ReCreating Europe

Copyright flexibilities: mapping and comparative assessment of EU and national sources

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List of Abbreviations

AutÕS	Estonian Copyright Act
AVMSD	Audio-visual Media Services Directive
AW	Dutch Copyright Act
BC	Berne Convention for the Protection of Literary and Artistic Works
BCA	Bulgarian Copyright and Related Rights Law
CDA	Portuguese Copyright Law
CDE	Belgian Code of Economic Law
CDSM	Copyright in the Digital Single Market Directive
CHIs	Cultural Heritage Institutions
CIP	French Code of Intellectual Property
CJEU	Court of Justice of the European Union
CL	Cypriot Law on Intellectual Property Rights and Related Rights
CMOs	Collective Management Organisations
CRD	Consumer Rights Directive
CRRA	Irish Copyright and Related Rights Act
CzCA	Czech Copyright and Related Rights Act
Database	Database Directive
DCA	Danish Copyright Act
DCSD	Digital Content Service Directive
DMCA	Digital Millennium Copyright Act (US)
DSM	Digital Single Market
E/Ls	Exceptions or Limitations
E&Ls	Exceptions and Limitations
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECL	Extended Collective License
ECtHR	European Court of Human Rights
EEA	European Economic Area

EU	European Union
EULA	End-user License Agreement
GCA	Greek Copyright and Related Rights Act
GLAMs	Galleries, Libraries, Archives, Museums
ICCPR	International Covenant on Civil and Political Rights
InfoSoc	Information Society (Directive)
IP	Intellectual Property
IPRs	Intellectual Property Rights
ISP	Internet Service Provider
l.aut	Italian Copyright and Related Rights Act
LaCA	Latvian Copyright Act
LBD	Belgian Law Transposing Database Directive
LDA	Belgian Law Related to Copyright and Related Rights
LiCA	Lithuanian Act on Copyright and Related Rights
LPO	Belgian Law Transposing Computer Programs Directive
LuDA	Luxembourgian Copyright, Database and Related Rights Law
Marrakesh	Marrakesh Directive
MCA	Maltese Copyright Act
MoU	Memorandum of Understanding
NN	Croatian Copyright and Related Rights Act
NUIM	Maynooth University
OCSSP	Online Content-Sharing Service Providers [in lieu of Articles 2(6) and 17 of the CDSM Directive]
OGH	Austrian Supreme Court
OOCW	Out-of-Commerce Works
OWD	Orphan Works Directive
PCPL	Portuguese Copyright Law
PJBD	Portuguese Decree Law on the Protection of Databases
PMÖD	Swedish Patent and Market Court of Appeals

RDA	Romanian Copyright and Related Rights Law
Rental	Rental and Lending Directive
Resale	Resale Directive
Sat-Cab	Satellite Broadcasting and Cable Transmission Directive
SGD	Sales of Goods Directive
Software	Computer Programs Directive
SSSA	Sant'Anna School of Advanced Studies, Pisa (Italy)
SZJT	Hungarian Law on Copyright
TDM	Text and Data Mining
TL	Finnish Copyright Act
TPM(s)	Technological Protection Measure(s)
TRLPI	Spanish Copyright Act
UGC	User-Generated Content
UK	United Kingdom
UN	United Nations
UPA	Polish Copyright and Related Rights Act
UrhG-A	Austrian Copyright Act
UrhG-G	German Copyright Act
URL	Swedish Copyright Act
US	United States
USZ	University of Szeged (Hungary)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WP	Work Package
WPPT	WIPO Performances and Phonograms Treaty
ZASP	Slovenian Copyright Act
ZKUASP	Slovakian Copyright Act

Executive Summary

This report illustrates and analyses the results of the research activities conducted in the framework of *reCreating Europe's* Task 2.1. From January 2020 to June 2022, the task performed an unprecedented, two-layer, comparative, EU and cross-national mapping and assessment of sources impacting on copyright flexibilities and access to culture, focusing on (a) statutes, court decisions, governmental policies, practices and schemes in the field of copyright law, DSM, and broader cultural policies, and (b) private ordering sources, such as standardized license agreements (EULAs) and terms of use from online platforms, selected to represent a wide array of cultural and creative goods and services. The study built on a rich state of the art, and particularly on previous partial attempts to systematize the matter. The research relied both on in-house desk mapping of available sources, and on a wide network of national experts from academia and private practice, who contributed to the study by answering to two rounds of questionnaires and participating at a mid-term workshop which discussed interim results.

The mapping produced a wealth of data and findings, which have been systematized and structured in an internal dataset and will be made available to the public on the user-friendly website www.copyrightflexibilities.eu by the end of the project (December 2022). This report provides an overview and commentary on the datasets, drawing descriptive conclusions that constitutes the backbone of the policy recommendations issued in September 2022.

The report is structured in 6 parts. The introductory sections (1 and 2) sketch the state of the art underlying this study, summarize its research questions, objectives and expected outcomes, and outline the general structure and workflow of the research, illustrating its general and sector-specific methodology and selection of sources. Section 3 offers a detailed overview of the mapping of public regulatory sources, focusing first on the EU and then on each of the 27 Member States. Section 4 provides a comparative analysis and assessment of the results, articulated around twelve categories of uses/flexibilities. Section 5 reports on the study of the state of copyright flexibilities in online platforms' EULAs, assessing their compliance with the CDSM Directive. Section 6 concludes, commenting on the descriptive findings of the research and sketching the road ahead.

The mapping of EU legal sources has drawn an all-encompassing picture of the state of the copyright balance in the EU, covering not only statutory interventions but also the CJEU case law, and tracking all uses, purposes, policy goals and conflicting rights and interests privileged in the copyright balance against rightholders' prerogatives. Flexibilities have been classified on the basis of a blended taxonomy, centred around categories of uses, purposes/goals and rights/interests balanced against copyright, coupled with horizontal, catch-all categories such as "public domain" and "external copyright flexibilities". The analysis of legislative sources confirmed the presence of promising steps forwards, yet with persisting problems, such as (a) a conceptual fragmentation and "clusterisation" of copyright flexibilities, with outstanding gaps; (b) the contemporary presence of multiple regimes,

ranging from optional to mandatory E&Ls, or E&Ls that are mandatory only in specific fields, hampering legal certainty; (c) the outdated nature of several provisions, which, due to the rigidity of EU copyright flexibilities, makes the (slow) intervention of the EU legislator necessary to adjust the law to new technological, market and social-cultural developments. The mapping of CJEU case law, classified through the same taxonomy, complemented this overview and provided a comprehensive assessment of the current state of the art of EU copyright flexibilities and the benchmarks of their harmonization. The analysis of CJEU's decisions showed: (a) a non-homogeneous coverage of copyright flexibilities, with some sectors heavily harmonized and others fully left uncovered; (b) a remarkable impact on some optional exceptions, which have been indirectly declared mandatory and their requirements clarified or standardized; (c) the broadening of some provisions, to safeguard their effectiveness and the underlying fundamental rights and public interest goals they protect; (d) the indirect identification of notion and boundaries of public domain through the definition of basic principles to distinguish protected from non-protected works; (e) the introduction of game-changing interpretations of certain provisions (e.g. the three-step test) and autonomous doctrines (e.g. fair balance) that are reshaping the EU copyright system.

The mapping of national legal sources provided a detailed overview of the state of the art of copyright flexibilities in all Member States, organized in 27 national reports that illustrated national provisions using the same taxonomy applied to EU sources. The reports commented on the main features of Member States' rules and, in case of correspondence to an EU provision, they assessed convergences, divergences and degree of flexibility compared to the EU model. If and when relevant, sub-sections also mentioned and briefly described landmark judicial decisions that contributed to shaping the content of national flexibilities. This static analysis showed a full reception of EU Directives and Regulations, the alignment of the majority of Member States around the flexibility categories provided by the InfoSoc Directive (with some variations in the qualification of some permitted uses as acts outside the scope of copyright or as exceptions), but at the same time the non-homogeneous reception of CJEU doctrines by national courts. Comparative reports followed the common taxonomy underlying this study and were limited to the categories for which the amount and relevance of data collected could allow sound, significant and verifiable assessment. Each report outlined convergences and divergences of Member States' solutions, looking at beneficiaries, rights, uses/rights and works covered, conditions and requirements imposed for the enjoyment of the flexibility, and other relevant aspects to be taken into account. The aim was to assess the degree of harmonization of national responses and to evaluate the comparative degree of flexibility of Member States' solutions, in order to provide a sound objective basis for the normative conclusions and policy recommendations that were issued at the end of September 2022.

The findings confirmed the scenario depicted by previous legal mappings with regard to the fragmentation of national solutions. Compared, however, to the very negative picture drawn in the past, the study highlighted also the presence of positive instances of

convergences and increasing flexibility, while the recent introduction of mandatory exceptions have proven largely successful in terms of harmonization and achievement of greater legal certainty across the Union. On the contrary, areas not covered by the EU harmonization still present moderate to very high degrees of fragmentation, which strongly call for an intervention by the EU legislature. Detailed conclusions were reached on each area of copyright flexibilities, i.e. (i) temporary reproduction, lawful uses and de minimis uses; (ii) private copy and reprography; (iii) parody, caricature and pastiche; (iv) quotation; (v) informatory purposes; (vi) teaching and research uses; (vii) cultural and socially oriented uses; (viii) copyright and disability; (ix) uses by public authorities; (x) other non-infringing uses and (xi) public domain.

The mapping of private ordering sources led to two sets of conclusions. In the first phase, the study concluded that users are granted a more limited range of flexibilities with respect to the use of intangible or service-like contents, and that platforms also tighten the grip on the potential uses of their services. Limitations or bans are placed on access to contents on a geographical basis or secondary dissemination, technical protection measures are strictly applied in many cases, and EULAs are either silent on some significant end-user flexibilities or they are not clear enough on their practical application. Similarly, various service providers apply misleading language. The empirical findings also showed that ownership-based user rights are the strongest ones and hence such users can unquestionably be ranked at the top of the end-user hierarchy, followed by social media users, who largely outperform users of streaming platforms in terms of control over available contents. In general, end-user flexibilities are heavily affected by the legislative framework and by competitions among platforms.

The second phase, which analysed EULAs in the period following the implementation deadline of the CDSM Directive, showed that selected OCSSPs' terms of uses continue to focus on (i) the exclusion of primary liability of platform operators and (ii) an effective notice-and-takedown procedure that protects rightholders' legitimate interests. The majority of the terms of uses examined include guarantees to allow users to challenge the lawfulness of content removal, but neither the guarantees in Article 17 CDSM appear *expressis verbis*, nor is there any specific reference to general prior content filtering mechanism in contractual terms. This shows that, on the one hand, OCSSPs are sticking to well-established liability limitation clauses, shifting the liability to end-users, thus weakening the viability of the new liability regime envisaged by the CDSM Directive. On the other hand, it highlights that some platforms also actively filter uploaded content through their automated systems, which they can remove at their own discretion without notifying rightholders. The overall balance continues to tip in favour of platforms and rightholders, with no clear measures protecting freedom of expression, freedom of creative creation and freedom of access to information – which is the sign of an almost unchanged *status quo*.

1 BACKGROUND

1.1 INTRODUCTORY REMARKS

This report illustrates and analyses the results of the research activities conducted in the framework of *reCreating Europe*'s Task 2.1 "Comparative and EU cross-national mapping of regulatory and private ordering sources", which is part of WP2 "End-users and access to culture."

Articulated around 7 work packages and more than 70 deliverables, which have been released in the timeframe January 2020 – December 2022, the H2020 *reCreating Europe* has delivered ground-breaking contributions towards a clear understanding of what makes a regulatory framework that promotes culturally diverse production, and optimizes inclusive access and consumption. An integral part of such endeavour was represented by the support the project provides to craft and embrace a sound "end-user perspective" of copyright law in Europe, with a particular focus on general users and selected vulnerable groups.

More specifically, WP2 performed an analysis of (i) regulatory measures having a positive or negative impact on digital access to culture, (ii) the degree of users' knowledge and understanding of EU and national copyright laws, and (iii) alternative coping strategies adopted by individual users, communities and networks to overcome regulatory obstacles to access and sharing. Parallel to this, WP2 identified, with a bottom-up participatory approach, the legal, economic, and technological challenges faced by selected vulnerable users (people with disabilities, minorities) in accessing digital culture, and evaluated the adequacy of existing EU and national regulatory responses to tackle such problems. WP2 also devised and implemented innovative measurement solutions (agent-based model) to assess iteratively the impact of digitisation and changes in the IPRs regulation on consumption patterns and access, and conducted two parallel case studies on the effectiveness of specific regulatory solutions on access problems in paradigmatic sectors (academics and access to scientific knowledge, and accessibility of cultural/creative materials for visually impaired persons). On this basis, WP2 formulated evidence-based best practices and policy recommendations, presented in September 2022.

In this context, Task 2.1 carried out an unprecedented, two-layer comparative EU and cross-national mapping and assessment of sources impacting on the copyright balance and access to culture, looking both at (a) statutes, case law, governmental policies, practices and schemes, and (b) private regulatory tools, such as standardized license agreements (EULAs) and terms of use from online platforms, selected to represent a wide array of cultural and creative goods and services. The research built on the expertise of the SSSA and USZ teams and on the contribution of a wide network of national experts coming from academia and private practice, while leveraging on previous partial attempts to systematize the matter. Differently from previous studies, which mostly focused on exceptions and limitations only,

Task 2.1 charted for the first time an exhaustive coverage of all copyright balancing tools, opening the research spectrum to the entire range of copyright flexibilities.

An interim report, delivered on December 2020, provided an overview of the first stage of the research, showcasing the structure, research questions, aims, methodological approach, and first substantial outcomes of the study. Building on this background, this final report offers a detailed description of the findings of the public and private sources mappings, and a critical/comparative assessment of their results.

Section 1 (Background) sketches the state of the art against which this research was conceived and build, offering a brief review of the most relevant literature in the field and of past attempts of mapping copyright flexibilities. It also summarizes the research questions underlying the study, its objectives and expected outcomes. Section 2 (Methodology) outlines the general structure of the task and the workflow of 30 months of desk and empirical research, illustrates the common methodological framework shared by both mapping exercises, and explains for each of them the selection of sources, main focus and sector-specific methodology and structure.

Section 3 offers a detailed overview of the findings of the mapping of public regulatory sources (3.1), focusing on EU law (3.1.1, statutory law/case law) and on the law of each of the 27 EU Member States (3.1.2), while Section 4 provides a comparative analysis and assessment of the results, articulated around twelve categories of uses/flexibilities. Section 5 comments on the analysis of the state of copyright flexibilities in online platforms' EULAs, assessing their compliance with the CDSM Directive. Section 6 concludes.

1.2 STATE OF THE ART

1.2.1 STUDYING EU COPYRIGHT FLEXIBILITIES

The existing literature concerning copyright flexibilities is ample and various. The studies that most directly constituted the background of this research are those embracing a broad and holistic approach to the topic.

With regards to copyright flexibilities and *public* sources of law, a substantial segment of the literature is composed by reports and expert opinions commissioned to or independently delivered by organizations representing end-users or other stakeholders.[1] Of considerable

[1] E.g. Francisco Javier Cabrera Blázquez and others, 'Les Exceptions et Limitations En Matière de Droit d'auteur' (Observatoire européen de l'audiovisuel 2017) <https://rm.coe.int/iris-plus-2017-1-les-exceptions-et-limitations-en-matiere-de-droit-d-a/1680788a63>; 'Limitations and Exceptions in EU Copyright Law for Libraries, Educational and Research Establishments: A Basic Guide' (LIBER: Ligue des Bibliothèques Européennes de Recherche – Association of European Research Libraries 2016) <https://libereurope.eu/wp-content/uploads/2020/09/A-Basic-Guide-to-Limitations-and-Exceptions-in-EU-Copyright-Law-for-Libraries-Educational-and-Research-FINAL-ONLINE-1.pdf> accessed 7 July 2022; Benjamin Gilbert, 'The 2015 Intellectual Property and Economic Growth Index' (*The Lisbon Council*) <https://lisboncouncil.net/publications/the-2015-intellectual-property-and-economic-growth-index/> accessed 7 July 2022; Teresa Nobre, 'Educational Resources Development: Mapping Copyright Exceptions and Limitations in Europe - Working Paper'

significance is also the number of *ad hoc* studies commissioned by international agencies and organizations and regional/national legislators. Interesting contributions can be found in the UN General Assembly resource repository.[2] Several studies analysing copyright flexibilities in selected critical scenarios were commissioned by the WIPO Standing Committee on Copyright and Related Rights.[3] Similarly, the EU Parliament has increasingly relied on expert opinions, independent studies, and internal working documents focusing on the role and effectiveness of copyright E&Ls within the EU legal framework.[4] At a national level, the focus on copyright flexibilities has been more confined, mostly revolving around informative materials on access to cultural heritage, libraries, and education.[5]

In the last two decades, academic scholarship on the topic has been flourishing. The revamped interest in copyright flexibilities and the public domain has recently led to a remarkable body of contributions across Europe and beyond, having a wide variety of focuses and methodological approaches. Questions and pitfalls related to the process of

<https://www.academia.edu/33280308/Educational_Resources_Development_Mapping_Copyright_Exceptions_and_Limitations_in_Europe_Working_Paper>; 'Policy Paper Nr.10 on the Importance of Exceptions and Limitations for a Balanced Copyright Policy' <https://www.communia-association.org/policy-papers/the-importance-of-exceptions-and-limitations-for-a-balanced-copyright-policy/>; Jeremy Malcom, 'Consumers in the Information Society: Access, Fairness and Representation' (Consumers International 2021).

[2] E.g. Farida Shaheed, 'Report of the Special Rapporteur in the Field of Cultural Rights: Copyright Policy and the Right to Science and Culture'; Lucie Guibault, 'The Nature and Scope of Limitations and Exceptions to Copyright and Neighboring Rights with Regards to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaption to the Digital Environment'; Anne Lepage, 'Overview of Exceptions and Limitations to Copyright in the Digital Environment'.

[3] E.g. M Kenneth Crews, 'Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised' (WIPO: World Intellectual Property Organization 2015) SCCR/30/3 <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=306216> accessed 7 July 2022; Séverine Dussolier, 'Scoping Study on Copyright and Related Rights and the Public Domain (Study Prepared for the WIPO Secretariat)' (*WIPO*, 2010) <https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_3_rev_study_inf_1.pdf> accessed 7 July 2022; Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' (World Intellectual Property Organization 2009) SCCR/19 <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393> accessed 7 July 2022; Judith Sullivan, 'Study on Copyright Limitations and Exceptions for the Visually Impaired' (WIPO: World Intellectual Property Organization 2007) SCCR/15/7 <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696> accessed 7 July 2022.

[4] E.g. Martine Hebette and others, 'Copyright Law in the EU (European Parliament Study)' <https://pdffox.com/copyright-law-in-the-eu-pdf-free.html> accessed 7 July 2022; Udo Bux, 'The Balance of EU Copyright: Impact of Exceptions and Limitations on Industries and Economic Growth' (*Think Tank: European Parliament*, 2015) <https://www.europarl.europa.eu/thinktank/en/document/IPOL_ATA(2015)519209> accessed 7 July 2022; Benjamin White and Chris Morrison, 'How to Tackle Copyright Issues Raised by Mass-Scale Digitisation?' (*Think Tank: European Parliament*, 2009) <https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_NT(2009)419619> accessed 7 July 2022; Mihaly Ficsor, 'How to Deal with Orphan Works in the Digital World?' <https://www.europarl.europa.eu/cmsdata/54163/att_20141103ATT92392-7716489616217349335.pdf> accessed 7 July 2022.

[5] E.g. 'Exceptions to Copyright: Guidance for Consumers' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/361788/Exceptions_to_copyright_-_Guidance_for_consumers.pdf> accessed 7 July 2022; 'Pubblico Dominio. Istruzioni per l'uso - Frequently Asked Questions' (*AIB-WEB*, 20 January 2020) <https://www.aib.it/attivita/2020/78571-pubblico-dominio-istruzioni-per-luso-frequently-asked-questions/> accessed 7 July 2022.

harmonization of copyright E&Ls have been played a key role on stage,[6] while increasing attention has been devoted to the notion of public domain, the judicial interpretation and adjudication of disputes on copyright flexibilities, and the practical effectiveness of their enforcement in the digital age.[7] Some studies take full account of the polyhedric nature of copyright flexibilities, and purport to draw a big picture, exploring the variety of legislative and judicial responses by way of theoretical, comparative, and legal design approaches.[8] Innovative policy proposals have been also put forward, aiming at rethinking the role of E&Ls at an international and EU level.[9]

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[6] E.g. Eleonora Rosati, 'Copyright in the EU: In Search of (in)Flexibilities' (2014) 9 Journal of Intellectual Property Law & Practice 585; Susan Marsnik, 'A Delicate Balance Upset: A Preliminary Survey of Exceptions and Limitation in US and European Union Digital Copyright Laws' [2014] International Business Law Review; P Bernt Hugenholtz, 'Why the Copyright Directive Is Unimportant and Possibly Invalid' (2000) 22 European Intellectual Property Review 499; Lucie Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) 1 Journal of Intellectual Property, Information, Technology & Electronic Commerce Law; João Pedro Quintais, 'Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law' (2017) 41 *Auteursrecht AMI: Tijdschrift voor auteurs, media- & informatierecht* 197; Séverine Dusollier, 'A Manifesto for an E-Lending Limitation in Copyright' (2014) 5 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 213; Christophe Geiger, Daniel Gervais and Martin Senftleben, 'Three Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29 American University International Law Review 582; Maria Daphne Papadopoulou, 'Copyright Limitations and Exceptions in an E-Education Environment' (2010) 1 European Journal of Law and Technology <https://ejlt.org/index.php/ejlt/article/view/38> accessed 7 July 2022; Michael L Hart, 'The Proposed Directive for Copyright in the Information Society' (1998) 20 European Intellectual Property Review 169.

[7] E.g. Lucie Guibault, "Drawing the Contours of the European Public Domain" in Godt et al (eds), *The Boundaries of Intellectual Property* (Common Core of European Private Law, forthcoming); Lionel Bently and others, 'Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union: Opinion on The Judgment of the CJEU in Case C-201/13 Deckmyn' (*European Copyright Society*, 2014) <https://europeancopyrightsociety.org/limitations-and-exceptions-as-key-elements-of-the-legal-framework-for-copyright-in-the-european-union-opinion-on-the-judgment-of-the-cjeu-in-case-c-20113-deckmyn/> accessed 7 July 2022.

[8] E.g. Emily Hudson, *Drafting Copyright Exceptions. From the Law in Books to the Law in Action* (Cambridge University Press 2020); Shyamkrishna Balganesh, Ng-Loy Wee Loon and Haochen Sun, *The Cambridge Handbook of Copyright Limitations and Exceptions* (Cambridge University Press 2021) <https://scholarship.law.columbia.edu/books/307>; Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017); Graham Greenleaf and David Lindsay, *Public Rights: Copyright's Public Domains* (Cambridge University Press 2018) <https://www.cambridge.org/core/books/public-rights/A0D8D0240E042B5FD98CE76A916478AB>; Reto M Hilty and Sylvie Nérisson, 'Questionnaire' in Reto M Hilty and Sylvie Nérisson (eds), *Balancing Copyright - A Survey of National Approaches* (Springer 2012) <https://doi.org/10.1007/978-3-642-29596-6_2>; Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (1st edn, Springer 2008); Robert Burrell and Allison Coleman, *Copyright Exceptions The Digital Impact* (Cambridge University Press 2005).

[9] E.g. Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use. The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020); Maurizio Borghi, 'Exceptions as Users' Rights in EU Copyright Law (Jean Monnet Working Papers No. 6)' <https://microsites.bournemouth.ac.uk/cippm/files/2020/10/06-2020-MBorghi_Copyright-exceptions-as-users-rights.pdf> accessed 7 July 2022; P Bernt Hugenholtz and Martin Senftleben, 'Fair Use in Europe: In Search of Flexibilities' [2012] Amsterdam Law School Research Paper 39; Christophe Geiger, 'Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions' (2009) 40 International Review of Intellectual Property and Competition Law 627; Daniel Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 5 University of Ottowa Law and Technology Journal 1; P Bernt Hugenholtz and Ruth Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright'

With regards to copyright flexibilities and *private ordering* mechanisms, the state of the art is significantly more limited. Despite the fundamental role played by EULAs and terms of use in determining *in concreto* the functioning of the copyright balance on online platforms, and thus in the distribution and access to cultural and creative content online,[10] not enough effort has been put to assess how platforms regulate users' rights and their possibility to use the materials downloaded or uploaded. More generally, the focus of such studies is quite diverse.

North American legal scholars have analysed EULAs of software providers and online retailers *vis-à-vis* their legislative and judicial framework. *Inter alia*, Alice J. Won focused on the computer games industry,[11] and Nina Aragon addressed Apple's terms and conditions in light of various US cases.[12] However, none of these contributions have assessed the consequences of specific clauses on the operations of online platforms and on the rights and experience of their users. Hans Schulte-Nölte commented on the American Law Institute's Restatement of Consumer Contract Law and its provisions on standard contract terms on websites,[13] while Aaron Perzanowski and Jason Schultz[14] built on existing literature to demonstrate the presence of a heavily misleading terminology (e.g. via the use of terms such as "sale" and "purchase"), and its problematic impact on consumers' expectations regarding the online access to protected works and subject matters. Yet, their book focuses on the specific issue of digital resales and touches only cursorily upon the treatment of users' flexibilities by EULAs. Last, but not less insightful, Pascale Chapdelaine published a book on contracts and the changing nature of property in the digital age, with special regards to users' remedies, rights and privileges.[15]

In recent times, an increasing number of European authors have focused on the matter. In 2017, Liliia Oprysk, Raimundas Matilevicius, and Aleksei Kelli studied the development of secondary market for e-books, and, as a part of their research, they developed a focus on Amazon's e-book business and related EULAs,[16] evidencing how they leave almost no room

<https://explore.openaire.eu/search/publication?articleId=doi_dedup___::f2f7b4474dec37d1c015f6cb21357bf4 https://dare.uva.nl/personal/pure/en/publications/conceiving-an-international-instrument-on-limitations-and-exceptions-to-copyright(f563d0d4-52e8-49a6-aff5-a4c6179105b6).html>.

[10] See in general: Jens Schovsbo, 'Integrating Consumer Rights into Copyright Law: From a European Perspective' (2008) 31 Journal of Consumer Policy 393.

[11] Alice J Won, 'Exhausted? Video Game Companies and the Battle Against Allowing the Resale of Software Licenses' (2013) 33 Journal of the National Association of Administrative Law Judiciary 386, 386–438.

[12] Nina Aragon, 'Calculating Artists' Royalties: An Analysis of the Courts' Dualistic Interpretations of Recording Contracts Negotiated in a Pre-Digital Age' (2017) 2017 Cardozo Law Review 180.

[13] Hans Schulte-Nölke, 'Incorporation of Standard Contract Terms on Websites: Observations on the American Law Institute's Restatement of Consumer Contract Law' (2019) 15 European Review of Contract Law 103.

[14] Aaron Perzanowski and Jason Schultz, *The End of Ownership - Personal Property in the Digital Economy* (The MIT Press 2016).

[15] Pascale Chapdelaine, *Copyright User Rights: Contracts and the Erosion of Property* (Oxford University Press 2016).

[16] Liliia Oprysk, Raimundas Matulevičius and Aleksei Kelli, 'Development of a Secondary Market for E-Books: The Case of Amazon' (2017) 8 Journal of Intellectual Property, Information Technology and E-Commerce Law <https://www.jipitec.eu/issues/jipitec-8-2-2017/4562>.

for end-users to resell lawfully acquired e-books.[17] Sabrina V. Helm, Victoria Ligon, Tony Stovall and Silvia Van Riper conducted a focus group research on the consumer interpretation of "ownership" of tangible and digital products, with a special focus on the book industry.[18] In the book edited by Thomas Riis, several contributions (among others, by Thomas Riis, Ole-Andreas Rognstad, Jens Schovsbo, Sebastian Felix Schwemer, Henrik Udsen, and Clement Salung Petersen) addressed the phenomenon of user generated law, cross-border licensing schemes, and private enforcement procedures by ISPs.[19] On a complementary note, Adrian Kuenzler published a book tackling the problem of online consumer sovereignty.[20]

More recently, European scholarship has extensively discussed specific issues related to copyright flexibilities on digital platforms. In 2018, Péter Mezei provided a systematic, but predominantly normative analysis of "digital exhaustion" comparing European and US norms and case law.[21] Caterina Sganga[22] and Reto M. Hilty[23] have also contributed to this analysis. Recent studies have also developed a focus on the interaction between copyright E&Ls and the private regulation of digital exploitation of content online, as the recent study by Bernd Justin Jütte, Giulia Priora, Guido Noto La Diega, and Léo Pascault outlined, analysing terms and conditions of online service providers used in digital teaching activities.[24]

The emergence of empirical studies is a promising development in the field. In 2019, Joan-Josep Vallbé, Balázs Bodó, João Pedro Quintais, and Christian Handke paid close attention to user preferences on digital cultural distribution, with a special focus on user satisfaction and copyright compensation systems.[25] More recently, Liliia Oprysk and Karin Sein provided an

[17] The issue of "ownership" of lawfully acquired e-books via Amazon is also addressed in a currently pending case in the United States, see inter alia Ariel Zilber, 'Amazon Argues Customers Who Buy Prime Video Content Don't Own It' (*Mail Online*, 28 October 2020) <https://www.dailymail.co.uk/news/article-8890213/Amazon-argues-customers-buy-Prime-Video-content-dont-California-woman-sues-company.html> accessed 5 July 2022.
[18] Sabrina V Helm and others, 'Consumer Interpretations of Digital Ownership in the Book Market' (2018) 28 Electronic Markets 177.
[19] Thomas Riis (ed), *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar 2016).
[20] Adrien Künzler, *Restoring Consumer Sovereignty – How Markets Manipulate Us and What the Law Can Do About It* (Oxford University Press 2017).
[21] Péter Mezei, *Copyright Exhaustion, Law and Policy in the United States and the European Union* (2nd edn, Cambridge University Press 2022).
[22] Caterina Sganga, 'A Plea for Digital Exhaustion in EU Copyright Law' (2018) 9 Journal of Intellectual Property, Information, Technology & Electronic Commerce Law 211.
[23] Reto M Hilty, 'Kontrolle Der Digitalen Werknutzung Zwischen Vertrag Und Erschöpfung' (2018) 120 *Gewerblicher Rechtsschutz und Urheberrecht* 865.
[24] Léo Pascault and others, 'Copyright and Remote Teaching in the Time of COVID-19: A Study of Contractual Terms and Conditions of Selected Online Services' (2020) 42 European Intellectual Property Review 548; Bernd Justin Jütte, 'Coexisting Digital Exploitation for Creative Content and the Private Use Exception' (2016) 24 International Journal of Law and Information Technology 1.
[25] Joan Josep Vallbé and others, 'Knocking on Heaven's Door: User Preferences on Digital Cultural Distribution' (2019) 8 Internet Policy Review.

empirical analysis of various consumer-law-oriented questions regarding user flexibilities in the age of platforms,[26] focusing on some of the most important outlets.

1.2.2 PRE-EXISTING EXPERIENCES OF LEGAL MAPPING IN THE FIELD OF COPYRIGHT FLEXIBILITIES

The work carried out in Task 2.1 relates also to pre-existing experiences of "mapping" of copyright laws across Europe. First, it is worth mentioning the platform "copyrightexceptions.eu". [27] Such resource shows affinity with the aims and rationale underlying the legal mapping conducted in reCreating Europe. It displays the national legislations on copyright exceptions and limitations of all EU Member States, proposing a particularly user-friendly interface and a dual (Member-State/exception-based) browsing option. The platform, however, does not provide information on public sources of law other than adopted legislation (it does not include e.g. court decisions, draft laws/bills, policy proposals) and no private sources of regulation (e.g. contracts, standardized licenses). Still looking at legislative sources, some recent research experiences of monitoring ongoing developments, especially those concerning the national implementation processes of the CDSM Directive, have turned into highly popular online database, presenting a solid structure and multiple browsing options. [28] Systematic efforts to compile information regarding copyright flexibilities have been made also by WIPO, [29] Creative Commons, [30] and the Wikimedia Foundation.[31] These platforms do not boast an exhaustive geographic coverage of all EU Member States, yet encompass a wider variety of sources, including also case law, explanatory documentation, and policy briefs. The platform "copyrightuser.org" fulfils a similar aim of informing the public about copyright flexibilities and boundaries of protection.[32] Its EU version, copyrightuser.eu, is currently being developed by CREATe (UK Copyright and Creative Economy Centre) - University of Glasgow within the context of reCreating Europe, in close synergy and cooperation with the research carried out under this task.

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[26] Liliia Oprysk and Karin Sein, 'Limitations in End-User Licensing Agreements: Is There a Lack of Conformity Under the New Digital Content Directive?' (2020) 51 International Review of Intellectual Property and Competition Law 594.

[27] 'Copyrightexceptions.Eu' <https://www.copyrightexceptions.eu/> accessed 5 July 2022.

[28] E.g., 'CDSM Implementation Resource Page – CREATe' <https://www.create.ac.uk/cdsm-implementation-resource-page/> accessed 5 July 2022; 'DSM Implementation Tracker' (*Communia*) <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879> accessed 8 July 2022.

[29] 'Limitations and Exceptions' <https://www.wipo.int/copyright/en/limitations/index.html> accessed 5 July 2022.

[30] 'CC Legal Database' (*Creative Commons*) <https://cc-caselaw.herokuapp.com/> accessed 8 July 2022.

[31] 'Limitations and Exceptions to Copyright', *Wikipedia* (2022) <https://en.wikipedia.org/w/index.php?title=Limitations_and_exceptions_to_copyright&oldid=1094910125> accessed 5 July 2022; 'EU Copyright Case Law', *Wikipedia* (2022) <https://en.wikipedia.org/w/index.php?title=EU_copyright_case_law&oldid=1096232548> accessed 5 July 2022.

[32] 'Exceptions' (*CopyrightUser*) <https://www.copyrightuser.org/understand/exceptions/> accessed 5 July 2022.

1.3 RESEARCH QUESTIONS

Against this background, Task 2.1 aimed at making a substantial step forward, providing a holistic assessment of the state of the art of EU copyright flexibilities and their impact on access to culture and a wide array of users' rights and public interest goals.

To this end, the research aimed at answering to four main questions:

1. What is the degree of harmonization and fragmentation of copyright flexibilities in the EU?

2. Which "uses" and "purposes" are balanced against copyright, and what is the absolute and comparative degree of user-friendliness and purpose-friendliness of EU and Member States' laws for each flexibility?

3. What are the regulatory enablers, obstacles and gaps impacting on the correct functioning of the copyright balance in the EU and its Member States?

4. What is the role played by private ordering sources in regulating access to and use of cultural goods and services? And how do they interact with copyright flexibilities and users' rights?

1.4 OBJECTIVES AND OUTCOMES

To answer these four research questions, the objectives of the research conducted under Task 2.1 were:

(1) To perform a comprehensive mapping of all public regulatory sources (legislative, judicial, administrative) shaping copyright flexibilities in the EU and each of its Member States, with the help of desk research and the contribution of a wide network of national experts.

(2) To operate a new classification of copyright flexibilities, grouping them per use/purpose allowed and going beyond the classic analysis of E&Ls, in order to better assess the concrete operation of the copyright balance *vis-à-vis* different beneficiaries, uses, activities, goals.

(3) To compare the different attitude of the EU and national legislators *vis-à-vis* each category of copyright flexibilities, and thus also

(4) to assess the degree of harmonization and fragmentation of copyright flexibilities in the EU, the impact of their territoriality and of the optional nature of most of EU copyright E&Ls.

(5) To conduct a two-phase empirical mapping of EULAs and terms of use of selected streaming service providers (with or without hosting functionality), online

marketplaces and social media platforms, in order to analyse their approach to copyright flexibilities and their impact on the copyright balance and users' rights, and to assess their legitimacy *vis-à-vis* the EU legislative framework.

(6) On this basis

a. to assess the state of the art of EU copyright flexibilities and elaborate best practices for stakeholders and recommendations for policy makers; and

b. to generate a findable, accessible, interoperable and reusable (FAIR) dataset of copyright flexibilities across the EU.

The two main products of Task 2.1 are this final report, which illustrates and comments on the datasets and findings generated by the research, and the online database www.copyrightflexibilities.eu. Both outcomes carry an added and original value compared to the state of the art, which lies in the comprehensive, interactive, and accessible nature of the findings and dataset they build upon. The legal mapping, in fact, charted a complete and up-to-date picture of the regulatory framework on copyright flexibilities in the EU, encompassing both public and private regulatory sources. And while this report represents a more theoretical and analytical overview of the data collected, and elaborates on them to offer a comparative assessment and related conclusions and recommendations, the online database is grounded on a FAIRified MediaWiki structure, where the remarkable amount of data collected have been collected, organized, classified and tagged so as to be easily searchable via several browsing options, and to generate user-friendly and catchy visualizations, making the dataset interactive and accessible also to the broader public. Short explanations, glossaries and summaries, framed in a user-friendly website that represent the front-end of the MediaWiki, will also help users navigating the complexity and technicalities of the regulatory framework. In this light, the public database resulting from the legal mapping is expected to effectively sustain the overarching aim of *reCreating Europe* project, which is to tackle the main challenges EU digital copyright law is currently facing, i.e., its complexity, its growing relinquishment, and the awareness and knowledge gaps affecting policymakers and stakeholders.

2 METHODOLOGY

2.1 GENERAL STRUCTURE OF THE RESEARCH TASK AND WORKFLOW

Task 2.1 was originally divided into two sub-tasks. Subtask 2.1.1, led by SSSA, carried out the legal mapping of EU and national public regulatory sources on copyright flexibilities, as illustrated below in Section 2.3. Subtask 2.1.2, led by USZ, performed the mapping of private regulatory sources, focusing mostly on EULAs and terms of use of online platforms (streaming service providers, with or without hosting functionality, online marketplaces and social media platforms), as detailed in Section 2.4.

As noted by Dusollier, flexibilities might be discussed from an *ontological* perspective (addressing their scope), *hermeneutical* perspective (focusing on their interpretation), *geographical* perspective (verifying whether cross-border uses are allowed), *legislative/comparative* perspective (analysing the state of harmonization and how Member States have implemented flexibilities), and finally, from a *contractual* perspective, that is how E&Ls are accommodated in private contracts.[33] While the public sources mapping focused on the first four perspectives, the private ordering mapping focused on the ontological and contractual perspectives, in order to see *how flexibilities work in real life*.

During the first six months, the two teams performed a review and analysis of the state of the art, and had periodic meetings to define the scope of the analysis and agree on common definitions, structure and focus of the research. In this context, it was of utmost importance to converge on a shared understanding of the notion of copyright flexibilities and of their categorization, in order to create a level playing field and a common glossary for the two subtasks. As better detailed below, in the two years that followed the two teams carried out in parallel their research tasks, with periodical coordination meetings to workshop research results and readjust, when needed, the research focus. Coordination meetings were also useful to recurrently check and reassess the compatibility of the original methodological options with the output and challenges stemming from the ongoing research. Both tasks completed their activities, as scheduled, by month 30 (June 2022).

2.2 COMMON METHODOLOGICAL FRAMEWORK: SYSTEMATIC AND COMPARATIVE LEGAL ANALYSIS

The research questions, topics and background materials featuring this research required the adoption of a complex and multifaceted comparative methodology. As it is often the case

[33] *Looking for Flexibility in Exceptions* (Directed by reCreating Europe, 2021) <https://www.youtube.com/watch?v=tYjDXAxIG-Q> accessed 8 July 2022.

in comparative legal scholarship,[34] the aims of Task 2.1 were – *inter alia* - to enhance the understanding of copyright flexibilities and to support the emergence of evolutionary taxonomies, thus *de facto* helping the process of harmonization of the legal systems involved. Among the various methods included in the comparative research "toolbox",[35] this study mostly relied on the functional,[36] contextual[37] and thus common core[38] approach, as it purported to look at the effects and the "living" nature of the law, as well as the actual functioning of EULAs of online intermediaries, which also entailed the use of empirical research tools.

The analysis of public regulatory sources called for a study that was at the same time qualitative, systematic, plain-comparative and functional-comparative. The mapping was carried out by local, independent desk-research and with the contribution of national experts, channelled in through questionnaires that employed principles and techniques typical of the common core and functional comparative analysis. EU sources (Directives, Regulations, CJEU case law) were studied, classified and organised via plain systematic analysis. National sources - ranging from statutes and other regulatory sources to case law - were first cleared, verified and assessed via systematic analysis, and then structured into a simple, intuitive dataset organized in hyperlinked spreadsheets.[39] On this basis, they were categorised and juxtaposed to EU sources by applying plain qualitative comparative methodology, to assess their convergences, divergences and degree of flexibility compared to the EU model. This allowed an additional verification of the correctness and up-to-date nature of national data, which led to the administration of survey addenda to national experts and thorough checks of national sources available in English or machine-translated. Last, comparative reports, articulated per macro-categories of flexibilities, performed a functional rather than a plainly systematic assessment of national sources, going beyond the mere comparison of statutory texts and evaluating, instead, implications and effects of each policy option. This allowed drawing sound conclusions on the state of harmonization, and laid the groundwork for the comparative evaluation of the degree of flexibility that each Member State presents *vis-à-vis* the various permitted uses and/or categories of beneficiaries.

[34] H Patrick Glenn, 'Aims of Comparative Law', *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 57–65.

[35] Mark Van Hoecke, 'Methodology of Comparative Legal Research' [2015] *Law and Method* 1.

[36] On the "functionalism" of comparative law see especially Konrad Zweigert and Hein Kötz, *Einführung in Die Rechtsvergleichung Auf Dem Gebiete Des Privatrechts*, vol 1 (3rd edn, JCB Mohr 1996).

[37] This method focuses on the political-technological-economic environment, which formed the body of the law; it necessitates the empirical observation of case law and more. See Van Hoecke (n 36) 16–18.

[38] This method "looks for commonalities and differences between legal systems in view of the question to what extent harmonization on certain points would be possible among the compared legal systems or the question how a European rule (…) could be interpreted in such a way that it fits best the different national traditions". See ibid., 21.

[39] Giulia Priora and Caterina Sganga, 'D2.1 Interim Report on EU and National Sources and Private Practices on Legitimate Uses and Flexibilities' <https://zenodo.org/record/4620957> accessed 8 July 2022.

Successful comparative research shall also consistently respond to the question of what shall be compared.[40] In this sense, an important phase from a methodological perspective was the proper selection of jurisdictions/countries and EULAs/platforms to be analysed. On the side of public regulatory sources, the scope of the study was necessarily extended to cover the EU system and all 27 Member States, while private ordering mechanisms required a proper, well-justified selection of online intermediaries, in order to narrow down the number of documents to be scrutinized and carry out a high-quality research**.** The main criteria followed in the selection of platforms were (i) a certain level of development (predominantly web 2.0 models, i.e., models where end-user involvement is not only necessary but inevitable), and (ii) similar, or almost similar, functions (mainly, hosting, streaming and/or selling of protected works or subject matter via the platform primarily by rightsholders and/or lawfully by end-users). *Prima facie* infringing websites were excluded from the scope of the analysis. Further relevant factors in the selection of platforms were their general availability in the EU, and the availability of English language versions of their EULAs. Furthermore, a "coincidence factor" was also taken into account, which led to focus on platforms having broad relevance, i.e. boast great numbers of users. Due consideration was also given to the comparability of the data collected. This requirement was ensured by the selection of the research parameters, e.g., the categorization of copyright flexibilities, the presence/absence of EU general principles, the type and scope of platforms; the focus of the research (EULAs); the exact focal points (certain provisions and features of EULAs).

The next sections will offer a more detailed overview on the selection of sources, main focus, methodology and structure of the research conducted under each of the two prongs of Task 2.1.

2.3 PUBLIC REGULATORY FRAMEWORK

2.3.1 SELECTION OF SOURCES AND MAIN FOCUS

On the basis of the state of the art, existing comparative legal mappings on the topic, and the heterogeneity of sources analysed, this research decided to abandon the traditional focus on E&Ls and related classifications, pivoting instead on the notion of "copyright flexibilities".

As illustrated above, in fact, scholarly contributions in the field covered from different angles and perspectives almost all copyright balancing tools. Yet, they generally missed to provide an all-encompassing definition of copyright flexibilities, capable of reflecting the complexity of the matter and the interrelations between single instruments and doctrines. The aim of this research was also to make a step forward in this direction and, with a

[40] In this light, comparative research allows for the macro-, meso- or micro-level of analysis to be the selected to serve as the research question. See Van Hoecke (n 36) 15–21. This study ambitiously covered both the macro-level analysis, analysing and comparing EU and national laws in its focus on public sources, and the meso-level research, studying online intermediaries' private ordering mechanisms.

methodological approach that was jointly functional and empirical, to contribute to the debate with a classificatory proposal capable of including labels, definitions and features of both public and private sources of law under holistic and homogeneous categories. To this end, this study developed a blended taxonomy centred around categories of uses, purposes/goals and rights/interests balanced against copyright, coupled with horizontal, catch-all categories such as "public domain" and "external copyright flexibilities".

Against this background, national questionnaires were articulated around the following structure:

- De minimis uses (e.g. temporary reproduction, ephemeral recording, incidental inclusion, technically necessary uses)
- Private non-commercial uses (e.g. reprography, private copy, freedom of panorama)
- Quotation
- Parody
- Teaching and scientific research (e.g. illustration for teaching and scientific research, digital teaching activity, text and data mining)
- Uses within/by cultural heritage institutions (e.g. public lending, preservation of cultural heritage, uses of orphan works, and of out-of-commerce works)
- Uses for visually impaired persons
- Uses for informatory purpose (e.g. news reporting, public speeches and lectures)
- Uses by public authority (e.g. public security, legislative and judicial proceedings, religious and official celebrations)
- Three-step-test
- Other non-infringing uses
- Public domain and other flexibilities
    - Copyright expiration
    - Works or subject matter excluded from protection
    - Paying public domain schemes
    - Mandatory/statutory and extended collective licensing schemes
    - Exhaustion
- User rights and public interest
    - Main legal instruments adopted to achieve a fair balance (fundamental rights, consumer protection law, media law, (copyright) contract law, miscellaneous)
    - References to notion of public interest
    - References to notion of user's rights

On the basis of the results of the mapping and the assessment that followed, the classification was slightly revised, resulting in the following **structure for national reports**, which has also been implemented to classify flexibilities on **the online database**:

I. Temporary, de minimis and lawful uses
    a) Temporary reproduction
    b) Ephemeral recording
    c) Incidental inclusion
    d) Acts necessary to access and normal use by lawful user
    e) Freedom of panorama
II. Private copy and reprography
    a) Reprography
    b) Private copy
III. Quotation
IV. Parody, caricature, pastiche
V. Uses for teaching and research purposes
    a) Private study
    b) Illustration for teaching or scientific research
    c) Digital use for illustration for teaching
    d) Text and data mining
VI. Uses for information purposes
    a) Press review and news reporting
    b) Use of public speeches and lectures
VII. Uses by public authorities
    a) Uses in administrative and judicial proceedings
    b) Other uses by public authorities
VIII. Socially oriented uses
IX. Cultural uses (access, preservation, reuse)
    a) Public lending
    b) Preservation of cultural heritage
    c) Specific uses by cultural heritage/education/social institutions
    d) Orphan works
    e) Out-of-commerce works
X. Flexibilities for persons with disabilities
XI. Other non-infringing uses (miscellaneous)
XII. Three-step test
XIII. Public domain
    a) Works or subject matter excluded from copyright protection
    b) Paying public domain schemes

XIV. Special licensing schemes (mandatory, statutory, extended collective licenses etc)

XV. External copyright flexibilities

a) Fundamental (users') rights

b) Consumer protection

c) Copyright contract law

d) Other instruments

Exhaustion was temporarily eliminated from the mapping due to lack or insubstantiality of responses and data provided and/or validated by national experts, which resulted in their scarce of no relevance for the purpose of the comparative analysis. For this reason, the topic does not appear in the EU mapping either, nor does it feature any comparative report. Additional research on exhaustion and digital exhaustion will be performed until the end of the project and in the context of the maintenance and update of the online database www.copyrightflexibilities.eu, also in order to complement the findings of the private sources mapping. Final data and the preparation of the corresponding comparative reports are expected to be collected and finalized by June 2023 and will be inserted and uploaded on the database website.

Comparative reports were prepared on the basis of the taxonomy on which the research was based since its outset and limited to the categories for which the amount and relevance of data collected could allow a well-grounded and verifiable assessment. This led, for instances, to the exclusion of sectors which would have required, in light of their non-statutory basis, a reporting of sufficient judicial decisions by a substantial number of national experts, which unfortunately was not reached in the 24-month span of this research (e.g. fundamental rights, public interest and users' rights). Similarly, heterogeneous sectors such as consumer protection law, contract law, media law and the like were not subject to comparative analysis for the extremely fragmented nature of national experts' responses. Further research is required, which will be carried out with the use of fact-based questionnaires to extract more up-to-the-point, homogeneous feedback in the following months.

As to the types of sources mapped, this study made a substantial step forward compared to the state of the art, for it covered not only national copyright statutes but the whole range of public regulatory sources, also beyond copyright acts, and judicial decisions, both at the EU and at a national level.

2.3.2 RESEARCH METHODOLOGY AND STRUCTURE

As mentioned above, the comparative mapping of EU and national public regulatory sources called for a study that was at the same time qualitative, systematic, plain-comparative and functional-comparative.

The first phase of the research (M1-M3) carried out a thorough literature review to assess the state of the art and reshape, on this basis, research focus and questions. The sources analysed ranged from studies officially commissioned by EU institutions and some Member States to scholarly contributions having both a EU and a national focus and publication outlet.

The second phase of the research (M3-M12) entailed (a) the first EU legal mapping, focused on EU Directive and Regulations, related preparatory works, and CJEU case law, based on local, independent desk research; and (b) the preparation of the questionnaire for national experts, which were conceptualized based on principles and techniques typical of the common core and functional comparative analysis. One or more national experts per Member State were identified on the basis of their expertise and also with the help of other consortium partners, and contacted in August-September 2020. Questionnaires were administered in September 2020, with a submission deadline set up for mid-December 2020. Parallel to this, EU sources were studied, classified and organised via plain systematic analysis in two dedicated spreadsheets, made publicly available as attachments to the interim report (D2.1), which was delivered to the EC at the end of M12 (31 December 2020).

The third phase of the research (M13-M18) consisted in the first verification, classification and analysis of national responses, which were received from January to March 2021. All national sources were cleared, verified, and assessed via systematic analysis, and structured into a simple, intuitive dataset organized in hyperlinked spreadsheets.[41] In this phase, the taxonomic categorisation introduced at the beginning of the research was refined to better fit to the first outcomes of the mapping. National data were categorised and juxtaposed to EU sources by applying plain qualitative comparative methodology, to assess their convergences, divergences and degree of flexibility compared to the EU model. This allowed an additional verification of the correctness and up-to-date nature of national data, which led to several requests for clarification to national experts, ultimately channelled into a Survey Addendum and a Follow-up questionnaire to fill in gaps, resolve inconsistencies, and start tracking the implementation of the CDSM Directive. In this phase, some national experts withdrew their availability and were promptly substituted (for their full list, see Annex A).

These activities took place at the beginning of the fourth phase of the research (M18-M24), which focused on the consolidation and verification of the data sets, in preparation for the national and comparative analysis that was carried out in the fifth and last phase of the research (M24-M30).

A national report was devoted to each Member State. Relevant provisions were enlisted, classified using the taxonomy adopted for the research, and analysed in their main features. When corresponding to an EU provision, the report assessed their convergences, divergences and degree of flexibility compared to the EU model. Comparative reports were articulated per macro-categories of flexibilities, with the exclusion of those categories where data where either not enough or too heterogeneous and fragmented to ground scientifically sound

[41] Priora and Sganga (n 34).

comparative conclusions. Each report performed a comparative assessment of national sources, looking at beneficiaries, requirements, conditions and other features of each exception, limitation or other balancing tools, looking at their overall, functional effects on the national copyright balance. This allowed drawing valid descriptive conclusions on the state of harmonization, and lays the groundwork for the comparative evaluation of the degree of flexibility that each Member State presents *vis-à-vis* the various permitted uses and/or categories of beneficiaries, which will be visually represented on www.copyrightflexibilities.eu.

2.4 PRIVATE ORDERING SOURCES

The two-phase empirical research on private ordering sources had the main objective to map and analyse selected – preferably mainstream – streaming service providers with or without hosting functionality; online marketplaces and social media platforms' private ordering mechanisms related to end-user flexibilities. In line with the general approach of T2.1, "flexibilities" are used as an all-encompassing expression, not limited to classic copyright limitations and exceptions but including all balancing tools. In this segment of the research, also procedural safeguards were consequently included.

Most of these flexibilities are granted by public sources, such as copyright exceptions and limitations. In this part of the study, they were classified in a different manner compared to public regulatory sources, in order to better fit to the approach and content of EULAs and terms of uses. Among others, these include *end-users' reproductions* (the download of one or more permanent copy or copies; creating a back-up copy); *end-users' disseminations* (resale of copies or accounts; linking); and *culturally or socially desirable uses* (uses for the purposes of teaching, research, studying, news reporting, parody, caricature, pastiche, quotation, criticism, review; including UGC, if the use fits into an existing limitation or exception). Other statutory provisions limit the existence or exercise of exclusive rights, such as the doctrine of exhaustion, collective rights management (CRM) or terms of protection.[42]

Besides these substantive statutory norms, private ordering sources feature other flexibilities, such as *procedural safeguards,* which can guarantee that end-users are not put in a single-sided, detrimental (inflexible) position when using online services. They range from notice-and-take-down and other complaint-and-redress mechanisms to contract

[42] Their applicability in the platform economy is limited to a certain degree. The concept of 'digital exhaustion' (that is, the resale of digital files or accounts) is mainly ruled out, especially in the case of online services. See the recent judgment of the CJEU in Case C-263/18 *Tom Kabinet case: Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* [2019] EU:C:2019:1111. The judgment sparked, however, significant criticism. See Péter Mezei, 'The Doctrine of Exhaustion in Limbo-Critical Remarks on the CJEU's Tom Kabinet Ruling' (2020) 2 Jagiellonian University Intellectual Property Law Review 130. Although CRM has direct relevance in the case of communication or making musical and audio-visual content available to the public, the majority of platforms have nothing to do with collective management organizations. Finally, the provision of public domain contents is less typical (although cannot be excluded) in the platform age. Hence, the majority of service providers deal with mainstream contents that are within the terms of protection.

amendments with or without users' agreement, removal of contents uploaded/shared by the user, or the formalities related to the termination of user accounts.

In line with *contractual freedom*, service providers might also be able to offer further flexibilities for the benefit of end-users. These flexibilities are either unrelated to statutorily regulated flexibilities or complementary to it (i.e., necessitating proper licensing by the service providers). Most of the time, they are dependent on the business model of the given service provider, and heavily influenced by the 'code', that is the technological parameters of the given service. These flexibilities include, among others, re-download options, use of content on multiple devices, family sharing, and other sharing (embedding, reposting etc.) options.

On the other hand, some of the public and private regulatory sources are purposefully designed to limit the flexible enjoyment of contents by end-users. TPMs, territoriality as public norms, geo-blocking (which is a de facto territorialisation of internet)[43] and the contractual provisions on rights granted to service providers as private rules, knowingly limit end-users' abilities to access and use contents via online services. EULAs might overstep copyright norms or make end-users consent to a restrictive interpretation of statutory provisions, including limitations and exceptions. As a result, users' flexibilities might be reduced to a mere grant to access contents. At the same time, end-users are not in the position to negotiate contractual clauses, being them usually requested to accept them "as is".[44] These constraints, however, have their own boundaries. TPMs shall be effective in nature to be protected,[45] and their application has been subject to limitations under Article 6(4) InfoSoc, the Marrakesh Directive, and Article 7(2) CDSM. Geo-blocking[46] has been partially ruled out by the EU.[47] Furthermore, consumer protection rules guarantee end-users

[43] Tal Kra-Oz, 'Geoblocking and the Legality of Circumvention' (2017) 3 IDEA - The Intellectual Property Law Review 387.

[44] Oprysk and Sein (n 26) 597–598.

[45] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, Art. 6(3).

[46] Geo-blocking technologies make it possible to determine geographical location (based on IP addresses) of the end-user who accessed the content. Such limitation on the accessibility of contents is nothing new. It mimics technological protection measures installed on tangible data carriers, such as region codes of DVDs. On geo-blocking see e.g. Sabrina Earle, 'The Battle against Geo-Blocking: The Consumer Strikes Back' (2016) 15 Richmond Journal of Global Law and Business 1; Alain Strowel, 'From Content Portability to Data Portability: When Regulation Overlaps with Competition Law and Restrictions Can Be Justified by Intellectual Property' (2016) 2 Competition Law & Policy Debate 63; Giuseppe Mazziotti, 'Is Geo-Blocking a Real Cause for Concern in Europe ?' (2016) 38 European intellectual property review 365; Roy Alpana and Althaf Marsoof, 'Geo-Blocking, VPNs and Injunctions' (2017) 39 European Intellectual Property Review 672; Marketa Trimble, 'Copyright and Geoblocking: The Consequences of Eliminating Geoblocking' (2019) 25 Boston University Journal of Science and Technology Law 476; Peter K Yu, 'A Hater's Guide to Geoblocking' (2019) 25 Boston University Journal of Science and Technology Law 503.

[47] Regulation 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L 168/1. The scope of the Regulation is rather narrow, for it focuses on consumer protection and creates a temporary exception in favour of the end-users in case of short, cross-border travels. It nevertheless leaves the contractual freedom of rightholders and platforms intact, thus the licensing agreements can continue being concluded on a territorial basis. See Giuseppe

with information duties concerning TPMs and other remedies against misleading standard contractual clauses.[48]

This study performed a comprehensive mapping and critical analysis of the EULAs and terms of use of selected platforms, in order to check their compatibility with existing statutory flexibilities. The aim was to have a clear view of the private ordering mechanisms of the selected service providers, but also to compare the flexibility of these platforms, and address whether they tend to follow or deviate from public regulatory sources.

2.4.1 SELECTION OF SOURCES AND MAIN FOCUS

The selection of sources and focus was driven by two main criteria: (i) service providers shall be at a certain level of development (predominantly web 2.0 models, i.e., models where end user involvement is not only necessary but inevitable), and (ii) they shall offer similar, or almost similar, functions (mainly, hosting, streaming and/or selling of protected works or subject matter via the platform primarily by rights holders and/or end-users). Prima facie infringing, piratical or rogue websites were excluded. Further relevant factors were the general availability of the selected platforms in the EU, and the availability of English language versions of their EULAs. We purposefully decided to analyse the basic models of platforms.

The study purposefully decided to analyse basic models of platforms, with which users are generally familiar. Most of them fit into the concept of 'online content-sharing service providers' (OCSSPs) under Article 17 CDSM[49] and are broadly used rather than serve niche markets. However, the focus of the study was not limited to the biggest players, as usually done by policymakers[50] or researchers (e.g., YouTube,[51] Instagram[52] or iTunes[53]).

Mazziotti, 'Allowing Online Content to Cross Borders: Is Europe Really Paving the Way for a Digital Single Market?', *Online Distribution of Content in the EU* (Edward Elgar 2019) 193.

[48] See the subjective conformity criteria of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1, Art. 7.

[49] The selected platforms will most probably fit into the scope of the newly envisaged categories of 'online platforms' and 'very large online platforms' under the proposed Regulation on a Single Market for Digital Services (DSA), Art. 2(h) and Section 4, respectively.

[50] See Tarleton Gillespie and others, 'Expanding the Debate about Content Moderation: Scholarly Research Agendas for the Coming Policy Debates' (2020) 9 Internet Policy Review 1.

[51] e.g. Hayleigh Bosher, 'Key Issues around Copyright and Social Media: Ownership, Infringement and Liability' (2020) 15 Journal of Intellectual Property Law & Practice 123, 132–133.

[52] e.g. Hayleigh Bosher and Sevil Yeşiloğlu, 'An Analysis of the Fundamental Tensions between Copyright and Social Media: The Legal Implications of Sharing Images on Instagram' (2018) 33 International Review of Law, Computers & Technology 164, 172–181.

[53] e.g. Aragon (n 12) 204–206.

In the definition of the sample, a total of 17 platforms were finally included, grouped into four sets of platforms: streaming sites with host function; streaming sites without (or with limited) host function; online marketplaces; and social media.[54]

Table 1 Analysed platforms

Streaming with hosting service	Streaming without hosting service	Online marketplaces	Social media
Soundcloud	Spotify	Steam	Twitter
Bandcamp	Netflix	Electronic Arts Origin	Instagram
YouTube	Disney+	Amazon	Facebook
Twitch		Apple Media Service	
DailyMotion		Google Play	
Pornhub			

2.4.2 RESEARCH METHODOLOGY AND STRUCTURE

The methodology used in the private sources mapping is a combination of comparative and empirical analysis. The *comparative* part is necessitated by the focus on public and private rules developed in various jurisdictions and at various (macro and meso) levels. The *empirical* part is related to the systematic and qualitative analysis of EULAs of selected service providers.

The goals of the research were to enhance the learning and knowledge about the topic of copyright users' flexibilities, support the emergence of evolutionary and taxonomic research efforts in the field, with particular regard to its mechanisms and features in private ordering mechanisms, and form recommendation to better regulate the copyright balance in B2C relationship. This is particularly timely in light of the CDSM Directive, which requires OCSSPs to 'inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law' (Article 17(9) CDSM).

In the purposive selection of sample contracts to be analysed procedure, a total of 17 platforms were finally included, grouped into four sets of platforms: streaming sites with host function; streaming sites without (or with limited) host function; online marketplaces; and social media. In order to proceed with the assessment by using verifiable and homogeneous metrics, also in connection with the public sources mapping and its methodology, the study

[54] These categories are not conclusive, indeed, there is a huge variety of online services. e.g. Microsoft is finally not covered by this research, as the company's Service Agreement – encompassing all online services of Microsoft – could not be comparably classified into any of the four selected groups of platforms.

pre-identified 15 different variables reflecting fundamental user flexibilities, detailed as follows:

- private users' reproductions (the download of one or more permanent copy or copies; creating a back-up copy; re-download options; download and use of copies on multiple devices);
- private users' disseminations (family sharing; resale of copies or accounts; linking);
- cultural uses (teaching/research/studying; news reporting; parody/caricature/pastiche; quotation/criticism/review; UGC);
- rights granted to the service provider;
- procedural safeguards (notice-and-take-down and other complaint-and-redress mechanisms; contract amendments with or without users' agreement; removal of contents uploaded/shared by the user; termination of a user account).

At first, an extensive chart was created to contain excerpts from the EULAs of the studied platforms related to 15 different variables. These variables reflected fundamental user-flexibilities, but in several instances during the analysis it was possible to spot significant departures from the initial variables. This was generally due to the differences of platforms presented in terms of different business models and technological features. In order to guarantee the comparability of data, the focus of the research was then limited to the eight most represented variables, i.e: (i) the extent of (access) rights; (ii) restricted acts that users are not entitled to perform; (iii) provisions, if any, on UGC; (iv) the license that end-users granted to the platforms or other users; (v) technological restrictions on access; (vi) family sharing and other types of transfer of subscription; (vii) termination/modification of user account/subscription; (viii) procedural safeguards. The initial data collection took place between September and December 2020.The secondary data collection took place between March and May 2021.

Finally, the platforms were measured according to a 'user-flexibility index'. In this index, points were allocated for each of the eight variables selected in the second phase of the analysis, ranging from 1 (least flexible) to 5 (most flexible).

3 RESULTS OF THE MAPPING

3.1 MAPPING OF PUBLIC REGULATORY SOURCES

3.1.1 EU LAW

As mentioned above, the mapping of EU copyright flexibilities covered all secondary law sources impacting on the copyright balance. The substantiality criterion was introduced to limit the sample of acts to a reasonable range and avoid listing provisions that just secondarily and cursorily touched upon copyright matters and the position of end-users. The statutory-based analysis was complemented by an updated mapping and analysis of the CJEU case law.

3.1.1.1 DIRECTIVES AND REGULATIONS

This section provides a general background description of the sources mapped, followed by a detailed analysis of relevant provisions, which are classified according to the general taxonomy adopted in this study.

3.1.1.1.1 SOURCES MAPPED

Directive on television broadcasting activities and/or Audio-visual Media Services Directive (AVMSD, 1989, as consolidated in 2010 and last amended in 2018)

The initial attempts of the EU to harmonize the rules governing television broadcasting activities were consolidated in the *Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities,* [1989] OJ L 298/23 (Directive on television broadcasting activities). This Directive entered into force on 6 October 1989, and the Member States were required to transpose it by 3 October 1991 (Article 25(1)). The original text of the Directive has been amended several times (in 1997, 2007, and 2010). Subsequently, the Directive was repealed by *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services,* [2010] OJ L 95/1 (Audio-visual Media Services Directive, AVMSD). The latter was also modified in 2018 by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69. These revisions were expected to come into force in Member States by 20 September 2020 (Article 35). The AVMSD is significant for this legal mapping, as it introduced since 2010 consumer protection provisions, and for it tackles the need to increase access to cultural content by persons with disabilities (Directive 2010/13/EU, Article 3c; Directive (EU) 2018/1808, Article. 7), as well as measures to combat hate speech addressed to a wide spectrum of vulnerable groups, including minorities and, again, persons with disabilities (Directive 2010/13/EU, Article 3b; Directive (EU) 2018/1808, Article 6).

Directive on the legal protection of computer programs (Software Directive, 1991, as codified in 2009)

Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, [1991] OJ L 122/42, was enacted on 14 May 1991, and Member States were given time to transpose it until 1 January 1993 (Article 10(1)). The Directive had retrospective effect, without prejudice to any acts concluded and rights acquired before that date (Article 9(2)). The Directive was later codified by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, [2009] OJ L 111/16, which entered into force on 25 May 2009 (Article 12).

Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental Directive, 1992, as codified in 2006)

The 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, [1992] OJ L 346/61, was aimed at harmonizing the rental and lending of the originals or copies of literary and artistic works across EU. It entered into force on 30 November 1992, with a transposition deadline to 1 July 1994 (Article 15(1)). This Directive has later been codified by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, [2006] OJ L 376/28. The Directive entered into force on 16 January 2007 (Article 15). Directive 2006/115/EC applies, in principle, to copyright works (with the exclusion of buildings and works of applied art, Article 2(1) Rental I; Article 3(2) Rental II), performances, phonograms, broadcasts, and first fixations of films (ibid.) which were protected, or which met the requirements for protection on 1 July 1994 (Article 11(1)).

Directive harmonizing the term of protection of copyright and certain related rights (Term Directive, 1992, amended in 2006 and in 2011)

Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights [1993] OJ L 290/9 was enacted on 29 October 1993. This Directive was replaced by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) OJ L 372/12, later complemented by 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] OJ L 265/1, entered into force on 31 October 2011 (Article 4). The transposition deadline was 1 November 2013 (Article 2). The 2011 amendment was directed to music performers and phonogram producers (Article 1), equalizing their term of protection to those of other rightholders (from 50 to 70 years, Article 1(2)(b)). It also introduced, in favour of performers who only received a lump sum payment, the right to obtain an annual supplementary remuneration (20% fund) from the phonogram producer for each year following the 50th year of publication or communication of the phonogram (Article 1(4)).

Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (SatCab Directive, 1993, amended in 2019)

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993] OJ L 248/15 *(SatCab)* was adopted on 27 September 1993 and entered into force on 4 October 1993. Member States were required to transpose the Directive by 1 January 1995 (Article 14). This instrument was later amended by Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programs and amending Council Directive 93/83/EEC, [2019] OJ L 130/82, in force since 6 June 2019, and having a transposition deadline set by 7 June 2021. The Directive lays down rules that aim to enhance cross-border access to a greater number of television and radio programs, by facilitating the clearance of rights for the provision of online services that are ancillary to the broadcast of certain types of television and radio programs, and for the retransmission of television and radio programs. It also regulates the transmission of television and radio programs through direct injection (Article 1).

Directive on the legal protection of databases (Database Directive, 1996, as last amended in 2019)

The EU has adopted the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996] OJ L 77/20, in order to provide copyright protection to databases that are original for their structure and arrangement (Article 3(1), and sui generis protection on extraction and re-use of the whole or substantial part of their content if their production required qualitatively or quantitatively substantial investments in the collection, verification and organization of their materials (Article 7(1)). The Directive entered into force on 16 April 1996, with a transposition deadline set for 1 January 1998 (Article 16(1)), and it was amended in 2019 by the CDSM Directive. Its provisions cover both online and offline databases (Article 1(1)), which are defined as collections of independent works, data, or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means (Article 1(2)). The Directive, however, excludes from its coverage computer programs involved in the making or operation of such databases, as well as works and other subject-matter contained in the databases (Articles 1(3) and 3(2)). Copyright protection applies to databases created before 1 January 1998 (Article 14(1)), while the sui generis protection extends to databases completed from 1 January 1983 (Article 14(3)).

Directive on the resale right for the benefit of the author of an original work of art (Resale Directive, 2001)

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, [2001] OJ L 272/32, was adopted on 27 September 2001 with the aim of harmonizing national laws with regard to the existence and application of the resale right. It entered into force on 13 October 2001, and Member States were given time until 1 January 2006 to implement it (Article 12). The Directive provides for a compulsory resale right for the benefit of authors of an original work of art, which by 1 January 2006 was protected by copyright or meet the criteria for protection (Article 10).

Directive on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive, 2001, as last amended in 2019)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] OJ L 167/10 represents the most comprehensive harmonization intervention on EU copyright law, and contains the largest set of copyright flexibilities introduced in the EU copyright acquis so far (20 optional, 1 mandatory, plus the formalization of the principle of exhaustion of the right of distribution). The Directive entered into force on 22 June 2001 (Article 14(1)), with a transposition deadline set to 22 December 2002 (Article 13). Its text was modified first, in 2017, by the Marrakesh Directive, and then, in 2019, by the CDSM Directive. The Directive applies to works and other subject-matter protected by copyright or related rights (Article 10(1)), yet without prejudice to acts concluded and rights acquired before this date (Article 10(2)).

Directive on certain permitted uses of orphan works (OWD, 2012)

To promote the digitization of and to provide wider access to copyright content, the EU adopted 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 L 299/5, The Directive entered into force on 28 October 2012 (Article 11), with a transposition deadline set for 29 October 2014 (Article 9(1)). The Directive applies to all works and phonograms protected as of 29 October 2014 (Article 8(1)), without prejudice to any acts concluded and rights acquired before that date (Article 8(2)).

Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (CMO Directive, 2014)

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, [2014] OJ L 84/72, provides a licensing scheme which helps facilitate end-users' access and use of online cultural and creative content. The Directive lays down requirements necessary to ensure the proper functioning of the management of copyright and related rights by CMOs. It also regulates the requirements for multi-territorial licensing by CMOs of rights in musical works for online use (Article 1). It entered into force on 9 April 2014, with a transposition deadline set to 10 April 2016 (Article 43).

Directive on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired, or otherwise print- disabled (Marrakesh Directive, 2017)

The Marrakesh Directive implements the WIPO Marrakesh Treaty,[55] introducing an exception for the production and distribution of works in accessible format for visually impaired individuals. It entered into force on 10 October 2017. Member States were given time to transpose the Directive to their national laws by 11 October 2018. (Article 11).

[55] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (adopted 27 June 2013, entered into force 30 September 2016) WIPO Doc VIP/DC/8 (Marrakesh Treaty).

Regulation on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired, or otherwise print-disabled (Marrakesh Regulation, 2017)

The Council Regulation (EC) 2017/1563/EU of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired, or otherwise print-disabled, [2017] OJ L242/1, entered into force on 12 October 2018 (Article 8). It complements the Marrakesh Directive, by allowing the exchange of accessible format copies towards and from extra-EU States members of the Marrakesh Treaty.

Directive on Copyright and related rights in the Digital Single Market (CDSM Directive, 2019)

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 entered into force on 7 June 2019. Member States were given time to transpose the Directive into their national laws by 7 June 2021 (Article 29). However, the great majority of Member States missed the transposition deadline. To date, Belgium, Bulgaria, Cyprus, Finland, Greece, Latvia, Poland, Portugal, Slovenia, Slovakia, Sweden have not yet transposed the Directive into their national laws.[56] The Directive introduces five mandatory exceptions to the EU catalogue of E/Ls, subordinating them to the three-step test under Article 5(5) InfoSoc (Article 7 CDSM), and an ECL scheme for out-of-commerce works. In general, the CDSM leaves intact existing E/Ls introduced by previous Directives, thus missing the opportunity to intervene on some of their criticisms such as, e.g., the fragmentation of national solutions caused by the optional nature of InfoSoc exceptions. In addition, Article 25 CDSM permits Member States to adopt or maintain in force broader provisions regulating uses and sectors covered by CDSM flexibilities, to the extent they are compatible with the E/Ls included in the Database and InfoSoc Directives.

Consumer Rights Directive (CRD, 1999, amended in 2011, last amendment 2019); Sales of Goods Directive (SGD, 2019); Digital Content and Services Directive (DCSD, 2019)

Directive 2011/83/EU of the European parliament and of the Council of 25th October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European parliament and of the Council and repealing Council directive 85/577/EEC and Directive 97/7/EC of the European parliament and of the Council, [2011] OJ L 304/64 (CRD), was adopted in October 2011 as a wide, horizontal instrument covering contracts negotiated away from business premises, distant selling and unfair terms and consumers' guarantees, which were originally regulated in different instruments, i.e. **(1)** Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, [1985] OJ L 372/31, which was into force until 13 June 2014 (repealed); **(2)** Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29, which entered into force on 16 April 1993 and Member States had to transpose it by 31 December 1994 (amended); **(3)** Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, [1997] OJ L 144/19, which was in force until 13 June 2014 (repealed); **(4)** Directive 1999/44/EC of

[56] See: --, 'Document 32019L0790' (EUR-Lex) <https://eur-lex.europa.eu/legalcontent/EN/NIM/?uri=CELEX:32019L0790> accessed 1 July 2022.

the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L 171/12, which entered into force on 7 July 1999 and Member States were given until 1 January 2002 to transpose it into their national laws (amended). The consolidated version of the CRD entered into force on 12 December 2011 and was due to be implemented by Member States by 13 December 2013 (Article 28). With few exceptions, it applies to most contracts between traders and consumer concluded after 13 June 2014 (Articles 3 and 28(2)), including those concerning digital content (Article 2(11)). It was subsequently amended by Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, [2015] OJ L 326/1, and Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, [2019] OJ L 328/7. This framework has been recently amended by two pieces of legislation: **(1)** Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, [2019] OJ L 136/28 (SGD, Article 23), and (**2)** Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, [2017] OJ L 136/1 (DCSD). DCSD applies to the supply of digital content or digital services, including digital content supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, as well as to the tangible medium itself, provided that the tangible medium serves exclusively as a carrier of the digital content (Article 3). In contrast, SGD applies to contracts for the sale of goods, including goods with digital elements which require digital content or a digital service in order to perform their functions (Article 3). Both pieces of legislation entered into force on 11 June 2019 and EU Member States were required to bring the Directive into law by 1 July 2021.[57] Both Directives apply to contracts which occur from 1 January 2022, and are relevant for this mapping, since they provide consumer protection measures tackling cases when TPMs hinder the enjoyment of a work or other subject matter in digital format.

3.1.1.1.2 RELEVANT PROVISIONS

The following section will offer a concise overview of the EU provisions directly or indirectly relevant for each category of flexibility. It shall be noted that all InfoSoc E/Ls covering the rights of reproduction under **Article 5(2)-(3)** may be extended by Member States to the right of distribution under **Article 4 InfoSoc** to the extent justified by the purpose of the authorized act of reproduction. In addition, all the flexibilities covered by **Article 5 InfoSoc** shall be applied only if they comply with the three-step test in the specific case.

3.1.1.1.2.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.1.1.2.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc introduces a mandatory exception to the right to reproduction of authors, performers, phonogram producers, film producers, and broadcasting organizations.[58] This provision permits temporary acts of reproduction, which are transient or incidental, and which are an integral and essential part of a technological process, for the sole purpose of enabling a transmission in a network between third parties by an

[57] Directive (EU) 2019/771, Article 24; Directive (EU) 2019/770, Art. 24. Both Directives apply to contracts which occur from 1 January 2022.
[58] See: Directive 2001/29/EC, Art. 5(1) in conjunction with Art. 2(1).

intermediary, or for a lawful use of a work or other-subject matter. The temporary reproduction of a work, fixation of a performance, phonogram, cinematographic work, or the fixation of a broadcast can be made by any means and in any form, in whole or in part,[59] and it shall not have any independent economic significance.

3.1.1.1.2.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc provides for an optional E/L to the reproduction right of authors over their works.[60] This provision allows broadcasting organizations to make ephemeral recordings of works, as long as such acts are carried out by their own means and for their own broadcasts. It also enables the preservation of such recordings in official archives if they have an exceptional documentary character.

Article 10(1)(c) Rental[61] introduces an optional E/L covering the fixation, broadcasting, communication to the public, and distribution rights[62] of authors on the original and copies of their work, of performers on the fixation of their performances of phonogram producers on their phonograms, and of producers of the first fixation of films on the original and copies the film.[63] It allows broadcasting organizations to ephemerally fixate a work or other subject-matter, by means of their own facilities and for their own broadcasts, in compliance with the three-step-test **(Article 10(3) Rental)**.[64]

3.1.1.1.2.1.3 INCIDENTAL INCLUSION

Article 5(3)(i) InfoSoc provides for an optional E/L to the reproduction right as well as the right to make available to the public and communicate to the public of authors, performers, phonogram producers, film producers, and broadcasting organizations.

3.1.1.1.2.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Article 5(1) Software allows the lawful acquirer to perform all restricted acts covered by the exclusive rights of the author of a computer program (permanent or temporary reproduction, translation, adaptation, arrangement and any other alteration and the reproduction thereof, any form of distribution, including the rental), without the authorization of the rightholder, when they are necessary for the use of the program in accordance with its intended purpose, including for error correction. Lawful users are also allowed to make a back-up copy of the program, and this privilege cannot be excluded by contract in so far as it is necessary for the use of the software **(Article 5(2) Software)**. Similarly, **Article 5(3) Software** allows the person having a right to use a copy of the program to observe, study or test its functioning in order to determine the ideas and principles which underlie any element of the program, if this is done while performing any of the acts of loading, displaying,

[59] See: Directive 2001/29/EC, Art. 5(1) in conjunction with Art. 2(1).
[60] See: Directive 2001/29/EC, Art. 5(2) in conjunction with Art. 2(1).
[61] Also see: Directive 92/100/EEC, Art. 10(1)(c).
[62] See: Directive 92/100/EEC, Artt. 6,8,9; Directive 2006/115/EC, Artt. 7, 8, 9.
[63] See: Directive 92/100/EEC, Art. 2(1); Directive 2006/115/EC, Art. 3(1).
[64] Also see: Directive 92/100/EEC, Art. 10(3).

running, transmitting or storing it. Any contractual provision contrary to this shall be null and void **(Article 8 Software).**

Article 6 Software allows the licensee or another person having the right to use the program, or another person acting on their behalf, to reproduce and translate the program when this is indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the information has not previously been readily available and those acts are confined to the parts of the original program which are necessary in order to achieve interoperability. The information so obtain cannot be used for other purposes, nor can it be given to other, except when necessary for the interoperability of the independently created program, nor used for the development, production or marketing of a program substantially similar in its expression, or for any other act which infringes copyright. The acts permitted by this exception, according to **Article 6(3)**, shall be performed in accordance with the three-step-test, as provided by the Berne Convention. Any contractual provision contrary to this shall be null and void **(Article 8 Software).**

Article 6(1) Database introduces a mandatory exception in favour of lawful users of a database or of a copy thereof, allowing the performance of any of the acts covered by exclusive rights of the database author[65] for the purposes of access to and normal use of the contents of the database. When the lawful user is authorized to use only part of the database, the provision applies only to that part.

Similarly, on the side of the sui generis right, **Article 8(1) Database** allows lawful users to extract and/or re-utilize insubstantial parts of the database content, evaluated qualitatively and/or quantitatively, for any purpose whatsoever. When the lawful user is authorized to use only part of the database, the provision applies only to that part. Lawful users should not perform acts which conflict with the normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database **(Article 8(2) Database)**, nor can they cause prejudice to the holder of a copyright or related right on works or subject matter contained therein **(Article 8(3) Database).**

According to **Article 6(4) InfoSoc**, in the absence of voluntary measures taken by rightholders, including agreements between them and other parties concerned, national laws should take appropriate measures to ensure that rightholders remove TPMs from their works when they hinder the enjoyment of specific E&Ls, to the extent necessary for the purpose, and only if the beneficiary has legal access to the protected work. E&Ls concerned are those related to reprography **(Article 5(2)(a) InfoSoc)**, the reproduction of works and other subject-matter by CHIs **(Article 5(2)(c) InfoSoc)**, ephemeral recording and preservation of such

[65] As regulated by Article 5 Database, i.e. the rights to carry out or to authorize (a) temporary or permanent reproduction by any means and in any form, in whole or in part; (b) translation, adaptation, arrangement and any other alteration; (c) any form of distribution to the public of the database or of copies thereof; (d) any communication, display or performance to the public; (e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

recordings **(Article 5(2)(d) InfoSoc)**, socially oriented uses of broadcasts by public institutions **(Article 5(2)(e) InfoSoc)**, illustration for teaching and scientific research **(Article 5(3)(a))**, uses by persons with disabilities **(Article 5(3)(b) InfoSoc)**, and for public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings **(Article 5(3)(e))**.

Article 6(4) InfoSoc also enables Member States to take similar measures for beneficiaries of the private copy exception **(Article 5(2)(b) InfoSoc)**, unless reproduction for private use has already been made possible by rightholders to the extent necessary for the purpose, without preventing rightholders from adopting adequate measures regarding the number of reproductions allowed.

The provision does not apply to works and other subject-matters made available to the public on agreed contractual terms, in such a way that members of the public may access them from a place and at a time individually chosen by them, while it covers, mutatis mutandis, also computer programs and databases.

3.1.1.1.2.1.5 FREEDOM OF PANORAMA

The freedom of panorama exception has been introduced to the EU copyright acquis by **Article 5(3)(h) InfoSoc** as an optional E/L. This provision enables the reproduction, making available and communication to the public of works made to be permanently located in public places. To illustrate the works included within the scope of the subject-matter, the provision provides a few non-exhaustive examples, such as works of architecture or sculpture.

3.1.1.1.2.2 PRIVATE COPY AND REPROGRAPHY

Article 5(2)(a) InfoSoc features an optional E/L for reprography. It permits the reproductions of protected works on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation.

The Database Directive features two optional exceptions to the exclusive rights of the database author and the sui generis rights of the database maker. **Article 6(2)(a) Database** allows the reproduction for private purposes of a non-electronic database. The interpretation of the provision is subject to the three-step test as featured in the Berne Convention **(Article 6(3) Database)**. **Article 9(a) Database** permits lawful users of a database which is made available to the public in whatever manner to extract or re-utilize a substantial part of the content of a non-electronic database for private purposes.

Article 5(2)(b) InfoSoc allows natural persons to reproduce a work or other subject-matter on any medium for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes

account of the application or non-application of technological measures referred to in **Article 6 InfoSoc**[66] to the work or subject-matter concerned.

Article 10(1)(a)[67] **Rental** provides for an optional exception or limitation to the fixation, broadcasting, communication to the public, and distribution rights[68] of authors on the original and copies of their work, of performers on the fixation of their performances, of phonogram producers on their phonograms, and of producers of the first fixation of films on the original and copies the film,[69] for the purpose of private use. The application of the provision is subordinated to the compliance with the three-step test, as provided by the Berne Convention **(Article 10(3) Rental)**.

3.1.1.1.2.3 QUOTATION

Article 5(3)(d) InfoSoc, which permits quotations from a work or other subject-matter that has been lawfully made available to the public, for purposes such as criticism or review. They shall be accompanied by the indication of the name of the author and the source of the work or other subject-matter, unless this turns out to be impossible, their use should be in accordance with fair practice, and should not go beyond the extent required by the purpose.

Article 17(7) CDSM requires Member States to ensure that when users upload and make available content on online content-sharing platforms, they can benefit from E/L for quotation, criticism, review and uses for the purpose or caricature, parody or pastiche.

3.1.1.1.2.4 PARODY, CARICATURE AND PASTICHE

Article 5(3)(k) InfoSoc introduces an optional E/L to the right of reproduction and communication to the public for the purpose of parody, caricature, and pastiche, with no further specifications.

Article 17(7) CDSM requires Member States to ensure that when users upload and make available content on online content-sharing platforms, they can benefit from E/L for quotation, criticism, review and uses for the purpose or caricature, parody or pastiche.

3.1.1.1.2.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.1.1.2.5.1 PRIVATE STUDY

Article 5(3)(n) InfoSoc features an optional E/L, allowing CHIs mentioned in **Article 5(2)(c) InfoSoc** (publicly accessible libraries, educational establishments, museums, archives) to communicate or make available works and other subject-matter not subject to purchase or licensing terms which are contained in their collections, to individual members of the public, for the purpose of research or private study.

[66] See section I(d) above.
[67] Also see: Directive 92/100/EEC, Art. 10(1)(a).
[68] See: Directive 92/100/EEC, Artt. 6, 8, 9; Directive 2006/115/EC, Artt. 7, 8, 9.
[69] See: Directive 92/100/EEC, Art. 2(1); Directive 2006/115/EC, Art. 3(1).

3.1.1.1.2.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

The Database Directive features two optional exceptions to the exclusive rights of the database author and the sui generis rights of the database maker. **Article 6(2)(b) Database** allows the reproduction, translation, adaptation, arrangement, alteration, distribution and communication, display or performance to the public of a database for the sole purpose of illustration for teaching or scientific research, to the extent justified by the non-commercial purpose and upon indication of the source. The interpretation of the provision is subject to the three-step test as featured in the Berne Convention **(Article 6(3) Database). Article 9(b) Database** permits lawful users of a database which is made available to the public in whatever manner to extract or re-utilize a substantial part of the content of a database for illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved. Both uses shall be without prejudice to the mandatory exceptions introduced by the CDSM Directive.[70]

Article 5(3)(a) InfoSoc provides for an optional E/L to the exclusive rights of reproduction, making available and communication to the public for the sole purpose of illustration of teaching or scientific research, to the extent justified by the non-commercial purpose to be achieved, and accompanied by the indication of the author's name and the source, unless this is proven impossible.

Article 10(1)(d)[71] **Rental** provides for an optional E/L covering the fixation, broadcasting, communication to the public, and distribution rights[72] of authors on the original and copies of their work, of performers on the fixation of their performances, of phonogram producers on their phonograms, and of producers of the first fixation of films on the original and copies the film, [73] for the sole purpose of illustration of teaching and scientific research. The uses as such shall comply with the three-step-test **(Article 10(3) Rental)**.[74]

3.1.1.1.2.5.3 DIGITAL USES FOR ILLUSTRATION FOR TEACHING

Article 5 CDSM introduces a mandatory L&E covering the right of reproduction, making available, communication to the public of works and other subject matter, to the exclusive rights of the database author and the sui generis right of the database maker, and to exclusive rights over computer programs, to allow the digital use of such works and other subject-matter for the sole purpose of illustration for teaching.

The exception shall apply to the extent justified by the non-commercial purpose to be achieved, and subject to the condition that the use takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff. **Article 5(3) CDSM**

[70] See: Directive (EU) 2019/790, Art. 24(1).
[71] Also see: Directive 92/100/EEC, Art. 10(1)(d).
[72] See: Directive 92/100/EEC, Artt. 6, 8, 9; Directive 2006/115/EC, Artt. 7, 8, 9.
[73] See: Directive 92/100/EEC, Art. 2(1); Directive 2006/115/EC, Art. 3(1).
[74] Also see: Directive 92/100/EEC, Art. 10(3).

introduces the country-of-origin principle, stating that the use of works or of other subject matters for the purpose of teaching through secure electronic environments, undertaken in compliance with this exception, shall be deemed to occur solely in the Member State where the educational establishment is established.

The indication of the source, including the author's name is required, unless this turns out to be impossible.

Article 5(2) CDSM gives Member States the option to exclude the application of the exception for specific types of works, such as sheet music or works originally intended for the educational market or sheet music, and to limit the operation of the exception to cases where no appropriate licenses, covering the needs and specificities of educational establishments, are easily available on the market. To this end, Member States are required to take measures to ensure that licenses are available and visible in an appropriate manner. Moreover, **Recital 23 CDSM** clarifies that Member States should specify under which conditions an educational establishment can use protected works or other subject matter under that exception and, conversely, when it should act under a licensing scheme.

Article 5(4) CDSM permits Member States to subordinate the L&E to the payment of a fair compensation for rightholders for the use of their works or other subject matter.

Article 7(1) CDSM declares this exception not overridable by contract, while **Article 7(2) CDSM** provides that it shall be applied in compliance with the three-step test enshrined in **Article 5(5) InfoSoc**, and that it should be preserved against the operation of TPMs as provided by **Article 6(4) InfoSoc.**

3.1.1.1.2.5.4 TEXT AND DATA MINING

Article 3 CDSM obliges Member States to provide an E/L to the exclusive rights of the database author, the sui generis rights of extraction and re-utilization of the database maker, the right of reproduction under the **InfoSoc Directive**, and the exclusive rights of press publishers for reproductions and extractions made by research organizations and CHIs, in order to carry out TDM of works or other subject-matter to which they have lawful access, for the purposes of scientific research.

Article 2(2) CDSM defines TDM as any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations, while **Recital 12 CDSM** clarifies that the term "scientific research" encompasses both natural sciences and human sciences. Beneficiaries are defined in **Article 2 CDSM.**

Article 2(1) CDSM defines "research organization" as "a university, including its libraries, a research institute and any other organizations the primary goal of which is to conduct scientific research or carry out educational activities involving also the conduct of scientific research: **(a)** on a non-for-profit basis or by reinvesting all the profits in its scientific research; or **(b)** pursuant to a public interest mission recognized by a Member State; in such a way that

the access to the results generated by such scientific research cannot be enjoyed on a preferential basis by an undertaking that exercises a decisive influence upon such organization."

Article 2(3) CDSM defines CHIs as "a publicly accessible library or museum, an archive or a film or audio heritage institution", while **Recital 13 CDSM** suggests that CHIs should be understood as covering publicly accessible libraries and museums regardless of the type of works or other subject matter they hold in their permanent collections, as well as archives, film or audio heritage institutions, national libraries and national archives, and the publicly accessible libraries of educational establishments, research organizations and public broadcasting organizations.

Pursuant to **Article 3(2) CDSM** Member States shall allow said beneficiaries to store copies of works or other subject matter in so far as the storage is made with an appropriate level of security, for the purpose of scientific research, including the verification of research results. **Recital 15 CDSM** further details the concept by referring to purposes of scientific research other than TDM, such as scientific peer review and joint research.

Under **Article 3(2) CDSM**, Member States shall permit rightholders to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

Article 3(4) CDSM requires Member States to encourage rightholders, research organizations and CHIs to define commonly agreed best practices concerning the application of the safety measures.

Article 7(1) CDSM declares this exception not overridable by contract, while **Article 7(2) CDSM** provides that it shall be applied in compliance with the three-step test enshrined in **Article 5(5) InfoSoc**,[75] and that it should be preserved against the operation of TPMs as provided by **Article 6(4) InfoSoc.**

Article 4 CDSM obliges Member States to provide for lawful users an E/L to the exclusive rights of the database author, the sui generis rights of extraction and re-utilization of the database maker, the right of reproduction under the **InfoSoc Directive**, the exclusive rights of press publishers for reproductions and extractions, and the exclusive right to reproduce, translate, adapt, arrange, and alter in any other manner a computer program. The exception does not have a purpose limitation but does not apply if TDM activities are expressly reserved by rightholders in an appropriate manner, which **Article 4(3) CDSM** and **Recital 18** specify as machine-readable means in the case of content made publicly available online (including metadata and terms and conditions of a website or a service). In other cases, reservation of rights might take place by other means, such as contractual agreements or a unilateral

[75] See below in XII, three step test.

declaration. According to **Article 4(2) CDSM**, the retention of reproductions and extractions is possible only as long as it is necessary for TDM.

While **Article 7(1) CDSM** does not apply to this provision, which makes it overridable by contract, **Article 7(2) CDSM** requires that this exception is subordinated to the three-step test enshrined in **Article 5(5) InfoSoc**,[76] and that it should be preserved against the operation of TPMs as provided by **Article 6(4) InfoSoc**.

3.1.1.1.2.6 USES FOR INFORMATORY PURPOSES

3.1.1.1.2.6.1 PRESS REVIEW AND NEWS REPORTING

Article 5(3)(c) InfoSoc introduces an optional E/L which enables the reproduction by the press, communication to the public or making available of published articles on current economic, political, or religious topics or of broadcast works or other subject-matter of the same character, unless such use is not expressly reserved, and as long as the source, including the author's name, is indicated. Alternatively, the use of works or other subject-matter shall be in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible.

Article 10(1)(b) [77] **Rental** provides for an optional E/L to the fixation, broadcasting, communication to the public, and distribution rights[78] of authors on the original and copies of their work, of performers on the fixation of their performances, of phonogram producers on their phonograms, and of producers of the first fixation of films on the original and copies the film.[79] It allows the use of short excerpts of the works and other subject-matter for the reporting of current news. However, such uses shall comply with the three-step-test **(Article 10(3) Rental)**.[80]

3.1.1.1.2.6.2 USE OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc introduces an optional E/L to the right to reproduction, making available or communication to the public, for the use of political speeches as well as extracts of public lectures or similar works or other subject-matter, to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except when this turns out to be impossible.

[76] See below in XII, three step test.
[77] Also see: Directive 92/100/EEC, Art. 10(1)(b).
[78] See: Directive 2006/115/EC, Artt. 7, 8, 9.
[79] See: Directive 2006/115/EC, Art. 3(1).
[80] Also see: Directive 92/100/EEC, Art. 10(3).

3.1.1.1.2.7 USES BY PUBLIC AUTHORITIES

3.1.1.1.2.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

The Database Directive features two optional exceptions to the exclusive rights of the database author and the sui generis rights of the database maker. **Article 6(2)(c) Database** allows the reproduction, translation, adaptation, arrangement, alteration, distribution and communication, display or performance to the public of a database for the purpose of public security or for the purposes of an administrative or judicial procedure. The interpretation of the provision is subject to the three-step test as featured in the Berne Convention **(Article 6(3) Database). Article 9(c) Database** permits lawful users of a database which is made available to the public in whatever manner to extract or re-utilize a substantial part of its content for the purposes of public security or an administrative or judicial procedure.

Article 5(3)(e) InfoSoc features an optional E/L to the rights to reproduction and making available or communication to the public to use works or other subject-matter for the purposes of public security, or to ensure the proper performance or reporting of administrative, parliamentary, or judicial proceedings.

3.1.1.1.2.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 5(3)(g) InfoSoc provides an optional E/L to the rights of reproduction and communication/making available to the public of works and other subject-matter for uses during religious celebrations or official celebrations organized by a public authority**.**

3.1.1.1.2.8 SOCIALLY ORIENTED USES

Article 5(2)(e) InfoSoc introduces an optional E/L to the right of reproduction over broadcasts in favour of social institutions pursuing non-commercial purposes, such as hospital or prisons. Rightholders shall receive fair compensation**.**

3.1.1.1.2.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.1.1.2.9.1 PUBLIC LENDING

Article 6(1) Rental[81] introduces an optional E/L for the public lending of literary and artistic works, fixed performances, phonograms, and films. For the purposes of this Directive, "lending" stands for making available for use, for a limited period and not for direct or indirect economic or commercial advantage, of a protected work, made through establishments which are accessible to the public.[82]

Article 6(1) Rental allows the lending of works and other subject-matters to the public, for a limited period and for non-commercial purposes, in publicly accessible establishments. Public lending shall be subordinated by the payment of a fair remuneration to rightholders, but Member States have the discretion to determine the amount in accordance with their

[81] Also see: Directive 92/100/EEC, Art. 5(1).
[82] Directive 92/100/EEC, Art. 1(3); 2006/115/EC, Art. 2(1)(b).

cultural promotion objectives. In addition, **Article 6(3) Rental** allows Member States to exempt selected cultural institutions from this obligation.

3.1.1.1.2.9.2 PRESERVATION OF CULTURAL HERITAGE

Although not explicitly finalized to the purpose of preservation of cultural heritage, **Article 5(2)(c) InfoSoc** has been used to this end, since it introduces an optional E/L in respect of 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.

Article 6 CDSM introduces a mandatory E/L, which allows CHIs to make copies of any works or other subject matter, works covered by the press publishers' right, databases and computer programs that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.

The notion of CHIs is provided in **Article 2(3) CDSM** (a publicly accessible library or museum, an archive or a film or audio heritage institution).

3.1.1.1.2.9.3 OTHER USES BY CULTURAL HERITAGE/EDUCATION/SOCIAL INSTITUTIONS

Article 5(2)(c) InfoSoc constitutes a broadly formulated E/L, which encourages and enables Member States to adopt further E/Ls in favour of CHIs, by exempting their reproduction of works and other subject-matter from the scope of the rightholders' exclusive right to reproduction, only if such acts are for non-commercial purposes.

3.1.1.1.2.9.4 ORPHAN WORKS

The Orphan Works Directive is designed to provide CHIs, defined as publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations established in Member States, with a mandatory copyright E/L, with the aim to facilitate the digital reproduction and communication/making available to the public of orphan works and thus to achieve goals related to their public-interest missions **(Article 1 OWD).**

Article 1(2) OWD limits the scope of the Directive to the following works protected by copyright or related rights, and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State:

- works published in the form of books, journals, newspapers, magazines, or other writings contained in the collections of publicly accessible libraries, educational establishments, or museums as well as in the collections of archives or of film or audio heritage institutions **(Article 1(2)(a))**.
- cinematographic or audio-visual works and phonograms contained in the collections of publicly accessible libraries, educational establishments, or

museums as well as in the collections of archives or of film or audio heritage institutions **(Article 1(2)(b))**; and

- cinematographic or audio-visual works, and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002, which are contained in their archives **(Article 1(2)(c))**.

Article 1(3) OWD extend the Directive's subject-matters to cover also works and phonograms which have never been published or broadcast, but which have been made publicly accessible by the beneficiaries CHIs with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses of their works. This rule is limited to works and phonograms which have been deposited with the beneficiaries before 29 October 2014. Paragraph 4 additionally extend the Directive to works and other protected subject-matter that are embedded or incorporated in or constitute an integral part of the works or phonograms referred to in the previous paragraphs.

As specified in **Article 2(1) OWD**, a work or a phonogram shall be considered orphan if none of the rightholders is identified or, even if one or more of them is identified, none is located despite a diligent search.

The notion of "diligent search" is detailed in **Article 3 OWD**. Beneficiaries CHIs shall ensure that, prior to the use of the work or phonogram, a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the categories involved, as determined by each Member State in consultation with rightholders and users (and including at least the sources listed in the Annex of the Directive). The search should be carried out in the Member State of first publication or, in the absence of publication, first broadcast. In the case of cinematographic or audio-visual works the producer of which has his headquarters or habitual residence in a Member State, the diligent search shall be carried therein. In the case of works/phonograms never published or broadcast but made publicly available by beneficiaries CHIs with the rightholder's consent, the diligent search shall be carried out in the Member State where the CHI that made the work or phonogram publicly accessible is established.

Sources from other countries should be consulted if there is evidence to suggest that relevant information on rightholders is to be found there in **(Article 3(4) OWD).**

National laws should ensure that CHIs that benefit from the exception maintain records of their diligent search and provide to competent national authorities' information on **(a)** the results of the diligent searches carried out and resulted into a declaration of orphan work; **(b)** the use of orphan works made by the CHI; **(c)** any change of the orphan status of works/phonograms used by the organization; **(d)** relevant contact information of the CHI **(Article 3(5) OWD).**

If more than one rightholder exists and not all of them have been identified or located after a diligent search, the work or phonogram can still be used under the E/L regulated by

the Directive, provided that the identified rightholder authorized the reproduction and making available to the public of the work or phonogram in relation to the rights they hold **(Article 2(2) OWD).** The E/L will therefore apply to non-identified and located rightholders **(Article 2(4) OWD).**

As clarified by **Article 2(5) OWD,** anonymous or pseudonymous works do not fall under the category of orphan works.

Article 6 OWD details the content of the E/L, requiring Member States to introduce an exception or limitation to the right of reproduction and making available to the public in favour of CHIs, in order to enable them to make orphan works available to the public within the meaning of **Article 3 InfoSoc** (that is by wire or wireless means, including the making available to the public of the orphan works in such a way that members of the public may access them from a place and at a time individually chosen by them), and to reproduce orphan works within the meaning of **Article 2 InfoSoc** (that is directly or indirectly, temporarily or permanently, by any means and in any form, in whole or in part), for the purposes of digitization, making available, indexing, cataloguing, preservation, or restoration.

According to **Article 6(2) OWD**, the beneficiary organizations shall perform the permitted acts solely to achieve aims related to their public-interest missions, and in particular the preservation of, the restoration of, and the provision of cultural and educational access to works and phonograms contained in their collections. They may generate revenues from such uses, but only for the exclusive purpose of covering the costs faced to digitize and make available to the public orphan works. Along the same lines, **Article 6(4) OWD** enables public-private partnerships in the pursuit of CHI's public-interest missions.

CHIs should indicate the name of identified authors and other rightholders in any use of an orphan work **(Article 6(3) OWD).** With a similar attention paid to rightholders' interest and in the pursuance of a fair balance between countervailing interests, **Article 6(5) OWD** requires Member States to provide that a fair compensation is due to rightholders that terminate the orphan work status of their works or other subject-matter in accordance with Article 5 OWD, covering the use that CHIs have made of such works under the exception or limitation. National legislators have room for discretion as to the circumstances under which the payment of such compensation may be organized. The level of compensation shall be determined by the law of the Member State in which the CHI using the orphan work is established.

For the purpose of legal certainty and the correct functioning of the internal market, **Article 4 OWD** rules that a work or phonogram deemed as an orphan work in a Member State shall be considered an orphan work in all Member States and may be used and accessed in accordance with this Directive in all Member States, in compliance with the Directive. To facilitate the sharing of information, Member States are requested to forward without delay the information received by CHIs under **Article 5 OWD** to EUIPO, which is in charge of managing a single publicly accessible online database on orphan works (Orphanet).

3.1.1.1.2.9.5 OUT-OF-COMMERCE WORKS

Article 8(2) CDSM requires Member States to introduce a mandatory exception or limitation for the benefit of CHIs, to permit them to reproduce and make available, for non-commercial purposes, out-of-commerce works that are permanently held in their collections.

A work is deemed to be "out-of-commerce" when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, further to a reasonable effort made to determine whether it is available to the public. Member States are free to provide for specific requirements, such as a cut-off date, to determine whether works and other subject matter can be used under the exception or limitation. Such requirements shall not extend beyond what is necessary and reasonable and shall not preclude being able to determine that a set of works or other subject matter as a whole is out of commerce, when it is reasonable to presume that all works or other subject matter are out of commerce **(Article 8(5) CDSM).**

Article 8(7) CDSM excludes the application of the provision to sets of out-of-commerce works or other subject matter if, on the basis of the reasonable effort made to determine whether it is available to the public, there is evidence that such sets predominantly consist of **(a)** works or other subject matter, other than cinematographic or audio-visual works, first published or, in the absence of publication, first broadcast in a third country; **(b)** cinematographic or audio-visual works, of which the producers have their headquarters or habitual residence in a third country; or **(c)** works or other subject matter of third country nationals, where after a reasonable effort no Member State or third country could be determined pursuant to points **(a)** and **(b)**.

The provision applies, however, limitedly to the ECL scheme under **Article 8(1) CDSM** and with the exclusion of the exception or limitation under **Article 8(2) CDSM**, where the CMOs is sufficiently representative of rightsholders of the relevant third country.

The exception or limitation shall cover the reproduction, by any mean, in whole or in part of original databases their translations, adaptation, arrangement or any other alteration, their communication to the public, display or performance, and the extraction or re-utilization of the content of databases protected by the sui generis right. It shall also cover the reproduction, translations, adaptation, arrangement, or any other alteration of computer programs, as well as the reproduction and communication/making available to the public of works, other subject matters, and works protected by the press publishers' right.

The indication of the source, including the author's name is required, unless this turns out to be impossible. Also, for the exception to apply, the works or other subject matter shall be made available on non-commercial websites.

Article 8(3) CDSM requires the exception or limitation to be limited to types of works or other subject matter for which no collective management organization that fulfils the condition set out in **Article 8(1)(a) CDSM** exists.

All rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the application of the exception or limitation, either in general or in specific cases, including after the conclusion of a license or after the beginning of the use concerned **(Article 8(4) CDSM).**

Similar to the other exceptions and limitations in the CDSM, **Article 7** subordinates this exception or limitation to compliance with the three-step test in **Article 5(5) InfoSoc.**

3.1.1.1.2.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 5(3)(b) InfoSoc allows Member States to introduce an exception or limitation to the rights of reproduction and communication/making available to the public of works and other subject matters for uses matter for the benefit of persons with disabilities. Permitted uses shall be directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.

Article 8 Marrakesh amended the **InfoSoc Directive** in 2017. The wording of **Article 5(3)(b) InfoSoc** remained unchanged but was subordinated to Member States' obligation as detailed in the Marrakesh Directive.[83]

Compared to the InfoSoc Directive, the **Marrakesh Directive** expands the array of beneficiaries and acts covered by the E/L for the benefit of people with disabilities**.** Beneficiaries are identified in **Article 2(2) and Article 2(4) Marrakesh**. **Article 2(2)** defines the "beneficiary person" as a person who **(i)** is blind; **(i)** has a visual impairments which cannot be Improved so as to give the person visual function substantially equivalent to that of a person who has no such impairment, and who is, as a result, unable to read printed works to substantially the same degree as a person without such an impairment; **(c)** has a perceptual or reading disability and is, as a result, unable to read printed works to substantially the same degree as a person without such disability; or **(d)** is otherwise unable, due to a physical disability, to hold or manipulate a book or to focus or move their eyes to the extent that would be normally acceptable for reading.

Article 2(4) Marrakesh adds for the first time also "authorized entities", which are entities that are authorized or recognized by a Member State to provide education, instructional training, adaptive reading, or information access to beneficiary persons on a non-profit basis. They also include a public institution or non-profit organization that provides the same services to beneficiary persons as one of its primary activities, institutional obligations or as part of its public-interest mission.

According to **Article 3(1) Marrakesh**, Member States are obliged to provide a mandatory exception, thus non-overridable by contract, covering the exclusive rights of database authors and the sui generis right of database makers, the general rights of reproduction, communication/making available to the public and distribution, the rental and lending rights,

[83] "[…] Without prejudice to the obligations of Member States under Directive (EU) 2017/1564 of the European Parliament and of the Council." See: EU 2017/1564, Art. 8.

the performer's right of broadcasting and communication to the public, the remuneration right of phonogram producers, and the distribution right of performers, phonogram producers, producers of the first fixation of films, and broadcasting organisations. The exception should allow beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject-matter to which the beneficiary person has lawful access for the exclusive use of the beneficiary person, and an authorized entity to make an accessible format copy and to communicate, make available, distribute or lend an accessible format copy to a beneficiary person or authorised entity on a non-profit for the purpose of exclusive use by a beneficiary person.

According to **Article 2(1) Marrakesh**, "work or other subject-matter" covers a work in the form of a book, journal, newspaper, magazine or other writing, notation including sheet music, and related illustrations, in any media, including in audio forms such as audiobooks and in digital format, which is protected by copyright or related rights, and which is published or otherwise lawfully made publicly available.

Accessible format copies should respect the integrity of the work, with due consideration given to the changes required for the purpose **(Article 3(2) Marrakesh)**. More generally, the exception should be applied only in compliance with the three-step test, and rightholders should ensure that TPMs, when applied, do not hinder its enjoyment **(Article 3(4) Marrakesh)**, unless the work is made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. **Recital 14** prevents Member States from imposing additional requirements for the application of the exception other than those laid in the Directive.

Article 3(6) Marrakesh allows Member States to subordinate the activities carried out by authorized entities to the payment of a fair compensation to rightholders. Yet, **Recital 14 Marrakesh** limits the compensation scheme to entities operating in the Member State providing such a scheme and excludes the possibility to adopt compensation schemes that require payment by beneficiary persons.

Article 4 Marrakesh requires Member State to allow authorized entities established in their territory to make, communicate, make available, distribute, or lend accessible format copies of works to authorized entities or individuals based in other EU Member States.

Similarly, Member States shall ensure that authorized entities and individual beneficiary persons are permitted to receive accessible format copies from authorized entities established in any Member State.

Article 5 Marrakesh imposes on Member States the obligation to provide that an authorized entity established in their territory establishes and follows its own practices to ensure that it **(a)** distributes, communicates and makes available accessible format copies only to beneficiaries and other authorized entities; **(b)** takes appropriate steps to discourage the unauthorised reproduction, distribution, communication to the public or making available to the public of accessible format copies; **(c)** demonstrates due care in, and maintains records

of, its handling of works or other subject matter and of accessible format copies thereof; and **(d)** publishes and updates, on its website if appropriate, or through other online or offline channels, information on how it complies with such obligation. At the same time, Member States shall ensure that an authorized entity established in their territory provide to beneficiary persons, other authorized entities or rightholders information regarding the list of works for which it has accessible format copies, the available formats, and the name and contact details of the authorized entities with which it has engaged in the exchange of accessible copies.

3.1.1.1.2.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

The InfoSoc Directive provides a limited number of further optional exceptions or limitations in addition to those already analysed above.

Article 5(3)(j) InfoSoc enables the reproduction and communication to the public of works, 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.

Article 5(3)(l) InfoSoc allows the reproduction and communication to the public of works or other subject-matters in connection with the demonstration or repair of equipment.

Article 5(3)(m) InfoSoc allows the reproduction and communication to the public of an artistic work in the form of a building, or a drawing or plan of a building for the purposes of reconstructing the building.

Article 5(3)(o) InfoSoc allows Member States to introduce exceptions or limitations to the rights of reproduction and communication to the public for the use of works or other subject matter in certain other cases of minor importance, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the EU.

3.1.1.1.2.12 THREE-STEP TEST

The three-step-test has been first introduced by the Berne Convention,[84] as revised in 1967. **Article 9(2) BC** rules that: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[85]

As a consequence of the obligations imposed to contracting parties - so also to the EU - by the WIPO Copyright Treaties[86], which embeds **Article 9(2) WCT**, the InfoSoc Directive introduced **Article 5(5),** which recalls the text of the BC verbatim and rules that all exceptions

[84] Berne Convention for the Protection of Literary and Artistic Works (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 221 (BC).
[85] Ibid, Art. 9(2).
[86] WIPO Copyright Treaty (adopted 20 December 2996, entered into force 6 March 2002) UNTS 121 (WTC)

provided by **Article 5 InfoSoc** shall be applied only if they concretely comply with the three-step test.

3.1.1.1.2.13 PUBLIC DOMAIN

Aside from the provisions determining the term of protection for each category of protected work (e.g., Article 8(1) Software, Article 10 Database, Articles 1(1), 1(2), 1(3), 1(4), 2, 3, 4, 5, 6 Term; 2011), the EU legislation contains only a few scattered references to works or subject matter excluded from copyright protection.

In line with **Article 2(1) BC**, **Article 1(2) Software** protects the expression in any form of a computer program, while it excludes from protection ideas and principles which underlie any of its elements, including those which underlie its interfaces.

Article 3(2) Database excludes from the copyright protection of databases their contents. Furthermore, the Directive is without prejudice to any rights subsisting in those contents **(Articles 3(3) and 8(4) Database).**

EU secondary sources do not feature any paying public domain scheme.

3.1.1.1.2.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Several EU copyright flexibilities are subordinated to the payment of a fair or equitable compensation to rightholders or revert around the transformation of an exclusive right into a remuneration right. While in some instances the EU provision also compels the management of such a right via CMOs, in other cases the rule is silent on the matter, remitting to Member States the decision on the matter (e.g., to mention but a few, the private copy and reprography exceptions under **Article 5(2)(a)-(b)**, the optional compensation for the orphan work exception under **Article 8(5) OWD**, the optional compensation for the digital teaching exception under **Article 5 CDSM**, etc.).

This paragraph report only mandatory or extended licensing schemes that are explicitly mentioned by EU sources.

Article 8(1) CDSM requires Member States to provide that a CMO, in accordance with its mandates from rightholders, may conclude a non-exclusive licence for non-commercial purposes with a CHI for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, irrespective of whether all rightholders covered by the licence have mandated the CMO. This licensing mechanism applies on condition that **(a)** the collective management organization is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights subject of the license, and **(b)** all rightholders are guaranteed equal treatment in relation to the terms of the license.

As specified by **Recital 43 CDSM**, the licensing mechanism shall be without prejudice to the use of such works or other subject matter under exceptions or limitations provided for in

EU law, or under other ECLs where such licensing is not based on the out-of-commerce status of the covered works or other subject matter.

Article 8(6) CDSM requires the license to be sought from a CMO that is representative for the Member State where the CHI is established.

Article 12 CDSM introduces the possibility for Member States to provide, as far as the use on their territory is concerned and subject to the safeguards provided by the Directive, that where a CMO that is subject to the national rules implementing the CMO directive, in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter: **(a)** such an agreement can be extended to apply to the rights of rightholders who have not authorised that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement; or **(b)** with respect to such an agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly. Such ECLs should only apply within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely and should ensure that such licensing mechanism safeguards the legitimate interests of rightholders **(Article 12(2) CDSM).**

Article 12(3) CDSM provides a number of safeguards, from the representativeness of the CMO to the equal treatment of rightholders (including in relation to the terms of the license), the presence of easy and effective out-out mechanisms, and the presence of Appropriate and timely publicity measures to inform rightholders about the ability of the CMO to license works or other subject matter, including the indication of possibility for rightholders to exclude their works from the licensing. The provision leaves unaffected the application of ECLs for out-of-commerce works under **Article 8(1) CDSM,** or other licensing mechanism with an extended effect envisaged in EU law, including EU rules imposing mandatory collective management of rights, as well as the provisions that allow exceptions or limitations.

Article 3(2)(b)-(d) Term Directive mandates Member States to establish a non-waivable right to an annual supplementary remuneration for performers, consisting of 20% of the revenue which the phonogram producer has derived, during the preceding year, from the reproduction, distribution and making available of each fixation in phonogram of their performances in the Member State concerned. Only performers who have transferred or assigned their exclusive rights to the phonogram producer are entitled to such remuneration. The eligible category of performers enjoys this supplementary remuneration each year from the 50th until the 70th year after the phonogram was lawfully published or, failing such publication, lawfully communicated. **Article 3(2)(b)** requires Member States to entrust to CMOs the management of the non-waivable annual supplementary remuneration due to performers who have transferred or assigned their exclusive rights to the phonogram producer.

Under **Article 1 Resale** Member States are obliged to attribute toto authors of an original work of art an inalienable and non-waivable right to receive a royalty based on the sale price obtained for any resale of the work, after the first transfer of the work. **Article 6(2) Resale** gives Member States the possibility to opt for compulsory or optional collective management of such resale royalty.

According to **Article 5(2) CMO**, as a matter of principle, the exercise of exclusive rights under copyright remains a prerogative of rightholders. Member States shall give them the choice to manage their rights, categories of rights or types of works and other subject matter, for the territories of their choice and regardless of the nationality, residence, or establishment of the CMO or rightholders. Exceptionally, Member States may accommodate other forms of licensing that restrict the rightholders' individual exercise of rights.

Article 9 SatCab (2013) obliges Member States to ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a CMO. **Article 10 SatCab** excludes from this scheme the exercise of rights of broadcasting organizations on their own transmissions.

Article 4 SatCab (2019) requires Member States to subordinate the acts of retransmission of programs subject to the authorization of the holder of the exclusive right of communication to the public. Along the same lines, Member States are obliged to ensure that rightholders exercise such right to authorize or refuse a retransmission only through a CMO.

Article 8(2) SatCab (2019) extends the same obligation to the exercise of the right to refuse or grant the authorization to signal distributors for a transmission of programs through direct injection made by broadcasting organizations.

Article 5 (4) Rental grants performers and authors who have transferred the rental right of phonograms or of an original copy of a film to a phonogram or film producer a non-waivable right to obtain an equitable remuneration for the rental of such phonograms or films. The provision requires this right to be managed by CMOs.

3.1.1.1.2.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.1.1.2.15.1 FUNDAMENTAL (USERS') RIGHTS

The only direct reference to fundamental rights in a piece of secondary EU copyright legislation has recently come from the CDSM Directive, which at **Recital 70** states that

> *"The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including, in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ('the Charter'), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual*

property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes".

Before that, **Recital 31 InfoSoc** stated that "A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded". This was used as a basis for the CJEU to offer an interpretation of EU copyright provisions (see infra, CJEU case law) that took into account conflicting fundamental rights at stake. Rights and freedoms more frequently cited were **Article 17(2) CFREU**, which represents the Charter's IP clause and states that "intellectual property shall be protected"; **Article 8** on the protection of personal data; **Article 11 CFREU** on freedom of expression; **Article 13** on freedom of the arts and sciences; and **Article 16** on freedom to conduct a business.

3.1.1.1.2.15.2 CONSUMER PROTECTION

Under **Article 5 CRD** Member States are required to impose certain information requirements for contracts other than distance or off-premises contracts. Specifically, **Article 5(1)(a)(g) CRD** requests Member States to ensure that traders provide consumers with information about the main characteristics of the goods or services and their functionality, including applicable TPMs of digital content. This information shall be provided to consumers in a clear and comprehensible manner, when the same is not already apparent from the context.
Article 6(1)(r) CRD requires the introduction of a similar information duty for distance and off-premises contracts.

Article 10 DCSD obliges Member States to introduce specific remedies when consumers cannot access the digital content or digital service or cannot do so lawfully because of legal or technical measures related to intellectual property protection. According to this provision, where a restriction resulting from a violation of any right of a third party, in particular intellectual property rights, prevents or limits the use of the goods in accordance with their functions, Member States shall ensure that the consumer is entitled to the remedies for lack of conformity provided for in **Article 13 DCSD** – bring the product into conformity, reduction of the price and/or termination of the contract – unless national law opts for the nullity or rescission of the sale contract.

Article 9 SGD envisages identical remedies where restrictions resulting from intellectual property rights prevent or limit consumers from the use of goods with digital elements, where the digital content is necessary for the good to perform its function.

3.1.1.1.2.15.3 COPYRIGHT CONTRACT LAW

See the explanations regarding the special licensing schemes above in section 3.1.1.1.2.15.

3.1.1.1.2.15.4 OTHER INSTRUMENTS

As last amended in 2018, the AVMSD features several provisions which have implications on end-users' access to and use of cultural content made available or communicated to the public by broadcasting organisations.

Article 7 AVMDS[87] imposes on Member States a wide range of obligations to make media services more accessible and fitting to the needs of persons with disabilities. **Articles 7(1) and 7(3) AVMDS** are particularly relevant to the purpose of this mapping. **Article 7(1)** rules that Member States shall ensure, without undue delay, that services provided by media service providers under their jurisdiction are made continuously and progressively more accessible to persons with disabilities through proportionate measures. Along the same line and to the same purpose, **Article 7(3)** holds that Member States shall encourage media service providers to develop accessibility action plans.

Article 14 AVMDS[88] aims at ensuring the public's access to broadcasts on events that are of major importance to the public at large, by preventing the monopoly of broadcasting organizations on broadcasting such events. In this context, **Article 14(1)** encourages Member States to take the necessary measures to prevent that a substantial part of the public in their territory is not deprived from the possibility of following such events by live coverage or deferred coverage on free television. Member States have the discretion to prepare a list of events, national or non-national, which they consider to be of major importance for society, and to determine whether these events should be available by whole or partial live or deferred coverage. This list shall be produced in a clear and transparent manner in due time. **Article 14(3) AVMSD** requires Member States to take action to ensure that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters after 30 July 1997 in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following such events.

For the purpose of short news reports, **Article 15 AVMDS**[89] grants to any broadcaster established in the Union access on a fair, reasonable, and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under a Member State's jurisdiction. To this end, **Article 15(2) AVMDS** rules that a broadcaster established in a Member State can seek access to such events from the broadcaster which has exclusive rights on them. Member States are encouraged to ensure such an access by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal, provided that they indicate the original source, unless this is proven impossible for reasons of practicality. Alternatively, Member States may establish an equivalent system reaching the same goal via other means **(Article 15(4) AVMDS).** According to **Article 15(5) AVMSD**, short extracts shall be used solely for general news programmes and

[87] Directive 2010/13/EU, Art. 3c; Directive (EU) 2018/1808, Art. 7.
[88] Directive 2010/13/EU, Art. 3j; Directive (EU) 2018/1808, Art. 14.
[89] Directive 2010/13/EU, Art. 3k; Directive (EU) 2018/1808, Art. 15.

may be used in on-demand audio-visual media services only if the same programme is offered on a deferred basis by the same media service provider. Member States are free to define the modalities and conditions for the provision of such short extracts, their maximum length and time limit, and the eventual compensation to be paid to rightholders, which shall not exceed the additional costs directly incurred by the latter to provide access.

3.1.1.2 CJEU CASE LAW

As a consequence of the vague and broad definitions offered by EU Directives, the lack of coordination among sources, and the uncertain degree of harmonization and flexibility left to Member States, since 2001 the number of questions raised for the CJEU by national courts on the interpretation of exceptions have been substantial. This has given ample room for the Court to engage in a prolific activism and a rampant judge-made harmonization of the field.

With its interventions, the CJEU have tackled and solved several problems triggered by the flaws in the EU legislative harmonization. Yet, some of its decisions have generated further inconsistencies and paved the way to additional questions, while other problems have largely been left unsolved. Getting a glimpse of the state of the art of the CJEU case law may help to understand the background on which preparatory works and consultations preceding the CDSMD reform took place, to define the boundaries and degree of EU copyright harmonization, and to highlight the problematic areas still requiring clarification.[90]

3.1.1.2.1 GENERAL PRINCIPLES

In the Grand Chamber trio of 2019 (*Funke Medien,*[91] *Pelham,*[92] *Spiegel Online*[93]), the CJEU had the opportunity to clarify that, as a matter of general principle, EU E&Ls provided under Article 5(2)-(3) InfoSoc shall be considered measures of minimum harmonization. The Court drew this conclusion from the fact that in the transposition of the provisions scrutinized in the three cases and in their application under national law, "Member States enjoy significant discretion allowing them to strike a balance between the relevant interests".[94] The existence of such a discretion is supported by the legislative drafts which preceded the adoption of the InfoSoc Directive. As stated in the Explanatory Memorandum (COM(97) 628 final),[95] "in view of their more limited economic importance, those limitations are deliberately not dealt with in detail in the framework of the proposal, which only sets out minimum conditions for their

[90] This section relies in part on the analysis and the text of the article Caterina Sganga, 'A New Era for EU Copyright Exceptions and Limitations? Judicial Flexibility and Legislative Discretion in the Aftermath of the CDSM Directive and the CJEU Grand Chamber's Trio' (311AD) 21 ERA Forum 2020.
[91] Judgment of 29 July 2019, *Funke Medien*, C-469/17, ECLI:EU:C:2019:623.
[92] Judgment of 29 July 2019, *Pelham*, C-476/17, EU:C:2019:624.
[93] Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625.
[94] *Spiegel Online*, para. 28; *Funke Medien*, para. 43.
[95] Explanatory Memorandum to COM(1997)628 - Harmonization of certain aspects of copyright and related rights in the Information Society [1997].

application, and it is for the Member States to define the detailed conditions for their use, albeit within the limits set out by that provision".[96]

Notwithstanding these considerations, Member States' discretion is circumscribed in several regards. First, the CJEU has repeatedly held that "the Member States' discretion in the implementation of the abovementioned exceptions and limitations provided for in Article 5(2) and (3) of Directive 2001/29 must be exercised within the limits imposed by EU law, which means that the Member States are not in every case free to determine, in an un-harmonised manner, the parameters governing those exceptions or limitations".[97] More generally, national legislators should abide by the requirements of EU secondary legislators, that is the general principles of the E/L at stake as laid down by the Directive.[98] Then, they should comply with "the general principles of EU law, which include the principle of proportionality, from which it follows that measures which the Member States may adopt must be appropriate for attaining their objective and must not go beyond what is necessary to achieve it."[99] Second, national implementations cannot "compromise the objectives of that directive that consist, as is clear from recitals 1 and 9 thereof, in establishing a high level of protection for authors and in ensuring the proper functioning of the internal market",[100] while still safeguarding "the effectiveness of the exceptions and limitations thereby established and to permit observance of their purpose, in order to safeguard a fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject matter"[101]. Third, Member States' discretion is limited by the three-step test regulated by Article 5(5) InfoSoc but should still ensure that "they rely on an interpretation of the directive which allows a fair balance to be struck between the various fundamental rights protected by the European Union legal order".[102]

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[96] *Spiegel Online,* para. 29; *Funke Medien*, para. 44.

[97] *Spiegel Online*, para. 31; *Funke Medien*, para. 46, both citing (see, to that effect, Judgments of 6 February 2003, *SENA*, C-245/00, EU:C:2003:68, paragraph 34; Judgement of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, paragraph 104; and of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 16; Opinion 3/15 *(Marrakesh Treaty on access to published works)* of 14 February 2017, EU:C:2017:114, paragraph 122)

[98] *Spiegel Online,* para. 32, *Funke Medien*, para. 48.

[99] *Spiegel Online*, para. 34, *Funke Medien*, para. 49 citing *Painer*, paragraphs 105 and 106.

[100] *Spiegel Online*, para. 35, *Funke Medien*, para. 50 citing (see, to that effect) *Painer*, C-145/10, EU:C:2011:798, para. 107, and Judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254, para. 34; Opinion 3/15 *(Marrakesh Treaty on access to published works)* of 14 February 2017, EU:C:2017:114, para. 124 and the case-law cited).

[101] Spiegel, para 36, *Funke Medien*, para. 51, citing (see, to that effect) Judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 163; *Deckmyn and Vrijheidsfonds*, para. 23.

[102] Ibid, para. 37-38, *Funke Medien*, paras 52-53, citing also Judgments of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, para. 46, and Judgment of 18 October 2018, *Bastei Lübbe*, C-149/17, EU:C:2018:841, para. 45 and the case-law cited; see also, by analogy, Judgment of 26 September 2013, *IBV & Cie*, C-195/12, EU:C:2013:598, para. 48 and 49 and the case-law cited).

On the effect of fundamental rights and the CFREU on copyright flexibilities in the case law of the CJEU, see more *infra*, section 3.1.1.2.16.

3.1.1.2.2 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.1.2.2.1 TEMPORARY REPRODUCTION (ARTICLE 5(1) INFOSOC)

Among the areas where the CJEU has contributed to increase the level of legal certainty and systematic consistency of EU copyright law, particularly with regard to the definition of scope and boundaries of EU provisions, the mandatory exception of temporary reproduction under Article 5(1) InfoSoc represents a good case in point.

Article 5(1) InfoSoc represents also one of the first InfoSoc provisions touched by the Court's harmonizing intervention. Already in 2009, **Infopaq**[103] laid down the five conditions that should be met in order to apply the exception, which should be understood as cumulative.[104] The act should (a) be temporary; (b) be transient or incidental; (c) have an integral and essential part of a technological process; (d) have the sole purpose of enabling a transmission in a network between third parties by an intermediary of a lawful use of a work or protected subject-matter; and (e) have no independent economic significance.[105] Also for the first time in this context, the CJEU stated that exceptions should be interpreted strictly, and in light of the three-step test, in order to satisfy the need for legal certainty for authors with regard to the protection of their works[106]

With regard to the case at stake, the Court held that in order to satisfy the conditions listed above, the storage and deletion of the reproduction not be dependent on discretionary human intervention, particularly by the user of protected works, since there is no guarantee that in such cases the person concerned will actually delete the reproduction created or, in any event, that he will delete it once its existence is no longer justified by its function of enabling the completion of a technological process.[107] This conclusion was also deemed supported by Recital 33 InfoSoc, "which lists, as examples of the characteristics of the acts referred to in Article 5(1) thereof, acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently. Such acts are, by definition, created and deleted automatically and without human intervention."[108]

As regard to the concept of "transient", the CJEU specified that an act can be qualified as such only if its duration is limited to what is necessary for the proper completion of the

[103] Judgment of 17 January 2012, Infopaq International, C302/10, EU:C:2012:16.
[104] Ibid, para. 55
[105] Ibid, para. 54
[106] Ibid, paras 56, 58-59.
[107] Ibid, para. 62
[108] Ibid, para. 63

technological process in question, and terminates by deleting automatically the copy, without human intervention.[109]

A few years later, **Football Association Premier League (FAPL)** offered the same definition of the conditions and the same reference and rationale to support a strict interpretation of exceptions,[110] including the reference to Article 5(5) InfoSoc,[111] yet with a new and important notation. Introducing a principle which is now set in stone in EU copyright law, the Court stated that "the interpretation of those conditions must enable the effectiveness of the exception thereby established to be safeguarded and permit observance of the exception's purpose"[112] which for Article 5(1) InfoSoc is to "allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other."[113]

FAPL introduced an interesting specification on the fifth condition, ruling that, in order not to make the provision redundant, the economic significance should be really independent, that is it should go beyond the economic advantage that users may derive from the technological process.[114]

Apart from reiterating the key concepts developed by its precedents, the **InfoPaq**[115] order in 2011 offered a number of additional specifications.

First, it clarified that the concept of 'integral and essential part of a technological process' requires the temporary acts of reproduction to be carried out entirely in the context of the implementation of the technological process and, therefore, not to be carried out, fully or partially, outside of such a process. This concept also assumes that the completion of the temporary act of reproduction is necessary, in that the technological process concerned could not function correctly and efficiently without that act.[116] In fact, the temporary reproduction can take place at any stage of the process – also at the very beginning or the very end.[117] With a shift in the original approach to the matter, however, the CJEU wanted to stress that "there is nothing in that provision to indicate that the technological process must not involve any human intervention and that, in particular, manual activation of that process be precluded, in order to achieve a first temporary reproduction."[118]

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[109] Ibid, para. 65
[110] Judgment of 4 October 2001, *Football Association Premier League Ltd and Others*, Joined cases C-403/08 and C-429/08, ECLI:EU:C:2011:631, paras 160-162.
[111] Ibid, para. 181.
[112] Ibid, para. 163.
[113] Ibid, para. 164.
[114] Ibid, para 175.
[115] Opinion of Advocate General Trstenjak delivered on 12 February 2009, *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, EU:C:2009:89.
[116] Ibid, para. 30, in line with see, to that effect, *Infopaq*, para. 61.
[117] Ibid, para. 31.
[118] Ibid, para. 32.

The decision was also relevant since it further specified the notion of independent economic significance. The Court ruled, in fact, that acts like browsing and caching have the purpose of facilitating the use of a work or making that use more efficient, thus they may enable the achievement of efficiency gains in the context of such use and, consequently, lead to increased profits or a reduction in production costs. This, however, does not mean that they have an independent economic significance. Not to have it, the economic advantage derived from their implementation must not be distinct or separable from the economic advantage derived from the lawful use of the work concerned and it must not generate an additional economic advantage going beyond that derived from that use of the protected work.[119] This is the case for the efficiency gains resulting from the activities mentioned above. On the contrary, "an advantage derived from an act of temporary reproduction is distinct and separable if the author of that act is likely to make a profit due to the economic exploitation of the temporary reproductions themselves."[120] And the same applied to reproduction causing a change in the subject-matter reproduced, as it exists when the technological process concerned is initiated, because those acts no longer aim to facilitate its use, but the use of a different subject matter.[121]

Public Relations Consultants (Meltwater)[122] added to this framework a number of important interpretative points. First, it assessed and admitted the compliance of on-screen cache copies with the five requirements of Article 5(1) InfoSoc, once again reiterating that the requirement of automatic deletion does not preclude such a deletion from being preceded by human intervention directed at terminating the use of the technological process.[123] In this context, it also noted that to meet the second condition laid down in Article 5(1) InfoSoc it was not necessary for the copies to be categorised as 'transient', once it has been established that they are incidental in nature in the light of the technological process used.[124] Thus, even if cached copies were retained on the user's device after the related technological process was terminated, this did not exclude their legitimacy, since they were still to be considered incidental, for they could not exist independently of, nor have a purpose independent of, the technological process at issue.[125] The decision also performed a much more articulated assessment of the national provision *vis-à-vis* the three-step test regulated under Article 5(5) InfoSoc. Since on-screen and cached copies are created only for the purpose of viewing websites, they constitute, on that basis, a special case.[126] Even if they make it possible for users to access works displayed on websites without the authorisation of the copyright holders, the copies do not unreasonably prejudice the legitimate interests of those rights holders. Also, works are made available to internet users by the publishers of the websites,

[119] Ibid, para. 50.
[120] Ibid, para. 52.
[121] Ibid, para. 53.
[122] Judgment of 5 June 2014, *Public Relations Consultants Association*, C-360/13, EU:C:2014:1195.
[123] Ibid, para. 41.
[124] Ibid, para. 48.
[125] Ibid, para 49.
[126] Ibid, para 55.

which are required, under Article 3(1) InfoSoc, to obtain authorisation from the copyright holders concerned.[127] This guarantees that the legitimate interests of the copyright holders concerned are properly safeguarded, so "there is no justification for requiring internet users to obtain another authorisation allowing them to avail themselves of the same communication as that already authorised by the copyright holder in question."[128] Last, the creation of on-screen and cached copies does not conflict with a normal exploitation of the works. Since, in fact, the viewing of websites by means of the technological process at issue represents a normal exploitation of the works, which makes it possible for internet users to avail themselves of the communication to the public made by the publisher of the website concerned, and the creation of copies forms part of such viewing, this cannot operate to the detriment of such an exploitation of the works.[129]

In the very last case to date fully devoted to Article 5(1) InfoSoc, **Stichting Brein v Wullems** (also known as **Filmspeler**),[130] the CJEU was called to assess whether the exception could cover the temporary reproduction on a multimedia player of a protected work obtained by streaming from a website belonging to a third party, offering that work without the consent of the copyright holder. As regard to the condition that the sole purpose of the process is to enable the transmission in a network between third parties by an intermediary or a lawful use of a work or protected subject matter, since the use of the works at issue was not authorized by rightholders, the Court held necessary to assess whether the aim of the acts in question was to enable a use of the works that was not restricted by the applicable legislation, taking into due account the constraints imposed by the three-step test.[131] Applying the principles developed in *FAPL* (the mere reception of a broadcasts in itself did not reveal an act restricted by the relevant legislation, since the sole purpose of the acts of reproduction at issue was to enable a 'lawful use' of the works within the meaning of Article 5(1)(b) InfoSoc) and in *Infopaq* (the drafting of a summary of newspaper articles, even though it was not authorised by the rightholder, was not restricted by the applicable legislation, with the result that the use at issue could not be considered to be unlawful),[132] the CJEU noted that the case at stake had radically different characteristics. On the one hand, purchasers of the multimedia player were attracted by it and used it deliberately and in full knowledge of the fact that it gave access to a free and unauthorised offer of protected works. On the other hand, such temporary acts of reproduction severely affected the normal exploitation of protected works and caused unreasonable prejudice to the legitimate interests of rightholders, for they resulted in a diminution of lawful transactions relating to the protected works.[133] On this basis, the Court held the conditions set by Articles 5(1)(b) and 5(5) InfoSoc were not met.

[127] Ibid, paras 56-57.
[128] Ibid, para. 59.
[129] Ibid, para. 61.
[130] Judgment of 26 April 2017, *Stichting Brein*, C-527/15, ECLI:EU:C:2017:300.
[131] Ibid, para 66.
[132] Ibid, para 67-68.
[133] Ibid, para 70-71.

3.1.1.2.2.2 EPHEMERAL RECORDING (ARTICLE 5(2)(D) INFOSOC)

The only case referring to the exception for ephemeral recording under Article 5(2)(d) InfoSoc, which interprets the requirement "by means of their own facility", is **DR TV2 Danmark v NCB.**[134] In light of the lack of reference to Member States' law, the Court defined the notion as an autonomous concept of EU law, and delineated its meaning on the basis of Article 11*bis*(3) BC.[135] It did it by arguing that this harmonization is also necessary in light of the goals of the InfoSoc Directive, which "is intended to harmonise certain aspects of the law on copyright and related rights in the information society and to ensure that competition in the internal market is not distorted as a result of differences in the legislation of Member States", as also testified by Recital 32 InfoSoc, which calls on the Member States to arrive at a coherent application of the exceptions to and limitations on reproduction rights, with a view to ensuring a functioning internal market.[136] This led to state that, although Member States have discretion in implementing the exception, once they do it the content of the provision and the limitations to its application should be harmonized across the Union to avoid inconsistencies.[137] The same concept was already expressed almost verbatim in *Padawan* (see *infra*, section "private copy exception").

On this basis, the CJEU was asked to determine whether the notion of "own facility" could include the facilities of a person acting 'on behalf of **or** under the responsibility of the broadcasting organisation' or only the facilities of a person acting 'on behalf of **and** under the responsibility of the broadcasting organisation'. The question was triggered by the fact that the different language versions of Recital 41 InfoSoc used, almost equally split, "or" or "and".[138] In the first case, if was sufficient for a third party to be acting either "on behalf of" or "under the responsibility" of the broadcasting organization; in the second case, the two requirements had to be fulfilled jointly. Faced with this divergence, the Court followed a settled-case law, which suggests to interpret the text "by reference to the purpose and general scheme of the rules of which it forms part".[139] By looking at the language of Article

[134] Judgment of 26 April 2012, *DR and TV2 Danmark*, C-510/10, EU:C:2012:244.

[135] The reason is explained in DR TV2, para 31: "That being so, by adopting Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, the European Union legislature is deemed to have exercised the competence previously devolved on the Member States in the field of intellectual property. Within the scope of that directive, the European Union must be regarded as having taken the place of the Member States, which are no longer competent to implement the relevant stipulations of the Berne Convention (see, to that effect, *Luksan*, paragraph 64). It is on that basis that the European Union legislature granted the Member States the option of introducing into their national laws the exception in respect of ephemeral recordings, as set out in Article 5(2)(d) of Directive 2001/29, and clarified the scope of that exception by stating, in recital 41 in the preamble to that directive, that a broadcaster's own facilities include those of a person acting 'on behalf of [and/or] under the responsibility of the broadcasting organisation'."

[136] Ibid, para 33-35.

[137] Ibid, para 36. (See, by analogy, concerning the concept of 'fair compensation' referred to in Article 5(2)(b) of Directive 2001/29, Judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, para 34 to 36).

[138] Ibid, para 40-41.

[139] Ibid, para 45, citing also Judgment of 27 October 1977, *Regina/Bochereau*, C-30/77, EU:1977:172, para 14; Judgment of 7 December 2000, *Italy v Commission*, C-482/98, EU:C:2000:672, para 49; and Judgment of 1 April 2004, *Privat-Molkerei Borgmann GmbH &Co.KG v Hauptzollamt Dortmund*, C-1/02, EU:2004:202, para 25.

5(2)(d) InfoSoc, Recital 41 InfoSoc and Article 11bis(3) BC, the CJEU argued that it appears clear that the legislature wanted the broadcasting organization to make the recording by means of its own facilities, but admitted the intervention of third parties,[140] inserting an additional condition to maintain a close link between the two actors, which ensures that the third party cannot profit, independently, from the exception in respect of ephemeral recordings, the sole beneficiary of which remains the broadcasting organisation.[141] In this sense, each of the two conditions ("on behalf of" and "under the responsibility of") are capable, in itself and independently of the other, of fulfilling the objective pursued by the exception, read jointly with Recital 51, so that they can be understood as equivalent and therefore alternative in nature.[142]

Moving to the criteria to be fulfilled, the CJEU maintained that the concept of acting "on behalf of" did not require any specification.[143] As to the requirement of acting "under the responsibility of the broadcasting organization, if the party could not be deemed as acting on its behalf, it will be required "to be accountable for every act of such a person connected with the reproduction of the protected work, *vis-à-vis*, among others, the authors who are the holders of the rights in question."[144] Being it irrelevant who took the final artistic or editorial decision on the content of the reproduced program commissioned by the organization,[145] the essential element to verify is whether "*vis-à-vis* other persons, among others the authors who may be harmed by an unlawful recording of their works, the broadcasting organisation is required to pay compensation for any adverse effects of the acts and omissions of the third party, such as a legally independent external television production company, connected with the recording in question, as if the broadcasting organisation had itself carried out those acts and made those omissions."[146]

3.1.1.2.2.3 INCIDENTAL INCLUSION (ARTICLE 5(3)(I) INFOSOC)

There are no CJEU decision directly addressing matters covered by the exception of incidental inclusion under Article 5(3)(i) InfoSoc.

3.1.1.2.2.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USERS

The only decision interpreting the provision related to lawful uses in the Database Directive is **Ryanair v PR Aviation**.[147] Here the Court excluded the application, respectively, of **Article 6(1) Database** to databases not protected by copyright under Article 5, and of **Article 8 Database** to databases not protected by the sui generis right under Article 7.

[140] DR TV2, para 50.
[141] Ibid, para 52.
[142] Ibid, para 53-56.
[143] Ibid, para 61.
[144] Ibid, para 63.
[145] Ibid, para 65.
[146] Ibid, para 64.
[147] Judgment of 15 January 2015, *Ryanair Ltd v PR Aviation BV*, C-30/14, EU:C:2015:10.

On the side of the **Software Directive I (1991) and II (2004, recast),** the CJEU had the opportunity to intervene on the interpretation of **Article 5(1) Software**, which allows the lawful acquirer to reproduce the program when this is necessary for its use in accordance with its intended purpose, including for error correction; of **Article 5(2) Software**, which allows the production of back-up copies; and of **Article 6 Software**, which provides the decompilation exception.

In **UsedSoft v Oracle**, the notion of "lawful acquirer" was extended to cover also the second-hand acquirer of a software who benefitted from the operation of the principle of exhaustion under Article 4(2) Software.[148] In this sense, the CJEU denied that the concept related only to a subject authorized under a license agreement concluded directly with the copyright holder to use the computer program, arguing that this conclusion would allow rightholders to prevent the effective use of any used copy in respect of which their rights have been exhausted.[149] Consequently, "in the event of a resale of the copy of the computer program by the first acquirer, the new acquirer will be able, in accordance with Article 5(1) of Directive 2009/24, to download onto his computer the copy sold to him by the first acquirer. Such a download must be regarded as a reproduction of a computer program that is necessary to enable the new acquirer to use the program in accordance with its intended purpose".[150]

Following up on this, in **Ranks and Vasiļevičs**,[151] the Court excluded the application of the *UsedSoft* doctrine and of the principle of exhaustion to a copy of a software program duplicated and thus stored on a non-original medium, even if the original material medium has been damaged. The CJEU grounded this conclusion on a detailed interpretation of Articles 5(1) and 5(2) Software. With regard to Article 5(2) Software, the Court held that the making of a back-up copy is subject to two conditions, which are that the copy must (i) be made by a person having a right to use that program and (ii) be necessary for that use.[152] This provision must be interpreted strictly,[153] which also implies that the copy "may be made and used only to meet the sole needs of the person having the right to use that program and that, accordingly, that person cannot — even though he may have damaged, destroyed or lost the original material medium — use that copy in order to resell that program to a third party".[154]

With regard to Article 5(1) Software, the Court stated that the situation of the lawful acquirer of a copy of a computer program, stored on a material medium which has been damaged, destroyed or lost, and that of the lawful acquirer of a copy of a computer program purchased and downloaded on the internet are comparable with regard to the rule of exhaustion of the distribution right and the exclusive reproduction right granted to the

[148] Judgment of 3 July 2012, *UsedSoft v Oracle International Corp*, C-128/11, EU:C:2012:407, para 80.
[149] Ibid, para 82-83.
[150] Ibid, para 81.
[151] Judgment of 12 October 2016, *Ranks and Vasiļevičs*, C-166/15, EU:C:2015:762.
[152] Ibid, para 41.
[153] Ibid, para 42.
[154] Ibid, para 43.

rightholder.[155] Still, the initial acquired of a copy of a computer program who resells it must make any copy in his possession unusable at the time of its resale not to infringe the rightholder's exclusive right of reproduction.[156] It follows that "although the initial acquirer of a copy of a computer program accompanied by an unlimited user licence is entitled to resell that copy and his licence to a new acquirer, he may not, however, in the case where the original material medium of the copy that was initially delivered to him has been damaged, destroyed or lost, provide his back-up copy of that program to that new acquirer without the authorisation of the rightholder".[157]

More details on the interpretation of Article 5 Software came from **Top System SA v Belgian State.**[158] The questions raised to the CJEU were whether Article 5(1) Software had to be interpreted as permitting the lawful purchaser of a computer program to decompile all or part of that program where this was necessary to enable the correction of errors affecting the operation of the program, including where this correction consisted in disabling a function that was affecting the proper operation of the application of which the program formed a part. In case of affirmative answer, the referring court asked whether also the conditions for decompilation set by Article 6 Software had to be satisfied. While the Court noted that Article 5(1) allows to perform all restricted acts under Article 4(a) and (b) Software, including reproduction and translation, for the normal use of the program and the correction of errors, and that this list does not make explicit reference to decompilation,[159] the latter activity requires, in fact, the reproduction of the code and its translation (as also specified in Article 6 Software).[160]

From this it follows that **Article 5(1) Software** allows the lawful purchaser of a program to decompile it in order to correct errors affecting its functioning.[161] **Article 6 Software,** in fact, cannot be interpreted as meaning that the only permitted decompilation of a computer program is the one effected for interoperability purposes.[162] While it is true that, read in light of Recitals 19 and 20, Article 6(1)(b) and (c) Software makes clear that the EU legislature "intended to limit the scope of the exception (…) to circumstances in which the interoperability of an independently created program with other programs cannot be carried out by any other means",[163] and this is supported also by Article 6(2)-(3) Software, which prohibits the use of information obtained by decompilation for other goals, it is also true that it cannot be inferred from the provision that the EU legislature wanted to exclude any possible reproduction/translation of the code other than for interoperability purposes.[164] Since

[155] Ibid, para 52.
[156] Ibid, para 55.
[157] Ibid, para 57.
[158] Judgment of 6 October 2021, *Top System*, C-13/20, EU:C:2021:811
[159] Ibid, para 33.
[160] Ibid, para 40.
[161] Ibid, para 42.
[162] Ibid, para 43.
[163] Ibid, para 46.
[164] Ibid, para 46-48.

Articles 5 and 6 Software have different purposes, they can operate independently without excluding each other. From this it also derives that the requirements provided by Article 6 Software are not applicable to the exception laid down in Article 5(1) Software,[165] so the lawful purchaser who wishes to decompile a program in order to correct errors affecting the operation thereof is not required to satisfy the requirements laid down in Article 6. However, and again in line with Article 5(1) Software, which allows errors to be corrected subject to 'specific contractual provision,[166] lawful users are entitled to carry out such a decompilation only to the extent necessary to affect that correction and in compliance, where appropriate, with the conditions laid down in the contract with the rightholder.[167]

The CJEU also took the opportunity to rule that the notion of "error" under Article 5(1) Software, absent a reference to Member States' laws, should be defined at the EU level. In the silence of the Directive, this implies to interpret it in accordance with its usual meaning in everyday language, as "a defect affecting a computer program which is the cause of the malfunctioning of that program",[168] in accordance with its intended purpose.

Article 5(3) Software, which allows the lawful acquirer to observe, study or test the functioning of that program in order to determine the ideas and principles which underlie any element of the software, has been subject to interpretation in **SAS Institute Inc v World Programming Ltd**.[169] In this decision, the CJEU stated that Article 5(3) Software applies also in case the acquirer carries out acts covered by the license with a purpose that goes beyond the contractual framework. This is not only because Article 9 Software declares the provision mandatory and thus any contrary contractual provision shall be deemed null and void,[170] but also because Article 5(3) Software has the aim to ensure that the ideas and principles which underlie any element of a computer program are not protected by the owner of the copyright by means of a licensing agreement.[171] As a consequence, the determination of those ideas and principles may be carried out within the framework of the acts permitted by the licence, no matter whether the latter had any purpose limitation.[172] This, however, is on condition that the person does not infringe the exclusive rights of the owner in that program.[173]

The CJEU has never intervened directly on Article 6(4) InfoSoc.

[165] Ibid, para 55.
[166] Ibid, para 64.
[167] The CJEU notes, however, that " under recital 18 of Directive 91/250, neither the acts of loading and running necessary for the use of the copy of a program that has been lawfully acquired nor the correction of errors affecting the operation of that program may be prohibited by contract (…) Accordingly, Article 5(1) of Directive 91/250, read in conjunction with recital 18 thereof, must be understood as meaning that the parties cannot prohibit any possibility of correcting those errors by contractual means." (ibidem, para 65-66)
[168] Ibid, para 59.
[169] Judgment of 2 May 2012, *SAS Institute*, C-406/10, EU:C:2012:259.
[170] Ibid, para 53.
[171] Ibid, para 51.
[172] Ibid, para 55.
[173] Ibid, para 59.

3.1.1.2.2.5 FREEDOM OF PANORAMA (ARTICLE 5(3)(H) INFOSOC)

The CJEU has never intervened directly on Article 5(3)(h) InfoSoc on freedom of panorama.

3.1.1.2.3 PRIVATE COPY AND REPROGRAPHY

3.1.1.2.3.1 REPROGRAPHY (ARTICLE 5(2)(A) INFOSOC)

The CJEU has intervened only collaterally on Article 5(2)(a) InfoSoc, when dealing with matters that the provision shared with Article 5(2)(b) InfoSoc. The only two cases where reprography were addressed independently are **Hewlett Packard v Reprobel**[174] and **VG Wort v Kiocera.**[175]

In **Reprobel**, the CJEU drew a connection between Articles 5(2)(a) and (b) InfoSoc, juxtaposing the two provisions and their scope. In this sense, it considered that since Article 5(2)(a) InfoSoc does not specify the users for which the reprography exception is intended, the purpose of the reproduction or the context, private or otherwise, in which such reproduction shall take place, the exception must be regarded as covering all categories of users, including natural persons, whatever the purpose of the reproduction is, including those covered by the private copy E/L.[176] At the same time, it noted that Article 5(2)(b) InfoSoc applies to copies made on any medium by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation. This entails that the private copy E/L extends also to copies made on paper or a similar medium and, since it does not specify the reproduction technique concerned, it must be regarded as not excluding from its scope reproductions effected by the use of any kind of photographic technique or by some other process having similar effects.[177] The clear overlap between the two provisions is excluded in the case of copies made by legal persons, which may be covered only by Article 5(2)(a) InfoSoc.[178]

Following up on these analogies, the Court recalled *Padawan* and noted that the concept of fair compensation, grounded on considerations based on Recital 35 InfoSoc, is valid for all L/Es laid down in Article 5 InfoSoc in respect of which fair compensation is required. This implies that the case law on Article 5(2)(b) InfoSoc must be applied, *mutatis mutandis*, for the implementation of Article 5(2)(a) InfoSoc. [179] However, the CJEU specified that it is appropriate to draw a distinction between reprographies made for private non-commercial use by natural persons and all other cases, since the harm suffered by rightholders are different, and thus require a different type of compensation.[180]

[174] Judgment of 12 November 2015, *Hewlett-Packard*, C-572/13, EU:C:2015:750.
[175] Judgment of 27 June 2013, *VG Wort*, Joined Cases C-457/11 to C-460/11, EU:C:2013:426.
[176] Judgment of 12 November 2015, *Hewlett-Packard*, C-572/13, EU:C:2015:750, para 30.
[177] Ibid, para 31-32.
[178] Ibid, para 34.
[179] Ibid, para 37-39.
[180] Ibid, paras 40-42.

In **VG Work v Kyocera**, the Court defined in more detail the scope of Article 5(2)(a) InfoSoc. First, it ruled that the medium of reproduction should be a paper or a support having comparable and equivalent qualities, with the exclusion of all non-analogue medium,[181] and in particular digital medium since, in order to be similar to papers, a support "must be capable of bearing a physical representation capable of perception by human senses".[182] Second, it stated that the reference not only to photographic technique but also to 'some other process having similar effects', covers any other means allowing results similar to those obtained by a photographic technique, as it was also highlighted by the Explanatory Memorandum to the InfoSoc Directive, which clarified that "the exception concerned is not focused on the technique used but rather on the result obtained."[183] This entails that, "as long as that result is ensured, the number of operations or the nature of the technique or techniques used during the reproduction process at issue does not matter, on condition, however, that the various elements or non-autonomous stages of that single process act or are carried out under the control of the same person and are all intended to reproduce the protected work or other subject-matter on paper or a similar medium."[184]

When relevant, reprography will be also mentioned in the section "private copy" below.

3.1.1.2.3.2 PRIVATE COPY (ARTICLE 5(2)(B) INFOSOC)

The area of copyright flexibilities where the CJEU intervened most intensively and incisively, with a far-reaching harmonization, is that of private copy (Article 5(2)(b) InfoSoc, also touching in collateral aspects the reprography exception (Article 5(2)(a) InfoSoc), with particular regard to the features and requirements of the private levy/fair compensation schemes allowed under the InfoSoc Directive.

In this sector, the Court[185] has intervened to provide guidelines for the interpretation of the notion of "fair" compensation, qualified as an autonomous concept of EU law[186] that needs a consistent and harmonized determination in order to comply with the InfoSoc Directive's objective of ensuring a functioning internal market.[187] The CJEU used a contextual and teleological interpretation of the InfoSoc preamble to define as "fair compensation" an amount that makes good of the harm suffered by the author as a consequence of the private copy.[188] At the same time, it considered fair and thus allowed under Article 5(2)(b) InfoSoc a private levy system that imposes on producers of reproduction equipment the payment of a fair compensation for private copies potentially executable through their devices, in light of the fact that the activity of producers represents a factual precondition of the private copy,

[181] Ibid, para 65-67.
[182] Ibid, para 67.
[183] Ibid, para 69.
[184] Ibid, para 70.
[185] From here to "professional capacity", the text recalls verbatim an excerpt taken from Sganga, 'A Plea for Digital Exhaustion in EU Copyright Law' (n 22).
[186] Judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, para 33.
[187] Ibid, paras 35-36.
[188] Ibid, paras 40-41.

that they may still pass the cost on to users by proportionally increasing the purchasing price, and that a single harm may be minimal and the cost of enforcement too high to make an individual collection effective.[189]

With a decision galore in the following years, the CJEU highlighted that Member States have full discretion on the definition of the features and mechanisms of their private levy systems.[190] However, when it was called to evaluate the legitimacy of certain national schemes, it took the opportunity to further elaborate on the notion of fairness and develop ad hoc principles, which are nevertheless characterized by a high degree of factual specificity and no general applicability. In this context, the Court ruled out the admissibility of a scheme that financed the compensation from the general state budget, for it indirectly imposed the levy on all taxpayers without guaranteeing that the costs of fair compensation were borne only by natural persons who could potentially make private copies of protected works.[191] Similarly, it required national laws to distinguish between lawful and unlawful sources of private copies, imposing levies only on the former;[192] it admitted the possibility to proportionally split the levy on different products that are used in a chain of devices;[193] it excluded that the rightholder's authorization of reproduction has a bearing on the fair compensation owed;[194] and it accepted a scheme where half of the funds collected from levies were directed to social and cultural institutions set up for the benefit of those entitled to compensation, attributing to Member States the discretion to provide indirect compensation.[195] According to the Court, a private levy system is fair – that is it ensures a fair balance between conflicting interests[196] - if it excludes compensation in case of minimal prejudice,[197] it is non-discriminatory *vis-à-vis* economic operators,[198] and it provides an effective, publicized, and simple reimbursement system in favour of legal persons or natural persons using the device in a professional capacity.[199]

A more detailed overview of the most significant decisions and their arguments and conclusions is provided below.

The first case intervening on the provision was **Padawan v SGAE,**[200] which ruled that the notion of fair compensation should be understood as an autonomous concept of EU law,

[189] Ibid, paras 46-49.
[190] Judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, para 26.
[191] Judgment of 9 June 2016, *EGEDA*, C-470/14, EU:C:2016:418, para 41.
[192] Judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254, paras 29 et seq.
[193] Judgment of 27 June 2013, *VG Wort*, Joined Cases C-457/11 to C-460/11, EU:C:2013:426, para 78 (but should not be different from amount obtained if single device).
[194] Ibid, para 40.
[195] Case C-462/09 *Amazon.com v Austro-Mechana* [2013] EU:C:2013:515 para 49; Judgment of 16 June 2011, *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397.
[196] Ibid, para 34.
[197] Judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, paras 27-28.
[198] Ibid, para 33.
[199] *Amazon.com*, paras 35-37; along the same lines see Judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, para 55.
[200] Judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620.

which must be interpreted in an independent and uniform manner in all Member States, irrespective of their right to choose the system of collection,[201] as it is the case for the concept of 'equitable remuneration' in Article 8(2) Rental.[202] The reasons grounding this conclusion are those recurring in the settled case law of the Court,[203] i.e. the fact that the InfoSoc Directive does not refer to national laws to define the notion,[204] the need to ensure a uniform application of EU law, and the principle of equality.[205] The conclusion was also supported by the objectives of the InfoSoc Directive (to harmonize copyright and related rights in the information society and to ensure competition in the internal market is not distorted as a result of Member States' different legislation), which require – as in Recital 32 InfoSoc – a coherent application of exceptions and limitation.[206] Thus, while Member States are free to introduce the E/L under Article 5(2)(b) InfoSoc, once they decide to make use of this option they must provide for the payment of fair compensation to rightholders affected by the application of that exception, "irrespective of the power conferred on them to determine, within the limits imposed by European Union law and in particular by that directive, the form, detailed arrangements for financing and collection, and the level of that compensation".[207] In this sense, the concept of "fair compensation" is an essential element of the provision, as set out in Recitals 35 and 38 InfoSoc.[208]

The Court also ruled that in order to determine the level of fair compensation, Recitals 35 and 38 InfoSoc suggest "as a valuable criterion" the possible harm suffered by the rightholder as a result of the act of reproduction, while a minimal prejudice would exclude the rise to a payment obligation.[209] In this sense "fair compensation must be regarded as recompense for the harm suffered by the author",[210] as also suggested by the use of the work "compensate" in Recitals 35 and 38 InfoSoc which, according to the CJEU, express the legislative intention to "establish a specific compensation scheme triggered by the existence of harm to the detriment of the rightholders, which gives rise, in principle, to the obligation to 'compensate' them."[211]

Applying the concept of "fair balance" under Recital 31 InfoSoc, the person obliged to pay the compensation/remuneration is the one who caused or is likely to cause the harm, that is the beneficiary of the E/L, identified in the natural person who, acting in a private and for their own private use, reproduces a protected work without seeking prior authorisation from

[201] Ibid, para 29, as ruled in Judgment of 6 February 2003, Sena, C-245/00, EU:C:2003:68, para 24.
[202] Ibid, para 33.
[203] The CJEU cites here Judgement of 18 January 1984, *Ekro*, C-327/82, EU:C:1984:11, para 11; Judgement of 19 September 2000, *Linster*, C-287/98, EU:C:2000:468, para 43; and Judgement of 2 April 2009, *A*, C-523/07, EU:C:2009:225, para 34).
[204] Judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, para 31.
[205] Ibid, para 32.
[206] Ibid, para 35.
[207] Ibid, para 37.
[208] Ibid, para 36.
[209] Ibid, para 39.
[210] Ibid, para 40.
[211] Ibid, para 41.

the rightholder.[212] Since, however, it is practically difficult to identify private users and oblige them to compensate rightholders for the harm caused to them, and considering that the harm caused by each private use may, if taken separately, be minimal and not give rise to compensation (Recital 35 InfoSoc), Member States are free to "establish a 'private copying levy' for the purposes of financing fair compensation chargeable not to the private persons concerned, but to those who have the digital reproduction equipment, devices and media and who, on that basis, in law or in fact, make that equipment available to private users or who provide copying services for them".[213] And while apparently this seems not to charge of the payment the person who caused the harm to rightholders, the Court considered the system in line with the fair balance and the guidelines of the InfoSoc Directive since (a) the activity of the persons liable to finance the fair compensation (namely the making available to private users of reproduction equipment, devices and media, or their supply of copying services) is the factual precondition for natural persons to obtain private copies; and (b) they can pass on the private copying levy in the final price charged to customers, thus moving the burden of the levy to the private user who is theoretically causing the harm, and who becomes indirectly liable to pay fair compensation.[214]

The CJEU also took the opportunity to specify that there should always be a link between the application of the levy and the deemed use of reproduction equipment, devices and media for the purposes of private copying in the sense of Article 5(2)(b) InfoSoc. An indiscriminate application of the levy scheme would run counter the principle of fair balance and the requirement, expressed in the InfoSoc Preamble, that the burden to pay the fair compensation should lay on those natural persons who ultimately caused the harm to rightholders with their private copies.[215] This does not require to show that users of such devices have in fact made private copies with the help of that equipment and have therefore actually caused harm to rightholders, for it is correct to presume that they are in the position to take full advantage of the functions associated with that equipment, including copying. The Court deemed this conclusion supported by Recital 35 InfoSoc, which mentions not only the "harm" but also the "possible" harm,[216] and by a general principle of EU copyright law, according to which account must be taken of the mere possibility for the ultimate users to access and enjoy protected works, as often reiterated in the case law on Article 3 InfoSoc.[217]

The CJEU had the opportunity to return several times on these principles in subsequent decisions, confirming their validity and enriching them of other specifications and details.

In **Stitching de Thuiskopie v Opus Supplies Deutschland**[218] the Court was asked to determine whether in a case of distance selling between a purchaser and a commercial seller

[212] Ibid, para 43-45.
[213] Ibid, para 46.
[214] Ibid, para 48-49.
[215] Ibid, para 53.
[216] Ibid, para 57.
[217] See already Judgment of 7 December 2006, *SGAE*, C-306/05, EU:C:2006:764, paras 43 and 44.
[218] Judgment of 16 June 2011, *Stichting de Thuiskopie*, C-462/09, EU:C:2011:397.

of reproduction equipment, devices and media, who are established in different Member States, Directive 2001/29 requires national law to be interpreted so that fair compensation can be recovered from the person responsible for payment who is acting on a commercial basis. To answer, the CJEU recalled *Padawan* and its reasoning on the admissibility of a private levy system,[219] and noted that the InfoSoc Directive does not contain any specific statement on the person to be regarded as responsible for paying the fair compensation.[220] The guiding principle, together with the harm or potential harm caused to rightholders, should have thus been considered the need to provide a high level of protection for copyright and related rights, as requested by Recital 9 InfoSoc.[221] Recital 9 InfoSoc indirectly imposes on a Member State which has introduced the private copying exception "an obligation to (….) guarantee, within the framework of its competences, the effective recovery of the fair compensation intended to compensate the authors harmed for the prejudice sustained, in particular if that harm arose on the territory of that Member State."[222] Since it is for the final user who causes the harm to bear the duty to compensate rightholders, the Court concluded that it could be assumed that the harm for which reparation is to be made arose on the territory of the Member State in which those final users reside,[223] and it is up to that Member State to ensure the effective recovery (and so the collection) of the fair compensation, regardless of where the commercial seller who makes available reproduction equipment, devices and media to purchasers residing on the territory of that Member State, as final users, are located.[224]

Amazon.com v Austromechana confirmed the holdings in *Padawan* and *Stitching de Thuiskopie*,[225] ruling out again the admissibility of a system that resulted in the indiscriminate application of the private copying levy to recording media suitable for reproduction, including in the case where the final use thereof did not fall within the case covered by Article 5(2)(b) InfoSoc. The additional question to solved for the Court, however, was whether, in such a situation, a right to reimbursement of the levy paid could allow to reinstate the fair balance necessary to uphold the scheme. In light of the principles developed in its previous case law – and particularly those referring to the need to ensure an effective recovery of the fair compensation – the CJEU ruled that a private levy system imposed indiscriminately on all recording media suitable for reproduction for commercial purposes and for consideration, together with a right to reimbursement that is effective and not too difficult to be enforced by users who are not beneficiaries of the exception under Article 5(2)(d) InfoSoc, may be consistent with this provision where the practical difficulties in proceeding otherwise justify its application.[226] It is for the national court to verify, in the light of the particular circumstances of each national system and the limits imposed by Directive 2001/29, whether

[219] Ibid, para 19-29
[220] Ibid, para 31.
[221] Ibid, para 32.
[222] Ibid, para 34.
[223] Ibid, para 35.
[224] Ibid, paras 39-40.
[225] Judgment of 11 July 2013, *Amazon,* C-521/11, EU:C:2013:515, paras 19-26.
[226] Ibid, para 31.

the practical difficulties justify such a system of financing fair compensation and, if so, whether the right to reimbursement of any levies paid in cases other than that under Article 5(2)(b) InfoSoc is effective and does not make repayment of those levies excessively difficult.[227] Other elements that should be taken into account are the scope, the effectiveness, the availability, the publicization and the simplicity of use of the right to reimbursement, and it allows the correction of any imbalances created by the system in order to respond to the practical difficulties observed.[228]

The Court also took the opportunity to clarify that Member States, despite the necessity to guarantee the payment of a fair compensation for rightholders, Member States enjoy a wide discretion in determining different distribution schemes.[229] In this sense, national laws may provide that not all the compensation collected is distributed directly to rightholders, but part of it is provided in the form of indirect compensation, for instances, through the intermediary of social and cultural establishments set up for their benefit,[230] provided that those social and cultural establishments actually benefit those entitled and the detailed arrangements for the operation of such establishments are not discriminatory, which it is for the national court to verify.[231]

In line with the principles expressed in *Stichting de Thuiskopie* and the arguments used to sustain them, the CJEU reiterated that a Member State which has introduced the private copying exception into its national law and in which the final users who privately reproduce a protected work live must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by those entitled. As a consequence, "the fact that a levy intended to finance that compensation has already been paid in another Member State cannot be relied on to exclude the payment in the first Member State of such compensation or of the levy intended to finance it." [232] However, "a person who has previously paid that levy in a Member State which does not have territorial competence may request its repayment in accordance with its national law."[233]

Copydan Båndkopi,[234] instead, solved the question of the treatment of multifunctional media, such as mobile telephone memory cards, particularly where the private levy is imposed irrespective of whether the main of such media is to make copies for private use. The Court used the principles developed in *Padawan* and *Amazon.com* to reiterate that the mere potentiality of a device to allow private copies is sufficient to justify the application of

[227] Ibid, para 35.
[228] Ibid, para 36.
[229] Ibid, para 49
[230] Ibid, para 50.
[231] Ibid, para 53. This means also, according to the Court, that "It would not be consistent with the objective of that compensation for such establishments to grant their benefits to persons other than those entitled or to exclude, *de jure* or *de facto*, those who do not have the nationality of the Member State concerned" (para 54).
[232] Ibid, para 64.
[233] Ibid, para 65.
[234] Judgment of 5 March 2015, *Copydan Båndkopi,* C-463/12, EU:C:2015:144.

the levy.[235] In this sense, it is "irrelevant whether a medium is unifunctional or multifunctional or whether the copying function is, depending on the circumstances, ancillary to the other functions, as the final users are deemed to take full advantage of all the functions provided by the medium."[236] The multifunctional nature of the device, however, may affect the amount of fair compensation payable, and competent authorities should take it into account when establishing the amount due, "by reference to the relative importance of the medium's capacity to reproduce works for private use".[237] Only if and where it is apparent that all the users of a medium rarely use the copying function, the obligation to pay a fair compensation may be ruled out, "since the prejudice to the rightholder will be regarded as minimal."[238]

When determining which devices to subject to fair compensation and with which amount, the Court was clear in stating that Member States should comply with the principle of equal treatment, [239] and not to discriminate without any justification between the different categories of economic operators marketing comparable goods covered by the private copying exception or between different categories of users of protected subject matter.[240] In this sense, the CJEU held that a national scheme which made a distinction between media that were detachable from devices with a digital reproduction function and components that could be detached from such devices, subordinating the supply of the former to the levy but not the supply of the latter even if they could perform the same copying function, was unjustifiably discriminatory and thus had to be struck down.[241]

Copydan also reiterated principles expressed in previous decisions. In line with what already stated in *VG Wort* (see below),[242] it denied that the implementation of TPMs under Article 6 InfoSoc on devices used to reproduce protected works could have the effect of excluding the payment of a fair compensation,[243] but it admitted that it could impact on the amount due.[244] Similarly, it also confirmed a principle already expressed in *ACI Adam*,[245] which ruled that the need for a restrictive interpretation of article 5(2)(b) InfoSoc means that that provision cannot be understood as requiring, beyond the limitation which is provided for expressly, copyright holders to tolerate infringements of their rights which may accompany the making of copies for private use.[246] As a consequence, the private levy system should distinguish whether the copy has been made from a lawful or an unlawful source and, in the latter case, it should exclude the application of the provision as this would be against the fair

[235] Ibid, para 25.
[236] Ibid, para 26.
[237] Ibid., para 27.
[238] Ibid, para 28.
[239] Ibid, para 32.
[240] Ibid, para 34.
[241] Ibid, para 35, 41.
[242] Judgment of 27 June 2013, *VG Wort*, Joined Cases C-457/11 to C-460/11, EU:C:2013:426
[243] Copydan, para 71.
[244] Ibid, para 73.
[245] Judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254
[246] *VG Wort,* para 76.

balance between the rightholder's and users' interests.[247] In fact, by bearing the burden of such an indiscriminate levy, "lawful" users contributed towards the compensation for the harm caused by reproductions made from unlawful sources, which are not permitted under the InfoSoc Directive, and were thus forced to assume an additional cost in order to enjoy the exception.[248]

In addition to this, the decision also introduced other important principles to guide the interpretation of the private copying exception. First, it ruled that the setting of the threshold to define of what amounts to a minimal harm that does not give rise to an obligation for payment is remitted to the discretion of Member States.[249] Second, it excluded that the rightholder's consent to the copy entails a waiver of their right to a fair compensation, since Article 5(2)(d) InfoSoc allows private copying without the rightholder's authorization, and thus it makes their consent devoid of any effect.[250] Third, it leveraged on the referring court's question on whether the fair compensation could be applied to reproductions made with the aid of a device belonging to a third party to define the three main factors determining the scope of the private copy exception, which are (a) the subject matter of the reproduction, i.e. a lawfully accessed protected work; (b) the beneficiary, i.e. a natural person who makes copies of the protected work in question for private use and for ends that are neither directly nor indirectly commercial; and (c) the media on which the protected work may be reproduced, which under the private copy exception are indicated as "any medium", and in the reprography exception "paper or any similar medium".[251] The Court also considered that the provision is silent as to the characteristics of the devices by or with the aid of which copies for private use are made, differently than Article 5(2)(a) InfoSoc.[252] And while the exception should be interpreted strictly and in light with Article 5(5) InfoSoc, this could not fight down the fact that the question whether the copying device must belong to the natural person making the copy or it could also belong to a third party was not considered by the EU legislature as pertaining Article 5(2)(b) InfoSoc, and should then be interpreted as left to the discretion of Member States.[253]

The **Reprobel** decision contributed to the consolidation of pillars that by this point could be understood as settled case law, such as the irrelevance of the consent of the rightholder to determine the rise of the obligation to pay an equitable remuneration,[254] and the exclusion of copies obtained from unlawful sources from the scope of Article 5(2)(b) InfoSoc.[255] In addition to this, *Reprobel* explicitly extended these principles to the reprography exception, arguing that Articles 5(2)(a) and (b) InfoSoc largely shared the same rationale and thus should

[247] Ibid, para 77.
[248] Ibid, para 78.
[249] Ibid, para 54.
[250] Ibid, para 65.
[251] Ibid, para 81-84.
[252] Ibid, para 86.
[253] Ibid, para 90.
[254] Judgment of 12 November 2015, *Hewlett-Packard*, C-572/13, EU:C:2015:750, para 58.
[255] Ibid, para 59-61.

be interpreted similarly, to the extent possible.[256] Applying the same argument, the CJEU extended the exclusion of sheet music to the private copy exception,[257] leaving nevertheless open the possibility to allow their private reproduction in a situation where the harm is minimal.[258]

At last, **Reprobel** extensively analysed the admissibility of a particular national private levy scheme, characterized by a system that combined a lump-sum remuneration, paid prior to the reproduction by manufacturers, importers or intra-EU acquirers of copying devices, with a second proportional remuneration paid after the copy and determined solely by means of a unit price multiplied by the number of copies produced, to be paid by the natural or legal persons who make those copies. The CJEU ruled out the compatibility of the solution with Articles 5(2)(a) and (b) InfoSoc (thus covering also the reprography exception), and particularly with the "criterion of the actual harm suffered" spelled out in *Padawan*, in so far as the lump sum is calculated solely by reference to the speed at which the device is capable of producing copies, the proportional remuneration recovered varied according to whether or not the person copying cooperated in the recovery, and the combined system, taken as a whole, did not include mechanisms, in particular for reimbursement, which allow the complementary application of the criterion of actual harm suffered and the criterion of harm established as a lump sum in respect of different categories of users. While the first part of the scheme could be theoretically subsumed under general admissible private levy schemes, provided that it complied with the requirements set by Amazon.com with regard to the right to reimbursement, the same could not be said with regard to the second part, which relied on the cooperation of the beneficiaries of the exceptions and thus made the final compensation paid dependent on and varying from this.[259]

Similarly complex and articulated is the analysis conducted in **Microsoft Mobile Sales International,**[260] which ultimately declared the inadmissibility under Article 5(2)(b) InfoSoc of the Italian private levy scheme, which (i) subjected the exemption from payment of the levy for producers and importers of devices/media intended for use unrelated to private copying to the conclusion of agreements between the former (or their trader association) and a CMO (SIAE); and (ii) provided that the reimbursement of such a levy, where it was unduly paid, could be requested only by the final user. The scheme, in fact, was held to run counter to the principle of equal treatment,[261] since (a) producers and importers in comparable situations

[256] Ibid, para 52: "Were it otherwise, the joint or parallel application of the private copying exception and of the reprography exception by Member States would risk being inconsistent, contrary to the requirement set out in the last sentence of recital 32 in the preamble to Directive 2001/29."
[257] Ibid, para 54, thus ruling that "It follows that Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude, in principle, national legislation, such as that at issue in the main proceedings, which introduces an undifferentiated system for recovering fair compensation which also covers the copying of sheet music" (para 55)
[258] Ibid, para 56.
[259] Ibid, para 79.
[260] Judgment of 22 September 2016, *Microsoft Mobile Sales International*, C-110/15, EU:C:2016:717.
[261] Ibid, para 46.

could have been treated differently, depending on whether or not they had concluded an agreement protocol with the SIAE; (b) no objective and transparent criteria were laid down as preconditions to conclude such agreements, and the content of the agreements was fully remitted to the discretion of the parties.[262] In addition, the scheme did not meet the requirements set by the CJEU in *Amazon.com* as necessary to hold as legitimate a system that applied the levy indiscriminately to all users.[263]

Along the same lines, and applying the principles derived from settled case law, **EGEDA** excluded the admissibility of a fair compensation scheme financed fully by the State budget, since this spread the burden to compensate the harm to all taxpayers without linking it directly to those who benefitted from the private copying exception and thus caused the harm to rightholders.[264]

In **VCAST v RTI**,[265] the Court intervened only incidentally, and almost with an *obiter dictum*, on Article 5(2)(b) InfoSoc. The service provided by the plaintiff, in fact, did not merely organize the reproduction but also provided access to programs of certain televisions channels that could be recorded remotely, with a view to reproducing them, so that the individual customers could choose which programs were to be recorded. In this sense, the service had a dual functionality, consisting in ensuring both the reproduction and the making available of the works and subject matter concerned.[266] Triggered by the attempt of the plaintiff to raise Article 5(2)(b) InfoSoc as a defence against the infringement claimed, the CJEU took the opportunity to rule that although the private copy exception means that the rightholder must abstain from exercising his exclusive right to authorise or prohibit private copies made by natural persons under the conditions enlisted by the provision, the strict interpretation of the exception implies that the rightholders are still entitled to prohibit or authorise access to the works or subject matter.[267]

The Court went back to the notion of "any medium" under Article 5(2)(b) InfoSoc in **Austro-Mechana v Strato AG,**[268] defined as an autonomous concept of EU law requiring an autonomous and uniform interpretation.[269] Since the wording of the provision does not in any way specify the characteristics of the devices by or with the aid of which copies for private use are made, the CJEU held that the EU legislature did not consider these to be relevant for harmonization purposes, making this a measure of partial harmonization.[270] Thus, "any medium" could be referred to all media on which a protected work may be reproduced, including – as in the case at stake – servers such as those used in cloud computing,[271] and the

[262] Ibid, para 47-49.
[263] Ibid, para 54-56.
[264] Judgment of 9 June 2016, *EGEDA*, C-470/14, EU:C:2016:418.
[265] Judgment of 29 November 2017, *VCast*, C-265/16, EU:C:2017:913
[266] Ibid, para 37-38.
[267] Ibid, para 39.
[268] Judgment of 24 March 2022, *Austro-Mechana*, C-433/20, EU:C:2022:217.
[269] Ibid, para 20.
[270] Ibid, para 22.
[271] Ibid, para 21.

fact that the storage space is made available to a user on a server belonging to a third party is not decisive in that regard.[272]

The broad interpretation of the concept of "any medium" was deemed to be supported not only by the clear distinction between this provision and Article 5(2)(a) InfoSoc (which indeed contains a limitation as to the medium),[273] but also by the need to adapt the EU copyright framework to the technological development, which has created new ways of exploiting protected works.[274] This is in line with the principle of technological neutrality, according to which the law must specify rights and obligations in a generic manner, so as not to favour the use of one technology to the detriment of another.[275] The objective of preventing copyright protection from becoming outdated or obsolete as a result of technological developments – the CJEU stated – "would be undermined if the exceptions and limitations to the protection of copyright which, according to recital 31 of that directive, were adopted in the light of the new electronic environment, were interpreted in such a way as to have the effect of excluding similar account being taken of those technological developments and of the emergence in particular of digital media and cloud computing services."[276]

As regards to the payment of fair compensation, since the copying of protected works in storage space in the context of cloud computing requires the carrying out of several acts of reproduction, which may be effected from a number of connected terminals, the CJEU ruled that Member States were free "to put in place a system in which fair compensation is paid solely in respect of the devices or media which form a necessary part of that process, provided that such compensation may reasonably be regarded as reflecting the possible harm to the copyright holder".[277] In any case, they should ensure that the levy paid, in so far as it affects several devices and media in that single process, does not exceed the possible harm resulting from the act in question.[278]

[272] Ibid, para 23.
[273] Ibid, para 24.
[274] Ibid, para 25.
[275] Ibid, para 27 citing also judgment of 15 April 2021, *Eutelsat*, C-515/19, EU:C:2021:273, para 48.
[276] Ibid, para 28. The Court felt also to specify that this finding was not challenged by the fact that the saving of a copy in the cloud is not separable from possible acts of communication, with the consequence that such an act, on the basis of the holding Judgment of 29 November 2017, VCast, C-265/16, EU:C:2017:913 *and* Judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, should come under Article 3(1) InfoSoc. In fact, the case at stake was different than VCast, which concerned a service with a dual functionality, offering both reproduction in the cloud and, almost simultaneously, communication to the public; and it also differed from *Tom Kabinet*, which concerned the provision by a club of an online service consisting of a virtual market for 'second-hand' electronic books, in which protected works were made available to any person who registered on that club's website, with such persons being able to access the site from a place and at a time individually chosen by them, such a service having to be regarded as communication to the public, within the meaning of Article 3(1) InfoSoc. (ibidem, para 31).
[277] Ibid, para 52.
[278] Ibid, para 53.

VG Wort v Kyocera[279] also intervened on the impact of TPMs[280] on the fair compensation due to rightholders. The Court was asked, in fact, to clarify whether Member States could exclude the payment of such a compensation in cases where rightholders have not applied those measures on their works.

The decision defined TPMs under 5(2)(b) InfoSoc as "technologies, devices or components intended to restrict acts which are not authorised by the rightholders, that is to say to ensure the proper application of that provision, which constitutes a restriction on copyright or rights related to copyright, and thus to prevent acts which do not comply with the strict conditions imposed by that provision." Then, it noted that it is up to Member States and not to rightholders to ensure the proper application of the exception, and eventually to restrict acts which are not authorized by the latter.[281] The Court also underlined that, according to Recital 52 InfoSoc, rightholders may voluntarily make use of TPMs which are compatible with the private copying exception, and which accommodate achieving the objective of that exception, by preventing or limiting unlawful reproductions.[282] Such technological measures should be encouraged by Member States.[283] Since, however, these are purely voluntary measures, their non-application cannot result in the denial of fair compensation. On the contrary, according to the Court, this circumstance may only have an impact on the level of compensation granted,[284] "so that those rightholders are encouraged to make use of them and thereby voluntarily contribute to the proper application of the private copying exception".[285]

As to the identification of the subject benefitting from the compensation, the Court had the opportunity to clarify in two decisions that to be entitled to it, one should hold the reproduction right under Article 2 InfoSoc, which is the entitlement Article 5(2)(b) intends to shield against harm.[286] This led the CJEU to rule in **Luksan** that the right to fair compensation vested by operation of law in the principal director of a cinematographic work,[287] since Article 2(a) InfoSoc grants them the reproduction right in their capacity as an author or co-author of the film,[288] along with producers of the first fixations of films in respect of the original and copies of the latter (Article 2(d) InfoSoc).[289] By the same token, in **Reprobel** the Court excluded the possibility for Member States to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, for they are not among the

[279] Judgment of 27 June 2013, *VG Wort*, Joined Cases C-457/11 to C-460/11, EU:C:2013:426, para 48.
[280] The CJEU recalled here (ibid, para 50) the definition of TPMs offered by Article 6(3) InfoSoc as meaning any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright.
[281] Ibid, para 52-53.
[282] Ibid, para 56.
[283] Ibid, para 55.
[284] Ibid, para 57.
[285] Ibid, para 59.
[286] Judgment of 9 February 2021, *Luksan,* C-277/10, EU:C:2012:65, para 90.
[287] Ibid, para 92.
[288] Ibid, para 89.
[289] Ibid, para 91.

rightholders listed in Article 2 InfoSoc, thus they cannot suffer any harm as a result of the reproduction of their works.[290] In addition, such a distribution would correspond to a substantial reduction in the amount paid to holders of the right of reproduction, particularly in the context of schemes such as the one challenged in the case at stake, where publishers were under no obligation to ensure that authors benefitted, even indirectly, from some of the compensation of which they had been deprived.[291] The decision, highly contested by publishers, was reversed by the EU legislature, which provided in Article 16 CDSM that publishers to which reproduction rights have been transferred by authors or other rightholders are entitled to the fair remuneration under Article 5(2)(b) InfoSoc, with immediate retroactive effect to cover also those national private levy schemes that were outlawed by the *Reprobel* judgment (Recital 60 CDSM).

Interestingly, Luksan also denied the possibility for Member States to lay down a presumption of transfer, in favour of the producer of a cinematographic work, of the remuneration right vested in the principal director of that work, thus allowing the latter to waive their rights to equitable remuneration.

The Court grounded its answer on Article 5(2)(b) InfoSoc,[292] arguing that the EU legislature did not wish to allow waivers to the right to a fair compensation.[293] However, in light of the principle of strict interpretation of exceptions, this shall apply only to the right of reproduction and not to remuneration rights.[294] The CJEU wanted nevertheless to make a step further, and observed that the concept of remuneration is also designed to reward authors, as fair compensation does,[295] and that the EU legislature is deemed, when adopting the InfoSoc Directive, to have maintained concepts used in earlier copyright-related directives. Being compensation and remuneration akin in nature, this allowed the Court to argue that the intention behind Article 5(2)(b) InfoSoc was to maintain the non-waivable nature of the right, as it was for the remuneration right of the Rental Directive.[296] In addition, allowing rightholders to waive their right would have been conceptually irreconcilable – according to the CJEU – with the imposition on Member States of the obligation to recover the fair compensation.[297] *A fortiori* – the Court stated - EU law should be interpreted as not allowing Member States to introduce an irrebuttable presumption of transfer, in favour of the producer of a cinematographic work, of the remuneration rights vesting in the principal director of that work, since this would result in the latter being denied payment of the fair compensation under Article 5(2)(b) InfoSoc.[298]

[290] Judgment of 12 November 2015, *Hewlett-Packard*, C-572/13, EU:C:2015:750, para 47-48.
[291] Judgment of 9 February 2021*, Luksan*, C-277/10, EU:C:2012:65, para 45-46.
[292] Ibid, para 99.
[293] Ibid, para 100.
[294] Ibid, para 101.
[295] Ibid, para 103.
[296] Ibid, para 105.
[297] Ibid, para 106.
[298] Ibid, para 108.

3.1.1.2.4 QUOTATION (ARTICLE 5(3)(D) INFOSOC)

Despite its relevance, old roots in the Berne Convention and frequent application by national courts, the number of CJEU cases on quotation are relatively limited, particularly if compared to the plethora of decisions on the private copy exception.

The first attempt to provide some guidelines to interpret the very general language of Article 5(3)(d) InfoSoc comes from **Painer**.[299] Here, the Court went through all the requirements set by the provision, arguing that even if the exception shall be interpreted strictly,[300] it should still be read in a manner that does not frustrate its effectiveness and the fair balance between rightholders' interests and other conflicting rights.[301] In the case of quotation, this means a balance between copyright and the right to freedom of expression,[302] which the provision strikes by preventing the author from blocking the reproduction of extracts from their work which has already been lawfully made available to the public, whilst ensuring that their name is indicated.[303]

In this sense, the condition that the work has been lawfully made available to the public shall be referred only to the work quoted, and not to the subject-matter in which the quotation is made.[304] Similarly, the obligation to mention the source and the name of the author represents a precondition for the lawfulness of the quotation, in the absence of which the exception cannot apply. However, the exemption due to "impossibility" shall be read flexibly enough to encompass all those cases where the mention would cause excessive hardship to the quoting party.[305] The Court also emphasized the need for the quoted work to have already been lawfully made available to the public, as confirmed by the French and German versions of Article 5(3)(d) InfoSoc and Article 10(1) BC.[306]

To have another intervention on Article 5(3)(d) InfoSoc, one has to wait until the Grand Chamber trio of July 2019.

In **Spiegel Online**, the Court was asked to determine whether the notion of quotation could cover also a reference made by means of a hyperlink to a file which could be downloaded independently. In response, it stated that the term "quotation", absent a definition in the InfoSoc Directive, should be delineated "by considering its usual meaning in

[299] Judgment of 1 December 2011, *Painer,* C-145/10, EU:C:2011:798.
[300] Ibid, para 133.
[301] Ibid, para 131-32.
[302] Ibid, para 134.
[303] Ibid, para 135.
[304] Ibid, para 131.
[305] Ibid, para 143 – 145: "However, it should also be noted that the main proceedings are unusual, in that they are taking place in the context of a criminal investigation, as part of which, following the kidnapping of Natascha K., in 1998, a search notice, with a reproduction of the contested photographs, was launched by the competent national security authorities. (…) Consequently, it is conceivable that the national security authorities were the cause of the making available to the public of the contested photographs which were the subject of subsequent use by the defendants in the main proceedings. (…) Such making available does not require, under Article 5(3)(e) of Directive 2001/29, in contrast to Article 5(3)(d) of that directive, the author's name to be indicated".
[306] Ibid, paras 126-128.

everyday language, while also taking into account the legislative context in which it occurs and the purposes of the rules of which it is part".[307] On this basis, the CJEU argued that the essential characters of an act of quotation are (a) the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user;[308] and (b) the establishment of a direct and close link between the quoted work and his own reflections, thereby allowing for an intellectual comparison to be made with the work of another, since Article 5(3)(d) of Directive 2001/29 states in that regard that a quotation must inter alia be intended to enable criticism or review. The use of the quote should also be secondary "in relation to the assertions of that user, since the quotation of a protected work cannot, moreover, under Article 5(5) of Directive 2001/29, be so extensive as to conflict with a normal exploitation of the work or another subject matter or prejudices unreasonably the legitimate interests of the rightholder".[309]

Last, the Court focused on the condition that the work should have already been lawfully made available to the public. Building on Painer, it specified that this requirement is met if the work "has been made available to the public with the authorisation of the copyright holder or in accordance with a non-contractual licence or a statutory authorisation."[310]

In **Pelham,** instead, the question posed to the CJEU was whether Article 5(3)(d) InfoSoc could apply to cases where it was not possible to identify the work concerned by the quotation in question. In this context, the Court recalled the everyday language definition introduced in **Spiegel Online**, emphasizing the need for the quoting work to enter into "a dialogue" with the quoted work.[311] For this to happen, an identification of the latter is necessary.[312]

3.1.1.2.5 PARODY, CARICATURE, PASTICHE (ARTICLE 5(3)(K) INFOSOC)

The only CJEU decision on the parody exception under Article 5(3)(k) InfoSoc is **Deckmyn**.[313] However, despite being so isolated, the decision represents one of the most important precedents of the Court in the field of EU copyright law, and particularly in the area of flexibilities and their interplay with fundamental rights protection.

As first thing, the Court stated that the notion of parody should be understood as an autonomous concept of EU law, to be interpreted uniformly across the Union.[51] This reading was not deemed invalidated by the optional nature of the exception, since "an interpretation according to which Member States that have introduced that exception are free to determine the limits in an unharmonized manner, which may vary from one Member State to another,

[307] Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625, para 77.
[308] Ibid, para 78.
[309] Ibid, para 79.
[310] Ibid, para 89.
[311] Judgment of 29 July 2019, *Pelham*, C-476/17, EU:C:2019:624, para 71.
[312] Ibid, para 73.
[313] Ibid.

would be incompatible with the objective of that directive"[314]. Then, the CJEU defined the notion looking, as in settled case law, to the usual meaning of the work in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part.[315] From this, it derived that the essential characteristics of parody are (1) to evoke an existing work while being noticeably different from it, and (2) to constitute an expression of humour or mockery.[316]

The Court also emphasized what does not pertain to the usual meaning of the term, "namely: that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; could reasonably be attributed to a person other than the author of the original work itself; should relate to the original work itself or mention the source of the parodied work."[317] More generally, the CJEU required Article 5(3)(k) InfoSoc to be implemented in a manner that ensures that a fair balance between copyright and freedom of expression is preserved, particularly by avoiding the imposition of criteria that are more restrictive than those deriving from the commonly accepted characteristics of parody.[52] The link between freedom of expression and parody resulted in a more pervasive harmonisation of the content of the exception and in the implicit transformation of an optional provision into a mandatory rule. Member States, in fact, could avoid implementing Article 5(3)(k) InfoSoc only if they could prove that they otherwise guaranteed the fair balance between copyright and freedom of expression struck by the parody exception.[53] The CJEU, however, also added that the exercise of parody should not violate the principle of non-discrimination, thus implicitly suggesting that the protection of fundamental rights may also require the judicial disapplication of national exceptions.[54]

3.1.1.2.6 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.1.2.6.1 RESEARCH AND PRIVATE STUDY (ARTICLE 5(3)(N) INFOSOC)

The CJEU intervened on the interpretation of Article 5(3)(n) InfoSoc in **Technische Universitat Darmstadt v Ulmer**,[318] addressing three key questions. First, it was called to clarify whether the concept of presence of "purchase or licensing terms" excluding or regulating the exercise of the exception shall be extended to also cover case where the rightholder has merely offered to conclude a license to the CHI beneficiary of the provision. Second, it was asked whether Article 5(3)(n) InfoSoc could be interpreted as also covering the possibility for CHIs to digitise the works contained in their collections, if such act of reproduction was necessary for the purpose of exercising the exception, that is making those works available to users, by means of dedicated terminals, within those establishments. Last,

[314] Ibid, para 16, citing also (see, to that effect, judgments in Judgment of 21 October 2010, *Padawan*, C-467/08, EU:C:2010:620, para 36, and Judgment of 10 April 2014, *ACI Adam and Others*, C-435/12, EU:C:2014:254, para 49).
[315] Ibid, para 19.
[316] Ibid., para 20.
[317] Ibid, para 21.
[318] Judgment of 11 September 2014, *Ulmer*, C-117/13, EU:C:2014:2196.

as a side question, the referring court requested clarification on whether Article 5(3)(n) InfoSoc could be stretched to allow patrons of CHIs to print out or save on USB stick works made available to them on dedicated terminals.

As to the first question, the Court adopted a strict interpretation. Building its argument on the rationale of the exception, which is to "promote the public interest in promoting research and private study, through the dissemination of knowledge, which constitutes, moreover, the core mission of publicly accessible libraries",[319] the CJEU excluded that the mere unilateral and discretional offer of license by the rightholder could frustrate the effectiveness of the exception,[320] and thus prevent it from realising its core mission and promoting the public interest.[321] This is – according to the Court – the only interpretation that may allow maintaining "a fair balance between the rights and interests of rightholders, on the one hand, and, on the other hand, users of protected works who wish to communicate them to the public for the purpose of research or private study undertaken by individual members of the public."[322] As a side note, this reading was also in line with Recital 40 InfoSoc, which states that specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.[323]

In this context, the Court also took the opportunity to clarify that all limitations listed under Article 5(3) InfoSoc and mentioning contractual agreements refer to existing relations, and not mere prospects thereof.

With an important step forward in the development of the fair balance doctrine and of the horizontal effects of fundamental rights on exceptions and their interpretation, the CJEU offered a positive answer to the second question raised by the referring court. In fact, the Court interpreted Article 5(3)(n) InfoSoc as implicitly granted a right to its beneficiaries, and ruled that "the right of communication of works enjoyed by establishments such as publicly accessible libraries covered by Article 5(3)(n) (…), within the limits of the conditions provided for by that provision, would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an ancillary right to digitise the works in question".[324] The same establishment are recognized – once again – "as having such a right pursuant to Article 5(2)(c) of Directive 2001/29, provided that 'specific acts of reproduction' are involved.[325] And while the condition of specificity is generally to be understood as excluding the possibility for CHIs to digitize their entire collections, this condition is still observed every time the digitization is functionalized to the communication to the public of the work under

[319] Ibid, para 27.
[320] Ibid, para 32 – "since, were it to be accepted, the limitation would apply, as Ulmer has maintained, only to those increasingly rare works of which an electronic version, primarily in the form of an e-book, is not yet offered on the market."
[321] Ibid, para 28.
[322] Ibid, para 31.
[323] Ibid, para 29.
[324] Ibid, para 43.
[325] Ibid, para 44.

Article 5(3)(n) InfoSoc.[326] This interpretation – the CJEU stated – is also in line with the three-step test, since the digitisation of works by publicly accessible libraries cannot have the result of the number of copies of each work made available to users by dedicated terminals being greater than that which those libraries have acquired in analogue format and, as such and coupled with an obligation to provide compensation, does not impair disproportionately the legitimate interests of rightholders.[327]

By the same token, the Court denied the possibility to include under the jointly-applied exception also the reproduction made by patrons by printing out those works on paper or storing them on a USB stick, arguing that this would not only cover acts that are not necessary for the fulfilment of the purpose of Article 5(3)(n) InfoSoc,[328] but also conflict with the three-step test.[329]

3.1.1.2.6.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH (ARTICLE 5(3)(A) INFOSOC)

The only CJEU case cursorily mentioning this exception is **Renckhoff**.[330] However, the reference to the provision is minimal, and just made to state that the EU legislature took into account the need for a balance between copyright and the right of education, by providing an E/L "to the rights laid down in Articles 2 and 3 of that directive so long as it is for the sole purpose of illustration for teaching or scientific research and to the extent justified by the non-commercial purpose to be achieved."[331]

3.1.1.2.7 USES FOR INFORMATORY PURPOSES

3.1.1.2.7.1 PRESS REVIEW AND NEWS REPORTING (ARTICLE 5(3)(C) INFOSOC)

In **Spiegel Online**, the CJEU was requested to clarify whether Article 5(3)(c) InfoSoc precluded a national rule limiting the exception for press review to cases where it is not reasonably possible to make a prior request for authorisation with a view to the use of a protected work for the purposes of reporting current events.

Since the provision does not make any express reference to Member States' laws to determine the meaning and scope of the concept, the Court assumed it is a uniform concept of EU law, and it attributed to it the meaning it has in everyday language, taking also into account the legislative context.[332] In this sense, "reporting" was equated to the act of "providing information on a current event".[333] A mere announcement is not enough, but at the same time the exception does not require the user to analyse the event in detail.

[326] Ibid, para 45-46.
[327] Ibid, para 48.
[328] Ibid, para 54.
[329] Ibid, para 56.
[330] Judgment of 7 August 2018*, Renckhoff*, C-161/17, EU:C:2018:634.
[331] Ibid, para 43.
[332] Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625, paras 62, 65
[333] Ibid, para 66.

Interestingly, the notion of "current" was not referred to the moment when the event is happening, but to the informatory interest of the public.[334] The CJEU also briefly recalled the need to mention the source unless it is proven impossible, and the need for the use not to go beyond what is proportionally needed for the informatory purpose.[335] In addition, in light of the purpose of the exception, the Court argued that the interest of the public is to receive news of the event in a timely fashion, a need which would be frustrated if the operation of the provision would be subordinated to obtaining the author's prior consent.[336]

3.1.1.2.7.2 USES OF PUBLIC SPEECHES AND LECTURES (ARTICLE 5(3)(F) INFOSOC)

The CJEU has issued no ruling directly addressing the interpretation of Article 5(3)(f) InfoSoc on the exception to the right of reproduction and communication to the public of public speeches and lectures.

3.1.1.2.8 USES BY PUBLIC AUTHORITIES

3.1.1.2.8.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS (ARTICLE 5(3)(E) INFOSOC

The only case mentioning this provision is **Painer,** where the Court was called to determine how strictly the requirements of Article 5(3)(e) InfoSoc should have been read, also to comply with the three-step test under Article 5(5) InfoSoc. More specifically, the CJEU was asked to determine whether the "use in administrative and judicial proceeding" required "a specific, current and express appeal for publication of the image on the part of the security authorities for search purposes", or, if that was not requested, whether mass media could use the provision to decide on their own initiative, and without a search request backing the action, to publish a photograph in the interests of public security.[337]

The Court admitted that the InfoSoc Directive wanted to leave the decision of which public security interest could be invoked to the full discretion of Member States,[338] upon the idea that they are the best placed to determine "in accordance with its national needs, the requirements of public security, in the light of historical, legal, economic or social considerations specific to it".[339] This discretion, however, should be exercised within the limit of proportionality,[340] without prejudicing the principal purpose of the InfoSoc Directive,

[334] Ibid, para 67.
[335] Ibid, para 68.
[336] Ibid, para 71.
[337] Judgment of 1 December 2011, *Painer,* C-145/10, EU:C:2011:798, para 100.
[338] Ibid, para 101.
[339] Ibid, para 102.
[340] Ibid, para 105 citing Judgment of 20 June 2002, *Mulligan and Others*, C-313/99, EU:C:2002:386, paras 35 and 36; Judgment of 25 March 2004, *Cooperativa Lattepiù*, Joined cases C-231/00, C-303/00 and C-451/00, EU:C:2004:178, para 57; and Judgment of 14 September 2006*, Slob*, C-496/04, EU:C:2006:570, para 41; Judgement of 14 December 2004, *Arnold Andrè*, C-434/02, EU:C:2004:800, para 45; Judgment of 14 December 2004, *Swedish Match*, C-210/03, EU:C:2004:802, para 47; and Judgment of 6 December 2005, *ABNA and Others*, Joined cases C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, para 68.

which is to guarantee a high level of protection and legal certainty to rightholders (Recital 9).[341] This implies that the use of a protected work, for the purpose of public security, must not be dependent on discretionary human intervention by a user of the protected work.[342] States should also comply with the three-step test,[343] and offer a strict interpretation of exceptions.[344] In light of this, the CJEU ruled that Member States cannot go as far as to allow the media to confer on themselves the protection of public security, and thus to use a work protected by copyright by invoking such an objective.[345] And while it is true that the purpose of the press, in a democratic society governed by the rule of law, is to inform the public without unnecessary restrictions, and this could allow a newspaper publisher to contribute to public security by publishing a photograph of a person under search, this initiative should still be taken "within the framework of a decision or action taken by the competent national authorities to ensure public security and, second, by agreement and in coordination with those authorities, in order to avoid the risk of interfering with the measures taken by them." [346] This conclusion is not hampered by Article 10 ECHR, which makes clear that "freedom of the press is not intended to protect public security but it is the requirements of the protection of public security which can justify a restriction on that freedom."[347]

3.1.1.2.8.2 OTHER USES BY PUBLIC AUTHORITIES

There is no decision in the CJEU case law that addressed Article 5(3)(g) InfoSoc, Articles 6(2)(c) or 9(c) Database directly.

3.1.1.2.9 SOCIALLY ORIENTED USES (ARTICLE 5(2)(E) INFOSOC)

The CJEU mentions Article 5(2)(e) InfoSoc only – and just cursorily - in **OSA v Léčebné lázně Mariánské Lázně**,[348] just to deny its application and without providing significant guidance for its interpretation.

3.1.1.2.10 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.1.2.10.1 PUBLIC LENDING (ARTICLE 6(1) RENTAL)

The CJEU was called to interpret the scope of the public lending exception under Article 6(1) Rental in **Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht,** [349] and particularly to determine whether the public lending of a digital copy of a book, carried out in conditions such as those indicated in the question referred, could be covered by the provision.

[341] Ibid, para 107.
[342] Judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, para 108 (see, to that effect, Order of 17 January 2012, I*nfopaq* International, C-302/10, EU:C:2012:16, para 62).
[343] Ibid, para 110.
[344] Ibid, para 109.
[345] Ibid, para 112.
[346] Ibid, para 113.
[347] Ibid, para 115.
[348] Judgment of 27 February 2014, *OSA*, C-351/12, EU:C:2014:110.
[349] Judgment of 10 November 2016, *Vereniging Openbare Bibliotheken,* C-174/15, EU:C:2016:856.

The main obstacle to the extension lied in the interpretation of the notion of "objects" and "copies" for the purpose of the Rental Directive, which had to be read in light of the equivalent concepts in the WCT.[350] In this respect, the Agreed Statement to Articles 6 and 7 WCT, covering also the right to rental, interpreted the two concepts as referring "exclusively to fixed copies that can be put into circulation as tangible objects".[351] To come out from the standstill, the Court decided to split the rental and lending rights, arguing that the use of "rights" show the intention of the EU legislature to regulate the two entitlements independently.[352] Since the WCT applied only to the rental right, it was possible to offer a different, non-tangible interpretation to the notions of object and copy without breaching the WCT.[353] And while it is true that in the Explanatory Memorandum to the first Rental Directive (92/100/EEC) mentioned the EC's desire to exclude the making available by way of electronic data transmission from the scope of Directive, this did not necessarily apply to e-books, since the examples mentioned in the Memorandum related only to the electronic transmission of film, and e-books were still not known and thus not taken into account by the Commission.[354]

Cleaned away the obstacle lying in the text of the law, the Court argued that Article 6(1) Rental should be interpreted strictly, but still be given a reading that enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed.[355] In this light, "given the importance of the public lending of digital books, and in order to safeguard both the effectiveness of the derogation for public lending referred to in Article 6(1) of Directive 2006/115 ('the public lending exception') and the contribution of that exception to cultural promotion, it cannot therefore be ruled out that Article 6(1) of Directive 2006/115 may apply where the operation carried out by a publicly accessible library, in view of, inter alia, the conditions set out in Article 2(1)(b) of that directive, has essentially similar characteristics to the lending of printed works".[356] Provided that the e-lending has similar characteristics to material lending (only one copy may be downloaded at a time; after the lending period expired, the downloaded copy cannot be accessed any longer; no simultaneous use is allowed). The CJEU justified its conclusion also by arguing that in light of new technological and economic developments,[46] the effectiveness of the provision and its purpose of contributing to cultural promotion would have been frustrated if its application were to be limited only to material copies.[47]

[350] Ibid, para 33.
[351] Ibid, para 34.
[352] Ibid, para 36 and 38; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28, Recitals 3 and 8
[353] Ibid, para 39.
[354] Ibid, para 41.
[355] Ibid, para 50.
[356] Ibid, para 51.

3.1.1.2.10.2 PRESERVATION OF CULTURAL HERITAGE AND OTHER SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

On Article 5(2)(c) InfoSoc Directive, the only case that is worth mentioning is **Ulmer**, where the provision was read jointly with Article 5(3)(n) InfoSoc and was offered some interpretative guidelines. See above, section 3.1.1.2.6.1.

3.1.1.2.10.3 ORPHAN WORKS

There is no decision in the CJEU case law that addressed the Orphan Works Directive.

3.1.1.2.10.4 OUT-OF-COMMERCE WORKS

There is no decision in the CJEU case law that addressed the matter of out-of-commerce works, but for – with regard to national law - *Soulier and Doke*, on which see infra, section 3.1.1.2.15.

3.1.1.2.11 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

There is no decision in the CJEU case law that addressed the two InfoSoc and Marrakesh disability exceptions.

3.1.1.2.12 OTHER NON-INFRINGING USES (MISCELLANEOUS)

The only further provision considered by the CJEU case law Article 5(3)(o) InfoSoc, which allows Members States to provide E&Ls to the rights provided for in Articles 2 and 3 InfoSoc in certain cases of minor importance where E/Ls already exist under national legislation, provided that they concern analogue uses only and do not affect the free circulation of goods and services within the EU, without prejudice to the other E&Ls contained in that article. In **AKM v Zürs.net Betriebs GmbH**,[357] the CJEU recalled the need to interpret exceptions strictly,[358] and excluded the applicability of the provision to a national rule which permitted economic operators to pursue an activity broadcasting protected works by means of communal antennae installations, without an obligation, *inter alia*, to seek authorisation from the authors of those works in accordance with the right of communication to the public which those authors hold, on condition that the number of subscribers connected to such an antenna is no more than 500.[359]

The Court justified its conclusion by arguing that the provision is likely to attract economic operators wishing to take advantage of it, and to lead to the continuous and parallel use of a multiplicity of communal antenna installations. Consequently, this could result, over the whole of the national territory, in a situation in which a large number of subscribers have parallel access to the broadcasts distributed in that way.[360] This could not be consider a use in cases of minor importance, particularly since the cumulative number of potential audiences

[357] Judgment of 16 March 2017, AKM, C-138/16, EU:C:2017:218.
[358] Ibid, para 37.
[359] Ibid, para 39.
[360] Ibid, para 40.

with access to the same work at the same time was likely to constitute a relevant public under Article 3 InfoSoc.[361]

3.1.1.2.13 THREE-STEP TEST (ARTICLE 5(5) INFOSOC)

The three-step test is mentioned cursorily in a number of CJEU decisions as a general principle that should be taken into account by legislators when exercising their discretion in the national transposition of InfoSoc exceptions and limitations, as seen above.[362]

In addition, in *ACI Adam* and its progeny, the CJEU rejected the idea that the test could be used as a fair use clause or as a tool to affect or extent the substantive content of exceptions under Article 5 InfoSoc.[363] On the contrary, the Court ruled that Article 5(5) InfoSoc should be understood as requesting courts to consider the impact of the exception on the normal exploitation of the work and rightholder's legitimate interests, and to decide in favour of its disapplication or limitation when the circumstances of the case cause the exception to alter the balance requested by the three-step test.[364] Such an approach introduced another element of legal uncertainty in the operation of EU copyright exceptions, remitting the ultimate decision on their application to the discretion of national courts, again with no guidelines to reduce the risk of conflicting and fragmented outcomes.

3.1.1.2.14 PUBLIC DOMAIN

Public domain is not a concept that is analysed holistically by the CJEU, nor has it ever been used as a general doctrine or framework to guide the interpretation of EU secondary sources.

Cases which may be understood as indirectly related to the notion of public domain, for they impact on its definition in EU copyright law, are those ruling on the retroactivity of the Term Directive (*Butterfly*[365]) and those intervening on the notion of protected work and the doctrine of originality. Without any aim of exhaustiveness – for the topic goes beyond the ultimate core of this study, it is worth mentioning **Infopaq**,[366] where the Court was asked to decide whether the reproduction of an 11-word excerpt of a newspaper article could amount to a violation of Article 2 InfoSoc. To respond to the question, the CJEU had to first determine what constituted a protected work, using to this end a contextual interpretation of other EU copyright law sources.[367] More specifically, it proposed a joint reading of Articles 2(5) and (8) BC, Article 1(3) Software I, Article 3(1) Database and Article 6 Rental,[368] elevating the result

[361] Ibid, para 41.
[362] Judgment of 29 July 2019, *Funke Medien*, C-469/17, ECLI:EU:C:2019:623; Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625.
[363] Judgment of 10 April 2014, ACI Adam and Others, C-435/12, EU:C:2014:254, para 26.
[364] Ibid, para 27.
[365] Judgment of 29 June 1999, *Butterfly Music*, C-60/98, EU:C:1999:333.
[366] Order of 17 January 2012, *Infopaq International*, C-302/10, EU:C:2012:16.
[367] The operation was justified in light of Recital 20 InfoSoc, which states that the Directive is based on the same principles and rules "already laid down in the Directives currently in force in this area". Ibid para 36.
[368] Ibid para 34-35.

to the role of general principle of EU copyright law under the InfoSoc Directive,[369] and defined as protected (literary) work any combination or sequence of words through which "the author may express his creativity in an original manner and achieve a result which is an intellectual creation."[370]

Subsequent judgments tried to give more content to what was a very general, overly broad and risky definition. In ***BSA***[371] the CJEU excluded the possibility to consider a graphic user interface (GUI) as a protected expression under Article 1(2) Software I, but accepted the idea of covering it with a general InfoSoc protection if it entailed the "author's own intellectual creation".[372] However, in light of the particular characteristics of the GUI, the Court had to underline that copyright cannot cover, for lack of originality, elements necessitated by their technical function, "since the different methods of implementing an idea are so limited that the idea and the expression become indissociable",[373] and the author is not called to make any creative and original choice that could be qualified as their own intellectual creation.[374]

The same principles were applied to items of unregistered design to which the Design Directive could not apply (***Flos***[375]); to videogames, which were excluded from the subject matter of the Software Directive due to their complex nature (***Nintendo***[376]); to sport events **(*FAPL*)**, which were not considered protectable since the existence of rules of the game does not admit creative freedom,[377] thus excluding their potential originality;[378] to portrait photographs in ***Painer***, which were qualified as protected work if it represented an intellectual creation, which constituted an author's own and reflected her personality[379] and personal touch[380] when "the author was able to express his creative abilities in the production of the work by making free and creative choices".[381] Here, however, the Court added another dangerous specification, and opened the door to potential misunderstanding by stating that the level of protection granted cannot and should not depend on the degree of originality of

[369] Ibid para 37.
[370] Ibid para 44-45. The originality of the combination should be tested with regard to the elements "which are the expression of the author's own intellectual creation" (ibid, para 47).
[371] Judgement of 22 December 2010, *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury,* C-393/09, EU:C:2010:816 (BSA). On the relevance of the case see Jonathan Griffiths, 'Infopaq, BSA and the "Europeanisation" of United Kingdom Copyright Law' (2011) 16 Media & Arts Law Review 69.
[372] Judgement of 22 December 2010, *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury,* C-393/09, EU:C:2010:816, para 46.
[373] Ibid para 48.
[374] Ibid para 50.
[375] Judgment of 27 January 2011, *Flos*, C-168/09, EU:C:2011:29, judged inconsistent with the Design and InfoSoc Directives and their rationales by Bently and others (n 7).
[376] Judgment of 23 January 2014, *Nintendo*, C-255/12, EU:C:2014:25.
[377] Judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631, para 98.
[378] Ibid paras 96-97.
[379] Judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, para 88.
[380] Ibid, para 92.
[381] Ibid, para 89.

the work.[382] In this way, it ultimately merged the notion of protected work with the concept of originality, creating an overlap between the preliminary identification of the subject matter of copyright and the subsequent requirement of protection, thus raising important question marks on the external boundaries of the public domain.

With the floodgates so open, it took little for a far-fetched case to reach the CJEU. In ***Levola Hengelo***,[383] the question was whether the notion of work as the author's own intellectual creation could be extended to cover the original taste of a cheese. In a very concise and dry decision, the Court decided to add some more specifications to its very general doctrine. It defined "work as an autonomous concept of EU law, to be interpreted uniformly throughout the Union, in light of the missing reference to national laws for determining its meaning and scope.[384] Then, it added that any creation can be protected by copyright only if it can be classified as a "work" under the InfoSoc Directive,[385] which happens when two cumulative requirements are met.[386] First, the creation should be "original in the sense that it is the author's own intellectual creation".[387] Second, it should represents an "expression of the author's own intellectual creation".[388] To clarify what "expression" means, since no definition is provided in EU sources, the CJEU referred to Article 2 WCT and Article 9(2) TRIPs, which introduce the idea-expression dichotomy by excluding copyright protection over ideas, procedures, and methods of operation or mathematical concepts as such.[389] This was translated into a definition similar to that of the graphic requirement for trademarks under *Sieckmann.*[390] To be protected, a work should be "expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form".[391] This is necessary to make sure that authorities and competitors can "identify, clearly and precisely" the subject matter protected, and to preserve legal certainty against any form of subjectivity in the identification of the protected work.[392] Tastes and smells are thus excluded from protection, for they cannot be defined but subjectively, and depending on variables such as age, food preferences, consumption habits, context of consumption etc.[393] Still, this also means that "it is not possible in the current state of scientific development to achieve by technical means a precise and objective identification of the taste", which hints to the fact that such the scope of copyright protection may be

[382] Ibid, para 97.
[383] Judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:618.
[384] Ibid, para 33.
[385] Ibid para 34, referring by analogy to Order of 17 January 2012, *Infopaq International*, C-302/10, EU:C:2012:16, para 29 and the case law cited therein.
[386] Ibid para 35.
[387] Ibid para 36.
[388] Ibid para 37.
[389] Ibid para 39, citing Case Judgment of 2 May 2012, *SAS Institute*, C-406/10, EU:C:2012:259, para 33.
[390] Judgment of 12 December 2002, *Sieckmann*, C-273/00, EU:C:2002:748.
[391] Judgment of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:618, para 40.
[392] Ibid, para 41.
[393] Ibid, para 42.

broadened once the technological process would allow their description as "expression". The same principles were later reiterated in ***Cofemel***[394] and ***Brompton Bicycle***.[395]

3.1.1.2.15 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

On the side of special licensing schemes, the CJEU had the opportunity to intervene twice to set general principles and doctrines that could be applied horizontally. The first case, *Soulier and Doke*,[396] intervened before the enactment of the CDSM Directive, and it raised challenges for ECL schemes which the EU legislator decided to tackle with Article 8 and 12 CDSM. The second case, *Spedidam*,[397] elaborated on similar principles, but with regard to the mandatory collective management on remuneration rights. In fact, the arguments raised by the Court to solve the two cases are largely the same.[398]

In ***Spedidam*** the heirs of a musician, died in 1985, sued INA for marketing without their consent phonograms and videos of the musician's performances, which were produced and broadcasted by the national television. INA commercialized them on the basis of Article 49 on the French law on freedom of communication, which derogates from the French Intellectual Property Code and allows INA to exercise the exploitation rights of performers providing the remuneration and according to terms fixed in agreements between INA and performers (or their organizations).

In the first and second instance, French courts ruled in favour of the heirs, arguing that the agreement between INA and the performers' associations only determined the remuneration due for new exploitations, while the first authorization from performers was still needed. The *Cour de Cassation* denied, instead, that the letter of the law required INA to prove the first authorization but asked the CJEU whether this solution was compatible with Articles 2, 3 and 5 InfoSoc.

Soulier and Doke[399] originated from the request of two French authors of literary works, Mark Soulier and Sara Doke, to the *Conseil d'État* to annul Decree No 2013-182, which introduced within the French Intellectual Property Code an extended licensing scheme to increase the availability of out-of-commerce books.[400] According to the Decree, the National Library was in charge of managing a database that every year enlisted new books published in France before 1 January 2001, no longer commercially distributed by a publisher and not

[394] Judgment of 19 September 2019, *Cofemel*, C-683/17, EU:C:2019:721.
[395] Judgment of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461.
[396] Judgment of 16 November 2016, *Marc Soulier and Sara Doke v Premier minister and Ministre de la Culture et de la Communication*, C-301/15, EU:C:2016:878.
[397] Judgment of 14 November 2019, *Spedidam and Others*, C-484/18, EU:C:2019:970.
[398] Judgment of 16 November 2016, *Marc Soulier and Sara Doke v Premier minister and Ministre de la Culture et de la Communication*, C-301/15, EU:C:2016:878.
[399] This excerpt, from "Soulier and Doke" to the end of this paragraph ("among all holders of neighboring rights"), is taken verbatim from the pre-print version in open access of Caterina Sganga, 'The Many Metamorphoses of Related Rights in EU Copyright Law: Unintended Consequences or Inevitable Developments?' (2021) 70 GRUR International 821.
[400] JORF No 51, 1 March 2013, p.3835.

currently published in print or in digital form.[401] Six months after the enlisting, the right to authorize the reproduction and communication to the public of the books in digital format was transferred to a collecting society approved by the Ministry of Culture. The society was obliged to offer a license back to the original publisher, which in case of acceptance would have received it in exclusivity for ten years, with the possibility of tacit renewal and the obligation to commercialize the title within three years. In case of refusal or no response, the collecting society was free to put the license on the market. Stringent safeguards were provided to ensure the fairness of the scheme, from the equal representation of authors and publishers in the society's governance bodies to fair rules of income distribution, and two possibilities to opt-out from the scheme.[402] First, rightholders had six months to oppose the enlisting of their works in the database. If they were publishers, they had the obligation to commercialize the book within two years. Second, authors could still withdraw their titles if they proved that the publication would have harmed their honor or reputation. Aside from that, they could opt out only upon demonstrating that they were the sole holders of exclusive rights of digital exploitation. Were this not the case, the law admitted only a joint author-publisher withdrawal, with an obligation of the latter to commercialize the book within eighteen months. No withdrawal was possible, instead, after another publisher acquired and begun exploiting a license from the collecting society.[403]

Soulier and Doke complained that the Decree constituted an unconstitutional violation of their property rights, and that the scheme was incompatible with the ban against formalities provided by Article 2(5) of the Berne Convention, and with the provisions of Articles 2 to 5 InfoSoc. The *Conseil d'Etat* rejected the claim of unconstitutionality,[404] and ruled in favor of the compatibility of the scheme with the Berne Convention, arguing that the opt-out mechanism did not interfere with the existence of copyright but only with its exercise.[405] The question of admissibility of the scheme *vis-à-vis* the InfoSoc Directive, instead, was referred to the CJEU.

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[401] As in Article L.134-2 of the Code de la Propriété Intelléctuelle. See Jane Ginsburg, 'Fair Use for Free, or Permitted-but-Paid?' (2014) 29 Berkeley Technology Law Journal 1383; Oleksandr Bulayenko, 'Permissibility of Non-Voluntary Collective Management of Copyright under EU Law – The Case of the French Law on Out-of-Commerce Books' (2016) 7 Journal of Intellectual Property, Information Technology and E-Commerce Law <http://www.jipitec.eu/issues/jipitec-7-1-2016/4402>.

[402] As in Article L.134-3-6 CPI.

[403] On the pitfalls and criticisms raised against the scheme, and particularly against its weak withdrawal rules and the favour towards commercial publishers, see Emmanuel Derieux, 'Le Régime Juridique de l'exploitation Numérique Des Livres Indisponibles Du XXe Siècle (1)' (2012) 87 Revue Lamy droit de l'immatériel 64; Sylvie Nérisson, 'La gestion collective des droits numériques des "livres indisponibles du XXe siècle" renvoyée à la CJUE: le Conseil d'État face aux fondamentaux du droit d'auteur' (2015) 191 Recueil Dalloz 1427. Similarly Bulayenko (n 402); Ginsburg (n 402). Who maintains that "the law expropriate authors"; see also Emmanuel Emile-Zola-Place, 'L'exploitation Numérique Des Livres Indisponibles Du XXe Siècle: Une Gestion Collective d'un Genre Nouveau' (2012) 295 Légipresse 35.

[404] On this claim it also consulted the *Conseil Constitutionel*, which also rejected it. Marc S and another, Conseil Constitutionel, Decision no 2013-370, QPC (*question prioritaire de constitutionnalité*), 28 February 2014. The decision was severely criticized for its industry-oriented interpretation of the concept of public interest. See e.g. Nérisson (n 404); Derieux (n 404).

[405] Conseil d'Etat, Decision No 368208, 6 May 2015, M.S., MMme D. The ECLI FR:CESSR:2015:368208.20150506.

With a decision that was foreseeable but dangerous in its potentially far-fetched implications,[406] the Court struck down the French scheme, declaring it incompatible with Articles 2 to 5 InfoSoc. Most of the arguments used in *Soulier* can be found, *mutatis mutandis*, in *Spedidam,* which cited the precedent in multiple passages.

As in *Soulier*, the exclusive rights of reproduction and making available were given a broad scope to ensure legal certainty.[407] The protection offered by Articles 2 and 3 InfoSoc, "in the same way as the protection conferred by copyright", covers not only their enjoyment but also their exercise.[408] Both rights were defined as preventive in nature, which means that any act of reproduction or communication to the public requires the prior consent of the rightholder or should be covered by an exception to be legitimate, otherwise it represents an infringement.[409] The CJEU considered this interpretation as being in line with the high level of protection requested under Recital 9 InfoSoc and with the need to obtain an appropriate remuneration for the use of the phonogram.[410]

Again like in *Soulier*, the Court admitted that the rightholder's consent could also be expressed implicitly, to the extent that conditions are clearly defined, and do not fully frustrate the principle of prior consent.[411] However, and this time differently than in the previous decision, the French scheme was held compatible with EU law, for the Court believed that it can be presumed that performers authorized the fixation of their work, and this presumption was considered legitimate since it may be rebutted at any time, and intervenes on a requirement - the written authorization of performers – which is not part of EU law but only of the French Intellectual Property Code.[412] As a complement to the main argument, the CJEU also underlined that the scheme is in line with EU law, since it enables a fair balance to be struck between conflicting fundamental rights, for two parallel reasons. On the one hand, if INA could not exploit fully its collections, a number of rightholders would perceive less or no remuneration; on the other hand, the legal presumption does not affect performers' right to obtain an appropriate remuneration.[413]

The latter is, probably, the most important sentence of the entire decision, and the one which puts in doubt the possibility of drawing a full analogy between *Spedidam* and *Soulier*. In *Spedidam*, in fact, the CJEU puts the greatest emphasis on remuneration, and the

[406] See, more extensively, Caterina Sganga, 'The Eloquent Silence of Soulier and Doke and Its Critical Implications for EU Copyright Law' (2017) 12 Journal of Intellectual Property Law & Practice 321.
[407] Judgment of 14 November 2019, *Spedidam and Others*, C-484/18, EU:C:2019:970, para 36, as in Judgment of 16 November 2016, *Marc Soulier and Sara Doke v Premier minister and Ministre de la Culture et de la Communication*, C-301/15, EU:C:2016:878, para 30, and the case law cited therein.
[408] Ibid, para 37, as in Judgment of 16 November 2016, *Marc Soulier and Sara Doke v Premier minister and Ministre de la Culture et de la Communication*, C-301/15, EU:C:2016:878, para 31.
[409] ibid, para 38, as in *Soulier and Doke*, paras 33-34, later confirmed in Judgment of 7 August 2018, Renckhoff, C-161/17, EU:C:2018:634, para 29
[410] ibid, para 39.
[411] Ibid, para 40, as in as in Judgment of 16 November 2016, *Marc Soulier and Sara Doke v Premier minister and Ministre de la Culture et de la Communication*, C-301/15, EU:C:2016:878, para 35.
[412] Ibid, para 43.
[413] Ibid para 44.

safeguards requested for implied consent and rebuttal are subject to a very light scrutiny. In *Soulier*, instead, the importance of consent explicitly prevails over remuneration, since the author's right to control the use of the work is the most important value to be preserved. This differentiates, once again, traditional author's rights from "industrial" related rights, even if granted to performers, who are the closest category to authors among all holders of neighboring rights.

3.1.1.2.16 EXTERNAL COPYRIGHT FLEXIBILITIES: FUNDAMENTAL RIGHTS AND THE FAIR BALANCE DOCTRINE[414]

Fourteen years passed from the first debut of the horizontal application of fundamental rights (*Drittwirkung*) in EU copyright law in *Promusicae* (2008), [415] which ruled that fundamental rights should be used not only by national legislators when implementing EU law, but also by national authorities and courts when applying related national measures, the Court of Justice of the European Union (CJEU) has opened a new era of rampant harmonization, where fundamental rights have consistently been employed in a wide range of matters to shape and often expand the *acquis communautaire*.[416]

Fundamental rights, as "an integral part of the general principles of law",[417] have been used twice by the CJEU to assess the validity of new EU copyright law provisions from 1998 to 2008. Then, with the entry into force of the Charter of Fundamental Rights of the EU (CFREU), and the reference to the "fair balance" made by Directive 2001/29/EC (InfoSoc, Recital 31), the number of cases where they featured a prominent role in the Court's argumentation skyrocketed. Freedom of expression, freedom to conduct a business, the right to private life and to the protection of personal data have been employed to interpret provisions in the field of ISP injunctions, exceptions and limitations, exclusive rights and fair compensation, or to assess the legitimacy of national measures.

From their first mention in a CJEU's copyright case in 1998 (*Metronome Music*),[418] the Court has made substantial use of fundamental rights in a wide and numerous array of

[414] This paragraph reports, with small adaptations to align formatting and style to this report, and with the elimination of Section 3, the pre-print open access version of Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright Versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 11 European Intellectual Property Review 683.

[415] Judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, para 68.

[416] As noted by Jonathan Griffiths, 'Constitutionalising or Harmonising? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38 European Intellectual Property Review 65. See also Bently and others (n 7); Martin Husovec, 'Intellectual Property Rights and Integration by Conflict: The Past, Present and Future' (2016) 18 Cambridge Yearbook of European Legal Studies 239; Tuomas Mylly, 'The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).

[417] Judgment of 28 April 1998, *Metronome Musik GmbH v Music Point Hokamp GmbH*, C-200/96, EU:C:1998:172, para 21; Judgment of 12 September 2006, *Laserdisken ApS v Kulturministeriet*, Case C-479/04, EU:C:2006:549, para 61.

[418] Judgment of 28 April 1998, *Metronome Musik GmbH v Music Point Hokamp GmbH*, C-200/96, EU:C:1998:172.

decisions. They can be classified chronologically in four phases, separated by landmark precedents marking momentous changes in the tests and principles developed by the CJEU.

PHASE ONE: THE PREHISTORY (1998-2008)

In ***Metronome Music*** (1998) the Court was called to decide on the validity of Article 1(1) of the Rental Directive,[419] challenged by a CD rental company which alleged that the introduction of a new rental right in favour of copyright owners disproportionately violated its freedom to pursue a trade. Eight years later, in ***Laserdisken*** (2006), a Danish company, which had long relied on international exhaustion to run its cross-border trading of copies of cinematographic works, claimed the invalidity of Article 4(2) InfoSoc and its system of regional exhaustion for disproportionate violation of its freedom of expression. In both instances the CJEU rejected the claims, proceeding with a "loose proportionality assessment",[420] made of two steps. The first step entailed the identification of the rights and freedoms to be weighed against each other, building on the indications provided by national courts. The protection of intellectual property rights was qualified as a general principle of EU law (*Metronome*)[421] and part of the right to property (*Laserdisken*).[422] The second step evaluated the validity of the measure, with a three-step assessment that verified its (i) accordance with the law (*Laserdisken*), (ii) justification in light of the general interest (both), (iii-a) proportionality to the legitimate aim pursued and necessity (*Laserdisken*), or (iii-b) proportionality and non-intolerable interference impairing the very substance of the rights guaranteed (*Metronome*). This embryonal, very general proportionality test, already used by the CJEU in other matters,[423] and derived from Member States' common constitutional traditions, the ECHR and the ECtHR's case law,[424] operated in the context of the still very traditional vertical use of fundamental rights as benchmarks to assess the legitimacy of EU law provisions. The real revolution arrived, instead, in 2008.

PROMUSICAE AND ITS PROGENY (2008-2013)

In ***Promusicae*** the Court was asked whether EU law obliged Member States to lay down an obligation for ISPs to communicate personal data of their customers in the context of civil proceedings. The referral, coming from the Juzgado de lo Mercantil de Madrid, originated from Telefonica's appeal against the injunction that requested the company to disclose to

[419] 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 [1992] OJ L 346/61

[420] Jonathan Griffiths, 'Constitutionalising or Harmonizing? The Court of Justice, the Right of Property and European Copyright Law' (2013) 38 European Law Review 65, 67.

[421] Judgment of 28 April 1998, *Metronome Musik GmbH v Music Point Hokamp GmbH*, C-200/96, EU:C:1998:172, para 21.

[422] Judgment of 12 September 2006, *Laserdisken ApS v Kulturministeriet*, Case C-479/04, EU:C:2006:549, para 65.

[423] See, eg, Judgment of 10 December 2002, *The Queen v Secretary of State for Health, ex parte British American Tobacco*, C-491/01, EU:C:2002:741, para 55; Judgment of 10 December 2002, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments)*, C-491/01, EU:C:2002:741, para 122; with regard to freedom of expression, Judgment of 25 March 2004, *Karner*, C-71/02, EU:C:2004:181, para 50.

[424] For a broader overview of the origin and development of the principle in the CJEU's case law, see Gráinne de Búrca, 'The Principle of Proportionality and Its Application in EC Law' (1993) 13 Yearbook of European Law 105.

Promusicae, an association of producers, the identities underlying IP addresses that were found exchanging infringing materials over KaZaA, in order to allow the launch of civil proceedings for copyright infringement. The CJEU excluded the existence of such an obligation, rejecting also Promusicae's attempt to derive it from the need to respect Article 17 and 47 CFREU on the protection of intellectual property and the right to an effective remedy. To support its conclusions, the Court introduced into EU copyright law two key interpretative prescriptions, already tested by the CJEU in other sectors, and now representing one of the pillars of the Court's copyright jurisprudence.[425] The first requires Member States to implement EU directives using a reading that allows a fair balance to be struck between various fundamental rights protected by the Community legal order, as demanded by Recital 31 InfoSoc. The second – a step forward compared to the InfoSoc preamble - asks national authorities and courts to use fundamental rights as interpretative tools to ensure that national measures transposing EU directives are read in line with fundamental rights and other general principles of Community law.

The innovation was momentous, for it marked the debut of the *Drittwirkung* in EU copyright law, which promised to increase the flexibility of the discipline, involving also national courts in the process. For the new fair balance doctrine to properly operate, however, the Court would have needed to formulate clear balancing criteria, and to apply them consistently in subsequent decisions. Instead, the decisions that followed added only side clarifications, and provided assessments that were mostly factual and backed by a dry and concise reasoning.

In ***Painer,***[426] concerning the unauthorized publication of photographs realized by Ms Painer, which portrayed a girl abducted and later released, on a number of newspapers reporting on the event, the CJEU refused to use freedom of expression to broaden the scope of the exception of Article 5(3)(e) InfoSoc in favor of the defendant-newspapers, arguing that the provision's goal was not to strike a balance between Article 10 CFREU and copyright, but between copyright and public security. In fact, the Court narrowed down *Promusicae* by allowing the use as an interpretative tool of the sole fundamental right which the legislature aimed at protecting through the provision at stake. Later, in ***Scarlet Extended***[427] and ***Netlog,***[428] the CJEU clarified that the entry into force of Article 17(2) CFREU did not introduce an absolute protection and inviolability for copyright,[429] but exhausted the fair balance analysis with a very concise observation, which qualified and banned the general filtering system imposed via injunction as a serious infringement of the ISP's freedom to conduct a

[425] Judgment of 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596, para 87; Judgement of 26 June 2007, *Ordre des barreaux francophones and Germanophone and Others*, C-305/05, EU:C:2007:383, para 28.
[426] Judgment of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798.
[427] Judgment of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771.
[428] Judgement of 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85.
[429] Judgment of 24 November 2011, *Scarlet Extended*, C-70/10, EU:C:2011:771, para 43; Judgement of 16 February 2012, *SABAM*, C-360/10, EU:C:2012:85, para 41.

business.[430] A similarly dry statement featured in ***Luksan,***[431] where the Austrian non-recognition of the copyright over a movie to its director was defined as a deprivation under Article 17(1) CFREU of a "lawfully acquired IP right" granted by EU law.[432] The argument, however, was only secondary to the finding of a violation of secondary EU law caused by the illegitimate wrong implementation of an EU Directive, and did not provide any additional guidance on content and implications of Article 17(2) CFREU.[433]

Confronted with a fact pattern similar to that of *Promusicae,* ***Bonnier Audio***[434] upheld a Swedish provision introducing the possibility to issue injunctions obliging ISPs to disclose users' data in civil proceedings on copyright infringement. The assessment of the fair balance was again concise and mostly practical,[435] with a very cursory but still significant reference to the elements of a raw proportionality assessment taken from the contested national provision ("the reasons for the measure outweigh the nuisance or other harm…"),[436] suggesting a synonymity between the notion of "fair" and the notion of "proportionate".[437] Similarly, when called to define the legitimacy of national private levy schemes financing the "fair compensation" provided under Article 5(2)(b) InfoSoc in case of private copy exception, the CJEU announced the intention to evaluate each solution on the basis of the principle of equal treatment under Article 20 CFREU,[438] but then proceeded with concise argumentations and very fact-specific criteria, of little use beyond the scope of private levy schemes.

TAKING PROPORTIONALITY SERIOUSLY (2013-2018)

It took five years for the Court to bring order in the fragmentation and clarify the steps to be followed when performing the fair balance test. The occasion was the Grand Chamber's decision in ***Sky Österreicht,***[439] ruling on the legitimacy of Article 15(6) of Directive 2010/13/UE, which allows Member States to determine the conditions of the unauthorized and uncompensated use by broadcasters of short excerpts of events of high interest to the public, which are transmitted on an exclusive basis by another broadcaster under their jurisdictions.

Sky Österreich retrieved and confirmed the most important doctrines developed by the CJEU so far, from the horizontal effects of fundamental rights[440] to the social function of

[430] Ibid, para 48; Ibid, para 46.
[431] Judgment of 9 February 2021, *Luksan*, C-277/10, EU:C:2012:65.
[432] Ibid, para 70.
[433] For a minimization of the importance of the decision in this respect see Henning Grosse Ruse-Khan, 'Overlaps and Conflict Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing 2015).
[434] Judgment of 19 April 2012, *Bonnier Audio et al.*, C-461/10, EU:C:2012:219.
[435] Ibid, para 57-59.
[436] Ibid, para 58.
[437] Ibid, para 60.
[438] Judgment of 27 June 2013, *VG Wort*, Joined Cases C-457/11 to C-460/11, EU:C:2013:426, para 73; Judgment of 5 March 2015, *Copydan Båndkopi*, C-463/12, EU:C:2015:144, para 3.
[439] Judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28.
[440] Ibid, para 60.

property and the freedom to conduct a business.[441] It added, however, two important points. On the one hand, it used the wording and contextual placement of the fundamental freedom at stake to define its content and, particularly, its inner limitations.[442] On the other hand, it proceeded with a direct and punctual application of Article 52(1) CFREU to evaluate the legitimacy of the limitation of the right(s) or freedoms(s) that the challenged legislative measure had allegedly caused.[443] Building on the Charter's provision, the Court introduced a two-step analysis. First, it verified whether the contested provision affected the core content (or essence) of the freedom to conduct a business. Once it answered to the negative, clarifying that the freedom could still be exercised otherwise,[444] it moved to the second step - the evaluation of the proportionality of the interference. The test adapted the standard proportionality assessment proposed by Article 52 CFREU to the fair balance analysis, articulating it in four prongs, which are (i) the legitimate aim of the measure, that is if the measure was adopted in the general interest or to protect the freedom or right of others; (ii) its appropriateness, framed as effectiveness and adequacy to reach its purpose; (iii) its necessity, which consists in the unavailability of a less restrictive solution to achieve the same goal, and (iv) its strict proportionality – the real fair balance test -, that is whether the measure managed to strike a proportionate balance between the requirements of protection resulting from the two fundamental freedoms or rights at stake.[445] The Court concluded that the exception had to be understood as proportionate and legitimate, since it was introduced in the public interest and to protect the right to receive and impart information, it adequately ensured access to news related to events of high interest, and it left to rightholders the possibility to still charge for the use of their programs through other channels, while a full exclusivity would have excessively increased the cost of access to their programs.[446]

The same criteria were used also in ***UPC Telekabel***,[447] which ruled on the compatibility with EU fundamental rights of an injunction that ordered under coercive penalties to an ISP to ban access to an infringing website, without specifying the measures to be taken, but allowing the ISP to avoid liability by proving to have adopted all reasonable responses.[448] The test implemented, however, was a step back compared to *Sky Österreicht,* as it provided substantially less details, and used a particularly convoluted reasoning.[449] First, the Court looked at whether the injunction infringed the very substance of the ISP freedom to conduct

[441] Ibid, para 45.
[442] Ibid, para 46, noting that Article 16 CFREU differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter", and concluding on this basis that "the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest".
[443] Ibid, para 48.
[444] Ibid, para 49.
[445] Ibid, para 50.
[446] Ibid, paras 51-66.
[447] Judgment of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192.
[448] Ibid, para 51.
[449] For a broader critique of the case see Martin Husovec and Miquel Peguera, 'Much Ado about Little – Privately Litigated Internet Disconnection Injunctions' (2015) 46 International Review of Intellectual Property and Competition Law 10.

a business, and concluded that the possibility for the ISP to decide on the measures to undertake, and thus to tailor them to its resources and abilities, preserved the essence of Article 16 CFREU. [450] Then, the CJEU moved to the criteria to be used by national courts when assessing the legitimacy of the measures implemented by the ISP. With a much more concise and implicit language, recalling Article 51(1) CFREU, it requested to check whether the measure was appropriate ("effect of preventing unauthorized access"[451]), necessary ("do not unnecessarily deprive internet users" [452] of their freedom of information) and strictly proportionate, *id est* striking a fair balance between all applicable fundamental rights,[453] with a more detailed evaluation devoted to the appropriateness prong.[454]

After ***Nintendo v PC Box***[455] made an implied translation of the same principles in the field of DRM protection, ***Coty Germany v Stadtsparkasse***[456] added another brick in the wall, specifying that a measure which results in a serious infringement of a right protected by the Charter is to be regarded as not respecting the fair balance requirement. [457] The case concerned the validity of a German provision which allowed a banking institution to oppose banking secrecy against any request of information on the name and address of an account holder, and was used by Stadtsparkasse to refuse disclosing the identity underlying an account linked to an online seller of perfumes carrying trademarks on which Coty Germany held an exclusive license. The CJEU concluded that the provision, by excluding any possibility for rightholders to acquire information on the infringers' data, completely deprived rightholders of an effective remedy, thus frustrating the essence of Articles 47 and 17(2) CFREU.[458] This ruled out the presence of a fair balance and the need to proceed further with the proportionality assessment. In fact, the approach was already implicitly present *Sky Österreicht*, which checked the respect of the core of the freedom/right before proceeding with the balancing test. *Coty*, however, crystallized the assumption in a cogent presumption of unfairness and illegitimacy of the measure, seemingly in line with the absolute theory of essence, which excludes the proportionality assessment in case of violation of the core of the fundamental right,[459] and with a use of Article 17(2) CFREU to expand the reach of the EU harmonization and compress Member States' policy space.[460]

[450] Judgment of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, paras 52-53.
[451] Ibid, para 62.
[452] Ibid, para 63.
[453] Ibid, para 57.
[454] Ibid, paras 58-62.
[455] Judgment of 23 January 2014, *Nintendo*, C-255/12, EU:C:2014:25.
[456] Judgment of 6 December 2017, *Coty Germany*, C-230/16, EU:C:2017:941.
[457] Ibid, para 35.
[458] Ibid, para 38.
[459] See Steve Peers and Sacha Prechal, 'Article 52: Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Nomos 2015).
[460] Along the same Husovec (n 417) 262., theorizing the introduction of a positive obligation for Member States to provide a specific remedy.

Mc Fadden,[461] ruling on the legitimacy of three injunctions imposed on a shop owner in order to ensure the prevention of copyright infringements through the wi-fi connection he offered free access to, followed *Coty*, checking in the first place whether they violated the essence of any of the conflicting freedoms and rights involved (freedom to conduct a business and freedom of information of users),[462] by verifying whether they could still be exercised otherwise.[463] Only the injunction that passed this first stage - the obligation to password-protect the wi-fi network - was then subject to the proportionality assessment dictated by Article 52 CFREU, where the CJEU factually evaluated whether the measure was appropriate, necessary and strictly targeted/proportionate.[464]

The approach was confirmed in ***Bastei Lubbe*,**[465] which concerned the compatibility with EU law of a German provision that allowed the owner of an internet connection, used to infringe copyright, to escape liability by proving that other people were able to have independent access to it at the time of the infringement, without being obliged to provide additional details. Here the Court excluded that the right to private life, and the higher protection it confers to family life, may allow a national measure that, making it possible to refuse to testify against family members, offered a sort of immunity to the owners of family-shared internet connections. The German provision was deemed to seriously impair the essence of the right to an effective remedy (Article 47 CFREU) and to intellectual property (Article 17(2) CFREU), a circumstance that radically denied the presence of a fair balance - *id est* of proportionality - without the need to perform the second prong of Article 52(1) test.

Cases involving fundamental rights to draw the boundaries of exclusive rights present different features. Two examples are ***GS Media***[466] and ***Renckhoff*.**[467]

In ***GS Media,*** the Court was asked to determine whether the posting of a link to protected works, freely available to another website without the consent of the rightholder, constituted an illegitimate communication to the public under Article 3 InfoSoc. Recalling the need for a fair balance between copyright and other fundamental rights,[468] the CJEU recognized that a positive answer would have had chilling effects on internet users who, unable to ascertain with certainty whether the linked content had been legitimately posted, would have avoided hyperlinking not to expose themselves to an incalculable risk of infringement. However, instead of following AG Wathelet's suggestion of excluding hyperlinks from the scope of Article 3 InfoSoc,[469] the Court decided to introduce an additional criterion to identify illegitimate conducts - the knowledge or reasonable expectation to know about the

[461] Judgment of 15 September 2016, *Fadden*, C-484/14, EU:C:2016:689.
[462] Ibid, paras 88-89, 91.
[463] Ibid, para 92.
[464] Ibid, paras 93-97.
[465] Judgment of 18 October 2018, *Bastei Lübbe*, C-147/17, EU:C:2018:841.
[466] Judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644
[467] Judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634
[468] Ibid, para 31.
[469] Opinion of Advocate General Wathelet delivered on 7 April 2016, *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, EU:C:2016:221, para 60.

illegitimate nature of the posted material, which is presumed in case of for-profit activities.[470] The solution struck a temporary, practical balance between copyright and the role hyperlinks play in fostering freedom of expression and the right to receive and impart information online,[471] but did not provide any argument that could contribute to the construction of the fair balance doctrine in the context of the interpretation of exclusive rights.

The output was different in ***Renckhoff,*** where the CJEU excluded that the unauthorized reposting on a school website of a protected picture, used by a pupil in a class assignment and taken from another website, could be subject to the *GS Media* criteria. The Court based its reasoning on two observations, both impacting on the fair balance results. The first emphasized that while hyperlinks are necessary to preserve freedom of expression on the Internet, the same cannot be said for the reuse of an image that can be lawfully obtained through other channels.[472] The second underlined that hyperlinks do not challenge the author's preventive right to control and eventually block the use of her work, insomuch as a direct reposting on another website does.[473] In this sense, the CJEU implicitly applied the first step of the test, identifying the fundamental right at stake and evaluating its effective involvement in the case. Afterwards, rather than assessing whether the essence of the right(s) and freedom(s) involved was violated, the CJEU focused on the preservation of the effectiveness of Article 3 InfoSoc,[474] limiting the evaluation of the necessity of the restriction to a cursory statement,[475] and omitting the strict proportionality check.[476]

Alongside these quite consistent precedents, ***Deckmyn***[477] stands out for its relatively different approach. As mentioned above, by ruling that parody is an autonomous notion of EU law[478] and that the application of Article 5(3)(k) InfoSoc should preserve the fair balance between copyright and freedom of expression (link provision-fundamental right),[479] the CJEU used fundamental rights to request an almost complete harmonization of the exception, banning all restrictive criteria for its application save for those deriving from the commonly known main features of the figure (necessity and strict proportionality). In addition, by linking parody to freedom of expression, the Court had implicitly transformed it into a mandatory exception (essence check, absorbing legitimate aim and appropriateness of the measure), which Member States should implement unless they can prove that they could strike through

[470] Ibid, para 51.
[471] Judgment of 8 September 2016, *GS Media*, C-160/15, EU:C:2016:644, para 45.
[472] Judgment of 7 August 2018, *Renckhoff*, C-161/17, EU:C:2018:634, para 40.
[473] Ibid, para 28.
[474] Ibid, para 30.
[475] Ibid
[476] No attention was paid, instead, to the exception for teaching and scientific research and to the fairness of the balance struck between copyright enforcement and the right to education protected by Article 14 CFREU, despite the ample space devoted by AG Sanchez Bordona to the matter (Opinion of Advocate General Campos Sánchez Bordona delivered on 25 April 2018, *Land Nordhein- Westfalen v Dirk Renckhoff*, C-161/17, EU:C:2018:279, para 109 -113.
[477] Judgment of 3 September 2014, *Deckmyn*, C-201-13, EU:C:2014:2132.
[478] Ibid, para 15.
[479] Ibid, para, 25.

other means the same fair balance between copyright and Article 11 CFREU in similar circumstances (again necessity).[480]

Despite its argumentation was extremely concise (36 paragraphs in total, 22 operative), and the fair balance assessment was fully remitted, with little guidance, to national courts, *Deckmyn* suggested to many that the gate was open for a much stronger impact of fundamental rights and their judicial implementation on the development of EU copyright law.[481] None of the decisions, in fact, offered an answer on the boundaries of the *Drittwirkung* in the field, and national courts interpreted their role with quite ample variations across the Union. The three referrals submitted in 2017 by the BGH did not come, in this sense, as a surprise, marking the opening of a new, fourth phase – the one of "boundary setting".

DRAWING A CONCEPTUAL MAP AND ITS GAPS

In the three phases, the notion of fair balance and fundamental rights have come into play in different areas – ISP injunctions, fair compensation, the definition of the scope of exceptions and exclusive rights. Despite the different matters at stake, however, the case law of the Court has converged around the construction of a fair balance doctrine that can be summarized in a conceptual map made of three steps.

In the first step, the CJEU identified the right or freedom conflicting with copyright, usually on the basis of the suggestion of the referring court. Then, it linked it with the provision(s) or injunction(s) at stake, based, to the extent possible, on the legislative intent. If there was no connection, the fundamental right or freedom was not used in the assessment. If a connection was found, the Court often explained the details of the interaction. Finally, the third and most important step consisted in the assessment of the presence of a fair balance, on the basis of criteria ultimately drawn from Article 52(1) CFREU.

Preliminarily, the CJEU verified whether the measure negatively affects the essence of the freedom or right involved. Should that be the case, the lack of fair balance was presumed. On the contrary, if the essence was preserved, the Court moved to the real proportionality assessment, which was adapted to the type of fair balance at stake.[482] Generally, in the case of ISP injunctions, the test was constituted by the full array of criteria suggested by Article 52 CFREU (legitimate aim, appropriateness, necessity, strict proportionality). In the case of definition of the scope of rights and exceptions, instead, the analysis was more simplified. The legitimate aim and appropriateness of the measure were absorbed within the preliminary essence check, where the focus, however, was not directly the core content of copyright or of the conflicting right(s) or freedom(s), but the preservation of the effectiveness of the exclusive right or the exception - the second being a mediated concept, since the purpose of

[480] See Aplin and Bently (n 9).
[481] Ibid at 131; Eleonora Rosati, 'Just a Laughing Matter? Why the Decision in Deckmyn Is Broader than Parody' (2015) 52 Common Market Law Review 511.
[482] More generally, see Kosta Vasiliki, *Fundamental Rights in EU Internal Market Legislation* (1st edn, Bloomsbury Publishing 2015) <https://www.bloomsbury.com/uk/fundamental-rights-in-eu-internal-market-legislation-9781782258971/> accessed 9 July 2022.

the exception is, usually, the protection of a fundamental right. Then, the Court assessed the necessity of the measure (restriction of the right or expansion of the exception) for the protection of the conflicting right or freedom, verifying whether there were other less invasive measures available to pursue the same goal. Last, it evaluated the strict proportionality of the intervention on the right or exception, looking at the fair balance between the requirements of protection of copyright and the conflicting right/freedom or public interest.

This conceptual map is clearly far from complete. The fair balance doctrine has been spelled out and followed step-by-step only in a handful of landmark cases, while most of the decisions, characterized by shorter argumentations, have merely recalled it or applied it cursorily, opting for a concise, practical and often syncretic analysis. Despite the Court's recent effort to offer more guidance, several essential aspects were still waiting to be clarified before the BGH's referrals in *Funke Medien*, *Pelham* and *Spiegel Online*.

The reference goes, first of all, to the **definition of the essence** of copyright, particularly in light of its protection under Article 17(2) CFREU.[483] The Court suggested that a fair balance is excluded if such a core is violated,[484] but has never provided any clear direction on the matter. Precedents have not been univocal either on the **sources to be used** in order to build content and structure of the conflicting rights at stake, particularly with regard to Article 17 CFREU. While the CJEU has reiterated that the validity of EU provisions should be assessed only against the Charter's rights, since the ECHR has not been incorporated yet in EU law[485], in several decisions the interpretation of fundamental rights has been assisted by references to the Convention and to the ECtHR's case law, and the role of common constitutional traditions to define the protection of property has featured important strains of the CJEU's case law.[486] No such clarity has characterized, instead, the construction of Article 17 CFREU, nor the fair balance decisions. Also, the **specific subject matter of copyright**, that is the content of the economic and moral rights to be taken as a benchmark in the balance against other fundamental rights, has long been left undefined. Precedents from other fields have indicated the need to avoid taking as metrics the maximum potential remuneration

[483] The debate on the role of the notion of essence in the fundamental right balance under the CFREU has become particularly intense in recent years. On the point see Peers and Prechal (n 460); Maja Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core' (2018) 14 European Constitutional Law Review 332.

[484] As in other field of EU law. See Brkan (n 484). See also Matti Mika-Tuomas Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter. ECJ 6 October 2015, Case C-362/14, Maximillian Schrems v Data Protection Commissioner' (2016) 12 European Constitutional Law Review 318.

[485] Judgment of 15 February 2016, *PPU -N*, C-601/15, EU:C:2016:85, paras 45 - 46; Judgement of 5 April 2017, *Orsi*, C-217/15, EU:C:2017:264, para 15.

[486] Judgment of 13 December 1979, *Hauer V Land Rheinland-Pfalz*, C-44/79, EU:C:1979:290; Judgment of 14 May 1974, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, C-4/73, EU:C:1975:51.

possible,[487] but nothing as such has systematically emerged in the case law on the interplay between copyright and fundamental rights protection. More generally, the Court has long left in haze the **boundaries of the *Drittwirkung*** in EU copyright law, being unclear on how far fundamental rights can go in shaping existing provisions and creating new ones, beyond the content provided by a literal and contextual interpretation of existing sources.

Such conceptual gaps, all intertwined and dependent on each other, would have needed a unitary solution to be coherently and exhaustively addressed. A path of systematization and construction of a more detailed, general doctrine, which would have also helped defining how far fundamental rights can go in shaping EU copyright law, could have only started from AG's Opinions, and would have required an additional effort of argumentation from the CJEU, in line with the approach followed in the third phase. Unfortunately, the Grand Chamber did not manage to fully exploit, for different reasons and to a different extent, the opportunity offered by *Funke Medien,*[488] *Pelham*[489] and *Spiegel Online.*[490]

THE BOUNDARY-SETTING SEASONS (2019 - TODAY): *FUNKE MEDIEN*, *PELHAM* AND *SPIEGEL ONLINE*

On July 29, 2019, the Grand Chamber has issued its responses to the three referrals, from the pen of Rapporteur Ilesic. Compared to the dangerous shift promised by AG Szpunar's Opinions, the decisions are characterized by a more balanced approach, and provide interesting elaborations of the main pillars of the CJEU's copyright jurisprudence and some long-awaited clarifications on controversial points that have never been explicitly addressed by the Court.

All the three decisions converge in defining Articles 2 and 3 Infosoc as provisions of full harmonization, on the basis of their unequivocal language, the unconditional nature of the rights they protect and the high level of protection requested by the Directive.[491] The wording of Articles 5(2) and (3) InfoSoc and the indications coming from preparatory works, instead, are read as indication of the need to define the scope of Member States' discretion on a case-by-case basis, depending on the impact of the degree of harmonization of exceptions on the

[487] Judgment of 4 October 2011, *Football Association Premier League and Others*, C-403/08 and C-429/08, EU:C:2011:631; Judgment of 18 March 1980, para 94; *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, C-62/79, EU:C:1980:84; para 15-16; Judgment of 20 January 1981, *Musik-Vertrieb Membran and K-tel International v GEMA,* Joined Cases 55/80 and 57/80, EU:C:1981:10, para 9-12; Judgment of 20 October 1993, *Phil Collins v Imtrat Handelsgesellschaft mbH e Patricia Im-und Export Verwaltungsgesellschaft mbH e Leif Emanuel Kraul v EMI Electrola GmbH*, Joined Cases C-92/92 and C-326/92, EU:C:1993:847, para 20; Judgment of 23 October 2003, *Rioglass and Transremar*, Case C-115/02, EU:C:2003:587, para 23; Judgment of 5 March 2009, *Uteca*, C-222/07, EU:C:2009:124, para 25.

[488] Opinion of Advocate General Szpunar delivered on 25 October 2018, F*unke Medien NRW v Bundesrepublik Deutschland*, C-469/17, EU:C:2018:870.

[489] Opinion of Advocate General Szpunar delivered on 12 December 2018, *Pelham and Others*, C-476/17, EU:C:2018:1002.

[490] Opinion of Advocate General Szpunar delivered on 10 January 2019, *Spiegel Online*, C-516/17, EU:C:2019:16.

[491] Judgment of 29 July 2019, *Funke Medien*, C-469/17, ECLI:EU:C:2019:623, paras 29 – 38; Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625, paras 78 -85.

smooth functioning of the internal market.[492] The Court is also clear in specifying, however, that this "freedom" is circumscribed by the parameters and general principles of EU law – such as proportionality, by the conditions set by the provisions regulating the limitations at stake, by the need to respect the objectives pursued by the directives and to safeguard the effectiveness and fair balance purpose of the exception, by the three-step-test and, not least, by the principles enshrined in the Charter, along the lines of *Promusicae* and its progeny.[493] Regardless of the margin of discretion left to national legislators, national authorities and courts are free to apply national standards of protection of fundamental rights only to the extent that they are not lower than the level requested by the Charter, and that the primacy, unity and effectiveness of EU law is not compromised, in line with the *Melloni* doctrine and Article 51 CFREU.[494]

Departing from the overly rigid approach proposed by the AG Opinions, the Grand Chamber delineates a graduated interplay between fundamental rights and exceptions, based on a blend of literal, contextual and teleological arguments. The CJEU still firmly excludes that fundamental rights may justify the introduction of exceptions beyond the scope of Article 5 InfoSoc, referring to the exhaustive nature of the list, to the need to apply exceptions consistently, and to the negative impact that their unharmonized proliferation would have on legal certainty and the functioning of the internal market.[495] The fair balance set by the legislator through Article 5(2) and (3) is ultimately deemed enough to offer protection to freedom of expression and of press.[496] Yet, this consideration does not lead the Court to overemphasize the role of the legislator as the AG Opinions did, forcing a strict literal reading of the legislative text unless this would result in a gross violation of the essence of a fundamental right. On the contrary, asked to clarify whether national courts could depart from a restrictive interpretation of exceptions when needed to respect freedom of expression, the CJEU confirms the horizontal effects of fundamental rights requested by *Promusicae* and subsequent case law,[497] reiterates that Article 17(2) CFREU has not conferred any absolute nor inviolable status to copyright,[498] and requests national courts to ensure that the effectiveness of exceptions is safeguarded, particularly when they aim at protecting fundamental rights and freedoms.[499] Compared to other precedents, the CJEU goes as far as to state that Article 5 InfoSoc does not only provide limitations to copyright, but confers rights to users, and makes an explicit reference to the ECtHR's case law to draw guiding criteria for

[492] Ibid, paras 39-44; ibid, paras 23-38.
[493]Ibid, paras 45 -53, Ibid, paras 31 – 38.
[494]Ibid, paras 30 – 32; Judgment of 29 July 2019, *Pelham*, C-476/17, EU:C:2019:624, paras 78 -80; ibid, paras 19 -21.
[495] Ibid, paras 53 -63; Ibid, paras 58 – 64; Ibid, paras 41 – 48.
[496] Ibid, para 58; Ibid, para 59; Ibid, para 43.
[497] Ibid, para 68; Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625, para 52.
[498] Ibid, para 72; Ibid, para 56; Judgment of 29 July 2019, *Pelham*, C-476/17, EU:C:2019:624, para 33.
[499] Ibid, para 71; Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625, para 55.

the balance between copyright and freedom of expression,[500] looking at the nature of the speech and at the importance of the information at stake as in *Ashby Donald.* [501] The last statement complements the reference to the common constitutional traditions and to international human rights instruments as inspiration and background for the Charter's rights, and thus as a tool for their interpretation.[502]

The CJEU adopts a similar approach to define the scope of exceptions, confirming the validity of the *Deckmyn* doctrine. In *Spiegel Online*, the Grand Chamber excludes that the limitation to the right of reproduction for purpose of reporting current events (Article 5(3)(c) InfoSoc) may be subject to the author's prior consent, since such a requirement would frustrate the goal of disseminating the information rapidly to satisfy the informatory interest of the public, and thus hinder the fulfilment of freedom of expression and of press.[503]

Much more interestingly, however, the Court uses of the same interpretative tool to draw the boundaries of exclusive rights. In *Pelham*, the key criteria used to define whether a 2-second sample amounts to partial reproduction under Article 2 InfoSoc are the functions of the right and the need to strike a fair balance between Article 17(2) CFREU, conflicting rights and the public interest, taking into account that Article 17(2) has not transformed copyright into an absolute and inviolable right.[504] The Court qualifies sampling as a form of artistic expression covered by freedom of the arts (Article 13 CFREU and 10(1) ECHR),[505] which prevails when weighed against copyright, since in this particular case the protection of the producer's investment and the opportunity of receiving a satisfactory return are not prejudiced by a sample that is included in a modified form unrecognizable to the ear in another piece.[506] Allowing the producer to prevent another person from taking a sound sample, even if very short, for the purpose of artistic creation would hinder the exercise of a fundamental right, " despite the fact that such sampling would not interfere with the opportunity which the producer has of realising satisfactory returns on his or her investment".[507] For the first time after the early case law on the essential function doctrine, the CJEU takes as a benchmark for the balance against fundamental rights and freedoms not a generic copyright entitlement, but the specific subject matter of the right, defined on a case-by-case basis in light of the function the exclusivity is called to perform.

[500] Ibid, para 70; Ibid, para 54.
[501] EctHR, 10.01.2013, *Ashby Donald and Others v France*, EC:EHCR:2013:36769/08.
[502] Judgment of 29 July 2019, *Funke Medien*, C-469/17, ECLI:EU:C:2019:623, para 59; Judgment of 29 July 2019, *Pelham*, C-476/17, EU:C:2019:624, para 61; Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625, para 44.
[503] Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625, paras 71 – 73.
[504] Judgment of 29 July 2019, *Pelham*, C-476/17, EU:C:2019:624, para 33.
[505] Ibid, para 35.
[506] Ibid, para 37. The same reference to the functions of the right features the definition of the scope of Article 9 Rental, based on Recitals 2 and 5, which justifies the attribution of a distribution right to phonogram producers with the need to fight piracy and grant them the possibility to recoup their risky investment [44-46].
[507] Ibid, para 38.

3.1.2 NATIONAL LEGAL SYSTEMS

3.1.2.1 AUSTRIA

The Austrian copyright law (hereinafter "UrhG-A") of 1965, as last amended in 2022,[508] is in line with the EU copyright acquis, however, to a certain extent. UrhG-A features a multitude of flexibilities, including the ones introduced by the CDSM Directive. However, some EU exceptions do not find a direct correspondence in the Austrian Act, such as the exceptions for parody, ephemeral recording, private study, socially oriented uses, as well as the three-step-test as enshrined in Article 5(5) of the InfoSoc Directive. Several provisions present more rigidity compared to EU rules (e.g. exceptions for incidental inclusion, reprography, illustration of teaching and research, 'other uses' by public authorities), or precede the entry into force of similar EU provisions and may for this reason be more restrictive (e.g. freedom of panorama) or not fit to the digital era.

In addition to the E/Ls, UrhG-A features several provisions regarding special licensing schemes, which contribute to end users' access to cultural content. Also, there is evidence that the fundamental human rights discourse and consumer law help making copyright law more user-friendly.

3.1.2.1.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.1.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc was implemented slavishly in **Section 41a UrhG-A**,[509] entitled "transient and incidental reproductions." The provision entered into force in 2003.

3.1.2.1.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc has not been implemented in UrhG-A. Neither there is concrete evidence to suggest that **Article 10(1)(c) Rental** has been transposed. Thus, Austrian copyright law does not feature any exception for ephemeral recordings of works or other subject-matter.

3.1.2.1.1.3 INCIDENTAL INCLUSION

Section 42e UrhG-A, entitled "unsubstantial accessories" and entered into force in 2015, corresponds to the copyright exception provided for incidental inclusion by **Article 5(3)(i) InfoSoc**. **Section 42e UrhG-A** permits the reproduction, distribution, broadcasting, making available to the public, use for public lectures, performances, and presentations of works only

[508] Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz). StF: BGBl. Nr. 111/1936 (StR: 39/Gu. BT: 64/Ge S. 19.)
Federal Law on Copyright in Literary and Artistic Works and Related Protection Rights (Copyright Law). StF: BGBl. No. 111/1936 (StR: 39/Gu. BT: 64/Ge p. 19.)
[509] For related case law, see: OGH 4 Ob 6/12d, OGH 4 Ob 71/14s.

if such acts are incidental to other activities or incidentally included in other works. No reference to the original work is needed.[510]

3.1.2.1.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Austrian copyright law provides several exceptions to facilitate access and use of computer programs, databases, and works protected by TPMs.

Entered into force in 1993, **Section 40d(2) UrhG-A** transposes **Article 5 Software**, by adopting verbatim the language and by closely following the structure of the EU provision. Similarly, **Section 40e UrhG-A** transposes **Article 6 Software**, by slavishly adopting the language of its EU counterpart.

Although there is no evidence to suggest that **Article 8 Database** has been transposed to the Austrian copyright law, in 1998, **Section 40h UrhG-A** introduced an exception to facilitate the access to and normal use of databases, by meeting the standards set by **Article 6(1) Database**. According to **Section 40h(1)**, any natural person is allowed to make individual copies of a database on any medium, only if the contents of the database are not accessible by any other means. The act of reproduction shall be carried out only for private and non-commercial use. Additionally, and by adopting the wording of the **Article 6(1) Database**, **Section 40h(3)** permits the lawful user of a database or a part thereof to perform any act necessary to access to the content of the database or a part thereof, only to the extent of its intended use. While this exception cannot be waived, the same provision allows the scope of the "intended use" to be determined by contract. **Section 40h(3)** compromises the scope of the exception enshrined in its EU counterpart, as it allows the contractual intervention to define the intended uses of the database.

As to accessing and normal use of works protected by TPMs, **Section 90c(6) UrhG-A**, which entered into force in 2018 and later amended in 2022, requires the rightholders as such to take the necessary measures to enable lawful access to the work or other subject-matter, especially to enjoy the exceptions provided for the preservation of cultural heritage **(Section 42(7))**, persons with disabilities **(Section 42d)**, digital and cross-border teaching activities **(Section 42g),** and TDM **(Section 42h).** This regulation cannot be waived by contract.

3.1.2.1.1.5 FREEDOM OF PANORAMA

Section **54(1)(5) UrhG-A,** entitled "free use of works of the fine arts" and entered into force in 1936, is the Austrian provision that most closely resembles the freedom of panorama exception introduced by **Article 5(3)(h) InfoSoc**. However, the limitations it introduces to subject-matter, permitted acts, and means of reproduction make it more restrictive than its EU counterpart.

The provision permits the reproduction, distribution, public demonstration by optical means, broadcasting, and making available to the public of works of architecture and other

[510] For related case law, see: OGH 4 Ob 81/17s.

works of fine arts produced for the purpose of being permanently installed in a public place. Uses excluded from the scope of this exception are the reproduction of works of architecture, of painting or graphic arts permanently installed in public spaces, and of sculptures by sculpting.

In several cases, the Austrian Supreme Court ruled that the uses permitted under this exception does not extend to the adaptation of the work.[511] Also, in **OGH 4 Ob 80/94**, the **Supreme Court** interpreted the extent of permitted uses, by deciding that this exception does not apply only to the reproduction of a building in its entirety, but also to the reproduction of its parts as well as its interior parts, such as staircase, courtyard, halls and rooms, portals, and doors as well as furnishings. It is required, however, that they are reproduced, distributed, in connection with the building, because only their connection with a certain room makes them an integral part of a "work of architecture". If, on the other hand, such furnishings are reproduced on their own, without any recognizable connection to others or to the space surrounding them, then the free use of the work is regularly excluded.

3.1.2.1.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.1.2.1 REPROGRAPHY

The Austrian reprography exception is featured under **Section 42(1) UrhG-A,**[512] entitled "reproductions for own and private use." Its entry into force precedes the adoption of **Article 5(2)(a) InfoSoc,** as it was introduced in 1936.

Section 42(1) UrhG-A permits the reproduction of individual copies of a work on paper or a similar medium for private use, unless, as indicated in **Section 42(5),** the act is carried out for making the work available to the public, or if the original work was unlawfully reproduced or made available to the public. Copies made for private use cannot be made available to the public.

Section 42(8) UrhG-A carves out from the exception a number of works, requiring the rightholder's consent for their reproduction. This is the case for entire books or periodicals, sheet music, or cases in which it is not the original works that is being reproduced, but its reproduction by any means. On the contrary, reproductions by transcription and reproductions of unpublished or out-of-print works are still covered by the general exception.

Compared to the EU exception, the Austrian provision is more restrictive, for it imposes limitations to the subject matter. However, in **OGH 4 Ob 101/98a**, the **Supreme Court** decided that the beneficiaries of the exception for reprography are not only natural persons but also legal persons.

[511] See: OGH 4 Ob 51/94, OGH 4 Ob 190/12p.
[512] For related case law, see: OGH 4 Ob 143/94, OGH 4 Ob 80/98p.

3.1.2.1.2.2 PRIVATE COPY

Austrian copyright law provides for certain flexibilities for the private copying of databases and works.

Section 40h(1) UrhG-A corresponds to **Article 6(2)(a) Database**, which permits to any natural person to make individual copies of a non-electronic database work for private non-commercial use. Likewise, **Section 76d(3)(1) UrhG-A**, by closely following **Article 9(a) Database**, permits the reproduction of a substantial part of a non-electronic database that has been disclosed, for private purposes.[513]

Section 42(4) UrhG-A, entitled, "reproduction for own and private use", entered into force in 1936, thus preceding the adoption of **Article 5(2)(b) InfoSoc**.[514] The provision allows any natural person to make copies of a work in any form, for private purposes that are neither directly nor indirectly commercial. The reproduced work should have not been unlawfully reproduced or distributed, and copies produced under the exception cannot be made available to the public.

Whereas **Section 42(4) UrhG-A** sets a general rule regarding the reproduction of works for private use, **Section 42(8) UrhG-A**,[515] excludes the same categories of works from the scope of this exception as well. In this sense, compared to the EU exception, the Austrian provision is more restrictive, for it imposes limitations to the subject-matter. In addition, it has been noted by the national expert that the provision is fully outdated (1936) and needs to be adjusted to the challenges of the digital era.

3.1.2.1.3 QUOTATION

The Austrian quotation exception, enshrined in **Section 42f UrhG-A,** was first introduced in 1936 and later amended in 2015, following the adoption of **Article 5(3)(d) InfoSoc.** As amended, the Austrian exception perfectly complies with its EU counterpart.

Section 42f(1) UrhG-A allows the reproduction, distribution, broadcasting, making available to the public; use in public lectures, performances, and presentations of works already made public, for the purpose of quotation and to the extent justified by the purpose.

The provision provides an exemplificative lists of incidents of quotations, such as cases where an individual work is included, after its publication, in a scientific work of which it constitutes the main subject matter; published works of fine arts are publicly performed in a scientific or educative lecture of which they are the main subject-matter; excerpts of a literary work are cited in an independent work; passages of a musical work are cited in a literary work; and finally, if individual passages of a published work are cited in an independent new work.

[513] For related case law, see: OGH 4 Ob 25/04m, OGH 4 Ob 252/01i.
[514] For related case law, see: OGH 4 Ob 80/98p, OGH 4 Ob 79/11p, OGH 4 Ob 124/07z, OGH 4 Ob 142/13f, OGH 4 Ob 62/16w.
[515] See above, under "reprography" (paragraph 3.1.2.1.2.1).

Section 42f(3) UrhG-A extends the scope of the provision by including in the notion of published work works that have been made accessible to the general public with the author's consent.

As to the so-called "online quotation" exception introduced by Article 17(7) CDSM, although **Section 42f(2) UrhG-A** was adopted in 2022, following the adoption of the CDSM Directive, it does not extend to the exception therein.

3.1.2.1.4 PARODY, CARICATURE, PASTICHE

Austrian copyright law does not feature provision regarding parody, caricature, and pastiche, given that **Article 5(3)(k) InfoSoc** has not been implemented in UrhG-A. However, the case law of the **Supreme Court** suggests the admissibility of parody on grounds of fundamental human rights and freedoms, and particularly freedom of expression.[516]

Following the adoption of the CDSM Directive, **Section 42f UrhG-A** now features a new **paragraph (2)**, which entered into force in 2022 to transpose – almost slavishly – **Article 17(7) CDSM**. **Section 42f(2) UrhG-A** permits the reproduction, broadcast, and making available to the public *via major online platforms* of published works for the purpose of caricature, parody, or pastiche. Yet, as opposed to its EU counterpart, this exception does not extend to related rights.

3.1.2.1.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.1.5.1 PRIVATE STUDY

There is no provision in UrhG-A that introduces an exception for private study purposes, neither there is evidence of a direct or indirect transposition of **Article 5(3)(n) InfoSoc**.

3.1.2.1.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Section 40h(2) UrhG-A features a provision that partially corresponds to **Article 6(2)(b) Database,** as it permit the private copy of copyright protected databases for scientific research. Yet, this provision is restricted to non-commercial and individual scientific research, and it does not encompass uses for illustration of teaching. Except for that, there is no concrete evidence to suggest that **Article 9(b) Database** has been transposed to UrhG-A.

Sections 42f, 45, 51, 54(1)(3), 56c, 59c UrhG-A concern illustration for teaching or scientific research.[517] Except for Section 56c, which was first introduced in 1996, all provisions date back to 1936, while Sections 42f and 56c have been amended in 2015, following the adoption of **Article 5(3)(a) InfoSoc.** The very sectorial approach adopted by UrhG-A, compared to the umbrella approach characterizing **Article 5(3)(a) InfoSoc**, results in a more restrictive regulation of teaching exceptions, with a narrower spectrum of works and rights covered.

[516] See: OGH 4 Ob 66/10z.
[517] For related case law, see: OGH 4 Ob 131/08f, OGH 4 Ob 227/08y.

As detailed above, **Section 42f UrhG-A** provides an exception for quotation,[518] encompassing also uses for public lectures, performances, and presentations. **Section 45 UrhG-A** introduces a rule specifically for the use of literary works for teaching and research purposes. Such works may be reproduced, disseminated, and made available to the public after being published in a joint-authored collection or individual work, which by its design is intended for the uses of churches, schools and for other educational purposes, provided that the use is for non-commercial purposes, and does not go beyond the extent justified by the purpose. **Section 45(2) UrhG-A** extends this exception to the non-commercial broadcasting of literary works, which have been declared of school use, by educational authorities and designated school radios. **Section 45(3) UrhG-A** provides that rightholders shall be adequately remunerated, and that related claims can be asserted only by CMOs.

Along the same line, **Section 51(1) UrhG-A** permits, only for non-commercial purposes and to a justifiable extent, the reproduction, distribution, and making available to the public of musical works which are intended for school use and have been published in the form of notations either in joint-authored collections for singing lessons or to explain the content. Also, here **Section 51(2) UrhG-A** provides that rightholders shall be adequately remunerated, and that related claims can be asserted only by CMOs.

Section 54(1)(3) UrhG-A allows the reproduction, distribution, making available to the public of works of fine arts in a literary work which, by its nature and designation, is intended for school or instructional use, for the sole purpose of explaining its contents, or in a textbook for the purpose of art education for young people.

Section 59c UrhG-A focuses on schoolbooks and examination exercises. **Section 59c(1)** allows the use of literary works, musical works and works of fine arts in a literary works, also for commercial purposes, only if the user has acquired the rights over the works from the competent collecting society. Authors who have not concluded any agreements with CMOs and authors whose rights are not administered on the basis of a reciprocity agreement with a foreign CMO are entitled to the same rights and obligations as members of CMOs. **Section 59c(2) UrhG-A** extends the same rule to the reproduction, distribution, and making available to the public of the same categories of works for the purpose of examination purposes in schools, universities, and other educational institutions.

Finally, **Section 56c UrhG-A**, under the title of "public display in the classroom", allows schools and universities are allowed to publicly perform cinematographic works and related musical works, to the extent justified by the instructional purpose, and with the exclusion of cinematographic works which, by their nature and designation, are intended for school or teaching purposes; and image or sound carrier which has been produced or distributed in violation of the exclusive right to reproduction or distribution **(Article 65c(3) UrhG-A). Section 56c(2) UrhG-A** concludes by demanding that a remuneration is paid to rightholders through CMOs.

[518] For quotation, please see paragraph 3.1.2.1.2.1. above.

3.1.2.1.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Austrian copyright law features an exception which encompasses digital uses for illustration for teaching since 2015 within its **Section 42g UrhG-A**, entitled "making available to the public for teaching and learning."

Section 42g(1) UrhG-A states that schools, universities, and other educational institutions may reproduce and make available to the public published works for teaching or instruction purposes, in favour of a specifically defined circle of class or course participants, to the extent necessary for the purpose, and provided that the use is of non-commercial nature. The same rule applies to works which, by their nature and designation, are intended for school or teaching, as well as cinematographic works if at least two years have passed since the first performance of the cinematographic work either in Austria or in Germany or in a language of an ethnic minority recognized in Austria **(Section 42g(2) UrhG-A).** However, according to the same provision, the use of these works cannot exceed 10% of the work. According to **Section 42g(3) UrhG-A,** rightholders should be granted an adequate remuneration, which shall be asserted only by CMOs. **Section 42g(5) UrhG-A** reiterates the mandatory nature of the exception, by prohibiting its overriding by contracts, while **Section 42g(4) UrhG-A** uses the discretion offered by **Article 5 CDSM** to require that rightholders are granted a fair remuneration to the rightholders, which can be asserted by CMOs.

The exception provided for digital and cross-border uses for teaching within UrhG-A, while closely resembling the language of the Directive, provide for a more restrictive exception compared to its EU counterpart, due to the restrictions imposed on the subject-matter.

3.1.2.1.5.4 TEXT AND DATA MINING

Austrian copyright law already included provisions that could be used to facilitate the free exercise of TDM activities, such as **Section 41a UrhG-A** (transient and incidental reproductions), and **Section 42(2) UrhG-A** (reproduction for own and private use). With the transposition of the CDSM Directive in 2022, however, the UrhG-A now contains a new **Section 42h**, implementing **Articles 3 and 4 CDSM**.

Section 42h(1) UrhG-A implemented **Article 3 CDSM** into the Austrian copyright law, by closely following the text and structure of its EU counterpart, except for encompassing only works but objects of related rights. According to this provision, anyone can reproduce a work for a research institution or for a CHI in order to use it for TDM in digital form for scientific or artistic research as well as to obtain information on patterns, trends, and correlations – as long as they have lawful access to the work. Individual researchers are also entitled to make such reproductions if this is justified for the pursuit of non-commercial purposes. **Section 42h(2) UrhG-A** allows storing the copies made for TDM purposes, by taking the appropriate security measures, and only if the storing is justified by the purpose of the research, including the verification of the results. The same provision enables the making available such copies to a specifically delimited group of persons for their joint scientific research or to anyone for

the purpose of reviewing the quality of scientific research, provided that this is justified for the pursuit of non-commercial purposes.

Section 42h(3) UrhG-A defines the beneficiaries of this exception, namely research institutions, as institutions whose primary objective is scientific or artistic research or research-led teaching. These institutions, if they are not profit organizations, shall reinvests all profits of its scientific or artistic research; or if it is profit-oriented, it shall operate in the public interest within the framework of a mission recognized by the state. In any case, no companies with commercial interests shall have a determining influence on the institution does not receive preferential access to the results of scientific research. Yet, **Section 42(4) UrhG-A** allows for the establishment of public-private partnership in which, in addition to the research institution or cultural heritage institution, a profit-making enterprise or other third party is also involved. **Section 42h(5) UrhG-A** prevents the contractual overriding of this exception.

In a similar vein, **Section 42h(6) UrhG-A** transposed **Article 4 CDSM**, by meeting its standards, except for falling short of encompassing related rights. The provision permits anyone to reproduce a work for their individual use for the same purposes. Nevertheless, the same paragraphs prevent reproduction if the work is expressly prohibited and this prohibition is made clear in an appropriate manner by a reservation of use, for example in the case of works made publicly accessible via the Internet by machine-readable means.

3.1.2.1.6 USES FOR INFORMATORY PURPOSES

3.1.2.1.6.1 PRESS REVIEW AND NEWS REPORTING

UrhG-A has two exceptions for press review and reporting of current events: **Section 42c UrhG-A** (formerly Section 49 UrhG-A), and **Section 44 UrhG-A**.[519] Both regulations entered into force in 1936, thus preceding the adoption of **Article 5(3)(c) InfoSoc.** In spite of this, the two provisions do not differ much from their EU counterpart.

Section 42c UrhG-A permits the reproduction, distribution, broadcasting, making available to the public, uses for public lectures, performances, and presentations of works which are publicly perceptible during events that are being reported, for the purpose of reporting on current events and only to an extent justified by the informatory purpose.

Section 44(1) UrhG-A complements it by allowing the reproduction and distribution in other newspapers and magazines of articles on economic, political, or religious issues, unless those rights are expressly reserved, for instance with a mention in the front page of the newspaper/magazine. **Section 44(2) UrhG-A** further permits the public performance, broadcasting, and making available to the public of the same categories of works. More generally, **Section 42c(3) UrhG-A** excludes from the scope of this provision news reports representing simple messages, such as mixed news or daily news.

[519] For related case law, see: OGH 4 Ob 53/19a, OGH 4 Ob 140/01v, OGH 4 Ob 230/02f.

In **OGH 4 Ob 7/19m**, the **Supreme Court** ruled that Section 42c shall be interpreted narrowly. It was explained by the Court that the free use of works applies only to works which become publicly perceptible in the context of reporting on a daily event. Hence, it was decided that a general justification for the reproduction of photographs that show events of the day or are related to them cannot be derived from provision.[520]

3.1.2.1.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Section 43 UrhG-A, entitled "free uses of works of literature", introduces an exception for use of public speeches and lectures for informatory purposes.[521] This provision entered into force in 1936, thus preceding the adoption of **Article 5(3)(f) InfoSoc**. In spite of this, the Austrian rule does not differ much from its EU counterpart.

According to **Section 43(1) UrhG-A**, speeches given any meeting related to public affairs or in judicial and administrative proceeding, and political speeches held in public may be reproduced, distributed, publicly performed, broadcasted, and made available to the public for informatory purposes. However, **Section 43(2) UrhG-A** requires the consent of the author for their distribution if they have been recorded on a sound carrier. While **Section 43(3) UrhG-A** reserves in any case to authors the right to reproduce, distribute and make available to the public their speeches in collections.

3.1.2.1.7 USES BY PUBLIC AUTHORITIES

3.1.2.1.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

There is no concrete evidence to suggest that **Article 6(2)(c) and Article 9(c)** have been transposed to UrhG-A.

Section 41 UrhG-A, entitled "free use of works in the interest of the judicial system and the administration", provides an exception for the use of a work for purposes of public security, or to ensure the proper conduct of administrative, parliamentary or court proceedings.[522] The provision entered into force in 1936, thus preceding the adoption of **Article 5(2)(e) InfoSoc**. In spite of this, the Austrian rule does not differ much from its EU counterpart.

In **OGH 4 Ob 170/07i**, the **Supreme Court** interpreted the "public security", which is a broad concept. The Court rules that this concept covers in particular criminal reporting, in the context of which, for example, photographs may be used on official orders of the security authorities without the consent of the author. However, it is sufficient for publication in free use if the security authorities have portraits available for publication and, in the context of their publication, reference is made to the fact that criminal investigations are still pending in order to clarify a criminal offence. In another case, **OGH 4 Ob 104/11i,** the **Supreme Court**

[520] Also see: OGH 4 Ob 92/08w.
[521] For related case law, see: OGH 4 Ob 230/02f.
[522] For related case law, see: OGH 6 Ob 131/18k.

ruled that for enjoying this exception, it is not sufficient to refer to pending investigations; the publication shall be related to these investigations.

3.1.2.1.7.2 OTHER USES BY PUBLIC AUTHORITIES

Section 53(1)(2) UrhG-A allows the public performance of a published musical work if this takes place at a religious, civil or military ceremony and members of the public are admitted for free. The provision was introduced in 1936 and was not amended in response to the adoption of **Article 5(3)(g) InfoSoc.** In fact, the Austrian rule is more restrictive than the InfoSoc provision, for it limits its scope to musical works only.

3.1.2.1.8 SOCIALLY ORIENTED USES

UrhG-A does not contain any flexibility corresponding to **Article 5(2)(e) InfoSoc.**

3.1.2.1.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.1.9.1 PUBLIC LENDING

There is no concrete evidence to suggest that **Article 6(1) Rental** has been transposed to UrhG-A. While there is no E/Ls for public lending, Austrian copyright law includes another flexibility to the right to distribution for public lending, coupled with a remuneration scheme, within **Sections 16(3) and 16a UrhG-A.**

Entered into force in 1936, **Section 16(3) UrhG-A** crystallizes the principle of exhaustion, stating that the right to distribution does not apply to works that have been put into circulation by sale or other transfer of copyright of the rightholder in a Member State of the EU or the EEA.

Introduced to UrhG-A in 1993, **Section 16a(2)** extends the exception enshrined in **Section 16(3)** to public lending. As explained in **Section 16a(3) UrhG-A,** lending refers to the providing access to a work for a limited period of time for non-commercial purposes by a facility accessible to the public, including but not limited to libraries, image or sound carrier collections, and the like. The public lending requires the payment of a reasonable remuneration to rightholders, which shall be asserted only by CMOs **(Section 16a(2) UrhG-A).**

3.1.2.1.9.2 PRESERVATION OF CULTURAL HERITAGE

Before the national transposition of **Article 6 CDSM**, Austrian copyright law covered the preservation of cultural heritage by CHIs in **Sections 42(7) and 56a UrhG-A** - the former introduced in 1936 and amended in 2003, the latter introduced and entered into force in 1996.

Section 42 UrhG-A, which is a general provision devoted to the private copying exception, allows in its **paragraph (7)** CHIs to produce copies for inclusion in their own archives, if and to the extent required for this purpose. The reproduction herein is not restricted to reprography; thus, it can be reproduced in any format and should not have any direct or indirect economic

or commercial purpose. Publicly accessible institutions may carry out other activities such as the production of a copy of works in their collections and to exhibit the reproduction instead of the original, lend it, and use it; as well as the production of copies of works, which were made publicly available but are unpublished or out-of-print, to exhibit them, lend them, and use them as long as the work is not published or out of print (**Section 42(8) UrhG-A**).

According to **Section 56a UrhG-A**, entitled "providing image or sound recordings to certain federal institutions," federal scientific institutions, which are required by public law, are permitted to use image and audio recording for the purpose of preservation, collection, and study of such audio-visual media; however, these acts shall not be carried out for commercial purposes. For providing the image or sound carrier, a reproduction of the image or sound carrier may also be produced. **Section 56a(2) UrhG-A** excludes from the scope of the provision image or sound carriers which have been reproduced or distributed in violation of copyright.

With the transposition of the CDSM Directive in 2022, however, the Austrian legislator has introduced a new paragraph to **Section 47(7) UrhG-A,** implementing **Article 6 CDSM** almost verbatim. **Section 47(7) UrhG-A** provides publicly accessible libraries and museums, archives, film and audio heritage institutions with the opportunity, not overridable by contract, to reproduce or have reproduced works that are permanently held in their collections for preservation purposes, to the extent necessary for the purpose.

In doing so, the Austrian exception provides for a more flexible exception compared to its EU counterpart, given the Austrian exception has a broader scope of beneficiaries and permitted acts permitted than the ones provided by **Article 6 CDSM**. On the one hand, the Austrian exception allows "publicly accessible institutions which collect works", or in other words galleries, to benefit from this exception, with the fulfilment of certain additional criteria. On the other hand, it allows these institutions, however only for non-commercial purposes, to produce a copy of each work in their permanent collections and to exhibit the reproduction, rather than the reproduced work; and to produce a copy of unpublished or out-of-print works and to exhibit, lend, and use the reproduction, rather than the reproduced work. But the provision introduces a restriction to the medium of reproduction and does not permit reproduction on paper or similar materials. Whereas the educational establishments have been excluded from the wording of **Section 42(7) UrhG-A,** it can be argued that the spectrum of copyright flexibilities that have been provided with UrhG-A for them already serve to the purposes aimed by **Article 6 CDSM.**

3.1.2.1.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Section 56b UrhG-A, entitled "use of image or sound carriers in libraries" and entered into force in 1996, allows facilities open to the public (library, image or sound carrier collection and the like) to use image or sound carriers for public lectures, performances and presentations of the works recorded thereon for no more than two patrons at a time,

provided this is not done for profit. The same paragraph requires the payment of an adequate remuneration to the author, which can only be claimed by CMOs. Images and sound carriers should come from a lawful source **(Article 56(2) UrhG-A).**

3.1.2.1.9.4 ORPHAN WORKS

The OWD has been implemented by the Austrian legislature in **Section 56e UrhG-A** in 2014, by closely following the language and the standards set by the Directive. **Section 56e(1) UrhG-A** transpose **Article 1 and Article 6 OWD**, by combining these provisions. It permits publicly accessible institutions, which collect works, to produce copies of works for which no person authorized to permit reproduction and make them available is known (orphan works) and to make them available to the public, only for non-commercial purposes and to fulfilment of its tasks in the public interest, in particular the preservation, restoration and provision of access to its collection of works for cultural and educational purposes **(Article 1(1) and Article 6(1) OWD)**. Still, the beneficiaries are permitted to generate an income to cover the digitization expenses **(Article 6(2) OWD).** The same provision also enlists the works considered to be orphan works, by closely following the wording of **Article 2(1) OWD.**

Section 56e(2) UrhG-A extends this exception to broadcasts, once again, closely following the text **Article 2(3)of the Directive. Section 56e(3)** UrhG-A introduces the diligent search requirement, by adopting **Article 3 paragraphs (1), (3), and (4) of the Directive**; while **56e(4)** specifies the diligent search requirement for the broadcasts and cinematographic works as done by **Article 3(2) OWD. Section 56e(5) UrhG-A**, provides for the details of the documentation obligations of the beneficiary institutions, by closely following the criteria set by **Article 3 paragraphs (5) and (6) OWD.** Last, **Section 56e(6) UrhG-A** regulates the termination of the orphan work status **(Article 5 OWD)** as well as the requirement to remunerate the author of the work that have been reproduced and made available to the public, by adopting **Article 6(5) OWD.**

3.1.2.1.9.5 OUT-OF-COMMERCE WORKS

Austrian copyright law did not contain any provision on out-of-commerce works before the implementation of the CDSM Directive. However, **Section 42(7) UrhG-A** on preservation of cultural heritage could have been used to this purpose. However, to transpose **Article 8(2) CDSM**, the Austrian legislature introduced in 2022 a new **Section 56f** into UrhG-A, which closely follows the text of the EU provision.

Section 56f(1) adopts **Article 8(2) CDSM** verbatim, while the same provision transposes the definition of out-of-commerce provided within **Article 8(5) CDSM**. Yet, it is regulated that the availability of adaptations and translations, including audio-visual adaptations of literary works, does not prevent a work from being judged as unavailable **(Section 56f(4) UrhG-A).**

As in **Article 8(3) CDSM**, CHIs benefit from the exception and are allowed to carry out such practices only if no collecting society is entitled to administer ECLs over the out-of-commerce works at stake **(Section 56f(1)(1) UrhG-A)**. **Section 56f(1)(2)-(3)** specifies that CHIs shall

provide information that would help identify the works and give to rightholders the opportunity to oppose any use thereof, as regulated by **Article 8(4) CDSM.**

After regulating the diligent search to be performed by CHIs in order to enjoy the exception in line with the EU text, **Section 56f(8) UrhG-A** uses the margin of discretion left by **Article 8 CDSM** on the matter to subordinate the exception to the payment of a fair remuneration to rightholders, which shall be claimed by CMOs.

3.1.2.1.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Section 42d UrhG-A, entered into force in 2003 and amended in 2018 in response to the Marrakesh Directive, introduces an exception tailored for the reproduction and distribution of works in accessible format for persons with disabilities.

Section 42d(1) UrhG-A is dedicated to the definition of persons with disabilities **(Article 2(2) Marrakesh)**, while **Section 42d(2)** defines the authorized entities **(Article 2(4) Marrakesh). Section 42d(3)UrhG-A** defines accessible format copy, as enshrined in **Article 2(3) Marrakesh**, by complementing this definition with the categories of works enlisted in **Article 2(1) Marrakesh.**

By adopting the legal text of the Directive, **Section 42d(4)** transposes the uses permitted for persons with disabilities and persons acting on their behalf, which are regulated by **Article 3(1)(a) of the Directive**. In a similar vein, **Section 42d(5)** transposes the uses permitted for authorized entities by **Article 3(1)(a) and Article 4 Marrakesh. Section 42d paragraphs (6)-(7) UrhG-A** enlists the obligations authorized entities, in a manner that is in line with **Article 5 and Article 6 Marrakesh**.

The Austrian legislature subjected this exception to the payment of a fair remuneration to rightholders **(Section 42d(8) UrhG-A),** once again, by closely following **Article 3(6) Marrakesh.**

As per **Article 3(5) Marrakesh**, this exception cannot be overridden by contract **(Section 42d(9) UrhG-A).**

It is worth to mention that **Article 42d(10) UrhG-A** extends these exceptions to persons with other disabilities, which leads this provision to correspond to **Article 5(3)(b) InfoSoc** as well.

3.1.2.1.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Section 50 UrhG-A allows the public performance of a published literary work if no admission fee is requested, or if the performance is not intended to generate profit, or if the fees collected are exclusively allocated to any charitable. The provision does not apply if performers receive remuneration, nor if the performance is made with the aid of a sound carrier which has been produced or distributed in violation of exclusive rights on the literary work recorded thereon. **Section 53(1)(3) UrhG-A** extends the same exception to musical works.

3.1.2.1.12 THREE-STEP TEST

Austrian copyright law does not feature any provision including the three-step-test as in **Article 5(5) InfoSoc.**

3.1.2.1.13 PUBLIC DOMAIN

3.1.2.1.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Section 7 UrhG-A identifies a number of "free works" excluded from copyright protection. They range from laws, ordinances, official decrees, announcements, and decisions to official works produced exclusively or predominantly for official use.[523] However, **Section 7(2) UrhG-A** excludes certain works from the public domain, by indicating that maps produced or edited by the Federal Office of Meteorology and Surveying and intended for distribution are protected by copyright.

3.1.2.1.13.2 PAYING PUBLIC DOMAIN SCHEMES

Austrian copyright law does not contain a paying public domain scheme.

3.1.2.1.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Austrian copyright law envisions compulsory licensing schemes for five major uses of protected works: compulsory licensing scheme for phonograms producers, enshrined in **Section 58 UrhG-A**; a licensing scheme to enable the organizers of a public event to communicate a broadcast to the public if a license from the competent CMO is obtained **(Section 59 UrhG-A)**; a collective licensing scheme introduced to enable the cable retransmission **(Section 59a UrhG-A)**,[524] as already mentioned above, a licensing scheme aimed at facilitating the commercial uses of textbooks **(Section 59c UrhG-A),** and as also indicated above, a collective licensing scheme for lending of works **(Section 16a UrhG-A).**[525]

Entered into force in 1936, **Section 58 UrhG-A** grants a phonogram producer the right to demand a license. **Section 58(1)** hold that if the rightholder has permitted another person to reproduce and distribute a phonogram, any phonogram producer may, as soon as the work has been published, demand from rightholders that they are also granted a similar authorization against appropriate remuneration. If the producer has its residence or main branch abroad, notwithstanding international treaties, this rule applies only upon condition of reciprocity or under the principle of national treatment towards manufacturers with residence or main branch in Austria. Such reciprocity shall be presumed to exist if it has been established in a notice issued by the Federal Minister of Justice. In addition, competent authorities may contractually agree reciprocity with another State if this appears necessary to safeguard the interests of Austrian manufacturers of sound carriers. The permission to use

[523] For related case law, see: OGH 4 Ob 17/02g.
[524] For related case law, see: OGH 4 Ob 89/08d.
[525] For related case law, see: OGH 4 Ob 341/97v, OGH 4 Ob 89/08d.

the work is only valid for the reproduction and distribution of the work on sound carriers within Austria and for export to States in which the author does not enjoy protection.

Section 58(2) UrhG-A extends this rule to literary works combined with sheet music if the rightholder has granted another person permission to reproduce and distribute it on phonograms.

Nevertheless, **Section 58(4) UrhG-A** excludes from the scope of this regulation the means intended for the simultaneous and systematic reproduction of works on image and sound carriers.

Also **entered into force in 1936, Section 59 UrhG-A** permits the use of broadcasts of literary and musical work for public lectures, and the use of broadcasts by means of loudspeakers if the organizer has been authorized by the CMO.[526] Authors who have not concluded a management agreement with the CMO and whose rights are not administered on the basis of a reciprocity agreement with a foreign CMO also have the same rights and obligations as the beneficiaries of the CMO. The CMO must distribute the remuneration so collected in the same way as it distributes the remuneration it receives from a domestic broadcaster for the authorization to broadcast literary or sound art works.

Section 59a(1) UrhG-A reserves the right to use broadcasts of works, including those transmitted by satellite, for simultaneous, complete and unaltered retransmission by wire to collecting societies, with the exclusion of the right to sue for copyright infringement.

Section 59a(2) UrhG-A extends this rule to rebroadcasting. Rightholders who have not concluded a management agreement with the collecting society and whose rights are not administered based on a reciprocity agreement with a foreign collecting society also have the same rights and obligations as members of the CMO.

In addition to the compulsory licensing schemes, **Article 8(1) CDSM** has been implemented verbatim to **Article 25a** of the Federal Act on Collecting Societies of 2016 (VerwGesG 2016).[527]

Finally, as already indicated for public lending above,[528] **Section 16a UrhG-A**, entered into force in 1936, holds a collective licensing scheme for the lending of works.[529] According to this provision, the authors of whose works are lent are entitled to remuneration, which can be collected by CMOs.

[526] For related case law, see: OGH 4 Ob 341/97v.
[527] Bundesgesetz über Verwertungsgesellschaften (Verwertungsgesellschaftengesetz 2016, VerwGesG 2016), StF: BGBl. I Nr. 27/2016 (NR: GP XXV RV 1057 AB 1078 S. 126. BR: 9558 AB 9565 S. 853.).
[528] For public lending, please see paragraph 3.1.2.1.9.1. above.
[529] For the definition of lending, please see paragraph 3.1.2.1.9.1. above.

3.1.2.1.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.1.15.1 FUNDAMENTAL (USERS') RIGHTS

The Austrian Supreme Court (OGH) has attempted to strike a balance between copyright and conflicting interest by referring to fundamental rights, particularly when there are no E/Ls on the matter. This applies, for example, to parody which the OGH has allowed on the basis of UrhG-A fundamental rights, especially freedom of speech and freedom of the arts, since a dedicated parody exception is missing in the UrhG-A.

To provide an example, in a landmark decision on a parody of a photograph which was used in a political context, the **OGH** has justified the transformative use of the original work, by examining the following factors: (i) whether the conduct falls within the scope of protected fundamental rights (Article 13 *Staatsgrundgesetz*,[530] Article 10 ECHR); (ii) whether the statement (conveyed by the parody) is untrue or defamatory; (iii) whether the economic interests of the author are undermined, the normal exploitation of the work impaired, the legitimate interests of the author improperly violated; (iv) whether the basic right of freedom of expression could not be exercised if not by interfering with copyright. The OGH also acknowledges the possibility of fundamental rights, especially freedom of speech, to restrict copyright if expressions are related to democratic or political contexts and purposes[531] or critical news reporting.[532]

3.1.2.1.15.2 CONSUMER PROTECTION

None reported.

3.1.2.1.15.3 COPYRIGHT CONTRACT LAW

It is possible to detect the adoption of copyright contract law principles and rules by the Austrian judiciary to balance public and private interests.

Austrian copyright law does not contain a "work for hire doctrine." Still, the OGH had the tendency to assume in many cases an implicit license, which allows the third party to use the work according to the contractual purpose, even though there are no provisions in the UrhG-A on the uses which the third party is entitled to carry out over a work created by an employee.

The OGH has decided that the exclusive license for using the national anthem also allows the Republic to change its text in order to foster gender equality.[533] The Republic of Austria, which is entitled to use the work, have not changed the text of the federal anthem in general terms, but for a concrete purpose, by adding the words "and daughters" in several places.

[530] Staatsgrundgesetz vom 21. December 1867, über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder – StGG (AUT-1867-L-84888), (Basic Law on the General Rights of Nationals of 21 December 1867).
[531] See: OGH 4 Ob 250/18w.
[532] See: OGH 4 Ob 53/19a.
[533] See: OGH 4 Ob 171/10s.

These amendments pursued the intention of expressing the principle of equal treatment and to create a shortened version of the Federal Anthem that could be more appealing to young people and in its formal structure corresponded to the scheme of many pop songs (verse-reframe-varied chorus). The Court ruled the changes justified by the nature and purpose of the permitted use.

3.1.2.1.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.2 BELGIUM

The Belgian *Code de droit économique* (CDE) of 2015, as last amended in 2022, is well-harmonized with the EU copyright acquis. The provisions related to E/Ls, contained in the Book XI-*Popriété intellectuelle et secrets d'affaire,*[534] feature the vast majority of the copyright flexibilities introduced by the EU Directives.

There are only a few flexibilities which are slightly more restrictive compared to their EU counterparts, such as the exceptions for incidental inclusion and freedom of panorama. It is also possible to see the limited implications of the fundamental rights discourse as well as general principles of civil law, copyright contract law, and competition law on transforming the Belgian copyright landscape into a more user-friendly one.

Before being consolidated in CDE, L&Es were introduced by other special statutes, such as the law of *relative au droit d'auteur et aux droits voisins* of 1994 (LDA),[535] the law on *transposant en droit belge la directive européenne du 14 mai 1991 concernant la protection juridique des programme d'ordinateur* of 1994 (LPO, repealed in January 2015), the law on *transposant en droit belge la directive européenne du 11 mars 1996 concernant la protection juridique des bases de données* (LBD, entered into force in 1998 and repealed in January 2015), and the first Belgian Copyright Act, the law *sur le droit d'auteur* of 1886, repealed in August 1994. This report refers to certain provisions of these laws, where necessary and in order to indicate the entry into force of the related E/Ls.

3.1.2.2.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.2.1.1 TEMPORARY REPRODUCTION

Article XI.189, §3 CDE implemented **Article 5(1) InfoSoc** by adopting the text of the EU rule verbatim.[536] This exception was extended, also verbatim, to related rights by **Article**

[534] Loi modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprises (numac. 2019011404, pub. 24/05/2019, prom. 04/04/2019).
[535] This law had entered into force on 1 August 1994 and was repealed on 1 January 2015. It had been modified in particular by the law of 22 May 2005 implementing the InfoSoc Directive, whose provisions came into effect on May 27, 2005. See: *Moniteur belge*, 27 May 2005, p. 24997.
[536] For related national case law, see: Brussels Court of Appeal, 5 May 2011 (*Google v Copiepresse e.a.*), Auteurs & Media, 2012, p. 202.

XI.217, 8° CDE. Both provisions entered into force in 2005 (LDA). Both exceptions are required to comply with the three-step-test.

3.1.2.2.1.2 EPHEMERAL RECORDING

Article XI.190, §14 CDE implemented **Article 5(2)(d) InfoSoc** in Belgian copyright law by adopting the EU rule almost verbatim,[537] which entered into force in 2005 (LDA). The mere difference of the Belgian exception from its EU counterpart is its slightly broader scope of beneficiaries. Indeed, the Belgian exception permits not only broadcasting organizations but also persons acting on their behalf to conduct the permitted acts. This exception was extended verbatim to related rights in 2005 (LDA), by **Article XI.217, §13 CDE**, which satisfies the standards introduced by **Article 10(1)(c) Rental** as well.

The beneficiaries shall comply with the three-step-test while performing the acts permitted by these exceptions.

3.1.2.2.1.3 INCIDENTAL INCLUSION

The exception for incidental inclusion is contained in **Article XI.190, §2 CDE**.[538] This provision precedes **Article 5(3)(i) InfoSoc**, as it entered into force in 1994 (LDA). It permits the reproduction and communication to the public of a work shown in a publicly accessible place unless the purpose of the acts is only to reproduce or communicate to the public the work.

This flexibility applies, by analogy, to copyright-protected database, due to the reference made to this exception in **Article XI.191 §2 CDE**, which entered into force in 1998 (LBD). Once again, the three-step-test applies to this exception.

The Belgian flexibility for incidental inclusion is more restrictive compared to its EU counterpart, for two intertwined reasons. On the one hand, the Belgian flexibility is limited to works that are located in a publicly accessible place and databases protected by copyright. On the other hand, **Article XI.190, §2 CDE** is not dedicated only to incidental inclusion, but it also corresponds to the exception of freedom of panorama.[539]

3.1.2.2.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The Belgian legislature transposed **Article 5 Software** to **Article XI.299, §§1-3 CDE**, while transposing **Article 6 Software** to **Article XI.300 CDE**. Entered into force in 2014, both provisions follow the wording of the corresponding EU rules verbatim.

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[537] For related national case law, see: Constitutional Court, 18 April 2007 (*Sonica and Record King v Sabam*), n° 59/2007.

[538] For related national case law, see: Brussels Court of Appeal, 23 March 2001 (*Le Vif Magazin v Sofam & Wibin*), Auteurs & Media, 2001, p. 375; Ghent Court of Appeal, 16 April 2002 (*Sabam v Stichting George Grard*), Auteurs & Media, 2002, p. 347; Brussels Court of Appeal, 4 September 2003 (*Télé Bruxelles v Sabam*), Auteurs & Media, 2003, p. 384; Liege Civil Court, 27 February 2007 (*Kroll v Demol*), Journal des Tribunaux, 2007, p. 804; Court of cassation, 4 December 1952 (La *presse démocrate socialiste de Charleroi v Strebelle*) and Court of cassation, 14 April 1955 (*Association Belgo-Américaine e.a. v Dessart*), Revue Critique de Jurisprudence Belge, 1956, p. 33.

[539] For freedom of panorama, please see paragraph 3.1.2.2.1.5. below.

Article XI.188 CDE transposed **Article 6(1) Database** in 1998 (LBD), by adopting its language verbatim.[540] In a similar manner, **Article 8 Database** has been transposed to **Articles XI.311 and XI.314 CDE** in 2015.

Article 87bis. §1er. CDE, Article 291 implements **Article 6(4) InfoSoc**, by adopting the EU rule verbatim, whereas the scope of this regulation has been extended to the objects of related rights by **Article 291, §4 CDE** and **Article XI. 316, §2 CDE**, respectively, in 2014 and 2022.

3.1.2.2.1.5 FREEDOM OF PANORAMA

Entered into force in 2016, **Article XI.190, §2/1 CDE** transposed the exception for freedom of panorama, by closely following **Article 5(3)(h) InfoSoc**. However, the Belgian exception is more restrictive compared to its EU counterpart, as it limits its subject-matter to certain categories of works.

Indeed, according to this provision, a lawfully disclosed work of plastic or graphic art, or a works of architecture located in publicly accessible places can be reproduced or communicated to the public. The reproduction or communication to the public shall comply with the three-step-test.

3.1.2.2.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.2.2.1 REPROGRAPHY

The Belgian copyright law features four provisions related to reprography of works and databases, which entered into force, respectively, in 1994 (LDA) and in 1998 (LBD). Despite preceding the adoption of **Article 5(2)(a) InfoSoc**, these provisions encompass the standards introduced by the EU exception, while the 'fair compensation' criterion within the EU exception has later been implemented in CDE as well.

Article XI.190, §5 CDE[541] allows the partial or full reproduction of articles or works of fine art or of short extracts of other works, fixed on paper or any similar medium, with the exception of sheet music. Works shall be reproduced on paper or any similar medium, by using any kind of photographic technique or other process having similar effects. Reproductions can be performed either by a legal person, however only for internal use, or by a natural person, only for internal use in the context of their business activities. The beneficiaries shall comply with the three-step-test.

[540] For related national case law, see: Antwerp Court of Appeal, 19 December 2005 (*Omni Whittington Group e.a. v East-West Debt*), Auteurs & Media, 2007/1-2, pp. 85-96.

[541] For related national case law, see: Constitutional Court, 13 April 2009 (*SEMU e.a.*), n° 69/2009; Constitutional Court, 16 July 2009 (*SEMU e.a.*), n° 127/2009; Brussels Court of Appeal, 17 April 2018 (*Reprobel v Lexmark International*), Auteurs & Media, 2018-2019/3, pp. 343-357; Brussels Civil Court, 18 May 2018 (*Ricoh Belgium v Reprobel*), Auteurs & Media, 2018-2019/3, pp. 357-369; Brussels Civil Court, 16 November 2012 (*Reprobel v HP Belgium*), J.L.M.B., 2013/12, pp. 702-715; Brussels Court of Appeal, 23 October 2013 (*HP Belgium v Reprobel*), J.L.M.B., 2014/10, pp. 474-483; Brussels Court of Appeal, 12 May 2017 (*HP Belgium v Reprobel*), Auteurs & Media, 2016/5-6, pp. 429-442.

This exception was extended to databases by **Article XI.191, §1, 1° CDE,** which reports almost slavishly the wording of **Article XI.190, 5° CDE**.

According to **Article XI.235 CDE**, which entered into force in 2015, authors are entitled to remuneration for the reproduction of their works. The remuneration shall be determined according to the number of copied made. It shall be payable by individuals or legal entities reproducing the works, or, where appropriate, by entities making a reproduction device available to others, whether for a consideration or free of charge.[542] **Article XI.318/1 CDE,** which entered into force in 2017, entitles publishers to a similar remuneration, without prejudice to the remuneration due to authors.

3.1.2.2.2.2 PRIVATE COPY

Belgian copyright law features several flexibilities for private copy of lawfully disclosed works, performances, and sui generis database rights.

Article XI.190, 9° CDE allows, with the exception of sheet music, reproduction of works for their use within the family circle and exclusively intended for that.[543] This provision entered into force in 1994 (LDA), hence it precedes **Article 5(2)(b) InfoSoc.** Although the formulation of the national rule diverges from its EU counterpart, it still satisfies the criteria set by EU rule.

Article XI.217, 7° CDE permits the reproduction of performances by a natural person for private use and only for non-commercial purposes.[544] This provision also entered into force in 1994 (LDA); however, it is still in line with **Article 5(2)(b) InfoSoc.**

According to **Article XI.229 CDE,** which entered into force in 1994 (LDA) and was later modified in 2015; authors, performers and producers of phonograms and audio-visual works have the right to a fair remuneration for the private reproduction of their works and performances. The remuneration shall be paid by the manufacturer, importer or intra-Community purchaser of media and other equipment manifestly used for the private reproduction of works and performances and put into circulation on the national territory.

[542] For related national case law, see: Brussels Civil Court, 30 October 2009 (*Reprobel v Dell*), Auteurs & Media, 2010/3, pp. 269-274; Brussels Court of Appeal, 17 April 2018 (*Reprobel v Lexmark International*), Auteurs & Media, 2018-2019/3, pp. 343-357.

[543] For related national case law, see: Court of Cassation, 27 May 2005 (*Sabam and IFPI v Goossens*), ECLI:BE:CASS:2005:ARR.20050527.7; Brussels Court of Appeal, 8 November 2002 (*IFPI e.a. v Sony Computer Entertainment e.a.*), Auteurs & Media, 2005, liv. 2, p. 126; Brussels Court of Appeal, 9 September 2005 (*Test-Achats v EMI Belgium, Sony Belgium and Universal Music*), Auteurs & Media, 2005, liv. 4, p. 301; Brussels Civil Court, 16 November 2012 (*Reprobel v HP Belgium*), J.L.M.B., 2013/12, pp. 702-715; Brussels Court of Appeal, 23 October 2013 (*HP Belgium v Reprobel*), J.L.M.B., 2014/10, pp. 474-483; Brussels Court of Appeal, 12 May 2017 (*HP Belgium v Reprobel*), Auteurs & Media, 2016/5-6, pp. 429-442.

[544] For related national case law, see: Court of Cassation, 27 May 2005 (Sabam and IFPI v Goossens), ECLI:BE:CASS:2005:ARR.20050527.7.

CMOs are in charge of collecting the remuneration and of distributing equally distributed among the rightholders.[545]

Last, as amended in 2022, **Article 191, §1, 1° CDE** transposes **Article 6(2)(a) Database** to the Belgian Act; however, this provision partially intersects the regulation concerning the exception for reprography. Also, entered into force in 1998, **Article XI.310, §1, 1° CDE** introduces an exception to the sui generis database right, while transposing **Article 9(a) Database** verbatim**.**

3.1.2.2.3 QUOTATION

Belgian copyright law contains a wide range of flexibilities for quotation.

Article XI.189, §1er CDE, permits the quotation of lawfully published works, for the purpose of criticism or review, in accordance with fair professional practices and to the extent justified by the purpose.[546] Quotations shall mention the source and the name of the author, unless it is proven impossible. This provision has entered into force in 1886 and was last modified in 2015 (with CDE), and it closely follows **Article 5(3)(d) InfoSoc.** The three-step-test applies to the uses covered by this exception.

Article XI.191/1, §1er, 1°, and §2 CDE applies the same rule to quotations made for purposes of teaching and scientific research,[547] while **Article XI.191/2 §3 CDE** (introduced in the LBD in 1998, later modified in 2019) does it for databases, and **Article XI.217, 1° CDE** (introduced in the LDA in 1994, later modified in 2015) for performances.

Last, **Article XI.217/1, 1° CDE**, which was adopted in 1994 (with LDA) and later modified in 2017, permits quotations from a service provided for the purpose of teaching and scientific

[545] For related national case law, see: Constitutional Court, 6 November 2008 (*Auvibel v Emerald Europe AG*), n° 152/2008; Council of State, 1 December 2011 (*Nokia Belgium and Sony Ericsson v Belgium and Auvibel*), *Ing.-Cons.*, 2011/4, pp. 491-502; Court of Cassation, 4 October 2012 (*Auvibel v S.T.*), J.L.M.B., 2013/12, pp. 678-680; Liege Court of Appeal, 20 November 2008 (*Auvibel v X*), Auteurs & Media, 2011/4-5, pp. 510-511; Ghent Court of Appeal, 20 January 2009 (*Auvibel v X*), Auteurs & Media, 2011/4-5, pp. 504-509; Brussels Court of Appeal, 3 February 2009 (*X v Auvibel*), Auteurs & Media, 2011/4-5, pp. 487-490; Brussels Court of Appeal, 3 February 2009 (*X v Auvibel*), Auteurs & Media, 2011/4-5, pp. 490-494; Brussels Court of Appeal, 3 November 2009 (*Auvibel v C.K.*), ECLI:BE:CABRL:2009:ARR.20091103.4; Brussels Court of Appeal, 22 December 2009 (*X v Auvibel*), Auteurs & Media, 2011/4-5, pp. 494-499; Brussels Court of Appeal, 22 December 2009 (*X v Auvibel*), Auteurs & Media, 2011/4-5, pp. 499-504; Antwerp Court of Appeal, 15 February 2010 (*X v Auvibel*), Auteurs & Media, 2011/4-5, pp. 485-487; Brussels Court of Appeal, 22 July 2016 (*Data Rayane v Auvibel*), Ing.-Cons., 2016/4, pp. 896-904.

[546] For related national case law, see: Brussels Court of Appeal, 14 October 2003 (*Ars Antiques Auctions v Sabam*), Auteurs & Media, 2004/1, pp. 40-41; Brussels Court of Appeal, 3 May 2005 (*Sofam v Vlaamse Media*), 3 May 2005, Auteurs & Media, 2005/5, pp. 419-424; Antwerpen Court of Appeal, 25 June 2007 (*M. Mallant e.a.v Standaard Uitgeverij*), Auteurs & Media, 2007/5, pp. 461-466; Brussels Court of Appeal, 5 May 2011 (*Google v Copiepresse e.a.*), Auteurs & Media, 2012, p. 202; Liege Court of Appeal, 16 May 2013 (*Primento v L.B. and Edition ETC, Inc.*), Auteurs et Media, 2013/5, p. 377; President of Brussels Commercial Court, 9 February 2017 (*La Libre Match v Sud Presse*), Auteurs & Media, 2016/4, p. 342; President of Liege Commercial Court, 19 February 2019 (*RTBF & Sudpresse v P.T.*), Auteurs & Media, 2018-2019/3, pp. 369-378.

[547] For related national case law, see: Constitutional Court, 13 April 2009 (*SEMU e.a.*), n° 69/2009; Constitutional Court, 16 July 2009 (*SEMU e.a.*), n° 127/2009.

research, in accordance with fair professional practices and to the extent justified by the purpose.

Last, **Article 17(7) CDSM** has been implemented in **Article XI.228/6, §1** in 2022, in a way to secure the making available works and other subject-matter available to the public via online content sharing platforms as long as such use falls under an E/L to copyright and related rights.

3.1.2.2.4 PARODY, CARICATURE, PASTICHE

Article XI.190, 10° CDE features an exception for parody. This provision has entered into force in 1994 (LDA) and later modified in 2015. Closely resembling **Article 5(3)(k) InfoSoc,** this provision permits the caricature, parody, or pastiche of a lawfully published work, in accordance with fair practices.[548] **Article XI. 191 §2 CDE** (LBD (1998), later modified in 2017) applies the same exception, by analogy, to databases, and **Article XI.217, 9° CDE** does it with related rights (LDA (1994), later modified in 2015). The beneficiaries of these exceptions shall comply with the three-step-test.

Article 17(7) CDSM has been implemented in **Article XI.228/6, §1** in 2022, in a way to secure the making available works and other subject-matter available to the public via online content sharing platforms as long as such use falls under an E/L to copyright and related rights.

3.1.2.2.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.2.5.1 PRIVATE STUDY

Article XI.190, 13° CDE transposes **Article 5(3)(n) InfoSoc** verbatim. This provision has entered into force in 2005 and was later amended in 2015. **Article XI.217, 12° CDE**, which also entered into force in 2005 (LDA) and was later amended in 2015, extends this flexibility to related rights. Both provisions are required to comply with the three-step-test.

[548] For related national case law, see: Court of cassation, 5 April 2001 (*Editions de l'Avenir v Groupe régional Ecolo de Namur e.a.*), auteurs & Media, 2001, pp. 400-404, note B. Michaux ; Antwerpen Court of Appeal, 11 October 2000 (*Het Volk and Nys v A*), Auteurs & Media, 2001, pp. 357-363, note D. Voorhoof; Brussels Court of Appeal, 3 May 2005 (*Sofam v Vlaamse Media*), 3 May 2005, Auteurs & Media, 2005/5, pp. 419-424; Antwerpen Court of Appeal, 2 May 2006 (*Code v Mercis and Bruna*), Auteurs & Media, 2006/3, pp. 257-260; Brussels Court of Appeal, 14 June 2007 (*Ahlberg v Moulinsart e.a.*), Auteurs & Media, 2008/1, pp. 23-36, note D. Voorhoof; Brussels Court of Appeal, 29 July 2010 (*RTBF v Fondation d'utilité publique Maurice Carême and Masson*), Auteurs & Media, 2010, pp. 547-551; Ghent Court of Appeal, 3 January 2011 (*De Bevere-Blanckaert and Lucky Comics v Dedecker e.a.*), Auterus & Media,pp. 227-232; Brussels Court of Appeal, 16 January 2012 (*I.P.M. v F.*), Jurisprudence de Liège, Mons, Bruxelles (JLMB), 2013/12, pp. 688-694; President Brussels Civil Court, 17 February 2011 (*Vandersteen e.a. v Vrijheidsfonds and Deckmyn*), Auteurs & Media, 2011/3, pp. 340-343; Brussels Court of Appeal, 8 April 2013 (*Vrijheidsfonds and Deckmyn v Vandersteen e.a.*), Auteurs & Media, 2013/5, 348-352; President Antwerpen Civil Court, 15 January 2015 (*Van Giel v Tuymans*), Auteurs & Media, 2015/2, pp. 183-193, note B. Van Besien; President Brussels Civil Court, 4 April 2019 (*Studio 100 v Greenpeace*), Auteurs & Media, 2018-2019/4, pp. 461-471.

3.1.2.2.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Belgian copyright law features of several flexibilities facilitating the use of databases, works, and performances for illustration of teaching or scientific research.

Entered into force in 1994 (LDA) and later amended in 2017, **Article XI.191/1, §1er 3° and 4°, as well as §2 CDE** transposed **Article 5(3)(a) InfoSoc**, by closely following the rule therein. According to this provision, a lawfully disclosed work, with the exception of sheet music, can be reproduced and communicated to the public, by natural persons and public authorities, for the purpose of illustration for teaching and scientific research. Such uses shall comply with the three-step-test, and the source and the name of the author shall be mentioned, unless it is proven impossible.

Article XI.217/1, 3° and 4° CDE, which entered into force in 1994 (LDA) and was later amended in 2017**,** extends this rule to related rights of performers. Whereas the exception provided in **Article 10(1)(d) Rental** has not been transposed to CDE, the exception within **Article XI.217/1, 3° and 4° CDE** corresponds to its EU counterpart.

Article XI.191/2, §1ter 1° and 2°, and §2 CDE applies the original exception, which is explained above, to the right of reproduction and distribution of databases that have been lawfully disclosed, while implementing **Article 6(2)(b) Database.** Entered into force in 1998 (LBD) and later amended in 2015, **Article XI.310, §1er, 2° CDE** transposed **Article 9(b) InfoSoc**, by adopting the text of its EU counterpart verbatim.

Article XI.240 CDE (1988 (LBD) and later modified in 2015), entitles the authors and publishers of lawfully published works, authors of databases, performers, producers of phonograms, and producers of first fixations of films to remuneration for the reproduction and communication of their works, databases, performances. The remuneration may be paid to an authorized CMO.

3.1.2.2.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Article 5 CDSM has been transposed to the Belgian copyright law in 2022, in **Article XI.191/1, §1, 8° CDE**. While this provision closely follows the standards set in its EU counterpart, **Articles XI.191/2, §2, 4° CDE** extends the scope of this provision to databases protected by copyright. **Article XI.217/1, 7° CDE** does the same for performances. Similarly, **Articles XI.299, §6 CDE and XI.310, §4 CDE** extend this exception, respectively, to computer programs and databases protected by sui generis rights.

3.1.2.2.5.4 TEXT AND DATA MINING

Articles 3 and 4 CDSM have been transposed to the Belgian copyright law in 2022, by closely following their EU counterparts. **Article 3 CDSM** finds correspondence, mainly, in **Article XI.191/1, §1, 7° CDE**. The scope of this provision has been extended to databases protected by copyright, performances, computer programs, and to databases protected by sui generis rights, respectively, by **Article XI.191/2, §1, 3° CDE**; **Article XI.217, §1, 6° CDE**; **Article XI.299, §5 CDE**; and **Article XI.310, 3° CDE**.

In a similar manner, **Article 4 CDSM** has been transposed to **Article XI.190, 20° CDE**. The scope of this provision is also extended to other subject-matter, such as performances by **Article XI.217, §1, 7° CDE**; to computer programs by **Article XI. 299, §5 CDE**; and to databases protected by sui generis rights by **Article XI.310, §3, 2° CDE**.

3.1.2.2.6 USES FOR INFORMATORY PURPOSES

3.1.2.2.6.1 PRESS REVIEW AND NEWS REPORTING

CDE contain several flexibilities enabling the use of works, databases, and performances for press review and reporting of current events.

Article XI.190, 1° CDE implements **Article 5(3)(c) InfoSoc**, closely following the language of its EU counterpart.[549] This provision has entered into force in 1886, it and was later amended in 1994 and 2015. It permits the reproduction and communication to the public for informatory purposes, of lawfully disclosed works, or works of plastic or graphic art, in order to report current events.[550] This use shall be justified by the informatory purpose pursued, and the source, including the name of the author, must be mentioned, unless this proves impossible. The three-step-test shall be considered while performing the acts encompassed by this exception.

Entered into force in 1998 and modified in 2017, **Article XI.191/2, §3 CDE** extends this flexibility to databases protected by copyright. Also, **Article XI.217, 2° CDE** permits the fixation, reproduction, and communication to the public of short fragments of the performances, for information purposes and to report current events. Entered into force in 1994 (LDA) and later modified in 2015, this provision corresponds to **Article 10(1)(b) Rental**.

3.1.2.2.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc has been implemented in **Article XI.172, §1 CDE** in 2015. Despite the difference in its formulation, the exception herein meets all the essential criteria of its EU counterpart.

This provision states that literary works, as well as lessons, lectures, speeches, sermons, and the like, delivered in administrative, judicial, and political proceedings can be freely reproduced and communicated to the public. However, their authors retain the exclusive right to publish them in collections. On the contrary, official acts of authorities do not give rise to copyright. The beneficiaries of this exception shall, as well, comply with the three-step-test.

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[549] For related national case law, see: Brussels Court of Appeal, 14 October 2003 (*Arts Antiques Auctions v Sabam*), Auteurs & Media, 2004/1, pp. 40-41; Brussels Court of Appeal, 3 May 2005 (*Sofam v Vlaamse Media Maatschappij*), I.R.D.I., 2005, pp. 244-255; Brussels Court of Appeal, 1 February 2007 (*N. v Sofam*), J.L.M.B., 2007/42, pp. 1762-1764; Antwerpen Court of Appeal, 25 June 2007 (*M. Mallant e.a.v Standaard Uitgeverij*), Auteurs & Media, 2007/5, pp. 461-466; Brussels Court of Appeal, 5 May 2011 (*Google v Copiepresse e.a.*), Auteurs & Media, 2012, p. 202; President of Liege Commercial Court, 19 February 2019 (*RTBF & Sudpresse v P.T.*), Auteurs & Media, 2018-2019/3, pp. 369-378.

[550] This provision also corresponds to the exception for freedom of panorama (see above).

3.1.2.2.7 USES BY PUBLIC AUTHORITIES

3.1.2.2.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

CDE features exceptions to database, protected by copyright and sui generis rights, for the purpose of public security and use in administrative and judicial proceedings, implementing **Articles 6(2)(c) and 9(c) Database**. Both provisions entered into force in 1998 (in LBD) and were later modified in 2015.

Article XI.191, 5° CDE adopts the language of **Article 6(2)(c) Database** verbatim, including the requirement to comply with the three-step-test. Similarly, **Article XI.310, §1, 3° CDE** slavishly adopts **Article 9(c) Database**, and permit for similar purposes the extraction and re-use of a substantial part of the content of the database.

Also, **Article XI.190, §21 CDE** corresponds to **Article 5(3)(e) InfoSoc**; while the scope of this exception is extended to the objects of related rights by **Article 217, 20° CDE**.

3.1.2.2.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 5(3)(g) InfoSoc has been implemented in **Article XI.190, 17° CDE.** This provision has entered into force in 2005 (LDA) and was later modified in 2015, and it closely resembles its EU counterpart.

It permits the reproduction of broadcasts by hospitals, prisons, youth assistance centres, or institutions for persons with disabilities, provided that these are not-for-profit entities, and that the reproduction is reserved for the exclusive use of persons residing therein. **Article XI.217, 16° CDE** extends this flexibility to related rights over such broadcasts. The beneficiaries of these exceptions shall abide by the three-step test.

3.1.2.2.8 SOCIALLY ORIENTED USES

Article 5(2)(e) InfoSoc has been implemented in **Article XI.190, 17° CDE** and **Article XI.217, 16° CDE**, in 2005; yet both provisions have been later amended in 2015.

Article XI.190, 17° CDE allows social institutions such as hospitals, prisons, youth welfare centres, institutions assisting persons with disabilities, and other similar institutions to reproduce works for non-commercial purposes and for the exclusive benefit of the persons residing in these centres. **Article XI.217, 16° CDE** extends the same exception to broadcasts. The Belgian exception for socially oriented uses may be considered more flexible compared to their EU counterpart, as it does not require compliance with the three-step-test.

3.1.2.2.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.2.9.1 PUBLIC LENDING

Belgian copyright law features some limitations, to copyright and to related rights, for public lending, both of which closely resemble and correspond to **Article 6 Rental**.

Article XI.192 CDE, which entered into force in 1994 and was later modified in 2015,[551] permits the lending of literary works, databases, photographic works, sheet music, audio, and audio-visual works for educational and cultural purposes, by institutions being officially organized as having this mission by public authorities. This provision is slightly more restrictive than its EU correspondent, as it imposes temporal restrictions upon the lending of audio and audiovisual works by allowing their lending only two months after their disclosure. **Article XI.218 CDE** (1994 (LDA), modified in 2015) adopts this provision verbatim to extend it to related rights of performers and producers of the first fixation of film.

Entered into force in 1994 (in LDA) and later modified in 2015, **Article XI.243 CDE** requires the payment of a fair remuneration to rightholders, to be collected by authorized CMOs, for uses that fall under the public lending exception. Both provisions require compliance with the three-step-test.

3.1.2.2.9.2 PRESERVATION OF CULTURAL HERITAGE

CDE still devotes two specific provisions to facilitate the reproduction of lawfully disclosed works and other subject-matter, both entered into force in 2005 (LDA) and later modified in 2015. These provisions correspond to the exception provided for CHIs within **Article 5(2)(c) Infosoc**.

Article XI.190, 12° CDE enables publicly accessible libraries, museums, or archives which do not seek any direct or indirect commercial or economic advantage, to reproduce a limited number of copies of lawfully disclosed works, for the purpose of cultural heritage preservation, subordinated to the three-step test. Authors may have access to such copies, in strict compliance with the preservation of the work and in return for a fair remuneration for the work performed by these institutions. **Article XI.217, 11° CDE** extends the same exception to related rights over performances. The acts permitted under this exception shall comply with the three-step-test.

It is worth indicating that **Article 6 CDSM** has been transposed to the Belgian copyright law in 2022 within **Article XI.191/2, §1 CDE**, by closely following the EU rule. The same exception has been extended to databases protected by copyright by **Article XI.217, 11° CDE**; to computer programs by **Article XI.299, §7 CDE**; and to databases protected by sui generis rights by **Article XI.310, §5 CDE**.

3.1.2.2.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Article 5(2)(c) InfoSoc has been implemented in several provisions of CDE in favour of educational establishments.

[551] For related national case law, see: Ghent Court of Appeal, 19 May 2014 (*Belgian Entertainment Association Interactive e.a. v Bibnet e.a.*), Auteurs & Média¸ 2014, liv. 16, p. 488; President of Brussels Civil Court, 3 March 2003 (*R. Blanpain, VEWA and Sofam v H.O.B.*), Auteurs & Media, 2003/3, p. 222.

Introduced in 2017, **Article XI.191/1, §1, 2° CDE** permits the public performance of a lawfully disclosed work in school activities and public examination, provided that the use is not for profit. The use may take place both within and outside the educational establishment. The source of the work and the name of the author shall be mentioned, unless it is proven impossible.

Entered into force in 2019, **Article XI.191/1, 6° CDE** permits the reproduction and communication to the public of a lawfully disclosed works for educational purposes by pre-school establishments.[552] Also in this case the source and the name of the author shall be mentioned, unless it is proven impossible.

Last, **Article XI.217/1, 2° CDE** allows the public performance of performances in the context of educational activities, including for school examinations, which may take place inside or outside the educational establishments, as long as such use if conducted for non-commercial purposes. No remuneration is due for such uses. Neither is there the need to comply with the three-step-test.

3.1.2.2.9.4 ORPHAN WORKS

OWD has been implemented in **Articles XI.192/1, XI.218/1, and XI.245/5 CDE**, by closely following the language of the Directive. These provisions entered into force in 2015, and they are perfectly in line with the flexibilities introduced by the Directive.[553]

Indeed, **Article XI.245/2, §1er** adopts the definition of orphan works provided by **Articles 1(2) and 2 OWD**, by including phonograms **(Article 1(3) OWD)** within this definition as well. **Article XI.192/1 CDE** identifies the beneficiaries of this exception, by adopting the regulation within **Article 1(1) OWD** verbatim. It further rules that the beneficiary institutions may make available to the public orphan works in their collections, and reproduce these works for the purpose of digitization, making available, indexing, cataloguing, preservation, or restoration **(Article 6(1) OWD)**; while **Article XI.218/1 CDE** reproduces this provision almost verbatim to extend it to works covered by related rights. Again, in line with the Directive, **Article XI.245/5 CDE** allows beneficiaries to collect revenue from such uses for the exclusive purpose of covering the digitization and dissemination costs, by adopting **Article 6(2) OWD**.

Article XI.245/3, §1er, once again closely following the text of the Directive, introduces the diligent search requirement regulated within **Article 3 of the Directive**; while **Article XI.245/7** regulates the termination of the orphan works status as well as its consequences, including the fair remuneration of the rightholders **(Article 4 OWD)**.

[552] An action for annulment of this provision has been brought before the Constitutional Court by several Belgian CMOs. The case is still pending. See: Moniteur belge, 6 January 2020, p. 128.
[553] Ibid.

3.1.2.2.9.5 OUT-OF-COMMERCE WORKS

Article 8(2) CDSM has been transposed, mainly, into **Article XI.192/2 CDE** in 2022, by adopting the language of its EU counterpart verbatim. This exception has been extended to the objects of related rights, such as performances, phonograms and broadcasts, by **Article 218/2 CDE**, and to the databases protected by sui generis rights by **Article 310/1 CDE**.

3.1.2.2.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 5(3)(b) InfoSoc and the Marrakesh Directive have been implemented in **Articles XI.190, 18° and 19° CDE, Article XI.16, §1er/1, Article XI.217, 17° and 18°, and Articles XI.299, §4 and XI.16, §1er/1 CDE**, which all entered into force in 2018.

Article I.16, §1/1 CDE identifies the beneficiaries and sets the scope of subject-matter, by adopting the definitions of persons with disabilities, authorized entities, and accessible format copy within **Article 2 Marrakesh.**

Article XI.190 CDE regulates the acts permitted by this exception, by adopting the formulation of **Article 3 Marrakesh**, also by requiring the beneficiaries' compliance with the three-step-test **(Article 3(3) Marrakesh)**. The same provision also enables a beneficiary entity resident in Belgium to obtain accessible copies from an authorized entity established in any EU Member State, by adopting **Article 4 of the Directive.**

Whereas **Article XI.217, 17° and 18° CDE** extend this exception for copyright to the related rights, **Article XI.299, §4 CDE** does the same for computer programs.

3.1.2.2.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Belgian copyright law features a multitude of other flexibilities for various stakeholders.

For instance, **Article XI.190, 3° CDE** permits the free private use of a lawfully disclosed work within a family circle.[554] **Article XI. 191 §2 CDE** extends this exception to databases as well.

Entered into force in 2018, **Article XI.196 §2/1 CDE** provides a flexibility for authors of scientific articles, whose research has been at least partially financed by public funds. They are entitled to make the manuscript freely available to the public after an embargo period of twelve months after publication for the humanities and social sciences, and six months for other sciences, with the mention of the source of the first publication. This right cannot be waived, even if the author has assigned or licensed their rights.

Article XI.190, 16° CDE, which entered into force in 2015, transposes **Article 5(3)(j) InfoSoc**. It allows the reproduction and communication to the public of a lawfully disclosed work for the purpose of announcing public exhibitions or sales of artistic works, to the extent

[554] For related national case law, see: Court of Cassation, 8 October 1999 (*Sabam v Hanuise*), Auteurs & Media, 2000/3, p. 289; Court of Cassation, 18 February 2000 (*Sabam v La Douce Quiétude*), Auteurs & Media, 2000/3, p. 290; Court of Cassation, 21 November 2003 (*Sabam v Farris Antonio*), Auteurs & Media, 2004/1, p. 35; Court of Cassation, 26 January 2006 (*Sabam v British Car Center*), Auteurs & Media, 2006/2, p. 180.

necessary to promote the event and with no commercial purposes. **Article XI.217, 15° CDE** extends this exception related rights over performances.

3.1.2.2.12 THREE-STEP TEST

Three-step-test has been implemented in the Belgian copyright law in 2022, within **Articles XI.192/3** and **XI.218/3 CDE**. Whereas the former adopts the three-step-test for works and databases protected by copyright, the latter does the same for the objects of related rights, by closely following the wording of **Article 5(5) InfoSoc**.

3.1.2.2.13 PUBLIC DOMAIN

3.1.2.2.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

There is no dedicated provision for drawing the boundaries of the public domain. However, **Article XI.172 CDE** allocates the speeches made in deliberative assemblies, in public hearings of jurisdictions or in political meetings, all of which lack written form, as well as the official acts of the public authorities to the public domain. Additionally, **Article XI.295 CDE** has transposed **Article 1(2) Software**, by excluding the ideas and principles underlying the elements of a computer program from the scope of copyright protection.

3.1.2.2.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.2.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Apart from the fair remuneration schemes mentioned above, **Article 8(1) CDSM** finds correspondence in **Article XI.245/7/2 CDE**. Entered into force in 2022, this provision closely follows its EU counterpart, by meeting all the standards set therein.

3.1.2.2.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.2.15.1 FUNDAMENTAL (USERS') RIGHTS

The interplay between copyright and fundamental rights and the resorting to fundamental rights as a balancing tool in Belgian case law evidences an evolution that is still ongoing and not linear.

In the early 2000s, the Belgian Court of Cassation seemed to consider that copyright does not impose disproportionate restrictions to freedom of expression[555]. In a decision of 25 September 2003, the Court stated that: "(…) the right guaranteed by articles 10, Article 1 ECHR and Article 19 ICCPR does not preclude [the possibility for the legislature to] to protect [the author's own intellectual creation]. (…) The interpretation given by the appeal judges to

[555] See: Alain Strowel and François Tulkens, 'Equilibrer La Liberté d'expression et Le Droit d'auteur – A Propos Des Libertés de Créer et d'user Des Œuvres' in Alain Strowel and François Tulkens (eds), *Droit d'auteur et liberté d'expression – Regards francophones, d'Europe et d'ailleurs* (Larcier 2006) 30.

the law of 30 June 1994 does not restrict the right to freedom of expression, as guaranteed by the aforementioned conventions (…)."[556]

The case deferred to the Court concerned the freedom to use protected works[557] rather than the freedom to create new works on the basis of existing ones, which justified the application of a more stringent proportionality test. In fact, a few years earlier the Court showed more openness when it admitted the existence of a parody exception under the first Copyright Act of 1886, which did not contain a provision specifically devoted to it.[558] The importance of the decision, however, should not be overstated, since at the time that decision was issued, the Copyright Act of 1886 had already been replaced by the new Copyright Act of 1994, which explicitly included a parody exception. Since then, no further guidance has been offered by the Court of Cassation. However, a closer look at the case law of other courts offers interesting hints, as evidenced by detailed studies on the matter.[559]

In general, courts showed a restrictive approach to the interpretation of exceptions, leaving very little room for transformative uses, parody included. And when parties resorted to freedom of expression to support their claims, the argument was rejected by maintaining that its protection was already addressed by the legislator in the parody exception. A paradigmatic example of this reasoning comes from a decision issued by the Antwerpen Court of Appeal,[560] which ruled that 'the right guaranteed in Article 10 ECHR does not stand against the protection of [authors' rights]. Incidentally, the Copyright Act already provides for a number of exceptions in favour of freedom of expression and the parody, but this exception is not applicable here.'

The *Deckmyn* decision,[561] in itself originated from a Belgian referral, did not change much. In fact, the only two parody cases that have been published since then show a strict understanding of what ought to be a legitimate parody.

While the first case did not even mention the CJEU precedent and opted for a traditional restrictive interpretation of the exception,[562] the second decision recalled *Deckmyn,* and cited the fair use doctrine,[563] but rather to argue that the parodic act failed to strike it. The court ruled, in fact: "(…) The fair balance between the right to freedom of expression and the

[556] Cass., 25 septembre 2003, *Pas.*, I, 2003, p. 1471, n° 455, *Arr. Cass.*, 2003, p. 1733, n° 454, concl. av. gén. G. BRESSELEERS, *A&M*, 2004, p. 29, *I.R.D.I.*, 2003, p. 214, *R.A.B.G.*, 2004, p. 205, note F. BRISON, *R.D.C.*, 2004, p. 55, concl., *R.W.*, 2003-2004, p. 1179, concl.

[557] The case was concerned with a tax law database that included (namely) copyrighted summaries of court decisions borrowed from law journals without authorization.

[558] Cass., 5 avril 2001, *Pas.*, 2001, p. 612, n° 203, concl. av. gén. DE RIEMAECKER, *A&M*, 2001, p. 400, note B. MICHAUX, *I.R.D.I.*, 2001, p. 323, *J.L.M.B.*, 2001, p. 1420.

[559] See: Julien Cabay and Maxime Lambrecht, 'Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity' (2015) 10 Journal of Intellectual Property Law and Practice 359, 359–377.

[560] Antwerpen Court of Appeal, 2 May 2006 (*Code v Mercis*), Auteurs & Media, 2006/3, p. 257.

[561] CJEU, 3 September 2014, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, ECLI:EU:C:2014:2132.

[562] President Antwerpen Civil Court, 15 January 2015 (*Van Giel v Tuymans*), Auteurs & Media, 2015/2, p. 183, note B. Van Besien.

[563] President Brussels Civil Court, 4 April 2019 (*Studio 100 v Greenpeace*), Auteurs & Media, 2018-2019/4, p. 461.

interest of a commercial enterprise to maintain a caring, child-friendly image was not sufficiently taken into account (…)."

More generally, Belgian courts have been reluctant so far to resort to fundamental rights to allow uses not covered by exceptions or to interpret E/L more flexibly. Similarly, the national case law does not feature cases where fundamental rights have been used to define the scope of exclusive rights, as the CJEU did, e.g., in *GS Media* and *Pelham*.

The only case that seems to adopt, albeit only indirectly, this approach comes from the Court of Appeal of Mons (2014), where Madonna was accused of plagiarism by a Belgian musician for her song "Frozen".[564] The court rejected the claim and incidentally mentioned that: "(…) When there is a true creation, the freedom to create of the second author limits the sometimes-exaggerated claims of the first creator."[565]

Interestingly, fundamental rights and conflicting public interests have come into play to determine the subject matter of copyright. In 2014, the Ghent Court of Appeal[566] issued a much-debated decision in which it refused to grant copyright protection to the shape of a handbag, arguing that this would unduly limit the freedom of expression of other creators. More specifically, the court stated that "to grant copyright protection to a fashion trend (or its beginnings) would be to unnecessarily restrict the freedom of expression of other authors as provided for in Article 10 of the ECHR (...)."[567] The Court of Cassation upheld the decision.[568]

The originality criterion has been read through the same lenses.[569] In the words of the Antwerpen Commercial Court, in assessing the requirement, "(…) it will therefore be necessary to examine how, when granting or rejecting protection, the author's interests in

[564] Mons Court of Appeal, 3 February 2014 (*Warner/Chappel Music Publishing v S.L and S.A.)*, Revue de droit commercial belge, 2014/5, p. 513.
[565] Ibid.
[566] Ghent Court of Appeal, 20 October 2014 (*Jean Cassegran v CALEM*), Revue de droit intellectuel – L'ingénieur-Conseil, 2014/4, p. 739, note P. Péters and C. de Callataÿ.
[567] Ibid.
[568] Court of Cassation, 17 February 2017 (*Jean Cassegrain v CALEM*), Intellectuele Rechten/Droits intellectuels, 2017, p. 135, note F. Gotzen.
[569] See: Julien Cabay, 'Proving Copyright Protection and Infringement: Lessons from the CJEU' in Eleonora Rosati (ed), *Handbook on EU Copyright Law* (Routledge 2021). Also see: Antwerpen Commercial Court, 4 July 2019 (*Serax v Kwantum*), A/18/7799, available on IE-Forum.
See: --, 'IEFbe 2911' <https://www.ie-forum.be/artikelen/geen-auteursrechtelijke-inbreuk-lamp-kwantum> accessed 2 July 2022.
Antwerpen Commercial Court, 6 June 2018 (*Studio 100 v Heidi.com*), A/17/6354, available on IE-Forum.
See: --, 'IEFbe 2601' <https://www.ie-forum.be/artikelen/logo-heidi-com-schendt-auteursrechten-studio100-beeltenis-van-heidi> accessed 2 July 2022.
Antwerpen Commercial Court, 2 November 2017 (*Jean Cassegrain v Kamize and PH Fashion*), A/16/8494, available on IE-Forum. See: --, 'IEFbe 2404' ,<https://www.ie-forum.be/artikelen/auteursrechtelijke-bescherming-van-pliage-tas-slechts-de-techniek-van-plooibare-tas-is-bekend-uit-ee> accessed 2 July 2022.
Ghent Commercial Court, 22 October 2020, A/19/01407 (*X v OVS Home*), available on IE-Forum. See: --, 'IEFbe 3138' <https://www.ie-forum.be/artikelen/schadevergoeding-wegens-foutief-beslag-en-roekeloos-geding> accessed 2 July 2022.

protection are weighed against the general interest of third parties in the free disposal of the work or its elements."

3.1.2.2.15.2 CONSUMER PROTECTION

None reported.

3.1.2.2.15.3 COPYRIGHT CONTRACT LAW

A number of provisions reinforce E/Ls in contractual settings, by declaring a number of exceptions mandatory. See, for instance, Article XI.193 CDE, which rules that: "The provisions of articles XI.189, XI.190, XI.191, XI.191/1, XI.191/2, XI.192, §§1 and 3, and XI.192/1 are mandatory." A similar provision (Article XI.219 CDE) extends the principle to exceptions to related rights.

These provisions prevent end-users from agreeing to contractual clauses which would either limit the scope of exceptions or would subject their enjoyment to a contractual fee,[570] by declaring such clauses null and void.[571] A carve-out from this rule is marked by Article **XI.23bis CDE** which, in line with an approach adopted also by other Member States, allows the contractual derogation from **Article XI.193 CDE** "in case of works which are made available to the public on demand (…) in such a way that users may have access to them from a place and at a time individually chosen by them."

While in its original version **Article XI.193** covered also online uses, in a later amendment the latter were excluded from its scope, sparking heated controversies in the Belgian copyright debate.[572] With the entry into force CDE, this limitation has again been deleted without explanation.[573]

3.1.2.2.15.4 OTHER INSTRUMENTS

The general civil law theory of abuse of rights has been applied in the context of copyright.[574] Particularly in relation to moral rights, the theory of abuse of rights has proven a true mean for balancing copyright holder's interests with others' interests.[575]

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[570] See: Marie-Christine Janssens, 'Art. XI.193 WER/CDE' in Fabienne Brison and Hendrik Vanhees (eds), *Het belgisch auteursrecht. Artikelsgewijze commentaar – Le droit d'auteur belge. Commentaire article par article* (4th edn, Larcier 2018) 300.

[571] Ibid, p. 299.

[572] See: Séverine Dusollier, *Droit d'auteur et Protection Des Œuvres Dans l'univers Numérique* (Larcier 2007) 504–507..

[573] See*:* Janssens (n 588) 300–301; Séverine Dusollier and Maxime Lambrecht, 'Les Exceptions Ont 20 Ans: Âge de Raisonb Ou de Refondation' in Julien Cabay and others (eds), *20 ans de nouveau droit d'auteur – 20 jaar nieuw auteursrecht* (Anthémis 2015) 201.

[574] See in general: Vanbrabant and Strowel, 'La mise en balance du droit d'auteur : rapport belge', *in The Belgian reports at the Congress of Washington of the International Academy of Comparative Law / Rapports belges au Congrès de l'Académie Internationale de Droit Comparé à Washington / De Belgische rapporten voor het Congres van de "Académie internationale de Droit Comparé" te Washington* (Bruxelles, Bruylant 2011), 602-606.

[575] In particular for limiting the said right when confronted with the right of the proprietor, *see* for an example Brussels Court of Appeal, 21 March 2003 (*Brodski v Swift*), Auteurs & Media, 2003/5, 366, note B. Vinçotte.

Competition law has been used also to limit abuses of dominant position by CMOs, accused of imposing unfair or discriminatory prices, particularly when collecting remunerations due for the exercise of E/Ls.[576]

3.1.2.3 BULGARIA

The Bulgarian Copyright and Neighbouring Rights Law (hereinafter "Bulgarian CA" or "BCA") of 1993, as last amended in 2018,[577] is mostly harmonized with the EU standards of E/Ls, given the vast majority of the flexibilities have been introduced to Bulgarian copyright law. Exceptions missing are those for incidental inclusion, parody (to which the exception for quotation has been extended by case law), and socially oriented uses. To date, the transposition of the CDSM Directive has not been finalized yet. Therefore, the Bulgarian CA misses copyright exceptions for TDM, digital and cross-border teaching activities, and an ECL scheme/exception for out-of-commerce works.

While several provisions present more rigidity compared to the standards set by EU Directives (e.g. the exception for private copy, the so-called "freedom of panorama" exception), others offer a higher degree of flexibility (e.g. exception for public speeches and lectures, exception for public lending), or fall short of satisfying the requirements set by the EU law, for they preceded the entry into force of corresponding EU provisions and were not aligned to them thereafter (e.g., access to and normal use of computer programs).

Yet, it is worth noting that not only the E/Ls, but also certain special licensing schemes, as well as the fundamental human rights discourse and media law play a role in promoting end users' access to cultural content in Bulgaria.

3.1.2.3.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.3.1.1 TEMPORARY REPRODUCTION

The exception provided for temporary acts of reproduction under **Article 5(1) InfoSoc** has been implemented verbatim by **Article 24(1)(1) of the Bulgarian CA**. In line with its EU

[576] See in general: Vanbrabant and Strowel, 'La mise en balance du droit d'auteur : rapport belge', *in The Belgian reports at the Congress of Washington of the International Academy of Comparative Law / Rapports belges au Congrès de l'Académie Internationale de Droit Comparé à Washington / De Belgische rapporten voor het Congres van de "Académie internationale de Droit Comparé" te Washington* (Bruxelles, Bruylant 2011), 599-601. Antwerpen Commercial Court, 28 February 2019 (*Sabam v Weareone.world and Candance*), Competitio, 2019/3, p. 278 has referred some questions to the CJEU, which answered recently in C.J.E.U., *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA, Wecandance NV*, C-372/19, ECLI:EU:C:2020:959. The Brussels Court of Appeal, 10 April 2019 (*Sabam v P.S.E.*), Competitio, 2019/3, p. 284 has been seeking advice from the European Commission on those practices, pursuant to article 15 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *J.O.* of 4 January 2003, L 1/1.

[577] Закон За Авторското Право И Сродните Му Права, В сила от 01.08.1993 г. изм. ДВ. бр.98 от 13 Декември 2019г (Copyright and Neighbouring Rights Act of 01.08.1993, as last amended by SG No. 94.2018, effective 13 December 2019).

counterpart, this provision requires compliance with the three-step-test, given **Article 23 BCA** subordinates all the E&Ls therein to this test.

While this provision was first introduced in 2003 and later amended in 2006, it has been extended to all neighbouring rights with the amendment of the Bulgarian CA in 2006. Thus, this exception applies, by analogy, to performances, phonograms, fixations of films, and broadcasts, respectively, by **Articles 84, 90, 90v, and 93 BCA**.

3.1.2.3.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc has been implemented almost verbatim in **Article 24(1)(12) of the BCA.** This provision entered into force in 2003.[578]

According to **Article 24(1)(12) BCA**, radio and television organizations, which have been authorized by the author to use a work, are permitted to temporarily record it by their own technical devices and to extent necessary to pursue their activities, within the scope of the authorization. Beneficiaries are also allowed to preserve the recordings of important documentary value. No remuneration is due to rightholders, while compliance with the three-step-test is essential due to **Article 23 BCA**.[579]

The scope of this provision has been extended to all neighbouring rights with the amendment of the Bulgarian CA in 2006. Thus, this exception applies, by analogy, to performances, phonograms, fixations of films, and broadcasts, respectively, by **Articles 84, 90, 90v, and 93 BCA**. That said, the BCA corresponds to the regulation encompassed within **Article 10(1)(c) Rental**.

3.1.2.3.1.3 INCIDENTAL INCLUSION

There is no evidence to suggest that **Article 5(3)(i) InfoSoc** has been transposed to Bulgarian copyright law, nor the Bulgarian CA provides any other flexibility on the matter**.**

[578] For related case law, see: Decision n. 473 of 11.03.2015, case n. 4476/2014 of the Sofia Appellate Court; Decision n. 1150 of 22.07.2014, case n. 2603/2013 of the Sofia District Court.

[579] For the three-step-test, please see 3.1.2.3.1.12. below.

3.1.2.3.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The Bulgarian CA includes three provisions enabling lawful users of a work to perform acts necessary to access and use, respectively, software, database, or works protected by TPMs.

Article 70 BCA, which dates back to 1993, provides specific flexibilities for the lawful user of a software program, while adopting **Article 5(1) Software,** by closely following its EU counterpart. According to this provision, while honouring the terms and conditions of any contractual arrangement, lawful users are permitted to carry out several actions that are necessary for the use of the program or to correct the systemic errors, such as displaying the program on screen; operating or transmitting it; storing it in the computer's memory; translating or adapting it. **Article 71(1) BCA** adopts verbatim **Article 5(2) Software**, while **Article 71(2) BCA** does the same for **Article 5(3) Software**.

Entered into force in 2000, **Article 71(3) BCA** implements **Article 6 Software.** However, **Article 71(3) BCA** does not include acts of reproduction but only translations, thus, offering quite a restrictive transposition of the EU provision.

Entered into force in 2003, Article 93e of the Bulgarian CA implements the exceptions introduced by **Articles 6(1) and 8 Database**, using an almost identical language. **Article 93e(1) BCA** permits the lawful user of a database or of a copy thereof to translate, adapt, arrange, and alter the database in question, in order to use it and access its content. According to **Article 93e(3) BCA** restricts the use of databases made available to the public, by introducing the three-step-test, mainly to balance the public and private interests, while **Article 93e(4) BCA** provides that uses of a database permitted under this provision shall not conflict with copyright and related rights over the works and other subject-matters contained therein. The exception is mandatory and cannot be overridden by contract.

Along the same lines, the exception provided for the private copying of databases introduced by **Article 8(1) Database** has been implemented within **Article 93e(2) BCA.** This provision entered into force in 2003. According to **Article 93e(2) BCA**, the lawful user of a database which has been made available to the public may extract or re-use the content of a database for any purpose.

Entered into force in 2006, **Article 25a(2) BCA** transposes almost verbatim **Article 6(4) InfoSoc** into national law, and permits lawful users of a work, which is protected by TPMs, to request rightholders access to the work, to the extent justified by the purpose of use. Just like its EU counterpart, this exception does not apply to cases in which works, or other protected subject-matter have become available by contractual means to the public at large and can be accessed at a place and at a time individually chosen by users.

3.1.2.3.1.5 FREEDOM OF PANORAMA

The so-called "freedom of panorama" exception introduced by **Article 5(3)(h) InfoSoc** has been implemented in **Article 24(1)(7) BCA**, which entered into force in 2003.

According to **Article 24(1)(7) BCA**, it is permitted to use works permanently exhibited in the public spaces. Nevertheless, the same provision restricts the scope of permitted acts by excluding, for instance "mechanical" copying, including broadcasting and transmitting by any means, or the use of works for purposes other than for informatory and other non-commercial ones.

The exception provided for freedom of panorama within the Bulgarian CA is restrictive compared to that of the InfoSoc Directive, due to the limitation of subject-matter, means of reproduction, as well as of its purpose. Given the regulation within **Article 23 BCA**, this provision requires compliance with the three-step-test.

In this context, the **Yambol District Court** has ruled **in case 181/2013** on 18 May 2013 that this exception does not apply to the reproduction of the statute of Goddess Diana, which was then under copyright protection, on leaflets for an election campaign. The Court has embraced an overbroad interpretation of the subjective criteria and ruled that the income generated by the copy shop for producing the leaflets was of commercial nature, hence the reproduction could not be covered by the exception.

3.1.2.3.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.3.2.1 REPROGRAPHY

Article 5(2)(a) InfoSoc has been implemented in **Article 25(1)(1) BCA.** This provision has been first introduced in 2003 and later amended in 2006, and it follows verbatim the text of the corresponding EU exception, while **Article 26(1) BCA** entitles the authors and publishers to remuneration, which is regulated as a right that cannot be contractually overridden. Once again, this exception has been subordinated to the three-step-test, given the regulation within **Article 23 BCA**.

Although this provision provides for an exception only to copyright, it has been extended to all neighbouring rights with the amendment of the Bulgarian CA in 2006. Thus, this exception applies, by analogy, to performances, phonograms, fixations of films, and broadcasts, respectively, by **Articles 84, 90, 90v, and 93 BCA**.

3.1.2.3.2.2 PRIVATE COPY

The BCA features a multitude of provision aimed at facilitating the private copy of databases and works.

Whereas **Article 6(2)(a) Database** does not find correspondence in the BCA, **Article 9(a) Database** has been implemented verbatim in **Article 93s(1) BCA.**

The exception provided for private copying of works introduced by **Article 5(2)(b) InfoSoc** has been implemented in **Article 25(1)(2) BCA**. The provision was first introduced in 2003 yet amended in 2006, and it offers a slightly more restrictive regulation compared to that of the InfoSoc Directive, for it imposes additional restrictions to the works covered.

According to **Article 25(1)(2) BCA,** natural persons are allowed to reproduce works by any medium, as long as the reproduction is carried out for non-commercial purposes. **Article 25(2) BCA** excludes from the scope of this exception computer programs and architectural works. The provision requires that a fair remuneration is provided to rightholders.

The scope of this exception has been extended to all neighbouring rights with the amendment of the Bulgarian CA in 2006. Thus, this exception applies, by analogy, to performances, phonograms, fixations of films, and broadcasts, respectively, by **Articles 84, 90, 90v, and 93 BCA**. That said, these provisions correspond to **Article 10(1)(a) Rental.** Also, **Article 26(1) BCA** entitles authors, performers, producers of sound recordings, or of the initial recording of films or other audio-visual works to remuneration for the private copying of their works. This right cannot be contractually overridden.

Considering the regulation within **Article 23 BCA**, these provisions are subjected to the three-step-test.

3.1.2.3.3 QUOTATION

The exception for quotation introduced by **Article 5(3)(d) InfoSoc** has been implemented in **Article 24(1)(2) BCA.**[580] This provision entered into force in 2003, and closely resembles its EU counterpart, while the transposition of **Article 17(7) CDSM** is still in progress.

Article 24(1)(2) BCA allows quoting parts of a published work for purposes of criticism or review. Whereas it is not required to pay any remuneration to rightholders, it is compulsory to cite the source and attribute the quote to its author, unless this is proven impossible. In any case, quotation shall be exercised according to fair practices and be limited to the extent necessary to achieve the aim of critique or review. This exception is subordinated to the three-step-test by **Article 23 BCA**, while its scope is extended to fixations of films, and broadcasts, respectively, by **Articles 90v and 93 BCA**.

The lack of attribution to the author of a quote excerpt has caused the non-application of the quotation exception in the case law of the Sofia Appellate Court (case no.78/2017 of 1 August 2017) and of the Supreme Court of Cassation (case no.523/2018 of 17 July 2019).

3.1.2.3.4 PARODY, CARICATURE, PASTICHE

The exception provided for caricature, parody, and pastiche introduced by **Article 5(3)(k) InfoSoc** has not been transposed into the national law. Nevertheless, an exception to copyright for parodic uses has been established by case law in 2017, when the Supreme Court of Cassation has extended the scope of the subjective criteria of quotation exception also to uses for the purposes of parody (case no. 1771/2016 of 2 August 2017).

As to the "online parody" exception within **Article 17(7) CDSM**, it shall be noted that the transposition of CDSM is still in progress.

[580] For related case law, see: Decision n. 112 of 02.08.2017, case n. 1771/2016 of the Supreme Court of Cassation.

3.1.2.3.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.3.5.1 PRIVATE STUDY

The exception provided for the purposes of private study introduced by **Article 5(3)(n) InfoSoc** has been implemented in **Article 24(1)(11) BCA.** This provision entered into force in 2003, and closely resembles the corresponding EU rule, yet provides for a more flexible exception given the absence of geolocational criteria.

Article 24(1)(11) BCA permits natural persons to access works held in the permanent collections of CHIs, only if such actions are carried out for scientific and non-commercial purposes. No remuneration is due to rightholders, yet **Article 23 BCA** subordinated this exception to the three-step-test. It is also worth noting this exception applies, by analogy, to fixations of films, and broadcasts, respectively, by **Articles 90v and 93 BCA**.

3.1.2.3.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

There is no concrete evidence to suggest that **Article 6(2)(b) Database** has been transposed to BCA, while **Article 9(b) Database** is implemented in **Article 93s(2) BCA** verbatim. No remuneration is due to rightholders, but the provision requires the indication of the source, unless it is proven impossible.

The Bulgarian CA contains another exception within **Article 24(1)(3) BCA,** which is intended to enable the use of excerpts from works for teaching and scientific purposes. This provision entered into force in 2003, and it corresponds to the exception provided by **Article 5(3)(a) InfoSoc**, however, to a limited extent, while still complying with the three-step-test requirement **(Article 23 BCA). Article 24(1)(3) BCA** permits the use of parts of works or several works in a collection for analysis, commentary, or other types of scientific research. No remuneration is due to rightholders, but it is compulsory to attribute to the author and source of the works in use, unless impossible. In this sense, the Bulgarian exception is narrower in scope than its EU counterpart enshrined in **Article 5(3)(a) InfoSoc**, for it limits both the subject-matter and the purpose of the use. It is worth noting that, partially corresponding to **Article 10(1)(d) Rental**, this exception applies, by analogy, to phonograms, fixations of films, and broadcasts, respectively, by **Articles 90, 90v, and 93 BCA**.

The **Sofia Appellate Court** has ruled in **case no. 741/2013 (9 May 2013)** that the conditions imposed by this provision are cumulative; therefore, uses for educational purposes do not necessary trigger the application of Article 24(1)(3) BCA, unless the work has been used for analysis, commentary, or any other form of scientific research. On its side, the **Supreme Court of Cassation** has clarified in **case no. 828/2009 (27 January 2010)** that the amount of works that may be used under this exception shall be decided on a case-by-case basis. In this specific context, the inclusion of three children songs' lyrics and sheet music in a collection intended for music education has been acknowledged as "a small number of works" and thus within the scope of the provision by the **Sofia Appellate Court** in **case no. 3303/2012**

(19 April 2013). It is worth noting that the Court has not sought for the "uses for analysis, commentary, or other scientific research" criteria in this case.

3.1.2.3.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

The Bulgarian CA does not contain any provision specifically addressing digital uses of protected works for teaching purposes. **Article 5 CDSM** is yet to be implemented.

3.1.2.3.5.4 TEXT AND DATA MINING

The Bulgarian CA does not contain any provision specifically addressing TDM activities, given that **Articles 3 and 4 CDSM**, regulating the matter, are yet to be implemented.

3.1.2.3.6 USES FOR INFORMATORY PURPOSES

3.1.2.3.6.1 PRESS REVIEW AND NEWS REPORTING

Article 5(3)(c) InfoSoc has been implemented by **Article 24(1)(5) and (6) BCA.** Entered into force in 2003, the exception provided by the Bulgarian CA is more rigid compared to the corresponding EU rule, for it is more restrictive in its definition of beneficiaries, scope of the subject-matter, as well as permitted acts. The three-step-test also applies to this exception as well **(Article 23 BCA).**

Article 24(1)(5) BCA allows the reproduction by mass media of articles on current economic, political, and religious topics that have already been made available to the public, unless the use of such works has not been explicitly prohibited. Additionally, **Article 24(1)(6) BCA** enables the free reproduction of works related to a current event by photographic, cinematographic, or analogous means, as well as by sound recording or video recording of works.[581] Under both provisions, reproductions are admitted only to the extent justified by the purpose, and by mentioning the source. This criterion has been further consolidated by case law.[582]

Also corresponding to **Article 10(1)(b) Rental**, the scope of this exception has been extended to it has been extended to all neighbouring rights with the amendment of the Bulgarian CA in 2006. Thus, this exception applies, by analogy, to performances, phonograms, fixations of films, and broadcasts, respectively, by **Articles 84, 90, 90v, and 93 BCA**.

Bulgarian courts have interpreted the exception restrictively. Beneficiaries have been limited to mass media entities, while the scope of the provision has been narrowed down via case law. For example, the **Sofia Appellate Court** in **case no.3149/2015** ruled that in order to

[581] For related case law, see: Decision n., case n. 8144/2013785 of 27.05.2014, Sofia City Court; Decision n. 478 of 11.03.2015, case n. 3824/2014Sofia Appeal Court; Decision n. 1307 of 31.07.2014, case n. 8142/2013, Sofia City Court; Decision n. 785, 27.05.2014, case n. 8144/2013, Sofia City Court; Decision n. 2376, 1.11.2017, case n. 3290/2017, Sofia Appeal Court; Decision n. 2625, 1.11.2019, case n. 3480/2019, Sofia Appeal Court.

[582] See: Sofia City Court, case n. 8144/2013 of 27 May 2014; Sofia City Court, case n. 8142/2013 of 31 July 2014; Sofia Appeal Court, case n. 3824/2014 of 11 March 2015.

benefit from the exception, “articles” reproducing excerpts shall be strictly “journalistic”, rather than being “creative”.

3.1.2.3.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 24(1)(4) BCA, which is in force since 2003, introduces an exception for the use of public speeches and lectures for informatory purposes. It implements **Article 5(3)(f) InfoSoc**, but it features a broader and more user-friendly flexibility, for it offers the possibility to use not only parts but also the entirety of speeches, reports, preaches and the like, presented in public meetings or judicial proceedings and embedded in works published by mass media. Besides, this provision, in line with its EU counterpart, has been subordinated to the three-step-test **(Article 23 BCA).**

3.1.2.3.7 USES BY PUBLIC AUTHORITIES

3.1.2.3.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Entered into force in 2003, **Article 93s(3) BCA** permits to extract or re-use the parts of content available in databases for the same purposes, by implementing **Article 9(c) Database** verbatim. However, there is no concrete evidence to suggest that **Article 6(2)(c) Database** has been transposed to BCA.

Also, the exception provided for the use of works for national security and official proceedings by **Article 5(3)(e) InfoSoc** has been implemented almost verbatim in **Article 24(1)(13) BCA** and entered into force in 2003. **Article 24(1)(13) BCA** allows the free use of works for the purposes of national security, as well as in judicial, administrative, and parliamentary proceedings. The three-step-test enshrined in **Article 23 BCA** applies herein as well. It shall be noted that the scope of this exception has been extended to phonograms, fixations of films, and broadcasts, respectively, by **Articles 90, 90v, and 93 BCA**.

3.1.2.3.7.2 OTHER USES BY PUBLIC AUTHORITIES

The exception provided within **Article 5(3)(g) InfoSoc** has been implemented almost verbatim in **Article 24(1)(14) BCA**, which entered into force in 2003. **Article 24(1)(14) BCA** allows the free use of works during religious ceremonies or at the official ceremonies, as long as such events are organized by public authorities and if such uses comply with the three-step-test **(Article 23 BCA).** Also, the scope of this provision has been extended to all neighbouring rights with the amendment of the Bulgarian CA in 2006. Thus, this exception applies, by analogy, to performances, phonograms, fixations of films, and broadcasts, respectively, by **Articles 84, 90, 90v, and 93 BCA**.

In line with the principle of strict interpretation of exceptions, the **Varna District Court** has ruled in **case no. 578/2008** (15 March 2010) that wedding rituals cannot be considered as official ceremonies organized by public authorities in the sense of Article 24(1)(14) of the Bulgarian CA.

3.1.2.3.8 SOCIALLY ORIENTED USES

The exception provided for socially oriented uses within **Article 5(2)(e) InfoSoc** has not been transposed into Bulgarian copyright law.

3.1.2.3.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.3.9.1 PUBLIC LENDING

The Bulgarian legislator has amended **Article 22a BCA**, in order to bring the existing legal regulation in line with **Article 6(1) Rental.** Whereas the Bulgarian public lending regulation, which comprise a compulsory licensing scheme rather than an exception, resembles that of its EU counterpart, but also presents more flexible traits, for it does not impose any geolocational restrictions to the performance of permitted acts.

Indeed, **Article 22a(2) BCA** permits the lending of works or copies of the support on which such works are fixated. In order to strike a balance between public and private interests, **Article 22a(5) BCA** requires rightholders to be remunerated. Remunerations should be collected by CMOs, and the amount and method of collection shall be determined through agreements between the latter and the subjects liable for the remuneration. Yet, **Article 22a(4) BCA** exempts the State, municipal cultural organizations, libraries, including those of schools, universities and community centres from the payment of remuneration.

3.1.2.3.9.2 PRESERVATION OF CULTURAL HERITAGE

Entered into force in 2003 and amended in 2006, **Article 24(1)(9) BCA** provides an exception for the preservation of cultural heritage, as regulated by **Article 5(2)(c) InfoSoc.** According to this provision, publicly accessible libraries, educational and other learning establishments, museums, and archives are permitted for educational or preservation purposes only. The subject matter of the provision is narrowly articulated, for it excludes unpublished works or works protected by neighbouring rights. This exception has also been subordinated to the three-step-test **(Article 23 BCA).**

It must be noted, however, that **Article 6 CDSM** has not been implemented yet.

3.1.2.3.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Article **24(1)(8) BCA** permits the public presentation and public performance of published works in educational and other learning establishments. To fall under this exception, such acts shall be carried out for non-commercial purposes and no income shall be generated by the participants of the presentation and performance. This exception applies, by analogy, to performances and broadcasts, respectively, by **Articles 84 and 93 BCA**.

As evidence of the strict interpretation of the exception by Bulgarian courts, the **Sofia District Court** has ruled **in case no. 2706/2013** of 25 March 2015 that the provision does not apply to the public performance of the translated text of a play by a university's acting club, given that defendants could not prove that the translation constituted a published work.

It is important to note that **Article 24(1)(8) BCA** flanks but not overlaps with other exceptions provided for the uses of works by educational establishments and CHIs. This provision mostly addresses amateur plays and concerts in traditional community centres in Bulgaria, which do not constitute formal educational establishments, but still play an important cultural role in Bulgaria since their establishment during the Ottoman Empire. In this sense, the provision resembles but not overlap with **Articles 5(2)(c)-(d) InfoSoc**, but rather constitutes an original implementation that cannot be compared against the two EU rules. Yet, the provision herein is also subjected to the three-step-test **(Article 23 BCA).**

3.1.2.3.9.4 ORPHAN WORKS

Following the adoption of the Orphan Works Directive, the Bulgarian legislature has transposed the exceptions provided therein into national law in 2015.

Article 71b(1) BCA permits the use of orphan works by public libraries, educational establishments and museums, as well as archives, institutions preserving film or sound recording heritage, and public radio and television organizations established in the Republic of Bulgaria, only within the framework of the exercise of their public mission **(Article 1(1) OWD). Article 71b(2) BCA** enlists the works covered by the exception **(Article 1(2)-(5)). Article 71c BCA** adopts verbatim and by following the structure of **Article 2 OWD.**

Article 71g BCA adopts verbatim the diligent search requirement and its details as set out in **Article 3 OWD.**

Article 71d BCA transposes the mutual recognition of the orphan work status, by closely following the regulation within **Article 4 OWD**; while **Article 71e BCA** adopts the regulation regarding the end of orphan work status regulate within **Article 5 OWD.**

Last but not least, and once again closely following the language of its EU counterpart **(Article 6 OWD), Article 71z** regulates the permitted uses of orphan works and broadcasts.

3.1.2.3.9.5 OUT-OF-COMMERCE WORKS

The Bulgarian CA does not feature any provision on the use of out-of-commerce works. To date, **Article 8(2) CDSM** has not been implemented.

3.1.2.3.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The Bulgarian legislature has introduced certain copyright flexibilities to the Bulgarian CA in 2018, which closely follow the text and the structure of **Article 5(3)(b) InfoSoc** and **the Marrakesh Directive.**

Article 24(1)(10) BCA, entered into force in 2003, implements the InfoSoc exception, by closely following its text. Thus, it allows for the use of published works for the benefit of persons with disabilities, unless such use is for commercial purposes. While there is neither remuneration due nor it is required to indicate the name of the author of the work in use, this provision also requires compliance with the three-step-test **(Article 23 BCA)**.

Article 26a BCA transposes into Bulgarian law the Marrakesh Directive of 2017, providing an exception for uses of protected work by persons with disabilities, by adopting verbatim the definition provided in **Article 2(2) Marrakesh**. The provision allows, for the benefit of persons with disabilities, the use of written works and related materials, if already lawfully made public and reproduced in any way and form, such as a book, specialized edition, newspaper, magazine, sheet music, sheet music, and illustration, as well as the integral parts thereof **(Article 2(1) Marrakesh)**. According to the same provision, no remuneration of the authors is due **(Article 26a(1) BCA).**

By closely following the text of the Marrakesh Directive, **Article 26b Marrakesh** identifies the beneficiaries of the exception herein, the authorized entities to conduct the permitted acts for the benefit of the persons with disabilities (**Article 26b(1) BCA).**

Article 26b(2) BCA defines the accessible format copy of a work **(Article 2(3) Marrakesh).** By adopting the regulation within **Article 3(1) Marrakesh, Article 26b(3) BCA** provides for the opportunity of making an accessible copy by these beneficiaries. In doing so, **Article 26b(5) BCA** transposes **Article 3(2) Marrakesh**, in order to ensure that the integrity of the work in use shall be respected. By consolidating **Article 3(5) Marrakesh**, **Article 26b(7) BCA** sets the mandatory character of the exception herein.

While **Article 26b(4) BCA** transposes the part of the **Article 4 Marrakesh** which concerns the direct beneficiaries, **Article 26b(6) BCA** adopts verbatim the regulation within **Article 4 Marrakesh**, which enables the exchange the accessible format copies by authorized entities in the internal market.

Authorized entities are entitled to distribute, make available to the public, communicate to the public, transmit, broadcast, and lend the works. Additionally, these entities are given the opportunity to exchange accessible format copies with other entities established in EU.

Articles 26v and 26g BCA regulate the documentation and informatory obligations of the authorized entity, by transposing **Article 5 Marrakesh**.

3.1.2.3.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 24(1)(15) BCA introduces an exception that aims at facilitating the use of architectural works that are under copyright protection. The provision, while corresponding to **Article 5(3)(m) InfoSoc**, allows the use of an architectural work or the plan of a building for the purpose of its reconstruction. While formal remuneration is not required, beneficiaries of this exception should coordinate their activities with the competent CMO and comply with the three-step-test **(Article 23 BCA).**

As specified by the **Sofia Administrative Court** in **case no-692/2917 of 22 February 2018**, the provision allows the reconstruction of an architectural work, but not the “upgrading” of a building (e.g., by adding new floors and the like).

3.1.2.3.12 THREE-STEP TEST

The three-step-test introduced to the EU copyright acquis by **Article 5(5) InfoSoc** has been implemented verbatim in **Article 23 BCA**. This provision entered into force in 2003 and stipulates that the "free uses" of works encompassed within the BCA are allowed only if such uses do not conflict with the normal exploitation of the work and unless they unjustifiably damage the interests of the author.

3.1.2.3.13 PUBLIC DOMAIN

3.1.2.3.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Entered into force in 2003 and later amended in 2014, **Article 4 BCA** enlists subject matters excluded from copyright protection. They include legislative and individual acts of government bodies, court decision, and the official translations of thereof, ideas and concepts, works of folklore, current news, facts, information, and data.

3.1.2.3.13.2 PAYING PUBLIC DOMAIN SCHEMES

The Bulgarian copyright law holds within **Article 179 of the Tax Code** a paying public domain scheme for the reproduction, distribution, and use of cultural heritage objects for, *inter alia,* personal, educational, scientific, and representation purposes. This provision has entered into force in 2003, and amended several times, respectively, in 2011, 2018, and finally in 2019.

According to **Article 179(2) of the Tax Code**, the creation, distribution, and use of an image of a cultural heritage object or of elements thereof in a photographic, computer, video and other image for commercial purposes, including the use of such image or parts thereof in the production of goods, labels and design solutions or for advertising, shall be carried out on the basis of a contract concluded with the owner of the cultural heritage object or, for artefacts owned by museums, by their directors. If read in light of the Bulgarian Law on Cultural Heritage,[583] the scheme shall apply both to movable and immovable elements of tangible cultural heritage.

3.1.2.3.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

The Bulgarian CA has envisioned a compulsory licensing scheme for the retransmission of a work by any electronic communications networks, simultaneously with its broadcasting or transmission, yet in an unabridged and unaltered form. Enshrined in **Article 21 BCA**, this provision has entered into force in 2000 and amended in 2011.

Especially in cases where an author has granted the retransmission by cable of their work, **Article 21(3) BCA** indicates that any waiver of remuneration by the author shall be invalid.

[583] Закон за културното наследство, 13 mar 2009 — 82 от 26.10.2012 г., в сила от 26.11.2012 г (Cultural Heritage Act, as last amended and supplemented by SG No. 82/86.10.2012, effective 26.11.2012).

Still, it has been consolidated by **Article 21(1) BCA** that the permission granted for the broadcast of a work by wireless means includes its transmission to enable electronic access to the work. Under these circumstances, it is necessary to remunerate the author of the broadcasted work, even if these acts are carried by different organizations.

The Bulgarian CA also introduces a compulsory licensing scheme for performers' "additional" remuneration, which may be claimed and collected only by collective management societies.

Entered into force in 2004, **Article 77a BCA** states that in cases where a performer authorizes a producer to use a sound recording of their performance and if the payment of the performer's remuneration is not scheduled as periodic payments, then the performer shall be entitled to receive an additional annual remuneration.

3.1.2.3.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.3.15.1 FUNDAMENTAL (USERS') RIGHTS

In several cases the Bulgarian judiciary has adopted a human rights approach in interpreting, especially, the exception provided for quotation, by extending the provision to cover also parodic uses of works, as in the **Supreme Court case no. 1771/2016 of 2 August 2017.**

3.1.2.3.15.2 CONSUMER PROTECTION

None reported.

3.1.2.3.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.3.15.4 OTHER INSTRUMENTS

Media law and competition law have played a role, yet to a certain extent, in balancing the rights of the public to access to information and culture with the private interests of copyright holders. With regards to media law, **Articles 19b, 19c, and 32(3) of the Radio and Television Act**[584] prevent broadcasters or audio-visual service provides to limit access to event and information that are of great importance to the public at large. These provisions implement **Articles 6(1), 7, and 14 AVMDS.**

3.1.2.4 CROATIA

The Croatian Copyright and Related Rights Act (hereinafter "NN"), as last amended in 2021,[585] has recently undergone a comprehensive amendment, mainly for transposing the

[584] Закон за радиото и телевизията, в сила от 1.01.2011 г., бр. 101 от 28.12.2010 г (Radio and Television Act, as last amended by SG No. 101/28.12.2010, effective 01.01.2011).
[585] Zakon o autorskom pravu i srodnim pravima, NN 111/21, na snazi od 22.10.2021 (Copyright and Related Rights Acts, NN 111/21, in force from 22.10.2021).

CDSM Directive, along with several others.[586] Due to this, NN is mostly in line with the EU copyright acquis, as the vast majority of the E/Ls within the EU acquis are adopted.

Despite its well-harmonized legal framework, NN still lacks a few exceptions inherent in the EU copyright law, such as the exceptions to copyright/sui generis rights over databases for illustration of teaching and scientific research, private study, and socially oriented uses by public authorities. There are also a few exceptions that are slightly more restrictive compared to their EU counterparts, such as parody and freedom of panorama.

Still, it shall be noted that NN provides for a detailed and comprehensive licensing scheme, which may effectively contribute to enabling end-users' access to and use of cultural content protected by copyright or related rights.

3.1.2.4.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.4.1.1 TEMPORARY REPRODUCTION

The exception within **Article 5(1) InfoSoc** has been implemented verbatim in **Article 182 NN**, which entered into force in 2003. Just like its EU counterpart, this exception has been subordinated to the three-step-test, due to the regulation within **Article 181(2) NN**.

3.1.2.4.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc has been implemented in **Article 190 NN** and entered into force in 2003, by closely following the EU provision.

According to **Article 190(1) NN,** broadcasting organizations, which are lawfully entitled to broadcast a work, are allowed to record the work on audio, video, or other mediums, by their own means and in accordance with their own needs. However, **Article 190(2) NN** requires the destruction of ephemeral recordings within one month after the broadcast, unless the ephemeral recordings as such are of exceptional documentary value. In this latter case, the recordings may be deposited in the organization's own archives or in the archives of public institutions. **Article 190(3) NN** regulates that the ephemeral recordings as such may be rebroadcast, transmitted, made available to the public, including by means of an Internet service provider, with the approval of the rightholder and payment of compensation. This right must be exercised in the context of collective licensing. This provision, as well, requires compliance with the three-step-test **[Article 181(2) NN].**

While the exception provided by **Article 190 NN** closely resembles the corresponding provision in the InfoSoc Directive, the Croatian lawmaker has used its margin of discretion to enable the re-use of ephemeral recordings.

As to **Article 10(1)(c) Rental**, there is no concrete to suggest this provision has been transposed to Croatian copyright law.

[586] For the complete list of EU Directives implemented in NN, see: NN 111/21, Art. 2, entitled "transposition of the acquis".

3.1.2.4.1.3 INCIDENTAL INCLUSION

Article 5(3)(i) InfoSoc has been implemented in **Article 203 NN** in 2021, by closely resembling its EU counterpart. While the Croatian exception meets all the criteria set by its EU counterpart, it differs from the EU provision only in its use of certain terminology. Indeed, this provision permits, without payment of compensation to the rightholders, to communicate to the public copyright works and other subject-matter protected by related rights, when the use occurs incidentally and if the reproduction is subordinate to the main work or subject-matter. Also similar to its EU counterpart, this exception has been subordinated to the three-step-test **[Article 181(2) NN]**.

3.1.2.4.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The Croatian NN features several provisions which provide for exceptions for the lawful users of databases, computer programs, and works protected by TPMs.

Article 208 NN transposes **Article 5 Software,** by adopting the EU exception verbatim, while **Article 209 NN**, once again adopting verbatim its language, transposes **Article 6 Software**. This provision requires the permitted acts to be conducted in a way that complies with the three-step-test.

Article 210 NN implements verbatim the exception for lawful users of databases introduced by **Article 6(1) Database,** while **Article 176 NN** transposes **Article 8 Database**, by adopting the regulation therein verbatim. In doing so, this provision requires the lawful user to comply with the three-step-test and to respect copyright and related rights of rightholders on the subject-matter contained in the database. Last but not least, **Article 213 NN** implements **Article 6(4) InfoSoc** in the Croatian copyright law, by adopting the EU provision verbatim.

3.1.2.4.1.5 FREEDOM OF PANORAMA

The “freedom of panorama” exception provided by **Article 5(3)(h) InfoSoc** has been implemented in **Article 204 NN**, which entered into force in 2003.

Article 204 NN permits the reproduction of the works permanently located in public spaces as well as the distribution and communication to the public of such reproductions. Copies should not be in three-dimensional form **[Article 204(1) NN].** Furthermore, the Croatian exception for freedom of panorama does not allow the reproduction of the interior spaces of architectural works either **[Article 204(2) NN].**

Compared to the corresponding EU provision, **Article 204 NN** follows the InfoSoc language almost verbatim, but imposes a slight restriction to the types of reproduction allowed. Yet, just like the EU provision, it also requires compliance with the three-step-test.

3.1.2.4.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.4.2.1 REPROGRAPHY

NN, as amended in 2021, does not feature a provision dedicated merely to the reprography exception, as in **Article 5(2)(a) InfoSoc**. With the amendment, reprography exception is encompassed by **Article 183 NN**, which provides for a detailed regulation on "reproducing copyright work for private and other personal use." In this framework, **Article 183(1) NN** allows natural persons to reproduce works of authorship on any medium as well as by means of photocopy, unless these acts are conducted for direct or indirect commercial purposes. While **Article 183(1) NN** is addressed to natural persons, the remuneration schemes regulated in **paragraphs (2) and (3)** of the same provision imply that natural persons or legal persons are also allowed to reproduce such works on behalf of a natural person and for their private use. Accordingly, and in any case, the direct beneficiaries as well as the third parties providing the copying services are required to pay remuneration to the author of whose work is reproduced. Just like the other E/Ls, the reprography exception is subordinated to the three-step-test **[Article 181(2) NN].**

While **Article 185(1) NN** extends this exception to objects of related rights as well; **Article 186 NN** excludes from the scope of the exception certain categories of works, such as the entire book unless copies of the book have been sold out for at least two years, graphic editions of musical works (sheet music), copyright databases, non-original databases, cartographic works, computer programs, or architectural construction, unless provided otherwise by law or by contract.

3.1.2.4.2.2 PRIVATE COPY

The exception provided for private copying by **Article 5(2)(b) InfoSoc** has been implemented by **Article 183 NN,** entitled "reproducing copyright work for private and other personal use". This provision modified the existing private copying exception in 2021, in order to bring it in line with the EU provision. It shall be noted that, just like any other E/L derived from the InfoSoc Directive, this provision is also subjected to the three-step-test **[Article 181(2) NN].** For more information on this provision, please see "reprography" above. Corresponding to **Article 10(1)(a) Rental**, the scope of this provision has been extended to performances, phonograms, and broadcasts by **Article 185(1) NN**.

Whereas **Article 6(2)(a) Database** has not been transposed to NN, **Article 211 NN** adopts the exception within **Article 9(a) Database** verbatim.

3.1.2.4.3 QUOTATION

Croatian copyright law has a long-established rule on quotation which dates back to the former Yugoslav Copyright Act of 1978. Amended first in 1999, the current **Article 202 NN,** entitled "Quotation", was last modified in 2003. This provision implements the exception provided by **Article 5(3)(d) InfoSoc.**

According to **Article 202 NN**, it is permitted to quote excerpts from a work which has already been lawfully made available to the public. The quotation shall be made for purposes of scientific research, teaching, criticism, polemics, revision, or review, only to the extent justified by the underlying purpose, and in accordance with fair practice, provided that the source and the name of the author are indicated.

While the language of the provision closely follows the corresponding InfoSoc rule, **Article 202 NN** features a broader exemplificative list of purposes justifying the quotation, which reinforces the flexibility of the exception. Yet, both the national and EU provision are required to comply with the three-step-test **[**see: **Article 181(2) NN]**.

Except for this, there are no other provision that can be associated with the "online quotation/parody" exception introduced by **Article 17(7) CDSM.**

3.1.2.4.4 PARODY, CARICATURE, PASTICHE

The exception provided for parody, caricature, and pastiche by **Article 5(3)(k) InfoSoc** has been implemented by **Article 206 NN**, which entered into force in 2003. While the Croatian parody exception closely resembles the corresponding InfoSoc provision, **Article 206 NN** is slightly more restrictive, for it excludes pastiche from its scope. Indeed, **Article 206 NN** allows the use and transformation of a protected work into a parody or caricature to the extent necessary for this, with the indication of the source. This exception is subordinated to the three-step-test **[Article 181(2) NN].**

As to the implementation of **Article 17(7) CDSM**, please see the section on "quotation" right above.

3.1.2.4.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.4.5.1 PRIVATE STUDY

Croatian copyright law does not provide any exception akin to **Article 5(3)(n) InfoSoc**.

3.1.2.4.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Articles 6(2)(b) and 9(b) Database have not been transposed to NN. However, **198(2) NN** transposes **Article 5(3)(a) InfoSoc** on illustration for teaching. The provision was last amended in 2021, yet it provides for a slightly more restrictive exception compared to that of its EU correspondent.

This provision permits the reproduction and distribution of excerpts of copyright works and other subject-matter protected by related rights unless this is prohibited by the author of the work and unless it harms the honour or reputation of the author or performer.

This exception applies also for the digital use in teaching, provided that such use takes place within the premises or other facilities of an educational establishment, or through a secure electronic environment that can only be accessed by pupils or students and the teaching staff of that educational institution.

Authors and other holders of rights to works, performances, phonograms and video-grams are entitled to remuneration for reproduction and distribution of their copyrighted works, performances, phonograms and video-grams. This compensation must be realized collectively. Also, the three-step-test applies to this exception as well **[Article 181(2) NN]**.

Corresponding to **Article 10(1)(d) Rental**, the scope of this provision has been extended to performances, phonograms, and broadcasts by **Article 185(1) NN**..

3.1.2.4.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Article 199 NN transposes **Article 5 CDSM**. This provision entered into force in 2021, and it closely follows its EU correspondent, while slightly extending the scope of the exception.

According to **Article 199(1) NN**, reproduction and communication to the public, including making available to the public, copyrighted works and other subject-matter protected by related rights for their digital use for illustration of teaching, is permitted. No payment of compensation is due, whereas compliance with the three-step-test is required **[Article 181(2) NN].**

These acts shall be conducted to the extent justified by the non-commercial purpose and shall takes place within an educational institution, in its premises or other facilities or through a secure electronic environment to be accessed only by pupils or students and teaching staff of that educational institution, provided that the source and name of the author or other right holder must be indicated, unless this proves impossible.

Article 199(2) NN applies this exception also to digital and online teaching, distance learning, and cross-border teaching, and to all educational levels; while **Article 199(6) NN** applies the same exception to lifelong learning activities carried out by state institutions, public institutions and other entities authorized to undertake such activities.

As consolidated by **Article 199(5) NN**, any contractual provisions contrary to this exception shall be null and void.

3.1.2.4.5.4 TEXT AND DATA MINING

Entered into force in 2021, **Articles 187 and 188 NN** transpose, respectively, **Articles 3 and 4 CDSM**, by closely following the language and the standards set by their EU counterpart. Both provisions are required to comply with the three-step-test **[Article 181(2) NN].**

Article 187 NN, by transposing **Article 3 CDSM**, by adopting the text of its EU counterpart verbatim.

As to the implementation of **Article 4 CDSM**, **Article 188 NN** holds that unless it is reserved by the rightholder, anyone can reproduce copyright works for TDM for purposes other than scientific research. The permitted acts under this exception include the reproduction of copyright databases, computer programs, decompilation, and related rights, as well as actions of extracting part of the content and actions of reusing the entire or significant part of the

content of the non-original database. The copies made for TDM may be retained only to the extent that is necessary to achieve the purpose of TDM.

3.1.2.4.6 USES FOR INFORMATORY PURPOSES

3.1.2.4.6.1 PRESS REVIEW AND NEWS REPORTING

Croatian copyright law features an exception for the use of copyright works for the purpose of informing the public in **Articles 201(1) and 201(2) NN**, both of which correspond to and recall almost verbatim the exception provided by **Article 5(3)(c) InfoSoc**. While meeting the standards set by its EU correspondent, the Croatian exception is more detailed, mainly because it overlaps with the exception provided for uses of public speeches and lectures.[587]

According to this provision, in order to inform the public on current event and to the extend necessary to do so, it is permitted to reproduce, distribute, and communicate to the public by press, radio, or television works that are part of a current event that is being reported on, provided that the work is used to the extent justified by the purpose/manner of reporting on current events; newspapers articles on and photographs of current political, economic, or religious topics, which are released through other media of public communication, provided that the author has not expressly prohibited such use, and that the work is used to the extent justified by the purpose/manner of reporting. As indicated by **Article 201(2) NN,** the attribution of the source is always mandatory – as well as the compliance with the three-step-test **[Article 181(2) NN].**

Corresponding to **Article 10(1)(b) Rental**, the scope of this provision has been extended to performances, phonograms, and broadcasts by **Article 185(1) NN**.

3.1.2.4.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Croatian copyright law does not contain an exception specifically devoted to uses of public speeches and lectures, as in **Article 5(3)(f) InfoSoc**; and this Croatian exception is also subordinated to the three-step-test **[Article 181(2) NN].**

However, **Article 201 NN**, which exempts from copyright protection uses of works for press review and reporting of current events,[588] may be considered within this context. **Article 201(1) NN**, in fact, permits the reproduction, distribution, and communication to the public of public political, religious, or other speeches made before state or local governmental bodies, religious institutions or during state or religious ceremonies, as well as excerpts from public presentations. Uses should be finalized only to inform the public and be limited to what necessary to achieve this goal. Additionally, the source should always be indicated.

[587] For the uses of public speeches and lectures please see paragraph 3.1.2.4.6.2. below.
[588] For the exception for press review and reporting for current events, please see paragraph 3.1.2.4.6.1. right above.

3.1.2.4.7 USES BY PUBLIC AUTHORITIES

3.1.2.4.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Enacted in 2017, **Article 212 NN** features a broadly articulated exception to copyright and sui generis rights over databases, which encompass **Articles 6(2)(c) and 9(c) Database**. Indeed, this provision holds that it is permitted, without payment of a fee, to use a work, including a copyright database, as well as other subject-matter protected by related rights, including a non-original database, to the extent and in a way that meets public security needs.

The exception provided by **Article 5(3)(e) InfoSoc** has been implemented by **Article 200 NN**, entitled "use of copyright works for judicial, administrative, or other official proceedings", which entered into force in 2003. **Article 200 NN** permits the reproduction and communication to the public of copies of works for judicial, administrative, and official proceedings, including arbitration. Collections are excluded from the scope of the exception.

While the EU exception refers to use for the purposes of public security as well, the national rule remains silent on this aspect of the original exception. Yet, per contra its EU counterpart, this provision can be considered more flexible, given the extension of the exception herein to private and alternative dispute resolution proceedings. It is also wort noting that the Croatian exception, just like that of the EU, is required to comply with the three-step-test **[Article 181(2) NN]**.

3.1.2.4.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 5(3)(g) InfoSoc has not been implemented in the Croatian NN.

3.1.2.4.8 SOCIALLY ORIENTED USES

There is no provision in the Croatian NN that explicitly implements **Article 5(2)(e) InfoSoc.**

3.1.2.4.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.4.9.1 PUBLIC LENDING

NN features a provision, **Article 34(3)**, that defines "public lending" and regulates the authors' right to remuneration for the public lending of their works. Despite the differences in its wording, the Croatian exception corresponds to **Article 6(1) Rental.**

According to **Article 34(3) NN,** public lending refers to the making available to the public of a work for a limited period of time, which shall be performed without generating any direct or indirect economic benefit. **Article 34(8) NN** excludes several categories of works, such as databases, buildings and works of applied arts from the scope of this exception.

While **Article 34(3) NN** requires the payment of a fair remuneration to authors for public lending practices, **Article 34(9) NN** waives the remuneration requirement for lending between public libraries.

3.1.2.4.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 191 NN, which has entered into force in 2021, transposes **Article 6 CDSM**, by adopting the exception for preservation of cultural heritage therein verbatim, while also meeting the three-step-test compliance requirement **[Article 181(2) NN].**

3.1.2.4.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Article 193 NN transposes **Article 5(2)(c) InfoSoc**, by permitting the CHIS, educational and scientific institutions, including the pre-school institutions, to reproduce copyright work or other subject-matter protected by related rights for non-commercial purposes, such as the need to preserve and secure material, technical restoration and repair of material, collection management and other own needs. The remuneration of the rightholders is not required.

Also, **Article 198(1)** permits, without payment of a fee, to perform or stage performances of copyright works and other subject-matter protected by related rights, in context of teaching, or at teaching-related events, to the extent justified by the educational purpose. These acts shall not be conducted for commercial purposes, and the names of the authors of whose works are in use shall be indicated. The same exception applies to lifelong learning activities carried out by state institutions, public institutions and other entities authorized to undertake such activities.

3.1.2.4.9.4 ORPHAN WORKS

Article 189 NN, entitled "free use of orphan works", has been first introduced in 2014 to transpose the OWD into Croatian copyright law, by following closely the standards set by the EU Directive.

Article 189(1) NN permits CHIs, educational institutions, and public broadcasting organizations **(Article 1(1) OWD)** to perform the permitted acts regulated by **Article 6(1) OWD.** While these acts shall be carried out only for non-commercial purposes **(Article 1(1) OWD), Article 189(2) NN**, by transposing **Article 6(2) OWD**, allows the generation of income from the use of orphan works, exclusively for the purpose of covering their costs related to digitization and making available to the public orphan works. The same provision also enables the public-private partnerships, for transposing **Article 6(4) OWD.**

Article 189(3) NN regulates the diligent search and documentation obligations of the beneficiaries as regulated by **Article 3 OWD**. **Article 189(4) NN**, by transposing **Article 5 OWD**, deals with the termination of the orphan works status as well as the fair compensation for the use of such works, which is regulated by **Article 6(5) OWD**. According to Article 189(6) NN, the request for the payment of fair compensation may be submitted by the author or by an authorized CMO.

It is also worth to note that the regulation encapsulated within this provision is extended to related rights, by **Article 189(7) NN.**

3.1.2.4.9.5 OUT-OF-COMMERCE WORKS

Article 192 NN transposes **Article 8(2) CDSM**, in a concise manner, yet by encompassing all the standards mentioned therein.

Article 192(1) NN enables CHIs to reproduce and communicate to the public, including making available to the public, of copyright works and other subject-matter protected by related rights, which are out-of-commerce and found in the permanent collections of CHIs. The permitted act shall be performed only for non-commercial purposes, provided that they indicate the names of the author or other identifiable rightholder, unless this proves impossible. The remuneration of the rightholders is not due.

Article 192(2) NN excludes from the scope of this exception sets of works or objects of related rights not available on the market, such as works or objects of related rights, other than audio-visual works, first published or, if not published, first broadcast in a third country; audio-visual works whose producers are established or habitually resident in a third country; or, acts or objects of related rights of third-country nationals where, after a reasonable effort, a Member State of the EU or a third country.

As clarified in **Article 192(4) NN**, this exception applies to out-of-commerce works for which there is no organization for the collective exercise of rights in the Republic of Croatia.

The documentation obligations of CHIs are regulated within **Article 192(5) NN**.

3.1.2.4.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The Croatian NN contains three provisions introducing flexibilities to access and use protected works for persons with disabilities.

Article 194 NN dates back to 1999 and was later amended in 2003 to align the provision with **Article 5(3)(b) InfoSoc.** While implementing the Marrakech Directive, the Croatian legislature has introduced two more provisions, **Articles 195 and 196 NN.**

Article 194 NN permits the use of protected works for the benefit of persons with disabilities, to the extent required by the purpose, which should be non-commercial.

By closely following **Article 3(1) Marrakesh, Article 195(1) NN** permits the reproduction, distribution, communication to the public in any way, as well as processing of copyrighted works, including computer programs and copyright databases, and other subject-matter, including non-original databases, which have been lawfully published or otherwise lawfully disclosed to the public in the forms enlisted in **Article 2(1) Marrakesh.** According to the same provision, these acts can be carried out by beneficiaries identified in **Article 2(2) Marrakesh.**

While the remuneration of the rightholders is not required, **Article 195(5) NN** regulates that the permitted acts shall be performed while respecting the integrity of the works and other subject-matter in use, by transposing **Article 3(2) Marrakesh**. The same provision also remarks the mandatory character of this exception, by implementing **Article 3(5) Marrakesh**.

The remaining paragraphs of **Article 195 NN** provide the definitions of persons with disabilities, authorized entities, and accessible format copies, by closely following the formulations within **Article 2 Marrakesh.**

Article 196 NN provides for further regulations on acts that can be carried out by the direct beneficiaries and authorized entities, by adopting **Article 4 Marrakesh** verbatim.

3.1.2.4.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 207 NN, entitled "use of copyright works for the purpose of presentation and testing of equipment", provides a flexibility for selected business enterprises, by implementing **Article 5(3)(l) InfoSoc.** Entered into force in 2003, this provision allows stores selling phonograms and video-grams, or equipment for audio and video reproduction or reception, to record and communicate to the public literary, audio-visual and broadcasted works, to the extent necessary to present them to buyers or to test the functioning of phonograms or films or to repair them.

Article 205 NN, entitled "posters and catalogues", transposes **Article 5(3)(j) of InfoSoc**, by allowing the organizers of public exhibitions and auctions to reproduce works of visual arts, architecture, applied art, industrial designs, and photographic works, which are displayed at a public exhibition or auction or are intended for such display, in order to distribute them on poster and catalogues for the promotion of the event, and only to the extent necessary to this purpose.

Both provisions are required to comply with the three-step-test, considering the general regulation within **Article 181(2) NN.**

3.1.2.4.12 THREE-STEP TEST

Under the title "common provisions", **Article 181(2) NN** introduces within the tangle of Croatian copyright law the three-step-test, implementing verbatim the language of **Article 5(5) InfoSoc**. Interestingly, however, **Article 181(1)** also adds that works that have already been made public may be used without the author's authorization and without payment of remuneration only in cases that are expressly covered by an exception or limitation provided by the Act under a *numerus clausus* principle.

3.1.2.4.13 PUBLIC DOMAIN

3.1.2.4.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 18 NN, as modified in 2021, provides for a detailed regulation that enlists the works and other subject-matter allocated to the public domain.

According to this regulation, copyright does not subsist in ideas, procedures, methods of work or mathematical concepts as such. Along the same line, discoveries, ideas and principles on which any element of a computer program is based, including those on which its interfaces

are based, daily news and other news that have the character of ordinary media information are not protected by copyright.

Nevertheless, official texts of legislation, administration and judiciary, such as laws, decrees, decisions, reports, minutes, court decisions, etc.; official programs, such as school and academic programs, work programs, etc., spatial plans, such as the spatial development plan, urban plan and the like, conservation bases, as well as their collections, are protected as copyrighted works from the moment of creation, if they are original intellectual creations that have an individual character. The moment they are handed over to any official procedure or handed over to an official person for public information or public use, or when they are published for official public information, they cease to be protected by copyright.

Expression of folklore in their original form are not subject to copyright, but a fee shall be paid for their communication to the public as for the communication to the public of protected copyrighted works. Last, when the term of protection for a work of visual arts has expired, no work created by reproducing such work shall be suitable for copyright protection, unless it is a work which is itself an original intellectual work of its author which has an individual character.

3.1.2.4.13.2 PAYING PUBLIC DOMAIN SCHEMES

Whereas the NN does not extend legal protection to folklore and works of folklore, **Article 18(7) NN** provides that the communication to the public of works of folklore are subject to payment of remuneration to the State budget. The sums so collected are to be used for fostering the creativity in the field.

3.1.2.4.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Except for the licensing scheme for reprography already explained above,[589] the Croatian legislature has introduced, with the amendment in 2021, several special licensing schemes to the Croatian copyright law, between **Articles 216 and 226 NN.** According to this, the NN envisions collective management schemes for both copyright and related rights, especially for the use of works and other subject-matter in the context of exceptions for out-of-commerce works, journalistic and other informatory works, private copying.

Article 216 NN regulates the collective management scheme for non-stage musical works with or without words and literary works **(Article 216(1)(1) NN),** journalistic works **(Article 216(1)(2) NN),** works of visual arts **(Article 216(1)(3) NN),** by specifying the rights that can be managed by the CMO. **Article 216(3) NN** provides for a detailed regulation on the rights over the same categories of works, which can be exercised only through CMOs.

Article 218 NN regulates the collective management of related rights. In this context, **Article 218(3)(4)(c) NN** provides for a compulsory licensing scheme for the use of out-of-commerce works by CHIs, by transposing **Article 8(1) CDSM**. According to this provision, the

[589] For public lending, please see paragraph 3.1.2.4.9.1. above.

right to reproduce, distribute, communicate to the public, including making available to the public for the benefit of CHIs, for non-commercial purposes, of out-of-commerce works, which are a permanent part of the collection of CHIs, fall under this licensing scheme.

3.1.2.4.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.4.15.1 FUNDAMENTAL (USERS') RIGHTS

Croatian case law makes broad use of exceptions and limitations and of public domain to strike a balance between public and private interests and guarantee the respect of fundamental rights conflicting with copyright. In this sense, fundamental rights as such have not been effectively used as external copyright flexibility tools, but rather as an interpretative tool in the application of existing copyright provisions.

3.1.2.4.15.2 CONSUMER PROTECTION

None reported.

3.1.2.4.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.4.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.5 CYPRUS

The Cypriot Law on Intellectual Property Rights and Related Rights (hereinafter "CL") of 1976, as last amended in 2022,[590] contains a multitude of copyright flexibilities facilitating the access to and use of copyright works by end-users.

The majority of copyright flexibilities are harmonized with EU Directives. The CDSM implementation, as well, was finalised in October 2022. While implementing the CDSM flexibilities, the Cypriot legislature has also introduced a parody exception in CL. Thus, only a few EU flexibilities remains not transposed to the CL, such as the exceptions for public lending, private study and other non-infringing uses regulated within the InfoSoc Directive (i.e., Article 5(2) paragraphs (j) to (m)).

Several provisions present more rigidity compared to the EU rules (e.g. exception for temporary acts of reproduction, exception for administrative and judicial proceedings, and freedom of panorama) or fall short of satisfying the standards set by the EU rules, for they preceded the entry into force of similar EU provisions (e.g. exception for the use of public speeches and public lectures).

[590] Ο περί του Δικαιώματος Πνευματικής Ιδιοκτησίας και Συγγενικών Δικαιωμάτων Νόμος του 1976 (N. 59/1976, όπως τροποποιήθηκε μέχρι το νόμο αριθ. 155 (I)/2022) [Law on Intellectual Property Rights and Related Rights (Law 59/1976) of 1976, as last amended by 155 (1)/2022].

Last but not least, it is worth mentioning the three-step-test envisioned in Article 5(5) InfoSoc and Article 7(2) CDSM were both implemented in, respectively, Article 7(6) CL and Article 28(2) CL with the amendment of the Law in 2022.

3.1.2.5.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.5.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc was implemented in **Article 7(5) CL,** in 2004. The Cypriot legislature has adopted the EU provision, by closely following the formulation of its EU correspondent. However, the scope of this exception does not extend to objects of related rights, but only to works protected by copyright. Furthermore, it introduces new conditions of applicability, which were originally not included in the EU rule. While it neither requires the temporary acts of reproduction to be economically insignificant, it requires the exception to be compliant with the three-step-test, given the regulation within **Article 7(6) CL**.

Indeed, **Article 7(5) CL** allows temporary acts of reproduction, which are transient or incidental, such as acts which enable browsing and caching, including those which enable transmission systems to function efficiently. To fall under this exception, the intermediary shall not modify the information nor interfere with the lawful use of technology (following an industry-practices standard) to obtain data on the use of the information.

3.1.2.5.1.2 EPHEMERAL RECORDING

Article 7(2)(k) CL features an exception for ephemeral recording, which precedes the adoption of **Article 5(2)(d) InfoSoc**. The Cypriot provision entered into force in 1976 and has not been subjected to any amendment since then. Despite preceding the EU rule, the Cypriot exception closely resembles **Article 5(2)(d) InfoSoc.** The Cypriot exception, just like InfoSoc, requires compliance with the three-step-test **(Article 7(6) CL)**.

The provision permits the ephemeral recordings of works, as long as such reproduction is conducted by or under the control of a broadcasting organization and to the extent necessary for a lawful broadcast. These recordings and the copies of the work shall be destroyed within six months after the making of the reproduction. It is possible to prolong this period by contractual agreements to be concluded between the broadcasting organization and the rightholder involved.

In cases where the ephemeral recording constitutes an exceptional documentary value, broadcasting organizations may preserve such recordings and copies in their archives. This reproduction shall not be used for broadcasting or for any other purpose without the consent of the rightholder.

Except for this regulation, there is no concrete evidence to suggest that **Article 10(1)(c) Rental** has been implemented in specific provision in the Cypriot copyright law.

3.1.2.5.1.3 INCIDENTAL INCLUSION

There is no provision in CL that directly implements the incidental inclusion exception under **Article 5(3)(i) InfoSoc**.

Nevertheless, CL features an exception which permits the incidental inclusion of an artistic work in a cinematographic work or broadcast **(Article 7(2)(d) CL)**. This regulation dates back to 1976.

The exception provided for incidental inclusion of works by the Cypriot CA is quite restrictive compared to the broadly articulated exception of the InfoSoc Directive, as it imposes restrictions to the subject-matter. It is worth to mention that the Cypriot provision also applies the three-step-test to this exception **(Article 7(6) CL)**.

3.1.2.5.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The Cypriot CA contains several legal provisions aimed at facilitating lawful user's access to and use of computer programs, database protected by copyright and sui generis rights, as well as works protected by TPMs.

Article 7B(4) and Article 7B(5)(a) CL implemented the copyright exception introduced by **Articles 5 and 6 Software** on access and use of computer programs by lawful users, in 2002.

Article 7B(4) CL transposes **Article 5 Software**, by closely following the EU rule. However, the Cypriot provision has a narrower articulation of the beneficiaries of this exception, as it limits the scope only to lawful user but third parties acting on their behalf. Except for this nuance, the Cypriot legislature has adopted the language of the Directive verbatim. Likewise, **Article 7B(5) CL** adopted **Article 6 Software** verbatim, also by adopting its broader approach to articulate the beneficiaries.

Article 7C(2)(b) CL transposed **Article 6(1) Database** verbatim, while **Article 7C(3)(b)(ii) CL** did the same for **Article 8 Database.**

Last but not least, in 2004, **Article 14B (4)-(7) CL** implemented the flexibility within **Article 6(4) InfoSoc** provided for works protected by TPMs**,** by adopting verbatim the language of its EU counterpart as well as the formulation of the standards therein.

3.1.2.5.1.5 FREEDOM OF PANORAMA

Since 1976, Cypriot copyright law features a "freedom of panorama" exception, which predates the entry into force of the **InfoSoc Directive. Article 7(2)(b) CL** makes it possible to include any artistic work installed in public spaces in a film or a broadcast. Similarly, it allows the reproduction and distribution of artistic works permanently located and installed in public spaces. Furthermore, **Article 7(2)(c) CL** allows for the reproduction and distribution of artistic works located in the public spaces. However, compared to **Article 5(3)(h) InfoSoc**, the Cypriot flexibility is quite restrictive, for it narrows down not only the range of subject-matters covered by the exception but also the permitted uses. Also, the Cypriot exception is expected to comply with the three-step-test **(Article 7(6) CL)**.

3.1.2.5.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.5.2.1 REPROGRAPHY

The exception provided for reprography by **Article 5(2)(a) InfoSoc** has been implemented almost verbatim by **Article 7(2)(p) CL**. This provision entered into force in 2004.

Article 7(2)(p) CL permits the reproduction of a work on paper or any similar medium, and by any technique. Sheet music are excluded from the scope of the exception. While the rightholders are entitled to remuneration; similar to its EU counterpart, this exception requires compliance with the three-step-test **(Article 7(6) CL)**.

3.1.2.5.2.2 PRIVATE COPY

While Article 6(2)(a) Database does not find correspondence in the Cypriot copyright law, **Article 9(a) Database** were implemented verbatim in **Article 7C(3)(b)(iii)(a) CL**, along with the three-step-test.

Entered into force in 2004, the exception provided for private copying in **Article 5(2)(b) InfoSoc** was implemented verbatim in **Article 7(2)(o) CL**.

There is no concrete evidence to suggest that **Article 10(1)(a) Rental** has been transposed to the Cypriot law.

3.1.2.5.3 QUOTATION

The Cypriot CA includes an exception for quotation within **Article 7(2)(f) CL** since 1976. Despite it preceded the adoption of **Article 5(3)(d) InfoSoc**, the provision closely resembles the corresponding EU rule, except for not encompassing the objects of related rights in its scope of subject-matter.

Article 7(2)(f) CL permits the quotation of certain excerpts of published works, including the citation of excerpts from newspaper and magazine articles in the form of a summary type, as long as the act is in compliance with fair practices and does not go beyond the extent necessary for the purpose. Quotations shall always be accompanied by an indication of the source used. Just like the EU rule, compliance with the three-step test is required by **Article 7(6) CL.**

As to the so-called “online quotation” flexibility, **Article 17(7) CDSM** has been transposed to **Article 38(9) CL** in 2022, by slavishly copying the EU provision. Similar to the EU rule, the Cypriot exception is also subordinated to the three-step-test with the regulation within **Article 28(2) CL.**

3.1.2.5.4 PARODY, CARICATURE, PASTICHE

Although the Cypriot copyright law did not contain any exception for parody, caricature, and pastiche; the last amended to the law has not only implemented **Article 5(3)(k) InfoSoc** in **Article 7(2)(k) CL**, but it has also implemented **Article 17(7) CDSM** in **Article 38(9) CL.** Entered into force in 2022, both provisions constitute verbatim implementations of their EU

counterparts. It is also worth noting that both provisions are subject to the three-step-test given the regulations, respectively, within **Article 7(6) CL** and **Article 28(2) CL**.

3.1.2.5.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.5.5.1 PRIVATE STUDY

Article 5(3)(n) InfoSoc has not been formally implemented in Cyprus. Nevertheless, the Cypriot CA provides an exception under **Article 7(2)(a)** CL for the use of works for private study. The provision entered into force in 1976 and is still in force. It allows the free use of works in good faith and for purposes of research, criticism, review, and reporting of current events, as long as such use is made in public. The provision requires that the source and author are always mentioned, except where the work is incidentally included in a broadcast. Given the regulation within **Article 7(6) CL**, this provision is required to comply with the three-step-test.

3.1.2.5.5.2ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

The Cypriot copyright law features several provisions enabling the use of databases and works for illustration of teaching or scientific research.

Although **Article 6(2)(b) Database** has not been transposed to CL, **Article 9(b) Database** was transposed verbatim in **Article 7(3)(b)(iii)(b) CL.**

In **Article 7(2)(e) and Article 7(2)(r) CL** also contained exceptions aimed at the illustration for teaching and scientific research, both of which entered into force in 1976, with the latter being amended in 2004. Both provisions are in line with **Article 5(3)(a) InfoSoc.** Indeed, **Article 7(2)(e) CL** allows the inclusion of a work in a broadcast, sound recording, film, or collection of works for teaching purposes, insofar as such uses are in compliance with fair dealing. The name of the author and the source of the work in use shall be indicated. Along the same lines, **Article 7(2)(r) CL** allows any non-commercial use of a work, as long as it is for the sole purpose of illustration of teaching and the name of the author as well as the source is properly indicated. Both provisions require compliance with the three-step-test **(Article 7(6) CL)**.

There is no concrete evidence to suggest that **Article 10(1)(d) Rental** has been transposed to Cypriot copyright law; however, **Article 7(2)(2) CL** extends the scope of this provision to phonograms and broadcasts.

3.1.2.5.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Article 5 CDSM was implemented in **Article 26 CL**, by adopting the language and structure of the EU rule almost verbatim. The mere divergence of the national provision is visible in its **paragraph (2)**, in which the Cypriot legislature imposes restrictions to the permitted uses under this exception by indicating that only 5% of works and other subject matter can be used for the purposes encompassed herein. Besides, this exception is subordinated to the three-step-test, given the regulation within **Article 28(2) CL**.

3.1.2.5.5.4 TEXT AND DATA MINING

The Cypriot legislature transposed **Articles 3 and 4 CDSM,** respectively, in **Article 24** and **Article 25 CL**. Entered into force in 2022, both provisions slavishly copy the text of their EU counterparts, while also requiring compliance with the three-step-test **(Article 28(2) CL).**

3.1.2.5.6 USES FOR INFORMATORY PURPOSES

3.1.2.5.6.1 PRESS REVIEW AND NEWS REPORTING

Copyright exceptions for press review and news reporting are regulated under **Articles 7(2)(a) and 7(2)(g) CL.** Both provisions precede the adoption of **Article 5(3)(c) InfoSoc**, given that they both entered into force in 1976.

According to **Article 7(2)(a) CL**, it is allowed to use already published works or works made available to the public for several reasons, including that of reporting for current events. In such cases, the author and the source of the work in use shall be indicated, except for the cases in which the work is incidentally included in a broadcast.

Additionally, and according to **Article 7(2)(g) CL**, reproduction of a work by the press, display of a work in public, or making available to the public articles on the current economic, political, or religious topics as well as the works transmitted over the radio, unless it is prohibited by the rightholders. In any case, the authors and rightholders of the work in use shall be attributed.

Despite the nuances in the articulation of the non-essential criteria, the copyright exceptions provided for press review and reporting of current events by the Cypriot CA closely resembles and corresponds to that of the InfoSoc Directive. Also, both provisions are expected to comply with the three-step-test, considering the regulation within **Article 7(6) CL**.

While the Rental Directive has not been transposed to the Cypriot law, the regulation within **Article 7(2)(a) CL** corresponds to **Article 10(1)(b) Rental** as well.

3.1.2.5.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Entered into force in 1976, **Article 7(2)(i) CL** permits the reading or recitation in public or broadcast of excerpts from a literary work already made public, only to extent necessary to the purpose, and with a proper mention of the source use. The provision diverges from its closest correspondent in **Article 5(3)(f) InfoSoc,** for it is significantly narrows down the permitted acts. Yet, it still requires compliance with the three-step-test **(Article 7(6) CL)**.

3.1.2.5.7 USES BY PUBLIC AUTHORITIES

3.1.2.5.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Cypriot copyright law features several provisions to facilitate uses of works and other subject-matter for administrative and judicial proceedings.

Entered into force in 2002, **Article 7C(3)(b)(iii)(c) CL** implements the exception provided in **9(c) Database verbatim**, whereas there is no concrete evidence to suggest that Article **6(2)(c) Database** has been transposed.

The exception provided within **Article (5)(3)(e) InfoSoc** has been implemented in **Article 7(2)(m) CL,** which entered into force in 2002. This provision allows for the use of a work in the context of judicial, parliamentary, or administrative proceeding and in reports thereof. Compared to the InfoSoc provision, **Article 7(2)(m) CL** is more restrictive, since it does not extend to objects of related rights, and also given that it excludes national security from the purposes justifying the use of the exception. It shall also be indicated that this exception is expected to comply with the three-step-test, given the regulation within **Article 7(6) CL**.

3.1.2.5.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 5(3)(g) InfoSoc does not find correspondence in the Cypriot copyright law.

3.1.2.5.8 SOCIALLY ORIENTED USES

The exception provided for socially oriented uses within **Article 5(2)(e) InfoSoc** has been implemented almost verbatim in **Article 7(2)(q) CL**, which entered into force in 2004. Indeed, the provision features all the elements of its EU counterpart, including that of the three-step-test **(Article 7(6) CL)**.

3.1.2.5.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.5.9.1 PUBLIC LENDING

The E/L for public lending within **Article 6 Rental** has not been transposed to CL.

3.1.2.5.9.2 PRESERVATION OF CULTURAL HERITAGE

The Cypriot legislature has introduced an exception for the preservation of cultural heritage within its **Article 7(2)(j) CL,** which has entered into force in 1976 and later amended in 2014.

Article 7(2)(j) CL permits publicly accessible libraries, scientific and educational institutions, museums, and archives to reproduce a work for non-commercial purposes. Along with the application of the three-step-test to the uses under this exception **(Article 7(6) CL)**, the Cypriot legislation is closely in line with its EU correspondent.

Additionally, **Article 6 CDSM**, once again slavishly copying its EU counterpart, was implemented in **Article 27 CL**, also by requiring compliance with the three-step-test **(Article 28(2) CL)**.

3.1.2.5.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

No other provisions of the CL, apart from those already mentioned above, refer to uses by cultural heritage, education, and social institutions and/or may be linked to **Article 5(2)(c) InfoSoc**.

3.1.2.5.9.4 ORPHAN WORKS

The Cypriot legislature has transposed the Orphan Works Directive in **Articles 7J to 7N of CL**, by closely following the structure of the Directive and adopting its language verbatim.

Article 7J, by adopting **Article 1 and Article 2 OWD** verbatim, sets the beneficiaries and scope of subject-matter, and provides for the definition of "orphan works".

Article 7K CL implements the diligent search criteria introduced by **Article 3 OWD,** and **Article 7L** regulates the mutual recognition of the orphan works status by the EU Member States, as did **Article 4 OWD**.

Article 7M CL provides for a regulation concerning the end of the orphan works status, by following **Article 5 OWD.**

Once again, adopting verbatim **Article 6 OWD, Article 7N CL** regulates the permitted acts as well as the possibility to generate income for covering the costs of digitization and making available the copies thereof to the public.

3.1.2.5.9.5 OUT-OF-COMMERCE WORKS

Article 8(2) CDSM was implemented in **29(2) CL**, by adopting the EU text verbatim.

3.1.2.5.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The Cypriot CA hold a copyright exception, under **Articles 7O-7U CL**, providing for flexibilities intended to facilitate use of works by persons with disabilities. These provisions have entered into force in 1976 and later amended in 2019.

Article 7P CL, by adopting verbatim **Article 2 Marrakesh**, defines persons with disabilities, authorized entity, as well as the accessible copy of a work.

Article 7R CL adopts **Article 3 Marrakesh,** in order to regulate the permitted uses by persons with disabilities and persons acting on their behalf as well as authorized entities.

Closely resembling **Article 4 Marrakesh**, **Article 7R(5) CL** enables the authorized entities to exchange copies of works in accessible format. While carrying out these acts, the direct beneficiaries and the authorized entities shall respect the integrity of the work. Besides, Article **7R(3)** draws the borders of such permitted uses, by introducing the three-step-test to this exception.

Article 7S CL, once again closely following the text of **Article 3 Marrakesh**, implements the uses permitted for authorized entities.

Finally, **Article 7T CL** regulates the obligations of such entities, by adopting **Article 5 Marrakesh**.

3.1.2.5.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 7(2)(i) CL provides for a flexibility addressed at facilitating the reading or recitation in public, or broadcasting of reasonable extracts a published literary work, only if such uses are accompanied with sufficient attribution to the source.

Article 7(2)(h) CL enables the making of a sound recording of a literary or musical work, as well as its reproduction by the maker or by anyone who has been granted a license by the rightholder. To enjoy this flexibility, copies shall be intended for retail sale in Cyprus, and works should have been previously recorded, whether in Cyprus or abroad, upon the authorization of the rightholder. The use is subject to the payment of such reasonable compensation, set by the Minister of Commerce and Industry.

3.1.2.5.12 THREE-STEP TEST

Subsequent to the amendment to implement the CDSM Directive in 2022, the Cypriot Copyright Act holds two provisions regarding the three-step-test. First, **Article 7(6) CL** adopts the regulation within **Article 5(5) InfoSoc**, in terms of subjecting the exceptions and limitations to copyright and related rights compiled under **Article 7(2) CL**. Second, **Article 28(2) CL** implements **Article 7(2) CDSM**, by introducing the three-step-test requirement for the exceptions for the TDM, digital and cross-border teaching activities, and for the preservation of cultural heritage.

3.1.2.5.13 PUBLIC DOMAIN

3.1.2.5.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Under **Article 3(2)-(3) CL** several categories of works belong to the public domain.

According to **Article 3(2) CL**, intellectual creations which have not been fixated on a tangible medium or via electronic or other means or works that do not meet the originality criteria have been explicitly excluded from the scope of copyright protection.

Article 3(3) CL further specifies that the protection does not extend to ideas, procedures, systems, methods, principles, and concepts. Likewise, it has been clarified that if an idea, procedure, system, method, principle, and concept can be expressed in a specific and unique way, this expression cannot be protected by copyright.

3.1.2.5.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.5.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Article 7(2)(l) aims at facilitating and fostering the use of works, also in cases where no collective management organization or any other organization is managing the rights over the works in question. This provision was first introduced in 1976 and later amended in 2017.

According to **Article 7(2)(l) CL**, it is permitted to further use the broadcast of a published work, on which no collective management organization or any other organization controls. In this case, the author/rightholder of the broadcast shall receive a fair remuneration, decided by the Copyright and Related Rights Authority of the Republic of Cyprus.

Except for this, **Article 8(1) CDSM** has been implemented in **Article 29(1) CL**, by closely slavishly copying the EU provision.

Additionally, the regulation enshrined in **Article 12 CDSM** on the extended collective licensing schemes were also implemented in the Cypriot law, by being enshrined in **Article 33 CL**.

3.1.2.5.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.5.15.1 FUNDAMENTAL (USERS') RIGHTS

The Cypriot judiciary is quite respectful to fundamental human rights and freedoms and often refers to the ECHR and ECtHR case law. Nevertheless, the Cypriot judiciary has made no reference to fundamental human rights and freedoms, nor the ECHR or ECtHR case law in copyright-related legal disputes.

3.1.2.5.15.2 CONSUMER PROTECTION

None reported.

3.1.2.5.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.5.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.6 CZECHIA

The Czech Copyright and Rights Related to Copyright Act (hereinafter "CzCA") of 2000, as last amended in 2019,[591] contains a rich selection of copyright flexibilities facilitating the access to and use of copyright works by end-users. The vast majority of the copyright flexibilities harmonized with EU Directives, by having been implemented by the Czech legislature often verbatim or only with nuances. However, the CDSM implementation is still

[591] 121/2000 Sb. Zákon ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (ve znění zákona č. 50/2019 Sb.) [Act no 120/2000 Sb., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts of 7 April 2000 (as amended by Act 50/2019)].

pending, therefore the CzCA does not feature exceptions for TDM and digital and cross-border teaching activities.

As to the pre-CDSM flexibilities, there are several provisions which are characterized by a slightly more restrictive approach compared to that of EU rules (e.g., exception for the private copying, parody, illustration of teaching and research, freedom of panorama, and "other uses" by public authorities). A handful of exceptions, instead, feature a more flexible approach (e.g., quotation and temporary acts of reproduction).

As a last remark, it is worth indicating that CzCA features a well-established licensing scheme which contributes to end-users' access to and use of cultural content.

3.1.2.6.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.6.1.1 TEMPORARY REPRODUCTION

The mandatory exception for temporary acts of reproduction enshrined in **Article 5(1) InfoSoc** has been implemented almost verbatim in **Section 38a(1) CzCA**. This provision was first introduced in the Czech copyright law in 2006, and later amended in 2017.

Section 38a(1) CzCA permits the making of temporary copies, which are transient and incidental, only for the purpose of enabling the transmission of a work by an intermediary between third parties *via computer or any other similar network*, and only if the act of reproduction as such is an integral and essential part of a technical process, it does not have an independent economic significance, and it is aimed at enabling the lawful use of the work in question.

This exception has been extended to performances (by **Section 74 CzCA**), phonograms (by **Section 78 CzCA**), audio-visual fixations (by **Section 82 CzCA**), and to broadcasts (by **Section 86 CzCA**), by references made to **Section 38a CzCA**.

Given the regulation within **Section 29(1) CzCA**, these provisions require compliance with the three-step-test.

3.1.2.6.1.2 EPHEMERAL RECORDING

The exception for ephemeral recording enshrined in **Article 5(2)(d) Infosoc** has been implemented in **Section 38a(2) CzCA.** This provision was first introduced in the Czech copyright law in 2006, and later amended in 2017.

Section 38a(2) CzCA allows radio or television broadcasters to make an ephemeral recording of a work by means of their own facilities and for their broadcast, but only if they have been originally authorized to broadcast the work. While the provision follows **Article 5(2)(d) Infosoc** almost verbatim, it omits to mention the possibility of preserving such ephemeral recordings in official archives.

This exception has been extended to performances (by **Section 74 CzCA**), phonograms (by **Section 78 CzCA**), audio-visual fixations (by **Section 82 CzCA**), and to broadcasts (by **Section**

86 CzCA), by references made to **Section 38a CzCA**. That said, the reference to **Section 38a CzCA** made within **Section 86 CzCA** corresponds to **Article 10(1)(c) Rental.**

Once again, these exceptions are subjected to the three-step-test **(Section 29(1) CzcA).**

3.1.2.6.1.3 INCIDENTAL INCLUSION

The exception for incidental inclusion enshrined in **Article 5(3)(i) Infosoc** has been implemented almost verbatim in **Section 38c CzCA,** and it entered into force in 2006. According to **Section 38c CzCA**, anyone can use a work incidentally, as long as such use is relevant to the intended primary use of another work or material. This provision requires compliance with the three-step-test, due to the regulation within **Section 29(2) CzCA.** The scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

3.1.2.6.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Czech copyright law features several provisions aimed at enabling end-users' access to and lawful use of databases, computer programs, and works protected by TPMs.

Section 66 CzCA implements the exceptions provided for the lawful user of a computer program, which have been introduced by **Articles 5 and 6 Software,** by enshrining them in the same provision. Indeed, **Section 66(1)(a)-(c)** transpose **Article 5 Software**; yet, the provision extends this exception to for any other purposes, unless it is contractually prohibited. **Section 66(1)(d) CzCA** transposes **Article 6(1) Software** verbatim. Departing from the EU rule, **Section 66(2) CzCA** explicitly regulates that the reproduction of a computer program and storage of the computer program in the computer's memory, as well as for its display, operation, and transmission. Just like its EU counterpart **(Article 6(3) Software)**, Section the Czech exception also requires compliance with the three-step-test. Also, by adopting the text of its EU counterpart, **Section 66(4) CzCA** transposes the prohibited uses enlisted in **Article 6(2) Software.**

As to databases, **Section 36 CzCA** transposes **Article 6(1) Database**, by providing for limitation to copyright for the lawful uses of "collection of works", which has been introduced in 2006 and later amended in 2017. By closely following the EU rule, this provision permits the lawful user of a *collection of works*, which constitutes a database, to use it for the purpose of accessing it and for the normal exploitation of its content. Additionally, **Section 91 CzCA** implements the exception provided for lawful user of a database within **Article 8(1) Database,** by closely following the language and standards set by the EU rule verbatim. Similar to the EU rule, the Czech exception also requires the uses that fall under this exception to comply with the three-step-test, as well as to respect copyright and related rights over the works and other subject-matter compiled within the database **(Article 8(3) Database)**.

Last but not least, **Section 43(4) CzCA** adopts verbatim **Article 6(4) InfoSoc**, in order to secure end-users' access to and use of works protected by TPMs, especially while enjoying the E/Ls provided for reprography, press review and news reporting, public lending,

temporary reproduction, socially oriented uses, and persons with disabilities. This regulation has been extended to computer programs by **Section 66(8) CzCA.**

3.1.2.6.1.5 FREEDOM OF PANORAMA

The exception provided for the so-called "freedom of panorama" introduced by **Article 5(3)(h) Infosoc** is implemented in **Section 33 CzCA.** This provision was first enacted in 2000 and later amended in 2006; however, despite this amendment, **Section 33 CzCA** is more restrictive, for it imposes certain other criteria on the permitted uses.

According to **Section 33(1) CzCA,** it is permitted to record or express by drawing, painting, graphic art, photography, or film a work that is permanently located in a public place. The same provision also allows further uses of such copies.

In this context, it is worth mentioning that **the Municipal Court in Prague** has decided in **case no. 9 A 105/2010-119 of 27 February 2014** that "the license to use a drawing depicting the form of an architectural work (mill building located in a public space) in the meaning of Section 33 is not conditioned by the existence of a rental relationship to the building, it is not related to the lease at all, and therefore the termination of the lease does not result in the termination of the existing tenant's right to continue to use unregistered designations, including *inter alia* the drawing of the mill building to mark their products."

The provision requires the mentioning of the source, unless the work is anonymous work, and the name or pseudonym of the author, as well as the title of the work and its location.

Section 33(2) CzCA excludes from the scope of the provision the reproduction or imitation of an architectural work in the form a building, and the reproduction and distribution of a work in three-dimensional form. Furthermore, it is wort noting that the three-step-test included within **Section 29(1) CzCA** applies to this exception as well.

3.1.2.6.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.6.2.1 REPROGRAPHY

The Czech CA held a copyright exception provided for enabling the acts of reprography, which was initially enshrined in **Section 30 CzCA** and entered into force in 2000. Following the adoption of **Article 5(2)(a) Infosoc**, this provision has been amended in 2006, and has become a special regulation under **Section 30a CzCA**, which closely resembles and satisfies the standards set by Article 5(2)(a) Infosoc, thus, in compliance with EU rule.

Section 30a(1)(a) and (c) CzCA permit natural persons as well as third parties acting on their behalf to engage in acts of reprography for personal use. **Section 30a(1) (b) and (d) CzCA** allow legal persons or a sole trader as well as third parties acting on their behalf to reproduce a work for their internal uses.

The exception is limited to printed reproductions of a work on paper or other similar medium by reprographic techniques or any other process having similar effects. Sheet music is excluded from the scope of the provision. The provision requires payment of a regular and

timely remuneration to rightholders to enjoy this exception, along with compliance with the three-step-test **(Section 29(1) CzCA).**

3.1.2.6.2.2 PRIVATE COPY

The Czech CA provides for several flexibilities aimed at facilitating the private copying of databases and works.

Article 6(2)(a) Database has been implemented in **Section 30(3) CzCA,** which encompasses not only copyright protected databases but also computer programs. This provision allows the fixation, reproduction, or adaptation of a computer program or an electronic database by natural persons and for their personal use, as well as by legal persons or sole traders for their internal use. Despite the slight divergence from the EU provision in its articulation of the exception, this provision perfectly corresponds to **6(2)(a) Database**. The exception provided by **Article 9(a) Database** has been implemented in **Section 92 CzCA**, which closely follows the language and meets the standards set but its EU counterpart.

As to the InfoSoc flexibility, **Section 30 CzCA**, in general, allows private copying of works and other subject matters under **Section 30,**[592] which was first introduced in 2000. Following the adoption of **Article 5(2)(b) Infosoc**, **Section 30 CzCA** was amended twice – in 2006 and 2017.

Put in a broad context, **Section 30(1) CzCA** states that the use of a work by a natural person and for personal needs does not constitute a "use" of a work under the CzCA if it does not cause a direct or indirect economic or commercial advantage. Following up with this, **Section 30(2) CzCA** permits the fixation, reproduction, or imitation of a work by these persons and for their personal uses. It is worth to indicate that this exception also extends to the reproduction of an architectural work in the form of a building or its imitation, as well as the ephemeral recording of an audio-visual work. However, **Section 30(4) CzCA** enables the reproduction or imitation of a work of fine arts only by natural persons and for their personal use. All reproductions covered by this Section – including the ones for computer programs and databases – should be limited to the purposes indicated therein **(Section 30(5) CzCA).** Also, the three-step-test enshrined within **Section 29(1) CzCA** applies to this exception as well. It is also worth noting that the scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

It is worth noting that the **Constitutional Court of Czechia** has decided in case **I. ÚS 1325/17 of 6 June 2017** that the public display of a work in a pub cannot be considered as private use, and thus it is not covered by this exception.

Overall, compared to EU provisions, the Czech private copying exception is broader and more articulated. In fact, not only it jointly transposes **Article 5(2)(b) Infosoc** and Article

[592] For related case law, see: Constitutional Court, III. ÚS 2429/14, 14. 5. 2015.

6(2)(a) Database, but it extends such provisions to cover also audio-visual, architectural, and artistic works.

Nevertheless, the Act does not contain any provision implementing **Article 10(1)(a) Rental**. This is confirmed by case law, which excludes the application of the private copying exception to broadcasts. Indeed, an interesting example comes from the Czech Supreme Court's decision in case **no.30 Cdo 3474/2010 on 30 November 2010**, which has both drawn the boundaries of the exception and clarified the notion of "private use", by ruling that "making sound recordings available to the public, i.e., to an open circle of persons associated in an association without legal personality, who have acquired ownership of the CDs, shall not be classified under Section 30(1)."

3.1.2.6.3 QUOTATION

Article 5(3)(d) InfoSoc has been implemented in **Section 31(1) CzCA.**[593] This provision was first introduced in 2000 and later amended in 2006, satisfies the standards set by its EU counterpart. In fact, it can be argued that the former is slightly broader than the one provided by the latter, given that the national rule facilitates the use of an entire small work in another work.

Indeed, **Section 31(1) CzCA** enables the use of excerpts of a published work in one's own work, to the extent justified by the purpose. Similarly, the provision allows the use of excerpts from a work and of small works in their entirety for purposes of critique, review, and of scientific or professional work. Quotation should always be made in accordance with fair practices and to the extent required by the specific purpose and should always indicate the source used unless the work is anonymous, the name or pseudonym of the author. It shall also comply with the three-step-test **(Article 29(1) CzCA).**

It shall be indicated that the scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

In this context the **Municipal Court of Prague** has **decided in case no. 66 EC 76/2011–50** of 27 September 2011 that the quotation of four out of nine paragraphs of the claimant's article in an art book concerning the life of a painter, accompanied by the author's name and the source, constitutes a use of "small works" falling under Section 31(1) CzCA, and in compliance with the three-step test. In another occasion, however, the same court has excluded the application of the quotation exception (**case no. 32 C 12/2011–56** of 22 June 2011). The decision was based on the fact that the unauthorized use of twelve drawings in the defendant's (civic society) book constituted a "major" quotation, and that the book itself was only a collection of works without any review or critique of the works used.

[593] For related case law, see: Municipal Court of Prague, 22. 6. 2011, 32 C 12/2011–56; Constitutional Court, 14. 11. 2012, II. ÚS 3688/12.

As to the so-called "online quotation" exception introduced by **Article 17(7) CDSM**, it shall be noted that the national transposition process is still in progress, while there are no other provisions within CzCA responding to this specific exception.

3.1.2.6.4 PARODY, CARICATURE, PASTICHE

The parody exception within **Article 5(3)(k) InfoSoc** has been implemented in **Section 38(g) CzCA** and entered into force in 2017.

The provision, in a very concise manner, permits the use of a work for the purpose of caricature or parody, while requiring compliance with the three-step-test as well **(Section 29(1) CzCA).**

It is worth mentioning that the provision has been linked to the constitutional right to freedom of expression by the **Czech Constitutional Court**, which in case no. **ÚS 3169/19 of 31 March 2020** ruled that: *"in case of caricature and parody (…), their communication and the related freedom of expression becomes important, as the expression of opinion is usually the primary purpose of caricature and parody."* On this basis, the Court has ruled that an unsubstantiated and unjustified preliminary injunction ordering the removal of the parodied audio-visual work from a Facebook profile, and imposing an obligation on the defendant to refrain from using it, constituted measure that unlawfully restricted the constitutionally guaranteed right to freedom of expression within the meaning of Article 17(1) and (2) of the Czech Constitution, as well as the right to fair trial guaranteed by Article 36(1) of the Charter.

While the so-called "online parody" exception within **Article 17(7) CDSM** has not been transposed to the national law yet; it is also worth to note that the Czech proposal for the implementation of the CDSM Directive contains **Section 49** aimed at transposing **Article 17(7) CDSM** by adding "pastiche" to the current wording of **Section 38(g) CzCA**. This amendment is likely to mend the slightly more restrictive approach adopted by the Czech legislature compared to **Article 5(3)(k) InfoSoc.**

3.1.2.6.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.6.5.1 PRIVATE STUDY

The exception provided for private study in **Article 5(3)(n) InfoSoc** has been implemented in **Section 37(1)(c) CzCA,** by adopting the text of its EU counterpart almost verbatim. This provision entered into force in 2000 and amended in 2006.

Slightly departing from the wording of the EU exception, the Czech provision allows libraries, archives, museums, galleries, schools, universities, and other educational institutions to make available to the public via the dedicated terminals within their premises and reproduce, if needed, the works in their collections, which are not subject to licensing or purchasing terms; however, strictly for private study purposes. Yet, the national exception adds that to fall under the exception, the indirect beneficiaries of this exception, or in other words the member of the public, shall be prevented from making reproductions of the works. Just like its EU counterpart, this provision also requires compliance with the three-step-test

(Section 29(1) CzCA). Also, the scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

3.1.2.6.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

The Czech CA contains several provisions corresponding to the EU flexibilities aimed at facilitating the illustration for purposes of teaching or scientific research.

While **Article 6(2)(b) Database** does not find any correspondence in CzCA, **Section 92(b) CzCA** adopts verbatim **Article 9(b) Database.** It permits the reproduction of databases or a copy thereof, for the sole purpose of illustration for teaching and scientific research, as long as the source is indicated and to the extent necessary for the intended use.

Section 31(1)(c) CzCA on quotation also cover such instances, for it allows the use of a work in teaching for illustration purposes or during scientific research, provided that such acts are carried out for non-commercial purposes, they do not exceed the extent necessary to the purpose, and they mention the source used, unless the work is anonymous, as well as the name or pseudonym of the author. That said, **Section 31(1)(c) CzCA** is in line with the scope and approach of **Article 5(3)(a) InfoSoc**, yet it does not cover copyright protected databases.

Yet, the scope of this provision is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA** – which can be deemed to corresponding to **Article 10(1)(d) Rental.**

3.1.2.6.5.3DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Article 5 CDSM has been implemented in **Section 31(a) CzCA,** by adopting the EU provision verbatim. While works primarily intended for educational purposes published musical or musical-dramatic works of notation are excluded from the scope of the exception, this exception has been extended to computer programs (by **Section 66 CzCA**) and to databases (by **Section 94 CzCA**), while **Section 43(6) CzCA,** transposing **Article 7 CDSM**, requires rightholders who have used TPMs on their works to ensure that authorized users may nevertheless enjoy the three mandatory exceptions, to the extent necessary to fulfil their purpose. Last but not least, it shall be emphasized that the three-step-test in **Section 29(1) CzCA** applies to this exception as well.

3.1.2.6.5.4 TEXT AND DATA MINING

Articles 3 and 4 CDSM have been implementation in **Section 39(c) and (d) CzCA,** by closely following the language of their EU counterparts and also by subjecting them to the three-step-test **(Section 29(1) CzCA).**

Section 39(c) CzCA transposed **Article 4 CDSM**, stating that anyone can make a reproduction of a work for the purpose of automated analysis of texts or data in digital form, carried out for the purpose of generating information including, *inter alia*, patterns, trends, and correlations. Reproductions generated in the course of TDM activities can be retained

only for the period necessary for the purpose. The application of the exception is excluded if the rightholder has expressly reserved TDM uses in an appropriate manner and/or in a machine-readable format.

Section 39(d) CzCA implemented **Article 3 CDSM**. Beneficiaries are educational institutions, scientific organisations and CHIs, which are allowed to reproduce a work for the purposes of scientific research and with the aim of performing an automated analysis of texts or data in digital form, carried out to extract information including, but not limited to, patterns, trends, and correlations. The reproductions made for TDM purposes shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including the verification of the results of the research.

As already mentioned above, these exceptions have been extended to computer programs and databases; while **Section 43(6) CzCA** requires rightholders who have used TPMs on their works to ensure that authorized users may nevertheless enjoy these exceptions, to the extent necessary to fulfil their purpose. However, both provisions exclude objects of related rights from the scope of their subject matter; thus, they provide for slightly narrower exceptions compared to the CDSM exceptions.

3.1.2.6.6 USES FOR INFORMATORY PURPOSES

3.1.2.6.6.1 PRESS REVIEW AND NEWS REPORTING

The Czech CA contains an exception allowing the use of works for press review and reporting of current events **(Section 34(1)(b)-(c) CzCA).** This provision entered into force in 2000, and it was amended in 2006, following the transposition of **Article 5(3)(c) InfoSoc and Article 10(1)(b) Rental**, which are followed almost verbatim. Also, it can be further indicated regarding the latter provision that, the scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

According to **Section 34 CzCA**, it is permitted to use a work for reporting on current events, and to use and translate a work on periodicals, broadcasting, or any other mass media reporting on current political, economic, or religious matters that have already been made public via any other mass media, to the extent justified by the informative purpose. The same provision allows the use of borrowed works and their translations unless the borrowing or the further use of such work has been explicitly excluded by rightholders. The provision requires the source to be mentioned, unless the work is anonymous or the name or pseudonym of the author, if it is not impossible. This provision also requires compliance with the three-step-test **(Section 29(1) CzCA).**

3.1.2.6.6.2 USES OF PUBLIC SPEECHES AND LECTURES

The Czech CA provides an exception for the use of public speeches and lectures within **Section 34(1)(d) CzCA.** This provision entered into force in 2000 and was amended in 2006,

following the adoption of **Article 5(3)(f) InfoSoc,** which is followed verbatim, and the exception has been subordinated to the three-step-test **(Section 29(1) CzCA).**

3.1.2.6.7 USES BY PUBLIC AUTHORITIES

3.1.2.6.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

While there is no concrete evidence to suggest that **Article 6(2)(c) Database** has been transposed to the Czech copyright law, **Article 9(c) Database** have been transposed to **Section 92(c) CzCA,** by adopting the EU provision verbatim.

Furthermore, **Section 34(1)(a) CzCA** provides an exception for the use of works in administrative and judicial proceedings**.** This provision entered into force in 2000, and it was amended in 2006, following the adoption of **Article 5(3)(e) InfoSoc,** which is transposed almost verbatim. Indeed, **Section 34(1)(a) CzCA** permits for the use of a work for purposes of public security, in court or administrative proceedings or for any other official purpose, or for parliamentary procedures and related minute-taking, to the extent justified by the purpose. This provision also requires compliance with the three-step-test **(Article 29(1) CzCA).** The scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

In an interesting case on the matter (**no. IV. ÚS 3208/16** of 21 March2017**), the Czech Constitutional Court** ruled that "administrative authorities need to make a clear and verifiable consideration when dealing with a request for information in respect of which an exclusion from the provision of information for reasons of third-party copyright protection may be applied. In administrative courts, it is then possible to request a proportionality test and the definition of general guidelines determining when administrative authorities are to provide information or, conversely, to prioritize copyright protection. Requests for information of this kind must be dealt with on a case-by-case basis, and upon a presumption of prevalence of the right to information, unless there are serious grounds for copyright protection which outweigh the right to information."

3.1.2.6.7.2 OTHER USES BY PUBLIC AUTHORITIES

Section 35(1) CzCA allows free uses of works during civil or religious ceremonies or during official events organized by public authorities, provided that this is not done for the purpose of any direct or indirect economic or commercial advantage**.** This provision entered into force in 2000, and it was amended in 2006, after the adoption of **Article 5(3)(g) InfoSoc. Section 35(1) CzCA** closely follows the InfoSoc provision, although it adopts a slightly more restrictive approach, for it allows uses of works only for non-commercial purpose. It is also worth noting that this provision also falls within the scope of **Section 29(1) CzCA**, which regulates the three-step-test, while the scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

3.1.2.6.8 SOCIALLY ORIENTED USES

Czech copyright law features two provisions for socially oriented purposes.

Section 23 CzCA was first introduced in 2005, and amended twice, in 2008 and 2012. The provision excludes from the notion of broadcasting and rebroadcasting, which is originally regulated under **Article 18(3) CzCA**, the making available of radio and television programs to patients in health care facilities, thus allowing their free use.

The scope and operation of the provision has been clarified and consolidated by the **Grand Chamber of the Civil and Commercial College of the Supreme Court in case No. 31 Cdo 3093/2013 of 14 October 2015.** The Court stated that "*The exception provided in the last sentence of Section 23 of the Copyright Act, according to which the making available of a work to patients in the course of providing health care in health care facilities is also not considered to be broadcasting under Section 18(3) of the same Act, generally does not apply to patients staying in spa facilities. In these cases, too, the operation of radio and television broadcasting is involved; therefore, the collecting society representing the authors is entitled to grant consent to the making available of works by spa facilities, as well as to negotiate and collect royalties for their use and to claim unjust enrichment from the unauthorized use of those works."*

Section 38e CzCA was first introduced in 2006 and later amended in 2012, and it adopts almost verbatim **Article 5(2)(e) InfoSoc**. It allows providers of health-care services or social facilities which were not established or founded for the purpose of generating profit, and in particular hospitals and prisons, to make a recording of broadcasted works and make them available to persons hosted therein, to the extent justified by the social purpose. The requires the payment of a fair remuneration to rightholders, along with requiring compliance with the three-step-test as well **(Section 29(1) CzCA).** The scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

3.1.2.6.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.6.9.1 PUBLIC LENDING

Public lending is regulated by **Section 37(2) and Section 37(3) CzCA.** This provision entered into force in 2000 and was amended in 2006 and 2017, following the adoption of **Article 6 Rental**, which the CzCA transposes almost verbatim.

According to **Section 37(2) CzCA,** libraries, archives, museums, galleries, schools, universities, and other non-profit educational establishments may lend originals and copies of published works, upon the payment of a fair remuneration to rightholders. Such a remuneration is not due if works are lent for on-the-spot references, and if the originals and copies of such works are lent by school and university libraries, the National Library of the Czech Republic, the Moravian Land Library in Brno, the State Technical Library, the National Medical Library, the Comenius National Pedagogical Library, the Library of the Institute of

Agricultural and Food Information, the Library of the National Film Archive and the Library of the Parliament of the Czech Republic. **Section 37(3) CzCA** excludes from the scope of the provision reproductions of works recorded in audio or audio-visual form. Such uses are subject to purchase or licensing terms, unless works are lent for on-the-spot references use or a copy of a record which is an integral part of a work. Also, beneficiaries are not allowed to make reproductions of works subject to this exception. Yet, the scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**. Once again, the three-step-test within **Section 29(2) CzCA** applies herein.

3.1.2.6.9.2 PRESERVATION OF CULTURAL HERITAGE

Section 37(2) CzCA, in the context of **Article 5(2)(c) InfoSoc**, permits libraries, archives, museums, galleries, schools, universities, and other non-profit school and educational establishments to reproduce a work, for archival and conservation purposes, and in the numbers and formats necessary for the intended use of the work. These acts shall not be conducted for commercial purposes. The scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

Furthermore, **Article 6 CDSM** has been implemented in **Section 37(1) CzCA** recently, by adopting the text of its EU counterpart almost verbatim. Indeed, the national provision diverges from the EU one, only for excluding the objects of related rights from the scope of its subject-matter. Yet, **Section 37 CzCA**, in general, shall also comply with the three-step-test regulated within **Section 29(1) CzCA.** Once again, the scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

3.1.2.6.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Entered into force in 2000 and amended in 2006, **Section 35 CzCA** provides for an exception that can be still considered in the context of **Article 5(2)(c) InfoSoc.**

Section 35(2) CzCA allows pupils, students, or teachers to use a work during school performances, provided that the performance is carried out exclusively by them, and not for any direct or indirect economic or commercial advantage. **Section 35(3) CzCA** allows schools and other educational establishments to use a work for teaching purposes or to meet their own internal needs, if a work is used by a pupil/student as a part of their school or educational assignments, provided that this is not done for the purpose of any direct or indirect economic or commercial advantage. Both exceptions are subordinated to the three-step-test **(Section 29(1) CzCA).** Similar to the vast majority of exceptions to copyright, the scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

3.1.2.6.9.4 ORPHAN WORKS

The Czech legislature has transposed the exception provided by the Orphan Works Directive in **Section 37(a) CzCA,** which entered into force in 2014, by following the language of and by complying with the standards set within the OWD.

Section 37a(1) CzCA permits the CHIs enlisted in **Article 1(1) OWD** to reproduce and make available of an orphan work, which are enlisted in **Article 1(2) OWD**, to for the purposes enlisted in **Article 6(1) OWD**. The procedure to declare a work orphan regulated within **Section 37a(6), (8), and (9) CzCA,** as well as the works that can fall within this category **(Section 37a(1))** are in complete compliance with, respectively, **Article 3 and Article 2 OWD.**

Section 37a(2) CzCA allows public broadcasting organizations to reproduce and make available for the purpose of digitization, making available, indexing, cataloguing, preservation, or restoration an orphan cinematographic or audio-visual work, provided that the act is performed only to attain objectives related to their public interest mission, the work is included in their archives, and it has been produced by them or upon their initiative before 31 December 2002. This regulation is, indeed, in line with **Article 1(3) OWD.** Likewise, and adopting verbatim **Article 1(4) OWD, Section 37a(4) CzCA** extends the provision to works embedded or incorporated into an orphan work, or forming an integral part thereof.

While these permitted acts shall be performed for non-commercial purposes, **Section 37a(5) CzCA** allows CHIs to generate income only to cover the digitization expenses, by transposing **Article 6(2) OWD. Section 37a(7) CzCA,** once again, closely following the Directive, requires the name of the author of the work in use to be indicated, if this is not impossible **(Article 6(3) OWD)**; and **Section 37a (8) and (10)** regulate the termination of the orphan work status as well as its consequences, by transposing **Article 5 and Article 6(5) OWD**.

3.1.2.6.9.5 OUT-OF-COMMERCE WORKS

Article 8(2) CDSM, aimed at facilitating the use of out-of-commerce works, has been recently implemented in **Section 37(b) CzCA**, by adopting the EU provision verbatim. Also, in accordance with **Article 7 CDSM, Section 8(2) CDSM** has also been subjected to the three-step-test enshrined in **Section 29(2) CzCA.**

3.1.2.6.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Section 39 CzCA provides a dedicated exception for persons with disabilities. This provision was first introduced in 2000, and it was amended for several times in 2006, 2017, and in 2019, especially following the adoption of Article 5(3)(b) InfoSoc and the Marrakesh Directive in 2017.

Section 39 CzCA provides for a broadly articulated exception, by following **Article 5(3)(b) InfoSoc.** It allows anyone to the extent required by the specific disability and not for purposes of direct or indirect economic or commercial advantage, to reproduce (or make others reproduce), distribute and communicate to the public a work in accessible format, to

reproduce, distribute and communicate to the public a published audio-visual fixation of an audio-visual work, by adding subtitles or other forms of visual or textual aids necessary to make the work accessible to those persons, and lend originals or copies of works in accessible format to meet the needs of persons with disabilities in relation to their disability. The same provision enables the broadcasting organizations are authorized to adding to the programme an audio description that makes the programme accessible to persons with visual impairments, provided that the service is free of charge and not carried out for the purpose of direct or indirect economic or commercial advantage. The scope of this exception is extended to performances by **Section 74,** to phonograms by **Section 78,** to cinematographic works by **Section 82,** and to broadcasts by **Section 86 CzCA**.

Following the adoption of the Marrakesh Directive, the Czech legislature has introduced **Sections 39a and 39b CzCA**, in order to transpose more detailed regulations of the Marrakesh Directive, by very closely following the language and standards of the Directive.

Section 39a(1) CzCA identifies the direct beneficiaries of the exception, by transposing verbatim **Article 2(2) Marrakesh**. Along the same line, **Section 39a(2) and Section 39a(3) CzCA** define, respectively, the accessible format copy and the authorized entities, by adopting the definitions within **Article 2(3) and Article 2(4) Marrakesh.**

Section 39a(4)(a)-(b) regulates the permitted uses, by closely following the structure and language of **Article 3(1) Marrakesh**.

Section 39a(4)(c) CzCA adopts verbatim **Article 4 Marrakesh**, while **Section 39a(5) CzCA** consolidate the mandatory character of the exception herein, by transposing **Article 3(5) Marrakesh.**

Section 39b CzCA, by closely following the regulation within the Marrakesh Directive, regulates in detail the documentation and other responsibilities of the authorized entities, as regulated within **Article 5 Marrakesh**.

3.1.2.6.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Section 30b CzCA, which entered into force in 2000 and was later amended in 2018, permits using a work to the extent necessary for the demonstration or repair of equipment for a customer, thus transposes **Article 5(3)(l) InfoSoc**.

Section 47b[594] **of the Act No. 111/1998 Sb. on Higher Education Institutions and on Amendments and Supplements to Some Other Acts,**[595] entered into force in 2006 and amended in 2010 and 2016, states that higher education institutions are obliged to make available to the public, and not-for-profit, the Bachelor's, Master's, Doctoral, and advanced Master's theses that have been defended at their institutions, including readers' reports, and the minutes and results of the defence. The law allows postponing the making available to

[594] For related case law see: Cdo 2864/2015.

[595] Zákon č. 111/1998 Sb.Zákon o vysokých školách a o změně a doplnění dalších zákonů (zákon o vysokých školách).

the public of such works for three years. Everyone is allowed to make extracts, copies, or photocopies of available theses.

Authors are presumed to consent to such uses when they deposit their dissertations, irrespective of the result of the defence.

Section 38f CzCA, entered into force in 2010 and amended in 2017, enables the reception of simultaneous, unaltered and unabridged radio or TV broadcasting through receivers on one and the same building, or a complex of buildings forming a whole in terms of spatial arrangement or purpose, by means of common house aerials, provided that only the reception of terrestrial or satellite broadcasting is made possible, and that the common reception is not used for any direct or indirect economic or commercial benefit.

It shall be indicated as well that **Article 5(3)(j) InfoSoc** has been implemented in **Section 32 CzCA,** by amending the existing provision in 2006, in order to bring it line with the EU provision.

Likewise, **Article 5(3)(m) InfoSoc** has been implemented in **Section 38d CzCA** in 2006 and was later amended in 2007, in terms of adopting and meeting the standards by the EU provision.

3.1.2.6.12 THREE-STEP TEST

The three-step-test is regulated under **Section 29 CzCA**. This provision entered into force in 2000 and later amended in 2006 and 2017. **Section 29(1) CzCA** follows almost verbatim the text of **Article 5(5) InfoSoc.**

Section 29(2) CzCA, instead, provides that E/Ls shall be applicable only to works that have already been made public. However, the provision excludes from this rule the exceptions for press review and news reporting **(Section 34 CzCA),** for making available to the public of Master's theses **(Section 35(3) CzCA),** for preservation of cultural heritage **(Section 37(1) CzCA),** for temporary reproductions **(Section 38a CzCA),** for photographic portraits **(Section 38b CzCA),** and for incidental inclusion **(Section 38c CzCA).**

There had been several cases in which the Czech judiciary has evoked the three-step-test. For instance, in **case no. 30 Cdo 2864/2015, the Supreme Court** has ruled that: *"the provision of Section 47b of Act No. 111/1998 Sb. represents a quasi-license restriction of copyright, the purpose of which is a non-profit publication of a dissertation, diploma, bachelor's and rigorous thesis for which the defense took place, which exceeds the use of the schoolwork for the internal needs of the school in the sense of Sec. 35 para. 3 of Act No. 121/2000 Sb. Even in case of exceptions, however, a restrictive interpretation applies, in accordance with the three-step test, which is explicitly stated in Sec. 29 para. 1 of the Copyright Act*) (…). *The first step was satisfied, as the rights of the author were limited on a legal basis (specifically Section 47b HEIA) and the internal regulations of Masaryk University also reflected this legal basis. There was also no problem with the second step, since the submission of the final thesis is a one of the prerequisites for completing the studies. The internal regulations of Masaryk University*

had foreseen this manner of publication and also reflected Section 47b(3) HEIA, in that submission of the thesis also implies consent to provide public access to it. The Higher Court further inferred – from the fact that the thesis is accessible in the university information system - that its use is for study purposes. Such use can be deemed normal. Even the third step had been complied with in the current case. The legitimate interest could not have been unreasonably prejudiced as the author had the opportunity to proceed according to the internal regulations and request that the thesis is not made publicly accessible but failed to do so."

Also, in **case no. 30 Cdo 3474/2010, the Supreme Court** has decided that the "sharing" of CDs among club owners (the club being an association of persons without legal personality), who have together acquired the ownership of such supports, cannot be qualified as personal use but rather resembles a rental business model, which shall be excluded from the scope of the exception in accordance with the three-step test, which requires exceptions and limitations not to be interpreted extensively.

3.1.2.6.13 PUBLIC DOMAIN

3.1.2.6.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

The Czech CA features three provisions on the matter.

Entered into force in 2000, **Section 2(6) CzCA** enlists subject-matters that are *not considered as work*, such as the news of the day, facts, ideas, procedures, principles, methods, discoveries, scientific theories, mathematical and similar formula, statistical graphs. The list is not deemed exhausted but to extend so as to cover also similar objects.

Section 3 CzCA, which entered into force in 2000 and was later amended in 2007, excludes from copyright protection official texts such as a legal regulation, decision, public charter, publicly accessible register and collection of its documents, and also any official draft of an official work and other preparatory official documentation; their translations; publications of the Chamber of Deputies and Senate publications and municipal chronicles; state and municipalities' symbols; any similar work where there is public interest in its exclusion from copyright protection creations of traditional folk culture, unless the real name of the author is commonly known or the work is anonymous or pseudonymous. Such works may only be used in a manner that does not detract from their value.

Broadening and specifying the scope of the provision, the **Municipal Court in Prague** has decided in **case no. 6 A 246/2013-59** of 17 February 2017, that an expert opinion used in court proceedings could not be considered as a protected work.

Last, **Section 65(2) CzCA** excludes from protection ideas and principles which underlie any element of a computer program and its interfaces.

3.1.2.6.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.6.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Section 72 CzCA introduces a **statutory licensing scheme.** It allows radio and televisions to broadcast and rebroadcast performances fixed on phonograms, upon the payment of a fair remuneration. This right may only be exercised by the performer through the relevant CMO.

Additionally, and as mentioned above, currently, the use of out-of-commerce works is only allowed on the basis of the ECL scheme regulated in **Sections 97e and 97f CzCA.**

Section 97e CzCA is dedicated to ECL. While **Section 97e(1) CzCA** defines ECL, **Section 97e(2) CzCA** carves out from the ECL audio-visual works or works integrated in audio-visual works as such, with the exception of audio-visual works used in music.

Section 97e(4) CzCA sets the scope of the permitted acts under an ECL, by enlisting these act, which are:

- the operation of artistic performance from a sound recording issued for commercial purposes or the operation of such a recording,
- non-theatrical performance of a musical work with or without lyrics from a sound recording released for commercial purposes,
- broadcasting of the work by radio or television,
- broadcasting of work, artistic performance, sound recording or audio-visual recording on radio or television broadcasting,
- the lending of an original or a copy of a work or the lending of a work or the performance, and the lending of such recordings, which the exception of computer programs,
- making the work available in an intangible form, with the exception of computer programs,
- live non-theatrical performance of a work, in so far as such performance does not pursue direct or indirect economic or commercial benefit,
- making available to the public of a published work on request, with the exception of computer programs, works or performances recorded on a sound or audio-visual recording, to published musical works of a musical or musically dramatic work and to works the disclosure of which by this library is the subject of other license agreements,
- making available to the public of a copy of a work included in the list of out-of-commerce works not available,
- making a printed copy of a published musical or dramatic work by a person for his own internal use or to order for the personal use of a natural person or for use in teaching

or scientific research, if making such a copy is not direct or indirect economic or commercial benefit, and finally,

- making a printed copy of a work and disseminating such a copy by a school, school facility or university, exclusively for educational purposes and not to achieve direct or indirect economic or commercial benefit.

Section 97f CzCA corresponds to **Article 8(1) CDSM**, given that it is addressed to the National Library. Indeed, **Section 97f(1) CzCA** requires the libraries to maintain a list of works that are not available on the market. This list shall consist of only literary works, including the works integrated therein, and the list shall be published on the National Library's website. In case the National Library wishes to include a work to the list, **Section 97f(2) CzCA** requires the rightholder of the work, which could a library or a CMO, to be contacted for this purpose, and this proposal shall also be published online as well. It shall be indicated that **Section 97f(5) CzCA** enables the rigththolders to request a work to be eliminated from the list as well. According to **Section 97f(3) CzCA** the National Library shall include a work in the list if the work cannot be obtained by purchasing or any other licensing scheme.

3.1.2.6.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.6.15.1 FUNDAMENTAL (USERS') RIGHTS

While the national experts have reported that the acknowledgement of copyright as property might clash with various fundamental rights, they have explained that the national courts have not yet dealt with or elaborated upon this problem extensively. Internal limits are thus seen as the "systemic tool for resolving conflicts."[596] The potential infringement of fundamental rights might stem from an unsubstantiated interim provision requesting the blocking of the allegedly infringing content, which can be considered as the violation of the freedom of speech.[597] In the case concerning the request for information of a copyrighted legal analysis, the Constitutional Court also suggested that these interests shall be balanced.[598]

3.1.2.6.15.2 CONSUMER PROTECTION

None reported.

3.1.2.6.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.6.15.4 OTHER INSTRUMENTS

None reported.

[596] Matěj Myška, *Výjimky a Omezení Autorského Práva v Prostředí Digitálních Sítí* (Wolters Kluwer 2020) 263.
[597] See: Constitutional Court, I. ÚS 3169/19.
[598] See: Constitutional Court, IV. ÚS 3208/16.

3.1.2.7 DENMARK

The Danish Copyright Act (hereinafter "DCA") of 2014,[599] as last amended in 2021,[600] offers a bundle of E&Ls enabling end-users' access to copyright content, while the level of flexibility of such regulatory tools varies highly. The majority of EU flexibilities find correspondence in the DCA. However, most of these flexibilities precede the ones introduced by the EU Directives, and they have not been amended in response to the EU harmonization. In addition, a number of exceptions are still not covered by the Act, such as use for official celebrations as well as a few mandatory exceptions introduced by CDSM (e.g., for TDM, digital and cross-border teaching activities), as the CDSM transposition is in progress.

There are also a few exceptions providing for a broader level of flexibility compared to the EU standards, such as exceptions for ephemeral recordings, illustration for teaching and scientific research, and for persons with disabilities. Furthermore, the Danish Supreme Court has introduced the principle of de minimis to exempt minimal uses of copyright content from copyright infringement.

3.1.2.7.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.7.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc has been implemented in **Section 11a DCA**,[601] and it entered into force in 2002. While **Section 11a(1) DCA** adopted the text of its EU counterpart verbatim, **Section 11a(2) DCA** explicitly excludes computer programs and databases from the scope of this exception, which is not contradictory to the InfoSoc regulations. The scope of this provision is extended to performances by **Section 65(6),** to phonograms by **Section 66(2),** to films by **Section 67(2),** to broadcasts by **Section 69(3),** and to photographs by **Section 70(3) DCA**. It shall be noted that, these provisions do not require compliance with the three-step-test.

3.1.2.7.1.2 EPHEMERAL RECORDING

The DCA enables ephemeral recording of works within its **Section 31.**[602] This provision entered into force in 1961, but it is in line with **Article 5(2)(d) InfoSoc**, and in some traits broader, for it does not require the recording to be carried out by means of the broadcasting organizations' own facilities. Neither it requires compliance with the three-step-test.

According to **Section 31 DCA**, broadcasting organizations are allowed to record works on tapes, films, and other materials, only for broadcasting purposes and only if the broadcasting organization has been authorized at the first place to broadcast the work in question. Rules

[599] Lov nr. 741 af 25.06.2014, Lov om ophavsret.
[600] See: Lov nr. 2607 af 28.12.2021, Lov om ændring af lov om ophavsret.
[601] For related case law, see: Ugeskrift for Retsvæsen 2013.1782 H.
[602] For related case law, see: Ugeskrift for Retsvæsen 2014.2442 H (NCB/DR); Ugeskrift for Retsvæsen 2003.280 (DR I); Ugeskrift for Retsvæsen 2003.284 (DR II).

on the conditions for the use or storage of such ephemeral recordings are left to the discretion of the Ministry of Culture.

The scope of this provision is extended to performances by **Section 65(6),** to phonograms by **Section 66(2),** to films by **Section 67(2),** to broadcasts by **Section 69(3),** and to photographs by **Section 70(3) DCA** – which may be deemed to correspond to **Article 10(1)(c) Rental**. It shall be noted that, these provisions do not require compliance with the three-step-test.

3.1.2.7.1.3 INCIDENTAL INCLUSION

The DCA allows the incidental inclusion of only artistic works in other materials in its **Section 23(3).**[603] This provision entered into force in 1961 and was not amended since then; thus, it fails to meet the standards of its EU counterpart, **Article 5(3)(i) InfoSoc**, due to providing for a much stricter subject matter as well as quite narrowly articulated purposes of use. Yet, it shall be indicated that the Danish exception does not require compliance with the three-step-test.

Indeed, according to **Section 23(3) DCA**, published works of art or copies thereof, which have been transferred to others by the author, may be used in newspapers, periodicals, films, and television only if the use is of subordinate importance and thus incidental.

3.1.2.7.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The Danish copyright law holds several provisions enabling the normal use of computer programs, databases and works protected by TPMs.

Entered into force in 1993 and later amended in 1998, **Section 36(1) DCA** transposed **Article 5 Software,** by closely following the EU standards therein and adopting the language of the EU provision verbatim. **Section 37** did the same for **Article 6 Software**.

As to databases, **Section 36(2) DCA** provides for an exception, by adopting **Article 6(1) Database** verbatim. However, **Article 8 Database** has not been transposed to the DCA.

Article 6(4) InfoSoc was implemented in **Section 75d DCA,** by very closely following and meeting all the standards of the EU rule. According to **Article 75d(1) DCA,** the Copyright Licensing Board[604] can oblige a rightholder to take the necessary measures to ensure the lawful user of a work to enjoy the E/Ls, such as the flexibilities for ephemeral recording, public speeches and lectures, uses for administrative and judicial proceedings, quotation, public performance by certain institutions, illustration of teaching and scientific research, socially oriented uses, preservation of cultural heritage, and for persons with disabilities. However, this flexibility is applicable only if there are no voluntary measures taken by the rightholder or no contractual provisions addressed to the same purpose **(Section 75d(2) DCA).** And it does not apply to works and other subject-matter made available to the public on contractual

[603] For related case law, see: Ugeskrift for Retsvæsen 2013.3002 V (TV2/Østjylland); Ugeskrift for Retsvæsen 2019.1109 (Würtz).
[604] See: Section 47 DCA for details regarding the Copyright Licensing Board, which is appointed by the Minister of Culture.

terms and in such a way that the public can access them at an individually chosen place and time **(Section 75d(3) DCA).**

3.1.2.7.1.5 FREEDOM OF PANORAMA

The Danish freedom of panorama exception is enshrined in **Section 24 (2)-(3) DCA**.[605] The provision has entered into force in 1933 and was not amended after the adoption of **Article 5(3)(h) InfoSoc**. The Danish provision is more restrictive than its EU counterpart, particularly with regard to subject-matter and permitted uses; however, no compliance with the three-step-test is required.

According to this provision, in fact, artistic works that are permanently located in a public place can be reproduced in pictorial form and such copies can be made available to the public **(Section 24(2) DCA).** However, to fall under this exception, the artistic work in question shall not constitute the main reason of the reproduction, and the reproduction itself shall not be made for commercial purposes **(Section 24(2) DCA).** With regard to architectural works, the law allows their reproduction and making available in pictorial form **(Section 24(3) DCA).**

3.1.2.7.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.7.2.1 REPROGRAPHY

Danish copyright law features two provisions regulating reprography for educational activities and business practices. They both precede the adoption of **Article 5(2)(a) InfoSoc** and have not been amended ever since.

Entered into force in 1961, **Section 13 DCA** covers reprography for educational purposes, and it allows the reproduction of published works and of recordings of works broadcasted in radio or television, as long as the act is carried for educational purposes and in compliance with the ECL regulated by **Section 50 DCA**. [606]

Entered into force in 1995, **Section 14 DCA** permits public or private institutions, organizations, and business activities to make copies of descriptive articles in newspapers, magazines and collections, and brief excerpts of other published works of descriptive nature, of musical works and of illustrations reproduced in association with the text. Reproductions shall be carried out only for internal purposes only and shall comply with the ECL scheme regulated by **Section 50 DCA.** [607]

Albeit relatively different in terms of approach if compared to **Article 5(2)(a) InfoSoc**, and relying on ECLs, the two Danish provisions feature all essential elements of the EU reprography exception and present the same degree of flexibility.

[605] For related case law, see: Ugeskrift for Retsvæsen 2001.1691 H.
[606] For related case law, see: Ugeskrift for Retsvæsen 2007.280 S, Ugeskrift for Retsvæsen 2013.3002 V,
[607] For related case law, see: Ugeskrift for Retsvæsen 2007.280 S, Ugeskrift for Retsvæsen 2013.3002 V,

3.1.2.7.2.2 PRIVATE COPY

Section 12(1) DCA – which was introduced in 1961 and not amended after the entry into force of **Article 5(2)(b) InfoSoc** – allows the making of copies of works that have been already made public, as long as the reproduction is only for private and non-commercial purposes.[608] The provision introduces several restrictions as to works and uses covered, which are not encompassed by its EU correspondent.

Section 12(2) DCA carves out from the scope of permitted acts construction of a work of architecture; reproduction of a work of art by casting, by printing from an original negative or base, or in any other manner which may lead the copy to be considered as an original; reproduction of computer programs in digitized form, reproduction in digital form of an electronic database already copied in digital form, reproduction in digital form of other works, unless this is done exclusively for the personal use of the person making the reproduction or his household. Similarly, the provision does not allow the reproduction by digital means of a work that has been lent or hired **(Section12(3) DCA),** and it excludes the possibility to make copies of musical works and cinematographic works by using technical equipment made available in libraries, business premises, or in other places accessible to the public. The same applies for literary works if the technical equipment has been provided for commercial purposes. It is also worth noting that this provision does not encompass objects of related rights.

Furthermore, **Section 12(4) DCA** does not allow the involvement of other persons, who have commercial interest and would generate an economic gain from the act of reproduction, in the process reproducing literary works, musical works, cinematographic works.

Yet, the scope of this provision is extended to performances by **Section 65(6),** to phonograms by **Section 66(2),** to films by **Section 67(2),** to broadcasts by **Section 69(3),** and to photographs by **Section 70(3) DCA** – which may be deemed to correspond to **Article 10(1)(a) Rental.** It shall be noted that, these provisions do not require compliance with the three-step-test.

3.1.2.7.3 QUOTATION

The Danish quotation exception is contained in **Section 22 DCA.**[609] This provision precedes the adoption of **Article 5(3)(d) InfoSoc**, and it dates back to 1933. However, its language is as broad and all-encompassing as that of its EU counterpart. Indeed, **Section 22 DCA** only prescribes that anyone can quote from a work which has been made public, in accordance with fair practices and to the extent justified for the purpose.

[608] For related case law, see: Ugeskrift for Retsvæsen 2005.1393/2 V.

[609] For related case law, see: Ugeskrift for Retsvæsen 2007.280 S, Ugeskrift for Retsvæsen 2010.60 Ø, Ugeskrift for Retsvæsen 2012.2063 H, Ugeskrift for Retsvæsen 2014.2652 Ø.

The scope of this provision is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to films by **Section 67(2)**, to broadcasts by **Section 69(3)**, and to photographs by **Section 70(3)** as well as to databases protected by sui generis rights by **Section 71(5) DCA**.

As to the so-called "online quotation" exception within **Article 17(7) CDSM**, it shall be indicated that **Section 52c(10) DCA**, which was introduced in 2021, does not encompass online quotation but only parody, caricature and pastiche.

3.1.2.7.4 PARODY, CARICATURE, PASTICHE

Danish copyright law does not contain an exception explicitly envisioned for parody, caricature, and pastiche as in **Article 5(3)(k) InfoSoc**. Judicial decisions have generally applied **Section 22 DCA** on quotation to parodic uses, yet in a very restrictive manner.

The Danish court has decided, in the case ***Ugeskrift for Retsvæsen* 2007.280SH,** that the use of a still picture from a feature film was an unlawful quotation. Similarly, **in *Ugeskrift for Retsvæsen* 1999.547Ø**, the Court ruled that use of extracts of film music played in a video rental store was an unlawful quotation. In a recent decision, **the Eastern Court of Appeal** decided in ***Ugeskrift for Retsvæsen* 2019.1294** that the caricature of a controversial public figure published in connection with a story about that specific person did not fall under this exception, since the caricature was not used in connection with the text, and it was not required for the purpose.

With the implementation of the CDSM Directive in 2021, the DCA now features the so-called "online quotation" in **Section 52c(10),** which almost slavishly transposes **Article 17(7) CDSM.** According to this provision, users of online content-sharing services are permitted to upload and make available user-generated content which comprises protected works, to the extent their inclusion is for caricature, parody, or pastiche only.

3.1.2.7.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.7.5.1 PRIVATE STUDY

Article 5(3)(n) InfoSoc has been implemented in **Section 16(a)(1) DCA,** which entered into force in 2004 and closely resembles the corresponding EU rule, however, with certain restrictions.

According to this provision, CHIs can make available to the public published works, for personal viewing or study-on-the-spot purposes. Copies that are made or deposited pursuant to the Act on Legal Deposit[610] may only be made available at the Royal Library, the State and University Library and the Danish Film Institute to individuals. These institutions can communicate and hand over deposited copies of works that have been broadcasted on radio and television and films and works published on electronic communication networks, for research purposes, unless the work can be acquired on the market.

[610] Lov nr 1439 af 22/12/2004, Lov om pligtaflevering af offentliggjort materiale (Act on Legal Deposit of Published Material No. 1439 of December 22, 2004).

The scope of this provision is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to films by **Section 67(2)**, to broadcasts by **Section 69(3)**, and to photographs by **Section 70(3)** as well as to databases protected by sui generis rights by **Section 71(5) DCA**.

3.1.2.7.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

There is no concrete evidence to suggest that **Article 6(2)(b) Database** or **Article 9(b) Database** have been transposed to the Danish copyright law. However, **Article 5(3)(a) InfoSoc** finds a correspondent in **Section 23(1) DCA,** which entered into force in 1933, hence falling short of meeting all the requirements set by the EU rule.

According to this provision, literary works and artistic works, which are of descriptive nature, can be reproduced by anyone for educational purposes and only to the extend required by this purpose. While the provision seeks for compliance with fair practices, it does not require compliance with the three-step-test or remuneration of or attribution to the author.

The scope of this provision is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to films by **Section 67(2)**, to broadcasts by **Section 69(3)**, and to photographs by **Section 70(3)** as well as to databases protected by sui generis rights by **Section 71(5) DCA** – which may be deemed to correspond to **Article 10(1)(d) Rental.**

3.1.2.7.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Danish copyright law does not feature exception for the digital use of a work for the illustration of teaching, and **Article 5 CDSM** has not been transposed yet. However, already before the CDMS provision, the ECL scheme regulated by **Section 50(2) DCA**[611] could be used for the purpose of allowing uses of works in digital teaching activities, given the technology-neutral language of the provision.

3.1.2.7.5.4 TEXT AND DATA MINING

The Danish Copyright Act does not contain any provision related to TDM. **Articles 3 and 4 CDSM** have not been implemented in Denmark yet.

3.1.2.7.6 USES FOR INFORMATORY PURPOSES

3.1.2.7.6.1 PRESS REVIEW AND NEWS REPORTING

Sections 23(2) and 25(1) DCA, which entered into force in 1961 and were not amended after the adoption of **Article 5(3)(c) InfoSoc**.

Section 23(2) DCA permits the use of artistic works made available to the public in newspapers and periodicals in connection with the reporting of current events, to the extent

[611] For the special licensing schemes, please see paragraph 3.1.2.7.14. below.

justified by the purpose.[612] However, "works produced with a view to use in newspapers or periodicals" are explicitly excluded from the scope of the exception.

Similarly, **Section 25(1) DCA** may be of help for the reporting of current events, for it allows the inclusion in the reporting of performances or exhibitions of a work which are part of a current event, and if they have been used in film, radio, or television.

The scope of Article 25 DCA is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to films by **Section 67(2)**, to broadcasts by **Section 69(3)**, and to photographs by **Section 70(3) DCA**.

To implement **Article 10(1)(b) Rental**, the Danish legislature introduced in 2009 **Section 25a DCA** which, in line with the EU provision, offers the opportunity to reproduce works which are part of short reports and which have been given access to under **Section 90(3) of the Radio and Television Broadcasting Act**,[613] which also regulates the conditions of the use.

3.1.2.7.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Section 26 DCA, which entered into force in 1961, allows the free use of documents concerning the proceedings in the Parliament, municipal councils, and other elected public authorities in judicial proceedings as well as in public meetings. The provision also attributes to the author of such statements the exclusive right to compile them into a collection.

Although the Danish exception has not been amended after the enactment of **Article 5(3)(f) InfoSoc**, it is in line with the standards set by its EU counterpart, yet with a narrower scope. However, this provision, per contra its EU counterpart, does not require compliance with the three-step-test.

3.1.2.7.7 USES BY PUBLIC AUTHORITIES

3.1.2.7.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

The exceptions provided by **Article 6(2)(c) Database** and **Article 9(c) Database** have not been transposed to the Danish copyright law. Yet, **Sections 26 and 27 DCA**, which entered into force in 1961, and **Section 28**, entered into force in 1995, introduced into Danish copyright law exceptions for the use of works in administrative and judicial proceeding. Despite preceding the adoption of **Article 5(3)(e) Infosoc**, they have not been amended ever since.

The provision that more closely recalls **Article 5(3)(e) InfoSoc**, albeit more restrictive regarding the subject matter, is **Section 26 DCA**, which allows the free use of documents related to proceedings of the Parliament, municipal councils, and other elected public

[612] For related case law, see: Ugeskrift for Retsvæsen 2007.280 S, Ugeskrift for Retsvæsen 2013.3002 V,

[613] Lov om radio- og fjernsynsvirksomhed, jf. lovbekendtgørelse nr. 429 af 27. maj 2009 med de ændringer der følger af lov nr. 426 af 30. maj 2009 (Radio and Television Broadcasting Act, cf. Consolidation Act No. 827 of 26 August 2009, as amended by Act No. 1269 of 16 December 2009).

authorities in judicial proceedings and public meetings. Notwithstanding the exception, authors of such statements shall still retain the exclusive right to compile them in collections.

To complement this, **Section 27 DCA** permits parties of a court proceedings to request access to the transcript or copies of a work, in case of a legal dispute that necessitates a work to be brought before administrative authorities or courts. The same rule applies to works produced by the public authorities as well as the other persons involved in these proceedings, such as the parties of a court case, during the administrative and judicial proceedings. Works, except for private documents, can be freely submitted to a public record office or other institutions identified by the Ministry of Culture. The exception does not cover the reproduction of such works for further exploitation. Also, **Section 28(1) DCA** allows the use of works in judicial and administrative proceedings, before public authorities and institutions within the structure of the Parliament.

It is worth noting that the scope of Article 28 DCA is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to films by **Section 67(2)**, to broadcasts by **Section 69(3)**, and to photographs by **Section 70(3) DCA**.

3.1.2.7.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 5(3)(g) InfoSoc finds correspondence in **Section 21 DCA.** This provision states that a work that has already been made public – with the exclusion of dramatic and cinematographic ones – can be performed in public if in the context of non-commercial, free-admission events where the performance itself is not the main feature, or as part of religious or educational activities.[614] Performances on radio or television and performances in educational activities are excluded from the scope of the exception, even if they are of non-commercial nature.

The scope of this provision is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to films by **Section 67(2)**, to broadcasts by **Section 69(3)**, and to photographs by **Section 70(3)** as well as to databases protected by sui generis rights by **Section 71(5) DCA**.

3.1.2.7.8 SOCIALLY ORIENTED USES

Danish copyright law contains a provision facilitating the use of works for socially oriented purposes, which was enacted before the adoption of **Article 5(2)(e) InfoSoc**, and never amended thereafter.

Section 15 DCA allows public service institutions such as hospitals, nursing homes, prisons, and other 24-hour institutions in the social/welfare sector to make recordings of works broadcasted on radio and television, only for non-commercial purposes and to be used only within the institutions in question.

In the case ***Ugeskrift for Retsvæsen 2003.212Ø,*** the performance of music in a private dancing school was **not** considered an educational activity covered by this exception. On the

[614] For related case law, see: *Ugeskrift for Retsvæsen 2003.212Ø,* Ugeskrift for Retsvæsen 2018.516H.

contrary, in the case **Ugeskrift for Retsvæsen 2018.516H**, the performance of music at physical training and dancing classes, organised by a non-profit adult education association, was considered an educational activity allowed under Section 15 DCA.

Section 15 DCA closely resembles the exception provided by the InfoSoc Directive. However, it does not require remuneration for rightholders, contrary to the EU rule; neither it requires compliance with the three-step-test.

3.1.2.7.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.7.9.1 PUBLIC LENDING

The DCA contains an exception that enables the public lending of works under its **Section 19**,[615] which entered into force in 1961, and has not been amended ever since. However, the provision still closely resembles **Article 6 Rental**.

According to this provision, a copy of a work, with the exclusion of cinematographic works and computer programs in digital form, unless the latter constitutes a part of a literary work, may be lent if it has been sold or otherwise transferred to others upon the author's consent, within and beyond the EEA. The exception is subjected to the payment of a fair remuneration to rightholders.

The scope of this provision is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to broadcasts by **Section 69(3)**, and to **photographs by Section 70(3)** as well as to databases protected by sui generis rights by **Section 71(5) DCA**.

3.1.2.7.9.2 PRESERVATION OF CULTURAL HERITAGE

Under **Section 16,** entered into force in 1961, as well as **Section 16(b),** entered into force in 2004, the Danish CA provides exceptions aimed at facilitating preservation activities carried out by CHIs.

Section 16(1) DCA permits public archives, public libraries and other libraries that are financed in whole or in part by the public authorities, as well as State-run museums and museums that have been approved in accordance with the Museums Act,[616] to use and distribute copies of works – with the exclusion of software in digital form but the inclusion of computer games – in their activities for non-commercial purposes. **Section 16(2) DCA** permits reproductions for the purpose of back-up and preservation. **Section 16(3) DCA** enables CHIs to make copies of missing parts of a work when the copy contained in the institution's collection is incomplete. However, the exception applies only if the copy cannot be acquired on the market or from the publisher. Similarly, **Section 16(4) DCA** enables libraries to make copies of published works t which cannot be acquired from the same sources.

According to **Section 16(b) DCA**, upon request, public libraries and other libraries financed in whole or in part by public authorities can reproduce in digital form articles from

[615] For related case law, see: Ugeskrift for Retsvæsen 2008.1999 H.
[616] Act no. 473 of 07.06.2001.

newspapers, magazines and composite works, brief excerpts of books and other literary works, as well as illustrations and music reproduced in connection with the text, in compliance with the ECL scheme regulated under **Section 50 DCA**. [617]

In general, broadcasting by radio or television, or the making available of works in such a way that members of the public may access them from a place and at a time individually chosen by them are excluded from the scope of this exception.

The scope of this provision is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to broadcasts by **Section 69(3)**, and to **photographs by Section 70(3)** as well as to databases protected by sui generis rights by **Section 71(5) DCA**.

In this context, it shall also be indicated that the mandatory exception introduced for the preservation of cultural heritage within **Article 6 CDSM** has not been implemented in the Danish CA yet.

3.1.2.7.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

None reported.

3.1.2.7.9.4 ORPHAN WORKS

Sections 75f to 75m DCA were introduced in the Danish Act in 2014 to transpose **the OWD.** These provisions closely follow the language and structure of the Directive.

Section 75f DCA implemented the definition of orphan works provided by **Article 2(1) OWD,** while **Section 75g** did the same for **Article 2(2) OWD,** in order to regulate the use of works and phonograms under special cases. By adopting **Article 1(1) OWD** verbatim, **Section 75h** identifies the beneficiaries of the exception.

Section 75i DCA, once again implementing verbatim **Article 1(2) OWD,** enumerates the works that fall under the scope of the exception. In doing so, it rules that this exception applies to works and broadcasts made available prior to 1 January 2003, and first published or, in the absence of publication, broadcasted in a country within the EEA. It also adopts verbatim **Article 1(3) and Article 1(4) OWD**.

The diligent search requirement set by **Article 3 OWD** has been transposed in **Section 75j DCA**, and **Section 75k** transposed **Article 4 OWD** on the mutual recognition of the orphan works status.

Section 75l DCA, again, by adopting verbatim the text of its EU correspondent, implemented the permitted uses regulated by **Article 6 OWD**. Last, the end of the orphan works status and its consequences enshrined in **Article 5 of the Directive** find correspondence in **Section 75m DCA**.

[617] For the special licensing schemes, please see paragraph 3.1.2.7.14. below.

3.1.2.7.9.5 OUT-OF-COMMERCE WORKS

Danish copyright law does not include an exception for the use of out-of-commerce works. Besides, **Article 8(2) CDSM** has not been transposed to the Danish CA yet. However, the ECL scheme regulated by **Section 50(2) DCA**, [618] could be used for the purpose of preserving and guaranteeing access to out-of-commerce works.

3.1.2.7.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The DCA featured an exception for uses of works for the benefit of people with disabilities in **Section 17**, which was adopted in 1961. It thus precedes both **Article 5(3)(b) Infosoc and the Marrakesh Directive**. In order to transpose these changes, the Danish legislature adopted an amendment to the provision in 2018 and introduced **Sections 17a-17e to the DCA**.

By keeping yet modifying **Section 17 DCA**, the Danish legislature expands the scope of the beneficiaries of flexibilities for persons with disabilities. **Section 17(1) DCA** allows the reproduction in accessible format and distribution of works that have already been made public, for the benefit of persons of disabilities who have not been encompassed within the Marrakesh Directive, only for non-commercial purposes. Yet, sound recordings of published literary works as well as of sounds recording of musical works are exempted. According to **Section 17(3) DCA**, governmental or municipal institutions and other social or non-profit institutions are also allowed to produce copies of works broadcasted on radio or television by means of sound or visual recording, for the benefit of visually- and hearing-impaired persons. Such uses are subject to the ECL scheme envisioned by the Act. The scope of this provision is extended to performances by **Section 65(6)**, to phonograms by **Section 66(2)**, to broadcasts by **Section 69(3)**, and to photographs by **Section 70(3)** as well as to databases protected by sui generis rights by **Section 71(5) DCA**.

The more recently introduced **Section 17a DCA**, by adopting verbatim **Article 2 Marrakesh,** identifies its direct beneficiaries (persons with disabilities) and the authorized entities; it as well defines accessible format copy.

Section 17b DCA contours the subject-matter, by adopting the text of **Article 2(1) Marrakesh**.

Section 17c DCA regulates the permitted acts, by adopting the text of **Article 3(1) Marrakesh** verbatim. The same provision also adopts **Article 4 Marrakesh**; however, it provides both persons with disabilities and the authorized entities with the opportunity to acquire or access an accessible format by another authorized entity in EU.

While adopting **Article 3(5) Marrakesh** to highlight the mandatory character of the exception therein, the provision features a correspondent to **Article 3(6) Marrakesh,** however by departing from the wording of the Directive. According to this, authors are due remuneration for the acts carried out by authorized entities, only if such damage is not

[618] For the special licensing schemes, please see paragraph 3.1.2.7.14. below.

minimal. Yet, **Section 17d DCA** exempts from remuneration the acts performed by the authorized entities to enable only the persons with disabilities to access such works.

Section 17e DCA regulates the documentation obligations of the authorized entities, as done by **Article 5 Marrakesh**.

3.1.2.7.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Entered into force in 1961, **Section 24(1) DCA,** which resembles **Article 5(3)(j) InfoSoc,** permits the reproduction and the communication to the public of copies of artistic works included in a collection or exhibited or offered for sale, for the purpose to be inserted in dedicated catalogues or in advertisement of exhibitions.[619]

Section 29(1) DCA permits the alteration of buildings only if necessary for practical reasons. This provision resembles and partially corresponds to the exception enshrined within **Article 5(3)(m) InfoSoc.**

3.1.2.7.12 THREE-STEP TEST

The Danish CA does not contain any provision introducing the three-step test along the lines of **Article 5(5) InfoSoc.**

3.1.2.7.13 PUBLIC DOMAIN

3.1.2.7.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Entered into force in 1933, **Section 9 DCA** explicitly excludes copyright protection for acts, administrative orders, legal decisions, and other similar official documents. However, the provision does not apply to works that appear in these documents as independent contributions.

3.1.2.7.13.2 PAYING PUBLIC DOMAIN SCHEMES

The Danish Copyright Act does not feature paying public domain schemes.

3.1.2.7.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Article 8(1) CDSM has not been implemented in Denmark yet. However, **Section 50(2) DCA** contains a rule that may partially correspond to the legal regulation introduced by **Article 8(1) CDSM**. This provision entered into force in 2008, and it has not been subject to any amendments since then.[620] It allows users, who have entered into an agreement for the exploitation of certain works with an organization representing a substantial number of authors of such works used in Denmark, to invoke extended collective licensing.

In this context, **Section 50(2) DCA** extends this exception to works that are used in a specific field, unless such uses are explicitly prohibited by the author.

[619] For related case law, see: Ugeskrift for Retsvæsen 2003.212 Ø.
[620] For related case law, see: Ugeskrift for Retsvæsen 2003.280 H.

3.1.2.7.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.7.15.1 FUNDAMENTAL (USERS') RIGHTS

Danish case law is poor of references to fundamental rights and freedoms as a copyright balancing tool. There is one reported case in which the Danish judiciary referred to artistic freedom of expression to determine the lawfulness of an unauthorized use of an artistic work, but its qualification is controversial as the mention does not appear to constitute the real ground of the decision.

3.1.2.7.15.2 CONSUMER PROTECTION

None reported.

3.1.2.7.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.7.15.4 OTHER INSTRUMENTS

It is worth noting that the Supreme Court of Denmark accepts the principle *de minimis non curat lex,* in line with the recent case law from the CJEU. [621] Indeed, in *Würtz v Coop*, the Supreme Court ruled that use of a copyrighted work, even for commercial purposes, may be of such minor importance that its use on the packaging of a commercial product may not lead to copyright infringement.

3.1.2.8 ESTONIA

The Estonian Copyright Act (AutÕS) of 1992, [622] as amended in 2021, [623] presents a particular case, for it holds a bundle of copyright exceptions either well-harmonized with or significantly diverge from EU standards.

The vast majority of EU flexibilities, including some of the exceptions introduced by the CDSM Directive, have been transposed into AutÕS, but for those related to online quotation/parody, socially oriented uses, and "other uses" by public authorities as well as exceptions to copyright over databases for private copy, illustration of teaching and scientific research, and national security and administrative and judicial proceedings. In addition, several provisions offer a more restrictive legal regulation compared to their EU counterparts, as it is the case for the exceptions for freedom of panorama, quotation, and public lending.

[621] See: Ugeskrift for Retsvæsen 2019.1109 (Würtz).
[622] Autoriõiguse seadus (RT I 1992, 49, 615 - jõust. 12.12.1992) [Copyright Act (RT I 1992, 49, 615 - entry into force 12.12.1992)].
[623] Autoriõiguse seadus (RT I, 28.12.2021, 3 - jõust. 07.01.2022) [Copyright Act (RT I, 28.12.2021, 3 - entry into force 2022)].

AutÕS also features a ECL scheme, which encompasses several uses, as well as provisions on the Consumer Protection Act [624] and Media Services Act, [625] which provide certain flexibilities for end-users.

3.1.2.8.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.8.1.1 TEMPORARY REPRODUCTION

Entered into force in 2004, **Section 18[1] AutÕS** transposes **Article 5(1) InfoSoc,** by closely following the language of its EU counterpart, with no additional specifications. A slight difference is to be found in that the "economic insignificance" requirement has been implemented in the form of a "no commercial purpose" requirement. The regulation within **Article 17 AutÕS** subordinates this exception to the three-step-test.

Section 75(1) AutÕS extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

3.1.2.8.1.2 EPHEMERAL RECORDING

Section 23 AutÕS features an exception for ephemeral recording of broadcasts. This provision entered into force before **Article 5(2)(d) InfoSoc**, but it was later modified to align with the EU rule. The Estonian exception meets all the requirements of the EU exception, while providing for certain details on the storage of the ephemeral recordings.

A broadcasting organization, which is entitled to broadcast a work, is permitted to make ephemeral recording of the broadcast, by means of its own facilities and for the use of recordings for its own broadcasts. Remuneration of rightholders is not required. Unless it is agreed otherwise, ephemeral recordings shall be destroyed within thirty days from their production. However, ephemeral recordings with a considerable documentary value can be preserved in public archives, identified by the broadcasting service provider or, in case of dispute, by the State Archivist. The regulation within **Article 17 AutÕS** subordinates this exception to the three-step-test.

Section 75(1) AutÕS extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

Entered into force in 2011, **Section 75(1)(5) AutÕS** transposes **Article 10(1)(c) Rental**, by adopting verbatim the substantive criteria of the exception therein. Yet, it requires such a recording and its reproduction (copies) to be destroyed 30 days after their making, except for

[624] Tarbijakaitseseadus (RT I, 31.12.2015, 1; RT I, 24.11.2021, 4 - jõust. 01.01.2022) [Consumer Protection Act (RT I, 31.12.2015; RT I, 24.11.2021, 4 - entry into force on 01.01.2022)].
[625] Meediateenuste seadus (RT I, 06.01.2011, 1 - jõust. 16.01.2011) [Media Services Act (RT I, 06.01.2011 – entry into force on 16.01.2011)].

one copy, which may be preserved as an archival copy under the conditions specified. Yet, **Section 75(2) AutÕS** requires compliance with the three-step-test.

3.1.2.8.1.3 INCIDENTAL INCLUSION

Article 5(3)(i) InfoSoc has not been transposed within Estonian copyright law.

3.1.2.8.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

AutÕS features several provision providing flexibilities for lawful users of computer programs, databases, and works protected by TPMs. These provisions entered into force in 2000.

Section 24 AutÕS transposes **Article 5 Software,** by adopting the structure and language of its EU counterpart verbatim; while **Section 25 AutÕS** implements **Article 6 Software** in the Estonian copyright law, once again, by adopting the EU rule verbatim.

Likewise, **Section 25[1] AutÕS** transposes **Article 6(1) Database** verbatim; and with a similar verbatim transposition, **Section 75[5] AutÕS** implements **Article 8 Database**.[626] Following the EU rule, this provision requires its beneficiaries to comply with the three-step-test.

As to the works protected by TPMs, **Section 80[3](4) AutÕS** transposes the flexibility within **Article 6(4) InfoSoc**, by closely following the wording of its EU counterpart. It helps end-users enjoying the E/Ls for ephemeral recording, private use, illustration of teaching and scientific research, for national security and administrative and judicial procedures, preservation of cultural heritage, and for persons with disabilities.

3.1.2.8.1.5 FREEDOM OF PANORAMA

Estonian copyright law features an exception covering freedom of panorama in **Section 20[1] AutÕS**, which entered into force in 1992 and was later amended to harmonize the national provision with **Article 5(3)(h) InfoSoc**. Yet, the Estonian exception is slightly more restrictive compared to its EU counterpart, for it imposes restrictions on means of reproduction.

This provision permits the reproduction of works of architecture, works of visual art, works of applied art, or photographic works permanently located in public places. The act of reproduction may take place by any means except for mechanical copying. The same provision also permits to communicate to the public such reproductions unless protected works are their main elements, or they are intended for commercial purposes. While it is required to indicate the name of the author and the source of the work, unless it is proven impossible, the remuneration of rightholders is not required.

Section 20[2] AutÕS, which entered into force in 2006, permits the reproduction and communication to the public of reproductions of works of architecture in real estate advertisements, and to the extent justified by the purpose. The name of the author and the source should be indicated to the extent possible. The regulation within **Article 17 AutÕS** applies the three-step-test to this exception as well.

[626] For related national case law, see: Case 3-2-1-71-12, Supreme Court of Estonia, 06.07.2012.

3.1.2.8.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.8.2.1 REPROGRAPHY

Estonian copyright law does not feature a dedicated provision for reprography, as in **Article 5(2)(a) InfoSoc**. However, **Section 27[1](1) AutÕS** entitles authors and publishers to receive a fair remuneration for the reprographic reproduction of their works, which shall be collected and distributed by CMOs. Despite the differences in its formulation, this provision satisfies the standards set by its EU correspondent.

3.1.2.8.2.2 PRIVATE COPY

AutÕS features several exceptions for private copying. While **Article 6(2)(a) Database** has not been transposed into the Estonian copyright law, **Section 75[6](1) AutÕS** adopts the exception within **Article 9(a) Database** verbatim.

According to **Section 18 AutÕS**, a lawfully published work may be reproduced (and translated) by a natural person for the purpose of personal use, without payment of remuneration. This exception does not cover works of architecture and landscape architecture, works of visual art in limited edition, electronic databases, computer programs, and sheet music. While this provision resembles **Article 5(2)(b) InfoSoc**, it is not well-harmonized with the EU rule, as it does not require the fair remuneration of the rightholders.

Section 75(1) AutÕS extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

Also, **Section 26 AutÕS** permits the reproduction for private use of audio-visual works and sound recordings by lawful users, including for purposes of education and scientific research, of the lawful user. Only natural persons may benefit from this flexibility. Copyright and related rightsholders are entitled to an equitable remuneration. **Section 27 AutÕS,** which was introduced in 2021,[627] provides a detailed regulation on methods of calculation, collection and distribution of such remuneration, which shall be collected by CMOs and equally amongst rightholders.

[627] This legislative amendment is the result of the lawsuits filed by the CMOs of authors, performers, and phonogram producers against the Government of the Republic of Estonia in February 2013. The CMOs claimed for the damages caused (covering years 2010-2013) by the then in force law, which used to envision a "blank tape levy". The Supreme Court decided that an adequate legal mechanism must be granted by a Member State if it has introduced the private copying exception under of Article 5(2)(b) InfoSoc which requires the equitable remuneration of rightholders. See: Case No. 3-3-1-9-16 (decision by the Supreme Court of Estonia, 29.09.2016). A similar case was filed again in 2018 (covering years 2014-2017), with Case No. 3-13-366. The Tallinn Circuit Court rules that every EU Member State is obliged to adopt, in return for introducing to its legislation the private copying exemption of Article 5(2)(b) InfoSoc, an adequate legal mechanism that would guarantee to the right holders an "equitable remuneration". According to the Court, the Government of the Republic of Estonia has failed to timely update the list of the equipment and devices subject to the "blank tape levy" regime and as a result of this, the "blank tape levy" has decreased substantially every year. The Court found that the legal rules on the "blank tape levy" did not take into account the technological developments in this area. As a result, the Estonian legislature adopted many amendments to its legislation related to the "blank tape levy" in 2021.

3.1.2.8.3 QUOTATION

Estonian copyright law features an exception for quotation within **Section 19(1) AutÕS**. This provision has entered into force in 1992 and was later amended in 2021.

According to **Section 19(1) AutÕS,** it is possible to quote from a lawfully disclosed work to the extent justified by the purpose. Rightholders shall not be remunerated, but it is mandatory to indicate the name of the author and the source of the original work. **Section 75(1) AutÕS** extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

Article 17(7) CDSM has been transposed to **Section 57^{9} AutÕS**, by closely following its EU counterpart, yet without necessarily restricting the exceptions and limitations indicated therein to quotation and parody.

3.1.2.8.4 PARODY, CARICATURE, PASTICHE

Article 5(3)(k) InfoSoc has been implemented in **Section 19(7) AutÕS** in 2006, by closely following the language of EU exception. According to this provision, the use of a lawfully published work in a caricature, parody or pastiche is permitted, only to the extent justified by such purpose. **Section 75(1) AutÕS** extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights. Therefore, these provisions meet the standards set by the EU exception, including the requirement to comply with the three-step-test (**Article 17 AutÕS**).

Article 17(7) CDSM has been transposed to **Section 57^{9} AutÕS**, by closely following its EU counterpart, yet without necessarily restricting the exceptions and limitations indicated therein to quotation and parody.

3.1.2.8.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.8.5.1 PRIVATE STUDY

Article 5(3)(n) InfoSoc had been implemented in **Section 20(4) AutÕS** in 2008 and amended in 2021. By closely following the text of its EU counterpart, this provision permits CHIs to make available works to natural persons on spot and to lend such work for the private and on-site use of individuals. While this provision does not seek for the works covered to be out of purchasing or licensing terms; **Section 75(1) AutÕS** extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights. The three-step-test within **Article 17 AutÕS** applies herein as well.

3.1.2.8.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Whereas **Article 6(2)(b) Database** has not been transposed**, Article 9(b) Database** has been implemented in **Section 75^{6}(3) AutÕS** verbatim.

Entered into force in 2021, **Section 19(2) AutÕS** transposes **Article 5(3)(a) InfoSoc,** by adopting the language of the EU rule verbatim.

Section 75(1)(2) AutÕS, by adopting verbatim its language, transposes **Article 10(1)(d) Rental,** while **Section 75(2) AutÕS** requires compliance with the three-step-test.

3.1.2.8.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

The law transposing the CDSM Directive amended **Section 19 AutÕS**, implementing a new education exception that covers the uses of digital works. The text largely follows **Article 5 CDSM**, partially restricting the previously broader Estonian teaching exception. However, the Estonian legislature decided to exempt the flexibility from the payment of a remuneration to rightholders, not to subordinate it to the non-availability of commercial licenses, and to cover all categories of works but objects of related rights.

3.1.2.8.5.4 TEXT AND DATA MINING

Articles 3 and 4 CDSM have been transposed to **Sections 19[1] and 19[2] AutÕS** in 2021**. Section 19[1] AutÕS** implements **Article 3 CDSM,** by closely following the language of the EU rule in the definition of beneficiaries (CHIs and research organizations), works covered, storage of copies and its purpose, application of security measures by rightholders and their proportionality. **Section 19[2] AutÕS** implements **Article 4 CDSM,** once again, by closely following the language of the Directive, with no significant additions**.** Both are subjected to the three-step-test within **Article 17 AutÕS.**

Section 75(1) AutÕS extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

3.1.2.8.6 USES FOR INFORMATORY PURPOSES

3.1.2.8.6.1 PRESS REVIEW AND NEWS REPORTING

Section 19(4) AutÕS features an exception that is similar to that of **Article 5(3)(c) InfoSoc,** by closely following the language of the EU rule. This provision has entered into force in 1992. It permits to reproduce by press and communicate to the public works related to a current event for the purpose of reporting, only to the extent and with the means justified by the purpose. While rightholders' remuneration is not required, the name of the author of the works in use shall be indicated.

The **Supreme Court of Estonia** has ruled that the reproduction of works which have not been perceived by the author of the press review during the course of the event being reported does not fall under **Section 19(4) AutÕS**.[628] The Court has also clarified that "current event" may also cover historical events, if emerged in the context of new circumstances, and

[628] See: Case 3-2-1-167-04 (decision by the Supreme Court of Estonia, 02.03.2005).

that the amount reproduced should not exceed the amount justified for information purposes. Certainly, reproductions cannot constitute the main motif of a page.

In another case,[629] the **Talinn Circuit Court** ruled it is permissible to post copyright protected content on a Facebook timeline if this content has already been published on Facebook, as long as the post is created to report to the public a current event and to illustrate its main circumstances. To reach this decision, the Court applied the three-step-test.

Last, **Section 75(1)(3)** adopts verbatim the exception provided by **Article 10(1)(b) Rental.** As required by **Section 75(2),** the acts permitted herein shall be conducted in compliance with the three-step-test.

3.1.2.8.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc has not been implemented in AutÕS as a dedicated provision. The exception for quotation as well as the exception for press review and reporting of current events cover uses that fall under this category.

3.1.2.8.7 USES BY PUBLIC AUTHORITIES

3.1.2.8.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

While **Article 6(2)(c) Database** has not been transposed to the Estonian copyright law, while **Article 9(c) Database** has been transposed to **Section 75^6(3) AutÕS** verbatim.

Section 19(5) AutÕS corresponds to **Article 5(3)(e) InfoSoc**. This provision entered into force in 1992. It permits to reproduce a work for the purpose of public security and in the context of a judicial or administrative proceedings. Differently than the InfoSoc Directive, the provision remains silent on communication to the public, and does not require the mention of the name of the author and the source. Still, it is subjected to the three-step-test regulated within **Article 17 AutÕS.**

Section 75(1) AutÕS extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

3.1.2.8.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 5(3)(g) InfoSoc has not been transposed in Estonia.

3.1.2.8.8 SOCIALLY ORIENTED USES

Article 5(2)(e) InfoSoc has not been transposed in Estonia.

[629] See: Case No. 2-18-751 (decision by Tallinn Circuit Court, 11.11.2020).

3.1.2.8.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.8.9.1 PUBLIC LENDING

Article 6 Rental has been implemented **in Section 13³ AutÕS,** however, by imposing restrictions to the beneficiaries as well as the subject-matter.

The provision permits publicly accessible libraries to lend a work or a sound recording without the consent of rightholders, as long as they receive remuneration. Audiovisual works are exempted unless the producer of the first fixation of a film has granted an authorization for public lending. The sound recording of a work can be lent if at least four months have passed since its first distribution in Estonia. The period can be shortened with the written consent of rightholders and does not apply to libraries providing services to educational institutions. The remuneration shall be paid to an authorized CMO. Additionally, **Section 13³(1) AutÕS** features an exception provided to libraries for "home lending" of works and sound recordings. The authors of the works and sound recordings lent under this exception shall be remunerated.

3.1.2.8.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 6 CDSM has been implemented in **Section 20(1) AutÕS**. This provision entered into force in 2022, and it closely follows its EU counterpart, yet it also permits the use of the reproduction to replace a lost, destroyed or rendered unusable work; however, as opposed to its EU counterpart, it requires the permitted acts to be conducted only for non-commercial purposes. **Section 75(1) AutÕS** extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

3.1.2.8.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Section 22 AutÕS, which entered into force in 1992, permits the public performance of works by teachers and students, in the context of teaching activities carried out by an educational institution. The name of the author or the title of the work in use shall be indicated, if this is possible. The audience of such public performances shall consist of only teachers, students, or other persons (e.g., parents, guardians, caregivers, etc.). **Section 75(1) AutÕS** extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

The Supreme Court of Estonia has ruled that the criteria provided in Section 22 are cumulative and aimed at enabling students to gain a diverse educational experience and to apply the learned skills in performing various works. To achieve this goal, the public performance does not need to take place in the premises of the educational establishment. These events can be organized in a specific place as part of the school's activities.[630]

[630] See: Case 3-2-1-159-16 (decision of the Supreme Court of Estonia, 27.02.2017).

In another case,[631] **the Supreme Court of Estonia** rules that this exception does not apply only to formal educational establishments, but also to other institutions. Also, the Court ruled that the exception applies also to related rights.

3.1.2.8.9.4 ORPHAN WORKS

The OWD has been implemented in **Sections 27²-27⁸ AutÕS** and entered into force in 2014. The provisions closely follow the language and the structure of the Directive.

By adopting the regulations within the Orphan Works Directive verbatim, **Sections 27², 27³, 27⁵ and 27⁵ AutÕS** provide, respectively, for the definition of "orphan work" (**Article 2(1) OWD)** and the works that fall under this generic term (**Article 1(2) and Article 1(3) OWD)**, the diligent search requirement and its details **(Article 3 paragraphs (1) to (4) of the Directive),** the competent authority and its documentation obligations and responsibilities **(Article 3 paragraphs (5) and (6))**; and the mutual recognition of the orphan work status amongst the EU Member States **(Article 4 OWD)**.

Section 27⁶ AutÕS permits CHIs, including film and audio heritage institutions as well as the Estonian Public Broadcasting Organization, as allowed by **Article 1(1) OWD**, to perform the acts provided by **Article 6(1) OWD**. Again, in line with **Article 6(2) of the EU text**, CHIs are allowed to generate revenues only for covering the costs of digitization of orphan works and making them available to the public online.

Section 27⁷ AutÕS regulates the conditions and consequences of the termination of the orphan work status, following verbatim **Article 5 OWD**.

Last, **Section 27⁸ AutÕS** regulates the eventual remuneration of rightholders, by adopting verbatim **Article 6(5) OWD**. In line with the EU text, if the orphan work status of a work or phonogram has been partially or fully invalidated, rightholders are entitled to be compensated for the use of their work or phonogram with an amount that takes into account the damage caused to them as well as the purposes and nature of use of the orphan work.

3.1.2.8.9.5 OUT-OF-COMMERCE WORKS

Entered into force in 2022, **Section 57⁴ AutÕS** transposes **Article 8(2) CDSM. Section 57⁴(1) AutÕS** enables CHIs to reproduce and make available out-of-commerce works, including those of computer programs and databases, in their collections, for non-commercial purposes. Except for the explicit references to computer programs and databases, the Estonian provision adopts the text of **Article 8(2) CDSM** without making any significant changes. Also, **Section 75(1)(6) AutÕS** extends this exception to related rights, while requiring compliance with the three-step-test as well **(Section 75(2) AutÕS).**

[631] See: Case 2-16-17491 (decision of the Supreme Court of Estonia, 27.11.2019).

3.1.2.8.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 5(3)(b) InfoSoc and the Marrakesh Directive have been transposed, respectively, in **Section 19(6) and Sections 25^2-25^5 AutÕS,** by closely following the structure and the language of the EU regulations.

Entered into force in 1992 and later amended, **Section 19(6) AutÕS** permits the reproduction, distribution, and communication to the public of a lawfully published work, for the benefit of disabled persons. These acts shall be carried out for non-commercial purposes and in a manner directly related to the disability of the beneficiaries. The remuneration of rightholders is not required; however, the name of the author of the work shall be indicated.

Section 75(1) AutÕS extends the scope of the copyright exceptions and limitations encompassed within Chapter 4 (Sections 17-28 AutÕS), including this provision, to the objects of related rights.

Entered into force in 2018, **Sections 25^2-25^5 AutÕS** adopt the Marrakesh Directive**,** by closely following its structure and language. **Section 25^2** defines the subject-matter **(Article 1(1) Marrakesh)** and beneficiaries **(Article 2(2) Marrakesh)** of the exception, as well as the "copy of a work in accessible format" **(Article 2(3) Marrakesh)** and the authorized entities **(Article 2(4) Marrakesh)**.

Section 25^3 AutÕS, by closely following **Article 3(1)(a) Marrakesh,** permits a beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject-matter to which the beneficiary person has lawful access, for the exclusive use of the beneficiary person. Similarly, it transposes **Article 3(1)(b) Marrakesh**, to enable authorized entities to reproduce, make available or communicate to the public, distribute, and lend a copy of a work or other subject-matter.

By transposing **Article 4 Marrakesh**, the same provision also enables the direct beneficiaries and authorized entities to obtain or have access to an accessible format copy from an authorized entity established in another Member State.

By adopting verbatim **Article 3(2) Marrakesh**, the same provision secures the integrity of the work and other subject-matter in use. And, once again, with verbatim transposition of **Article 3(5) Marrakesh**, the mandatory character of the exception is consolidated.

Sections 25^4 and 25^5 AutÕS regulate the documentation and information obligations of the authorized entities, fully in line with **Article 5 Marrakesh**.

3.1.2.8.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

None reported.

3.1.2.8.12 THREE-STEP TEST

Section 17 AutÕS implements the three-step test in Estonian copyright law, with a language that follows slavishly **Article 5(5) InfoSoc.**[632]

3.1.2.8.13 PUBLIC DOMAIN

3.1.2.8.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Section 5 AutÕS, which entered into force in 1992 and was last modified in 2022, defines the scope of public domain.[633] The provision excludes from copyright protection ideas, images, notions, theories, processes, systems, methods, concepts, principles, discoveries, inventions, and other results of intellectual activities which are described, explained or expressed in a work; works of folklore; legislation and administrative documents (acts, decrees, regulations, statutes, instructions, directives) as well as official translations thereof; court decisions and official translations thereof; official symbols of the state and insignia of organizations; news of the day; facts and data; ideas and principles which underlie any element of a computer program, including those which underlie its user interfaces. As a consequence of the verbatim implementation of **Article 14 CDSM**, the provision also excludes from protection reproductions of any work of visual art, if the term of protection of the original work has expired, and unless the reproduction constitutes an original work.

3.1.2.8.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.8.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Although there is no dedicated provision transposing **Article 8(1) CDSM**, **Section 57^5(2) AutÕS** indicates that the out-of-commerce works in the collections of CHIs can be used by virtue of an extended collective license to be concluded with an authorized CMO. **Section 76 AutÕS** provides a legal regulation on collective management of copyright and related rights, by consolidating the right of copyright and related rights owners to establish a CMO.

Mandatory collective management is regulated by **Section 79 AutÕS** in the following cases:

- Section 10^3 – retransmission in any simultaneous, unaltered, and complete retransmission of a television or radio program.
- Section 10^4 – direct transmission of a television or radio program.
- Section 13^3(7) – "home loan" of a work or sound recording from a library.

[632] For related national case law, see: Case 3-2-1-167-04 (Supreme Court decision of 02.03.2005), Case 2-16-17491 (Supreme Court decision of 27.11.2019).
[633] For related national case law, see: Case 3-2-1-128-04 (Supreme Court decision of 08.12.2004).

- Section 14(6) – use of a work licensed by the author to the producer of an audio-visual work.
- Section 14(7) – use of a work licensed by the author to a phonogram producer.
- Section 15 – resale of an original work of art.
- Section 27 – private use of audio-visual works and sound recordings.
- Section 67^1 – additional remuneration of the performer of a work who has licensed their performance to a phonogram producer.
- Section 68 – use of performances.

3.1.2.8.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.8.15.1 FUNDAMENTAL (USERS') RIGHTS

None reported.

3.1.2.8.15.2 CONSUMER PROTECTION

Articles 10 and 13 DCSD have been transposed to **Section 61(1^2) of the Consumer Protection Act**.[634] Accordingly, the provider of an online content service is obliged to allow the subscriber (a consumer who has a right to access and use the service in the Member State of residence under a contract with the service provider) to use the online content service temporarily while in another Member State. The service provider must inform the subscriber of the quality of the network service provided on the basis of the information in his possession, for example as information on his website. Possible disputes between the service provider and the rightholders are not covered by the state supervision mechanism.

3.1.2.8.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.8.15.4 OTHER INSTRUMENTS

Sections 49 and 50 of the Media Services Act,[635] which transposes **Articles 14 and 15 AVMSD**, provide certain flexibilities for end-users to access to and use copyright content which are directly related to their right to access to information.

[634] Tarbijakaitseseadus (RT I, 31.12.2015, 1; RT I, 24.11.2021, 4 - jõust. 01.01.2022) [Consumer Protection Act (RT I, 31.12.2015; RT I, 24.11.2021, 4 - entry into force on 01.01.2022)].
[635] Meediateenuste seadus (RT I, 06.01.2011, 1 - jõust. 16.01.2011) [Media Services Act (RT I, 06.01.2011 – entry into force on 16.01.2011)].

3.1.2.9 FINLAND

The Finnish Copyright Act (hereinafter "TL") of 1961,[636] as last amended in 2018,[637] features the majority of copyright flexibilities introduced by EU Directives, save for the parody exception, optional exceptions to copyright and sui generis rights over databases, and the three-step test. Several others, such as reprography and private copy, have been facilitated via ECL schemes rather than exception to copyright and/or related rights. The CDSM implementation is still pending, thus the Act does not contain exceptions for TDM and for digital and cross-border teaching activities.

Several provisions present more rigidity compared to the EU rules (e.g., ephemeral recording, incidental inclusion, acts necessary for access and lawful use, exception for administrative and judicial proceedings, and freedom of panorama).

3.1.2.9.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.9.1.1 TEMPORARY REPRODUCTION

The exception provided for temporary acts of reproduction in **Article 5(1) InfoSoc** has been implemented in **Section 11a TL**. This provision entered into force in 2005, and it adopts the text of EU provision verbatim; whereas the scope of this provision is extended to performances by **Section 45(7)**, to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio and audio-visual recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, and to photographs by **Section 49a(3) TL**. As opposed to its EU counterpart, it does not require compliance with the three-step-test.

3.1.2.9.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc has been implemented in **Section 25f(4) TL** and entered into force in 2015. While providing for a broadly formulated exception, the Finnish provision slightly departs from the text of its EU counterpart.

Indeed, **Section 25f(4) TL** allows broadcasting organizations to retransmit a work or other subject matter, which is integral to a radio or television broadcast, at the same time as the original broadcast and without altering the original broadcast. While the EU exception provides for a regulation regarding the storage of ephemeral recordings as such, the Finnish exception remain silent about this. However, the Finnish exception has not been subjected to the three-step-test.

The scope of this provision is extended to performances by **Section 45(7)**, to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to broadcasts by **Section 48(3)**, and to databases protected by sui generis rights by **Section 49 TL**. Given the aforementioned

[636] Tekijänoikeuslaki, 404/1961 (Copyright Act, 404/1961).
[637] See**:** Lakitekijänoikeuslain muuttamisesta, 849/2018 (Law Amending the Copyright Act, 849/2018).

provisions, it can be deemed that TL encompasses the flexibility enshrined in **Article 10(1)(c) Rental.**

3.1.2.9.1.3 INCIDENTAL INCLUSION

Section 25(2) TL, which entered into force in 2005, corresponds to **Article 5(3)(i) InfoSoc.** Compared to the EU exception, the Finnish exception is more restrictive, for it covers only works of art and for it restricts the works in which the reproduced works can be included. Indeed, **Section 25(2) of the Act** allows the incidental inclusion of a lawfully disclosed work of art in a photograph, film, or a television programme, provided that the work incorporated does not constitute their main subject. Yet, it shall be noted that the Finnish exception does not require compliance with the three-step-test.

3.1.2.9.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Finnish copyright law features the vast majority of the EU flexibilities provided for lawful users to access and normally use computer programs, databases, and works protected by TPMs.

Section 25j(1)-(3) TL implemented **Article 5 Software** in 1996 verbatim,[638] allowing lawful users to make copies and alteration of the program that are necessary for its normal use, to make a back-up copy, and to observe, study, or test its functioning in order to determine the ideas and principles which underlie any element of the program, while performing the acts of loading, displaying, running, transmitting or storing the program. **Article 6 Software** finds correspondence in **Section 25k TL.**

Section 25j(4) TL, which entered into force in 1998, implemented verbatim **Article 6(1) Database,** permitting the lawful user of a database to make copies and perform any other act necessary to access the content of the database and exercise its normal use. However, **Article 8 Database** has not been transposed to TL.

Article 6(4) InfoSoc, aimed at enabling the lawful use of a works under the protection of TPMs, has been implemented in **Section 50a(3) TL in 2005**. This provision has been later amended in 2015.[639] It allows the circumvention of a TPM in the course of research or education activities related to encryption, and in order to be able to listen to or view the work, but not to reproduce it. Nevertheless, **Section 50a(4) of the Act** excludes from the scope of this flexibility computer programs under the protection of TPMs.

3.1.2.9.1.5 FREEDOM OF PANORAMA

The freedom of panorama exception introduced by **Article 5(3)(h) InfoSoc** has been implemented in **Section 25a paragraphs (3) and (4) TL,** both of which entered into force in 2005.

[638] For related national case law, see: KKO638 2008:45.
[639] For related national case law, see: TN 2007:09.

Section 25a(3) TL permits the photographic reproduction of works of art or of architectural works that are permanently located in a public space, provided that the work itself is not the main subject matter of a stand-alone picture that is used for the purpose of economic gain. **Section 25a(4) TL** permits the photographic reproduction of buildings, without any restrictions as such.

The Finnish provision is more rigid compared to the InfoSoc counterpart, for it imposes certain restrictions on the subject-matter and the means of use. Yet, it does not require compliance with the three-step-test.

3.1.2.9.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.9.2.1 REPROGRAPHY

Article 5(2)(a) InfoSoc has not been transposed to TL; however, **Section 13 TL**, which entered into force in 2005, permits the reproduction of a lawfully published work by photocopying or similar means, under the ECL scheme regulated by **Section 26 TL**.[640]

3.1.2.9.2.2 PRIVATE COPY

Whereas **Article 6(2)(a) Database** and **Article 9(a) Database** have not been transposed to TL, **Article 5(2)(e) InfoSoc** is covered by **Section 12 TL,** which entered into force in 1961 and amended in 2015 in order to be harmonized with its EU counterpart.[641]

Section 12(1) TL permits anyone to reproduce a work, which has been made public, for private use only. **Section 12(2)** extends this exception to third parties acting on behalf of the beneficiary, while **Section 12 paragraph (3) and paragraph (4) TL** exclude from the scope of the provision musical works, cinematographic works, 3D objects or sculptures, the reproduction of any other work of art by artistic means, software, databases, and works of architecture. The scope of this provision is extended to performances by Section 45(7), to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL** – which can be deemed to correspond to **Article 10(1)(a) Rental.** Yet, the Finnish exceptions do not require compliance with the three-step-test.

3.1.2.9.3 QUOTATION

The Finnish Copyright Act contains two provisions related to quotation, both preceding the entry into force of **Article 5(3)(d) InfoSoc** yet later amended in 2015. Despite the differences in their formulation, these exceptions, cumulatively, meet the standards of their EU correspondent.

[640] For special licensing schemes, please see paragraph 3.1.2.9.14. below.
[641] For related national case law, see: KKO 1987:16. KKO 1999:115, KKO 2010:47.

Section 22 TL offers a general exception by permitting to quote a work that has been made public, to the extent necessary for the purpose and in accordance with good practice.[642] The scope of this provision is extended to performances by Section 45(7), to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL.**

Section 25(1) TL, which overlaps with the exception provided for reporting for current events, holds that works of art, which have been made public, may be reproduced in pictorial form, and be associated with a text in a critical or scientific presentation, or in a newspaper or a periodical when reporting on a current event, provided that the work has not been created for this purpose only.[643]

The exception provided for incidental inclusion **(Section 25(2) TL)** may also be used for quotation purposes.

It shall be noted that **Article 17(7) CDSM** has not been transposed to TL yet.

3.1.2.9.4 PARODY, CARICATURE, PASTICHE

The exception provided for caricature, parody, and pastiche under **Article 5(3)(k) InfoSoc** has not been transposed. However, parodic uses have traditionally being covered under the provision on derivative works **(Section 4(2) TL).**[644] Entered into force in 1961, **Section 4(2) TL** holds that anyone can create a new an independent work based on an existing protected work, provided that such a use does not prejudice the copyright over the original work.

The draft proposal for implementing the CDSM Directive, if approved, will introduce a new exception for caricature, parody, and pastiche in **Section 23a TL,** subject to compliance with fair practices. However, at the time being, the so-called "online quotation" exception within **Article 17(7) CDSM** does not find correspondence in TL either.

3.1.2.9.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.9.5.1 PRIVATE STUDY

The exception for private study provided by **Article 5(3)(n) InfoSoc** has been implemented in **Section 16b(1) TL**. This provision entered into force in 2013 and later amended in 2015. The provision is completely in compliance with its EU counterpart, while providing for more details regarding the beneficiaries.

The provision allows libraries, which are entitled to a legal deposit of a copy of a work under the Act on Deposit and Preservation of Cultural Material, [645] to reproduce and communicate to the public works permanently held in their collections on dedicated

[642] For related national case law, see: TN 2020:7, TN 2016:16, TN 2015:13, TN 2020:7.
[643] For related national case law, see: MAO 126/21.
[644] For related national case law, see: TN 2017:4, TN 2010:3/ Helsinki Court of Appeals HO 15.5.2011 no. 1157 (Helsingin hovioikeus).
[645] Laki kulttuuriaineistojen tallettamisesta ja säilyttämisestä, 1433/2007.

terminals in their premises and in the Library of Parliament and in the National Audiovisual Institute, for purposes of research or private study. The provision does not extend to the digital reproduction of the work nor to further communications. **Section 16b(2) TL** allows the same beneficiaries to reproduces works made available to the public in information networks to include them in their collections, and to do the same for published works which the library needs to acquire but are not available through regular channels of commercial distribution or communication.

Different from its EU counterpart, this provision neither requires compliance with the three-step-test nor it seeks for works as such not be subjected to licensing or purchasing terms.

The scope of this provision is extended to performances by Section 45(7), to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL**

3.1.2.9.5.2ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Even though **Article 6(2)(b) and Article 9(b) Database** have not been transposed to TL, Finnish copyright law features several other provisions for facilitating use of works for illustration of teaching and scientific research.

The exception for illustration for teaching or scientific research provided by **Article 5(3)(a) InfoSoc** finds correspondence in **Section 14 TL,** which has been introduced in 2005 and was amended in 2015. The provision allows the reproduction (not by photocopying) and use of a work in educational activities or in scientific research, by virtue of an ECL. The same provision also permits the communication to the public of such works by means other than radio or television, under the same conditions, unless rightholders have reserved such rights. **Section 14(2) TL** allows the recording of a protected sound or image lawfully made public, performed by a teacher or a student for temporary use in educational activities. Last, **Section 14(3) TL** allows parts of a literary work that has been made public or, when the work is not extensive, the entire work, to be incorporated into a test constituting part of the matriculation examination or into any other corresponding test.

Section 14 TL does not require compliance with the three-step-test. The scope of this provision is extended to performances by Section 45(7), to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL** – which can be deemed to correspond to **Article 10(1)(d) Rental.**

Along similar lines, **Section 16c(2) TL** permits the use of works in the collections of the National Audiovisual Institute, with the exception of cinematographic works deposited by a foreign producer, for purposes of research and higher education in cinematography.

3.1.2.9.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

The draft proposal implementing the CDSM Directive will amend, if approved, **Section 14 TL** to transpose **Article 5 CDSM.** Nevertheless, the proposed **Section 14** introduces an ECL along with an exception addressed to this purpose.

Section 14 of the proposed Act holds that a published work may be reproduced and made available to the public, by virtue of an ECL and for teaching and for scientific research, by other means than transmission through radio or television. It is consolidated that the exception does not extend to reprography.

Following up with this, **Section 14a** provides for an exception for the use of works for which an ECL cannot be obtained. In doing so, **Section 14a(1) of the proposed Act** adopts the wording of **Article 5(1) CDSM verbatim**, along with the categories of works excluded by **Article 5(2) CDSM**. Once again, closely following the Directive, **Section 14a(3)** consolidates that this exception cannot be overridden by any contractual provision.

Last but not least, **Section 19a(2) of the proposed Act** requires the remuneration of the author or the rightholder, for the use of works for illustration in teaching. It is clarified that the remuneration shall be paid through an organization that has been approved by the Ministry of Education and Culture, and which represents the authors of works that are in such use. Several organizations can be approved if the representation of authors cannot otherwise be achieved.

3.1.2.9.5.4 TEXT AND DATA MINING

The draft proposal implementing the CDSM Directive will amend, if approved, **Section 13b TL** to transpose **Articles 3 and 4 CDSM.**

Section 13b(1) of the proposed Act implements **Article 4 CDSM**, by closely following the standards sets by EU provision. Similarly, **Section 13b(2)** corresponds to **Article 3 CDSM**, and adopts this provision, without departing from its language and standards.

3.1.2.9.6 USES FOR INFORMATORY PURPOSES

3.1.2.9.6.1 PRESS REVIEW AND NEWS REPORTING

The Finnish Copyright Act features several flexibilities enabling the use of works and other subject-matter for the purpose of press review and news reporting. These provisions entered into force in 1995, thus preceding the adoption of **Article 5(3)(c) InfoSoc and Article 10(1)(b) Rental.** Yet, all of them were amended in 2015, thus, the Finnish provisions are in line with their EU counterparts, while not requiring compliance with the three-step-test.

Section 23(1) TL allow the inclusion of articles in newspapers and periodicals on current religious, political, or economic topics in other newspapers and periodicals, unless reproduction is expressly prohibited. It is mandatory to mention the author as well as the source of the work, according to **Section 23(2) TL.**

Section 25 TL, which has already been explained in the context of the quotation exception, can also be considered herein.

Section 25b TL holds that when a current event is presented in a radio or a television broadcast or as a film, a work visible or audible therein may be included in the presentation, to the extent necessary for the informational purpose.

Section 25(b)(2) TL holds that when short extracts from a television transmission are used for the purpose of news reports on events of high interest for the public, a work included in the transmission may be incorporated into the news report. The scope of **Section 25 TL** is extended to performances by Section 45(7), to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL** – which may be taken as a correspondent to Article 10(1)(b) Rental.

3.1.2.9.6.2 USES OF PUBLIC SPEECHES AND LECTURES

The Finnish Copyright Act provides an exception for the use of public statements in **Section 25c TL,** which entered into force in 1996 and later amended in 2015. This provision corresponds to **Article 5(3)(f) InfoSoc**, by meeting all the standards therein, except for requiring compliance with the three-step-test.

The provision permits the reproduction and communication to the public of oral or written statements made in a public representational body, before an authority or at a public consultation on a matter of public interest. However, according to the Finnish exception, an oral or written statement or similar work presented as evidence in a case may be reproduced and communicated only in the reporting of the case and only to the extent necessary for the purposes. Authors retain in any case the exclusive right to publish a compilation of their statements.

3.1.2.9.7 USES BY PUBLIC AUTHORITIES

3.1.2.9.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Articles 6(2)(c) and 9(c) Database have not been transposed to TL. However, the exception for uses in administrative and judicial proceedings provided by **Article 5(3)(e) InfoSoc** has been implemented in **Section 25d TL** in 2005 and was later amended in 2015. The Finnish provision satisfies all the standards of its EU counterpart, while providing for a more detailed regulation and not requiring compliance with the three-step-test.

Section 25d(1) TL states that copyright shall not limit the statutory right to obtain information from a public document, while **Section 25d(2)** holds that a work may be used when the administration of justice or public security so requires, and **Section 25d(3)** concludes by permitting the quotation of a work for the enjoyment of the statutory right to obtain information from a public document as well as for the performance of judicial proceedings and public security. **Section 25d(4) TL** permits the reproduction and communication to the public of copyright works incorporated in works and other subject-

matter in the public domain, only for the enjoyment of the statutory right to obtain information from a public document, for public security and in the context of judicial proceedings. **Section 25d(5) of the Act** permits anyone who communicates a work to the public by radio or television or by other means to make a copy of such transmission or to have a copy made, and to retain the copy, insofar as this is done to comply with a statutory duty to record or store.

The scope of this provision is extended to performances by **Section 45(7)**, to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL.**

3.1.2.9.7.2 OTHER USES BY PUBLIC AUTHORITIES

There is no concrete evidence to suggest that **Article 5(3)(g) InfoSoc** has been implemented in Finnish copyright law.

3.1.2.9.8 SOCIALLY ORIENTED USES

Uses in favour of social institutions are included under **Section 15 TL,** which entered into force in 1995 and was later amended in 2005, to implement **Article 5(2)(e) InfoSoc**.

Section 15 TL permits hospitals, senior citizens' homes, prisons, and other similar social institutions to reproduce (or to make audio and video recordings of) works, including radio and TV broadcasts, which have been made available to the public. To fall under this exception, the act of reproduction shall be conducted only for temporary use of the works within the institution, and within a short period after the time of the recording.

On the one hand, the Finnish rule has a broader scope than the InfoSoc provision, for it covers also other subject matters and not only broadcasts; besides it does not require compliance with the three-step-test. On the other hand, per contra the EU rule, it imposes temporal limitations to the permitted uses.

3.1.2.9.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.9.9.1 PUBLIC LENDING

Article 6 Rental has been implemented in **Section 19 TL** in 2005 and later amended in 2015. This provision diverges from its EU counterpart in its formulation of the exception, while it meets the criteria set by the EU exception.

The provision allows the lending of a work, a copy of which has been lawfully disclosed within the EEA. However, **Section 19(2) TL** regulates that “public lending” does not encompass the act of “renting” or any other similar transaction. **Section 19(3) TL** also excludes the lending of cinematographic work and computer-readable programs. Public lending is subject to a fair remuneration due to rightholders **(Section 19(4) TL)** with the exception of architectural works, artistic handicraft, and works of applied art. The duty to remunerate does not apply to libraries serving research or educational activities. The remuneration right cannot be waived.

Section 19(5) TL extends this exception to copies of works which have been lawfully disclosed outside the EEA. In this case, the permitted acts encompass making available to the public by lending; or selling or otherwise permanently transferring a copy, only if the copy is to be acquired by a natural person for private use or by a CHI for preservation purposes.

The scope of this provision is extended to performances by **Section 45(7),** to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL.**

3.1.2.9.9.2 PRESERVATION OF CULTURAL HERITAGE

The exception provided by **Article 5(2)(c) InfoSoc** has been implemented in **Section 16 TL** in 2005.

Section 16 TL allows archives and publicly accessible libraries and museums with the opportunity to reproduce works in their collections, for non-commercial purposes, such as the preservation of materials, their restoring and repairing, the administration, organization and maintenance of collections, the completion of incomplete works, or works published in several parts, if the necessary complement is not available through regular channels of commercial distribution or communication. The scope of this provision is extended to performances by **Section 45(7)**, to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL/**

Section 16a TL[646] permits the same beneficiaries to make copies of works in their collections which are susceptible to damage and to lend them to the public, if the work is not available through regular channels of commercial distribution or communication.

Entered into force in 2013, **Section 16c TL** permits the National Audiovisual Institute to exercise the same prerogatives attributed by Section 16 TL to CHIs, with the exclusion of cinematographic works deposited in its collection by a foreign producer, and to make copies of works and other subject-matter made available to the public by television or radio transmission, in order to include them in its collections.

The draft proposal implementing the CDSM Directive will introduce, if approved, a new **Section 16d TL**, which will transpose **Article 6 CDSM**.

3.1.2.9.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Apart from what has been already analysed above, **Section 16d TL** permits further uses by CHIs for cultural purposes under the ECL scheme regulated by **Section 26 TL**, unless rightholders have prohibited the reproduction or communication to the public of their works.

[646] For related national case law, see: TN 2006:7.

Also, **Section 16c(2) TL** can also be considered within this context as well. Once more, it is worth noting that neither of these provisions require compliance with the three-step-test.

3.1.2.9.9.4 ORPHAN WORKS

The copyright flexibilities envisioned to enable the use of orphan works introduced by the Orphan Works Directive have been **implemented in a separate Act** in the Finnish legal landscape, which is: **The Act on the Use of Orphan Works 764/2013 of 2013.**[647] This Act is a concise legal regulation with only ten provisions, which follow the wording of the Orphan Works Directive very closely.

Section 1(1) of the Act defines orphan works, by rephrasing the definition provided within **Article 2(1) OWD**, while **Section 1(2) of the Act** indicates that image and sound recordings as well as recordings of performances are included within this definition.

Section 2 OWD identifies the beneficiaries of the Act, simply by adopting the formulation within **Article 1(1) OWD**. With a similar approach, **Section 3 of the Act** adopts the regulation within **Article 2(1) OWD**, to enable the use of works whose author(s) have been identified.

Section 4 regulates the subject-matter of the Act, and in doing so, it slavishly copies the structure and the wording of **Article 1 paragraphs (2), (3), and (4) OWD.** It also transposes the regulation within **Article 4 OWD**, regarding the mutual recognition of the orphan work status.

The diligent search requirement enshrined in **Article 3 paragraphs (1) to (4) of the Directive** has been transposed to **Section 5 of the Act**, once again, by verbatim; while the documentation obligations of the beneficiaries, as regulated in **Article 3(5) and Article 3(6) OWD** are implemented in **Section 6 of the Act.**

Section 7 of the Act provides for the permitted uses of orphan works, by adopting verbatim **Article 6(1) OWD**. It also transposes **Article 6(2) OWD**, which enable the generation of income to cover the costs for digitization and making available to the public of copies, as well as **Article 6(3) OWD**, which requires the indication of the name of the author of the work in use.

The end of the orphan works status (**Article 5 OWD)** as well as its consequences **(Article 6(5) OWD)** are enshrined in **Section 8 of the Act.**

3.1.2.9.9.5 OUT-OF-COMMERCE WORKS

The draft proposal for the implementation of the CDSM Directive, if approved, will include two new **Sections 16g and 16h** to TL to transpose, respectively, **Article 8(1) and Article 8(2) CDSM.**

Section 16h of the proposed Act introduces an exception to copyright aimed at facilitating the use of out-of-commerce works in certain situations.

[647] Laki orpoteosten käyttämisestä 764/2013.

Section 16h largely follows the language of its EU counterpart, yet, **Section 16h(4)** restricts the application of this exception to works that have never entered channels of commercial distribution within five years since the year in which the work had been added to that entity's collections. Also departing from the EU exception, **Section 16h(2) of the proposed Act** requires the beneficiaries to conduct a meticulous research, to inform the rightholders of the works desired to be used, and to ensure the out-of-commerce nature of the works in question. For this, beneficiaries shall ensure that the work in the work in question can be assumed to have left commercial distribution. For the use of computer programs or video games, it shall be ensured that seven years have passed since the first publication of these works.

Nevertheless, **Section 16h(2) of the proposed Act** excludes from the scope of this exception the set of works which has been removed from commercial distribution, only if the search conducted with reasonable efforts. These works mainly consist of cinematographic works, whose producer has a main office or habitual residence in a state situated outside the EEA; other works than cinematographic works which have been firstly published in a state outside the EEA or if they have not been published, has been publicly broadcasted first time in a state outside the EEA; the works made by citizens of states outside the EEA, whose residence cannot not be established after reasonable efforts.

While **the proposed Section 16h TL** does not constitute the final version of this new exception, it significantly departs from its EU counterpart, mainly for it imposes various restrictions to the subject-matter and for it requires other criteria, such as the meticulous research explained above.

3.1.2.9.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The flexibilities for the use of persons with disabilities provided by **Article 5(3)(b) InfoSoc and the Marrakesh Directive** have been implemented in **Sections 17, 17a, 17b TL**. Whereas **Section 17a and 17b TL** closely follow the structure and the language of **the Marrakesh Directive, Section 17** slightly departs from **InfoSoc** and imposes certain restrictions to the subject-matter as well as the permitted uses.

By adopting **Article 5(3)(b) Infosoc**, **Section 17 TL** provides for a flexibility for persons with visual and hearing impairment. In spite of closely following its EU counterpart, the Finnish exception excludes sound and image recording from the scope of the subject-matter **(Section 17(1) TL)**. While **Section 17(2) TL** rules that the authorized entities to produce such accessible copies are to be determined by a Government Decree, it also permits these entities to lend, sell, and use the copies as such, except for radio or television broadcasting. Yet, **Section 17(4) TL** requires these acts to be performed for non-commercial purposes. **Section 17(3)** entitles the authors of such work with remuneration.

Section 17a(1) TL identifies persons with disabilities, by adopting the language of **Article 2(2) Marrakesh** verbatim. Subsequently, it regulates the acts permitted for these beneficiaries, once again, closely following the text of **Article 3(1)(a)** and the second sentence

of **Article 4 Marrakesh.** In doing so, it enlists the subject-matter of this exception, by adopting verbatim **Article 2(1) Marrakesh. Section 17a(2) TL** consolidates that the exceptions provided herein for the use of works by persons with disabilities cannot be overridden by contractual provisions.

Section 17b(1) of the Act defines the authorized entities, by adopting verbatim the definition provided by **Article 2(4) Marrakesh.**

Section 17b(3) and (4) of the Act regulate the acts permitted for authorized entities, by closely following the language of, respectively, **Article 3(1)(b) and Article 4 Marrakesh**. According to **Section 17b(2) of the Act**, such organizations are allowed to conduct the permitted acts under this exceptions, if they can lawfully gain access to the copy of the work in question.

Section 17c TL, once again, very closely following the structure and language of **Article 5 Marrakesh**, regulates the obligations of the authorized entities.

The scope of both provisions is extended to performances by Section 45(7), to phonograms by **Section 46(3)**, to cinematographic works by **Section 46a(3)**, to audio recordings by **Section 47(4)**, to broadcasts by **Section 48(3)**, to photographs by **Section 49a(3)**, and to databases protected by sui generis right by **Section 49 TL.**

3.1.2.9.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Section 21(2) TL,[648] which entered into force in 1961, enables the public performance of a published work at an event in which the performance of work is not the main feature. To fall under this exception, the permitted act shall be carried out for non-commercial purposes, thus attendance to the event shall not be subject to any admission fee nor generate any other economic gain.

3.1.2.9.12 THREE-STEP TEST

There is no dedicated provision for the three-step test, as introduced by **Article 5(5) InfoSoc,** in the Finnish Copyright Act.

3.1.2.9.13 PUBLIC DOMAIN

3.1.2.9.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Section 9 TL, which entered into force in 1961 and was later amended in 2005, enlists the categories of works and other subject-matter that are excluded from copyright protection. They include laws and decrees, resolutions, and other documents which are published under the **Act on the Statutes of Finland**[649] and the **Act on the Regulations of Ministries and other Government Authorities**, [650] treaties, conventions, and other international documents,

[648] For related national case law, see: KKO 2006:12.
[649] Laki Suomen säädöskokoelmasta 188/2000.
[650] Laki ministeriöiden ja valtion muiden viranomaisten määräyskokoelmista 189/2000.

decisions and statements issued by public authorities or other public bodies, and translations of all such documents if made or commissioned by public authorities or other public bodies. **Section 9(2) TL** specifies that independent works incorporated within the above-mentioned works and subject-matter are exempted from the public domain.

3.1.2.9.13.2 PAYING PUBLIC DOMAIN SCHEMES

The Finnish Copyright Act offers a detailed regulation of paying public domain schemes in **Section 47 TL**. Both provisions entered into force in 1961, and they were later amended in 2005 and 2015.

Section 47(1) TL enables the direct/indirect use in a public performance, the use in original communication to the public (except in cases where members of the public may access to the recorded performance or material at a place and time individually chosen by them), and the use for simultaneous and unaltered retransmission of a radio or television broadcast of recorded performances already made lawfully available to the public. **Section 47(2) TL** attributes to producers and performers a right to equitable remuneration, to be paid by the organization operating the retransmission, unless they demonstrate that the remuneration has already been paid.

Section 47(3) TL extends the provisions to music recordings containing images, which have been published for commercial purposes. Performers whose performances are recorded on such mediums are entitled to remuneration.

The Finnish Act on Public Broadcasting Tax,[651] holds a legal provision within its **Section 1** concerning the paying public domain scheme for public broadcasts. Entered into force in 2013, **Section 1 of the Act** requires natural and legal persons to pay an annual public broadcasting tax according to provisions of this Act. Yet, the natural and legal persons permanently residing in the province of Åland Islands are exempted from the jurisdiction of this Act.

3.1.2.9.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Finnish copyright law contains several provisions introducing extended or compulsory licensing schemes.

Entered into force in 2005, **Section 26 TL** provides for a general regulation concerning **ECL.** It explains that ECL shall apply to an agreement made on the use of works, between users and an organization approved by the Ministry of Education and Culture, which is highly representative of the authors involved in Finland.

Section 26(4) TL allows the authorized organizations to distribute remunerations for the reproduction, communication, or transmission of works among all authors affected by the ECL, regardless of their membership to the organization.

[651] Laki yleisradioverosta 2012/484.

Entered into force in 1980 and later amended in 2005, **Section 13 TL** subordinated reprography to the ECL scheme provided in **Section 26 TL.**

Likewise, **Section 13a(1) TL** allows the reproduction of newspaper or periodical excerpts, which consist of literary works and images associated with such works, under the ECL regulated within **Section 26 TL**. **Section 14(1) TL** does the same for the reproduction and communication to the public (by means other than radio and television) of works in the context of educational activities. However, reproduction of a work by photocopying or by similar means are excluded from the scope of the provision.[652]

The ECL scheme enshrined in **Section 26 TL** also covers, under **Section 16(d) TL**, the reproduction of works in CHIs' collections and making available such copies to the public, with the exclusion of works for which rightholders have reserved such rights. **Section 26 TL** also applies, under **Section 25a(2) TL, for** the reproduction and communication to the public (but for radio and television broadcast) of works of art included in a collection, displayed or offered for sale, again provided that rightholders have not reserved such rights.

Section 25f(1) TL uses ECL to cover the transmission of works by broadcasting organizations, with the exclusion of dramatic works, cinematographic works, and any other work for which such right has been reserved. Additionally, **Section 25f(3)** holds that for using a work more often than provided in subsection 2, or for over a year, a broadcasting organization may make a copy or have a copy made of the work by virtue of extended collective license, as provided in **Section 26 TL.**

Section 25g(1) TL enables a broadcasting organization to reproduce and communicate to the public a television or radio programme stored in its archive, and works included therein, if transmitted before 1 January 2002, subject to the ECL regulated by **Section 26 TL**. ECLs under **Section 26 TL** covers also the reproduction and communication to the public by a publisher of a work included in a newspaper or a periodical published by it before 1 January 1999, unless rightholders reserved such right (**Section 25g(2)** TL), and to the retransmission without alteration of a work included in a radio or television transmission, for reception by the public simultaneously with the original transmission **(Section 25h(1) TL)**.[653]

In addition to the schemes already mentioned under the related copyright flexibilities above, the Finnish Copyright Act provides several other **compulsory licensing schemes**.

An example is **Section 19(4) TL**, which states that rightholders have right to remuneration for the public lending of copies of their works, with the exception of products of architecture, artistic handicraft and works of applied art. Remuneration may be claimed only for lending which has taken place within the last three calendar years and does not apply to libraries serving research or educational activities. The remuneration right is not waivable.

[652] For related national case law, see: TN 2020:4.
[653] For related national case law, see: MAO 285/19.

Similarly, **Section 18 TL** holds that minor parts of literary or musical works, or entire works of limited extent may be incorporated into a literary or artistic compilation of works by several authors, produced for educational uses, after five years from the first publication. Works of art made public may be reproduced in pictorial form in connection with the text. The provision does not apply to works specifically created for educational purposes. In these cases, rightholders are entitled to remuneration.

Section 47a TL provides for regulation regarding **CMOs**. According to this provision, the remuneration for the direct or indirect use of a sound recording in a public performance, as well as for the use of sounds recordings in original communication to the public **(Section 47a(1) TL)**, for simultaneous and unaltered retransmission of a radio or television broadcast **(Section 47a(2) TL),** and for the use of a music recording containing images **(Section 47a(3) TL),** shall be paid through a CMO approved by the Ministry of Education. The remaining paragraphs of the same provision hold detailed regulations concerning the time and method of claiming such remuneration by the rightholders.

Last but not least, **Section 16g of the proposed Act** to implement the CDSM Directive provides for an **ECL** for the use of out-of-commerce works, in order to transpose **Article 8(1) CDSM**. This provision enables archives as well as publicly accessible libraries and museums to reproduce and make available to the public the out-of-commerce work in their collections, only for non-commercial purposes and by virtue of an ECL. This regulation aims to enable the public at large to access to such works in such a manner which enables them to access the work from a place and a time individually chosen by them. Yet, **Section 16g(3)** restricts the application of this rule only to works that have never entered channels of commercial distribution when five years has passed from the year when the work was added to that entity's collections.

Section 16g(2) of the proposed Act extends this flexibility to the making available of the copies of such out-of-commerce works to the public by the beneficiaries. Nevertheless, **Section 16g(4)** excludes form the scope of this regulation the works whose authors have prohibited the reproduction or communication of the work.

3.1.2.9.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.9.15.1 FUNDAMENTAL (USERS') RIGHTS

None reported.

3.1.2.9.15.2 CONSUMER PROTECTION

The national experts indicated that traces of use of consumer protection tools in copyright-related matters are present in the track record of the Consumer Ombudsman, which has authority to file and represent class action suits in disputes between consumers

and enterprises.[654] Unreasonable contract clauses offered to consumers in EULAs could be subject to these proceedings. In the past, the Ombudsman has made censuring statements concerning cease-and-desist letters that have been sent out to consumers of copyright-protected content.[655]

3.1.2.9.15.3 COPYRIGHT CONTRACT LAW

None reported, aside from the broad use of ECLs.

3.1.2.9.15.4 OTHER INSTRUMENTS

Media law plays a significant role in the copyright balance. More details have already been provided under relevant flexibilities above.

3.1.2.10 FRANCE

The French Code of Intellectual Property (hereinafter "CPI"), as last amended in 2020,[656] contains a multitude of copyright flexibilities encompassed within the EU Directives. While significant amount of these E/Ls predate their EU correspondents, still the French copyright law can be deemed in line with the EU copyright acquis.

Indeed, the vast majority of copyright flexibilities are harmonized, including the mandatory exceptions and extended collective licensing scheme for the use of out-of-commerce works within the CDSM. Yet, several EU flexibilities have not been transposed to the CA, such as the exception for ephemeral recording, incidental inclusion, reprography, public lending, and "other uses" by public authorities. A few exceptions present more rigidity compared to EU rules (e.g., exception acts necessary for access and lawful use of works protected by TPMs, and freedom of panorama).

Additionally, the French judiciary tends to adopt human rights discourse in order to ensure end-users' access to cultural content.

3.1.2.10.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.10.1.1 TEMPORARY REPRODUCTION

Article L. 122-5-6° CPI, which entered into force in 2006, transposes **Article 5(1) InfoSoc,** by adopting the language of EU rule verbatim. **Article L. 211-3-5 CPI** extends this exception to related rights. This provision requires compliance with the three-step-test, given the regulation within **Article L. 122-5 CPI.**

[654] Laki Kilpailu- ja kuluttajavirastosta 2012/661, §15 (Act on Competition and Consumer Authority 2012/661, Section 15).
[655] See: Consumer Ombudsman Newsletter, 1/2018 (2018), <http://www.anpdm.com/article/0/40/44415A427740405A4771/4823865> accessed 11 November 2020. The statement on best practices made by the working group can be found here (available in Finnish only): Suositukset tekijänoikeuskirjeiden ja -menettelyjen hyviksi käytännöiksi <https://minedu.fi/kirjevalvonnan-suositukset> accessed 11 November 2020.
[656] Code de la propriété intellectuelle, dernière modification le 22 mai 2020.

Nevertheless, the scope of the subject-matter of this exception has been narrowed down by case law. Indeed, *Tribunal de grande instance Paris* decided in *Wizzgo & CA Paris,*[657] this exception does not apply to digital recordings of TV shows, as the recordings can be kept by users for an indefinite period of time and have an independent economic value.

3.1.2.10.1.2 EPHEMERAL RECORDING

Due to Article 11*bis*(3) of the Berne Convention, the French *loi n° 57-298* (March 3rd, 1957), Article 45(3) has introduced an exception for ephemeral recording, which **was repealed in 1985**.

Given that **Article 5(2)(d) InfoSoc** has not been transposed to French law. Neither there is concrete evidence to suggest that **Article 10(1)(c) Rental** has been transposed. Thus, there is no E/L provided for ephemeral recordings in French copyright law.

3.1.2.10.1.3 INCIDENTAL INCLUSION

Article 5(3)(n) InfoSoc has not been transposed to French law.

3.1.2.10.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

French copyright law contains of several flexibilities facilitating the access and normal use of computer programs, databases, and works protected by TPMs.

Article L. 122-6 and Article L. 122-6-1 CPI transpose, respectively, **Articles 5 and 6 Software**, by adopting these EU rules verbatim, including the three-step-test requirement therein. This provision entered into force in 1994.

Entered into force in 1998, **Article L. 122-5-5° CPI** transposes **Article 6(1) Database** verbatim. However, there is no concrete evidence to suggest that **Article 8(1) Database** has been transposed to French copyright law.

Article L. 331-31 CPI provides for a flexibility for the use of works protected by TPMs, by transposing **Article 6(4) InfoSoc**.[658] This provision entered into force in 2009, and it is in complete compliance with its EU counterpart.

This provision guarantees the lawful user's access and normal use of works, by regulating that voluntary TPMs shall not impose restrictions other than the ones decided by the copyright holder or by the holder of neighbouring rights over a phonogram, video-gram, computer program, or press publication.

It ensures that TPMs shall not prevent the beneficiaries from enjoying the exceptions for private copy, illustration for teaching and research, persons with disabilities, preservation of cultural heritage, private study, uses for administrative and judicial proceedings and public security, TDM, and digital and cross-border teaching activities, as well as the access and normal use of databases.

[657] TGI Paris, 3ème ch., 25 novembre 2008, *Wizzgo* & CA Paris, pôle 5, 1ère ch., 14 décembre 2011.
[658] For national case law, see: Cass., 1ère civ., 19 June 2008, n° 07-14.277.

The number of copies authorized to be made under the private copy exception copy shall be decided by the relevant public authority, by taking into account the type of work or other subject-matter protected by TPMs and the means of communication to the public.

3.1.2.10.1.5 FREEDOM OF PANORAMA

Article L. 122-5-11° CPI transposes **Article 5(3)(h) InfoSoc**,[659] which entered into force in 2016, by resembling its EU correspondent. Yet, the French rule provides for a more restrictive exception compared to its EU counterpart, for it imposes restrictions on the beneficiaries as well as the subject-matter of the exception. Indeed, **Article L. 122-5-11° CPI** permits natural persons to reproduce architectural works and sculptures permanently placed on public places, for non-commercial purposes.

It shall be noted that this provision requires compliance with the three-step-test, given the regulation within **Article L. 122-5 CPI.**

3.1.2.10.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.10.2.1 REPROGRAPHY

Article 5(2)(a) InfoSoc has not been transposed to French law. However, **Article L. 122-10 CPI** provides for a licensing scheme for reprography of works have been disclosed.[660]

3.1.2.10.2.2 PRIVATE COPY

While **Article 6(2)(a) Database and Article 9(a) Database** have not been transposed to French law, **Article L. 122-5-2° CPI** transposes **Article 5(2)(b) InfoSoc**. This provision entered into force in 1957 and later amended in 2011; however, it significantly departs from its EU counterpart, while still requiring compliance with the three-step-test **(Article L. 122-5 CPI**).

Article L. 122-5-2° CPI allows a "copyist" to reproduce a lawfully disclosed work, only for the purpose of private use. This exception does not apply to the reproduction of artistic works, electronic databases; and computer programs, unless it is a back-up copy permitted by the exception for access and normal use of a computer program.

Although **Article L. 122-5-2° CPI** does not define "copyist", in *Rannou-Graphie,*[661] *Cour de cassation* has interpreted the "copyist" as the person who owns the reprographic equipment and makes it available to their clients. The French Court's interpretation of the beneficiary of the private copy exception does not comply with the decision of CJEU in *V-Cast Limited*,[662] in which the Court interpreted the beneficiary of this exception as "any user."

[659] For national case law, see: Cass., 1ère civ., 15 mars 2005, *Place des Terreaux.*
[660] For special licensing schemes, please see paragraph 3.1.2.10.14. below.
[661] Cass., 1ère civ. 7 mars 1984, *Rannou-Graphie.*
[662] CJEU, 29 November 2017, case n° 265-16, *V Cast Limited v RTI SpA.*

As to the interpretation of "private use", the French judiciary has ruled in the ***Mulholland Drive*** case[663] that private use encompasses a "*cercle familial restreint*", or in other words, a narrow family circle.

As to the works protected by TPMs, **Article L. 331-5 CPI**, by transposing **Article 6(4) InfoSoc,** asserts that TPMs as such shall not interfere with the free use of the protected work or other subject-matter, within the limits of the rights provided for in CPI and those granted by the rightholders.

Still, the French Court has ruled in the ***Mulholland Drive***[664] case that users cannot oppose the use of TPMs by rightsholders, even if their actions fall under the private copy exception.

In light of the case law, it can be argued that the French exception for private copy is in line with **Article 5(2)(b) InfoSoc,** while its application by the French judiciary raises questions about the exception's interplay with **Article 6(4) InfoSoc.**

As to **Article 10(1)(a) Rental**, **Article L211-3-2° CPI** envisions a private copy exception for the objects of related rights, such as performances, phonograms, fixations of films, and broadcasts.

It is also worth noting here that, **Article L. 311-1 CPI** entitles authors, performers and producers of works fixed on phonograms or videograms, to remuneration for the reproduction of their works. The same provision also entitles authors and publishers of works fixed on any other medium for the reproduction of their works.

3.1.2.10.3 QUOTATION

Article L. 122-5-3° a) CPI features an exception for quotation, which has entered into force in 1957 and amended in 1992.

Article L. 122-5-3° a) CPI allows short quotations of works have been disclosed, within a critical, polemic, educational, scientific, or informatory work. The quotation shall be accompanied by the name of the author and the source of the quoted work. This provision requires compliance with the three-step-test, given the regulation within **Article L. 122-5 CPI.**

Article 211-3-3° CPI holds a similar provision for the objects of related rights, such as performances, phonograms, fixations of films, and broadcasts.

The "incorporation into a critical, polemic, educational, scientific, or informatory work" criterion within **Article L. 122-5-3° a) CPI** has been interpreted by ***Cour de cassation*** in the ***Microfor***[665] case. The Court has ruled that the quotation does not have to be incorporated into a second work, as long as the quoted part is informative and if it does not spare the reader from reading the analysed work. In the ***Utrillo*** case,[666] ***Cour de cassation*** decided that

[663] CA Paris, 4ème ch., 22 avril 2005, *Mulholland Drive.*
[664] Cass., 1ère civ., 19 juin 2008, *Mulholland Drive.* The national expert has reported that the French Court's decision in this case contrasts with Article L. 331-7 CPI, which transposes Article 6(4) InfoSoc.
[665] Cass., 1ère civ., 9 novembre 1983, *Microfor.*
[666] Cass., 1ère civ., 13 novembre 2003, *Utrillo.*

the reproduction of an artistic work and the use of reproduction in another work cannot be deemed a short quotation. Finally, the French judiciary has ruled that the quotation exception does not only apply to literary works but also to photographs.[667] In light of the case law, it can be concluded that the French exception for quotation is in line with EU rule.

Additionally, **Article L. 331-32-1 of ARCOM,**[668] which entered into force in 2022, features a regulation corresponding to the online quotation exception within **Article 17(7) CDSM**, and by closely following the EU provision. This provision prevents the online content sharing service providers depriving end-users from the free and lawful use a work in the online platform as well as from enjoying the copyright exceptions provided by law.

It is also worth noting that **Article 17(7) CDSM** finds correspondence also in **Article L137-4-1 CPI** for works protected by copyright and in **Article L219-4-1 CPI** for objects of related rights.

3.1.2.10.4 PARODY, CARICATURE, PASTICHE

Article L. 122-5-4° CPI features an exception for parody, pastiche, and caricature, which entered into force in 1957 and later amended in 1992.[669] Although preceding the adoption of **Article 5(3)(k) InfoSoc**, this provision is in line with its EU counterpart. This provision permits the parody, pastiche, and caricature, as long as it complies with the laws of the genre. Also, this provision requires compliance with the three-step-test, given the regulation within **Article L. 122-5 CPI.**

Article 211-3-4° CPI holds a similar provision for the objects of related rights, such as performances, phonograms, fixations of films, and broadcasts.

In this respect, ***Cour d'appel de Paris*** has ruled that whereas parody entails a humoristic intent, the parodist's attempt of humor shall not be "degrading."[670] *Cour d'appel* has also associated the parody exception with the fundamental human rights and liberties, by ruling in ***Arconsil c/ Moulinsart***[671] that the exception for parody is rooted in Constitutional freedom of expression.

Additionally, entered into force in 2022, **Article L. 331-32-1 of ARCOM**[672] (*Autorité de regulation de la communication audiovisuelle et numérique*) features a regulation corresponding to the online parody exception within **Article 17(7) CDSM**, which has already been highlighted above.

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[667] CA Paris, 4ème ch., 12 octobre 2007.

[668] Autorité de regulation de la communication audiovisuelle et numérique, dernière modification le 13 avril 2022. (Regulatory Authority for Audiovisual and Digital Communication, last modified on 13 April 2022.)

[669] For related national case law, see: CA Paris, pôle 5, 2ème ch., 18 février 2011; TGI Paris, 3 janvier 1978 and CA Paris, 4ème ch., 1er février 2006; Cour d'appel de Paris, pôle 5, 1ère ch., 23.02.2021, N° 19/09059, Koons c/ Fait d'hiver; Tribunal judiciaire de Rennes (2ème ch. civ.), 10.05.2021, N° 17/ 04478, Soc. Moulinsart c/ X. Marabout.

[670] CA Paris, 13 octobre 2006.

[671] CA Paris, pole 5, 2ème ch., 18 février 2011, Arconsil c/ Moulinsart.

[672] Autorité de regulation de la communication audiovisuelle et numérique, dernière modification le 13 avril 2022. (Regulatory Authority for Audiovisual and Digital Communication, last modified on 13 April 2022.)

3.1.2.10.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.10.5.1 PRIVATE STUDY

Article L. 122-5-8° CPI features an exception which entered into force in 2006 and implements **Article 5(3)(n) InfoSoc** verbatim, while also requiring compliance with the three-step-test. **Article 211-3-7° CPI** holds a similar provision for the objects of related rights, such as performances, phonograms, fixations of films, and broadcasts.

3.1.2.10.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

While there is no evidence to suggest that **Article 6(2)(b) Database** has been transposed to CPI, **Article 9(c) Database** finds correspondence in **Article L342-3-4° CPI**.

Article L. 122-5-3° e) CPI transposes **Article 5(3)(a) InfoSoc,** by closely following the EU rule. This provision has entered into force in 2006 and later amended in 2013; and it is also subjected to the three-step-test **(Article L. 122-5 CPI).**

Article L. 122-5-3° e) CPI permits the performance and reproduction of excerpts from works that have been lawfully disclosed, with the exception of works designed for educational purposes and sheet music. The permitted acts can be carried out only for the purposes of illustration of teaching and research, including the development and dissemination of subjects for examinations or competitions organized as an extension of the lessons. The same provision enables the permitted uses herein to be held by any means, including the digital illustration of teaching and research, as long as they are addressed to an audience composed mainly of pupils, students, teachers, or researchers directly concerned by the act of teaching, training, or research activity. Performance or reproduction of the works for commercial purposes or for distribution of the works to third parties, except for the ones mentioned above, are exempted. The provision requires the remuneration of the author as well as the indication of the name of the author and the source of the works used under this exception.

Article 211-3-3° CPI holds a similar provision for the objects of related rights, such as performances, phonograms, fixations of films, and broadcasts, which can be taken as a correspondence to **Article 10(1)(d) Rental**.

3.1.2.10.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Articles L. 122-5-12° and L. 122-5-4 CPI transpose **Article 5 of the CDSM**. These provisions entered into force in 2021, and they closely resemble the EU rule. Once again, the three-step-test applies hereto (**Article L. 122-5 CPI).**

Article L. 122-5-12° CPI permits the reproduction and communication to the public of excerpts of works have been disclosed, for the purposes of illustration for education and professional training.

Article L. 122-5-4 CPI allows these acts to be carried out also for vocational training, including apprenticeship, as well as for the development and dissemination of subjects for exams or competitions organized as an extension of the teaching, except for activities for

recreational purposes, only to the extent justified by the non-commercial purpose intended. The illustration of teaching shall take place under the responsibility and the premises of an educational institution or at other venues, and for an audience comprised of pupils, students, or teachers. The illustration of teaching can also take place by means of a secure digital environment accessible only to pupils, students, and teaching staff of this establishment. The authors of the works used for digital teaching activities are entitled to remuneration. The licenses issued by a CMO can be extended to rightholders who are not members of this organization, via the order of the Ministry of Culture. However, this exception does not apply to the reproduction and communication to the public of works if the licenses authorizing these acts for illustration of teaching respond the needs and specificities of the beneficiaries of this exception. The reproduction and communication to the public of illustration for teaching designed for non-digital environment and sheet music are also exempted from the scope of this exception. The conditions for granting licenses mentioned in the previous paragraph are based on objective and transparent criteria. The amount of remuneration requested in return for these licenses is reasonable.

Article 211-3-3° e) CPI holds a similar provision for the objects of related rights, such as performances, phonograms, fixations of films, and broadcasts.

3.1.2.10.5.4 TEXT AND DATA MINING

Article L. 122-5-3 CPI transposes **Articles 3 and 4 of the CDSM**. This provision entered into force in 2021, and it closely resembles the EU rules, along with the requirement to comply with the three-step-test **(Article L. 122-5 CPI).**

Article L. 122-5-3-1 CPI adopts verbatim the definition of TDM provided within **Article 2(2) CDSM.**

Article L. 122-5-3-2 CPI transposes **Article 3 CDSM**, by closely following the structure and the wording of its EU counterpart, in order to provide for an exception for TDM purposes to CHIs (publicly accessible libraries and museums, archives, film and audio-heritage institutions, educational establishments) and research establishments which have lawful access to the digital copies works, as well as the third parties acting on their behalf. The French exception meets all the standards of its EU counterpart. Similarly, **Article L. 122-5-3-3 CPI** adopts verbatim **Article 4 CDSM.**

The scope of these provisions is extended to computer programs, databases protected by sui generis rights, performances, phonograms, and broadcasts, respectively, by **Article L122-5-3-3 CPI, Article L211-3-8° CPI, Article L122-6-1-6 CPI, Article L342-3-6° CPI.**

3.1.2.10.6 USES FOR INFORMATORY PURPOSES

3.1.2.10.6.1 PRESS REVIEW AND NEWS REPORTING

French copyright law features of two exceptions enabling press review and new reporting.

On the one hand, **Article L. 122-5-3° b) CPI** features a dedicated exception for press review. This provision has entered into force in 1957 and later amended in 1992; thus, it predates the adoption of **Article 5(3)(c) InfoSoc.** According to this provision, a work which has been disclosed can be used for press review, as long as the use is accompanied by an indication of the author's name and source of the work.

The beneficiaries of this exception have been interpreted as "journalists" by ***Cour de cassation***, as the Court defined a "press review" as a joint and comparative roundup of several comments authored by different journalists and all on the same theme or event.[673] Regarding the subject-matter of the exception, it has been decided that the event or events constituting the subject-matter of the press review must be current.[674]

Based on these, **Article L. 122-5-3° b) CPI** does not only encompass the exception in **Article 5(3)(c) InfoSoc,** but it provides for a broader exception compared to its EU counterpart, as the French rule does not impose any limitations on the subject-matter, permitted acts, and purposes of use. However, the scope of beneficiaries of the French rule is more restrictive compared to the EU rule, as the French case law narrows it down to the press.

Article L. 122-5-9° CPI features an exception for reporting of current events, which entered into force in 2006.[675] This provision is slightly narrower than its counterpart, for it imposes certain restrictions on the subject-matter. This provision permits the reproduction or communication to the public, in whole or in part, of a work of graphic, plastic or architectural art, by written, audio-visual or online press, for the exclusive purpose of reporting current events. The author's name shall be clearly indicated. This exception does not apply to works, particularly photographic or illustrative works, which themselves constitute the main content of the news/events reported. The reproduction or communication to the public of a work for the information of the public on news other than current events require remuneration of the author.

Article 10(1)(b) Rental also finds correspondence in **Article L211-3-3° b) CPI**, which is dedicated to the use of the objects of related rights.

3.1.2.10.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article L. 122-5-3° c) CPI features an exception provided for use of public speeches and lectures. This provision precedes **Article 5(3)(f) InfoSoc**, given that it has entered into force in 1957 and later amended in 1992. Yet, this exception is in line with its EU counterpart as well as with the three-step-test requirement included therein [see: **(Article L. 122-5 CPI)**].

Article L. 122-5-3° c) CPI permits the communication to the public and broadcast of current events; public speeches delivered at political, administrative, judicial, or academic

[673] Cass., crim., 30 janvier 1978.
[674] TGI Seine, 3ème ch., 17 juin 1964.
[675] For national case law, see: CA Paris, pôle 5, 2ème ch., 26 mars 2010; CA Paris, pôle 5, 2ème ch.,1er février 2019.

gatherings, as well as at political meetings, and official ceremonies. Similarly, **Article L211-3-3° c) CPI** permits the performance of the same acts on the objects of related rights.

3.1.2.10.7 USES BY PUBLIC AUTHORITIES

3.1.2.10.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

French copyright law features an exception for uses in administrative and judicial proceedings, enshrined in **Article L. 331-4 CPI**. In spite of predating the adoption of **Article 5(3)(e) InfoSoc**, as it entered into force in 1998, this provision closely resembles its EU counterpart. According to **Article L. 331-4 CPI**, copyright shall not prevent acts necessary for the performance of a parliamentary, judicial, or administrative proceeding or of maintaining public security.

Except for this, there is no concrete evidence to suggest that **Article 6(2)(c) Database and Article 9(c) Database** have been transposed to CPI.

3.1.2.10.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 5(3)(g) InfoSoc has not been transposed to French law.

3.1.2.10.8 SOCIALLY ORIENTED USES

Article 5(2)(e) InfoSoc has not been transposed to French law.

3.1.2.10.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.10.9.1 PUBLIC LENDING

Article 6 Rental has not been transposed to French law. However, CPI features a licensing scheme for public lending as such within **Articles L. 133-1 - L. 133-4.**

3.1.2.10.9.2 PRESERVATION OF CULTURAL HERITAGE

Entered into force in 2021, **Article L. 122-5-8° CPI** transposes **Article 6 of the CDSM,** also by subjecting it to the three-step-test **(Article L. 122-5 CPI).** This exception permits CHIs (publicly accessible libraries and museums, archives, film and audio heritage institutions) to reproduce and communicate to the public of a work for the purposes of preservation of cultural heritage or for maintaining the availability of the works for research or private study of individuals on the premises of the establishment and at the dedicated terminals. The acts permitted by this exception shall not be carried out for commercial purposes.

This provision has a narrower scope of beneficiaries compared to its EU counterpart, as it does not include educational establishment and public broadcasting organizations. However, it provides more flexibilities to its beneficiaries, as it not only allows the reproduction of works for the internal activities of CHIs, but also permits the communication to the public of such copies, which reinforces the exception provided for public lending.

The scope of this provision is extended to computer programs and databases protected by sui generis rights by **Article L122-6-1-5 CPI** and **Article L342-3-5° CPI**.

3.1.2.10.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

None reported.

3.1.2.10.9.4 ORPHAN WORKS

Article L. 113-10 and Articles L. 135-1-L. 135-7 CPI transpose the **OWD**, by closely following the language and structure of the EU Directive, with the exception of a few nuances. These provisions entered into force in 2015.

Article L. 113-10 CPI defines "orphan work", by adopting verbatim **Article 2(1) OWD. Article L. 135-1 CPI** identifies the subject-matter of this exception, by closely following **Article 1(2) and Article 1(3) OWD**. Accordingly, the scope of the subject-matter is set as orphan works first published or broadcast in an EU Member State, such as works published in the form of books, journals, newspapers, magazines or other writings in the collections of publicly accessible libraries, museums, archives, film and audio heritage institutions, and educational establishments; audiovisual or musical works which form part of these collections or which were produced by public broadcasting organizations before 1 January 2003 and held in their archives. Independent works of photography are exempted. The same provision extends this exception to the works considered to be orphan in another EU Member State, by adopting **Article 4 OWD**.

Article L. 135-2 CPI stipulates that the beneficiaries of this exception, by adopting the formulation within **Article 1(1) OWD**. While emphasizing the non-commercial nature of these beneficiaries, the same article permits, by transposing **Article 6(2) OWD**, generation of income to cover the costs of digitization and making available to the public of the orphan works they use, only for a seven-year period. The names of the authors and rightholders shall be indicated, if possible. The same provision also identifies the permitted use of the orphan works adopting verbatim **Article 6(1) OWD.**

Article L. 135-3- L.135-5 CPI regulate the diligent search as well as the documentation and reporting obligations of the beneficiaries **(Article 3 OWD),** and the termination of the orphan work status **(Article 5 OWD)**. In doing so, **Article L. 135-6 CPI** also transposes verbatim **Article 6(5) OWD** to regulate the fair compensation in case of the termination of the orphan works status.

Further details regarding the use of orphan works, as mentioned in **Article L. 135-7 CPI,** are regulated by a Council of State decree.

3.1.2.10.9.5 OUT-OF-COMMERCE WORKS

The exception introduced by **Article 8(2) CDSM** has been transposed to **Articles L. 122-5-13° and L. 122-5-5 CPI**.

Article L. 122-5-13° CPI states that the author of a work has been disclosed cannot prohibit the reproduction and communication to the public of an out-of-commerce work by CHIs, in the circumstances regulated by **Article L. 122-5-5 CPI.**

Article L. 122-5-5 CPI provides CHIs with the opportunity to make an out-of-commerce work in their collections available to the public via non-commercial websites, by indicating the name of the author. This rule does not apply to the out-of-commerce works which is represented and can be licensed by a CMO.

The provision also regulates the documentation obligations of CHIs, and the termination of the out-of-commerce works status.

3.1.2.10.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article L. 122-5-7° CPI transposes **Article 5(3)(b) InfoSoc**, by providing a more detailed regulation than its EU counterpart. This provision has entered into force in 2006 and later modified in 2013. According to this provision, a work has been disclosed can be reproduced and communicate to the public by legal persons and CHIs (archives, publicly accessible libraries and museums, documentation centres), only for persons with one or more motor, physical, sensory, mental, cognitive, or psychic disabilities, which prevent them from accessing a work in the form it has been made available to the public. **Article L211-3-6 CPI** extends the scope of this provision to the objects of related rights.

Also, **Article L. 122-5-1-2° CPI**, which entered into force in 2016, has been modified in 2018 to bring the regulation therein in line with **the Marrakesh Directive**. Even though the French regulations departs from the structure and language of its EU counterpart, it is still in line with the Directive.

According to this provision, natural persons as well as legal persons authorized by the Ministry of Culture are allowed to reproduce and communicate to the public a works in digital format, whose copies have been deposited to the National Library of France. To facilitate digital reproduction of such works, **Article L. 122-5-1-2° b) CPI** obliges publishers of textbooks, whose legal deposit or publication in the form of a digital book in digital format is required by Law No. 2011-590 of May 26, 2011,[676] and other works, upon request of the beneficiaries, within ten years after the publication of the works, which have been published after 4 August 2006 or digitized according to the aforementioned law.

Article L. 311-8-I-3° CPI, which **entered into force in 1985**, provides for another copyright flexibility by exempting natural and legal persons enlisted and approved by the Ministry of Culture from paying remuneration to rightholders, if they acquire their own medium to record media for the benefit of persons with disabilities.

[676] Loi n° 2011-590 du 26 mai 2011 relative au prix du livre numérique (Act n. 2011-590 of 26 May 2011 related to the price of digital books).

3.1.2.10.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Entered into force in 1957 and later amended in 1992, **Article L. 122-5-1° CPI** permits private and non-commercial performance of a work, which has been disclosed, in a family circle.

Entered into force in 1997, **Article L. 122-5-3° d) CPI** permits the reproductions, in whole or in part, of graphic or plastic works of art, for being included in the catalogue of a public auction in France. The copies can be made available to the public before the sale, only for describing the works of art offered for sale. This exception corresponds to and meets the standards set by **Article 5(3)(j) InfoSoc.**

3.1.2.10.12 THREE-STEP TEST

Entered into force in 2006, **Article L. 122-5 CPI** introduces the three-step-test to French copyright law, by adopting verbatim the language of **Article 5(5) InfoSoc**.

3.1.2.10.13 PUBLIC DOMAIN

3.1.2.10.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

French copyright law does not feature a dedicated provision drawing the borders of the public domain. Neither there are legal provision excluding certain works or other subject-matter from copyright protection.

3.1.2.10.13.2 PAYING PUBLIC DOMAIN SCHEMES

Entered into force in 1964, **Article 111-4-3 CPI** features a paying public domain scheme. A fee shall be paid to an organization designated by decree, if a work published in France or elsewhere is not granted copyright, due to the lack of international agreements between the country of origin and France regarding the reciprocal and national protection of authors. The moral rights of the author and the integrity of the work shall be respected.

3.1.2.10.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

The CPI features several provisions providing for special licensing schemes.

The extended collective licensing scheme introduced by **Article 8(1) CDSM** have been transposed into **Article L. 138-1 and Article L. 138-2 CPI.** These provisions entered into force in 2021, and they closely resemble their EU counterpart.

Article L. 138-1 CPI defines out-of-commerce works as works available in the collections of CHIs (publicly accessible libraries and museums, archives; film, audio-visual, and audio heritage institutions), which have not been made available to the public via commercial means and which have been first published or made available to the public at least thirty years before the intended use. A work is deemed out-of-commerce, only after a diligent search with good faith is conducted. Unless there is a CMO representing them, certain categories are exempted from this rule. These are the works, except for audio-visual works, which have been

published for the first time or broadcast for the first time in a non-EU Member State; audio-visual works whose producers have their registered office or their habitual residence in a non-EU Member State; works, except for audio-visual works, of non-EU Member State nationals whose place of first publication or broadcast cannot be determined despite a diligent search.

In this context, **Article L. 138-2 CPI transposes Article 8(1) CDSM** almost *verbatim***.** It provides CMOs, in accordance with its mandates from rightholders, to conclude a non-exclusive license for non-commercial purposes with a CHIs for the reproduction and communication to the public of an out-of-commerce work in the collections of the CHI. A license as such would be valid if the CMO sufficiently represents all the rightholders of the relevant type of works and the relevant rights that are subject to the license, and if all the rightholders are guaranteed equal treatment in relation to the terms of the license.

Entered into force in 1995, **Article L. 122-10 CPI** features a licensing scheme facilitating reprography.

According to the provision, the publication of a work implies the transfer of the reproduction right by reprography to a designated CMO. Other authorized entities may also enter into an agreement with users for the purposes of managing the reproduction right, for authorizing copies for the purposes of sale, rental, advertising, or promotion. If a CMO has not been designated by the author or his successors on the date of publication of the work, one of the authorized entities may be deemed to be assigned to represent the work. The transfer of the right to reproduction by reprography does not prevent the author or his successors to make copies for the purposes of sale, rental, advertising, or promotion. Unless otherwise agreed, this provision applies to all protected works regardless of the date of their publication.

Articles L. 133-1 - L. 133-4 CPI, which entered into force in 2003, offer a compulsory licensing scheme for public lending of works.

Article L. 133-1 CPI facilitates the deposit of copies of a book subject to a publishing contract to a publicly accessible library. The author has the right to remuneration due to the deposit of their work, except for the cases in which the book is deposited to a school library. According to **Article L. 133-2 CPI,** the remuneration can be collected by one or more CMOs.

Last, entered into force in 1985, **Articles L. 213-1 – L.213-2 CPI** envisions a compulsory licensing scheme regarding phonograms. According to this regulation, publication of a phonogram for commercial purposes enables the direct communication of the phonogram in a public place, except for its use in a show, and its simultaneous and complete broadcasting and cable distribution, as well as its reproduction strictly reserved for these purposes, carried out by or on behalf of audio-visual communication companies for their own programs. These uses of the phonograms, regardless of the place of fixation of these phonograms, entitle

performers and producers the right to remuneration. The remuneration is paid by the person who uses the phonogram to the performer and producer.[677]

3.1.2.10.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.10.15.1 FUNDAMENTAL (USERS') RIGHTS

It has been reported that the fundamental human right and liberties, particularly freedom of speech, is often invoked by defendants of copyright infringement cases concerning dispute on the incidental or parodic uses of copyright works.

The ***Utrillo*** case[678] constitutes a landmark case, dealing with the apparent conflict between authors' exclusive rights and users' freedom of expression. In this case, the defendant (the national public television channel France 2) invoked the public's right to information, which falls under the freedom of expression. ***Tribunal d'instance*** found that the defendant's reporting of an event, in which 12 of Maurice Utrillo's paintings are clearly visible, exhibited an informative character. Given the public's right to information, the Court decided that the defendant's incidental use of the works does not require the author's authorization. In the same case, ***Cour d'appel*** have employed the three criteria of Article 10(2) of the ECHR, in order to resolve this conflict of fundamental rights. These criteria consolidate that the restrictions to a fundamental right must be prescribed by law, pursue a legitimate goal, and be necessary in a democratic society, in proportion to the legitimate goal being pursued. Most of the Appeal Court's analysis has revolved around whether the restriction (author's right) was proportionate to the legitimate goal being pursued (i.e. the protection of authors' interests with regard to their works) and ruled that the defendant's use is not justified, given that the reporting of the event could have done without exhibition of the claimant's works. Even though ***Cour de cassation*** sided with the Appeal Court; this prompted the French legislature to transpose Article 5(3)(c) InfoSoc in Article L. 122-5-9° CPI.

The controversy surrounding the issue has been rekindled by ***Cour de cassation*** in the ***Klasen*** case.[679] The ruling of *Court de cassation* in the *Klasen* case has given the French Court the faculty to "dismiss" the author's exclusive rights in instances not expressly covered by the limitative list of exceptions set out in Article L. 122-5 CPI.

Last, procedural rights have also played a role, as in the ***Hadopi*** case.[680] This case concerns a government agency, blocking the Internet access of individuals who engaged in illegal downloading of protected works. ***Conseil constitutionnel*** held that Internet access is associated with the freedom of expression and communication under Article 11 of the *Déclaration des droits de l'homme et du citoyen de 1789*;[681] hence, it can only be suspended by a judge. The decision also held that blocking a person's Internet access on the presumption

[677] For related case law, see: Cass., 1ère civ., 14 juin 2005, *SPPF c/ Sté Multiradio* & *SNEP et SCPP c/ Spedidam.*
[678] Cass., 1ère civ., 13 novembre 2003, *Utrillo.*
[679] Cass., civ., Chambre civile 1, 15 mai 2015, 13-27.391.
[680] Décision n° 2009-580 DC du 10 juin 2009.
[681] Declaration of the Rights of Man and of the Citizen of 1789.

that he/she is the one engaging in infringing activities just by looking at that person's IP address is contrary to the benefit of doubt. The ***loi Hadopi II*** case answered those concerns, although the blocking of someone's Internet access was partially repealed.

3.1.2.10.15.2 CONSUMER PROTECTION

Article L. 331-10 CPI features a regulation requiring the information of end-users regarding the conditions of access and normal use of a work, a videogram, a program, a phonogram, or a press publication, as well as the limitations to the private copying exception by the implementation of a TPM. Incompliance with this rule has been acknowledged as the violation of Article L. 111-1 of the Code of Consumers,[682] and a fraud ("*tromperie*") under Article L. 213-3 of the Code of Consumers.[683]

3.1.2.10.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.10.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.11 GERMANY

The German Act of Copyright and Related Rights (hereinafter 'UrhG-G') of 1858, as last amended in 2021,[684] is very well-harmonised with the EU copyright acquis, given that all the essential E/Ls within the EU Directives, including the ones within the CDSM Directive, have been implemented into the UrhG-G. Indeed, each category of flexibility present in the EU law finds its correspondence in German law. Also, when the UrhG-G has not directly transposed a specific EU flexibility, it is always possible to find pre-existing provisions that partially or fully match the related EU rules, even though a handful of exceptions are more restrictive than the corresponding EU regime (e.g., freedom of panorama, private copy, and illustration for teaching and research). Yet, it is worth noting that the three-step-test, as regulated within Article 5(5) InfoSoc, has not been transposed to the German copyright law; thus, the German E/Ls implementing the InfoSoc Directive E&Ls tend to be more flexible from this aspect.

Additionally, the German judiciary has a growing tendency to recognize fundamental human rights and liberties as tools to adopt in terms of balancing the public and private interests.

[682] Loi n° 93-949 du 26 juillet 1993 relative au code de la consommation (Act n. 93-949 of 26 July 1993 related to the Code of Consumers).
[683] For related national case law, see: TGI Nanterre, 15 décembre 2006, *UFC Que choisir c/ Sté Sony France et Sté Sony UK.*
[684] Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273), zuletzt geändert durch Artikel 25 des Gesetzes vom 23. Juni 2021 (BGBl. I S. 1858).

3.1.2.11.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.11.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc has been implemented verbatim in **Section 44a UrhG-G,**[685] which entered into force in 2003. However, the German provision does not require compliance with the three-step-test, hence it provides for a more flexible exception.

The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.**

3.1.2.11.1.2 EPHEMERAL RECORDING

Ephemeral recording of works is covered by **Section 55 UrhG-G,** which entered into force in 1965 and thus precedes the adoption of **Article 5(2)(d) InfoSoc**, but it is still in line with the EU rule. The provision allows a broadcasting organization, which is already authorized to broadcast the work, to transfer it, by its own means, to video or audio recording mediums in order to use them for the purpose of broadcasting them via its transmitters or relay stations. Recordings as such shall be destroyed within one month after the work is first broadcasted. However, **Section 55(2) UrhG-G** permits the preservation of such recordings in an official archive if they have an exceptional documentary value, while the authors shall be immediately notified about such inclusion. Once again, this provision does not require compliance with the three-step-test.

The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.** This can be considered as the existence of rules corresponding to **Article 10(1)(c) Rental.**

3.1.2.11.1.3 INCIDENTAL INCLUSION

Incidental inclusion of works is regulated by **Section 57 UrhG-G,**[686] which entered into force in 1965 and thus precedes the adoption of **Article 5(3)(i) InfoSoc,** but it is still mostly in line with the EU rule, except for leaving the objects of related rights out of its scope. Indeed, the provision permits the reproduction, distribution, and communication to the public of works if they are to be regarded as incidental to the actual subject-matter being reproduced, distributed, or communicated to the public. Yet, compliance with the three-step-test is not required.

[685] For related case law, see: BGH, 29.4.2010 - I ZR 69/08 (OLG Jena) Vorschaubilder; BGH, 11.04.2013, I ZR 151/11 - Masterkopie.
[686] For related case law, see: BGH, 17.11.2014, I ZR 177/13 – Möbelkatalog (GRUR 2015, 667).

The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.**

3.1.2.11.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

While no general rule on lawful uses is present in German copyright law, **Section 69d paragraphs (1) to (3) UrhG-G**[687] implement **Article 5 Software,** by adopting its language almost verbatim and by following the structure therein. In fact, the mere difference of the German provision from the EU rule is the exclusion of distribution from the scope of permitted acts.

To better draw the boundaries of the provision, in **BGH, 4.10.1990, I ZR 139/89 – Betriebssystem,** the German Supreme Court has ruled: "(…) the pure use is – in contrast to the technical rights of use – not covered by copyright (…) This applies to the use of a computer program as well as to the reading of a book, the listening to a record, the viewing of a work of art or a video film. It will therefore be important to ask whether the program input and processing that takes place in the course of using the program makes it necessary to reproduce it."

Article 6 Software was implemented in **Section 69e UrhG-G**, once again, verbatim and by following the structure therein, including the requirement of compliance with the three-step-test.

While **Article 6(1) Database** was implemented in **Section 55a UrhG-G**, there is no evidence to suggest that **Article 8 Database** was transposed to UrhG-G.

Section 95(b)(1) UrhG-G implemented **Article 6(4) InfoSoc** in 2003 to enable lawful users to access and use works protected by TPMs. The provision requires rightholders that have imposed TPMs on their work to make sure that lawful users may rightfully enjoy the exceptions of TDM, use in judicial and administrative proceedings, for public security, and for public entities, use for people with disabilities, private and other personal uses, ephemeral recordings by broadcasting organizations, illustration for teaching and scientific research, use of school broadcasts, and preservation of cultural heritage.

Last, in response to the CDSM Directive and to implement **Article 7 CDSM**, **Section 95b(3) of UrhG-G**, as amended in 2021, applies the same exception to use of works and other subject-matter that have been made available to the public, in order to reinforce the exceptions for TDM, persons with disabilities, digital and cross-border teaching activities, preservation of cultural heritage, and other permitted uses by CHIs.

[687] For related case law, see: BGH, 20.01.1994, I ZR 267/91 – Holzhandelsprogramm.

3.1.2.11.1.5 FREEDOM OF PANORAMA

Section 59 UrhG-G implemented **Article 5(3)(h) InfoSoc** on freedom of panorama in 2000.[688] It permits the reproduction, distribution and making available to the public of works located permanently in public spaces. Compared to the EU rule, the German provision, on the one hand, is slightly more restrictive, for it excludes architectural works apart from the façade of a building **(Section 59(2) UrhG-G)**. On the other hand, this provision does not seek for compliance with the three-step-test; hence, it provides for a certain level of flexibility from this aspect.

The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.**

3.1.2.11.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.11.2.1 REPROGRAPHY

While there is no reprography exception corresponding to **Article 5(2)(a) InfoSoc** in the German Copyright Act, the private copying exception **(Section 6 UrhG-G)**, the exception of illustration for teaching and research **(Section 12 UrhG-G)** and the exception for preservation by CHIs **(Section 16 UrhG-G** enable reprography in such specific circumstances.

It is also possible referring to **Section 53(2) UrhG-G** herein, as this provision allows for the reproduction of a single of copy of a work, or having a single copy made, for private use and for the inclusion of such a copy in personal archives, as long as the original work used for copying is a lawfully acquired or legal work. This provision, as well, does not need to comply with the three-step-test.

3.1.2.11.2.2 PRIVATE COPY

There are several provisions within UrhG-G which provide for E/Ls for private copying of databases and works.

Whereas **Article 6(2)(a) Database** does not find correspondence in UrhG-G; **Section 87c(1)(1) UrhG-G** adopts the text of **Article 9(a) Database** verbatim.

The private copying exception is included in **Section 53 UrhG-G.**[689] This provision has entered into force in 1965, and later amended in 1985, 1998, and finally in 2003, following the adoption of **Article 5(2)(b) InfoSoc**. According to **Section 53(1) UrhG-G**, natural persons

[688] For related case law, see: BGH, 4. 5. 2000 – I ZR 256/97 – Parfumflakon; BGH 8. 5. 2002 – I ZR 98/00 – Stadtbahnfahrzeug; BGH 17. 12. 2010, V ZR 45/10 – Preußische Gärten und Parkanlagen; BGH, Urt. v 27.4.2017, I ZR 247/15 – AIDA Kussmund; BGH, 5. 6. 2003, I ZR 192/00 – Hundertwasser-Haus; BGH, 24.1.2002, I ZR 102/99 – Verhüllter Reichstag.

[689] For related case law, see: BGH, 19.11.2015 – I ZR 151/13 (Gesamtvertrag Unterhaltungselektronik); BGH, 21.4.2016 – I ZR 198/13 – Verlegeranteil (GRUR 2016, 596) and KG (Kammergericht Berlin), 14.11.2016 – 24 U 96/14; BGH, 5.3.2020 – I ZR 32/19 – Internet-Radiorecorder.

are permitted to make single copies of a work for private use on any medium. Reproductions shall not directly nor indirectly serve commercial purposes, nor shall they be derived from unlawful sources. The provision also allows reproduction to be carried out by third parties on behalf of the person authorized to make copies, but only if no payment is received in return.

Section 53(2) UrhG-G provides additional specifications with regard to certain categories of works whose reproduction is allowed for specific purposes. This is the case for works to be included in a personal archive, which is permitted insofar as the reproduction is necessary for this purpose and the personal copy of the work is used as the model for the copy. The provision also refers to copies of works broadcasted, if made for one's own personal information concerning current affairs, and to copies of small parts of a published work or individual articles from newspapers or periodicals, or if the work has been out of print for at least two years. Such uses are allowed only if the reproduction is produced on paper or any other similar medium, by photocopying or other similar photographic technic, or if exclusively analogue use takes place.

Section 53(4) UrhG-G permits, for similar purposes, the reproduction of sheet music, and books or periodicals in their entirety only if by means of manual transcription and for the inclusion in a personal archive, the law requires the consent of rightholders, while for personal uses, the exception applies only if the work has been out of print for at least two years.

Section 53(5) excludes from the scope of the provision databases that are individually accessible by electronic means. Copies so produced cannot be distributed nor communicated to the public **(Section 53(6) UrhG-G),** while lawfully produced copies of newspapers and out-of-commerce works may be lent. The same applies to those works whose damaged or missing parts have not been replaced by means of copies.

To conclude, **Section 53(7) UrhG-G** rules that the recording of public lectures, productions, or performances of a work on video or audio recording mediums, the realization of plans and drafts of artistic works and the reconstruction of architectural works always require the consent of the rightholder.

With its specifications on subject matter and allowed purposes, **Section 53 of UrhG-G** may at the same time result in a more flexible and more restrictive provision compared to the umbrella clause introduced by **Article 5(2)(b) InfoSoc**, depending on the strict or extensive interpretation provided by national courts. Yet, this provision does not require compliance with the three-step-test.

The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.** Thus, this can be considered as an indirect implementation of **Article 10(1)(a) Rental**.

3.1.2.11.3 QUOTATION

The quotation exception is featured in **Section 51 UrhG-G,**[690] as amended in 2007 in response to the adoption of **Article 5(3)(d) InfoSoc**, by closely following its EU counterpart. However, the German exception happens to be slightly more flexible, given that it requires compliance neither with fair practices nor with the three-step-test.

The provision allows the reproduction, distribution, and communication to the public of a published work for the purpose of quotation, only to the extent justified by the particular purpose. As an exemplification, **Section 51 UrhG** specifies that quotation is permissible in particular where excerpts are included in an independent scientific work for the purpose of explaining its contents or are quoted in an independent literary work, or where passages from a musical work are quoted in another independent musical work. Apart from the latter case, the use of a work for quotation includes the use of an illustration or other reproduction of the work cited, even if protected by copyright or a related right.

The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.**

Additionally, **Article 17(7) CDSM** has been implemented in **Section 5 of the German Act on Copyright Liability of Online Content Sharing Service Providers (UrhDaG)** in 2021.[691] According to this provision, the reproduction of works and parts of works protected by copyright by the user of an online content-sharing service provider is permitted for quotation, in accordance with **Section 51 UrhG-G**, and for caricatures, parodies and pastiches under **Section 51a UrhG-G**. The service provider shall in any case correspond to rightholders an appropriate remuneration. This claim is not waivable and can only be assigned in advance to a CMO. While this provision does not encompass the objects of related rights within its scope, it does not require compliance with the three-step-test.

3.1.2.11.4 PARODY, CARICATURE, PASTICHE

Article 5(3)(k) InfoSoc was implemented in **Section 51a UrhG-G** in 2021, by adopting almost verbatim the EU exception. According to this rule, it is permitted to reproduce, distribute and communicate to the public a published work for the purpose of caricature, parody and pastiche. The same provision applies the same exception to the derivates of the original work, even if such derivatives are also protected by copyright or related rights; while it does not seek for compliance with the three-step-test. The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one

[690] For related case law, see: BGH, 1.6.2017 – I ZR 139/15 – Afghanistan Papiere and BGH, 30.04.2020 - I ZR 139/15 – Afghanistan Papiere II; BGH, 27.7.2017 – I ZR 228/15 – Reformistischer Aufbruch and BGH, 30.04.2020 – I ZR 228/15 – Reformistischer Aufbruch II; BGH, 30.04.2020 - I ZR 115/16 – Metall auf Metall IV; BGH, 17.12.2015 – I ZR 69/14 – Exklusivinterview; BGH, 30.11.2011 – I ZR 212/10 – Blühende Landschaften.
[691] See: Urheberrechts-Diensteanbieter-Gesetz vom 31. Mai 2021 (BGBl. I S. 1204, 1215).

enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.**

Caricature, parody, and pastiche have been also covered by **Section 23 UrhG-G** on adaptation, and **Section 51 UrhG-G** on quotation. **Section 23(1) UrhG-G** allows the publication and exploitation of adaptations and other transformations of a work, in particular of a melody, to be published or exploited, but only with the author's consent.

As to the implementation of **Article 17(7) CDSM**, see above (quotation).

3.1.2.11.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.11.5.1 PRIVATE STUDY

Under German copyright law, the private use exception **(Section 53 UrhG-G)** may be understood to cover also uses for the purpose of private study.

Also, **Section 60e(4) UrhG-G** implemented in 2018 the exception provided for private study by **Article 5(3)(n) InfoSoc**, by closely following yet introducing more specificities to the text of its EU counterpart. The provision holds that libraries are allowed to make available to their patrons works belonging to their collections on terminals located at their premises, for personal research or private study purposes. They may enable users, for non-commercial purposes, to reproduce up to 10 per cent of a work per session and to make reproductions of isolated illustrations, articles from professional or scientific journals, other small-scale works and out-of-commerce works. By specifying the possibility to reproduce works consulted on terminals, the German provisions is apparently more flexible than its EU counterpart, also given that it is not subordinated to the three-step-test. It shall be noted, however, that this clarification compensates, to a certain extent, the absence in the UrhG-G of a specific reprography exception.

The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.**

3.1.2.11.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

German copyright law contains several provisions enabling the use of databases and works for illustration in teaching and scientific research.

Whereas **Article 6(2)(b) Database** has not been transposed to UrhG; **Section 87c(1)(3) UrhG-G**, which permits the use of databases by educational establishments for the purpose of illustration of teaching, implements **Article 9(b) Database** by closely following the text and structure of its EU counterpart. Nevertheless, the German exception adopts certain percentages restricting the amount permitted to be reproduced under this provision.

Entered into force in 2018, following the adoption of **Article 5(3)(a) InfoSoc**, **Section 60a of UrhG-**[692] identifies educational establishments, which include early childhood educational establishments, schools, universities, vocational schools, and other training and educational institutions as its beneficiaries. It permits the reproduction, distribution, and making available of up to 15 per cent of works that have been made available to the public on a non-commercial basis, only for the purpose of illustration in teaching, including presentations in class, exams and presentations of the results held by teachers, examiners and third parties. It is possible to use in their entirety illustration, single articles from professional and scientific journals, other small works and out-of-commerce works **(Section 60a(2) UrhG-G).**

Section 60a(3) UrhG-G excludes from the scope of the exception the reproduction of a work by means of video and audio recording and the communication to the public of a work whilst it is being publicly recited, performed or presented; the reproduction, distribution, and communication to the public of a work that was originally intended for teaching use; and the reproduction of graphic recordings of musical works, if it is not necessary to make the available to the public.

Section 60b(1) of UrhG-G enables the producers of media collections to reproduce, distribute, or make available to the public up to 10 per cent of a published work for such collections, only for teaching purposes. Collections should bring together a significant number of authors, and should be exclusively suitable, intended and labelled for the purpose of illustration in teaching in educational establishments, on a non-commercial basis **(Section 60b(3) UrhG-G)**. Along the same lines, **Section 60c(1) of UrhG-G** enables the reproduction, distribution, and making available to the public of up to 15 per cent of a work, only for the purpose of non-commercial scientific research and for a specifically limited circle of persons, and for third parties insofar as this serves for the evaluation of the quality of the research. **Section 60c(2) UrhG-G,** instead, allows the reproduction of up to 75 per cent of a work for personal scientific research, reiterating the possibility to copy specific works in their entirety **(Section 60c(3) UrhG-G)**, yet with the exclusion of the audio and video recording of public recitation, performance, or presentation of a work, and its subsequent making available to the public.

As for other flexibilities, the specifications and distinctions between different works and purposes may result at the same time in more rigidity and more flexibility of the German system compared to the EU acquis, depending on the approach to the interpretation of exceptions adopted by national courts.

As a last remark, it is worth noting that the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.**

[692] For related case law, see: BGH, 10.01.2019 – I ZR 267/15 – Cordoba II.

3.1.2.11.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

The exception for the digital and cross-border teaching activities enshrined in **Article 5 CDSM** has been implemented in 2021 in **Section 60a(3a) and Section 60b(2) UrhG-G,** by adopting the language and the structure of its EU correspondent verbatim.

Section 60a(3a)UrhG-G recalls the country of origin principle introduced by **Article 5(3) CDSM.**

Compared to the EU text, **Section 60b(2) UrhG-G** extends the application of the rule enshrined in **Section 60a(3)** to publishers of teaching and instructional collections and to their reproduction, distribution, and making available to the public of up to 10 per cent of a published work within such collections. Additionally, **Section 69d(5)** permits the use of computer programs for this purpose, in part or in entirety, as long as digital uses take place under the responsibility of an educational establishment on its premises, at other locations or in a secure electronic environment.

While this provision already refers to works protected by copyright and objects of related rights; the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG** as well as to databases protected by sui generis rights by **Section 87c UrhG**.

Just like the other E&Ls originated from the InfoSoc Directive and the CDSM Directive, these provisions are not subordinated to the three-step-test either.

3.1.2.11.5.4 TEXT AND DATA MINING

UrhG-G featured a copyright exception, within **Section 60d**, for TDM purposes even before the adoption of the CDSM Directive. Introduced in 2018, this exception corresponds to **Article 3 CDSM**. This provision was introduced in German copyright law in 2018, to provide for a copyright flexibility for TDM for the purpose of scientific research. Whereas **Section 60d(1)** permits the reproduction of works for TDM for the aforementioned purposes, **Section 60d(2)** introduces certain other subjective criteria as follows pursuing non-commercial purposes, reinvesting all profits in scientific research, or if they are active in the public interest within the framework of a state-recognised mandate. It shall be highlighted that **Section 69d(6)** carves out computer programs from the scope of this regulation. Yet, the same provision excludes from the scope of beneficiaries the research organisations cooperating with a private enterprise which has a determining influence on the research organisation and preferential access to the results of the scientific research.

Section 60d(3) UrhG-G identifies the publicly accessible libraries and museums, as well as archives and institutions in the field of film or audio heritage; and individual researchers, provided they do not pursue commercial purposes, as the beneficiaries of the exception provided herein. **Section 60d(4) UrhG-G** indicates that beneficiaries who have no commercial purposes are allowed also to make the reproductions as such available to the following groups

of people, such as a specifically delimited group of persons for their joint scientific research, or individual third parties for the purpose of reviewing the quality of scientific research. As soon as the joint scientific research or the review of the quality of scientific research has been completed, the making available to the public shall be terminated.

Section 60d(5) UrhG-G allows the rightholders retain reproductions with appropriate safeguards against unauthorised use for as long as they are necessary for the purposes of scientific research or the review of scientific knowledge. Likewise, **Section 60d(6) UrhG-G** permits the rightholders to take necessary measures to prevent the security and integrity of their networks and databases from being compromised by reproductions. **Section 60h UrhG-G** provides for a detailed remuneration scheme for the uses that fall under this category.

As to **Article 4 CDSM**, this was implemented in **Section 44b UrhG-G,** by following the standards set by its EU counterpart. Entered into force in 2021, **Section 44b(1) UrhG-G** defines TDM, by adopting verbatim the definition provided by **Article 2(2) CDSM.**

Section 44b(2) of UrhG-G permits the reproduction of lawfully accessible works for TDM purposes, including computer programs (**Section 69d(4) UrhG-G)**. Yet, the same provision requires the deletion of such reproductions if they are no longer required for TDM purposes. Last but not least, it is clarified that the use of works for TDM purposes are allowed only if it has not been reserved by the rightholder.

While these provisions already refer to works protected by copyright and objects of related rights; the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG** as well as to databases protected by sui generis rights by **Section 87c UrhG**.

These copyright exceptions provided for the TDM purposes within these provisions correspond to that within the Articles 3-4 of the CDSM Directive, even though Section 60d provides for a slightly restrictive regulation compared to Article 3 CDSM, due to the additional criteria introduced to define the purpose of use of works and other subject-matter for TDM. Yet, these provisions, per contra **Article 7 CDSM**, does not require compliance with the three-step-test.

3.1.2.11.6 USES FOR INFORMATORY PURPOSES

3.1.2.11.6.1 PRESS REVIEW AND NEWS REPORTING

Sections 49 and 50 UrhG-G implemented, respectively in 2008 and 2003, the exception for press review and reporting on current events introduced with **Article 5(3)(c) InfoSoc**, without necessarily subordinating this exception to the three-step-test.

Section 49(1) UrhG-G allows the reproduction and distribution in newspapers and periodicals of broadcast commentaries, article and related illustrations taken from other newspapers and periodicals devoted solely to current affairs. Communication to the public is

allowed if such materials concern current political, economic, or religious issues and rights were not reserved.[693]

The exception requires the payment of a fair remuneration to rightholders, to be collected only by CMOs, unless the reproduction, distribution, and communication to the public concern only short extracts of several commentaries or articles in the form of an overview. **Section 49(2) UrhG-G permits** the reproduction, distribution, and communication to the public of miscellaneous news items of a factual nature and news of the day which has been published by the press or broadcasted. The exception leaves exclusive rights otherwise unaffected.

Section 50 of UrhG-G permits the reproduction, distribution, and communication to the public of works for the purposes of reporting on current events by broadcasting in newspapers, periodicals, and the like, to the extent justified by the reporting purpose.

While this provision already refers to works protected by copyright and objects of related rights; the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG** as well as to databases protected by sui generis rights by **Section 87c UrhG**.

3.1.2.11.6.2 USES OF PUBLIC SPEECHES AND LECTURES

The exception for the use of public speeches and lectures within **Article 5(3)(f) InfoSoc** has been implemented almost verbatim by **Section 48 UrhG-G** in 2003. The provision allows the reproduction, distribution, and communication to the public of speeches related to current affairs in newspapers, periodicals and the like, when they were made at public gatherings or published otherwise, and of speeches delivered during public assemblies organized by state, local, or religious authorities.

Section 48(2) UrhG-G excludes the application of the exception to speeches included in collections covering speeches by the same author. Furthermore, the provision does not extend to public lectures, while at least it does not seek for compliance with the three-step-test.

The scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG.**

[693] For related case law, see: BGH, 30. April 2020 – I ZR 139/15 – Afghanistan Papiere II; BGH, 30. April 2020 - I ZR 228/15 – Reformistischer Aufbruch II; BGH, 27. 3. 2012 – KZR 108/10 – Elektronischer Programmführer; BGH, 7. 1. 2005 – I ZR 119/02 – WirtschaftsWoche (regarding the definition of 'Newspapers'); BGH, 11. 7. 2002 – I ZR 255/00 – Elektronischer Pressespiegel.

3.1.2.11.7 USES BY PUBLIC AUTHORITIES

3.1.2.11.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Although **Article 6(2)(c) Database** does not find correspondence in UrhG-G, **Section 87c(2) UrhG-G** adopts the exception provided in **Article 9(c) Database** by very closely following the EU provision. Nevertheless, the German exception requires the indication of the source for such types of uses.

Section 45 UrhG-G provides an exception for uses in administrative and judicial proceeding and for public security. It entered into force in 1965, thus preceding the adoption of **Article 5(3)(e) InfoSoc**, but it is still in line with its EU counterpart. The provision allows the reproduction of works for use in proceedings before a court, an arbitration tribunal, or other authorities; however, the objects of related rights are not included within this scope. Courts and other public authorities are also permitted to make copies of portraits or to have these reproduced for similar purposes. The exception also covers the distribution, exhibition in public and communication to the public of the works. Similar to other InfoSoc-derived E&Ls, this German provision does not require compliance with the three-step-test.

While this provision already refers to works protected by copyright; the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG**.

3.1.2.11.7.2 OTHER USES BY PUBLIC AUTHORITIES

There is no provision in UrhG-G that strictly corresponds to **Article 5(3)(g) InfoSoc.** However, **Section 46 UrhG-G** on collections for religious uses may be classified under this category. Entered into force in 2003 and later amended in 2018, the provision allows the reproduction, distribution, and making available to the public of limited excerpts of published works, of small-scale literary works and of musical and artistic works to incorporate them into a collection which combines the works of several authors, and it is intended exclusively for use during religious ceremonies. The collection should be accompanied by an indication clarifying its purpose. The exception requires the payment of a fair remuneration to rightholders.

Section 52(2) UrhG-G allows the communication to the public of a published work in a religious service or at a religious celebration organised by a church or religious community, also subordinated to the payment of fair remuneration, while **Section 52(3) UrhG-G** seeks for the consent of the rightholder for the public performance, making available to the public and broadcasting of a work, and the public screenings of a cinematographic work.

Neither of the provision above subordinate the exceptions therein to the three-step-test. Also, while these provisions already refer to works protected by copyright; the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including

the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG**.

3.1.2.11.8 SOCIALLY ORIENTED USES

German copyright law covers socially oriented uses in **Section 52(1) of UrhG-G,** entered into force in 2000 and later amended in 2018. The provision aligns in large part, with some specifications, to **Article 5(2)(e) InfoSoc.** The provision permits the communication to the public of a published work in an event, provided that it is for non-commercial purposes and participants are admitted free of charge. In the case of a lecture or performance of a work, it is required that none of the performers is remunerated. The exception requires the payment of a fair compensation to rightholders, unless the event is organized by the youth welfare service, the social welfare service, the geriatric and welfare service, and the prisoners' welfare service and it is offered only to a specific, limited group of persons for social or educational purposes. Compliance with the three-step-test is not required.

While this provision already refers to works protected by copyright; the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG,** to phonograms by **Section 85(4) UrhG,** and to broadcasts by **Section 87(4) UrhG.**

3.1.2.11.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.11.9.1 PUBLIC LENDING

Public lending is regulated by **Section 27(2**) **UrhG-G**, which was adopted in 1995 and by closely following the regulation within **Article 6 Rental.** The provision allows publicly accessible institution to lend their collections of literary works as well as collections of video or audio recordings, including the copies of such works and other subject-matter therein, for non-commercial purposes, for limited time, and upon the payment of fair remuneration to rightholders.

3.1.2.11.9.2 PRESERVATION OF CULTURAL HERITAGE

Entered into force in 2018 and later amended in 2021, in order to implement **Article 6 CDSM**, **Sections 60e(1) and 60f(1) UrhG-G** allow publicly accessible libraries, archives, audio and film heritage institutions, publicly accessible museums, educational establishment to reproduce (or have reproduced) a work from their collections or exhibitions, for the purpose of making available, indexing, cataloguing, preservation, and restoration of such works. The exception covers also subsequent reproductions and technically required alterations. Publicly accessible libraries pursuing a commercial purpose are also allowed to perform the same acts, but only for the purpose of the preservation of cultural heritage **(Sections 60e(6) and 60f(3) UrhG-G).**

The German legislature has transposed **Article 6 CDSM** quite verbatim and decided to require for this exception the payment of a fair remuneration to rightholders, while not seeking for compliance with the three-step-test.

While these provisions already refer to works protected by copyright; the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG**.

3.1.2.11.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

On top of the flexibilities already mentioned above, see also **Section 60b UrhG-G** on collections for teaching and **Section 46(1) UrhG-G** on collections for religious use.

In addition, **Section 47(1) UrhG-G,** which entered into force in 1966 and was later amended in 1985, permits schools and other training institutions to reproduce works on audio and video recordings as parts of a school broadcast and for teaching purposes only. The same rule applies to youth welfare institutions and state image archives, or comparable institutions under public ownership. Copies should be deleted at the latest at the end of the academic year following the transmission of the school broadcast unless the author has been paid an equitable remuneration.

None of these provisions require compliance with the three-step-test, as opposed to the regulation within the InfoSoc Directive.

3.1.2.11.9.4 ORPHAN WORKS

The Orphan Works Directive have been implemented in **Section 61 and Section 61c UrhG-G in 2014,** by closely following the regulations within the Directive and often adopting them verbatim.

Section 61(1) UrhG-G permits the reproduction and making available to the public of orphan works (**Article 6(1) OWD**), while **Section 61(2) of UrhG-G** initiates with the definition of orphan works, which adopts verbatim the definition provided by the Orphan Works Directive in **Article 1(2).** S**ection 61(3)** adopts verbatim **Article 1(3) OWD**, while **Article 1(4) OWD** is transposed verbatim to **Section 61(4) UrhG-G,** which deals with unpublished works or broadcasts.

Once again, adopting almost verbatim the Directive, **Section 61(5) UrhG-G** holds that the reproduction and the making available to the public by the beneficiary institutions shall be permissible only if the institutions are acting on non-commercial purposes, if they preserve and restore holdings and make them accessible in their collections, if this serves cultural and educational purposes. The institutions are allowed to charge a fee for providing access to the orphan works which covers the costs of the digitalization and the making available to the public.

Section 61a UrhG-G adopts the rules set for the diligent search by **Article 3 OWD**, and **Annex to Section 61a UrhG-G** provides for a list of sources for this purpose. **Section 61b UrhG-G** provides a regulation for the termination of the orphan works status and its consequences,

as done by **Article 5 OWD**. In a similar vein, **Section 61c of UrhG-G** provides for an exception enabling the use of orphan works by public broadcasting organizations.

3.1.2.11.9.5 OUT-OF-COMMERCE WORKS

Article 8(2) CDSM has been implemented in 2021 in **Sections 52b of the German Act on Collecting Societies (VGG)**[694] and **61d UrhG-G**.

Section 52b VGG defines orphan works, or, as referred to in the German CA, the 'unavailable works'. According to this provision, unavailable works comprise of works not offered to the general public in a complete version by any customary means of distribution; works for which the cultural heritage institution has attempted, with reasonable effort but without success, to identify offers in a timely manner before informing the public; and works published in books, journals, newspapers, magazines or other published writings, only if they were also last published at least 30 years prior to the commencement of the information of the public as such.

Section 61d(1) VGG, by closely following the regulation within **Article 8(2) CDSM**, holds that the above-mentioned works available in the collections of cultural heritage institutions may be reproduced by CHIs, or these institutions may have these unavailable works reproduced and make them available to the public. To fall under this flexibility, such acts of preproduction shall be conducted for non-commercial purposes. This shall only apply if there is no collecting society which administers these rights for the respective types of works and is representative in this respect. Last, the making available to the public shall only be permitted on non-commercial Internet sites. The remaining paragraphs of **Section 61d** regulate the procedure and the documentation obligations concerning the use of out-of-commerce works, by adopting the system introduced by the Directive.

3.1.2.11.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The exception for use of works by persons with disabilities is enshrined in **Sections 45a-45c of UrhG-G**. This provision has **entered into force in 2019**, and it corresponds to the copyright flexibility envisioned in **Article 5(3)(b) InfoSoc as well as to the Marrakesh Directive.** The provisions very closely follow the text of the Marrakesh Directive, and definitely correspond to the InfoSoc Directive.

Section 45a UrhG-G permits the reproduction of a work for non-commercial purposes and to distribute such copy exclusively to persons with disability, by anyone, if such reproduction is necessary to facilitate access. Literary works and graphic recordings of musical works are excluded. And except for the reproduction of individual copies, the author of the work is entitled to remuneration.

Section 45b(1) UrhG-G is addressed to persons with disability. It permits these direct beneficiaries to reproduce, for their personal use, published literary works which are available

[694] Verwertungsgesellschaftengesetz vom 24. Mai 2016 (BGBl. I S. 1190), das zuletzt durch Artikel 2 des Gesetzes vom 31. Mai 2021 (BGBl. I S. 1204) geändert worden ist.

in text or audio format as well as graphic recordings of musical works, or may have them reproduced, in order that they may be converted into an accessible format. This authorisation also encompasses illustrations of all kinds which are contained within literary or musical works. Copies may only be produced of works to which persons with a visual impairment or reading disability have lawful access. **Section 45(2) UrhG-G** defines persons with disabilities, by closely following the language of the Marrakesh Directive.

Section 45c UrhG-G focuses on authorized entities. While Section **45c(3) UrhG-G** identifies and **Section 45c(5) UrhG-G** regulates the documentation obligations of these entities; Section 45c(1) permits these entities to reproduce published literary works which are available in text or audio format as well as graphic recordings of musical works for producing an accessible format for the exclusive use of persons with disability. **Section 45c(2) UrhG-G** also permits authorised entities to lend out and disseminate such copies to persons with a visual impairment or reading disability or to other authorised entities and may use them to make the works available to the public or for other communication to the public.

Section 45d UrhG-G prevents the contractual overriding of this regulation.

As a last remark, it is worth indicating that the scope of the exceptions and limitations encompassed within Division 6 (Sections 44a-63a UrhG), including the one enshrined in this provision, are extended to performances by **Section 83 UrhG**, to phonograms by **Section 85(4) UrhG**, and to broadcasts by **Section 87(4) UrhG**.

3.1.2.11.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

The UrhG-G holds two other exceptions within **Sections 56 and 58**, which respectively adopt **Article 5(3)(l)** and **Article 5(3)(j) InfoSoc.** Both provisions provide for exceptions that are slightly narrower than their EU counterparts. While **Section 56 UrhG-G** restricts its beneficiaries to business entities and contours the scope of its subject-matter only with audio- and video-recordings; **Section 58 UrhG-G** is only addressed to the organisers of public auctions and exhibitions. Yet, neither of these provisions require compliance with the three-step-test.

3.1.2.11.12 THREE-STEP TEST

The three-step-test enshrined in **Article 5(5) InfoSoc** has not been implemented in German copyright law.

3.1.2.11.13 PUBLIC DOMAIN

3.1.2.11.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Under Section **5 UrhG-G**, the German copyright law provides for a legal regulation concerning the works and other subject-matter that have been allocated to the public domain. This provision has first entered into force in 1966, and later amended in 2003. It identifies several categories which are excluded from the scope of copyright protection, which

are acts, statutory instruments, official decrees, and official notices, as well as decisions and official head notes, as well as other official texts published in the official interest for general information purposes.

Yet, it has been clarified within **Section 5(3) UrhG-G** that copyright in respect of private normative works shall not be affected by this rule if acts, statutory instruments, decrees, or official notices refer to such works without reproducing their wording. Under these circumstances, the author is required to grant every publisher, on equitable conditions, a right of reproduction and distribution. Where a third party is the owner of the exclusive right of reproduction and distribution, he shall be obliged to grant the right of use of works as such.

3.1.2.11.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.11.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Two provisions in the UrhG-G may be qualified as enshrining *quasi*-compulsory licensing schemes for the use of certain works.

Entered into force in 1966 and later amended in 2003, **Section 5 UrhG-G** holds that copyright subsisting in private regulatory sources shall not be affected if acts, statutory instruments, decrees or official notices, all of which are allocated to the public domain by law (**Section 5 of UrhG-G**), refer to such works without reproducing their wording. Under these circumstances, the author or any other successor in title is required to grant every publisher, on equitable conditions, a right of reproduction and distribution.

Entered into force in 2003, **Section 42a UrhG-G** introduces a compulsory licensing scheme for audio recordings. **Section 42a(1) UrhG-G** holds that if a producer has been granted a right transfer a musical work into audio recordings and to reproduce and distribute the latter for commercial purposes, the author shall be required upon to grant the same rights on reasonable conditions to any other producers whose main establishment is located within the territory to which UrhG-G applies. The provision applies also to literary works employed as texts of a musical work, if their author has granted to a producer the right to record it in conjunction with the musical work and to reproduce and distribute such recordings.

Section 42a UrhG-G does not apply when such rights are administered by CMOs or if the author has disowned the work and revoked any existing transfer of exclusive rights. In addition, authors cannot be compelled to authorize the use of their works in the production of a cinematographic work.

Section 42a(1) UrhG-G applies also to producers established outside the territory of the UrhG-G only upon condition of material reciprocity, that is if a similar right is granted by its State of establishment to producers established in the territory where the UrhG-G applies, as evidenced by a notification by the Federal Ministry of Justice and Consumer Protection published in the Federal Law Gazette.

3.1.2.11.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.11.15.1 FUNDAMENTAL (USERS') RIGHTS

Fundamental rights have played a significant role in the copyright balance before national courts. In most cases lower courts and the Federal Supreme Court (BGH) have tried to strike a balance between copyright and conflicting interests and rights by interpretating the UrhG-G without referring directly to fundamental rights but considering them implicitly.

The famous "Schoolbook" decision of the **German Constitutional Court (1 BvR 765/66, 7 July 1971)** outlines this approach very well. It states that:

> *"a) Copyright as a right of exploitation constitutes 'property' within the meaning of Article 14 (1), sent. 1, GG.*
>
> *b) Article 14 (1), sent. 1, GG in principle commands the attribution of the economic value of a copyrighted work to the author. It does not, however, provide a constitutional safeguard for any and all kinds of exploitation. It is for the legislature to establish (…) appropriate standards which guarantee an exploitation of copyright that is commensurate with its nature and social importance (Article 14 (1), sent. 2, GG).*
>
> *c) The general public interest in a free access to cultural products justifies the incorporation, without the author's consent, of protected works into collections which are intended for religious, school, or instructional use, but not that the author must make his work available free of charge (Section 46 URG)."*

Germany represents the country where the horizontal effects of fundamental rights (Drittwirkung) has led to the most interesting results in the judicial evolution of the copyright balance. Analysing the very rich German case law on the matter would deserve a separate analysis and go beyond the scope of this report. Suffice it to note that the three landmark decisions setting the boundaries of the effects of fundamental rights on EU copyright law and its exceptions and limitations – *Funke Medien, Pelham, Spiegel Online* – which stemmed from three referrals from the German Federal Constitutional Courts, which built on long judicial sagas, *Metall auf Metall* (BVerfG, 1 BvR 1585/13 of 31 May 2016) being the most eloquent example.

3.1.2.11.15.2 CONSUMER PROTECTION

None reported.

3.1.2.11.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.11.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.12 GREECE

The Law 2121/1993 on Copyright, Related Rights and Cultural Matters (hereinafter 'GCA') of 1993, as last amended in 2021,[695] features the majority of copyright flexibilities introduced by the EU Directives, except for the CDSM exceptions which are still to be transposed by the Greek legislature.

However, there are still some EU exceptions that have not been directly implemented in the GCA, such as the exception for ephemeral recording, incidental inclusion, parody, reprography, private study, and press review and reporting of current events. At the same time, a number of provisions show a more rigid approach than the one adopted by their EU counterparts (e.g., the teaching and research exception), whereas some others were introduced before the corresponding EU rule and are thus departing from its standard (e.g., exceptions for access to and normal use of computer programs, freedom of panorama, and uses in administrative and judicial proceedings).

Except for the statutory E/Ls as well as the copyright exhaustion and termination, the Greek copyright law does not offer any other tools to facilitate end users' access to copyright content. Indeed, neither the GCA consist of a compulsory, statutory, or extended licensing scheme nor there exist any other public regulatory sources (court decisions or other statutory laws) that may reinforce the user-friendliness of the GCA, while the public domain does not either provide for a broad spectrum of subject-matter for the free use of end users.

3.1.2.12.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.12.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc was implemented in 2002 by **Article 28B GCA**, which follows the EU text verbatim. To benefit from this exception, the beneficiaries shall comply with the three-step-test, as regulated by **Article 28C.**[696] **Article 52(b) GCA** extends the scope of the exceptions and limitation to copyright to performances, phonograms, and broadcasts as well.

In drawing the boundaries of the exception, **the Multimember Athens Court of First Instance** has ruled in case **3530/2017** of 18 September 2017 that internet service providers are obliged to block access to 'pirate' websites, even if the act of reproduction falls under **Article 5(1)(a) InfoSoc.**

3.1.2.12.1.2 EPHEMERAL RECORDING

Neither **Article 5(2)(d) InfoSoc** nor **Article 10(1)(c) Rental** was implemented in the Greek copyright law, thus, GCA does not contain an exception covering ephemeral recordings.

[695] Νόμοσ 2121/1993, Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα Και Πολιτιστικά, Όπωσ Τροποποιήθηκε Το 2021 Από Το Ν. 4829/2021 (Law 2121/1993, Copyright, Related Rights and Cultural Matters, Official Gazette A 25 1993, As amended by Law 4829/2021, Official Gazette A 134, 2021).
[696] Article 28C is a common provision applying to all the E/Ls encompassed within GCA.

3.1.2.12.1.3 INCIDENTAL INCLUSION

Article 5(3)(i) InfoSoc was not implemented in the GCA, which does not contain any other exception covering incidental inclusions.

3.1.2.12.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The GCA contains several provisions enabling the access and normal use of protected works by lawful users of computer programs, databases, and works protected by TPMs.[697]

Article 42(1)-(4) and Article 43 GCA implemented, respectively, **Articles 5 and 6 Software** in 1994, by adopting the standards and closely following the text of their EU counterparts almost verbatim. To complement this regulation, **Article 43(3) GCA** requires the application of the three-step-test to these exceptions, while waiving the remuneration of the author.

Articles 3(3) and 45A(5) GCA implemented, respectively, **Articles 6(1) and 8 Database** in 2000, by adopting verbatim the E/Ls therein. Once again, these exceptions require the application of the three-step-test regulated within **Article 28C**. Yet, it is worth indicating that **Article 3(4)** prohibits the reproduction of an electronic database, even for the purpose of private use.

As to the works protected by TPMs, **Article 66A(5) GCA** transposed **Article 6(4) InfoSoc**. It requires rightholders to ensure that TPMs as such shall not prevent end-users from enjoying the exceptions for private copy, illustration for teaching and scientific research, preservation of cultural heritage; uses for administrative and judicial proceedings, and national security; and for persons with disabilities.[698] The categories enlisted by the GCA does not include all the categories mentioned in InfoSoc, given that not all the optional E/Ls have been transposed to the GCA.

3.1.2.12.1.5 FREEDOM OF PANORAMA

Article 26 GCA contains the Greek "freedom of panorama" exception. The text, which dates back to 1993, still resembles its EU counterpart, **Article 5(3)(h) InfoSoc.** However, as opposed to the EU rule, the Greek exception is sector-specific, thus a restrictive one, due to benefitting only the media sector. The provision allows the incidental reproduction and communication of images of architectural works, works of fine art, photographs, or works of applied art, which are located permanently in a public place, only by the mass media, without

[697] For related case law, see: Court of Auditors 7/2018, Athens Court of Appeals 2695/2016, Piraeus Court of Appeals 679/2015, Athens Multimember Court of First Instance 895/2012, Court of Auditors 7/2018, Athens Court of Appeals 2695/2016, Piraeus Court of Appeals 679/2015, Athens Multimember Court of First Instance 895/2012.

[698] For related case law, see: Supreme Court (Full Court) 6/2007, Supreme Court 1327/201, Supreme Court 1328/2018, Supreme Court 2097/2013, Supreme Court 1125/2006, Athens Court of Appeals 3629/2018, Athens Court of Appeals 2300/2011, Thessaloniki Court of Appeals 954/2008, Thessaloniki Court of Appeals 1002/2008, Athens Court of Appeals 4438/2008, Athens Court of Appeals 6233/2007, Athens Court of Appeals 551/2005, Larisa Court of Appeals 629/2002, Athens Multimember Court of First Instance 2373/2017, Athens Single-member Court of First Instance 1610/2013, Athens Single-member Court of First Instance 5567/2013.

remuneration being due. This provision is also subordinated to the three-step-test regulated in **Article 28C GCA**.

In **case 3141/2015**, **the Multimember Athens Court of First Instance** has ruled that the exception for freedom of panorama does not cover the use of parts of the work that are not visible without the use of technical means (e.g. drones, helicopters, ladders, special lenses), without the occurrence of a random event (e.g. open window) and without a human intervention (e.g. jumping over a fence), even if such works are situated in a public space under normal and usual circumstances.

3.1.2.12.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.12.2.1 REPROGRAPHY

Article 5(2)(a) InfoSoc has not been implemented in the GCA.

3.1.2.12.2.2 PRIVATE COPY

The GCA provides for exceptions to enable the private copying of only works and other subject-matter, except for databases.

Neither **Article 6(2)(a) Database** nor **Article 9(a) Database** has been transposed to the Greek copyright law. In fact, **Article 3(4) GCA** explicitly prohibits the reproduction of a non-electronic database for private purposes.

The private copying exception contained in **Article 5(2)(b) InfoSoc** finds correspondence in **Article 18(1) GCA.**[699] This provision was first introduced in 1993, and later amended in 1996, 2022, 2014, 2017, and 2018. This provision implements the InfoSoc rule, by closely following its standards, with the exception of the differential remuneration scheme it envisions for the analogue and mechanical modes of reproduction. As amended in 2018, it permits the reproduction of published works for 'private use', specifying that the term excludes the uses of enterprises, services, or organizations. Also exempted are the reproduction of a work of architecture in the form of a building, reproduction of sheet music; and the reproduction of a visual art, which circulates in a limited number, by technical means. While the regulation within Article 52(b) allows for the extension of this exception to performances, phonograms, and broadcasts; the exception is subjected to the three-step test **(Article 18(2) GCA),** while remuneration of the rightholder is not due, unless the reproduction takes place by mechanical means, including by photocopying. In this case the rightholder is entitled to receive a fair remuneration. **Article 18 GCA** regulates the calculation of the amount

[699] For related case law, see: Supreme Court (Full Court) 6/2007, Supreme Court 1327/2018, Supreme Court 1328/2018, Supreme Court 2097/2013, Supreme Court 1125/2006, Athens Court of Appeals 3629/2018, Athens Court of Appeals 2300/2011, Thessaloniki Court of Appeals 954/2008, Thessaloniki Court of Appeals 1002/2008, Athens Court of Appeals 4438/2008, Athens Court of Appeals 6233/2007, Athens Court of Appeals 551/2005, Larisa Court of Appeals 629/2002, Athens Multimember Court of First Instance 2373/2017, Athens Single-member Court of First Instance 1610/2013, Athens Single-member Court of First Instance 5567/2013.

due and the consequences of lack of compliance and the actions that can be taken by CMOs in these cases.

Article 52(b) GCA extends the scope of the exceptions and limitation to copyright to performances, phonograms, and broadcasts as well. In this case, this can be acknowledged as a regulation corresponding to **Article 10(1)(a) Rental.**

The Supreme Court has ruled in **case 1327/2018 of 8 August 2019** that the acts permitted for private copying can be carried by with the intervention of third parties, as long as they act on behalf of the private user. In the very same decision, the Court has also ruled that photocopying a book in its entirety conflicts with the normal exploitation of a work, hence it does not fall under the private copying exception.

3.1.2.12.3 QUOTATION

Article 19 GCA provides the quotation exception. The text entered into force in 1993, thus it precedes the adoption of **Article 5(3)(d) InfoSoc**.[700] However, the provision is in line with its EU counterpart. It allows the quotation of short extracts of a lawfully published work for the purpose of supporting an argument made by the person making the quotation, or for the purposes of critique, while **Article 52(b) GCA** extends the scope of subject-matter to performances, phonograms, and broadcasts as well. The quotation shall comply with fair practice and be carried out only to the extent necessary for the purposes of the use. No remuneration is due to rightholders, but the indication of the source and of the name of the author and of the publisher is required, unless it is proven impossible. The three-step-test enshrined in **Article 28C** applies here as well; while **Article 52(b) GCA** extends the scope of the exceptions and limitation to copyright to performances, phonograms, and broadcasts.

3.1.2.12.4 PARODY, CARICATURE, PASTICHE

The GCA does not contain an exception for parody, caricature, and pastiche, and **Article 17(7) CDSM** is yet to be implemented.

3.1.2.12.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.12.5.1 PRIVATE STUDY

Article 5(3)(n) InfoSoc has not been transposed to the Greek CA.

3.1.2.12.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

The GCA features several provisions allowing flexibilities for teaching and research purposes.[701]

[700] For related case law, see: Supreme Court 1624/1998, Athens Court of Appeals 4109/2008, Athens Court of Appeals 3214/2007, Thessaloniki Court of Appeals 3340/1998.
[701] For related case law, see: Athens Court of Appeals 2224/2006, Athens Multimember Court of First Instance 1322/1997, Lamia Multimember Court of First Instance 73/2010, Athens Single-member Court of First Instance 1428/2019.

While the exception within **Article 6(2)(b) Database** has not been transposed to GCA, **Article 45A(6)(a) GCA** implemented verbatim **Article 9(b) Database.**

Entered into force in 1993 and later amended in 2002, **Article 20 paragraphs (1) and (3) GCA** regulate the use of school textbooks and anthologies. It allows the reproduction of published literary works containing contribution from several authors in educational textbooks approved for use in primary and secondary education by competent authorities. No remuneration is due to rightholders. However, reproductions should encompass only a small part of the total output of each author. The exception covers only reproduction. The provision is limited by the application of the three-step test with **Article 20(3) GCA**, and by the obligation to mention source and author, unless it is proven impossible. **Article 22 GCA** extends the rule to excerpts of works of fine arts, visual or photographic work, excerpts of musical, cinematographic, audio, and audio-visual works, if necessary for the content of teaching/educational materials, as long as it is approved for use in teaching and free distribution by official authorities. Source and title of the work should be always mentioned unless this is proven impossible.

In a similar vein, **Article 21 GCA,** which entered into force in 1993, permits the reproduction of articles published in a newspaper or periodical, of short extracts of a work or parts of a short work, and published works of fine art exclusively for teaching or examination purposes in an educational establishment. The same provision requires the application of the three-step-test and the mention of the source in case this is not impossible. No remuneration is due to rightholders. **Article 52(b) GCA** extends the scope of the exceptions and limitation to copyright to performances, phonograms, and broadcasts as well.

Given the regulation within **Article 52(b) GCA**, the scope of both provisions is extended to performances, phonograms, and broadcasts as well; while Article 28C GCA, both provisions mentioned above are subordinated to the three-step-test.

The Ministerial Decision 24505KB/2006, entered into force in 2006, also provides certain flexibilities for the use of works for teaching and research. According to this Decision, the foreign language certificate tests that are published on the official website of the Ministry of Education at the end of each examination period can be freely reproduced, stored, or copied in whole or in part only for private or educational uses. It is required to indicate the source of the information in use. Uses for commercial purposes or the inclusion of a text in whole or in part in another text are not permitted under any circumstances. Furthermore, the reproduction, publication, and dissemination of such content in whole or in part for educational or scientific purposes is not permitted unless upon written authorization of the Ministry of Education.

Evident from the above, the Greek approach to flexibilities for teaching and scientific research lacks a holistic approach as in **Article 5(3)(a) of the InfoSoc Directive**. Its focus on specific works and uses, with the introduction of additional fragmented criteria may result in more rigidity compared to the approach of the corresponding EU rule.

While there is no concrete evidence to suggest that **Article 10(1)(d) Rental** has been implemented in a specific provision of GCA, **Article 52(2)(b)** extends the copyright E/Ls to related rights as well.

3.1.2.12.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Article 5 CDSM has not been implemented in Greece yet. No other provision in the GCA refers to digital use for illustration for teaching.

3.1.2.12.5.4 TEXT AND DATA MINING

Articles 3 and 4 CDSM have not been implemented in Greece yet. No other provision in the GCA refers to text and data mining activities.

3.1.2.12.6 USES FOR INFORMATORY PURPOSES

3.1.2.12.6.1 PRESS REVIEW AND NEWS REPORTING

Article 5(3)(c) InfoSoc has not been transposed to the Greek copyright law. Thus, the Greek CA does not contain any provision enabling the use of works for press review or reporting of current events. However, **Article 25(1)(a) GCA,** which entered into force in 1993**,** allows the reproduction and communication to the public of works seen or heard in the course of current events, for the sole purpose of reporting such events by the mass media.[702] **Article 52(b) GCA** extends the scope of this exception to related rights over performances, phonograms, and broadcasts. No remuneration is required, but the use of the works as such shall be accompanied by an indication of the source and of the name of the author, wherever this is possible. The three-step-test enshrined in **Article 28C** applies to this exception as well.

Except for this provision, there are no other provisions in the GCA which can be associated with **Article 10(1)(b) Rental.** Yet, **Article 52(2)(b)** extends the copyright E/Ls to related rights as well.

3.1.2.12.6.2 USES OF PUBLIC SPEECHES AND LECTURES

The exception for the use of public speeches and lectures is contained in **Article 25(1)(b) GCA**, which entered into force in 1993, thus preceding the adoption of **Article 5(3)(f) InfoSoc.** However, its text is in line with the EU rule. **Article 25(1)(b) GCA** permits the reproduction and communication to the public by mass media, only for informatory purposes, of political speeches, addresses, sermons, legal speeches, summaries, or extracts of lectures, provided that they have been delivered in public and that the source is always indicated, unless this is proven impossible. While **Article 52(b) GCA** extends this provision to performances, phonograms, and broadcasts; the three-step-test enshrined in **Article 28C** applies to this exception as well.

[702] For related case law, see: Athens Multimember Court of First Instance 1493/2005, Thessaloniki Single-member Court of First Instance 40026/2006, Athens Single-member Court of First Instance 32992/1997.

3.1.2.12.7 USES BY PUBLIC AUTHORITIES

3.1.2.12.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

While there is no concrete evidence to suggest that **Articles 6(2)(c) and 9(c) Database** have been transposed to the GCA**, Article 24 GCA** covers an exception for use of works in administrative and judicial proceeding. Entered into force in 1993, **Article 24 GCA** precedes the adoption of **Article 5(3)(e) InfoSoc**. This provision permits the reproduction of a work to be used in judicial or administrative proceedings. **Article 52(b) GCA**, which extends copyright exceptions to performances, phonograms, and broadcasts also applies herein. Remuneration is not due to authors, but the reproduction of the works shall be carried out only to a justifiable extent. The three-step-test enshrined in **Article 28C** applies to this exception as well.

3.1.2.12.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 27(a) GCA, introducing an exception for the use of works by public authorities, entered into force in 1993, thus preceding the adoption of **Article 5(3)(g) InfoSoc**. However, its text is in line with the EU rule.[703] The provision allows the performance of a work in a public event such as official ceremonies, to the extent compatible with the nature of the ceremonies. No remuneration should be paid to rightholders, while compliance with the three-step-test is required.

3.1.2.12.8 SOCIALLY ORIENTED USES

The GCA does not feature any flexibility corresponding to **Article 5(2)(e) InfoSoc**.

3.1.2.12.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.12.9.1 PUBLIC LENDING

Article 22(2) GCA introduced the public lending exception in 1993 to implement almost verbatim **Article 6 Rental**. The provision was later amended in 2017. It permits the public lending of works in libraries of primary and secondary education institutions, and in academic libraries that are members of the Hellenic Academic Libraries Association. The scope of this exception is extended to performances, phonograms, and broadcasts by **Article 52(b) GCA**. While no remuneration is due to rightholders, **Article 28C GCA** applies to this provision as well and requires compliance with the three-step-test.

3.1.2.12.9.2 PRESERVATION OF CULTURAL HERITAGE

Whereas **Article 6 CDSM** has not been implemented yet**, Article 22(1) GCA**, which entered into force in 1993, corresponds to **Article 5(2)(c) InfoSoc**, even though it precedes the adoption of the InfoSoc. This provision allows non-profit libraries and archives to reproduce an additional copy of works in their permanent collection, for the purpose of retaining it, or

[703] For related case law, see: Supreme Court (Full Court–criminal division) 1/2009, Supreme Court 1733/2017, Supreme Court (criminal division) 1525/2008, Athens Court of Appeals (criminal division) 718/2011.

transferring it to another non-profit library or archive. The reproduction shall be permissible only if another copy cannot be obtained in the market promptly and under reasonable terms. No remuneration is due to rightholders. It shall be noted that the scope of the subject-matters of this exception encompasses performances, phonograms, and broadcasts, given the regulation within **Article 52(b) GCA**. Furthermore, it requires compliance with the three-step-test, as regulated in **Article 28 GCA**.

3.1.2.12.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Article 5(2)(c) InfoSoc find correspondence in **Article 27(b) GCA,** which provides for an exception for public performance. This provision permits in the context of the activity of educational institutions by staff and students or students of the institution if the audience consists exclusively of them or of the parents of the students or students or those who have custody of them or those directly connected with the activities of the institution.

Also, **Article 28(1) GCA** may be considered under this title. Entered into force in 1993, the provision allows, without any remuneration due to rightholders, the exhibition of works of fine arts on the premises of museums which own the physical carriers into which works of fine art have been incorporated, or in the context of exhibitions organized in museums.

3.1.2.12.9.4 ORPHAN WORKS

Article 27A GCA implemented **the OWD** in 2013**,** by closely following the EU Directive. **Article 27A(1) GCA** draws the borders of this exception, by stipulating that orphan works may be made available or communicate to the public, or may be reproduced for purposes of digitization, publicity, indexing, cataloguing, maintenance or restoration, as regulated within **Article 6 OWD,** and by the CHIs indicated within **Article 1 OWD**.

Article 17A(2)-(3) GCA implement verbatim the scope of the subject-matter regulated within **Article 2(2)-(3) OWD**, while **Article 27A(4) GCA** highlights the public-interest mission that shall be pursued by the beneficiaries to enjoy this exception **(Article 1 OWD)**.

Articles 27A (5) to (8) GCA deal with the diligent search and documentation obligations of the beneficiaries, by very closely following the legal text of **Article 3 OWD**. **Article 27A(8) GCA** also implements the mutual recognition of orphan works status, as regulated within **Article 4 OWD**.

The consequences of the termination of the orphan works status, which is regulated within **Article 5 OWD**, has been transposed by **Article 27A(10) GCA**, which refers to **(see: Articles 63A and 66D GCA)** to provide for detailed regulations regarding the legal procedure to be followed and the compensation to be paid to the rightholder **(Article 63A GCA)** as well as for the consideration of the code of conducts of CMO, to enable them to become parties of such legal procedures **(Article 66D GCA).** Finally, **Article 27A(12) GCA** implements verbatim **Article 2(5) OWD**, in order to clarify that the exception herein does not prejudice the regulations concerning anonymous and pseudonymous works.

As usual, the three-step-test enshrined in **Article 28C GCA** applies here as well.

3.1.2.12.9.5 OUT-OF-COMMERCE WORKS

Article 8(2) CDSM has not been implemented in Greece yet. No other provision in the GCA refers to uses of out-of-commerce works.

3.1.2.12.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 5(3)(b) InfoSoc and the Marrakesh Directive have been implemented in **Article 28A GCA,** which was first introduced in 2002 and later amended in 2020.

Article 28A(1) GCA, by adopting verbatim **Article 2 Marrakesh**, provides for the definitions of persons with disabilities, accessible format copy, and authorized entity, **while Article 28A(2)** implements the permitted uses within **Article 3(1).** By following closely **Article 3(5) Marrakesh, Article 28A(3) GCA** consolidates the mandatory character of the exceptions provided for the benefit of persons with disabilities, while **Article 28A(4) GCA** provides for the regulation within **Article 3(2) Marrakesh**, which aims at respecting and protecting the integrity of the work used for the making an accessible format copy.

Article 28A(5) GCA implements **Article 4 Marrakesh**, by closely following the regulation therein concerning the exchange of accessible format copies amongst EU Member States. **Articles 28A paragraphs 6 to 8 GCA** tackle with the obligations of the authorized entities, as regulated within **Articles 5 and 6 Marrakesh.** While the three-step-test envisioned by **Article 28C GCA** applies to this exception, **Article 28A(9) GCA** implements the requirement for the compensation of authors whose works are in use, as regulated by **Article 3(6) Marrakesh.** And while **Article 28A(4) GCA** confirms the non-overridability of the exception by contract, **Article 28A(12) GCA** makes a step forward compared to the EU acquis, by extending the Marrakesh exception to persons with hearing disabilities.

3.1.2.12.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Beyond the flexibilities already illustrated above, the GCA features other two provisions, both entered into force in 1993, which is worth mentioning here. **Article 20(2) GCA** permits the reproduction anthologies of works of more than one author, compiled by a deceased author, with no remuneration required, provided that just a small part of the total contribution of each author is copied. **Article 20(3) GCA** requires reproductions not to conflict with the normal exploitation of the work from which the texts are taken, and to mention the source, unless this is proven impossible. This provision also falls into the scope of **Article 28 GCA** that regulates the three-step-test. **Article 28(2) GCA** transposed **Article 5(3)(j) InfoSoc,** by closely following the EU rule. It allows the reproduction of works of fine art in catalogues, to the extent necessary for the promotion of their sale. No remuneration for rightholders is required, but **Article 28(3) GCA** subjects the application of the exception to the three-step test.

3.1.2.12.12 THREE-STEP TEST

The GCA features the three-step-test in **Article 28C GCA**, which was introduced in 2002 and follows verbatim **Article 5(5) InfoSoc**. This provision has been formulated as a general rule which applies to the E/Ls within Chapter 4 of the GCA.

3.1.2.12.13 PUBLIC DOMAIN

3.1.2.12.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 2(3)-(5) GCA, which entered into force in 1993, carves out from copyright protection ideas and principles, which underlie any element of a computer program, including interfaces that are not protected by copyright, official legislative, administrative or judicial texts, works of folklore, news, facts, and data.[704] **Article 3(3) GCA** rules that the first sale of a copy of a database within EU constitutes an exhaustion of the resale right within the EU, as long as the first sale is a lawful one. According to **Article 45A(2),** the same rule applies to *sui generis* database rights. And **Article 41 GCA** extends the same rule to computer programs.

3.1.2.12.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.12.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

The GCA used to have a CMO scheme within **Articles 54 to 58**; however, these provisions have been repealed in 2017. Furthermore, **Article 8(1) CDSM** for the use of out-of-commerce works is yet to be implemented to GCA.

However, **Article 23 GCA** introduces a compulsory license for the reproduction of cinematographic works, only for the purpose of preservation of such works in the National Cinema Archive and only if the copyright owner(s) refuse to allow the reproduction of the work in question, especially when the work has an exceptional artistic value. To conduct the permitted acts, the decision of the Minister of Culture is required, while no remuneration is due for the author in this case.

3.1.2.12.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.12.15.1 FUNDAMENTAL (USERS') RIGHTS

Especially in cases concerning parody, which is not covered by a specific exception, the Greek doctrine evokes to fundamental human rights and liberties, in order to justify the parodic uses of works. Also, the Greek courts have made ample references to fundamental rights, and particularly to right to property, to reinforce the authors' rights.[705]

[704] For related case law, see: Athens Court of Appeals 101/2009, Athens Court of Appeals 1280/2007, Athens Court of Appeals 8153/1999, Athens Multimember Court of First Instance 970/2020.
[705] See: Athens Court of Appeals, 3325/2006.

3.1.2.12.15.2 CONSUMER PROTECTION

None reported.

3.1.2.12.15.3 COPYRIGHT CONTRACT LAW

There is no concrete evidence to suggest copyright contract law plays a significant role in balancing copyright against conflicting rights and interest, being it rather a tool to safeguard the rights of authors vis-à-vis publishers and producers.

3.1.2.12.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.13 HUNGARY

The Hungarian Copyright Act (hereinafter 'SZJT') of 1999,[706] as last amended in 2020, is mostly harmonized with the EU copyright acquis, for it has implemented the vast majority of the E/Ls provided by EU Directives, including those of the CDSM Directive. Still, there exist a few flexibilities that have not been implemented in the Hungarian copyright law, such as exceptions for incidental inclusion, online parody/quotation, and the exceptions for copyright over databases for private copy, illustration of teaching and scientific research, and national security, administrative and judicial proceedings.

3.1.2.13.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.13.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc has been implemented in **Section 35(6) SZJT** in 2004, by closely following the language of its EU counterpart, whereas **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well. According to the regulation within **Section 33(2) SZJT**, this exception is subordinated to the three-step-test.

3.1.2.13.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc has been implemented in **Section 35(7) SZJT** in 2004, once again, by largely adopting the text of the EU provision, while **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well. According to the same provision, unless otherwise agreed in the license contract granting broadcasting right, the recording shall be destroyed or erased within three months from its production. However, recordings with exceptional documentary value may be preserved for an unlimited period in the archives of film and audio heritage institutions. It shall be noted that this exception is subordinated to the three-step-test regulated within **Section 33(2) SZJT**.

[706] 1999. évi LXXVI. törvény a szerzői jogról.

As a last remark, it can be considered that the regulation within **Section 83(2) SZJT** corresponds to **Article 10(1)(c) Rental**.

3.1.2.13.1.3 INCIDENTAL INCLUSION

Whereas **Article 5(3)(i) InfoSoc** has not been transposed to SZJT per se, the Hungarian copyright law features another provision that may be considered in this context. **Section 41/F(4) SZJT,** which entered into force in 2014, allows CHIs to use orphan works and other protected subject-matter embedded or incorporated therein, or constituting an integral part of an orphan work or phonogram. Aside from this, there is no other provision in SZJT that could be understood as implementing **Article 5(3)(i) InfoSoc.**

3.1.2.13.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Hungarian copyright law features all the EU E/Ls addressed to the lawful users of computer programs, databases, and works protected by TPMs.[707]

Article 5 Software has been implemented in **Section 59 SZJT,** and **Article 6 Software** has been implemented in **Section 60 SZJT paragraphs (1)-(3).** Both provisions of SZJT adopt their EU counterparts verbatim.

Articles 6(1) and 8 Database have been implemented, respectively, in **Section 62(1),** which entered into force in 2012, and **Section 84/B SZJT**, which entered into force in 2018.

Section 62(1) SZJT, in line with the EU text, permits the lawful user of a database to perform the acts that are necessary to access and use the database and its content.

Section 84/B SZJT, by very closely following the language of the EU provision and adopting all the standards set therein, transposes **Article 8 Database**, along with implementing the three-step-test requirement **(Article 8(2) Database)** to **Section 84/B(3) SZJT**.

Section 95/A SZJT, which has entered into force in 2004, transposed **Article 6(4) InfoSoc,** in order to facilitate access to and normal use of works that are protected by TPMs**.** This provision was later amended in 2021, for transposing **Article 7 CDSM** as well. As amended, this provision requires rightholders to make sure that lawful users enjoy a range of exceptions on works protected by TPMs **(Section 95/A(1) SZJT)**. These exceptions consist of reprography, illustration of teaching and scientific research, private copy, preservation of cultural heritage, temporary recording, TDM for the purpose of scientific research, exceptions for persons with disabilities, use of out-commerce-works.

Once again, adopting the language of the provision verbatim, the Hungarian provision regulates that this exception does not apply when a work has been made available to the public under a contract in such a way that members of the public may access them from a place and at a time individually chosen by them **(Section 95/A(2) SZJT).**

[707] For related case law, see: Fővárosi Ítélőtábla Pf. 20.644/2018/6. EBH2002. 616.

3.1.2.13.1.5 FREEDOM OF PANORAMA

Article 5(3)(h) InfoSoc and its freedom of panorama exception has not been implemented in SZJT, but **Section 68(1) SZJT,** which has entered into force in 1999, already covered, in a similar manner, this type of uses.[708] While resembling its EU counterpart, the Hungarian exception is more restrictive due to the limitations imposed on the subject-matter and the explicit reference to only "outdoor" public spaces. Indeed, **Section 68(1)** allows the making of and use of visual representations of works of fine and applied art as well as architectural works that have been permanently located in outdoor public places. Also diverging from its EU counterpart, this provision does not require compliance with the three-step-test.

It is worth noting that **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

3.1.2.13.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.13.2.1 REPROGRAPHY

Article 5(2)(a) InfoSoc finds correspondence in **Section 21 SZJT**.[709] This provision, in fact, regulates a remuneration scheme for authors whose works have been reproduced by means of reprography and for private use, while meeting the standards set by the EU exception for reprography.

According to **Section 21(1) SZJT**, the authors of works that are reproduced, by photocopying or any other similar means and on paper or other any similar medium, are

[708] For related case law, see: BH2005. 143. SzJSzT 13/2004. Advisory opinion of the Expert Board of Authors' Rights – A képzőművészeti, fotóművészeti, iparművészeti, ipari tervezőművészeti és építészeti alkotások, műszaki létesítmények szabad felhasználása.

[709] For related case law, see: 3035/2014. (III. 3.) AB végzés alkotmányjogi panasz eljárás megszüntetéséről 124/B/2004.AB határozat a szerzői jogról szóló 1999. évi LXXVI. törvény 20. § (1) és (2) bekezdése alkotmányellenességének vizsgálatáról Kúria Pfv. 20.233/2019/8. Elszámolás Kúria Pfv. 21.272/2012/7. szerzői jogdíj megfizetése Debreceni Ítélőtábla Pf. 20.607/2011/7. szerzői jogdíj megfizetése Debreceni Ítélőtábla Pf. 20.514/2009/4. szerzői jogdíj megfizetése Fővárosi Ítélőtábla Pf. 20.209/2020/9. közös jogkezelés körébe tartozó adatszolgáltatás Fővárosi Ítélőtábla Pf. 20.957/2018/5. elszámolás megállapítása Fővárosi Ítélőtábla Pf. 22.075/2011/4. szerzői jogdíj megfizetése Fővárosi Ítélőtábla Pf. 22.001/2010/4. szerzői jogdíj megfizetése Fővárosi Ítélőtábla Pf. 21.961/2011/5. szerzői jogdíj megfizetése Fővárosi Ítélőtábla Pf. 21.118/2010/6. szerzői jogdíj megfizetése Fővárosi Ítélőtábla Pf. 20.810/2010/4. szerzői jogdíj megfizetése Fővárosi Ítélőtábla Pf. 20.492/2008/6. polgári ügyben hozott határozat Győri Ítélőtábla Gf. 20.007/2011/14. szerzői jogok érvényesítése Győri Ítélőtábla Pf. 20.406/2009/6. 172.248 Ft szerzői jogdíj megfizetése Szegedi Ítélőtábla Pf. 20.386/2008/3. szerzői jogdíj megfizetése Fővárosi Törvényszék P. 21.200/2018/28. személyiségi jog megsértése Fővárosi Törvényszék P. 21.188/2019/18. közös jogkezelés körébe tartozó adatszolgáltatás Fővárosi Törvényszék P. 23.498/2015/12. reprográfiai díj Fővárosi Törvényszék P. 25.845/2013/9. szerzői jogdíj megfizetése Fővárosi Bíróság P. 20.688/2009/30. szerzői jogdíj megfizetése Fővárosi Bíróság P. 22.419/2006/25. szerzői jog Fővárosi Bíróság P. 24.337/2009/22. tartozás megfizetése és egyéb igények Fővárosi Bíróság P. 24.495/2009/24. jogdíj megfizetése Fővárosi Bíróság Gf. 75.873/2010/6. megbízási díj megfizetése Fővárosi Bíróság P. 20.497/2008/18. szerzői jogdíj megfizetésére kötelezés Fővárosi Bíróság K. 30.050/2007/14. adóügyben hozott közigazgatási határozat bírósági felülvizsgálata Pesti Központi Kerületi Bíróság G. 305.471/2009/13. megbízási díj és járulékai megfizetése Baranya Megyei Bíróság P. 21.295/2008/7. szerzői jogdíj megfizetése Hajdú-Bihar Megyei Bíróság P. 21.465/2008/11. szerzői jogdíj megfizetése Jász-Nagykun-Szolnok Megyei Bíróság P. 20.889/2010/23. szerzői jogdíj megfizetése Komárom-Esztergom Megyei Bíróság G. 40.147/2007/79. szerzői jogok érvényesítése Komárom-Esztergom Megyei Bíróság P. 20.367/2008/14. szerzői jogdíj tartozás megfizetése.

entitled to fair remuneration. This provision, in line with the InfoSoc provision, excludes sheet music from the scope of this exception. The same provision requires this fee to be paid by the manufacturers of reprographic equipment and, for equipment that is manufactured abroad, by the person required by law to pay the customs duty, or, if there is no customs payment obligation, the person importing the equipment together with the person placing it on the market. Operators of reprographic equipment are also obliged to pay an additional fee. Both fees must be paid to the relevant CMO.

3.1.2.13.2.2 PRIVATE COPY

Hungarian copyright law features several exceptions aimed at enabling private copying of databases and works.

Whereas **Article 6(2)(a) Database** has not been implemented in Hungarian copyright law, **Article 9(a) Database** has been implemented in **Section 84/C(1) SZJT**, by adopting the language of its EU counterpart verbatim.

Article 5(2)(b) InfoSoc has been implemented in **Section 35(1) SZJT**,[710] which entered into force in 2004. The Hungarian exception is in line with its EU counterpart, except for excluding the objects of related rights as well as certain other subject-matters from the scope of the exception herein (e.g., works of architecture, technical structures, software, electronic databases, and the recording of public performances of works on video or audio media). This provision, according to the regulation within **Section 33(2),** is subordinated to the three-step-test.

Section 83(2) SZJT extends the scope of copyright exceptions and/or limitations to the objects of related rights as well. This regulation, in this case, may be deemed to correspond to **Article 10(1)(a) Rental.**

It is worth noting that **Section 20 SZJT,** which entered into force in 1999, provides for a detailed fair remuneration scheme for private copying in favour of the holders of copyright and related rights.

In a recent case, **Pf. 20.802/2020/10** (decided on 11.05.2021), **Fővárosi Ítélőtábla (Budapest-Capital Regional Court of Appeal)** has ruled that uploading twelve photos on the Internet and social media platforms does not fall under the private copying exception.

3.1.2.13.3 QUOTATION

The quotation exception is featured in **Section 34 SZJT,** which entered into force in 1999. This provision was complemented by **Section 34/A(1)** in 2009, following the adoption of **Article 5(3)(d) InfoSoc**, of which the Hungarian provision follows almost verbatim. It holds that anyone is entitled to quote excerpts from a work, only to the extend required for the intended use and by indicating the name of the author as well as the source of the work. **Section 34/A(1) SZJT**, by almost slavishly copying the wording of **Article 5(3)(d) InfoSoc**, holds

[710] For related case law, see: Bfv.II.659/2016/6.

that anyone can use a work for purposes such as criticism or review and/or for purposes such as quotation, and caricature, parody or pastiche for an expression of humour or mockery **(Section 34/A(1)(b) SZJT),** provided that the source, including the author's name, is indicated **(Section 34/A(1)(a) SZJT).** As required by their EU counterparts, these provisions require compliance with the three-step-test, due to the regulation within **Section 33(2) SZJT**. It shall be added that **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

Section 34/A(1) SZJT was introduced by the Hungarian legislature in 2021, in order to transpose **Article 17(7) CDSM**. However, as in other Member States, this provision does not entail the extension of the provision to the online content-sharing platforms.

Some guidelines on the interpretation of this exception recently came from **Szegedi Ítélőtábla (Szeged Regional Court of Appeal)** in the case **Pf. 20.029/2018/6 (decided on 8 June 2018),** where the Court ruled that the use of the work by the plaintiff could not be covered by the quotation exception, since the extent of the slavish copying of a protected work overstepped the reasonable limit of permitted use.

3.1.2.13.4 PARODY, CARICATURE, PASTICHE

The copyright exception provided for parody, caricature, and pastiche introduced in **Article 5(3)(k) InfoSoc** has been implemented in **Section 34/A(2) SZJT**,[711] by adopting the EU exception almost verbatim. Indeed, this provision permits the use of a work by anyone for purposes such as quotation, and caricature, parody, or pastiche for an expression of humour or mockery; and in respect to the regulation within **Section 33(2) SZJT**, it requires compliance with the three-step-test, while **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well. As to the implementation of **Article 17(7) CDSM**, see quotation above.

3.1.2.13.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.13.5.1 PRIVATE STUDY

The exception for private study covered by **Article 5(3)(n) InfoSoc** have been implemented almost verbatim in **Section 38(5) SZJT,** which entered into force in 2003, and it was later amended in 2008 and 2019. The provision allows publicly accessible CHIs and educational establishments to communicate the works in their permanent collection to the public, for the purpose of scientific research or individual study, by displaying these works on the screens of the computer terminals in their premises, only for non-commercial teaching and scientific research purposes. The provision, in line with its EU counterpart, enables the contractual overriding of this exception, while also requiring compliance with the three-step-

[711] For related case law, see: BDT2020. 2; SZJSZT 16/08 Advisory opinion of the Expert Board of Authors' Rights – Reklámozás céljából megrendelt mű felhasználása.

test, given the regulation within **Section 33(2) SZJT**.[712] Also, **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

3.1.2.13.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

SZJT features several provisions allowing the use of databases and works for the purpose of illustration for teaching and scientific research.

Whereas **Article 6(2)(b) Database** has not been transposed to Hungarian copyright law, **Section 84/C(2) SZJT** transposes **Article 9(b) Database,** by adopting the text of EU provision verbatim.

Section 34(2) SZJT[713] implemented the exception provided by **Article 5(3)(a) InfoSoc** in 2009, by largely following its text. Still, compared to the EU provision, the Hungarian rule is slightly more restrictive with regard to the works covered by the exception and their quantity. This provision allows the use of a range of works for the purpose of teaching in educational institutions and scientific research. These works comprise excerpts from literary works, musical works, films that have been made public or small works, pictures of works of fine art, architectural works, works of applied art and designs, and photographic works. The source should always be mentioned, while the use should be of a non-commercial nature and limited to the extent necessary for the purpose. It shall be noted that this provision, given the regulation within Section 33(2) SZJT, is subordinated to the three-step-test.

Section 83(2) SZJT extends the scope of copyright exceptions and/or limitations to the objects of related rights as well – which, in this case, may be considered to correspond to **Article 10(1)(d) Rental**.

Section 68(2) SZJT enables the use of pictures of fine art, architectural, and applied art works as well as pictures of industrial designs and photographic works for scientific lectures, without remunerating the author.

3.1.2.13.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Article 5 CDSM has been implemented in **Section 34(3) SZJT**, which was originally introduced in 1999 and then amended in 2021. **Section 34(3)(b) SZJT** adopts **Article 5(1) CDSM** by closely following the text of the provision as well as the standards set therein. Additionally, **Section 35(5) SZJT** permits the reproduction of excerpts of works that have been published as books and newspaper and periodical articles for educational purposes with a number of copies that corresponds to the number of students in a group or class, and for examinations in public education, vocational training, and/or tertiary education. The same provision also permits distribution of such copies to students and scholars, and it enables making the works and copies thereof to students and scholars, for the purposes of illustration and through the education establishment's secure electronic network. Both provisions are subordinated to the three-step-test by the regulation within **Section 33(2) SZJT**, while **Section**

[713] For related case law, see: BDT2015. 3392; EBH2003. 947 Gyulai Törvényszék P. 20.213/2017/22.

83(2) SZJT extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

3.1.2.13.5.4 TEXT AND DATA MINING

Articles 3-4 CDSM have been implemented in **Section 35/A and 84/D SZJT** in 2021.

Section 33/A(1)(3)(3) SZJT defines TDM, in line with **Article 2(2) CDSM**, as "any automated analytical technique aimed at analysing text and data in digital form in order to derive information."

Section 35/A(1) SZJT transposes **Article 4 CDSM** by closely following the structure and language of EU provision; while **Section 35/A(2)-(3) SZJT** does the same for **Article 3 CDSM.** Both provisions, as also required by their EU correspondents, require compliance with the three-step-test, given the regulation within Section 33(2) SZJT.

Section 84/D SZJT extends the two provisions to cover the sui generis right and allows extractions from databases, while **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

3.1.2.13.6 USES FOR INFORMATORY PURPOSES

3.1.2.13.6.1 PRESS REVIEW AND NEWS REPORTING

SZJT contains two provisions, **Section 36(2)** and **Section 37**,[714] which implement or correspond quite closely to **Article 5(3)(c) InfoSoc**. Both provisions entered into force in 2004.

Section 36(2) SZJT permits to quote and disseminate such quotation of articles and broadcasts on daily events and on current economic or political issues with the purpose of informing the public, and provided that the source is mentioned. The exception may be prohibited by the rightholders of works and broadcasts.

Section 37 SZJT allows similar free uses for the report of current events, to the extent justified by the informatory purpose, and provided that the source is mentioned, unless it is proven impossible.

Both provisions, as also required by their EU correspondent, require compliance with the three-step-test, given the regulation within Section 33(2) SZJT.

3.1.2.13.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc has been implemented almost verbatim in **Section 36(1) SZJT in 2004,** without having any significant departures from the text of its EU counterpart. The regulation within **Section 33(2) SZJT** extends to this provision as well and subordinates this exception to the three-step-test.

[714] For related case law, see: BH2005. 56; Fővárosi Ítélőtábla Pf. 21.512/2008/5 Heves Megyei Bíróság G. 20.353/2007/16 SZJSZT 25/2000 Advisory opinion of the Expert Board of Authors' Rights – Tények, hírek a szerzői jog tükrében.

Section 83(2) SZJT extends the scope of copyright exceptions and/or limitations to the objects of related rights as well. In this case, this regulation may be considered to correspond with **Article 10(1)(b) Rental**.

3.1.2.13.7 USES BY PUBLIC AUTHORITIES

3.1.2.13.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

While **Article 6(2)(c) Database** has not been transposed to Hungarian copyright law, **Article 9(c) Database** has been implemented in **Section 84/C(3) SZJT**,[715] by adopting the text of its EU counterpart verbatim.

Article 5(3)(c) InfoSoc has been implemented in **Section 41(2) SZJT** in 2014, by using a slightly different language than its EU counterpart. Indeed, **Section 41(2) SZJT** allows the use of protected works in judicial, administrative, and other official proceedings for the purpose of providing evidence in a manner and to the degree appropriate for the purpose.

Also in this context, **Section 41(3) SZJT** permits to the Parliament to use works for legislative purposes and to carry out related activities, provided that the use is consistent with the purpose of the exception and has a non-commercial nature. In line with its EU correspondent, this provision also requires compliance with the three-step-test, given the reference in **Section 33(2) SZJT,** whereas **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

Compared to the EU acquis, Hungarian exceptions are slightly more restrictive, for excluding public security from the purposes allowing free uses.

3.1.2.13.7.2 OTHER USES BY PUBLIC AUTHORITIES

Hungarian copyright law features two exceptions that partially or entirely correspond to **Article 5(3)(g) InfoSoc.**[716]

Section 38(1)(e) SZJT entered into force in 1999, and it only partially corresponds to the exception introduced by **Article 5(3)(g) InfoSoc**. It allows religious communities to perform protected works at religious ceremonies and church festivities, as long as such uses are not intended to generate an income and performers are not remunerated.

Section 38(1a) SZJT, which entered into force in 2013, is broader than its EU counterpart, particularly for its wider spectrum of beneficiaries. Indeed, this provision allows the performance of works during celebrations held on national holidays, only if such uses are not intended for commercial purposes. The provision also covers performance of other groups,

[715] For related case law, see: Győri Törvényszék P. 20.137/2013/21; Fővárosi Bíróság P. 20.568/2007/43; Fővárosi Bíróság P. 26.166/2009/17; Fővárosi Ítélőtábla Pf. 21.836/2009/3; Fővárosi Ítélőtábla Pf. 21.038/2018/6, Debreceni Ítélőtábla Pf. 20.567/2012/6.

[716] For related case law, see: BDT2012. 2797, Hajdú-Bihar Megyei Bíróság P. 21.321/2011/10, Fővárosi Bíróság P. 27.124/2009/13, Fővárosi Bíróság P. 24.771/2010/11, Fővárosi Ítélőtábla Pf. 20.064/2012/4, Debreceni Ítélőtábla Pf. 20.753/2011/4.

such as amateur artistic groups, as long as their uses do not violate any laws or international treaties, and do not generate any income.

It is worth noting that both provisions are subordinated to the three-step-test by the regulation within **Section 33(2) SZJT**, while **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

3.1.2.13.8 SOCIALLY ORIENTED USES

Article 5(2)(e) InfoSoc has not been directly implemented in the SZJT. However, **Section 38(1)(c) SZJT,** which entered into force in 1999, permits public performances of protected works within the framework of social care and care for the elderly, and for non-commercial purposes only. Compared to the EU provision, the Hungarian rule has a much narrower range of permitted acts. However, similar to its EU counterpart, it requires compliance with the three-step-test, given the regulation within **Section 33(2) SZJT**,[717] while **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

3.1.2.13.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.13.9.1 PUBLIC LENDING

Article 6 Rental has been implemented in **Section 39 SZJT** in 2009. According to this provision, national libraries are entitled to lend copies of works without any restrictions, but with the exclusion of software and electronic databases. The Hungarian legislature decided not to subordinate the exception to the payment of a fair remuneration to rightholders, while it still requires compliance with the three-step-test.[718]

Section 83(2) SZJT extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

The Hungarian exception provides for more flexibility, given that it does not require remuneration of rightholders.

3.1.2.13.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 6 CDSM has been implemented by **Section 33/A(1)(2) and Section 35(4)(b) SZJT** in 2021.

Section 33/A(1)(2) SZJT defines the beneficiaries of this exception, namely CHIs, by adopting the definition provided by **Article 2(3) CDSM. Section 35(4)(b) SZJT** permits CHIs and educational establishments to reproduce works for archiving and for non-commercial purposes.

[718] For related case law, see: SZJSZT 5/2006 Advisory opinion of the Expert Board of Authors' Rights – Az idézeteket tartalmazó tanulmány online hozzáférhetővé tétele; nyilvános szolgáltatásokat nyújtó könyvtárak által végezhető szabad másolatkészítések feltételei.

Section 35(4)(b) SZJT provides for a slightly narrower exception compared to that of **Article 6 CDSM**, mainly for two reasons. On the one hand, the national rule does not include public broadcasting organizations **(Recital 13 CDSM)** amongst its beneficiaries; on the other hand, requires the permitted act to be conducted for non-commercial purposes. **Section 35 SZJT** permits CHIs and educational establishments not only to reproduce but also distribute such copies, for non-commercial purposes as well. This exception, just like its EU correspondent, is subordinated to the three-step-test, given the regulation within **Section 33(2) SZJT**, and **Section 83(2) SZJT** extends the scope of copyright exceptions and/or limitations to the objects of related rights as well.

3.1.2.13.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Section 35(5) SZJT, which has already been explained in the context of digital illustration of teaching, can be linked to **Article 5(2)(c) InfoSoc**.

3.1.2.13.9.4 ORPHAN WORKS

The **Orphan Works Directive** have been implemented in **Sections 41/F-41/I SZJT** in 2014, by very closely following the wording of the Directive.

Section 41/F(1) SZJT identifies the beneficiaries of this exception as CHIs as enlisted in **Article 1(1) OWD.** The same provision transposes the permitted act regulated by **Article 6(1) OWD**, by adopting the language of the provision verbatim.

Section 41/F(2) SZJT sets the scope of the subject-matter, in line with the regulation within **Article 1(2) OWD**, while also adopting the temporal limitations set therein. Similarly, **Section 41/F(3),** adopts verbatim the regulation within **Article 1(3) OWD.**

Section 41/F(4) SZJT extends this exception to works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms, by adopting verbatim **Article 1(4) OWD.**

Section 41/G SZJT transposes **Article 3 OWD** in order to adopt the diligent search requirement therein, while **Section 41/H SZJT** transposes the mutual recognition of orphan works within the internal market, by closely following **Article 4 OWD.**

Section 41/I SZJT regulates the termination of the orphan work status and the fair compensation of the rightholders, while **Section 41/J SZJT** adopts verbatim **Article 6(2) OWD**, which permits CHIs to generate income to cover the costs regarding digitization and making available to the public.

3.1.2.13.9.5 OUT-OF-COMMERCE WORKS

Article 8(1)-(2) CDSM have been implemented in **Section 41/M SZJT** in 2021, while **Section 41/L(1)(2) SZJT** provides the definition of “out-of-commerce works” by adopting the definition within **Article 8(5) CDSM.**

Section 41/M(4) SZJT adopts verbatim the exception provided for CHIs for the use of out-of-commerce works within **Article 8(2) CDSM.**

3.1.2.13.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 5(3)(b) InfoSoc and the **Marrakesh Directive** have been implemented by **Section 41 SZJT**, which entered into force in 2018.

Section 41(1) SZJT provides for a general statement, by following InfoSoc, for it permits the free use of works exclusively for the benefit of persons with disabilities, while indicating that such uses shall be proportionate with the intended use and be of non-commercial nature.

Section 41(1a) SZJT transposes **Article 3(1) Marrakesh**, by following the language of its EU counterpart. **Section 41(1b) and Article 1(1c) SZJT** transpose, once again by largely copying the text of the regulation within **Article 4 Marrakesh**, in order to enable the cross-border exchange of accessible format copies in EU.

Section 41(1d) SZJT clarifies that the free uses of works mentioned above include the works published in any format, including those of digital. On top of this **Section 84/C(3a) SZJT** permits the extraction or re-utilization of the content of a database for non-commercial purposes, for the benefit of persons with disabilities, if directly related to their disability and to the extent necessary for the purpose.

It shall be noted that the three-step-test regulated within Section 33(2) SZJT also applies to the exception provided for persons with disabilities by Section 41 SZJT.

3.1.2.13.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Section 36(3) SZJT, entered into force in 2003, permits audio-visual media services to use works of fine arts, photography, architecture, applied art, or industrial design in a theatrical scenery. Attribution and mention of the source are not required.

Section 36(5) SZJT,[719] also introduced in 2003, transposes **Article 5(3)(j) InfoSoc** by closely following its text. It allows the reproduction and distribution of artistic works for the purpose of advertising a public exhibition or sale, only to the extent required by the purpose and for non-commercial purposes.

Both provisions require compliance with the three-step-test, given the regulation within **Section 33(2) SZJT.**

3.1.2.13.12 THREE-STEP TEST

The three-step test enshrined in **Article 5(5) InfoSoc** is mirrored verbatim in **Section 33(2) SZJT**,[720] although the provision was enacted already in 1999**.** The regulation introduced by

[719] For related case law, see: Heves Megyei Bíróság G. 20.353/2007/16; Fővárosi Ítélőtábla Pf. 21.512/2008/5.
[720] For related case law, see: Heves Megyei Bíróság G. 20.353/2007/16, Gyulai Törvényszék P. 20.213/2017/22, Győri Ítélőtábla Pf. 20.093/2015/26, Debreceni Ítélőtábla Pf. 20.514/2009/4, Debreceni Ítélőtábla Pf. 20.220/2010/4.

this provision applies to the exceptions and limitations introduced by SZJT within Section 33 to Section 41 therein.

3.1.2.13.13 PUBLIC DOMAIN

3.1.2.13.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Section 1(4)-(7) SZJT, which entered into force in 1999, excludes a wide range of works from copyright protection. These works and subject-matter consist of laws and other regulations to court rulings, regulatory resolutions, other official communications and documents, standards prescribed as mandatory by law and other similar regulations **(Section 1(4) SZJT)**; facts and daily news items released in press **(Section 1(5) SZJT)**; ideas, principles, theories, procedures, operating methods, mathematical operations **(Section 1(6) SZJT)**; and works of folklore **(Article 1(7) SZJT)**.[721]

Nevertheless, **Section 1(7) SZJT** clarifies that whereas the expressions of folklore are allocated to the public domain, original and individualistic works deriving from folklore can be protected by copyright.

3.1.2.13.13.2 PAYING PUBLIC DOMAIN SCHEMES

Section 100 SZJT, which entered into force in 2006 and was last amended in 2016, introduces a form of paying public domain. The provision requires a contribution to be paid after each transfer of a work of art that has fallen into the public domain for expiration of the term of protection. It also determines how the amount due should be calculated and excludes the application of the scheme if one of the parties involved in the transfer is a museum. Section 100 SZJT also enlists the obligations imposed on CMOs when managing the process.

3.1.2.13.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Except for the remuneration schemes and licensing schemes already mentioned above, **Section 19 SZJT,**[722] which entered into force in 2016, provides that composers and lyricists may enforce their rights of reproduction and distribution of copies of previously published non-theatrical compositions and lyrics, or excerpts thereof, through their CMOs only, and shall be entitled to waive their remuneration. The provision does not apply to adaptation rights.

[721] For related case law, see: Győri Ítélőtábla Pf.I.20.116/2015/6/I, Kúria Pfv.IV.20.071/2015/10; BDT2006. 1319, BH1978. 471; SzJSzT 18/2007, SzJSzT 13/2016; SzJSzT 19/2002, SzJSzT 9/2001; SzJSzT 27/2001, SzJSzT 25/2000; SzJSzT28/2003.

[722] For related case law, see: BDT2017.3713; Fővárosi Ítélőtábla Pf. 20.957/2018/5, elszámolás megállapítása; Fővárosi Ítélőtábla Pf. 20.056/2017/4, szerzői jogsértés megállapítása és jogkövetkezményeinek alkalmazása Fővárosi Ítélőtábla Pf. 21.470/2011/4, szerzői jogdíj megállapítása Fővárosi Törvényszék P. 24.768/2017/8, elszámolás megállapítása Fővárosi Törvényszék P. 25.172/2014/50, szerzői jogsértés megállapítása Fővárosi Bíróság P. 22.419/2006/25, szerzői jog Gyulai Törvényszék P. 20.166/2014/13, szerzői jogdíj megfizetése Nyíregyházi Törvényszék G. 40.035/2013/128. szerzői jogok sérelmének orvoslása.

Also, in 2020, **Section 41/M(1) SZJT** transposed the ECL scheme provided by **Article 8(1) CDSM** for the use of out-of-commerce work by CHIs. The Hungarian provision adopts its EU counterpart verbatim.

3.1.2.13.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.13.15.1 FUNDAMENTAL (USERS') RIGHTS

None reported.

3.1.2.13.15.2 CONSUMER PROTECTION

None reported.

3.1.2.13.15.3 COPYRIGHT CONTRACT LAW

The **Hungarian Civil Code**[723] contains detailed provisions regulating standard contract terms and the unfair standard contract terms, which apply to EULAs having digital goods as objects.

Section 6:77 of the Code determines the term of standard contract terms as follows. In doing so, it provides for a flexibility by reversing the burden of proof, by indicating that if a party claims that a standard contract term has been individually negotiated, the burden of proof in this respect shall be on the party applying the standard contract term.

Section 6:102 of the Code defines unfair standard contract terms and the regulates consequences of unfair standard contract terms. According to **Section 6:102(1) of the Code**, an unfair standard contract term refers to those that have been concluded contrary to the requirement of good faith and fair dealing, and which causes a significant and unjustified imbalance in contractual rights and obligations, to the detriment of the party entering into a contract with the person imposing such contract term. **Section 6:102(5) of the Code** holds that any unfair contract term that has been incorporated into the contract as a standard contract term can be contested by the injured party.

3.1.2.13.15.4 OTHER INSTRUMENTS

The **Act CLXXXV of 2010 on Media Services and on the Mass Media**,[724] which aims at ensuring that a substantial proportion of domestic audience as well as persons with disabilities have access to cultural content, contains a number of provisions externally impacting on the copyright balance. These provisions, by closely following the structure and text of AVMSD, implement several provisions of the Directive to the Hungarian law.

Section 16 of the Hungarian Act transposes **Article 14 AVMSD**, by closely following the language and by meeting the standards of the regulation therein, while **Section 17** does the same for transposing **Article 15 AVMSD.**

[723] 2013. évi V. törvény a Polgári Törvénykönyvről.
[724] 2010. évi CLXXXV. Törvény a médiaszolgáltatásokról és a tömegkommunikációról.

Section 39 of the Hungarian Act implements **Article 7 AVMSD**. In doing so, it adopts **Article 7(1) AVMSD** verbatim, while introducing an accessibility in the following paragraphs as required by **Article 7(3) AVMSD.**

Section 30 paragraphs (2)-(8) of the Act regulate the obligations of audio-visual service providers and broadcasters to provide subtitles or sign language interpretation for programmes, live broadcasts, and teletex services along with the standards to be met in organizing the subtitles and sign language. **Section 39(9) of the Act** requires providers of audio-visual media services to develop accessibility action plans.

3.1.2.14 IRELAND

The Copyright and Related Rights Act (hereinafter "CRRA")[725] n.28 of 2000, as amended by Act n. 18/2004, Act n. 39 of 2007 and Act n. 19/2019, govern copyright law in Ireland. The Irish copyright landscape is chiefly harmonized with EU standards of E/Ls, given that most of the flexibilities introduced by EU Directives have been transposed. Moreover, on 12 November 2021, Ireland transposed the CDSM Directive by way of S.I. with the Minister for Enterprise, Trade and Employment signing the European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021.[726]

Although lacking a specific private copy exception, the CRRA contains a specific time-shifting provision which fulfils similar functions. Already pre-CDSM Directive, Ireland envisaged provisions allowing distance learning and text and data mining, which have been recently amended to align with the EU Directive. The transposing law also introduced the other CDSM mandatory exceptions, such as the use of out-of-commerce works by Cultural Heritage Institutions. Most of these CDSM provisions are adopted by following the EU counterpart closely.

It is worth mentioning that Irelands' catalogue of exceptions and limitations is characterized by a purpose oriented fair dealing provision, proper to common law jurisdictions, which covers uses for research, private study, criticism, review and reporting of current events. In addition, Ireland enjoys a broad range of flexibilities allowing specific uses by CHI. At the same time, Ireland features several provisions allowing socially oriented uses, alle being adopted in line with the EU standards.

[725] Copyright and Related Rights Act n.28 of 2000, as amended by Act n. 18/2004, Act n. 39 of 2007 and Act n. 19/2019.
[726] S.I. No. 567 of 2021 implementing the CDSM Directive.

3.1.2.14.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.14.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc was implemented in **Section 87(1) CRRA**, in force since 2004.[727] The Irish temporary reproduction was adopted by closely following the formulation of its EU correspondent. However, the Irish provision expressly excludes from the scope of the exception the transfer, rental, lending, or making available of the copy. The same exception is envisioned in **Section 244 CRRA** with regard to performers' rights.

3.1.2.14.1.2 EPHEMERAL RECORDING

Under **Section 248 CRRA**, when a license or assignment of broadcasting rights authorizes the inclusion in a cable program service of the recording of a performance, the authorization also covers the possibility of making a copy of the recording. The copy shall be made through the broadcaster's own facilities and the recording shall not be used for any other purpose than its own broadcast or cable program. Moreover, the recording shall be destroyed within three months after the first use.

Except for this regulation, there is no concrete evidence to suggest that the exception contained in **Article 10(1)(c) Rental Directive** or **Article 5(2)(d) InfoSoc Directive** have been explicitly transposed to the Irish CRRA.

3.1.2.14.1.3 INCIDENTAL INCLUSION

Section 52 CRRA exempts from infringement the incidental inclusion of protected works into other works and the making available of such works. However, the exception does not apply when the interests of rightholders are unreasonably prejudiced by its exercise.

The Irish exception for incidental inclusion is in line with **Article 5(3)(i) InfoSoc.**

3.1.2.14.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Sections 80-82 CRRA implement the copyright exception introduced by **Articles 5 and 6 Software** on access and use of computer programs by lawful users.

Section 80 (1) CRRA closely follows the wording of **Article 5(2) Software**, but it further specifies that a "lawful user" of a computer program is one who holds a licence to undertake any act restricted by the copyright in the program. When needed for the proper use of the program, **Section 82(1) CRRA** permits lawful users to make a permanent or temporary copy of the program or its part, and to perform any necessary translation, adaptation, arrangement or other alteration. The national provision is in line with **Article 5(2) Software.**

Section 81(1)(a)(b) CRRA implements *verbatim* the mandatory exception to the exclusive rights of the rightholders over the computer program, for interoperability purposes,

[727] Unless otherwise indicated, the provisions entered into force in 2000, as amended by Act n. 18/2004, Act n. 39 of 2007 and Act n. 19/2019.

contained in **Article 6 Software**. **Section 82(2) CRRA** does the same with regard to the mandatory exception envisaged under **Article 5(3) Software.**

Section 83 transposes **Article 6(1) Database,** while **Section 327 CRRA** introduces **Article 8 Database** to the CRRA, benefiting lawful users of a database, who are allowed to extract or re-utilize insubstantial parts of its content for any purpose. The exception operates under the condition that the acts do not prejudice rights over works or other subject matter contained in the database.

Article 374 CRRA implements **Article 6(4) Infosoc** as regards the safeguards for permitted uses when TPMs are in place. The provision was amended in 2019. According to this provision, upon request of lawful users, rightholders are required to enable them to enjoy a range of exceptions allowing specific free uses of the work within 30 days of the request. However, rightholders are exempted from this duty when copies of the works protected by TPMs have been made available under reasonable and agreed contractual terms.[728]

3.1.2.14.1.5 FREEDOM OF PANORAMA

Section 93 CRRA implements **Article 5(3)(h) Infosoc**. The Irish exception follows the EU counterpart, for it covers the uses of sculptures, models for buildings and works of artistic craftsmanship permanently situated in a public place or in premises open to the public. Nevertheless, unlike the EU counterpart, the Irish rule lists the specific acts of reproduction that are allowed. Precisely, making a painting, drawing, diagram, map, chart, plan, engraving, etching, lithograph, woodcut, print, or similar thing representing the work. The exception also applies to the broadcast or inclusion of an image of the work in a cable program service.

3.1.2.14.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.14.2.1 REPROGRAPHY

The **CRRA** lacks provisions implementing the reprography exception introduced by **Article 5(2)(a) InfoSoc**. Nevertheless, certain provisions allowing reprography can be found in the context of education and teaching purposes.

3.1.2.14.2.2 PRIVATE COPY

The Irish CRRA does not feature a specific provision related to private copy, regulated under **Article 5(2)(b) InfoSoc.** The Recommendations of the Copyright Review Committee in 2013 for its inclusion were not implemented in the 2019 Act amending the Act.[729]

Despite this, **Section 101 CRRA** envisions an exception allowing making private and domestic recordings, including by an establishment, of a broadcast or cable program,

[728] On the notion that a rightholder may give implied consent for downloading of works where those works are on a server without protection measures, see *Ryanair Ltd v Billingfluege De GmBH* [2015] IESC 11.
[729] See: Catherine Murphy and Stephen Donnelly, 'Copyright Review Committee Submission' (*Department of Enterprise, Trade and Employment*) <https://enterprise.gov.ie/en/Consultations/Consultations-files/Murphy-Donnelly-McGarr-DRI.pdf> accessed 7 July 2022.

including of works communicated therein, when such recordings are made solely for time-shifting purposes. Ministerial regulations may determine other conditions of applicability. Recordings cannot be communicated beyond the family circle for private and domestic purposes.

3.1.2.14.3 QUOTATION

Section 52(4) CRRA implements **Article 5(3)(d).** The provision allows the quotation of works or extracts of works that have already been published or made lawfully available to the public. The exception is subject to sufficient acknowledgment of the source and operates as long as the use does not prejudice the interests of rightholders. The Irish exception resembles the EU counterpart, except for the lack of reference to the need to comply with fair practice.

3.1.2.14.4 PARODY, CARICATURE, PASTICHE

In 2019, the Copyright and Other Intellectual Property Provisions Act of 2019 amended **Section 52(5) CRRA** (2000) to include caricature, parody and pastiche within the fair dealing exception; while **Section 221(2) CRRA** extends the scope of this provision to performances and press publications. Within the specificities of fair dealing, this provision is in line with **Article 5(3)(k) InfoSoc.**

Ireland did not introduce a specific provision implementing **Article 17(7) CDSM**; online quotation and parody of works in the context of online content sharing services are covered by the existing quotation and parody exceptions.

3.1.2.14.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.14.5.1 PRIVATE STUDY

Section 69A, as introduced in 2019, implements **Article 5(3)(n) InfoSoc** in line with the standard set by the EU rule. It envisages a fair dealing exception allowing libraries and archives to perform acts of reproduction and communication to the public of works contained in their permanent collection, as long as these acts are made for research and study purposes, through dedicated terminals located at their premises. The Irish exception also covers the brief and limited display of the copy to the public but. Nevertheless, unlike the EU rule, the national provision applies only if the acts are done in connection with a public lecture held in the CHI or by librarians or archivists. Again, unlike the EU rule, the indication of the source is required under the Irish provision. The scope of this provision is extended to performances by **Section 235A(1) CRRA**.

Section 50(1) CRRA allows, within the fair dealing clause, the use of a literary, dramatic, musical or artistic work, sound recording, film, broadcast, cable program, or non-electronic original databases for research or private study purposes. A similar exception is envisaged under **Section 50(2) CRRA** for the typographical arrangement of a published edition. The exception operates to the extent that the use does not unreasonably prejudice the interests of rightholders.

3.1.2.14.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 5(3)(a) InfoSoc finds correspondence in **Section 53(1) CRRA.** The provision was partially amended in 2019. It allows the reproduction via reprography of literary, dramatic, musical or artistic works or the typographical arrangement of a published edition, as long as the copy is made in the course of education or preparation for education. Additionally, the exception requires that the use is made by or on behalf of a person offering or receiving instruction. The acknowledgement of the source is also required.

Section 53(3) CRRA envisages a similar exception with regard to a sound recording, film, broadcast, cable program or an original database. However, the exception operates within the maximum of *one copy.*

Section 53(5) CRRA allows the use of works in the context of examination questions and answers. Nonetheless, this does not apply to reprographic copies of a musical work for the use by an examination candidate in performing the work.

The Irish exception is quite detailed in the permitted acts, the works covered and the number of copies that can be made. As a result, the provision is less flexible compared to the EU source. This is particularly evident with regard to the subject of related rights, for which a stringent quantitative limit of copies is established.

Article 329 and 330 CRRA implement **Article 9(b) Database** in complete adherence with its content, whereas there is no concrete evidence to suggest that **Article 6(2)(b) Database** has been implemented in the CRRA.

3.1.2.14.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Section 57 CRRA, as amended by the 2019 Act, permits the reproduction and communication to the public of a work for illustration for education, teaching or scientific research. Furthermore, educational establishments are allowed to reproduce or perform any act, including by third parties, to display a work within their educational purposes. No more than 5% of any work can be copied in any calendar year. The exception operates subject to the condition that the uses are non-commercial. Sufficient acknowledgement of the source is mandatory.

Section 57A CRRA allows said beneficiaries to digitally communicate a work as part of a lesson or examination to students, who in turn are allowed to make a copy of the work for using it at a more convenient time (time-shifting). Educational establishments are also permitted to make a copy or communicate a work that is available through the internet. Sufficient acknowledgement of the source is required.

As a result of the transposition of **Article 5 CDSM**, the newly added **Section 57A(2) CRRA** allows the use of works or other subject matter **(Section 225C CRRA)** in the context of distance learning. While the operational conditions of the exception are in line with those laid in **Article 5(1)(a)(b) CDSM**, the Irish provision requires that access is given through appropriate authentication procedures, including password-based authentication.

However, Section **57C CRRA** excludes the application of the exception where a certified licensing scheme[730] is available for the use of such work. In this sense, educational institutions are subject to license agreements managed by the Irish Licensing Agency. **Section 57C(2) CRRA** declares any contrary contractual clause null and void, as mandated by **Article 7(1) CDSM.**

It is worth mentioning that **Section 2 CRRA** defines "educational establishments" as any school, any university to which the Universities Act (1997) applies, as well as any relevant provider of qualifications and quality assurance education and training, as defined in Section 2 of the Qualification and Quality Assurance Act (2012), or any other educational establishment prescribed by order of the Minister (Section 55(4)).

3.1.2.14.5.4 TEXT AND DATA MINING

With the amendment Act of 2019, Ireland introduced a mandatory exception for text and data mining for research purposes. **Section 53A CRRA** allows a lawful user to make a copy of a work to carry out computational analysis of works for the sole purpose of non-commercial research. The provision explicitly excludes the possibility of transferring or communicating to third parties the results from the scope of the exception. However, **Section 53A(5) CRRA** considers an exempted incidental inclusion of extracts works when such reproduction is made with the publication of the computational analysis results. The reproduction of such extracts shall not exceed the reasonably necessary to explain the analysis results.

The Irish Regulation S.I. No.567 of 2021 implementing the CDSM Directive amended **Section 53A CRRA** by adding **subparagraphs 3A-F** and introduced **Section 53B CRRA** and **225A CRRA** to bring the exception in line with the content of **Articles 3-4 CDSM.**

Section 53A (3A) closely follows **Article 3 CDSM,** except that it indicates that an adequate level of security may be ensured using IP address validation or user authentication. It also entitles rightholders to request information about the security proceedings adopted. At the same time, they shall ensure that the beneficiaries can benefit from the exception.

Section 53B deals with text and data mining for commercial purposes as envisaged in **Article 4 CDSM**. However, the Irish provision specifies that the rightholders' express reservation can also be made through the terms and conditions of a website or service. A similar exception is envisaged under **Section 82(3-5) CRRA** with regard to computer programs.

3.1.2.14.6 USES FOR INFORMATORY PURPOSES

3.1.2.14.6.1 PRESS REVIEW AND NEWS REPORTING

Under the fair dealing for criticism and review, **Section 51(2) CRRA**, as amended in 2019, allows the reproduction and communication to the public of articles on current economic, political or religious topics, and of other subject matter of the same character, unless the rightholder has expressly reserved such uses. Beneficiaries of the exceptions are media

[730] Requiring certification of the Ministry in accordance with Section 173 CRRA.

businesses acting under the Irish Competition Act. The acknowledgement of the source is mandatory.

This provision implements **Article 5(3)(c) InfoSoc** by adopting a less flexible approach towards the beneficiaries, which are defined explicitly by reference to a separate act; no reference is made to the use of broadcast works. Conversely, the Irish press review exception does not reference the three-step test.

3.1.2.14.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Section 89 CRRA allows recording, reproducing and communicating public speeches, including political speeches, extracts from public lectures or similar works in writing and material lawfully taken thereof, to report current events or broadcasting, including in a cable program service. The exception operates only with regard to the direct recording of speeches, unless prohibited by the speaker. Sufficient acknowledgement of the source is required.

The Irish exception resembles and corresponds to **Article 5(3)(f) InfoSoc**.

3.1.2.14.7 USES BY PUBLIC AUTHORITIES

3.1.2.14.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 5(3)(e) InfoSoc is implemented in **Sections 71** to **74 CRRA**. The rules allow the use of works for the purpose of parliamentary or judicial proceedings and statutory inquiry, including their use for reporting. In addition, when protected materials are open to the public, it is permitted to copy and supply them to third parties. **Section 237 CRRA** envisages a similar exception with regard to a recording of a performance, whereas **Section 331-333 CRRA** does the same with regard to databases, following **Article 9(c) Database Directive.**

The Irish exception is slightly more restrictive than the EU standard, for it narrows the notion of public security to cover statutory inquiry purposes solely.

3.1.2.14.7.2 OTHER USES BY PUBLIC AUTHORITIES

Ireland does not feature any further exception covering uses by public authorities. This aspect was identified as a possible area for reform by the 2013 Copyright Review Committee, but it was not subsequently followed in the reform of 2019.

3.1.2.14.8 SOCIALLY ORIENTED USES

Section 97 and **Section 98 CRRA** find correspondence in **Article 5(2)(e) InfoSoc.** In contrast to the EU counterpart, the national provisions do not impose fair compensation to rightholders or compliance with the three-step test. Thus, both provisions present a higher level of flexibility compared the EU source as regards their operational conditions.

Specifically, **Section 97 CRRA** permits playing broadcasts and cable programs within the premises of prisons or other similar social institutions. **Section 246 CRRA** envisages a similar exception for sound recordings.

In turn, **Section 98 CRRA** permits playing sound recordings in not-for-profit clubs/societies or other similar organizations whose aim is charitable, or connected to the advancement of religion, education or social welfare. The exception does not cover uses by clubs, societies or other organizations which charge an admission fee. Similar uses are provided for sound recordings under **Section 247 CRRA.**

Other than the above provisions, **Section 90(1) CRRA** permits the public reading of a reasonable extract of a literary or dramatic work which has been lawfully made available to the public. Acknowledgement of the source is mandatory.

3.1.2.14.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.14.9.1 PUBLIC LENDING

Section 58 CRRA, introduced by the Copyright and Related Right Amendment Act of 2007 to implement **Article 6 Rental Directive**, permits an educational establishment to lend protected works. **Section 226 CRRA** provides an exception in favour of the same beneficiaries with regard to the recording of a performance. As per Article **42A CRRA**, the remuneration due to rightholders is calculated and distributed based on the rules set by two separate statutory instruments, in particular S.I. No. 597/2008 - Copyright and Related Rights (Public Lending Remuneration Scheme) Regulations 2008, as amended by S.I. No. 221/2013 - Copyright and Related Rights (Public Lending Remuneration Scheme) (Amendment) Regulations 2013.

3.1.2.14.9.2 PRESERVATION OF CULTURAL HERITAGE

CRRA did not expressly use so far, the term 'cultural heritage', even though the Copyright Review Committee in 2013 recommended the change. Regulation S.I. No.567 of 2021 (implementing the CDSM Directive) amended Section 2 CRRA by introducing the definition of 'cultural heritage institution' as having "the meaning assigned to it in the European Union" – a reference which corresponds to **Article 2(3) CDSM Directive.**

Section 68A, in force since 2019, envisages a mandatory exception for the benefit of libraries and archives, which are allowed to make copies of works in their permanent collection under a different format (format shift) for preservation or archival purposes. The act shall lack economic gain. To align this provision with **Article 6 CDSM**, Regulation S.I. No.567 of 2021 (implementing the CDSM Directive) adds that any contractual clause limiting this exception is unenforceable against the beneficiaries.

Moreover, **Section 65 CRRA** allows librarians and archivists to make a copy to preserve or replace a work permanently held in their collection that has been damaged or lost. The exception applies only when it is not reasonably practicable to purchase a copy of the work in the regular channels of commerce.

3.1.2.14.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Other than Section **68A CRRA**, libraries and archives benefit from a broad range of allowed uses concerning reproduction of certain works, specifically regulated in **Sections 61-69 CRRA. Section 61 CRRA** allows a librarian or archivist of a prescribed library or archive to supply a copy of an article or the contents of a page in a periodical to a natural person for its private study or research purposes. However, no more than one copy can be supplied, unless the person requiring it demonstrates that the previous copy has been lost, stolen, discarded or destroyed or a reasonable period has elapsed. In any case, that person shall not be supplied with more articles from a volume of a periodical than the number of issues that comprise that volume or 10 per cent of the volume. **Section 62 CRRA** contains a similar disposition with regards to copies of part of a work (other than an article or the contents page in a periodical). **Section 63 CRRA** imposes a similar rule regulating the supply of copies of works lawfully made available to the public, periodical or articles or the contents of a page contained therein, between prescribed libraries or archives.

Section 66 CRRA allows making copies of works permanently present in libraries or archives' collections to obtain insurance cover, security, and their exhibition in the library or archive (including informing the public of an exhibition). The exception also covers reproductions to compile or prepare a catalogue (including a published catalogue relating to an exhibition). Nevertheless, the exception therein envisaged applies as long as the source is listed and provided that the use does not extend beyond what is justified by the non-commercial purpose pursued.

Section 67 CRRA allows a librarian or archivist of a prescribed library or archive to make a copy of unpublished works in their permanent collection or part of them, as long as the rightholder has not expressly reserved this right. Provided that no reservation is made, such copy might be supplied to a natural person for private study or research purposes up to a maximum of one single copy.

Section 68 CRRA allows the reproduction of a work of cultural or historical importance or interest which may not lawfully be exported from the State unless a copy of it is made and deposited in a library, archive or other institution designated by the Minister for Arts and Heritage under Section 50 of the National Cultural Institutions Act, 1997.

Section 55 CRRA envisions a fair dealing provision in favour of specific educational establishments identified by order of the Ministry, allowing the performance of literary, dramatic or musical works in the course of the educational activities, provided that the audience is limited to teachers and their pupils or other persons directly connected with the activities of the educational establishment. The exception covers performances made by a teacher or a pupil during educational activities and performances generally made within the premises of the educational establishment.

The provisions mentioned above fall within the umbrella of the broader exception contained in **Article 5(2)(c)-(d) InfoSoc**, from which they diverge for they specify, from time to time, the purpose for which the act of reproduction is allowed. While a purpose limitation is perfectly in line with the EU rule, the Irish provision is quite restrictive, for it sets a quantitative limitation on the number of copies that can be made. Conversely, it uses the degree of flexibility granted by Article 5(4) InfoSoc and expands the scope of the permitted acts to cover the distribution of the copy.

3.1.2.14.9.4 ORPHAN WORKS

S.I. No. 490/2014 introduced the Orphan Works Directive in Ireland, which is regulated under **Section 70A CRRA**. The Irish rule follows *verbatim* the definitions of beneficiaries and orphan works contained in the EU Directive, by explicitly incorporating those terms. Similarly, the provision implements *verbatim* the exception contained in **Article 3 Orphan Works Directive.**

3.1.2.14.9.5 OUT-OF-COMMERCE WORKS

The **CRRA** lacked any provision related to the use of out-of-commerce works. However, the situation changed following the implementation of Article 8 CDSM, which led to the introduction of **Sections 58A CRRA** (works and other subject matter), **82A CRRA** (on software) and **330A CRRA** (on databases).

The Irish implementation of the mandatory exception provided under **Article 8(2) CDSM Directive** perfectly aligns with the EU model.

3.1.2.14.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Section **104 CRRA,** as amended in 2019, implements the **Marrakesh Directive.** It allows specific non-profit entities designated by the Minister to reproduce and modify works, including the distribution of works in an accessible format and the transmission and reception of accessible copies between designated bodies for the benefit of people with disabilities, in line with **Articles 3(1) and 4 Marrakesh Directive**. The exception applies if the acts are directly related to the disability, have only a non-commercial purpose and do not exceed the extent required by the nature of the disability.

According to **Section 104(1)A CRRA,** copies made in an accessible format by a designated body shall bear or otherwise incorporate an express statement indicating that the copy has been made under the exception; they shall also sufficiently acknowledge the source.

However, under Section **104A CRRA** the exception is excluded when a certified licensing scheme which the designated body knew or ought to have been aware of covers the use of specific works.

The notion of disability, as per **Section 2 CRRA,** is defined by reference to **Section 2 Disability Act (2005)**[731] which encompasses a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State because of an enduring physical, sensory, mental health or intellectual impairment.

3.1.2.14.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Section 94 CRRA, introduced in 2019, permits the reproduction and communication to the public of an artistic work or its copies to advertise its sale or public exhibition. The use shall not extend beyond what is reasonably necessary for the purpose and shall not have any other commercial purpose than the advertising or exhibition of the work. This provision implements **Article 5(3)(j) InfoSoc** by closely following its wording, except for the lack of reference to the three-step test.

Section 96 CRRA envisages an exception covering any use of buildings, drawings and plans related to them for their reconstructions, which implements *verbatim* **Article 5(3)(m) InfoSoc.**

3.1.2.14.12 THREE-STEP TEST

Several sections of the **CRRA** limited exceptions by requiring that they do not unreasonably prejudice the interest of the rightholders.[732] In addition, an explicit reference to the three-step test, as enshrined in **Article 5(5) InfoSoc**, has been introduced with the law implementing the CDSM Directive at Section **53A(3D)**, **53B(4)** related to text and data mining and **57A(3)** related distance learning.

3.1.2.14.13 PUBLIC DOMAIN

3.1.2.14.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Whereas **Section 17(2)(a) CRRA** defines the requirements for copyright protection, **Section 17(3) et seq** exclude several matters from the scope of copyright. This is the case for ideas and principles which underlie any element of a work, procedures, methods of operation or mathematical concepts, works which infringe the copyright in another work, or a work which is a copy taken from a work that has already been made available to the public.

On top of this, **Section 20 (1) CRRA** excludes from the subject matter of copyright the transmission of a broadcast or other material in a cable program service unless the transmission alters the content of the broadcast or other materials.

Ireland did not implement Article 14 CDSM.

[731] Disability Act n. 14/2005.
[732] See, for instance, Section 50 CRRA.

3.1.2.14.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.14.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

As mentioned above, uses for educational institutions are subject to the licensing agreement managed by the Irish Licensing Agency for the use of protected materials in their teaching and examination activities (**Section 168 CRRA)**.

The provision envisaging extended collective licensing for out-of-commerce works has been included by S.I. n. 567 of 2021, in **Sections 58A**, **82A** and s. **330A CRRA**, implementing *verbatim* Article 8(1) CDSM.

A compulsory licensing scheme is introduced by **Section 38 CRRA**, applicable to broadcasting and cable program organizations, which may broadcast sound recordings in their programs without prior consent from rightholders, but subject to prior notice to collecting societies[733] and the payment of a pre-established remuneration. Similarly, **Section 174(3) CRRA** requires that the cable retransmission right be exercised against a cable program service provider only through a licensing body.

3.1.2.14.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.14.15.1 FUNDAMENTAL (USERS') RIGHTS

There is no explicit and significant case law to support the statement that fundamental rights play any role as a copyright balancing tool in Irish CA. **Article 17(7) CDSM** exceptions and limitations are treated as user rights in Ireland.[734] Outside of the scope of those provisions the user rights status has not been legislated in Ireland.

3.1.2.14.15.2 CONSUMER PROTECTION

Provisions under CRRA may protect consumers who are lawful users from being inhibited access to protected works by technical protection measures. For example, as mentioned above, **Section 374(4) CRRA**, as amended in 2019, makes it possible for lawful users to file a court complaint if, upon request, the rightholder denies or fails to give them access to works protected by TPM to the benefit of specific exceptions and limitations.

While no other reference to consumer protection law as a source of balancing tools in the Irish copyright landscape has been reported, it can be added that Ireland has not implemented Directive 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services and Directive 771/2019 on certain aspects concerning

[733] Such as a society, a company registered under the Companies Acts, 1963 to 1999, or other organization which has as one of its objects the negotiation or granting of licenses to play sound recordings in public or to include sound recordings in broadcasts or cable program services.

[734] See Article 52(5) CRRA for caricature, parody and pastiche within the fair dealing exception, Article 51 CRRA for criticism and review and Article 52(4) CRRA for quotation.

contracts for the sale of goods. Thus, Irish law does not feature any further provision protecting consumers/users from adverse effects of TPMs.

3.1.2.14.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.14.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.15 ITALY

The primary law regulating copyright in Italy is Law n. 633 of 22 April 1941 (hereinafter "l.aut."), as supplemented and amended by subsequent laws.[735] The Italian l.aut contains most of the limitations and exceptions enshrined in EU sources, but for a few provisions, such as the exception on freedom of panorama, incidental inclusion, and the ones covering repair and testing of devices and uses for building purposes. Italy does not envision an explicit general exception for parody, pastiche or caricature, which have traditionally been covered under the quotation exception. A dedicated provision for parody, to the benefit of users of online content sharing services only, has been introduced as a result of the transposition of Article 17 CDSM.

While several provisions present more rigidity compared to the models set by the EU Directive - as with the case of reprography and private copy) - others offer a higher level of flexibility in certain or all the features of the exception (e.g., quotation). The exceptions allowing acts when needed for access and normal use of computer programs and databases, private study, and of uses or orphan works and out-of-commerce works are transposed almost verbatim. As to the new mandatory provisions introduced with the implementation of the CDSM Directive, Italy is one of the few countries that adopts a flexible approach toward the acts covered by the TDM exception. The Italian legislator has adopted an instead articulated ECL licensing mechanism for the use of out-of-commerce works.

3.1.2.15.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.15.1.1 TEMPORARY REPRODUCTION

Article 68-*bis* l.aut. (2003) envisages an exception to the right of reproduction to allow making temporary copies of protected works, transposing almost *verbatim* **Article 5(1) InfoSoc**. Interestingly, compared to the EU text, the Italian provision clarifies that the exception leaves unaffected the provisions regarding the liability of intermediary service providers, which therefore continue to apply in cases where ISPs interfere with the content of the transmission.

[735] Legge 22 Aprile 1941, n. 633, Protezione del diritto d'autore e di altri diritti connessi al suo esercizio, con le successive modificazioni ed integrazioni, da ultimo dai DD.Lgs. 8 Novembre 2021, n. 177.

3.1.2.15.1.2 EPHEMERAL RECORDING

Article 55 l.aut. was introduced in 2003 to implement **Article 5(2)(d) InfoSoc**. It contemplates an exception in favour of broadcasting organizations, allowing them to record protected works on a disk or another medium for their subsequent broadcasting. The exception applies when performing such an act is necessary, with regard to the time or the technology.

Broadcasting organizations must destroy the recording after its use or render it unusable unless the recording has an exceptional documentary character. In this case, it is possible to preserve it in official archives. Any further economic or commercial exploitations are excluded.

Article 71-*decies* l.aut. extends the scope of this provision to the objects of related rights.

The Italian ephemeral recording exception features more stringent operational conditions than the EU counterpart, for it requires necessity in performing the act and because specifies on which mediums the recordings shall be made. At the same time, unlike the EU model, it does not require that the recording takes place in the broadcasting organization's own facilities, presenting, thus, a higher level of flexibility than the EU counterpart. The conditions for preservation align with the EU standard.

3.1.2.15.1.3 INCIDENTAL INCLUSION

The **l.aut.** does not contain explicit flexibility implementing **Article 5(3)(i) InfoSoc.**

3.1.2.15.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The **l.aut.** contains several provisions allowing certain acts when needed for access and normal use of computer programs and databases by a lawful user.

Article 64-*sexies* (2) l.aut. implements *verbatim* **Article 6(1) Database**. In line with the EU standard, the Italian provision is mandatory and thus not overridable by contract.

Article 64-*ter* l.aut. limits the rights on computer programs by implementing **Article 5 Software**. Both provisions were introduced in 1992 and subsequently amended in 1996. The Italian exceptions, allowing a lawful user to perform acts when necessary to the normal use of the program and to observe and study the program, are in full adherence to the EU source.

Article 64-*quarter* l.aut. transposes the mandatory exception contained in **Article 6 Software** by following the EU model.

Provisions regulating the circumvention of technical protection measures (TPM) are contained in **Article 71-*quinquies***, which implement **Article 6(4) InfoSoc** by closely following its wording. The Italian provision makes it explicit that the safeguards apply only to beneficiaries of the exceptions that are in lawful possession or access to the protected work and if such users are in compliance with, and within the limits of said exceptions, including the payment of fair compensation, where applicable.

3.1.2.15.1.5 FREEDOM OF PANORAMA

The exception featured under **Article 5(3)(h) InfoSoc** has not been explicitly incorporated into the Italian Copyright Act. [736]

3.1.2.15.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.15.2.1 REPROGRAPHY

The reprography exception envisaged in **Article 5(3)(a) InfoSoc** is covered under the same provision devoted to private copy (**Article 68 l.aut.**).

Article 68(2) l.aut. allows the free reprographic reproduction of works detained by publicly accessible libraries, archives, museums and school libraries, if performed by such CHIs for non-commercial purposes and in the context of the provision of their services.

Article 68(3) l.aut. allows the reproduction for personal use of original works by photocopy, Xerox or similar systems within the limit of 15% cent of each volume or issue of a periodical, excluding advertising pages, and with the exclusion of sheet music.

When the reproduction occurs in copy centres, where reprography devices are made available to third parties, centre's owner shall correspond an equitable remuneration to rightholders for the reproduction of their works, which shall also be for personal, non-commercial use only. **Article 181-*ter* l.aut.** clarifies that,[737] unless otherwise agreed between the CMO and associations representing the categories involved, the remuneration for each page cannot be lower than the average price per page recorded annually by ISTAT for books.

If the private reprography is made from works held in public libraries, a quantitative limit (15% of each volume or issue of a magazine, excluding advertising pages) applies. Moreover, in this case rightholders are entitled to fair remuneration, under the criteria set by **Article 181-*ter* l.aut.**, to be paid cumulatively on an annual basis directly by the libraries.

Neither this quantitative limitation nor the exclusion of sheet music applies to works that qualify as "rare". For instance, this would be the case of works not present in publishing catalogues because cannot be easily found through ordinary commercial channels.

Article 68 l.aut prohibits distributing the copies made under this exception to the public and, in general, any use that is in competition with rightholders' economic interests.

[736] Despite this, doctrinal interest in the freedom of panorama is increasing. This is particularly true for the protection of works of cultural heritage by the Code for the protection of Cultural Goods and Landscape (D.lgs. n. 42/2004) as well as property rights (Art. 832 of the Italian Civil Code). See: Mirco Modolo, 'La Riproduzione Del Bene Culturale Pubblico' (2021) 1 *Aedon Rivista di Arte e Diritto* <http://www.aedon.mulino.it/archivio/2021/1/modolo.htm> accessed 7 July 2022.

[737] Article 181-ter indicates S.I.A.E. – Italian Society of Authors and publishers – as the intermediary body in charge of agreeing with the associations of the category concerned on the measure and collection of the remuneration; in the absence of agreement on the measures and modalities of the remuneration, they are established by decree of the President of the Council of Ministers.

The Italian provision is more flexible than the EU counterpart, for it provides a carve-out to the exclusion of sheet music from the exception. Nevertheless, it is restrictive concerning the amount of work that can be reproduced.

3.1.2.15.2.2 PRIVATE COPY

Article 68 l.aut. authorizes the reproduction of single works or excerpts thereof for personal use, if performed by handwriting or with copying devices which do not enable the commercialization or the public dissemination of the copies. The provision was modified in 2000 and in 2003 following **Article 5(2)(b) InfoSoc.**

Articles 71-*sexies* l.aut., introduced in 2003 to implement **Article 5(2)(b) InfoSoc** allows the reproduction of phonograms and videograms on any medium, if carried out by a natural person for exclusively personal, non-commercial use, with the exclusion of acts performed by third parties. The exception does not apply to works or other protected subject matter made available to the public so everyone may access them from a place and time individually chosen by them, when certain technological measures protect the work, or when access is permitted on contractual basis.

Despite the application of technological measures, rightholders are required to allow lawful users of a work to make a private copy thereof, subject to compliance with the three-step-test.

Under **Article 71-*septies*** rightholders are due fair compensation which, pursuant to **Article 71*octies* l.aut.** is managed collectively.

The Italian private copy exception is quite well harmonized with the EU model, except that it explicitly excludes the possibility of making copies through third parties and for the exclusion of works available on a contractual basis.

3.1.2.15.3 QUOTATION

Article 70-l.aut., in force since the adoption of the law in 1941, was amended in 2003 to implement **Article 5(3)(d) InfoSoc. Article 71-*decies* l.aut** extends the scope of this provision to the objects of related rights.

The provision allows the abridgement, quotation or partial reproduction of a protected work and its communication to the public, for purposes of criticism and discussion, within limits justified by said purposes and provided that there is no interference with the rightholders' economic exploitation of the work. Uses for educational and research purposes shall be non-commercial and for illustration.[738] Acknowledgement of the source is required.

When assessing the possibility of covering under the quotation exception the reproduction of a website article, the Court of Milan, took a broad interpretation of teaching so as to include the exchange of experiences and suggestions.[739] The Court, however,

[738] This use overlaps with illustration for teaching and parody (see below 3.1.2.15.2 and 3.1.2.5.2).
[739] Tribunale Milano, Sez. spec. Impresa, n.11564, 17/09/2013.

highlighted that the quotation or reproduction must always be accompanied by the mention of the title of the work, the names of the author and of the publisher.

The Italian quotation exception features greater flexibility than the EU model, for it expands the list of allowed purposes, as confirmed by the judiciary. Nevertheless, it restricts the amount of work that can be quoted.

A dedicated exception for parody, limited to the use of providers of online content sharing services, has been introduced by D.Lgs. n.177 of 8 November 2021, which implemented **Article 17(7) CDSM** by including a new **Article 102-*nonies*(2) l.aut.** The provision recalls almost *verbatim* the EU text, including the OCSSP's duty to inform their users of the possibility of benefiting from specific L&Es.

3.1.2.15.4 PARODY, CARICATURE, PASTICHE

Article 5(3)(k) InfoSoc has not been explicitly implemented into the Italian Copyright Act. Italian courts have covered such uses by referring to the quotation exception and the constitutional right of freedom of expression and artistic freedom (Article 21 of the Italian Constitution),[740] thus actively engaging in the definition of limits and conditions for parody. For instance, in a judgement of 2011, the Tribunal of Milan (first instance court)[741] considered that the greater or lesser degree of imitation of the parodied work cannot be given decisive importance, although it contributes to the assessment and act as an indicator of the creative contribution made by the second author. By contrast, the Court held that the evaluation should consider whether the parodic work as a whole while reproducing - to a greater or lesser extent - the original work and, in any case, drawing inspiration from it (...), deviates from it in order to convey a different artistic message.

A dedicated exception for parody, limited to the use of providers of online content sharing services, has been introduced by D.Lgs. n.177 of 8 November 2021, which implemented **Article 17(7) CDSM** by including a new **Article 102-*nonies*(2) l.aut.** The provision recalls almost *verbatim* the EU text, including the OCSSP's duty to inform their users of the possibility of benefiting from specific L&Es.

3.1.2.15.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.15.5.1 PRIVATE STUDY

Article 71-*ter* l.aut. transposes **Article 5(3)(n) InfoSoc**, in force since 2003. It allows publicly accessible libraries, educational establishments, museums or archives to

[740] Confirmed by Tribunale di Venezia in 2015 ("The appropriations work of art that by making use of détournement, scandal and mockery, conveys a creative, original and autonomous message clearly perceptible cannot be reduced to a mere counterfeit of the appropriate work, but must be considered lawful by virtue of the exemption of parody, as argued by the judgment of the European Court of Justice no. 201 of 3 September 2014 (C-201/2013), the parody itself being recognized as a right constitutionally guaranteed in the domestic system by Articles 21 and 33 of the Constitution"). See Fundamental rights, Section XV) a).

[741] Tribunale Milano Sez. Proprietà Industriale e Intellettuale 13.07.2013, citing Tribunale Milano, 15.11.1995 "Susanna Tamaro case".

communicate or make available to their patrons protected works held permanently in their collections, on dedicated terminals located within their premises, for research or private study purposes. The exception does not apply where the works are subject to purchase or licensing terms. **Article 71-*decies* l.aut** extends the scope of this provision to the objects of related rights.

The Italian private study exception is perfectly in line with the EU model.

3.1.2.15.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

As mentioned above, although lacking an explicit implementation of **Article 5(3)(a) InfoSoc,** the quotation exception (**Article 70(1) l.aut**.) partially covers uses for illustration for teaching. The Italian exception shows a restrictive approach allowing solely for the abridgement, quotation or partial reproduction of works to be communicated to the public for education or scientific research purposes.

In addition, **Article 64-*sexies* l.aut.** implemented **Article 6(2)(b) Database**, permitting access and consultation (but unlike the EU, model not the reproduction) of a database for teaching and scientific purposes, to the extent necessary for the purpose, which should be non-commercial.

Article 70(2) l.aut. allows the inclusion of works in school anthologies, providing that reproductions shall not exceed the extent specified in *ad hoc* regulations, and remunerations are paid to rightholders.[742] The indication of the source, including the author's name, is required; the same obligation of acknowledgment applies to the case of translations.

Another provision addressing educational and scientific needs is **Article 70(1)-*bis* l.aut.**, introduced in 2008, which allows the dissemination over the internet of low-resolution versions of photographs and musical works on a not-for-profit basis. A separate decree may introduce possible limitations to this exception.

3.1.2.15.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Until recently, the only reference to digital uses for illustration for teaching in the Italian Copyright Act came from **Article 70(1)-*bis* l.aut.** on the online publication of low-resolution photographs and music works.

With the implementation of the CDSM Directive (D.lgs. 8 November 2021, n. 177), a new **Article 70-*bis*** now regulates the matter, transposing almost *verbatim* the conditions set under **Article 5 CDSM**, including its non-overridability by contract. However, the Italian provision diverges from the EU model by narrowing the amount of work that can be used. Specifically, it allows the summary, quotation, reproduction, translation and adaptation of passages or parts of works and other subject matter and their communication to the public by digital means. Works intended principally for the educational market and sheet music and musical

[742] Regulated under Article 22 R.D. 18 maggio 1942, n. 1369. Approvazione del regolamento per l'esecuzione della L. 22 aprile 1941, n. 633, per la protezione del diritto di autore e di altri diritti connessi.

scores are excluded from the scope of the exception when suitable voluntary licenses are available on the market and provided that such licenses answer to the needs and special characteristics of educational establishments and are readily available and accessible to them.

3.1.2.15.5.4 TEXT AND DATA MINING

The Italian Copyright Act did not feature any reference to text and data mining until D.lgs. 8 November 2021, n. 177 implemented **Articles 3** and **4 CDSM** in **Articles 70-*ter*** and **70-*quarter* l.aut**, respectively.

Article 70-*ter* (2)(3)(4) l.aut define the notion of text and data mining, cultural heritage institutions and research organizations in line with the EU counterpart.

Article 70-*ter* (1) transposes **Article 3 CDSM** by expanding the scope of the exception to cover the communication to the public of the reproductions made, if expressed in a new work, and in an original way. Other than this, the Italian implementation is perfectly in line with the EU model.

Article **70-*quarter*** implements **Article 4 CDSM** *verbatim*.

3.1.2.15.6 USES FOR INFORMATORY PURPOSES

3.1.2.15.6.1 PRESS REVIEW AND NEWS REPORTING

Article 5(3)(c) InfoSoc is implemented in **Article 65 l.aut**., as modified in 2003.

The provision allows the reproduction and making available of articles on current interest having an economic, political or religious character in magazines, newspapers or radio unless the rightholder has expressly reserved such uses. The source, the date, and the author's name, if quoted, shall be indicated.

The article also allows the reproduction or communication to the public of works or other protected subject matter used during current events to report them. The use is allowed to the extent justified by the informatory purpose. The source and author's name should be mentioned unless proven impossible.

Article 71-*decies* l.aut. extends the scope of this provision to the objects of related rights.

The Italian use of works for reporting current events features less flexibility because it requires that the work is part of the reported event, a condition that is absent in the EU model.

3.1.2.15.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 66 l.aut., as amended in 2003, implements **Article 5(3)(f) InfoSoc** by imposing more stringent operational conditions. **Article 71-*decies* l.aut.** extends the scope of this provision to the objects of related rights.

It allows the reproduction and communication to the public in magazines, newspapers, radio or online news of speeches on matters of political or administrative interest delivered

in public assemblies or public lectures. The source, the author's name, the date and the place where the speech was delivered shall be indicated.

3.1.2.15.7 USES BY PUBLIC AUTHORITIES

3.1.2.15.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 67 l.aut, amended in 2003, transposes **Article 5(3)(e) InfoSoc. Article 71-*decies* l.aut.** extends the scope of this provision to the objects of related rights.

It allows the reproduction of works or portions of works for public security purposes, and in the context of parliamentary, judicial or administrative proceedings. Unlike the EU model, the indication of source, including, where possible, the author's name, is mandatory. The Italian provision is slightly less flexible than the EU counterpart, for it does not cover uses for reporting.

Article 64-sexies(1)(b) l.aut. (1999) extends the exception to databases, in line with **Article 6(2)(c) Database.**

3.1.2.15.7.2 OTHER USES BY PUBLIC AUTHORITIES

The l.aut. does not feature any other explicit reference to uses by public authorities as defined in **Article 5(3)(g) InfoSo**c. However, such cases may fall within the scope of **Article 66 l.aut**., as modified in 2003 to implement **Article 5(3)(f) InfoSoc**, which introduces an exception for using public speeches and lectures for informatory purposes.

3.1.2.15.8 SOCIALLY ORIENTED USES

Article 71-*quarter* l.aut. permits public hospitals or prisons to reproduce broadcasts for internal uses only, provided that rightholders are paid fair compensation, in the amount defined by an *ad hoc* ministerial decree. The provision closely follows **Article 5(2)(e) InfoSoc,** except that it limits the use to internal uses of the beneficiaries.

3.1.2.15.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.15.9.1 PUBLIC LENDING

The public lending exception is regulated under **Article 69 l.aut**. The provision has been in force since 1994 and was amended in 2000, 2003, and 2006 to a it in line with the exception envisaged in **Articles 6** and **10 Rental.**

It allows state libraries, other libraries and public establishments to lend, for the sole purposes of cultural promotion and personal study, without paying any remuneration to rightsholders, (a) printed copies of works, except for of sheet music and musical scores, and (b) phonograms and videograms containing cinematographic or audio-visual works or sequences of moving images, whether they have sound or not. For the latter type of work, the exception requires that at least eighteen months have passed from their first distribution or, if the distribution right has not been exercised, at least twenty-four months have passed from their production.

The provision additionally permits the single reproductions lacking any direct or indirect economic or commercial advantage of phonograms and videograms containing cinematographic or audio-visual works or sequences of moving images that are stored in a permanent collection for public libraries, discotheques and film archives.

Rightholders are due a remuneration, regulated under Law n. 286 of 24 November 2006.

3.1.2.15.9.2 PRESERVATION OF CULTURAL HERITAGE

Until recently, preservation of cultural heritage found coverage only in the context of ephemeral recordings and orphan works. The decree implementing the CDSM Directive has now introduced a new **paragraph 2bis to Article 68 l.aut.**, which implements **Article 6** CDSM *verbatim.*

3.1.2.15.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Article 15 l.aut., as amended in 2013, stipulates that when the performance, representation or recitation of the work within the ordinary circle of the family, school residence (*convitto*), school or institution is not done for profit, the act is not considered public. Similarly, the law allows the recitation of literary works carried out, on a non-profit basis, in public museums, archives and libraries for the exclusive purpose of cultural promotion and enhancement of their collections, as identified by memoranda of understanding between SIAE and the Ministry of Cultural Heritage.

Other specific exceptions falling within the umbrella of specific uses by cultural heritage institutions (**Article 5(3)(c) InfoSoc)** are listed under **Article 68** (Reprography), **Article 55** (ephemeral recording), and those provided in this section.

3.1.2.15.9.4 ORPHAN WORKS

Articles 69*bis-quinquies* l.aut., in force since 2014, implement the exception contained in **Article 6 Orphan Works** by providing for the same conditions, beneficiaries, permitted uses and definitions therein.

3.1.2.15.9.5 OUT-OF-COMMERCE WORKS

The Italian Copyright Act did not contain any reference to out-of-commerce works until the implementation of the CDSM Directive in 2021. The new **Article 102-*duodecies* (4) l.aut.** implements the mandatory exception provided by **Article 8(2) CDSM.** The Italian provision is transposed in full adherence to the EU counterpart.

3.1.2.15.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 71-*bis* l.aut. was introduced in response to **Article 5(3)(b) InfoSoc**. It allows the reproduction and communication to the public of works or other protected subject matter in favour of persons with disability, for their personal use only, with no possibility to delegate such acts to third parties. The exception applies provided that the reproduction or the

communication lack commercial purpose. In addition, the act must be directly related to the disability and limited to the extent justified to the purpose. The notion of persons with disabilities is defined by a separate decree, which also may define other operational conditions. This provision was amended in 2019[743] to transpose the **Marrakesh Directive** into the Italian national law (by adding **paragraphs (2)-*bis* to *quinquies*** to **Article 71-*bis***).

Article 71-*bis* (2)bis implements the exception envisaged in **Article 3 Marrakesh** by providing the same conditions and permitted uses. Nevertheless, the Italian law lists explicitly the works covered by exception; among them are published literary works, photographs, visual artworks, books, newspapers or other writings, annotations, music sheets, illustrations – on any physical, audio or digital support.

The exception contained in **Article 71-*bis* (2) bis** applies to the beneficiaries identified in **Article 71-*bis*(2)*ter*,** which in turn introduces the definition of beneficiary person and authorized entities as outlined in **Article 2(2)** and **Article 2(4) Marrakesh.**

However, the exception does not apply to authorized entities when accessible versions of a work or other material are already commercially available.

3.1.2.15.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

None reported.

3.1.2.15.12 THREE-STEP TEST

The three-step test envisaged under **Article 5(5) InfoSoc** finds several implicit references within the Italian Copyright Act, and two explicit mentions. The narrowest one comes from **Article 68 l.aut**., which requires rightholders to allow lawful users to make a private copy of protected works, provided that this does not conflict with the normal exploitation of the work and does not cause unjustified prejudice to the rightholder. The most relevant mention comes, instead, from **Article 79-*nonies* l.aut.**, which states that all L&E covered by the Italian Copyright Act, when they apply to works and other protected materials made available to the public in a way that users can have access from a place and a time individually chosen by them, should not conflict with the normal exploitation of the work nor cause unjustified prejudice to the legitimate interests of rightholders.

3.1.2.15.13 PUBLIC DOMAIN

3.1.2.15.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 5 l.aut. excludes from the scope of protection texts of official acts of the State or public administrations, whether Italian or foreign.

[743] Legge 3 maggio 2019, n. 37 "Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea – Legge europea 2018", pubblicata in Gazzetta Ufficiale n. 109 del 11 maggio 2019, entrata in vigore del provvedimento: 26 maggio 2019.

Differently from other national experiences, **Article 71 l.aut**. loosely considers works of folklore or works derived therefrom as a protected subject matter. Works of folklore may also fall under the protection offered by D.lgs. 22 January 2004, n.42 (Cultural and Natural Heritage Code). The implementation of the CDSM Directive has introduced into the Italian Copyright Act a new **Article 32-*quarter***, transposing **Article 14 CDSM**. The provision states that, upon the expiration of the term of protection of a work of visual arts, the material resulting from an act of reproduction of such work is excluded from copyright protection unless it constitutes an original work, and without prejudice to the provisions on the reproduction of cultural goods set out in the Cultural and Natural Heritage Code.

3.1.2.15.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.15.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Article 70(2) l.aut., regulating the reproduction for scientific and didactic purposes, has been interpreted as a compulsory license, given that anthologies for school use seem to have a right to reproduce (also the entirety of) other authors' works provided that remuneration is paid.

Article 188 l.aut. also provides for an equivalence rule, according to which if the law of that State includes a period of compulsory licensing during the term of protection, the foreign work shall be submitted to an equivalent rule in Italy.

The **l.aut.** features mandatory collective management of the right of retransmission of broadcasts (**Article 180-*bis* l.aut.)**; the right of performers to an annual supplementary remuneration (**Article 84-*bis* l.aut.**), compensation for public performance in public establishments of broadcast works through sound radio receivers equipped with loudspeakers (**Article 58 l.aut.**); remuneration for broadcasting and any communication to the public of movie or audiovisual work including the performer's artistic contribution (**Article 84 l.aut.**); resale rights (**Article 152-154 l.aut.**); remuneration for private copying (**Article 71*octies* l.aut.**); remuneration for reprographic reproduction, also in copy centres and libraries (**Article 68l.aut.**); lending rights (**Article 18-*bis* l.aut.**);equitable remuneration due in case of public performance of works in social care institutions or other charity associations for non-profit activities (**Article 15-*bis* l.aut.**).

Article 102-*duodecies* introduces an ECL scheme following almost *verbatim* **Article 8 CDSM** in the rights covered by the licensing scheme.

As to the procedure, the Italian transposition provides for an articulated mechanism which imposes the CHI requesting the non-exclusive license to submit to the representative CMO documentation demonstrating the conducted verification of the availability of the work in the usual commercial channels. In turn, CMOs must inform all rightholders about the request and verify the adequacy of the verification carried out by CHI. If the CMO ascertains that the work is out-of-commerce, it communicates the request to the Ministry of Culture,

which publishes it on its institutional website. If within 30 days no rightholder has opposed, the CMO grants the license and communicates it to the European Union Intellectual Property Office for publication in the single portal. The rights of use conferred by the license may be exercised six months after the date of publication on the single portal.

3.1.2.15.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.15.15.1 FUNDAMENTAL (USERS') RIGHTS

The balance between conflicting rights and interests is primarily deferred to the judicial. Courts often refer to constitutional rights (e.g., freedom of expression) for realizing such balance. Other than the already cited judgement of 2011, the Tribunal of Milan (first instance court) related to parody, the Italian Supreme Court has referred to the need to balance the rights to information and the right to criticism – both protected by Article 9 of the Constitution.[744] The Court of Rome has cited the same source for balancing copyright (right to create) and other constitutionally protected rights such as privacy.[745]

There is a limited number of references to the public interest in the Italian Copyright Act. For instance, **Article 97 l.aut.** (Portrait of famous persons on the occasion of ceremonies of public interest), **Article 71-*bis* l.aut**. (Defining organizations authorized to make copies for persons presenting handicaps), **Article 112 l.aut**. (Expropriation for public interest), **Article 70-*ter* l.aut.** (Implementation of Article 3 CDSM, research organizations that pursue a public interest), **Article 69-*quinquies* l.aut.** (Organizations and orphan works), **Article 91 l.aut.** (Publication of non-original photographs of public interest).

3.1.2.15.15.2 CONSUMER PROTECTION

It can be mentioned that Italy has implemented Directive 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services with Legislative Decree n. 173 of 4 November 2021, and Directive 771/2019 on certain aspects concerning contracts for the sale of goods with Legislative Decree n. 170 of 4 November 2021.

3.1.2.15.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.15.15.4 OTHER INSTRUMENTS

None reported.

[744] Cass. civ., sez. III^, sent., 07-05-2009, n. 10495; Cass. civ., sez. III^, sent., 31-03-2010, n. 7798
[745] Tribunale di Roma, 13.12.2011; Tribunale di Roma, 14.02.2008 (literary works vs. privacy)

3.1.2.16 LATVIA

The Latvian Copyright Act (hereinafter "LaCA") n. 148/150, in force since 11 May 2000, as last amended in 2017,[746] has adopted several copyright flexibilities contained or introduced by EU Directives. Conversely, it does not feature any provision regulating uses for press review or news reporting and use of public speeches and lectures, yet these uses may be covered under the quotation exception. Similarly worth noting is that LaCA envisages a quantitative limit for the exception for private copy. The Act also explicitly references the three-step test, which applies transversely to all its E/L.

Although the implementation of the CDSM in Latvia is still pending, thus, the mandatory exceptions therein provided are not yet part of the Latvian Copyright landscape, the Act already contains an exception for the use of out-of-commerce works for preservation purposes, benefiting certain CHIs. Moreover, whereas an exception covering the uses of works for the purposes of parody is already envisioned, the existing provision does not cover the uses for caricature, nor does it contain an explicit reference to online uses.

3.1.2.16.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.16.1.1 TEMPORARY REPRODUCTION

Section 33 LaCA implements **Article 5(1) InfoSoc** in Latvian copyright law by adopting the EU rule verbatim. A slight difference is to be found in the "incidental requirement" is not expressed explicitly but can be deduced by looking holistically at the other parameters mentioned by the provision. The provision was first introduced in 2000 and subsequently amended in 2004 and 2007.

It allows carrying acts of temporary reproduction of protected works if such acts have no independent economic significance and are of transient nature and an essential part of a technological process. The transitory reproduction shall be made for the sole purpose of sending the work by the intermediary to a data network between third persons, or to allow the lawful use of the work. No remuneration is due to rights holders.

Article 54(3)(2) LaCA extends the scope of this exception to related rights (performances, phonograms, film fixations and broadcasts).

3.1.2.16.1.2 EPHEMERAL RECORDING

Section 19(1)-(8) and **Section 27 LaCA**, introduced in 2000 and amended in 2004, envisages an exception allowing broadcasting organizations to perform ephemeral recordings of a work they can already lawfully use. No mention is made of the requirement to use "its own facilities". Beneficiaries should carry out the recordings employing their own equipment and for the exclusive purpose of their own use. No remuneration is due to rightholders.

[746] Autortiesību Likums (Ar Grozījumiem: 14.06.2017) Publicēts: "Latvijas Vēstnesis", 148/150 (2059/2061), 27.04.2000., "Ziņotājs", 11, 01.06.2000. likums Pieņemts: 06.04.2000. Stājas spēkā: 11.05. 2000.Attēlotā redakcija: 14.06.2017.

Recordings should be destroyed within one month from their production, unless agreed otherwise with rightholders. It is possible to store recordings in official archives when they have a particular documentary character or cultural and historical significance. The possibility of storing the recording does not include the right to use them in any other manner. This exception implements **Article 5(2)(d) InfoSoc** by specifying certain operational conditions of the exception**.** The conditions for preserving the recordings are less restrictive than the EU counterpart.

Article 54(3)(2) LaCA extends the scope of this exception to related rights (performances, phonograms, film fixations and broadcasts).

3.1.2.16.1.3 INCIDENTAL INCLUSION

The Latvian CA lacks any explicit provision related to **Article 5(3)(i) InfoSoc**. However, a collateral reference can be found in **Section 25 LaCA**, which allows the inclusion in a work, for non-commercial purposes only, of images of works of architecture, visual and applied arts, design and photography that are permanently displayed in public places.

3.1.2.16.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The LaCA features several provisions that provide for exceptions for the benefit of lawful users of databases and computer programs, and safeguards against TPMs hindering users benefiting from E/L. These provisions entered into force in 2004, and they transpose the related provisions contained in **Article 6(1) Database**, **Article 5(1)** and **6 Software**, and **Article 6(4) InfoSoc** by closely following the EU standards.

Section 31 LaCA, by adopting **Article 6(1) Database,** allows the lawful user of a database to perform acts necessary for the access and normal use of the database or its content. This provision cannot be overridden by contract. Likewise, **Article 58 LaCA** transposes **Article 8(1) Database,** by closely following its EU counterpart.

Section 29 (1) LaCA permits lawful users the reproduction, translation, adaptation or any other act of transformation of a computer program, including the correction of errors, while **Section 29(2) LaCA** allows the making of backup copies when is necessary for them to the use of the program. Both provisions are declared mandatory and thus cannot be excluded by contract.

While **Section 29(3) LaCA** implements *verbatim* **Article 5(3) Software**, **Section 30 LaCA** does the same for **Article 6 of the Directive**.

Provisions regulating the circumvention of TPMs are contained in **Section 18(4) LaCA**, last amended in 2014. Pursuant to this rule, when necessary for a lawful user to carry out acts covered by the exceptions related to educational and research purposes; for people with disabilities; ephemeral recordings; for Judicial proceedings, access can be requested from rightholders, who may refuse the request only if the use falls outside the scope of the permitted uses.

3.1.2.16.1.5 FREEDOM OF PANORAMA

Section 25 LaCA allows the visual reproduction and communication to the public of works of architecture, visual and applied arts, design and photography that are permanently displayed in public places, as long as this is made for personal use. The exception also covers similar uses for the purpose of information in news broadcasts or reports of current events. However, the use of images for broadcast by broadcasting organisations is explicitly excluded. Similarly excluded are uses for commercial purposes. **Article 54(3)(2) LaCA** extends the scope of this exception to related rights (performances, phonograms, film fixations and broadcasts).

This exception implements **Article 5(3)(h) InfoSoc.** It was first introduced in Latvia in 2000, and it was amended in 2004 and 2007. The Latvian equivalent can be considered more restrictive than the exception envisaged in the InfoSoc Directive. This is evident from the limitation of the means of reproduction, and because the Latvian provision subordinates the applicability of the exception to certain purposes that are absent in the EU directive.

3.1.2.16.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.16.2.1 REPROGRAPHY

Section 35 LaCA (2000)[747] allows the reprographic reproduction of published works, with the exclusion of sheet music, by natural persons for their personal use and without any direct or indirect commercial purpose. The exception is subject to the payment of a fair compensation to rightsholders. The remuneration is due by the owner, the person responsible or in possession of the equipment intended for the reprographic reproduction. The determination of the amount, collection, repayment and distribution of the remuneration are managed by CMOs.

3.1.2.16.2.2 PRIVATE COPY

Section 34(1) LaCA, first introduced in 2000, as per amendments of 2007, 2010, 2014 and 2017[748] implements **Article 5(2)(b) InfoSoc. Article 54(3)(2) LaCA** extends the scope of this exception to related rights (performances, phonograms, film fixations and broadcasts).

Nevertheless, the Latvian private copy exception features s a more restrictive approach than such EU rule, for it limits the works covered and the number of copies that can be made. Specifically, the exception allows natural persons to reproduce, also in a digital format, works that have been included in lawfully acquired films, phonograms or visual works. The reproduction should be for personal use without any direct or indirect commercial purpose. The provision does not cover computer programs and databases, and it is not allowed to have the copy done by a third person. It is worth highlighting that the exception allows only making one copy. Rightholders are entitled to receive fair compensation ("blank tape levy").

[747] For related case law, see: Constitutional Court, Judgment of May 2, 2012, Case No. 2011-17-03.
[748] For related case law, see above Constitutional Court, Judgment of May 2, 2012, Case No. 2011-17-03.

While there is no concrete evidence to suggest that **Article 6(2)(a) Database** has been transposed to the Latvian copyright law, **Article 59(1)(1) LaCA** implements **Article 9(a) Database** by closely following the EU rule.

3.1.2.16.3 QUOTATION

The quotation exception provided in **Article 5(3)(d) InfoSoc** is featured under **Section 20(1) LaCA**.[749] The provision has been in force since 2000 and was amended in 2004 and 2007.

It allows the reproduction of published works, excluding computer programs, in the form of quotations and fragments, for scientific, research, polemical or critical purposes. The use of works in news broadcasts and reports of current events is also permitted, to the extent justified by the information purpose.

Along the same lines and with the same purpose of informing the public, **Section 20(3) LaCA** allows the fixation, communication to the public and publication of current events in photographic works. In addition, broadcasting organizations are allowed to broadcast visual or phonographic works related to current events, to the extent justified by the informational purpose.

While rightholders are not entitled to any remuneration, the source and name of the author should always be mentioned. In addition, the exception is subordinated to the three-step test.

The Latvian quotation features a broader exemplificative list of purposes justifying the quotation, which reinforces the flexibility of the exception, as is furthermore evident from the broad range of overlapping uses.

3.1.2.16.4 PARODY, CARICATURE, PASTICHE

The exception provided for caricature, parody, and pastiche introduced by **Article 5(3)(k) InfoSoc** has been transposed under **Section 19(1)(9) LaCA**. Nevertheless, the LaCA is less flexible than the EU rule, for it does not cover pastiche.

To date, Latvia has not implemented the CDSM Directive yet. Thus, it is still to be seen whether the Latvian legislature will transpose **Article 17(7) CDSM** into its Copyright Act.

3.1.2.16.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.16.5.1 PRIVATE STUDY

Section 23(2) LaCA permits publicly accessible libraries, archives and museums to reproduce and make available to the public, on dedicated terminals located at their premises, works held in their permanent collection for the benefit of their patrons, for purposes of private study and research having no commercial nature, provided that adequate technical protection is put in place. Section 23(3) LaCA extends the provision to cover works to which such institutions have access via the closed network of the joint state library information

[749] For related case law, see: Supreme Court, Judgment in Case No. C30649011 = SKC- [B] / 2016.

system (Latvian Digital Library). **Article 54(3)(3) LaCA** extends the scope of this exception to related rights (performances, phonograms, film fixations and broadcasts).

This provision has been in force since 2007 and correspond to in **Article 5(3)(n) InfoSoc.** Uses for private study may also be covered by the private copy and reprography exceptions.

3.1.2.16.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Section 21 LaCA (2004) implements Article **5(3)(a) InfoSoc.** The exception allows the use of disclosed or published works and their fragments in textbooks, radio and television broadcasts, audio-visual works, visual aids and the like, which are specially created and/or used by educational and research institutions in in-person teaching and research activities. The exception does not apply to computer programs; it covers only acts that are strictly necessary for the purpose and have no commercial nature. No remuneration is due to rightholders but the mentioning the author and source is mandatory. **Article 54(3)(2) LaCA** extends the scope of this exception to related rights (performances, phonograms, film fixations and broadcasts).

Whereas **Article 6(2)(b) Database** has not been implemented in LaCA, **Article 9(b) Database** finds correspondence in **Article 59(1)(2) LaCA**.

3.1.2.16.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

The Latvian Copyright Act does not feature any provision covering the digital use of works for illustration for teaching. The **CDSM** Directive and its **Article 5** have not been implemented yet.

3.1.2.16.5.4 TEXT AND DATA MINING

The Latvian Copyright Act does not contain any text and data mining exception. The **CDSM** Directive and its **Articles 3-4** have not been implemented yet

3.1.2.16.6 USES FOR INFORMATORY PURPOSES

3.1.2.16.6.1 PRESS REVIEW AND NEWS REPORTING

The exception contained in **Article 5(3)(c) InfoSoc** is covered by **Section 20(3) LaCA** which regulates that to fixate, communicate to the public and publish current events by photographic works; for a broadcasting organisation to broadcast works which have been seen or heard in the course of current events, to the extent justified by the informational purpose. **Article 54(3)(2) LaCA** extends the scope of this exception to performances, phonograms, film fixations and broadcasts.

3.1.2.16.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc is covered by the quotation exception under **Section 20(2) LaCA**, which makes it possible to publish, broadcast or otherwise make available to the public political speeches, addresses, announcements and other similar works, to the extent justified

by the informational purpose. Acknowledgement of the source and compliance with the three-step test is mandatory. No remuneration is due to rightholders.

3.1.2.16.7 USES BY PUBLIC AUTHORITIES

3.1.2.16.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 5(3)(e) InfoSoc is transposed in **Section 24 LaCA**. It allows the reproduction of protected works other than computer programs if necessary for the correct functioning of judicial proceedings, to the extent justified by the said purpose. No remuneration is due to rightholders. **Article 54 LaCA** extends the scope of this exception to performances, phonograms, film fixations and broadcasts.

Even though **Article 6(2)(c) Database** has not been implemented in LaCA, **Article 9(c) Database** finds correspondence in **Article 59(1)(3) LaCA**.

3.1.2.16.7.2 OTHER USES BY PUBLIC AUTHORITIES

The Latvian Copyright Act envisages other allowed uses by public authorities under **Section 26(1) LaCA**, as amended in 2007. By following the corresponding **Article 5(3)(g) InfoSoc**, this provision allows the performance of works during official or religious ceremonies to the extent justified by their nature and purposes. As for other exceptions, the application of this provision shall comply with the three-step test. No remuneration is due to rightholders. **Article 54 LaCA** extends the scope of this exception to performances, phonograms, film fixations and broadcasts.

3.1.2.16.8 SOCIALLY ORIENTED USES

The Latvian Copyright Act does not feature an explicit reference to **Article 5(2)(e) InfoSoc**.

3.1.2.16.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.16.9.1 PUBLIC LENDING

Libraries of the State, local governments or other derived public persons in relation to private libraries are allowed to lend works that are permanently held in their collections (**Section 19(1) LaCA**), provided that copyright and related rightholders receive fair remuneration. The Cabinet of Ministry determines the procedures to calculate the amount of the remuneration, collect the sums and distribute them proportionately among rightholders.[750] The amount due is to be paid into the account of a credit institution indicated by the collective management organization. **Article 54(4) LaCA** extends the scope of this exception to performances, phonograms, film fixations and broadcasts.

The Latvian public lending exception is in line with **Article 6 Rental**.

[750] Ministru kabineta 2007.gada 21. augustā noteikumi Nr. 565, Noteikumi par kārtība, kādā aprēķina, izmaksā un sadala atlīdzību par publisko patapinājumu (Grozīts: 14.12.2013).

3.1.2.16.9.2 PRESERVATION OF CULTURAL HERITAGE

To implement **Article 5(2)(c) InfoSoc**, **Section 23(1) LaCA** enables state-owned libraries, archives or museums to make one copy of a work permanently held in their collections, for non-commercial purposes and to preserve or replace a work that has been damaged or has become unusable. The application of the exception is subordinated to the condition that it is not possible to obtain a copy from any other ordinary channel, and to the compliance with the three-step test. The act of reproduction shall be carried out in separate and mutually unrelated cases. **Article 54(3)(3) LaCA** extends the scope of this exception to performances, phonograms, film fixations and broadcasts.

Article 6 CDSM has not been implemented yet.

3.1.2.16.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

In addition to the exceptions provided under **Section 23(1)-(3) LaCA**, **Section 26(2) LaCA**, as amended in 2007, allows educational institutions to publicly perform protected works in the context of teaching activities, which should be not-for-profit, and to the extent justified by the purpose. The performance should be addressed exclusively to teachers, pupils or persons directly associated with the teaching activity. It is mandatory to mention author and source of the work performed. This provision resembles **Article 5(2)(c)-(d) InfoSoc**, yet it is less flexible with regard to the subject matter and purposes permitted. **Article 54 LaCA** extends the scope of this exception to performances, phonograms, film fixations and broadcasts.

3.1.2.16.9.4 ORPHAN WORKS

Section 62(1) LaCA, in force since 2014, transposes the **Orphan Works Directive**. The Latvian exception follows *verbatim* the text of the Directive with regard to the beneficiaries of the exception, the notion of orphan works, and the permitted acts. The exception also covers making works available to the public by wire or otherwise when carried in a manner that the works are available in an individually selected location and at an individually selected time.

3.1.2.16.9.5 OUT-OF-COMMERCE WORKS

Article 8(2) CDSM has not been implemented yet. However, Latvia envisages a specific exception for the preservation of out-of-commerce works under **Section 23(1) LaCA**, which has been in force since 2000 (as amended in 2007). It covers the reproduction, also in digital format, of out-of-commerce works that have been published in the country. The exception benefits libraries, archives or museums. They are allowed to reproduce works permanently held in their collection for the exclusive non-commercial purpose of preserving or replacing a work that has been damaged or has become unusable, provided that it is no longer possible longer to obtain a copy from ordinary channels of commerce.

3.1.2.16.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Exceptions in the benefit of persons with disabilities are envisaged under **Sections 19(1)(3)** and **22 LaCA**.

Section 19(1)(3) LaCa allows the use of works for the benefit of people who are blind or with other reading difficulties. The provision corresponds to **Article 5(3)(b) InfoSoc** but the national implementation provides a narrower notion of disability.

Section 22 LaCA entered into force in 2018 following the transposition of the **Marrakesh Directive**. The Latvian exception is in line with the EU source, for it concerns the definition of the beneficiaries, works covered and permitted uses. No remuneration is due.

3.1.2.16.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

None reported.

3.1.2.16.12 THREE-STEP TEST

Section 18 LaCA contains an explicit reference to the three-step test. It requires that exceptions and limitations provided by the Act be applied only in specific cases in a way that they are not contrary to the provisions for normal use of the work and do not unjustifiably limit the lawful interests of the rightholder.

Section 18(3) LaCA presumes that, in case of doubt, the provisions of the Act shall be interpreted as the right to receive remuneration, or the prerogatives of rightholders are not restricted.

3.1.2.16.13 PUBLIC DOMAIN

3.1.2.16.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Section 5 LaCA, as amended in 2004, excludes from protection laws, regulations, administrative rulings, documents issued by State and local government institutions, court decisions, and other official documents, as well as their official translations and consolidated versions. Also symbols and signs (e.g., flags, coats of arms, anthems, and awards), including maps approved by the State or internationally recognized, the use of which is subject to specific laws and regulations, are not covered by copyright. The same applies to facts, ideas, methods, processes, mathematical concepts, and information provided in the press, radio or television broadcasts or other information media concerning news of the day and various facts and events.

3.1.2.16.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.16.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Whereas **Article 8(1) CDSM** has not been implemented yet; **Article 63 LaCA** lists specific types of rights that shall be managed collectively. This applies to public performance rights if it occurs in places of public entertainment; rights for retransmission of broadcasts through any means, including cable, online or mobile networks; the compensation / remuneration for resale of works of art; compensation for reproductions for personal use; the compensation for rental and public lending rights; as well as for the use of phonograms published for commercial purposes.

3.1.2.16.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.16.15.1 FUNDAMENTAL (USERS') RIGHTS

Whereas copyright is protected as a fundamental right under Article 113 of the Constitution of Latvia (*Satversme*), the Latvian Constitutional Court has clarified (reminded in its judgment of 2 May 2012 (No. 2011-17-03) that constitutional values are not absolute and that basic constitutional rights can be limited under the general principles regulating restriction of fundamental rights. Therefore, a restriction of copyright is to be deemed constitutional, if is provided by law, has a legitimate aim and is proportional.

No judicial decisions directly applying fundamental rights as a balancing tool in copyright matters have been reported.

3.1.2.16.15.2 CONSUMER PROTECTION

No reference to consumer protection law as a source of balancing tools in the Latvian copyright landscape has been reported. Despite this, it can be said that Latvia has not transposed yet Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services, which envisages certain remedies under Article 10 when consumers cannot access the digital content or digital service or cannot do so lawfully because of legal or technical measures related to intellectual property.

3.1.2.16.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.16.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.17 LITHUANIA

The Lithuanian Act on Copyright and Related Rights of 18 May 1999 No. VIII-1185 (LiCA), last amended in 2022 to transpose the CDSM Directive,[751] envisages most copyright

[751] Autorių teisių ir gretutinių teisių įstatymas 1999 m. gegužės 18 d. Nr. VIII-1185 su pakeitimais Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymo Nr. VIII-1185 1, 2, 3, 5, 11, 15, 21, 22, 23, 32, 40, 42, 46, 48, 51, 53, 55, 56, 58, 59, 63, 65, 68, 70, 729, 7210, 7212, 7213, 7230, 7231, 75, 78, 80, 87, 89, 91, 92, 93, 95, 96

flexibilities provided in European Directives. However, absent is an exception allowing socially oriented uses, expressly implementing the corresponding InfoSoc exception.

Several provisions present more rigidity than the corresponding EU rule (e.g., private study, reprography, private copy, freedom of panorama, teaching uses), the most common feature being the limitation on the amount of work that can be used. On the other hand, provisions like the exceptions covering the temporary reproduction, TDM, use of out-of-commerce works, use of orphan works and uses by public authorities closely follow the corresponding EU model.

3.1.2.17.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.17.1.1 TEMPORARY REPRODUCTION

Article 29(1) LiCA envisages an exception to the right of reproduction of works or other subject matter to allow temporary copies which are transient or incidental and an integral and essential part of a technological process, which is perfectly in line with **Article 5(1) InfoSoc. Article 58(1) LiCA** contains a similar exception with regard to related rights on performances, phonograms, fixations of audio-visual works and broadcasts.

3.1.2.17.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc is implemented in **Article 29(2) LiCA**. It contemplates an exception in favour of broadcasting organizations, allowing them (or a third party on their behalf) to make ephemeral recordings of works by means of their own facilities and for the purpose of their own broadcasts. The exception is subject to the condition that the recording is destroyed within 30 days from its use. Recordings having an exceptional documentary character could be preserved in official State Archives. **Article 58(7) LiCA** contains a similar exception with regard to related rights on performances, phonograms, fixations of audiovisual works and broadcasts. This exception corresponds to **Article 10(1)(c) Rental.**

Compared to the EU model, the national implementation of the ephemeral recordings' exception specifies the operational conditions, but these still align well with the EU standards.

3.1.2.17.1.3 INCIDENTAL INCLUSION

Article 58(11) LiCA permits the incidental inclusion of related rights in other material or works. The provision implements **Article 5(3)(i) InfoSoc** by limiting the subject matter that can be used.

straipsnių, 3 priedo pakeitimo ir įstatymo papildymo 151, 152, 211, 221, 222, 401, 402, 403, 571, 651 straipsniais, VIII ir IX skyriais įstatymas Nr. XIV-970. Unless otherwise specified, the provisions are in force as per latest amendment.

3.1.2.17.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Article 30 LiCA, implements the exception provided in **Article 5 Software,** and it specifies that a back-up copy can also be made in case the program is lost, destroyed or becomes unfit for its purpose.

Article 30(3) LiCA implements **Article 5(3) Software** in full adherence to the EU model, while **Article 31 LiCA** does the same for **Article 6 Software.**

Article 32(1) LiCA allows lawful users of a protected database to perform any act necessary to access and normally exploit the database or its content, in line with **Article 6(1) Database.**

In case n. 2A–206/2005 of 16 May 2005, the Court of Appeal of Lithuania offered a strict interpretation of Article 32 LiCA, ruling that the exception does not permit lawful users to access the content of a database but to ensure its proper use.

None of the exceptions can be overridden by contract. **Article 62 LiCA** transposes **Article 8(1) Database**.

Last, **Article 75 LiCa** introduces the regulation envisioned in **Article 6(4) InfoSoc** into the Lithuanian copyright law.

3.1.2.17.1.5 FREEDOM OF PANORAMA

Article 28(1) LiCA permits the two-dimensional[752] reproduction and making available of works of architecture and sculptures made to be located permanently in public places, unless the works represent the main and only subject of representation in the reproduction. The exception does not cover the display of such reproductions in exhibitions or museums. Similarly excluded are reproductions for commercial purposes. This exception implements **Article 5(3)(h) InfoSoc** by adopting a more restrictive approach towards the types of reproductions and communication to the public that can be made. It also includes a restriction regarding commercial uses.

3.1.2.17.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.17.2.1 REPROGRAPHY

Lithuania introduced **Article 5(2)(a) InfoSoc** in 2015.[753] **Article 20(1) LiCA** allows the single reproduction of lawfully published articles or other similar short works, short extracts of literary works (including the illustrations contained therein) on paper or any similar medium, such as photography and any other technique having a similar effect. The reprographic reproduction is permitted if the act is for private, not-for-profit use. The provision excludes from its subject-matter sheet music and whole books or larger parts of it.

[752] Section 28(3) LiCA excludes the possibility "to reproduce works of architecture in the form of buildings or other construction works, and to make copies of sculptures" [non-official machine translation].
[753] Subsequently amended by law n. *Nr. XIII-1612, 2018-11-08, paskelbta TAR 2018-11-19, i. k. 2018-18615* and n. *Nr. XIII-1840, 2018-12-20, paskelbta TAR 2018-12-28, i. k. 2018-21868.*

Rightholders are entitled to receive fair compensation, which conditions and amount are defined in a separate Annex to the LiCA, and subject to bi-annual review.[754]

The provision is more restrictive than the EU model because it limits the amount of work that can be reproduced. It also narrows the objective scope by covering only reproductions of published works.

3.1.2.17.2.2 PRIVATE COPY

Article 20(1) LiCA allows making one single copy of protected works (also audiovisual) already made available to the public for private non-commercial purposes. The exception does not apply to works of architecture or other construction works, computer programs and electronic databases. **Article 20(4)** requires rightholders to be compensated. **Article 58(2) LiCA** extends the scope of this exception to the objects of related rights.

In line with the CJUE case law, the Vilnius District Court has clarified that legal persons do not benefit from this exception. The Court also ruled that beyond the case of backup copies (**Article 30 LiCA,** see above), a licensee may be allowed to reproduce a computer program only if such a prerogative is envisaged within the license agreement.[755]

The Lithuanian private copy exception is more restrictive than **Article 5(2)(b) InfoSoc** for it excludes several works from the scope, as confirmed by the judiciary.

Whereas **Article 6(2)(a) Database** has not been transposed to LiCA, **Article 9(a) Database** finds correspondence in **Article 63(1)(1) LiCA**.

3.1.2.17.3 QUOTATION

Article 5(3)(d) InfoSoc is transposed in **Article 21 LiCA**. **Article 58(1)(14) LiCA** extends the scope of this exception to the objects of related rights. It allows the quotation of a small fragment of a work already made publicly available, for the purpose of criticism or review, in accordance with fair practice and to the extent justified by the purpose. The exception also covers the quotation of the same works in a translated language. Acknowledgment of the source is required unless it is proven impossible. The exception has been broadened by Law n. XIV-970 of 24 March 2022 (implementing CDSM Directive) to cover also online quotations as a consequence of the transposition of **Article 17(7) CDSM.**

In a case concerning the distribution of activity books reproducing other original textbooks, the Supreme Court of Lithuania[756] considered the purpose and amount taken from the original work to conclude that the quotation at issue was not lawful because it essentially reproduced the original work. This finding was also supported by the absence of any mention of the source quoted. In a similar case related to the quotation of an online news article in another media, the same Court[757] stressed the need to consider whether the quote that

[754] On which see Vilnius District Court, Civil case No. e2A-179-881/2017, 12 October 2017.
[755] Civil case No. 2A-1538-619/2013, 9 September 2013.
[756] Civil case No 3K-3-270-687/2017, 15 June 2017.
[757] Civil case No e3K-3-513-916/2016, 14 December 2016.

prima facie does not meet the requirements laid down in Article 21 LiCA refers to facts or current events in the public domain. The Court expressed the need to ensure a proper balance between rightholders of protected works and the interest of users with regard to information that cannot be monopolized.

While the operational conditions align with the corresponding EU exception, the Lithuanian provision restricts the amount of work that can be quoted to small fragments. The judiciary has also confirmed this restrictive approach and seems to additionally require that the quote does not create a risk of confusion with the original work.

3.1.2.17.4 PARODY, CARICATURE, PASTICHE

Article 21(1) LiCA, introduced by Law n. XIV-970 of 24 March 2022 implements **Article 17(7) CDSM** in Lithuania.

Article 58(12) LiCA already envisaged an exception covering the uses of a performance, a phonogram, a film or a broadcast for caricature or parody. The provision has been recently amended to include pastiche. The exception is made subject to the operational condition that the act is performed in accordance with fair practice and to the extent justified by the purpose.

Compared to the corresponding **Article 5(3)(k) InfoSoc,** the national implementation restricts the works that can be used and imposes additional conditions absent in the EU model.

3.1.2.17.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.17.5.1 PRIVATE STUDY

Article 22(3) LiCA envisages an exception in favour of libraries, libraries within educational and research institutions, museums and archives, allowing them to make available to the public works held in their collections, as long as this act is made only for the non-commercial purpose of research or private study. In line with the EU counterpart, the Lithuanian provision requires that the permitted uses are made through dedicated terminals located within the premises of the beneficiary institutions. The reproduction of lawfully acquired works is allowed exclusively for making the works available to the public via computer networks. However, no more copies than the number held by the institution shall be made. Beneficiaries shall adopt effective technical protection measures to prevent the reproduction and distribution of works outside their networks. Acknowledgment of the source, when possible, is required.

Article 58(1)(3) LiCA contains a similar exception for related rights on a performance, fixation of a film, and a broadcast.

The Lithuanian private study has been in force since 2010 and it was amended in 2013. The exception closely follows **Article 5(3)(n) InfoSoc** in the operational conditions. But,

conversely, it is less flexible than the EU counterpart in the number of copies that can be made.

3.1.2.17.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 22(1)(2) LiCA implements **Article 5(3)(a) InfoSoc** by adopting a more restrictive approach toward the amount of work that can be used. It also limits the educational context in which the exception applies.

The provision allows the reproduction, communication to the public and public display of short works or fragments of published works, and the translations thereof, when made for the sole purpose of illustration for teaching or scientific research. The uses shall be related to a study or professional development programs and shall not exceed the extent necessary for the purpose. Acknowledgment of the source, including the author's name is required, where possible.

Article 58(1)(5) LiCA extends this exception to related rights on a performance, a fixation of a film, and a broadcast, and **Article 32(4) LiCA** does the same with databases, in line with **Article 6(2)(b) Database**. Likewise, **Article 63(1)(2) LiCA** implements **Article 9(b) Database**.

The amount of work used is an essential element that courts consider deciding on the application of the exception. For instance, in case n.2A – 250 of 29 July 2002, the Court of Appeal of Lithuania denied the application of the provision based on the extreme substantiality of the part of the work used; the Court also considered the commercial advantage derived to the defendant. Along the same lines, in case n. 3K-3-28/2007 of 30 January 2007, the Supreme Court of Lithuania applied the exception to using only two fragments of a protected work published in limited edition.

3.1.2.17.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Lithuania has transposed the CDSM Directive into the LiCA with Law n. XIV-970 of 24 March 2022. The Law amends **Article 22(1) LiCA**, to implement **Article 5 CDSM**. The national provision implements *verbatim* the operational conditions and permitted uses laid in the EU model, except it limits the uses to excerpts of published works and minor works.

A similar exception is introduced under **Article 32(5) LiCA** to cover databases.

3.1.2.17.5.4 TEXT AND DATA MINING

Before the implementation of the CDSM Directive, Lithuania did not feature any provision in the Copyright Act related to text and data mining. Articles 3 and 4 CDSM have now been transposed into **Articles $22^{(1)}$, $22^{(2)}$** and **32(7) LiCA.**

Article $22^{(1)}$ LiCA implements *verbatim* **Article 3 CDSM**, whereas **Article $22^{(2)}$ LiCA** transposes **Article 4 CDSM** by providing the same conditions and requirements laid in the corresponding EU rule. **Article 32(7)** additionally contemplates the reproduction and extraction of lawfully accessed databases for text and data mining purposes.

3.1.2.17.6 USES FOR INFORMATORY PURPOSES

3.1.2.17.6.1 PRESS REVIEW AND NEWS REPORTING

Article 24 LiCA allows the reproduction, communication and online making available to the public of publicly disseminated articles on current economic, political or religious topics and of broadcasts of the same character. The exception benefits the press and applies as long as rightholders have not excluded it. Where possible, acknowledgment of the source, including the author's name is required.

Article 24(2) LiCA permits the reproduction and communication to the public in the press, radio or television of literary or artistic works on public or current events. The exception applies only to the extent justified by the informatory purpose.

Article 58(2) LiCA extends the provision to short extracts of works covered by related rights.

The national transposition of **Article 5(3)(c) InfoSoc** is in line with the standard set by the EU model.

3.1.2.17.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 24(3) LiCA envisages an exception covering the reproduction and communication to the public of political speeches, oral arguments given in court proceedings, public lectures or similar works to the extent justified by the informatory purpose. This exception implements **Article 5(3)(f) InfoSoc** by also covering other kinds or oral speeches.

3.1.2.17.7 USES BY PUBLIC AUTHORITIES

3.1.2.17.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Perfectly in line with **Article 5(3)(e) InfoSoc, Article 27 LiCA** permits the reproduction and communication to the public of works, for the purpose of public security and for conducting or reporting administrative, parliamentary or judicial proceedings. A similar exception is contained in **Article 58(9) LiCA** for related rights, and in **Article 32(4) LiCA** for databases; the latter implements verbatim **Article 6(2)(c) Database,** whereas **Article 63(1)(3) LiCA** does the same for **Article 9(c) Database.**

3.1.2.17.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 26 LiCA, as amended in 2011, allows the reproduction, communication or public performance of works during religious celebrations, provided that the acts do not seek financial benefit. The exception requires the acknowledgment of the source unless this turns out impossible. **Article 58(10) LiCA** envisages a similar exception for related rights.

This provision implements **Article 5(3)(g) InfoSoc** by expanding its scope to cover also other non-official acts that are for-non-profit. However, unlike the EU model, it requires acknowledgement of the source.

3.1.2.17.8 SOCIALLY ORIENTED USES

The Lithuanian Copyright Act does not feature an explicit reference to **Article 5(2)(e) InfoSoc**.

3.1.2.17.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.17.9.1 PUBLIC LENDING

Public lending is indirectly worded as an exception in the Lithuanian Copyright Act. In fact, **Article 16(3) LiCA** provides that when libraries lend books and fine art publications, rightholders are entitled to receive remuneration "for having transferred their exclusive right to lend a work". The amount and procedure of collection of the remuneration shall be established by the Government, taking into account the proposal of the Council for Copyright and Related Right. However, the remuneration is not due when the lending is carried out by the libraries of educational and research institutions, in line with **Article 6 Rental**.

3.1.2.17.9.2 PRESERVATION OF CULTURAL HERITAGE

Prior to the CDSM Directive, **Article 23 LiCA** already allowed libraries, archives and educational institutions to reproduce works permanently held in their collection for preservation purposes. The law implementing the CDSM Directive amended **Article 23 LiCA** to align it in line with the mandatory exception envisioned under Article 6 CDSM Directive. While the amended text broadens the array of beneficiaries, compared to the previous wording, the flexibility adheres to the EU model. Indeed, except for the requirement of acknowledging the source, when possible, the Lithuanian transposition of **Article 6 CDSM** is taken verbatim.

Article 58(4) LiCA envisages a similar disposition covering the use of related rights, but it excludes from the scope the reproduction of subject matters published on the internet.

3.1.2.17.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Specific uses benefiting CHI are listed under uses for private study, socially oriented uses, preservation of CHI, text and data mining, and uses for illustration for teaching and research. Other uses can be in the orphan works and out-of-commerce sections below. Other than this, **Article 22(4) LiCA** permits the public performance and display of a work during concerts, exhibitions of formal and non-formal educational institutions, pre-school education, such as nurseries, kindergartens, schools for children with special needs, as long as such events take place in connection to their educational programs. A similar exception is contained in **Article 58(6) LiCA** with regard to related rights.

The provisions fall under the umbrella of **Articles 5(2)(c)-(d) InfoSoc** although the national rule specifies the beneficiaries, the permitted acts, and it imposes additional operational conditions.

3.1.2.17.9.4 ORPHAN WORKS

Lithuania implemented the provisions contained in the Orphan Work Directive under Chapter VII, **Articles 89 et seq LiCA**. The provisions have been in force since 2015 and were amended in 2018.

The national transposition of the exception contained in **Article 6 OW** closely follows the EU counterpart. The notion of orphan work contained in **Article 89 LiCA** is also in accordance with the text of the EU Directive. While the Lithuanian provision provides for the same array of beneficiaries, **Article 89(3) LiCA** specifies that for service broadcasting organizations is meant the public establishment Lithuanian National Radio and Television or similar organizations of other Member States.

3.1.2.17.9.5 OUT-OF-COMMERCE WORKS

Lithuania did not feature any exception related to the use of out-of-commerce works before the CDSM Directive. **Articles 65(1), 97, 101** and **102 LiCA** have been introduced by Law n. XIV-970 of 24 March 2022 to implement **Article 8 CDSM** Directive. The exception contained in **Article 8(2) CDSM** is regulated under **Article 102 LiCA**, which implements verbatim the EU model.

3.1.2.17.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 25 LiCA contained an exception in the benefit of people with disability, falling within the umbrella of **Article 5(3)(b) InfoSoc.** This exception has been amended in 2018 by law n. XIV-970[758] which transposes into the Lithuanian copyright framework the exception contained in **Article 3 Marrakesh Directive.** The transposing law also amended **Article 2 LiCA** to introduce the definitions of beneficiary persons and authorized entities, in line with **Articles 2(2) and 2(4) Marrakesh.**

Unlike **Article 3(1) Marrakesh**, **Article 25 LiCA** explicitly allows the online making available to the public of works made in an accessible format and makes the exception subject to the operational condition that the acts are made for the benefit of people with a disability, and for uses directly related to the disability. The provision also details the kind of works that authorized entities can reproduce by specifying this refers to reproduce books, journals, newspapers, periodicals or other written matter, signs, including sheet music, and related illustrations, in any medium, including in audio form (e.g., audiobook) and in digital form including online, as long as the act is made for the benefit of people with a disability.

The exception excludes from the scope works created specifically for the use of people with disabilities. Again, departing from the EU model, the Lithuanian implementation requires acknowledgment of the source.

[758] Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymo Nr. VIII-1185 1, 2, 3, 5, 11, 15, 21, 22, 23, 32, 40, 42, 46, 48, 51, 53, 55, 56, 58, 59, 63, 65, 68, 70, 729, 7210, 7212, 7213, 7230, 7231, 75, 78, 80, 87, 89, 91, 92, 93, 95, 96 straipsnių, 3 priedo pakeitimo ir įstatymo papildymo 151, 152, 211, 221, 222, 401, 402, 403, 571, 651 straipsniais, VIII ir IX skyriais įstatymas Nr. XIV-970.

The procedure providing for the exchange of copies of works or other objects in an accessible form for the benefit of persons with blindness, visual impairment or other print reading disabilities is established separately by the Government.

3.1.2.17.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 28(2) LiCA allows the use of a project, a design, a sketch, a model of a building, and any other construction works when the use of such works is for the reconstruction of the building. **Article 58(13) LiCA** envisages a similar exception with regard to the subject matter of related rights. This provision implements **Article 5(3)(m) InfoSoc** by restricting the type of works that can be used.

Article 24(4) LiCA, perfectly in line with **Article 5(3)(j) InfoSoc,** permits the reproduction and communication to the public of works of art, as long as the use is made for the sole purpose of advertising their public exhibition or sale, and to the extent necessary to promote the event. Other commercial purposes are excluded from the scope of the exception.

Article 24(5) LiCA envisages an exception covering the reproduction and communication to the public of works, when such uses are made to demonstrate or repair devices. The Civil Court of Appeal of Lithuania in case n. 2A-724-823/2016 of 21 October 2016 clarified that the exception applies where, in light of the intended use of the device, it is necessary to test its performance by reproducing or communicating protected works. While the wording of the exception is taken slavishly from **Article 5(3)(l) InfoSoc**, its judicial interpretation has been less flexible.

Article 33 LiCA contains a provision addressed to owners of copies of works of fine arts. It allows them to exhibit the artistic work in public, provided that the act is made for non-commercial purposes. Acknowledgment of the source, including the indication of the author's name, is required, unless it is proven impossible.

3.1.2.17.12 THREE-STEP TEST

Article 19 LiCA transposes verbatim the three-step test contained in **Article 5(5) InfoSoc**. Accordingly, the Supreme Court of Lithuania confirmed in case No 3K-3-214/2009 of 19 May 2009 that the concrete application of all E/L should preventively be subject to the three-step test scrutiny.

3.1.2.17.13 PUBLIC DOMAIN

3.1.2.17.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 5 LiCA excludes from protection ideas, procedures, methods, principles of operation, concepts, informatory reports on events, and mere data. Similarly excluded are official State symbols and insignia, such as flags, coat-of-arms, anthems, banknote designs and other similar symbols, and officially registered drafts or legal acts. In addition, Lithuania excludes from protection works of folklore. The Supreme Court of Lithuania in case No e3K-

3-77-687/2020 of 26 March 2020 ruled that the list of subject matters carved out from copyright and related rights protection is exhaustive and cannot be interpreted more extensively, as opposed to the list of protected objects.

3.1.2.17.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.17.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Article 65 LiCA, as amended in 2018, envisages collective licensing schemes for the right of cable retransmission of works, except in the case of rebroadcasting of the operator's own programmes; the right of broadcasting, retransmission and other communication to the public of phonograms published for commercial purposes (including background music); for the compensation due for the reprographic reproduction of works; lending of books and other publications in libraries. The same applies to the compensation due for the reproduction of works and objects of related rights for private purposes.

The Supreme Court of Lithuania in case n. 3K-3-152/2014 of 21 March 2014 offered an interesting explanation of the purpose of mandatory collective management. It clarified that, as a general rule, holders of related rights may choose to exercise their rights directly or delegate their management to CMOs. Yet, some rights can only be managed collectively, as in the case of performers and phonogram producers for the remuneration right they have on occasion of the broadcasting, retransmission, and other communications to the public of their phonograms for commercial purposes, which can only be exercised through CMOs. The Court noted that such a choice is justified by the increased demand for the use of sound recordings (phonograms), broadcasting (retransmission) or other public announcements and the growing variety of uses, which makes it impossible for rightholders to individually manage all their rights and/or to conclude individual contracts with users. Thus, in order to balance the legitimate interests of rightholders and those users, the law provides for the mandatory collective administration of these rights.

ECLs are envisaged under **Article 65 LiCA(1)** with regard to certain permitted uses of out-of-commerce works, in line with **Article 8(1) CDSM.**

3.1.2.17.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.17.15.1 FUNDAMENTAL (USERS') RIGHTS

Article 42 Lithuanian Constitution, states that culture, science and teaching shall be free. The same provision also imposes the State to support culture and science, as well as to account for the protection of Lithuanian historical, artistic and cultural monuments and other culturally valuable objects. At the same time, the constitutional provision states that the law shall protect and defend the spiritual and material interests of authors which are related to scientific, technical, cultural, and artistic work.

The Constitutional Court (*Konstitucinis Teismas*) has repeatedly addressed how such rights are balanced with other fundamental rights. An example of it is given in case n. KT17-N8/2017 of 01 December 2017.

The Supreme Court of Lithuania has raised the need to strike a fair balance between the legitimate interests of rightholders and users' interests in the above-referred cases n. 3K-3-152/2014 of 21 March 2014 and n. e3K-3-513-916/2016, 14 December 2016.

3.1.2.17.15.2 CONSUMER PROTECTION

No reference to consumer protection law as a source of balancing tools in the Lithuanian copyright landscape has been reported. Yet, it is worth mentioning that Lithuania has transposed Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services and Directive 771/2019 on certain aspects concerning contracts for the sale of goods in July 2021[759].

3.1.2.17.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.17.15.4 OTHER INSTRUMENTS

Article 5 of the Law on the Provision of Information to the Public[760] states that every person has the right to collect and publish in the mass media. This provision aims at balancing the interests of those information providers, holders and journalists. This is related to the fundamental right to receive and impart information. At the same time, Article 23 prevents abuses against journalists/authors, where it states that authors shall be remunerated for their creative works.

3.1.2.18 LUXEMBOURG

Copyright Law in Luxembourg is regulated by the Copyright, Database and Related Rights Law of 18 April 2001[761] *(Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données,* LuDA), as last amended in 2022.[762] The Act implements most of the

[759] Lietuvos Respublikos civilinio kodekso 1.125, 6.228-1, 6.228-12, 6.228-14, 6.363, 6.364, 6.419 straipsnių ir priedo pakeitimo ir Kodekso papildymo 6.228-17, 6.228-18, 6.228-19, 6.228-20, 6.228-21, 6.228-22, 6.228-23, 6.228-24, 6.350-1, 6.364-1, 6.364-2, 6.364-3, 6.364-4 straipsniais įstatymas Nr. XIV-466; Lietuvos Respublikos teisingumo ministro 2021 m. liepos 1 d. įsakymas Nr. 1R-217 "Dėl teisingumo ministro 2007 m. kovo 1 d. įsakymo Nr. 1R-91 „Dėl Europos Sąjungos teisės aktų ir juos įgyvendinančių Lietuvos Respublikos teisės aktų, kuriuos pažeidus Lietuvoje veikiančių prekių ar paslaugų pardavėjų (tiekėjų) veiksmais, Europos Sąjungos valstybių narių institucijos ar organizacijos turi teisę Lietuvos Respublikos teismuose pareikšti ieškinius, sąrašo patvirtinimo" pakeitimo; Law No XIV-467 amending Articles 12, 40 and the Annex to the Law on the Protection of Consumer Rights of the Republic of Lithuania No I-657.

[760] Visuomenės Informavimo, Įstatymas, 1996 m. liepos 2 d. Nr. I-1418.

[761] Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données.

[762] Loi du 1er avril 2022 portant modification de la loi modifiée du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données en vue de la transposition de la directive 2019/790 du Parlement européen et du Conseil 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.

flexibilities provided by EU Directives, with few gaps gaps, such as the lack of an exception for socially oriented uses. Moreover, most exceptions follow the corresponding EU source, as with the case of flexibilities for people with disabilities, private copy, temporary reproduction, and the new mandatory exceptions introduced by the CDSM Directive.

At the same time, while Luxembourg provides for a quite friendly quotation exception, other provisions such as the exception for the use of public speeches are slightly narrower if compared to the EU model. Significantly, already prior to the CDSM Directive, Luxembourg envisaged a quite friendly exception for uses for preservation purposes.

3.1.2.18.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.18.1.1 TEMPORARY REPRODUCTION

Article 10(5) LuDA implements Article 5(1) InfoSoc verbatim. Whereas **Article 46 LuDA** extends the scope of this exception to public performances, phonograms, and film fixations, **Article 55 LuDA** extends it to broadcasts.

3.1.2.18.1.2 EPHEMERAL RECORDING

Article 10(9) LuDA, as amended in 2004, allows broadcasting organizations to make ephemeral recordings of published works by their own means, as long as such recordings are used for their broadcasts. The conservation in official archives is allowed when the recordings entail an exceptional documentary character. A separate instrument (Grand-Ducal regulation) stipulates the modalities and conditions of the conservation. The provision implements almost verbatim **Article 5(2)(d) InfoSoc.** Whereas **Article 46 LuDA** extends the scope of this exception to public performances, phonograms, and film fixations, **Article 55 LuDA** extends it to broadcasts.

3.1.2.18.1.3 INCIDENTAL INCLUSION

No provision in LuDA directly implements the incidental inclusion exception contained in **Article 5(3)(i) InfoSoc**.

3.1.2.18.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The LuDA contains two provisions that allow lawful users to perform specific acts that are necessary for the access and normal use of protected works. **Articles 34-35 LuDA** entered into force in 2001 and implemented **Article 5 Software and Article 36 LuDA** did the same for **Article 6 Software**, whereas **Article 10bis(1) LuDA**, in force since 2004, corresponds to **Article 6 Database** and **Article 67bis LuDA** does the same for **Article 8(1) Database**. All provisions follow verbatim the EU counterpart in regulating the permitted uses, conditions, purposes and carve-outs. None of the exceptions for the use of computer programs can be overridden by contract.

Articles 71*quinquies* and **71*sexies* LuDA** transpose **Article 6(4) InfoSoc**. They require rightholders to ensure that lawful users are not prevented from enjoying the exceptions for private copy, illustration for teaching and scientific research, recordings by broadcasting

organizations, reproductions by libraries, uses for administrative and judicial proceedings, and uses for persons with disabilities, due to the presence of TPMs. Where rightholders fail to take these measures, the beneficiaries of the exceptions, a professional group or an association representing their interests, are entitled to bring an action to remove TPMs.

3.1.2.18.1.5 FREEDOM OF PANORAMA

Article 10 (7) LuDA implements the freedom of panorama exception introduced by **Article 5(3)(h) InfoSoc**. In force since 2001, this exception aligns with the EU rule by allowing the reproduction and communication to the public of works located in a place accessible to the public. However, the national rule additionally requires that works are not the main subject of the reproduction or communication. **Article 46 LuDA** extends the scope of this provision to the objects of related rights.

3.1.2.18.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.18.2.1 REPROGRAPHY

Article 5(2)(a) InfoSoc has not been implemented explicitly into the Luxembourg Copyright Act.

3.1.2.18.2.2 PRIVATE COPY

The private copy exception is delineated in **Article 10(4) LuDA**, which implements slavishly **Article 5(2)(b) InfoSoc**. The rule has been in force since 2004.[763] It allows reproductions of works on any medium made by a natural person, as long as the copy is made for private use and the act lacks any direct or indirect commercial purpose. The private copy exception is made subject to the payment of fair compensation in favour of rightholders, the amount of which should take into account the presence of TPMs. The conditions to calculate and collect the remuneration are determined by a Grand-Ducal Regulation. Other than this, **Article 10(13) LuDA** permits the reproduction of all or part of a database belonging to the State, provided that it is lawfully made public and subject to other conditions defined by a separate regulation. **Article 68(a) LuDA** implements verbatim the exception contained in **Article 9(a) Database,** whereas **Article 10(2)(a) LuDA** implements **Article 6(2)(a) Database** slavishly.

3.1.2.18.3 QUOTATION

Article 10(1) LuDA envisages the quotation exception. The provision, which entered into force in 2001, permits short quotations of works that have been lawfully made available to the public, in their original form or translation, as long as the quotation is justified by the critical, controversial, educational, scientific or informational nature of the work in which they are incorporated.

Quotes should comply with fair practice, have a non-profit purpose, and neither harm the quoted work nor its exploitation. The name of the author and the title of the work shall be

[763] For related case law, see: Jugt no 1823/2015, Tribunal d'arrondissement de Luxembourg/Correctionnel.

listed, if indicated in the source. The text corresponds to **Article 5(3)(d) InfoSoc Directive**, yet it adopts a more flexible list of purposes. Whereas **Article 46 LuDA** extends the scope of this exception to public performances, phonograms, and film fixations, **Article 55 LuDA** extends it to broadcasts.

Law n. 158 of 5 April 2022, implementing the CDSM Directive, has introduced an explicit reference to quotation, parody, caricature and pastiche as a mandatory exception for users/uploaders of protected works on OCSSPs, transposing verbatim Article 17(7) CDSM in the new **Article 70bis(8) LuDA.**

3.1.2.18.4 PARODY, CARICATURE, PASTICHE

Article 10(6) LuDA corresponds to **Article 5(3)(k) InfoSoc**. It allows the use of works that have been lawfully made available to the public for the purpose of caricature, parody or pastiche, which aim to mock the parodied work. The act shall comply with fair practice and shall only borrow from the original work those elements that are strictly necessary for the purpose. The original work cannot be denigrated. Thus, the Luxembourg provision imposes stricter requirements than those envisioned in the InfoSoc Directive. Whereas **Article 46 LuDA** extends the scope of this exception to public performances, phonograms, and film fixations, **Article 55 LuDA** extends it to broadcasts.

Law n. 158 of 5 April 2022, implementing the CDSM Directive, has introduced an explicit reference to quotation, parody, caricature and pastiche as a mandatory exception for users/uploaders of protected works on OCSSPs, transposing verbatim Article 17(7) CDSM in the new **Article 70bis(8) LuDA.**

3.1.2.18.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.18.5.1 PRIVATE STUDY

Article 10(14) LuDA permits the communication to the public of published works, held in the collection of specific establishments, for the purpose of research or private study by individual members of the public. Those uses shall take place through dedicated terminals located at their premises. The exception does not apply when such uses are subject to purchase or licensing terms. The provision, in force since 2004, implements **Article 5(3)(n) InfoSoc,** whereas **Article 46 LuDA** extends the scope of this provision to the objects of related rights.

3.1.2.18.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 10(2) LuDA was amended in 2004 to implement **Article 5(3)(a) InfoSoc**. It allows the reproduction and communication to the public of short fragments of works for the sole purpose of illustration for teaching or scientific research, and only to the extent justified by this non-commercial purpose. The law implementing the CDSM Directive eliminated the reference to “short fragments”, thus maximising the scope of the exception. In contrast, the exception requires compliance with fair practices, a requirement that is absent in the

corresponding EU provision. Acknowledgment of the source, including listing the author's name is mandatory, unless this is proven impossible. Whereas **Article 46 LuDA** extends the scope of this exception to public performances, phonograms, and film fixations, **Article 55 LuDA** extends it to broadcasts.

A similar provision is contained in **Article 68(b) LuDA** with regard to databases. Perfectly in line with **Article 9(b) Database**, the exception operates subject to the condition that the source is indicated, and the use does not extend beyond the acts justified by its non-commercial purpose. Likewise, **Article 10bis(3) LuDA** implements **Article 6(2)(b) Database**.

3.1.2.18.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Luxembourg did not feature any provision allowing digital uses of works for illustration and teaching before implementing the CDSM Directive. The transposition law introduced the exception contained in **Article 5 CDSM** by adding sub-paragraph **2*bis*** to **Article 10(2) LuDA**. The new provision closely follows its EU counterpart in the beneficiaries, requirements for the application of the exception, security measures and acknowledgement of the source used. The Luxembourgian legislator decided not to subordinate the exception to the absence of easily available licenses on the market and not to provide any remuneration for rightholders. **Article 46 LuDA** extends the scope of this provision to the objects of related rights.

3.1.2.18.5.4 TEXT AND DATA MINING

Prior to the transposition of the CDSM Directive, Luxembourg did not feature any provision related to text and data mining. The law implementing CDSM Directive introduced the exceptions contained in **Articles 3** and **4 CDSM** under the new **Articles 10(15) and 10(16) LuDA**, both strictly adhering to the EU text, with no relevant or particular specifications. In Article **10*bis* LuDA** adopts a similar rule with regard to the reproduction and extraction of lawfully accessed databases. **Article 46 LuDA** extends the scope of these provisions to the objects of related rights.

3.1.2.18.6 USES FOR INFORMATORY PURPOSES

3.1.2.18.6.1 PRESS REVIEW AND NEWS REPORTING

Article 10(3) LuDA, in force since 2001 and amended in 2004 to implement the exception contained in **Article 5(3)(c) InfoSoc**, allows the reproduction and communication to the public of short fragments of works or entire plastic works to report current events, to the extent justified by the informatory purpose. The indication of the source, including the author's name is required unless this is proven impossible. Whereas **Article 46 LuDA** extends the scope of this exception to public performances, phonograms, and film fixations, **Article 55 LuDA** extends it to broadcasts. Also, **Article 10(1) LuDA** on quotation has been applied to cover such uses.

Compared to the corresponding EU exception, the Luxembourgian provision is more flexible, for it does not envisage the possibility for rightholders to reserve their rights, nor does it limit the nature of the articles that can be used.

3.1.2.18.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 10(13) and **Article 10(8) LuDA** mirror the exception envisaged under **Article 5(3)(f) InfoSoc**, while **Article 46 LuDA** extends the scope of this provision to the objects of related rights.

Article 10(13) LuDA permits using short extracts from public lectures, or similar publicly available works, to the extent justified by the informatory purpose. The indication of the source, including the author's name, is mandatory unless this is proven impossible. The provision entered into force in 2004.

Article 10(8) LuDA allows using official acts of authorities (including their official translation), and speeches held in deliberative assemblies, public court hearings or political meetings. The provision was already in force in 2001. It is slightly restrictive towards the type of works that can be used, for it specifies the type of speeches that can be used.

The author retains the right to edit or create a compilation of his speeches.

3.1.2.18.7 USES BY PUBLIC AUTHORITIES

3.1.2.18.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

In force since 2001, **Article 10(2) LuDA** corresponds almost *verbatim* to **Article 5(3)(e) InfoSoc**. The exception allows the use of works lawfully made available to the public for public security purposes or to ensure the proper functioning or reporting of administrative, parliamentary or judicial proceedings.

A similar rule is provided in **Article 68(c) LuDA** with regard to databases, implementing **Article 6(2)(c) Database,** and in **Article 10bis(4) LuDA** implementing **Article 6(2)(c) Database**.

3.1.2.18.7.2 OTHER USES BY PUBLIC AUTHORITIES

Luxembourg does not feature any provision adopting **Article 5(3)(g) InfoSoc Directive.**

3.1.2.18.8 SOCIALLY ORIENTED USES

Beyond the provisions already mentioned above, Luxembourg does not feature any further flexibility allowing socially oriented uses.

3.1.2.18.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.18.9.1 PUBLIC LENDING

Pursuant to **Article 65 LuDA** rightholders cannot prevent the public lending of their works. However, they are entitled to remuneration, the amount of which is determined by a separate Grand-Ducal Regulation. The same regulation can also exempt certain establishments from

paying such remuneration. The provision is in force since 2001 and is perfectly in line with **Article 6(1) Rental.**

3.1.2.18.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 10(10) LuDA, which entered into force in 2004, allows the reproduction of published works by publicly accessible libraries, educational institutions, museums or archives which do not seek any direct or indirect commercial or economic advantage, when such copies are made exclusively for the purpose to preserve cultural heritage and are compliant with the three-step test. The same beneficiaries may communicate to the public audiovisual works held in their connection, to make cultural heritage known, in so far as this communication is analogue and takes place within the institution. Whereas **Article 46 LuDA** extends the scope of this exception to public performances, phonograms, and film fixations, **Article 55 LuDA** extends it to broadcasts.

The provision falls under the umbrella of **Article 5(2)(c) InfoSoc**, but it restricts the purpose of the exception to the preservation or equivalent purposes.

There is no reference of explicit implementation of **6 CDSM**.

3.1.2.18.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Beyond the provisions already mentioned above, Luxembourg CA does not feature any further flexibility falling within this use category.

3.1.2.18.9.4 ORPHAN WORKS

Articles 6(2)(3) of Law no.227 of 3 December 2015[764] implement the exception regulated in **Article 6 OWD** in Luxembourg. The transposition is verbatim, including the regulation regarding the beneficiaries, the works covered, and the notion of orphan works.

3.1.2.18.9.5 OUT-OF-COMMERCE WORKS

Luxembourg did not feature any exception related to the use of Out-of-Commerce-Works prior to the CDSM Directive. **Article 10*quater* LuDA** has been introduced by the law implementing the CDSM Directive in 2022, transposing **Article 8(2) CDSM**.

Whereas LuDA follows the text of the EU model as regards the beneficiaries of the exception and the permitted acts, the notion of out-of-commerce works is defined by reference to **Article 38 *bis*, (3)** of the Act of 25 April 2018 on the Collective Management of Copyright and Related Rights and the granting of multi-territorial licences for rights in musical

[764] Loi du 3 décembre 2015 relative à certaines utilisations autorisées des oeuvres orphelines.

works for online use in the internal market, which in turn implements *verbatim* **Article 8(4)(5) CDSM**.[765]

3.1.2.18.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 5(3)(b) InfoSoc and Article 3 of the Marrakesh Directive have been implemented in **Article 10 (11)** and **Article 10*ter* LuDA**, both introduced in 2020.

Article 10(11) LuDA, in force since 2004, implements *verbatim* **Article 5(3)(b) InfoSoc**. It allows the reproduction and communication to the public of works, for the benefit of persons with disabilities and for uses directly related to the disability, to the extent required by the specific disability. **Article 46 LuDa** extends the scope of this provision to the objects of related rights.

Article 10*ter* LuDA implements the definition of beneficiaries following the EU Directive. The same provision, perfectly in line with **Article 3 Marrakesh**, allows a person with disability or a person acting on their behalf to make a copy of a lawfully accessed work or other subject matter in an accessible format for the exclusive use of the disabled person. Similarly, authorized entities are permitted to make accessible format copies of works to which they have lawful access, and communicate, make available, distribute or lend them on a not-for-profit basis, and for the exclusive use of a person with disability.

The exception operates subject to the condition that the accessible format respects the integrity of the work, and the use complies with the three-step-test.

The provision cannot be overridden by contract.

3.1.2.18.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

None reported.

3.1.2.18.12 THREE-STEP TEST

The three-step test included in Article 5(5) InfoSoc is recalled verbatim in the last sentence of **Article 10 LuDA**, which entered into force in 2004.

3.1.2.18.13 PUBLIC DOMAIN

3.1.2.18.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 1 LuDA explicitly excludes from protection ideas, operating methods, concepts or information as such.

[765] Loi du 25 avril 2018 relative à la gestion collective des droits d'auteur et des droits voisins et l'octroi de licences multiterritoriales de droits sur des œuvres musicales en vue de leur utilisation en ligne dans le marché intérieur.

3.1.2.18.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.18.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Article 60 LuDA envisages a mandatory collective licensing scheme for cable re-transmission. Pursuant to **Article 61(2**) **LuDA** when the author or holders of related rights have not entrusted any CMO, the body that manages rights in the same category is deemed responsible for managing their rights, on an ECL basis.

The law transposing the CDSM Directive into the Luxembourgian law has amended the Act of 25 April 2018 on the Collective Management of Copyright and Related Rights and the granting of multi-territorial licences for rights in musical works for online use in the internal market to introduce, under the new Title IV *bis* the licensing scheme envisaged under **Article 8(1) CDSM**.[766] In this sense, **Article 38 *bis* LuDA** implements *verbatim* the conditions laid in the EU model (Article 8(1)(3-7)CDSM), and it specifies that a Grand-Ducal decree may determine the collective management bodies which are sufficiently representative of rightholders or database producers.

No other mandatory licensing scheme has been reported.

3.1.2.18.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.18.15.1 FUNDAMENTAL (USERS') RIGHTS

None reported.

3.1.2.18.15.2 CONSUMER PROTECTION

No reference to consumer protection law as a source of balancing tools in the Luxembourgian copyright landscape has been reported. Yet, worth is mentioning that Luxembourg has transposed Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services and Directive 771/2019 on certain aspects concerning contracts for the sale of goods, with the Law of 8 November 2021.[767]

3.1.2.18.15.3 COPYRIGHT CONTRACT LAW

None reported.

[766] Loi du 25 avril 2018 relative à la gestion collective des droits d'auteur et des droits voisins et l'octroi de licences multiterritoriales de droits sur des œuvres musicales en vue de leur utilisation en ligne dans le marché intérieur.

[767] Loi du 8 décembre 2021 portant modification du Code de la consommation aux fins de transposition de : 1°la directive (UE) 2019/770 du Parlement européen et du Conseil du 20 mai 2019 relative à certains aspects concernant les contrats de fourniture de contenus numériques et de services numériques ; 2°la directive (UE) 2019/771 du Parlement européen et du Conseil du 20 mai 2019 relative à certains aspects concernant les contrats de vente de biens, modifiant le règlement (UE) 2017/2394 et la directive 2009/22/CE et abrogeant la directive 1999/44/CE , published in the JOURNAL OFFICIEL DU GRAND-DUCHE DE LUXEMBOURG on 2021-12-09

3.1.2.18.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.19 MALTA

The Maltese Copyright Law (MCA), Chapter 415 of the Laws of Malta,[768] envisages the great majority of the copyright flexibilities envisioned in copyright-related Directives. However, the pre-CDSM Directive status reveals the lack of specific exceptions covering the preservation of cultural heritage, although some provisions related to this goal could already be found in the Act Regulating the use of Orphan Works. Furthermore, with law n. 261 of 2021[769] Malta has recently transposed the CDSM Directive, thus, the mandatory exceptions therein envisaged are now part of the Maltese copyright framework.

Several Maltese exceptions are transposed verbatim from the EU sources, such as the exception for private copy, reprography, private study, and the new mandatory exceptions for TDM, preservation, and the use of out-of-commerce works. At the same time, the great majority of exceptions showcase a higher level of flexibility, if compared to the EU standards, for it concerns the permitted acts. With a rather opposite take, the exception allowing the use of works situated in public spaces ("freedom of panorama") appears less flexible than the EU counterpart.

3.1.2.19.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.19.1.1 TEMPORARY REPRODUCTION

Article 9(1)(a) MCA[770] implements **Article 5(1) InfoSoc** by limiting the works covered by the exception. The Maltese rule envisages an exception to the right of reproduction with regard to an audio-visual work, a database, a literary work or a musical or artistic work to allow temporary copies which are transient or incidental and an integral and essential part of a technological process. Reproduction of computer programs is expressly excluded from the scope of the exception.

The act of transitory reproduction should have the exclusive purpose of enabling transmission in a network between third parties through intermediaries, or to allow the lawful use of works or other protected subject matter. It should also lack independent economic significance.

Article 21 MCA extends the scope of copyright exceptions and limitations to the objects of related rights.

[768] Act XIII of 2000 as amended by Acts VI of 2001, IX of 2003, IX of 2009 and VIII of 2011.
[769] L.N.261 of 2021 – Copyright and related rights in the Digital Single Market Regulations, 2021 Government Gazette of Malta No. 20,647– 18.06.2021
[770] Unless otherwise indicated, the provisions MCA are force since 2001, as subsequently amended by Act IX.2009.4.

3.1.2.19.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc has been implemented in **Article 9(1)(e) MCA.** The provision contemplates an exception in favour of broadcasting organizations, allowing them to perform ephemeral recordings of an audio-visual work, a database, a literary work or a musical or artistic work (excluding computer programs) by means of their own facilities. The exception is subject to the condition that such acts are made exclusively for their own broadcasting by the beneficiaries of the exception. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

The provision also allows the preservation of recordings in official archives when the works reproduced have an exceptional documentary character.

3.1.2.19.1.3 INCIDENTAL INCLUSION

Article 9(1)(q) MCA permits the incidental inclusion of an audio-visual work, a database, a literary work or a musical or artistic work or other subject matter in other material or works. The exception does not apply to computer programs. This provision transposes **Article 5(3)(i) InfoSoc** into the Maltese copyright by closely following the standard. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

3.1.2.19.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The **MCA** allows under **Article 9(1)(w), (2)** and **(3)** specific acts necessary for the access and normal use of certain works by a lawful user.

Article 9(1)(w) MCA limits the exclusive rights of rightholders over an audio-visual work, a database, a literary work or a musical or artistic work (excluding computer programs) in favour of the licensee of a database, as long as such acts are necessary for the user to access and normally exploit the database and its content. The exception is mandatory; thus, it is not overridable by contract. This provision implements **Article 6 Database,** whereas **Article 26(1) MCA** implements **Article 8(1) Database.**

Article 9(2)(b) MCA transposed **Article 6 Software**, by adopting its content *verbatim*, whereas **Article 9(2)(a) MCA** does the same for **Article 5(3) Software.** In a similar vein, **Article 9(2)(c) MCA**, implements verbatim **Article 5(1) Software**.

The law contains in **Article 9(3) MCA** an explicit reference to the proportionality test, linked to the three-step test envisaged in Berne Convention and recalled by **Article 6(3) Software**, as a criterion for interpreting the application of the exception.

Provisions regulating the circumvention of technical protection measures (TPM) are contained in Article **42(2) MCA**, which implements **Article 6(4) InfoSoc**. According to this rule, rightholders are required to ensure access to works to allow legitimate beneficiaries of a broad range of exceptions, such as those related to reprography; private copy; uses by CHI; ephemeral recordings; uses by people with disability; uses for educational and research purposes to benefit from the work. Nevertheless, this does not apply to works made available

to the public on agreed contractual terms allowing access to the public from a place and time individually chosen.

3.1.2.19.1.5 FREEDOM OF PANORAMA

Article 9(1)(p) MCA allows the inclusion in a communication to the public, in the making of a graphic representation and the making of a photograph or film, of a work of architecture or sculpture or similar works made to be permanently located in public places. The exception covers only two-dimensional representations. This provision transposes **Article 5(3)(h) InfoSoc** by restricting the permitted acts to two-dimensional reproduction, compared to the EU standard.

3.1.2.19.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.19.2.1 REPROGRAPHY

The exception for reprography contained in **Article 5(2)(a) InfoSoc** is implemented in **Article 9(1)(b) MCA**, by excluding certain categories of works if compared to this EU rule. The provision allows the reproduction of an audio-visual work, a database, a literary work or a musical or artistic work (excluding computer programs) on paper or any other similar means, such as photography and any other technique having similar effects. The exception does not cover the reproduction of sheet music. The reproduction is made subject to the payment of fair compensation in favour of right holders.

3.1.2.19.2.2 PRIVATE COPY

Article 9(1)(c) MCA implements verbatim **Article 5(2)(b) InfoSoc.** The provision allows reproductions on any medium made by a natural person, as long as the copy is made for private use and the act lacks any direct or indirect commercial purpose. The private copy exception is made subject to the payment of fair compensation in favour of rightholders, the amount of which should take into account the application or non-application or technological measures to the work or subject matter concerned.

In addition, **Article 26(2)(a) MCA** transposes **Article 9(a) Database** verbatim; however, there is no concrete evidence to suggest that **Article 6(2)(a) Database** has been transposed to MCA.

3.1.2.19.3 QUOTATION

Article 9(1)(k) MCA allows the reproduction, translation, distribution or communication to the public of quotations of an audio-visual work, a database, a literary work or a musical or artistic work (excluding computer programs), as long as these acts are made for purposes of criticism or review. The use should be in accordance with fair practices and should not go beyond the extent required by the purpose. To be quoted, the work should have already been lawfully made available to the public. The source should be sufficiently acknowledged, including indicating the author´s name. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

This provision transposes **Article 5(3)(d) InfoSoc** by adopting greater flexibility on the permitted acts than the EU rule.

3.1.2.19.4 PARODY, CARICATURE, PASTICHE

Article 9(1)(s) MCA limits the right of reproduction and communication to the public of an audio-visual work, a database, a literary work or a musical or artistic work (excluding computer programs) when such reproduction and/or communication are made for purposes of caricature, pastiche or parody.[771] This provision corresponds to **Article 5(3)(k) Infosoc**. The formulation of the national rule diverges from its EU counterpart, but it still satisfies the criteria set by EU rule. Also, **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

Following the transposition of the CDSM Directive with Law n. 261 of 2021, Malta has adopted a specific provision regulating the online uses of works in the context of online-sharing services. In this sense, **Article 16(7)** transposes **Article 17(7) CDSM** verbatim**.**

3.1.2.19.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.19.5.1 PRIVATE STUDY

For the transposition of **Article 5(3)(n) InfoSoc**, **Article 9(1)(v) MCA** envisages an exception covering the communication to the public of works and other subject matters, contained in the collection of publicly accessible libraries, educational establishments, museums, or archives, as long as this act is made for the purpose of research or private study, for the benefit of individual members of the public, and through dedicated terminals located within their premises. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

However, the exception does not apply when such uses are covered by specific purchase or licensing terms.

3.1.2.19.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 9(1)(h) MCA finds correspondence in **Article 5(3)(a) InfoSoc.** The provision allows the reproduction, translation, distribution or communication to the public of a work and other subject matter, as long as such acts are made for the sole purpose of illustration for teaching or scientific research and only to the extent justified by this non-commercial purpose. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

[771] For related case law, see: Benny Casha et. v Fredrick sive Fedele Camilleri et. (First Hall, Civil Court, 19 June 2016).

Article 32(b) MCA adopts a similar rule with regard to the reproduction of topographies. The law further requires the indication of the source, including the author's name, unless this is impossible.

The Maltese exception showcases a great degree of flexibility with regard to the permitted acts if compared to the EU rule.

A similar exception is contained in **Article 26(2)(b) MCA** which, in line with **Article 9(b) Database**, permits the extraction and re-utilization of substantial parts of a database, as long as such acts are made for the purposes of illustration for teaching or for scientific research, and to the extent justified by the non-commercial purpose. Also, in this case the acknowledgement of the source is required. However, **Article 6(2)(b) Database** has not been transposed to MCA.

3.1.2.19.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

The law n. 261/2021 implementing CDSM Directive introduced the exception contained in **Article 5 CDSM** in its **Article 6**. The Maltese provision allows educational establishments the digital uses of an audio-visual work, a database, a literary work, a musical or artistic work and the sui generis right accorded to the maker of a database as well as the press publishers' right to the extent justified by the non-commercial educational purpose, in line with the EU counterpart. Furthermore, with a rather flexible approach, the law explicitly states that the exception also covers the digital use of works to benefit persons with disability.

Malta has also used its margin of discretion to subordinate the exception to a fair compensation in favour of rightholders, and to exclude from its scope works or other subject-matter which are intended primarily for the educational market. Pursuant to **Article 3** of the Law n. 261/2021, "educational establishment" means a college, school or university as recognised by the Minister responsible for education.

3.1.2.19.5.4 TEXT AND DATA MINING

The law n. 261/2021 implementing CDSM Directive introduced the mandatory exceptions for TDM envisioned in **Articles 3** and **4 CDSM**. The Maltese provision enabling TDM for scientific research purposes follows verbatim the text of the Directive, for it refers to beneficiaries, conservation and permitted acts, but unlike the EU rule, it excludes from the scope of the exception the use of computer programs. In line with the EU rule, this exclusion is not contained in the national implementation of Article 4 CDSM, for which the Maltese transposition closely follows the EU standard, including the possibility for rightholders to reserve their rights in an appropriate manner. Pursuant to Article 3 Law n. 261/2021, "cultural heritage institution" means a publicly accessibly library or museum, an archive or a film or audio heritage institution and "educational establishment" means a college, school or university as recognised by the Minister responsible for education.

3.1.2.19.6 USES FOR INFORMATORY PURPOSES

3.1.2.19.6.1 PRESS REVIEW AND NEWS REPORTING

Article 9(1)(j) MCA implements **Article 5(3)(c) InfoSoc** by broadening the permitted acts. The Maltese exception permits the reproduction by the press, and the translation, distribution or communication to the public of published articles on current economic, political or religious topics, including broadcasted works or other subject matters of the same character. This also extends to other uses of protected works or other subject matters in connection with reporting current events.

The exception is subordinated to the condition that such uses are not expressly reserved, and that the source, including the author's name, is indicated.

3.1.2.19.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 9(1)(m) MCA envisages an exception covering the reproduction, translation, distribution or communication to the public of political speeches as well as extracts of public lectures or similar works or subject-matter, to the extent justified by the informatory purposes. It is further required to indicate the source, including the author's name, except when this is proven impossible. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

This exception finds correspondence in **Article 5(3)(f) InfoSoc,** yet the Maltese exception is more flexible as regards the permitted acts, if compared to the EU source.

3.1.2.19.7 USES BY PUBLIC AUTHORITIES

3.1.2.19.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

The Maltese Copyright Act contains two provisions regulating the use of works in administrative and judicial proceedings. **Article 9(1)(l) MCA**, which corresponds to **Article 5(3)(e) InfoSoc** permits the reproduction, translation, distribution or communication to the public of a work, provided this is made for purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings. This provision is more flexible than the EU source for it broadens the permitted uses. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

A similar exception is envisaged under **Article 26(2)(c) MCA**, allowing the extraction and re-utilization of substantial parts of a database for similar purposes, in line with **Article 9(c) Database Directive.** However, **Article 6(2)(c) Database** has not been implemented in the MCA.

3.1.2.19.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 9(1)(n) MCA permits the reproduction, translation, distribution or communication to the public of a work for use during religious celebrations or official celebrations organized

by a public authority. This provision implements **Article 5(3)(g) InfoSoc** by expanding the scope of the permitted acts. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

3.1.2.19.8 SOCIALLY ORIENTED USES

Article 9(1)(f) MCA transposes verbatim **Article 5(2)(e) InfoSoc.** The rule permits the reproduction of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons. However, in this case, a fair compensation to rightholders is envisaged. It is worth noting that **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

Other than this, **Article 9(1)(g) MCA** allows performing, playing or showing a work in a place where no admission fee is charged, and as long as the club where those acts are performed is a not-for-profit entity. Similarly, **Article 9(1)(o) MCA** permits the reading or recitation in public of any reasonable extract from a published literary work, provided that sufficiently acknowledged.

3.1.2.19.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.19.9.1 PUBLIC LENDING

No information has been reported about public lending.

3.1.2.19.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 5(2)(c) InfoSoc has been transposed to **Article 9(1)(d) MCA** verbatim, while **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

The law n. 261/2021 implementing CDSM Directive introduced into the MCA the exception envisaged in **Article 6 CDSM** by adopting a wording that closely resembles the EU source, for it concerns the beneficiaries, works that can be used, permitted uses and purpose.

3.1.2.19.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Article 9(1)(d) MCA allows specific acts of reproduction made by publicly accessible libraries, educational establishments, museums, or archives, provided that said acts are not for direct or indirect economic or commercial advantage. This exception implements **Article 5(2)(c) InfoSoc** by closely resembling its wording.

3.1.2.19.9.4 ORPHAN WORKS

Provisions related to the preservation of cultural heritage are to be sought in the Regulations on Certain Permitted Uses of Orphan Works (Law SL415.05).[772]

Specifically, **Article 9(1)(b)**, **(2)** and **(3)** of the **Regulation on Certain Permitted Uses of Orphan Works** allows publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions and public service broadcasting organizations to reproduce orphan works for the purpose of preservation or restoration through their digitization, making available, indexing and cataloguing et al. In line with the EU Directive, such uses only to the extent they are performed to achieve aims related to the organizations' public-interest mission, and particularly the preservation and restoration of their collections, and the provision of cultural and educational access to works and phonograms contained in the latter.

The provision requires indicating the name of identified authors and other rightholders.

3.1.2.19.9.5 OUT-OF-COMMERCE WORKS

The law n. 261/2021 transposed **Article 8(2) CDSM** Directive into the Maltese copyright law. The national provision follows *verbatim* the EU counterpart. However, Malta exercised its discretion to introduce a non-rebuttable presumption that excludes the possibility of considering a work as out-of-commerce before ten years from its first commercialization has elapsed.

3.1.2.19.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 9(1)(i) MCA permits the reproduction, translation, distribution, or communication to the public of a work, as long as this is made for the benefit of people with a disability, and for uses directly related to the disability, to the extent required by the specific disability, and with no commercial nature. This provision implements **Article 5(3)(b) InfoSoc** with a relatively flexible approach towards the allowed uses for it covers the rights of reproduction, translation, distribution and communication to the public. **Article 21 MCA** extends the scope of copyright exceptions and limitations to the objects of related rights.

Malta has implemented the Marrakesh Directive with the law on Permitted Use of Certain Works and Other Subject Matter Protected by Copyright and Related Rights for the Benefit of Persons who are Blind, Visually Impaired or Otherwise Print-Disabled Order, 2018 - European Union Act (CAP. 460).[773]

[772] Regulation implementing Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, published in the Malta Government Gazette, n. 18,341 of 07 November 2014 and in force since 2014.
[773] The Malta government gazette; Publication date: 13/11/2018.

3.1.2.19.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Malta envisages other specific non-infringing uses under **Article 9(1)(t) MCA**, allowing the reproduction, translation, distribution or communication to the public of a work, when such uses are made in connection to the demonstration or repair of equipment.

A similar permitted use is featured under **Article 9(1)(u)** with respect to a building or a drawing or plan of a building when the use of such works falls within the purposes of reconstructing the building.

These provisions implement **Article 5(3)(l)** and **Article 5(3)(m) InfoSoc,** respectively. In both cases the national provision features a higher level of flexibility than the EU rule for it concerns the permitted acts.

3.1.2.19.12 THREE-STEP TEST

Article 9(3) MCA contains an explicit reference to the three-step test as envisaged in **Article 5(5) InfoSoc**. The three-step test in the MCA shapes the limits of all exceptions envisaged in Article 9 MCA.

3.1.2.19.13 PUBLIC DOMAIN

3.1.2.19.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

While **Article 2 MCA** lists the categories of protected works, **Article 3 MCA** specifically excludes from copyright protection literary, musical, or artistic work if not original or not written down, recorded, fixed or otherwise reduced to material form. Similarly excluded from protection are databases when the selection or arrangement of their content does not constitute their authors' own intellectual creation.

3.1.2.19.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.19.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Malta envisions mandatory collective management schemes of the right of retransmission of broadcasts (Article 4 L.N. 234 of 2021, Copyright and Related Rights applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Program Regulations).

3.1.2.19.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.19.15.1 FUNDAMENTAL (USERS') RIGHTS

Maltese law does not contain any reference to fundamental rights in relation to copyright and its internal balance. The same can be said for the notion of public interest or user rights. Similarly, nothing was reported or can be otherwise traced on publicly available sources on

the use by Maltese courts of fundamental rights in relation to the copyright balance, nor on the qualification of exceptions as users' rights.

3.1.2.19.15.2 CONSUMER PROTECTION

With Act n. I of 14 January 2022 amending the Consumer Affairs Act, cap 378, Malta has transposed *verbatim* Article 9 Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods, applicable to goods with digital elements which require digital content or a digital service to perform their functions. The new Article 73A of the Maltese Act qualifies as a lack of conformity restrictions resulting from intellectual property rights, which prevent or limit consumers from the use of goods, and entitles them to remedies therein envisaged (e.g., bring the product into conformity, reduction of the price and/or termination of the contract).

The Digital Content and Digital Services Contract Regulations (Law n. 406 of 2021) implements Directive (EU) 2019/770, applicable to the supply of digital content or digital services, including digital content supplied on a tangible medium, such as DVDs, CDs, USB sticks and memory cards, including tangible medium that serves exclusively as a carrier of the digital content. According to Article 9 of the Maltese Law, where consumers cannot access the digital content or digital service or cannot do so lawfully because of legal or technical measures related to intellectual property protection, such consumer is entitled to the remedies for the lack of conformity (e.g., bring the product into conformity, reduction of the price and/or termination of the contract).

3.1.2.19.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.19.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.20 THE NETHERLANDS

The Dutch Copyright Act (*Auteurswet,* hereinafter AW) of 1972, as last amended in 2021[774], offers a bundle of E/Ls enabling end-users' access to copyright content. Most of the EU provisions find correspondence in the AW, with a few caveats (such as the exception for repair, testing and that for the purpose of reconstruction).

The level of flexibility of such regulatory tools varies highly. Some flexibilities precede the provisions introduced by EU Directives, such as the exception for the use in official celebrations, and therefore are more restrictive than the EU standard. In general, some exceptions adopt a stricter approach, such as the provision on uses for teaching and research,

[774] Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Auteurswet 1912, tekst geldend op: 16.12.2020). Unless otherwise indicated, the provisions are in force as per amendments of 2004, 2015 and 2021.

which subject them to the payment of fair compensation. With an opposite take, the exceptions for press review and news reporting embrace a flexible approach vis-à-vis beneficiaries. The same can be said for socially oriented uses. Along the same line, temporary acts of reproduction are not regulated as an exception but as conducts falling outside the scope of the reproduction right. Significantly, the three-step test has not been embedded into the Dutch Copyright Act.

3.1.2.20.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.20.1.1 TEMPORARY REPRODUCTION

Article 13a AW[775] implements **Article 5(1) InfoSoc** not via an exception but excluding from the scope of the right of reproduction temporary reproductions of literary, scientific or artistic works that are transient or incidental and constitute an integral and essential part of a technological process, provided that they have the sole purpose of enabling transmission in a network between third parties through intermediaries, or of allowing the lawful use of works or other protected subject matter, and that the reproduction lacks any independent economic significance.

3.1.2.20.1.2 EPHEMERAL RECORDING

Article 17b(2) AW, in force since 2004, implements **Article 5(2)(d) InfoSoc**. The rule provides that a broadcasting organization entitled to communicate to the public a radio or television program is also allowed to record the work, only for its own temporary broadcasting purposes and if the recording is made with its own equipment. The storage of the recording in official archives is permitted only when they have an exceptional documentary value.

3.1.2.20.1.3 INCIDENTAL INCLUSION

Article 18a AW (2004) allows the incidental inclusion of a literary, scientific or artistic work as a component of minor significance in another work. The provision implements **Article 5(3)(i) InfoSoc** adopting a more restrictive standard as regards the operational conditions of the exception ("minor significance") and by (at least apparently) narrowing down the categories of works that can be used. [776]

[775] For related case law, see: Gerechtshof Amsterdam, 19 August 2014, ECLI:NL: GHAMS:2014:3435 (*NSE/BREIN*).
[776] For related case law, see: Rechtbank Noord-Holland, 26 November 2014, ECLI:NL: RBNHO:2014:11165 *(2Houses/Stemra).* Paragraph § 4.11 of this judgement refers to CJEU, 21 October 2010, C-468/08 (Padawan) and CJEU, 3 September 2014, C-201/13(Deckmyn). In this regard, see also: Rechtbank Midden-Nederland, 20 July 2016, ECLI:NL: RBMNE:2016:3986 *(Scriptie over fictieve reis).* Rechtbank Rotterdam, 15 February 2019, ECLI:NL: RBROT:2019:1573 *(Foto in werkstuk).*

3.1.2.20.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Article 24a AW (2004) permits a lawful user of a database to carry out acts of reproduction which are necessary for accessing and normally using the database.[777] The provision implements **Article 6(1) Database**, but with a more restrictive approach towards the rights covered by the exception.

Article 45j AW implements *verbatim* **Article 5(1) Software**, allowing lawful users to reproduce a program when needed for the use of the computer program in accordance with its intended purpose. In principle, parties can contractually agree otherwise, unless the reproduction is made in connection with loading, display, or for the correction of errors of the program. In *Onderhoud TMS-software* (2016), the Rechtbank Midden-Nederland interpreted this provision as including the maintenance that enables the user to continue to use the functionalities of the software, also confirming that a lawful user is not permitted to carry out acts of reproduction that consist in adding functionalities to the program.[778]

Similarly, **Article 45k AW** is in line with **Article 5(2) Software,** allowing lawful users to make back-up copies when needed for the proper use of the program. The provision has been interpreted restrictively. In *(Autodesk/Aztec)* case, for instance, the Rechtbank Breda held that making a back-up copy of a program on a hard drive was not necessary if the user already had a CD as back-up copy.[779]

Article 45l AW (1994) contains *verbatim* the exception allowing a lawful user to study and observe the program to determine the ideas and principles underlying its elements, as defined in **Article 5(3) Software**, while **Article 45m AW (1994)** mirrors the exception contained in **Article 6 Software**.[780] Dutch courts have interpreted the exception as also covering the reproduction necessary to make the software compatible with software from other suppliers, and have confirmed the non-application of the provision when the information needed to achieve interoperability is already easily accessible otherwise.[781]

Articles 29(a)-(b) AW, in force since 1985 and last amended in 2021, implement safeguards for permitted uses when TPMs are in place. The provision allows the otherwise prohibited circumvention of effective TPMs, to ensure that lawful users are not prevented from enjoying a range of specific exceptions, such are the exceptions related to private copying (16c); reprography (16h); preservation uses made by certain institutions (16n); uses

[777] With regard to the notion of 'normal use', see: Gerechtshof Amsterdam, 13 March 2012, ECLI:NL: GHAMS:2012:BW0096, *(Ryanair/PR Aviation).*

[778] Rechtbank Midden-Nederland, 28 December 2016, ECLI:NL: RBMNE:2016:6791 *(Onderhoud TMS-software).*

[779] Rechtbank Breda, 25 October 2006, ECLI:NL: RBBRE:2006:AZ5955 (Autodesk/Aztec). In this regard, see also: Gerechtshof Arnhem-Leeuwarden, 14 July 2015, ECLI:NL: GHARL:2015:5301.

[780] Hof Arnhem, 16 December 2003, ECLI:NL:GHARN:2003:AP8476 *(Deurwaarderssoftware IV)*, Rechtbank Dordrecht, 11 August 2010, ECLI:NL:RBDOR:2010:BN3863 Rechtbank Amsterdam, 29 October 2014, ECLI:NL:RBAMS:2014:7005. For further case law related to this exception, see: Vzr. Rb. Leeuwarden, 25 mei 2005, ECLI:NL:RBLEE:2005:AT6118 *(Conversie Schoolsoftware).*

[781] Hof Arnhem, 16 December 2003, ECLI:NL:GHARN:2003:AP8476 *(Deurwaarderssoftware IV)*, Rechtbank Dordrecht, 11 August 2010, ECLI:NL:RBDOR:2010:BN3863 Rechtbank Amsterdam, 29 October 2014, ECLI:NL:RBAMS:2014:7005.

for the benefit of disabled persons (15j); uses in public official procedures (22) as required by **Article 6(4) InfoSoc.**

3.1.2.20.1.5 FREEDOM OF PANORAMA

Article 18 AW (2004) allows the free reproduction and communication to the public of images (drawings, paintings, works of architecture and sculpture, lithographs, engravings and the like) of a work of architecture permanently placed in public places. The term "work of architecture" shall be intended as covering also drafts, sketches and three-dimensional works relating to architecture, geography, topography or other sciences. If the use concerns the incorporation into a compilation of works, no more than a few works of the same creator may be incorporated.[782]

The Dutch provision is more restrictive than **Article 5(3)(h) Infosoc**, particularly with regard to the definition of the subject matter and uses Covered by the exception.

3.1.2.20.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.20.2.1 REPROGRAPHY

The **AW** provides an exception for reprography under **Article 16h AW**. The provision was introduced in 1996, but it has been amended in 2004 to implement the exception harmonized by **Article 5(2)(a) InfoSoc.**

Article 16(h) AW permits the reprographic reproduction of an article in a daily or weekly newspaper or other periodical, or of a small part of a book and other works it contains.[783] The reproduction of the whole work is allowed when it may reasonably be assumed that no new copies of the book will be made available for sale in the ordinary channels of commerce.

Rightholders should be granted fair compensation.

Article 16(h) AW (3) provides a special rule for reprographic reproductions made by public authorities and institutions working in the public interests, referring for further details to an ad hoc regulation ('*Besluit reprografische verveelvoudigen')*.

3.1.2.20.2.2 PRIVATE COPY

Articles 16(b) and 16(c) AW [784] provide for a private copy exception. These rules correspond to **Article 5(2)(b) InfoSoc** and are in force since 2006.

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[782] For related case law, see:Rechtbank Leeuwarden, 19 April 2005, ECLI:NL:RBLEE:2005:AT4169 *(De Groene Leguaan/Friesland Bank);*Rechtbank Zwolle, 20 July 2005, ECLI:NL:RBZLY:2005:AU6956 *(Stichting Beeldrecht/Gemeente Hardenberg)* and Gerechtshof Arnhem, 20 January 2009, ECLI:NL:GHARN:2009:BH4145 *(Typisch Enschedé/Beeldrecht).*

[783] This use overlaps with uses for press review and current events – on which see the dedicated section below.

[784] Case law in Netherland related to this exception is particularly rich. See, indicatively: Hoge Raad 8 July 2011, ECLI:NL:HR:2011:BQ1703 (*Thuiskopie/Heldt*);Hoge Raad, 12 October 2012, ECLI:NL:HR:2012:BW8301 (*Thuiskopie/Opus 2*), Rechtbank Den Haag, 3 December 2014, ECLI:NL:RBDHA:2014:14732 (*Thuiskopie/Verbatim*), Hoge Raad, 20 January 2017, ECLI:NL:HR:2017:59, Hoge Raad 21 September 2012, ECLI:NL:HR:2012:BW5879; Hoge Raad, 6 October 2017, ECLI:NL:HR:2017:2569 (*Imation/Thuiskopie*); Rechtbank

It allows the reproduction of literary, scientific or artistic works, partially or in their entirety, by a natural person, as long as the copy is made for their private practice, study or use. The act shall lack any direct or indirect commercial relevance. In this regard, in *Duijsens/Broeren* (2011),[785] it was held that showing infringing works in an atelier and using them on websites where other works are sold constitutes a use with commercial aim. In *Met spybril opnemen van examenvragen* (2017)[786] the recording of driving exam questions to use them for a driving school was deemed to be a commercial use, because the aim was to improve the position of the company vis-a-vis competing driving schools. The exception is subject to the payment of fair compensation to rightholders. The devices for which compensation is due are determined by a separate law (Order in Council). According to Article 16(d) AW, the distribution and collection of the fair compensation are entrusted to CMOs. The Dutch private copy exception can be understood as being more restrictive than the EU model, as it defines in detail the private purpose falling under the umbrella of the exception.

3.1.2.20.3 QUOTATION

Article 15(a)(1) AW (2004)[787] allows quoting scientific, literary or artistic works that have already been made available to the public in an announcement, review, polemic or scientific piece, or another piece with a similar purpose. The quoted parts shall not extend the number and size justified by the purpose, and the use shall comply with reasonably acceptable social customs. The name of the author and the source shall be indicated, if reasonably possible. The exception also covers quotations in the form of press review of articles published in a daily or weekly newspaper or other periodicals as well as quotations in a language other than the original.

The Dutch rule implements **Article 5(3)(d) InfoSoc** with an expansive and more encompassing approach.

Article 17(7) CDSM finds correspondence in **Article 19(5) AW**, which closely follows the wording of its EU counterpart.

Den Haag, 13 February 2019, ECLI:NL:RBDHA:2019:1251 & Rechtbank Den Haag, 30 September 2020, ECLI:NL:RBDHA:2020:9999; Rechtbank Den Haag, 5 September 2018, ECLI:NL:RBDHA:2018:10645 (*SEKAM/De Staat*); Rechtbank Den Haag, 13 February 2019, ECLI:NL:RBDHA:2019:1251 (*Stobi/De Staat*); Rechtbank Den Haag, 11 March 2020, ECLI:NL:RBDHA:2020:2166 (*Thuiskopie/Stern Telecom*).

[785] Hof 's-Hertogenbosch, 15 November 2011, ECLI:NL: GHSHE:2011: BU4770 (*Duijsens/Broeren*).

[786] Gerechtshof Amsterdam, 9 June 2017, ECLI:NL: GHAMS:2021:2934 (*Met spybril opnemen van examenvragen*).

[787] For related case law, see: Gerechtshof Arnhem, 4 July 2006, ECLI:NL:GHARN:2006:AY0089 *(NVM/Zoekallehuizen.nl).*; Gerechtshof Arnhem, 24 June 2008, ECLI:NL:GHARN:2008:BG1062 *(Openbareverkopen.nl/ Internetnotarissen);*Gerechtshof Leeuwarden, 10 July 2012, ECLI:NL:GHLEE:2012:BX0988 *(Beeldcitaat);* Hoge Raad, 3 April 2015, ECLI:NL:HR:2015:841*(GS Media/Sanoma);* Gerechtshof Den Haag, 27 October 2015, ECLI:NL:GHDHA:2015:2910 *(Moulinsart S.A./Hergé genootschap);* Gerechtshof Amsterdam, 6 February 2018, ECLI:NL:GHAMS:2018:395 *(Anne Frank Stichting/Anne Frank-Fonds).*

3.1.2.20.4 PARODY, CARICATURE, PASTICHE

Article 5(3)(k) InfoSoc finds implementation in **Article 18(b) AW (2004)**,[788] which allows the reproduction and making available of works for caricature, parody or pastiche. Unlike the EU source, the Dutch provision restricts the application of the exception to uses that are in accordance with reasonably acceptable social customs. In *Mercis en Bruna/Punt.nl,* [789] the Court of Amsterdam accepted that in a parody a character ("Miffy") could be associated with drugs and terrorism, as long as the association is made in accordance with what social custom regards as reasonably acceptable.

At the time of writing, there is a pending case at the Dutch Supreme Court relating to parody.[790] The case is worth mentioning because it goes further into the concept of parody and applies this exception to portraits. In this case, a look-a-like of famous F1 driver Max Verstappen, who is the face of supermarket chain Jumbo, is used in a commercial to market a small groceries delivery service. The AG of the Dutch Supreme Court (*Hoge Raad*) assessed the commercial nature of the parody *vis-à-vis Deckmyn*. According to the AG, the *Deckmyn* criteria allow for parodies with a commercial background, thus also making it admissible to use it in an advertisement/commercial video. Should this reasoning be embraced by the final decision, the Dutch system would admit commercial parodies, even when aimed at directly competing with another company, as long as there is no risk of creating confusion among the audience.

Article 17(7) CDSM finds correspondence in **Article 19(5) AW**, which closely follows the wording of its EU counterpart.

3.1.2.20.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.20.5.1 PRIVATE STUDY

Aside from the reference to private study purposes made under the private copy exception of **Article 15(b) AW**, **Article 15h AW** allows public libraries, archives, museums or educational establishments to make a copy and communicate to the public works permanently held in their collections from dedicated terminals at their premises, as long as the acts are made for the benefit of a natural person, for its private education, scientific study or research purposes.

In force since 2014, the exception implements **Article 5(3)(n) InfoSoc**, with a more flexible approach than its EU counterpart, since it does not exclude its operation when works are subject to licensing terms.

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[788] For related case law, see: Gerechtshof Amsterdam, 30 January 2003, ECLI:NL: GHAMS:2003: AK4786 *(Bassy III);* Gerechtshof Amsterdam, 6 November 2003, ECLI:NL: GHAMS:2003:AN7646 (*Harry Potter/Tanja Grotter*), not accepted as parody because the work mainly aimed at the hype surrounding Harry Potter.

[789] Gerechtshof Amsterdam, 13 September 2011, ECLI:NL: GHAMS:2011:BS7825 *(Mercis en Bruna/Punt.nl).*

[790] Parket bij de Hoge Raad (AG of the Dutch Supreme Court - Hoge Raad). For reference to the standing decision, see: Gerechtshof Amsterdam, 2 June 2020, ECLI:NL: GHAMS:2020:1410.

3.1.2.20.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 16 AW (2004), which implements **Article 5(3)(a) InfoSoc**, permits the reproduction and making available of parts of literary, scientific or artistic works that have been already disclosed to the public, as long as the use is made exclusively for illustration for teaching, and to the extent justified by the purpose. However, it is worth noting that courts have generally adopted a restrictive interpretation of the educational purpose. For instance, in *Vogelfoto* the Court of Rotterdam held that showing an instruction video to volunteers of an organization helping them to recognize bird sounds did not qualify as 'education'.[791]

The reproduction of musical works, photographic works or works of applied arts is permitted but in a manner that the copy clearly differs from the original work. Compilation works of the same author can be reproduced only in short portions.

The exception operates subject to the conditions that the uses comply with reasonably acceptable social customs. The source and name of the author, when clearly indicated in the work, need to be acknowledged. Rightholders are entitled to fair compensation. There are, however, collective agreements between educational institutes and publishers.[792]

This rule was last amended in 2021 to implement the mandatory digital teaching exception envisaged in **Article 5 CDSM** (see below).

Article 12(5) AW (2004) excludes from the right of communication to the public the recitation, playing, performance or presentation in public of a work, when the acts are made for educational/scientific purposes, and only if executed in the context of a schoolwork plan or curriculum delivered by public entities or not-for-profit legal persons.

3.1.2.20.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Before enacting the CDSM Directive, Netherland did not feature any specific provision allowing digital teaching. With the transposition law of 16 December 2020, in force since 07 June 2021, the Dutch legislature has introduced some amendments to **Article 12(5) AW** and added **Article (5) AW**, which follows verbatim **Article 5(1) CDSM**, to cover with a mandatory, non-overridable exception the digital use for illustration for teaching. [793]

[791] Rechtbank Rotterdam, 21 December 2017, ECLI:NL: RBROT:2017:10388 (*Vogelfoto's*).

[792] See, for instance: the Mediafederatie and the Auteursbond: https://mediafederatie.nl; https://auteursbond.nl

[793] Wet van 16 december 2020 tot wijziging van de Auteurswet, de Wet op de naburige rechten, de Databankenwet en de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten in verband met de implementatie van Richtlijn (EU) 2019/790 van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG (Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt). Publication date: 19.12.2020.

3.1.2.20.5.4 TEXT AND DATA MINING

Prior to the CDSM Directive, the Dutch AW did not make any reference to text and data mining. Two ad hoc exceptions have been introduced to implement **Articles 3** and **4 CDSM** in **Articles 15 (n)**; **15(o)** and **25(a) AW**, in force since June 2021.

Article 25a **AW** adopts *verbatim* the definitions of TDM and research and cultural heritage organizations offered in **Article 2(1)(2)(3) CDSM**. Whereas **Article 15n AW** implements **Article 3 CDSM** by following closely the features referred to in the EU source, **Article 15o AW** does the same for it concerns the implementation of **Article 4 CDSM.** It allows the reproduction of works by CHI and research organizations, for text and data mining, including the conservation for research purposes.

3.1.2.20.6 USES FOR INFORMATORY PURPOSES

3.1.2.20.6.1 PRESS REVIEW AND NEWS REPORTING

Article 16a AW (2004) [794] allows copying, communicating, or recording a literary, scientific or artistic work in a photographic, film, radio or television report, as long as such acts are made to give a proper account of a current event.

Article 15 AW (2015)[795] allows press media to reproduce reports and articles on current economic, political, religious or ideological topics from other news media and free of charge. While adaptations do not fall under this exception, translations from another language are accepted. The provision applies only if the author has not expressly reserved the exercise of such rights. The indication of the source and authorship of the work used is required.

Article 15 AW identifies as beneficiaries daily or weekly newspapers, other periodicals, radio or television programs, or other media that have the same function. This may include websites as well, as they are periodical publications and media that are periodically updated and provide a supervised presentation of news. Websites that are not updated regularly, or information on CDs or other durable information carriers, do not fall under this exception.

This provision implements **Article 5(3)(c) InfoSoc**, adopting a broad definition of press beneficiaries.

[794] For related case law, see: Gerechtshof Leeuwarden, 10 July 2012, ECLI:NL: GHLEE:2012:CA1097 & ECLI:NL: GHLEE:2012: BX0988*(Beeldcitaat).* With regard to the benefeciaries of the exception, see: Rechtbank Amsterdam 17 August 2011, ECLI:NL: RBAMS:2011:BT6885 (Cozzmoss/particulier);Rechtbank Breda 30 mei 2012, ECLI:NL:RBBRE:2012:BW7204 (Cozzmoss/Belastingplanet.

[795] For related case law, see: Rechtbank Utrecht, 12 May 2010, ECLI:NL:RBUTR:2010:BM4200 *(Eredivisie);* Rechtbank Breda, 30 May 2012, ECLI:NL:RBBRE:2012:BW7204 *(Cozzmoss/Belastingplanet);* Gerechtshof Arnhem, 18 December 2012, ECLI:NL:GHARN:2012:BZ4286 *(Cozzmoss/Remie consultants);* Gerechtshof Den Haag, 27 October 2015, ECLI:NL:GHDHA:2015:2910 *(Moulinsart S.A./Hergé genootschap);* Gerechtshof Arnhem, nevenzittingsplaats Leeuwarden, 26 July 2011,:NL:GHARN:2011:BR3119 *(NDP/Provincie Flevoland).*

3.1.2.20.6.2 USES OF PUBLIC SPEECHES AND LECTURES

The Dutch Copyright Act does not feature any other exception covering the use of public speeches and lectures. Such uses may fall under the quotation exception.

3.1.2.20.7 USES BY PUBLIC AUTHORITIES

3.1.2.20.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 22 AW,[796] in force since 2006, implements **Article 5(3)(e) InfoSoc.** It allows the reproduction of images of any kind in the interest of public security and criminal investigation and permits judicial authorities, or people/entities acting on their behalf, to make available such works, for the same public interest purposes. Literary, scientific or artistic works can be freely used for public safety or for the proper functioning and reporting of administrative, judicial or parliamentary proceedings.

While the Dutch exception is narrowly shaped as regards the use of images, purposes and permitted uses of other types of works show complete correspondence to the EU standard.

3.1.2.20.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 17c AW allows the use of works in congregational singing and their instrumental accompaniment during a service. The provision is in force since 1973, yet it can find correspondence in **Article 5(3)(g) InfoSoc,** from which the Dutch rule differs only for the slightly limited scope as regards the permitted uses.

3.1.2.20.8 SOCIALLY ORIENTED USES

The Dutch Copyright Act does not feature any provision similar to **Article 5(2)(e) InfoSoc.**

3.1.2.20.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.20.9.1 PUBLIC LENDING

Article 15c AW[797] implements **Article 6 Rental**. The provision is in force since **2018** and it permits the public lending of works or parts of them, only if such works have already been put into circulation with the consent of the rightholder. The lending is made subject to the payment of fair compensation. However, rightholders can waive this right.

Educational establishments, research institutes and their libraries, public libraries, the Royal Library, and institutions that are primarily funded by the State or local administrations and lend accessible works to people with disabilities are not subject to the payment of remuneration.

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[796]For related case law, see: Rechtbank Amsterdam, 29 November 2004, ECLI:NL: RBAMS:2004:AR6898 *(Foto Mohammed B.);* Rechtbank Oost-Brabant, 10 August 2015, ECLI:NL: RBOBR:2015:5077 *(Geen verbod rapport in bodemprocedure in het geding te brengen).*

[797] For related case law, see: Hoge Raad, 23 November 2012 ECLI:NL:HR:2012: BX7484 *(Stichting Leenrecht/Vereniging van Openbare Bibliotheken)* (Para. 3.5.3: citing CJEU, 30 June 2011, C-271/10, *(VEWA/België)*

3.1.2.20.9.2 PRESERVATION OF CULTURAL HERITAGE

The Netherlands did not adopt any specific provision to implement **Article 6 CDSM** Directive. The scope of this use is covered by **Article 16n AW**,[798] which is in force since 2014.

The provision allows publicly accessible libraries, museums, educational institutions or archives, not seeking a direct or indirect economic or commercial benefit, to make reproductions of works that are permanently held in their collections, with the exclusive purpose of restoring the works, including their preservation either against damage or against the risk of becoming obsolete in light of the available technology.

Compared to **Article 5(2)(c) InfoSoc,** which is broadly drafted, the Dutch exception restricts the purposes to preservation or restoration only. However, the provision is in line with **Article 6 CDSM.**

3.1.2.20.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

No other provision has been reported, except for those already referred to in this Section.

3.1.2.20.9.4 ORPHAN WORKS

Article 16o AW[799] implements the exception contained in **Article 6 OWD**. It entered into force in 2014.

The exception allows educational establishments, libraries, museums accessible to the public, as well as archives and film or audio-visual heritage institutions, which do not have a direct or indirect economic or commercial gain to reproduce and make available to the public literary, musical, and film orphan works that form part of their collection. The notion of orphan works is defined in line with the EU rule.

3.1.2.20.9.5 OUT-OF-COMMERCE WORKS

An exception for the use of out-of-commerce works has been introduced in **Article 18c AW** to implement **Article 8(2) CDSM**.

The provision allows cultural heritage institutions, in the absence of a representative collective management organization, to make available to the public, for non-commercial purposes, out-of-commerce works or other subject matter which are permanently in the collection of the institution. The Dutch provision implements almost verbatim the operational conditions set in **Article (2)(a)(b) CDSM.** Moreover, the Dutch legislation transposed almost

[798] For related case law, see: Rechtbank Amsterdam, 20 May 2015, ECLI:NL: RBAMS:2015:3231*(Stichting Internationaal Instituut Voor Sociale Geschiedenis);* Rechtbank Amsterdam, 23 December 2015, ECLI:NL: RBAMS:2015:9312 *(Anne Frank Stichting/Anne Frank-Fonds & KNAW).*

[799] Introduced by law Wet van 8 oktober 2014 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de implementatie van de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken. For related case law, see: Rechtbank Den Haag, 5 April 2018, ECLI:NL: RBDHA:2018:3768 *(Erfgoed Leiden).*

verbatim **Article 8(4) CDSM**, which indeed allows excluding the exception in specific cases without providing any further guidance.

Pursuant to **Article 44(4) AW** and in full adherence to **Article 8(5) CDSM** a work is considered out-of-commerce available when, after a reasonable effort has been made, it can be presumed in good faith that the work is not or no longer available to the public through customary channels of commerce.

3.1.2.20.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The Dutch **AW** envisages several provisions covering uses for the benefit of people with disabilities.

Article 15i AW permits the reproduction and distribution of works in an accessible format for the benefit of persons with disabilities, provided that such acts are not-for-profit, tailored to the specific disability, and not exceeding the extent required for the purpose. The exception is subject to the payment of an equitable remuneration to rightholders. The rule implements **Article 5(3)(b) InfoSoc**, following its standard except for the additional compensation requirement.

Article 15j AW, in force since 2018, implements the exception contained in **Article 3 Marrakesh.** The exception is addressed to people with visual impairment or a person acting on their behalf who, in line with the EU standard, are permitted to convert a published work into a form accessible to a person with a reading disability, as long as they have lawful access to the published work. The operational conditions of the exception also follow the EU rule, for it concerns the need to preserve the integrity of the work as much as possible, the limitation of uses to what is directly related to the disability and the non-overridability of the exception. The provision also embeds the authorization to import accessible copies into another EU Member State or state party to the Marrakesh Treaty, in line with the Marrakesh Regulation. However, the Dutch implementation does not contain the reference to the three-step test, enshrined in **Article 3(3) Marrakesh**.

The Netherlands exercised the freedom left by **Article 3(6) Marrakesh** to subject the exception to the payment of reasonable compensation. Other conditions in this regard are determined by order of the Council.

3.1.2.20.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 23 AW (2004)[800] allows the owner or possessor of a drawing, painting, sculpture or architectural work, or a work of applied art to reproduce them and make them public for the purpose of advertising their public exhibition or sale of that work, and for no other commercial purposes. This exception implements **Article 5(3)(j) InfoSoc** almost verbatim.

[800] For related case law, see: Gerechtshof Amsterdam, 6 February 2018, ECLI:NL: GHAMS:2018:395 *(Anne Frank Stichting/Anne Frank-Fonds).*

Article 24 AW (1912) permits the original author of a painting to keep making similar works even after the transfer of exclusive rights of the former to a third party. Parties can agree otherwise.

Article 15b AW permits the reproduction or communication to the public a literary, scientific or artistic work disclosed by or on behalf of a public authority either by law, decree or regulation or by a specific notice. Rightholders can reserve such rights. The provision entered into force in 1973 and was amended in 2006. It aims to allow any person to use works made public by public authorities, but which are not in the public domain.

Article 12(4) AW – in force since 1973, excludes from copyright protection the recitation, playing, performance or presentation in public of protected works in closed circles exclusively consisting of relatives or friends, and as long as no admission fee is charged. The same applies to exhibitions. Colleagues at a company listening to music while working do not qualify as a closed circle of friends, according to *Buma/Suplacon.*[801] Neither the inhabitants of a caring home do qualify as a closed circle limited to relatives or friends, as per ruling *Woonvoorziening*[802]they are deemed to be brought together randomly by the organization. This reasoning was recently confirmed in a judgement of 2021.[803]

3.1.2.20.12 THREE-STEP TEST

There is no explicit provision in the Dutch AW referring to the three-step test as enshrined in **Article 5(5) InfoSoc**. However, it is reported that Dutch courts generally consider the three-step test when interpreting exceptions and limitations.

3.1.2.20.13 PUBLIC DOMAIN

3.1.2.20.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 11 AW,[804] in force since 1912, as amended in 1972, excludes from copyright protection laws, decrees or ordinances issued by public authorities, and judicial or administrative decisions.

Under **Article 1(a) AW** (2008), performing artists of expressions of folklore are granted rights for their performance in acts of folklore. The provision was inserted in the AW in order to meet the criteria of Article 2(a) WPPT.

3.1.2.20.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

[801] Rechtbank Zwolle-Lelystad, 10 December 2008, ECLI:NL: RBZLY:2008:BH4922 (*Buma/Suplacon*).
[802] Rechtbank Midden-Nederland, 19 September 2018, ECLI:NL: RBMNE:2018:4388 (*Woonvoorziening).*
[803] Gerechtshof Arnhem-Leeuwarden, 23 March 2021, ECLI:NL: GHARL:2021:2727 (*Dagelijks Leven/Buma*).
[804] For related case law, see: Hoge Raad, 22 June 2012, ECLI:NL:HR:2012:BW0393 *(Knooble).*

3.1.2.20.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Compulsory licensing schemes are applicable with respect to the compensation for public lending **(Article 15c AW);** uses for persons with disability **(Article 15i AW)**; reproduction for teaching **(Article 16 AW);** private copy **(Article 16c AW);** reprography **(Article 16h AW)** and for the use of orphan works for which rightholders put to an end the condition of orphan works **(Article 16q AW).**

After the implementation of **Article 8(1) CDSM** in June 2021, the Dutch AW now features an ECL scheme for out-of-commerce works under **Articles 44, 44a, 44b AW**, which implementation follows *verbatim* the elements and conditions envisaged in the corresponding EU rule.

3.1.2.20.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.20.15.1 FUNDAMENTAL (USERS') RIGHTS

In some exceptional cases, Dutch courts have accepted that a fundamental right, in particular the right to freedom of expression, could rule out the application of an exclusive right or limit the applicability of injunctions and other enforcement measures vis-à-vis online intermediaries. However, after the ECJ decisions in *Funke Medien*, *Pelham* and *Spiegel Online*, that room to apply fundamental rights in such a way now appears much more limited.

After stating in **Article 17 AW** that public media institutions identified in Chapter 2 of the Media Act (2008) are allowed to reproduce and make available to the public works published in the European Economic Area, which have been produced and archived by such media institution before 1 January 2003, **Article 17a AW** specifies that the conditions for exercising such right are to be defined by a separate instrument (Order in Council) in the public interest.

3.1.2.20.15.2 CONSUMER PROTECTION

None reported.

3.1.2.20.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.20.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.21 POLAND

The Polish Act on Copyright and Related Rights of 4 February 1994, as last amended in 2019[805] (UPA), implements almost all the copyright flexibilities envisioned in EU Directives. Absent is an exception covering socially oriented uses. Until recently, Poland did not feature an explicit parody exception. Despite not having implemented the CDSM Directive yet, Poland

[805] Ustawa z 4 lutego 1994r. o prawie autorskim i prawach pokrewnych, t.j. Dz. U. z 2019 r. poz. 1231, z zm., UPA.

already regulates ECL schemes for the use of out-of-commerce works by CHIs and allows free uses for digital teaching, albeit with a narrower array of beneficiaries than those in the EU model.

At the same time the level of flexibility of the E/L in the Polish landscape varies. While the exceptions for computer programs, databases and for the use of orphan works closely follow the EU model, those for freedom of panorama, ephemeral recording, illustration for teaching and research and incidental inclusion are more restrictive than the EU counterpart. Interestingly, some exceptions present both restrictive and user-friendly approaches, as is the case for private copy. On the contrary, Poland benefits from a broad encompassing exception for quotation.

3.1.2.21.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.21.1.1 TEMPORARY REPRODUCTION

Article 23 UPA, in force since 2004, implements verbatim **Article 5(1) InfoSoc** and its exception for temporary reproductions which are transient or incidental and an integral and essential part of a technological process, providing for the same conditions and requirements.

Article 100 UPA extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

3.1.2.21.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc is implemented in **Article 23(2) UPA**. In force since 2015, the provision contemplates an exception in favour of broadcasting organizations, allowing them to make a recording of works with their own equipment and for the purpose of their own broadcasts. The exception is subject to the condition that the recording is destroyed within one month from the expiration date of the right to broadcast the work, except when the recordings consist of archival material belonging to the national archive resources.

Unlike the EU model, the Polish exception specifies the operational conditions of the exception and presents more stringent criteria for allowing the preservation of the recordings.

Article 100 UPA extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

3.1.2.21.1.3 INCIDENTAL INCLUSION

Article 29(2) UPA, in force since 2002, permits the unintentional incidental inclusion of protected works or other subject matter in other material or works. The incorporated work should lack significance for the work that embeds it. This provision implements **Article 5(3)(i) InfoSoc** by introducing a slightly more restrictive operational condition.

Article 100 UPA extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

3.1.2.21.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The UPA transposes under **Article 74-76(2) and 17(1)** specific acts necessary for the access and normal use of computer programs and databases by a lawful user by adopting a wording that closely follows the correspondent **Software** and **Database** Directive.

Article 17(1) UPA (2002) limits the right of reproduction of the rightholder of a database in favour of a lawful user, providing the same conditions and requirements laid in **Article 6(1) Database.**

Article 75(1) UPA implements the exception contained in **Article 5(1) Software** in full adherence to the EU model, including the therein envisaged possibility for rightholders to reserve the uses. The same provision contains the mandatory exception as provided in **Article 5(2) Software,** but departs from it by specifying that the copy may not be used concurrently with such program.

Whereas **Article 75(2)(2) UPA** implements verbatim **Article 5(3) Software**, **Article 75(2) and 75(3) UPA** does the same for **Article 6 Software.** In line with the correspondent EU rule, these exceptions cannot be overridden by contract (**Article 76 UPA**).

Poland also has a provision permitting the otherwise prohibited circumvention of technical protection measures (TPMs) when this is necessary for a lawful user to benefit from exceptions and limitations. The provision is perfectly in line with **Article 6(4) Infosoc.**

3.1.2.21.1.5 FREEDOM OF PANORAMA

Article 33(1) UPA (1994) allows the reproduction and dissemination of works permanently exhibited on publicly accessible roads, streets, squares or gardens, as long as such acts do not compete with the primary exploitation of the works. Even though this provision is in force since 1994 it is well harmonized with **Article 5(3)(h) InfoSoc,** except where it narrows the type of public space where the works shall be placed for the use to fall within the exception.

3.1.2.21.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.21.2.1 REPROGRAPHY

According to **Article 20[1] UPA**, any person who is in possession of reprographic devices and runs a business offering the use of such devices to third parties for the purpose of making personal copies is obliged to pay authors and publishers, through a CMO, fees up to 3% of the proceeds generated from such activities, unless the reproduction is regulated by a specific contract signed with a rightholder.

The notion of "reprographic devices" has been understood as open by the Appellate Court in Warsaw,[806] and based only on the ability of the device to make copies of a work in order to allow an interpretation of the provision that is adaptive to technological development.

The amount due as remuneration is determined by a regulation issued by the Ministry of Culture, upon consultation with CMOs, associations of authors and publishers and the respective chambers of commerce.

In addition, **Article 28(1) paragraph 2 UPA** envisages a limitation to the reproduction right in favour of libraries, archives, museums and educational institutions for preservation purposes, which covers reprography.

3.1.2.21.2.2 PRIVATE COPY

Article 23(1) UPA allows making single copies of published works for personal use or use within the circle of family and friends, for non-commercial purposes, as confirmed by the Appellate Court of Warsaw.[807] The exception excludes from its scope the copy of architectural and urban planning works intending to reproduce the same building/work and the reproduction of protected electronic databases unless it is made for private, non-profit use, for academic purposes. **Article 100 UPA** extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

Rightholders are entitled to receive fair compensation, the amount of which is defined in accordance with **Articles 20 and 20(1) UPA**. The right is managed collectively. The Appellate Court of Warsaw recognized that foreign artists are entitled to claim remuneration from CMOs on equal foot with national performing artists.[808]

The exception is in force since 1994, last amended in 2002 to include databases. Compared to the corresponding **Article 5(3)(b) InfoSoc**, the Polish private copy exception restricts the use to one single copy. It also limits the type of works by specifying that only published works can be used. Conversely, it expands the notion of private use to comprise family and friends.

3.1.2.21.3 QUOTATION

Under **Article 29 UPA** it is permitted to quote fragments of published works in other independent works, in so far as the quotation is justified by purposes such as explanation, polemics, critical or scientific analysis, or artistic genre. The exception is in force since 1994 and was lastly amended in 2015.

[806] Wyrok Sądu Apelacyjnego w Warszawie I Wydział Cywilny, IACa 770/19, 10.07.2020, Legalis nr 2538837.
[807] Judgement of Sąd Apelacyjny (Appellate Court) in Warsaw, of 5th February 2003, I ACa 601/02, LEX nr 1680981: The scope of use within the framework of art. 23 is limited to a circle of persons having a personal relationship, particularly as relatives, or having social relations. It does not extend to a person using the work in the framework of an economic, for-profit activity.
[808] Wyrok Sądu Apelacyjnego w Warszawie I ACa 1166/13, LEX nr 1451839, 11.03.2014.

Works of visual art, photographic works, and small/minor works can be quoted in their entirety. Asked to determine whether the reproduction of a poster from the 1989 elections as a cover of a newspaper could qualify as a quotation of a minor work, the Polish Supreme Court held that quoting entire works must be allowed when this is necessary to accomplish the purpose of the quotation (explanation, polemics, critical or scientific analysis or "rights of artistic genre").[809] More recently, in a dispute related to the use of documentary footage, the Supreme Court held that while Article 29 UPA does not expressly refer to the size/amount of work that can be quoted, the provision should be interpreted so as to ensure that its aim, which is to guarantee freedom of artistic expression, analysis and scientific critic, is preserved. In any case, the quote should play a subsidiary role to the main work.[810]

The Polish quotation exception is characterized by an expansion of the purpose of the quotation, if compared to **Article 5(3)(d) InfoSoc**, which at the same time has been interpreted in a rather user-friendly manner by Courts. The Polish implementation also envisages a greater level of flexibility than the EU model, for it does not require compliance with fair practice or acknowledgment of the source. **Article 100 UPA** extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

Article 27[1] UPA, as amended in 2015,[811] UPA allows quoting minor works or fragments of larger works in textbooks, extracts from literature, and anthologies for educational and scientific purposes. Rightholders are entitled to fair remuneration.

3.1.2.21.4 PARODY, CARICATURE, PASTICHE

Article 5(3)(k) InfoSoc is implemented in **Article 29[1] UPA** in 2015. In line with the EU model, the Polish provision allows the use of works for caricature, pastiche, or parody purposes. Before the amendment of 2015, which introduced this exception into the Polish Act, the Supreme Court covered such uses under the quotation exception (in particular within the "rights of artistic genre"),[812] requiring the new work to change the sense and situation of the work transformed, in a manner that it conveys one's own perspective of the latter.
Poland has not yet implemented the CDSM Directive and its **Article 17(7)** CDSM.

[809] Judgement of Sąd Najwyższy (Supreme Court) of 23rd November 2005 I CK 232/04, OSNC 2005/11/195. The judgement is prior to the amendment of 2015, by which the possibility to quote works of visual arts such a painting, graphic photography in their entirety was made explicit.
[810] Judgement of Sąd Najwyższy (Supreme Court) of 22nd February III CSK 11/17, Legalis nr. 1878767. In the case at hands the Supreme Court confirmed the lower court judgement which had found that the link between the expression of the narrator and the footage used in the film was too weak, and the proportions between the footage (42 minutes) and the rest of the film (90 minutes) were not such to justify considering the use as quoting.
[811] Prior to the amendment rules on including extracts and minor works in textbooks, extracts from literature or anthologies were part of art. 29 (2) and (3) introduced in 1994 and amended in 2004.
[812] See: Judgement of Sąd Najwyżych (Supreme Court) of 23rd November 2005 I CK 232/04, OSNC 2005/11/195.

3.1.2.21.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.21.5.1 PRIVATE STUDY

Article 28(1)(3) UPA permits educational institutions, universities, research institutes (as defined by the Act of 30 April 2010 on Research Institutes),[813] libraries, museums, and archives, to make their collections available to the public through dedicated terminals located within their premises, for the non-commercial purpose of research or private study. The District Court of Poznań[814] ruled that storing and offering access to paper copies of a journal by libraries falls within the scope of activities permitted under the umbrella of this exception.

The provision does not apply when such uses are covered by specific purchase or licensing terms. Significantly, however, in a judgement rendered by the Court on the Protection of Competition and Consumer,[815] the court found that a clause limiting the number of copies that can be made for users to one publishing sheet (about 22 pages) was not allowed in a contract concluded with the library user.

The Polish provision implements **Article 5(3)(n) InfoSoc** with a more restrictive approach for it attaches the array of beneficiaries to those specifically defined in a separate law. At the same time, Polish Courts have adopted a user-friendly approach when interpreting the carve-out of the exception. **Article 100 UPA** extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

3.1.2.21.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 27(1) UPA, in force since 1994 and amended in 2018, implements **Article 5(3)(a) InfoSoc,** while **Article 100 UPA** extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

The provision allows educational institutions regulated explicitly under the Law on Higher Education and Science[816] to use, reproduce, and translate published minor works and extracts of larger works for scientific research purpose. Interestingly, in a dispute concerning the use of a photo of a national poet on the invitation to a lecture organized by a public library, as part of the celebration dedicated to that poet, the Appellate Court of Łódź [817] found that libraries do not fall within the array of beneficiaries covered by Article 27 UPA. Confirming the restrictive approach, the Court also recalled that the reproduction of a whole work was excluded from the scope of the provision to avoid that the exception substitutes the need of consulting the original work in its entirety.

[813] Research institutes specified by Act of 30 April 2010 on Research Institutes[813] (Dziennik Ustaw 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 (Dziennik Ustaw2017, items 1869 and 2201).
[814] Judgement of 29th October 2014, LEX nr 1729297.
[815] Wyrok Sądu Ochrony Konkurencji i Konsumentów (Judgement of the Court on the protection of competition and consumers) of 9th December 2011XVII Amc 113/11.
[816] Entities referred to in Article 7.1 (1), (2), and (4) to (8) of the Act of 20 July 2018.
[817] Wyrok Sądu Apelacyjnego (Appellate Court in Łódź) of 4th February 2016, I ACa 1107/15; Legalis 2055849.

Compared to the corresponding EU model, the Polish provision limits the array of beneficiaries to those specifically defined by a separate instrument. While showcasing a higher level of flexibility with regard to the permitted acts, the Polish exception is less flexible in the amount of work that can be used, as confirmed by the judiciary.

3.1.2.21.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Already before the entry into force of the **CDSM** Directive, digital uses for illustration for teaching have been covered under **Article 27(2) UPA**, in force since 2015, which extends the exception for illustration for teaching introduced under the first paragraph to the making available of works digitally, exclusively for the benefit of a limited circle of teachers and students of educational institutions identified by the Law on Higher Education and Science.

As of today, Poland has not implemented the CDSM Directive and its **Article 5** yet.

3.1.2.21.5.4 TEXT AND DATA MINING

The Polish Copyright Act does not feature any text and data mining provisions. As of today, Poland has not implemented **Articles 3-4** CDSM Directive.

3.1.2.21.6 USES FOR INFORMATORY PURPOSES

3.1.2.21.6.1 PRESS REVIEW AND NEWS REPORTING

Poland features the exception envisaged in **Article 5(3)(c) InfoSoc** in **Article 25 UPA**. The provision is in force since 1994, but it was amended in 2004. If made for informative purposes, the provision allows the dissemination by (online)[818] press, radio and television of published reports or short excerpts on current events and translations thereof and of published articles or short excerpts of articles on current political, economic or religious topics and unless the rightholder has expressly reserved the use. The exception also covers the use of current comments, photographs taken by reporters, reviews of publications and works already disseminated and short summaries thereof. Rightholders are entitled to fair remuneration which, if not contractually agreed, is collected by a competent CMO.

Article 100 UPA extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

The Appellate Court of Gdansk,[819] in a controversy related to the re-publication of a press article on a website, construed the category of beneficiaries of the provision narrowly, as exclusively covering the online press and online press portals operated by entities that satisfied the criteria for press, radio and television set by the Act on Press Law of 1984 (Ustawa Prawo Prasowe). The Court also held that the rightholder's reservation of rights does not need to concern a particular article but may be expressed in general *in impressum* by the publisher.

[818] The provision refers to "making works available to the public in a manner that allows anyone to access them from a place and at a time individually chosen by them".
[819] Sąd Apelacyjny Gdańsk of 6th April 2017 V ACa 687/15; LEX nr 2343498.

In a case related to the publication of a portrait photo already published in another newspaper, the Warsaw Appellate Court ruled that the exception operates only if the dissemination entails an informative purpose in the sense that it is a "press" or "reporting" document.[820]

Article 26 UPA [821] (1994) permits quoting in reports on current events works made available during those events. The exception applies only to the extent justified by the informatory purpose.

While the beneficiaries of the exception are defined in line with the EU model, the subjective scope has been construed narrowly by the judiciary. Similarly restrictive are the operational conditions, as the exception is made subject to fair compensation. The Polish implementation presents some traits of flexibility, for it does not require acknowledgment of the source. In addition, unlike the EU provision, Poland adopts a broader list of works that can be used.

3.1.2.21.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 26(1) UPA (2015) allows the use of political speeches, discourses given in public trials, lectures and sermons to the extent justified by the informatory purpose. The exception does not cover the publication of collections of such works. This provision is in line with **Article 5(3)(f) InfoSoc**.

3.1.2.21.7 USES BY PUBLIC AUTHORITIES

3.1.2.21.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 33(2) UPA (2004), in line with **Article 5(3)(e) InfoSoc,** permits the use of works made for purposes of public security and for conducting or reporting administrative, parliamentary or judicial proceedings. **Article 100 UPA** extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

The Provincial Administrative Court of Warsaw interpreted the provision as covering the use of both published and unpublished works.[822]

3.1.2.21.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 31(1)(3) UPA allows the use of works during religious celebrations or official celebrations organized by a public authority, as long as such use is not aimed at any financial benefit. The exception does not apply to uses during advertising, promotional or electoral campaign events. The exception entered into force in 2004 and was amended in 2015. It

[820] Judgement of Sąd Apelacyjny (Appellate Court) in Warsaw, of 19th August 2005, VI ACa 330/05, Wokanda 2006 nr 11, str. 42, Legalis nr 76271. In the case at issue the Court found that a portrait photo of a company's management is not of such a nature, thus, it was not covered by the exception.

[821] For related case law, see: Judgement of Sąd Apelacyjny (Appellate Court) in Lublin I ACa 579/14 of 16th September 2014, Legalis 1164532, related to a television documentary on a music and dance festival.

[822] Judgement of Wojewódzki Sąd Administracyjny (Provincial Administrative Court) in Warsaw of 5th February 2013, VII SA/Wa 1402/12, Legalis 641288.

implements **Article 5(3)(g) InfoSoc** by narrowing down the types of official events during which the exception applies.

3.1.2.21.8 SOCIALLY ORIENTED USES

None reported.

3.1.2.21.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.21.9.1 PUBLIC LENDING

Article 28(1) and **Article 28 (4)-(7) UPA** regulate public lending. By implementing **Article 6 Rental Directive,** the Polish exception allows educational institutions, universities, research institutes (as defined by the Act of 30 April 2010 on Research Institutes),[823] libraries, museums, and archives to lend copies of published works. **Article 100 UPA** extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

When public libraries, as defined in the Act of 27 June 1997 on Libraries,[824] lend printed literary works, made or published in the Polish language, rightholders should be remunerated. Article $35^{(1)}$ imposes a mandatory collective management scheme for managing such rights. The Ministry of Culture appoints the CMO.

However, no remuneration is due when the lending is made by the National Library.

3.1.2.21.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 28(1)(2) UPA, in force since 1994, as amended in 2015 and 2018, UPA permits educational institutions, universities, research institutes (as defined by Act of 30 April 2010 on Research Institutes),[825] libraries, museums, and archives to reproduce works permanently held in their own collections for the purpose of supplementing, preserving, or protecting them. **Article 28(2) UPA** prohibits reproductions which would result in an increase in the copies of works held and/or in an expansion of the collections of the beneficiaries of the exception. **Article 100 UPA** extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

In a dispute concerning the making available online of a series of documentary films, the Polish Supreme Court pointed to the limits of permitted uses,[826] holding that works reproduced need to be already disseminated, and that the act of reproduction should be

[823] Research institutes specified by Act of 30 April 2010 on Research Institutes (Dziennik Ustaw 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 (Dziennik Ustaw2017, items 1869 and 2201)

[824] Dziennik Ustaw 2018, items 574.

[825] Research institutes specified by Act of 30 April 2010 on Research Institutes (Dziennik Ustaw 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 (Dziennik Ustaw 2017, items 1869 and 2201).

[826] Judgement of Sąd Najwyższy (Supreme Court) of 20th March 2015, II CSK 224/14, LEX nr 1711682. The judgement is prior to the amendment of 2015 which specified that reproduction is allowed only with regard to works permanently held in the collection of the beneficiaries' institutions.

limited to what is necessary for its preservation purpose. In this regard, the Supreme Court pointed out that preserving and protecting works refer to activities preventing the loss of a work, such as the deterioration of a material copy of a work, whereas supplementing the collection means making it complete by adding missing elements, as it would be the case of supplementing a missing part of the series of books or films.

Other uses for preservation purposes are covered by the ephemeral recording exception, addressed to broadcasting organizations and by orphan works.

As to date, the **CDSM** Directive and its **Article 6** has not been implemented yet.

3.1.2.21.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Specific uses benefiting CHI and educational institutions are listed in **Articles 27-28 UPA**.

Article 31(2) UPA permits the public performance and display of a published work through devices or similar mediums, which is addressed to an audience within school and academic events. The exception applies subject to the condition that performers do not receive remuneration. This exception falls under the umbrella of **Article 5(2)(c)-(d) InfoSoc**. **Article 100 UPA** extends the scope of the exceptions and limitations to copyright regulated within **Articles 23 to 34 UPA** to the objects of related rights as well.

3.1.2.21.9.4 ORPHAN WORKS

The Polish Copyright Act already featured a provision relating to the use of certain orphan works before implementing the Orphan Work Directive. **Article 33, paragraph 33** (1994) permits the use of encyclopaedias and atlases of published artistic and photographic works if contacting the author to obtain prior consent entails obstacles that are difficult to overcome. The author is entitled to remuneration.

Poland has transposed the exception provided by the Orphan Works Directive in **Chapter 2, Section 5, Articles 35(5)-(9) UPA**, in force since 2015 The Polish transposition of the exception contained in **Article 3 Orphan Works** closely follows the wording of the EU model, providing for the same conditions and requirements. Whereas the array of beneficiaries coincides with those identified in the Directive, it shall be noted that in the Polish implementation research institutes are those specified by the Act of 30 April 2010 on Research Institutes.[827]

3.1.2.21.9.5 OUT-OF-COMMERCE WORKS

To date, Poland has not implemented the CDSM Directive. Despite this, **Articles 35(10) - 35(12) UPA**, introduced in 2015 and amended in 2018, already regulate certain uses of out-of-commerce works through ECLs, where available.

[827] Research institutes specified by Act of 30 April 2010 on Research Institutes (Dziennik Ustaw 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 (Dziennik Ustaw2017, items 1869 and 2201).

The scheme benefits certain archives, educational institutions, cultural institutions, other specific educational entities identified by the Law on Higher Education and Science,[828] and cultural institutions. Licenses are granted by CMOs and cover the reproduction and making available, including online, of out-of-commerce works, also from rightholders not having conferred a mandate to the CMO, as long as the work is listed as out-of-commerce.

Pursuant to **Article 35(10) UPA**, out-of-commerce works are books, daily newspapers, periodicals, or other forms of publication in print that are not commercially available or are not available in a quantity that satisfies the access needs of the public if first published in Poland before 24 May 1994. The use of foreign literary works translated into the Polish language is excluded from the scheme. Out-of-commerce-Works shall be listed in a specific database which is public and freely available in Biuletyn Informacji Publicznej [the Public Information Bulletin] on the website of the minister responsible for culture and national heritage protection.

3.1.2.21.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 33(1) UPA (2004) permits the use of a published work for the benefit of people with a disability, and for uses directly related to the disability, to the extent required by it, and with no commercial nature. The exception implements **Article 5(2)(b) InfoSoc** by taking a slightly restrictive approach, for it covers only the use of published works.

This provision has been amended in 2018 to specify that the reproduction and dissemination of literary works, mathematical symbols, graphic marks or notations as well as related artistic or photographic works, for the benefit of people with disability shall be carried out under the conditions set out in Subchapter 3a, **Articles 35a** to **35e UPA**, which implement the **Marrakesh Directive** into the Polish national law.

While the Polish exception allows the reproductions of works in an accessible format, it makes the exception subject to the condition that the reproduction is made solely for the purpose of ensuring that the beneficiary has equally and convenient access to the work as persons without disabilities. Moreover, pursuant to Article 35a UPA, beneficiaries and persons acting on their behalf can make a copy of a work in an accessible format and disseminate it among other beneficiaries or authorized entities, upon the condition that proof of the impairment is provided by the person receiving the copy, such as by a statement made in writing or as a document, submission of a medical certificate, a disability certificate.

The notion of beneficiaries and authorized entities is included in **Article 6(1)(18)** and **Article 6(1)(19) UPA** by following that of the EU Directive.

3.1.2.21.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 33(3) UPA, in force since 2004 and amended in 2015, permits the use of works in advertisements, catalogues, and other similar materials for the purpose of advertising a

[828] Those referred to in Article 7.1 (1), (2), and (4) to (8) of the Act of 20 July 2018.

publicly accessible exhibition or sale of works taking place in museums, galleries, and exhibition halls. The exception applies to the extent justified by the promotion of that exhibition or sale, with the exclusion of other commercial uses. This provision implements **Article 5(3)(j) InfoSoc** by restricting the type of exhibitions and kind of uses falling within the scope of the exception.

Article 33(4) UPA (2004), in line with **Article 5(3)(l) InfoSoc** allows the use of works in connection with the demonstration or repair of equipment.

Article 5(3)(m) Infosoc is transposed in **Article 33(4) UPA** (2004), which envisages an exception allowing the use of a work of architecture, its drawings, plans or other similar arrangements, for the purpose of reconstructing or renovating a building structure. The Appellate Court of Gdansk held that the exception cannot operate to the detriment of the moral rights to paternity and integrity.[829]

Article 32(1) UPA (1994) allows owners of copies of artistic works to publicly exhibit the work in public for non-commercial purposes. The Appellate Court of Warsaw has subordinated the application of the exception to compliance with the three-step test.[830]

3.1.2.21.12 THREE-STEP TEST

Article 35 UPA (1994) contains an explicit reference to the three-step test, which states that permitted uses should not conflict with the normal use of the work and do not prejudice the legitimate interests of the author.

3.1.2.21.13 PUBLIC DOMAIN

3.1.2.21.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 4 UPA (1994) excludes from protection legislative acts and their official drafts, official documents, materials, logos and symbols, published patent specifications, industrial design specifications, and simple press information. In addition, **Article 1(2[1]) UPA** (2003) specifies that copyright does not cover inventions, ideas, procedures, methods, principles of operation, or mathematical concepts. **Article 74(2) UPA** (1994) makes it clear that ideas and principles which underlie any element of a computer program, including those which underlie its interface, are not protected.

Whereas the Supreme Administrative Court ruled in 2012[831] that expert opinions on the draft of a legislative act commissioned by the Office of the President are “public information”, thus, official materials in the meaning of Article 4 UPA, more recently, the same Court clarified

[829] Judgement of Sąd Apelacyjny, (Appellate Court) in Gdańsk of 10th February 2009 II APo 8/08 Legalis Numer 177239; LEX nr 524897.
[830] Judgement of Sąd Apelacyjny (Appellate Court) in Warsaw of 19th January 2007 I ACa 882/06 LEX nr 1120185.
[831] Judgement of Naczelny Sąd Administracyjny (Supreme Administrative Course) of 29th February 2012 I OSK 2196/11 LEX nr 1145090.

that expert opinions are not (excluded) "public information" if they do not relate to a concrete legislative draft in an ongoing legislative process.[832]

In connection to this, the Provincial Administrative Court of Warsaw stated that, while expert opinions on drafts of legislative acts commissioned by the President of the Republic of Poland's Office (*kancelaria Prezydenta*) are excluded from copyright protection as official documents, they are subject to the rules on access to public sector information, including the denial of access in case it prejudices public or individual's welfare.[833] This latter interpretation is consistent with the position adopted by the Supreme Court[834] in a dispute concerning the use of test questions for the driving license exam.[835] The Supreme Court held that the exclusion from copyright protection under Article 4 does not mean absolute freedom of copying or disseminating materials. On the contrary, such uses are still subject to rules on the protection of personal interests, secrecy, or unfair competition.

On the contrary, **Article 85 UPA** protects the performance of works of folklore.

3.1.2.21.13.2 PAYING PUBLIC DOMAIN SCHEMES

Poland does no longer envision paying public domain schemes at the time of writing. Provisions on the Fund on the Promotion of Creativity were repealed by the Act of 11 September 2011 amending the Act on Copyright and Related Rights and Gambling Act and as of 1 January 2016 the Fund was liquidated. With this amendment, Article 40 UPA, which imposed to producers or publishers of copies of literary, musical, visual art, photographic and cartographic works not protected by copyright, the payment of a fee to the Fund was repealed.

3.1.2.21.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Article 21 UPA (1994) envisages a collective licensing scheme covering the broadcasting organizations' right to broadcasting and making available to the public on demand, minor musical or lyrical works, and artistic performances. The scheme is not mandatory and requires the conclusion of a separate contract to broadcast works commissioned by a radio or television broadcasting organization. The uses of phonographs may be covered unless the organization concludes an individual agreement with the rightholder.

Article 21(1) UPA (1994) introduces a collective licensing scheme, managed by competent CMOs, addressed to cable network operators for their cable retransmission of any broadcasted work, artistic performance, phonograms and videograms by radio and television organizations.

[832] Judgement of 27th January 2020 I OSK 2130/11 LEX nr 1126276.
[833] Judgement of 11th October 2017, II SAB/Wa 175/17.
[834] Judgement of Sąd Najwyższy (Supreme Court) of 26th September 2001, IV CKN 458/00 LEX nr 52711.
[835] The nature of excluded subject matter of test questions for driving license exam was confirmed by Judgement of Naczelny Sąd Administracyjny (Supreme Administrative Court) of 16th January 2020, I OSK 1417/18 LEX nr 2781878.

CMOs and mandatory collective management also play a role, as emphasized above, in the context of specific exceptions subordinated to the payment of equitable remuneration, such as, e.g., **Article 25 UPA** on uses of works for press review and reporting.

ECLs are used in the context of out-of-commerce works and their preservation by CHIs.

Article 21(1) UPA (2018) is addressed to holders of devices used to receive radio or television programs. They may be allowed to communicate to the public broadcasted works only after entering into a contract to this end with the competent CMO or the rightholder.

3.1.2.21.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.21.15.1 FUNDAMENTAL (USERS') RIGHTS

The protection of fundamental rights and freedoms envisioned in the Polish Constitution or protected in the framework of EU law has been invoked by Polish Courts to interpret L&Es, mostly with reference to the freedom to express opinions, receive and impart information (Article 54 of the Polish Constitution), the right to education (Article 70), the freedom of artistic creation and scientific research, the freedom to teach and to enjoy the products of culture (Article 73). Polish Courts have also invoked CJUE rulings which addressed the question of balancing fundamental rights and values when interpreting copyright Directives. An example of this can be found in the Judgement of Sąd Najwyższy (Supreme Court) of 22 February 2017 III CSK 11/17, Legalis nr. 1878767 on the interpretation of the quotation exception.

3.1.2.21.15.2 CONSUMER PROTECTION

Article 10(1) of the Act on Combating Unfair Competition of 16 April 1993 prohibits misleading information on products or services. When called to decide on the information provided in DVDs and CD's, the President of the Office of Competition and Consumer Protection found[836] that the fact that the manufacturer had placed those devices with the wording "all right reserved" violated Article 10 (1) of the Act because it could lead consumers to believe that even exempted acts under private use exception would fall under the reservation made by the manufacturer.

Article 385[1] § 1 of the Polish Civil Code regulates certain unfair terms in standardized consumer contracts. The provision was applied by the Court on the Protection of Competition and Consumer, which found that a clause limiting the number of copies that can be made for users to one publishing sheet (about 22 pages) was a prohibited clause in a contract concluded with the library user. [837]

While no other reference to consumer protection law as a source of balancing tools in the Romanian copyright landscape has been reported, it can be added that Poland has not yet

[836] Decision DECYZJA Nr DDK-5/2007 of 31 January 2007.

[837] Wyrok Sądu Ochrony Konkurencji i Konsumentów (Judgement of the Court on the protection of competition and consumers) of 9th December 2011XVII Amc 113/11. See above, private study exception.

implemented Directive 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services, nor has it implemented Directive 771/2019 on certain aspects concerning contracts for the sale of goods.

3.1.2.21.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.21.15.4 OTHER INSTRUMENTS

Polish media law (Act on Radio and Television of 1992)[838] introduced provisions that improve the accessibility to radio and television programs (and thus to information and culture) which partially overlap with copyright law, for they impose duties and obligations to broadcasters and certain audiovisual on-demand media service providers. These are, e.g., obligations imposed on the broadcaster related to the accessibility of programs to people with disabilities (Article 18a); limitations on the transmissions of events of major societal importance, to ensure accessibility in free-to-air channels (Article 20b); right to access materials held by the broadcaster having exclusive rights over the transmission of an important event, in order to prepare an own short news report, subject to the payment of access costs (Article 20c); obligation of public radio and television broadcaster to prepare educational programs for schools and educational establishments (Article 25(2)), and obligations of the audiovisual media service provider to gradually ensure accessibility of programs offered to people with visual or hearing impairment (Article 47g).

In Poland the provision contained in Article 5 of the Civil Code, related to the abuse of rights may play a role as a copyright balancing tool. The Polish Supreme Court invoked the provision in a copyright dispute to recall that the exclusive nature of authors' rights precludes, in principle, protection of rightholders who act unlawfully unless the general interest would justify this. In this sense, the Court held that the general clause prohibiting abuse of rights aims at adjusting the abstract scope of rights shaped to the concrete case, but this could not result in repealing, waiving or changing existing provisions, nor in permanently depriving the rightholders of their rights.[839]

3.1.2.22 PORTUGAL

The Portuguese Copyright Law (Codigo do direito de autor e dos direitos conexo, CDA n. No.63/85 of 14 of March, in force since 14 March 1985, as last amended in 2019)[840], has adopted several copyright flexibilities contained or introduced by EU Directives. Yet, the Codigo is missing specific provisions regulating uses for parody, caricature and pastiche. The Portuguese Act also envisages an exception covering acts of reproduction for preservation

[838] Consolidated text Dz. U. z 2017 r. poz. 1414, 2111, with amendments.
[839] Judgement V CSK 373/10 - Wyrok Sądu Najwyższego LEX nr 885040.
[840] Código do Direito de Autor e dos Direitos Conexos (aprovado pelo Decreto-Lei n.º 63/85 de 14 de março de 1985, e alterado até ao Decreto-Lei n.º 92/2019 de 04/09/2019).

purposes, benefiting certain CHIs, the wording of which is unclear with respect to reproductions in digital format. While many of the flexibilities enshrined in the Portuguese landscape follow the standard of the EU corresponding source, some of them present traits of rigidity because of the additional operational conditions imposed, as it is the case of the exception for illustration for teaching and quotation. On the other side, Portugal enjoys a broad press review exception.

Moreover, Portugal has transposed *verbatim* the exceptions envisaged under the Computer Program Directive by Decree Law n. 252/94 of 20 October 1994 and amended by Decree Law n. 93 of 09 April 2019.[841] (**PCPL**). By the same token, the Database Directive in Portugal is transposed with D.L 122/2000 (Protecção jurídica das bases de dados – PJBD).

Portugal is one of the Member-States which, to date, has still not implemented the CDSM Directive. A first draft of the implementing act, which takes almost *verbatim* the text of the Directive, was made publicly available three months after the first notice of infringement sent by the Commission on 23 July 2021. However, changes in the Portuguese Governmental composition led to the expiry of the proposal. A new draft proposal is expected to be tabled yet. Meanwhile, on 19 May 2022 the EU Commission sent reasoned opinions to Portugal, among other Member States over their failure to notify the Commission of transposition measures.

3.1.2.22.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.22.1.1 TEMPORARY REPRODUCTION

Article 75(1) CDA, in force since 2004, implements **Article 5(1) InfoSoc** not via an exception but by excluding from the scope of the right of reproduction temporary acts of reproduction which are transient, incidental or accessory, form an integral and essential part of a technological process. The exclusion operates as long as the temporary reproduction is made for the exclusive purpose of enabling transmission over a network between third parties by an intermediary, or to allow a legitimate use of a protected work. It is further required that the reproduction complies with the conditions set out acts enabling navigation on networks and temporary storage, and that the intermediary does not alter the content of the transmission, nor does it interfere with the lawful use of the technology in accordance with recognized fair market practices.

Article 189(3) CDA extends the scope of the copyright exceptions and limitations to the objects of related rights.

3.1.2.22.1.2 EPHEMERAL RECORDING

Entered into force in 1985, **Article 152 CDA** corresponds to **Article 5(2)(d) InfoSoc,** despite restricting the number of retransmissions of the ephemeral recordings of works. **Article**

[841] Decreto-Lei n.° 252/94 de 20 de outubro de 1994 com as alterações introduzidas por Decreto-lei n. 93 de Abril 2019.

189(1)(d) CDA extends the scope of this provision to the objects of related rights. Given the restrictions as such, the Portuguese exception for ephemeral recording presents for a more restrictive one compared to its EU counterpart.

3.1.2.22.1.3 INCIDENTAL INCLUSION

The exception covering the incidental inclusion of a protected work or other subject-matter in other material is envisaged under **Article 75(2)(r) CDA**. In force since 2004, this provision implements **Article 5(3)(i) InfoSoc** verbatim. **Article 189(3) CDA** extends the scope of the copyright exceptions and limitations to the objects of related rights.

3.1.2.22.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Under the title "*Direitos do utente*" ("User rights") the **PCPL** implements the exceptions contained in **Article 5 Software.** The permitted acts and the operational conditions of the Portuguese provision are in line with those laid down in the EU Source. **Article 7 PCPL** implements the mandatory exception contained in **Article 6 Software**, by following closely its language. **Article 9 PJBD** implements **Article 6(1) Database**, whereas **Article 14 PJBD** transposes **Article 8 Database**. None of the national provisions presents any feature departing from the EU counterparts. Law, **Article 221(1) CDA** implements **Article 6(4) InfoSoc**, by closely following the wording of its EU counterpart.

3.1.2.22.1.5 FREEDOM OF PANORAMA

Article 75(2)(q) CDA allows the use of works of architecture or sculpture made to be kept permanently in public places. In force since 2004, this provision implements **Article 5(3)(h) InfoSoc**, almost verbatim. **Article 189(3) CDA** extends the scope of the copyright exceptions and limitations to the objects of related rights.

3.1.2.22.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.22.2.1 REPROGRAPHY

Article 5(3)(a) InfoSoc is implemented in **Article 75(2)(a) CDA**, in force since 2004. In line with the EU source, the Portuguese exception allows the reproduction of works, with the exclusion of sheet music, on paper or any other similar means, such as photography and any other technique having similar effect. **Article 189(3) CDA** extends the scope of the copyright exceptions and limitations to the objects of related rights.

In accordance with **Article 76(1)(b) CDA** and **Article 82 CDA** rightholders are entitled to fair compensation, which is collected via private levies imposed on the sale price of all mechanical, chemical, electrical, or electronic devices capable of reproducing works. Calculation criteria, mechanisms of collection and distribution are determined by law No.62/98.[842] However, no compensation is due when devices and support mediums are acquired by audio-visual communication entities or video/sound producers exclusively for the

[842] Lei n.° 62/98, de 1 de setembro de 1998. First published in 1998, subsequently amended in 2004, 2015, 2017, and lastly by Law 2/2020.

production of works in accessible format and aids for people with visual or hearing impairments.

3.1.2.22.2.2 PRIVATE COPY

Article 5(2)(b) InfoSoc finds almost verbatim implementation in **Article 75(2)(a) CDA.** The exception permits natural persons for their private and non-commercial use to reproduce works, in any medium. Other than this**, Article 81(b)** and **Article 82 CDA** establish a levy compensation system, which is regulated in a separate bill.

Other than that, **Article 189(1)(a) CDA** (1985),[843] applicable to related rights, explicitly states that copyright protection does not cover private use.

In addition, **Article 10(a)PJBD** transposes **Article 6 (2)(a) Database** verbatim. In the similar way, **Article 15(a) PJBD** implements **Article 9(a) Database.**

In a similar vein, **Articles 10(a) and 15(a) of DL 122/2000** implement, respectively, **Articles 6(2)(a) and 9(a) Database.**

3.1.2.22.3 QUOTATION

Article 75(2)(g) CDA (2004) allows the insertion of quotations or summaries of protected works, for purposes of supporting one's own positions, and for criticism, discussion or teaching, within the extent justified by the purpose.

While **Article 76(1)(a) CDA** requires acknowledgment of the source, when possible, **Article 76(2) CDA** makes the exception subject to the condition that the citation does not create confusion with the cited work. It also forbids reproductions or citations that are extensive and thus prejudice interest in the cited works. The importance of this condition has been strongly emphasized by the Portuguese Supreme Court,[844] which has clarified that quotation is lawful only if the use of a protected work is occasional, brief, and does not exceed the limits imposed by law in a manner that undermines rightholders' interests.

Article 189(1)(b) CDA envisages the same exception for extracts from a performance, a phonogram, a video or a broadcast.

These provisions transpose into the Portuguese national law **Article 5(3)(d) InfoSoc** with a greater level of flexibility than the EU counterpart for its statutory extends the purposes for which quotation is allowed. At the same time, the operational conditions of the exception are more stringent than in the EU counterpart, for it introduces the condition of not creating confusion with the original work.

3.1.2.22.4 PARODY, CARICATURE, PASTICHE

CDA currently lacks any explicit reference to **Article 5(3)(k) InfoSoc**. Absent a specific provision, part of Portuguese legal doctrine maintains that parody would fall within the scope

[843] For related case law, see: Case n. 1788/04.5JFLSB.C1 of the Second Instance of Court of Coimbra.
[844] Portuguese Supreme Court, Case n.103/04.2TVLSB.L1. S1 of 17.11.2011.

of **Article 75(2)(g) CDA** on quotation, in so far as the protected work is used for the purpose of criticism. However, there is no case law supporting this reading.

The first draft proposal for the implementation of the CDSM Directive envisioned the introduction of a general parody exception, rather than an exception limited to the use on providers of online content sharing services. Yet, this proposal has expired because of political changes in the Portuguese Government.

3.1.2.22.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.22.5.1 PRIVATE STUDY

Article 75(2)(o) CDA (2004) implements **Article 5(3)(n) InfoSoc**, by following its standard, while **Article 189(3) CDA** extends the scope of the copyright exceptions and limitations to the objects of related rights.

The rule allows libraries, museums, public archives and schools to communicate and make available to the public protected works permanently held in their collection on dedicated terminals located within their premises, for the benefit of their patrons, and for individual research and study purposes. The exception does not apply in case such uses are covered by specific purchase or licensing agreements.

Other permitted uses for private study may be covered under the reprography exception.

3.1.2.22.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article75(2)(f) CDA envisages an exception covering the reproduction, making available and distribution of published works or their parts, when these acts are made exclusively for teaching and education purposes and for no economic or commercial advantage. Acknowledgement of the source is required under **Article 76(1) CDA.**

These provisions implement **Article 5(3)(a) InfoSoc** by adopting a flexible approach towards permitted acts, for it covers also the distribution of the works according to **Article 5(4) InfoSoc.**

Other than this, **Article 15 (b) PJBD**, permits the extraction and re-utilisation of substantial parts of a database, as long as such acts are made for the purposes of illustration for teaching or for scientific research, and to the extent justified by the non-commercial purpose, in line with **Article 9(b) of the Database.** A similar provision is contained in **Article 10(b) PJBD**, which for original databases, as per **Article 6(2)(b) Database.** In both cases, the acknowledgement of the source is required.

3.1.2.22.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

The Portuguese CDA does not currently feature a special provision covering digital uses for illustration for teaching, and Portugal has not implemented yet the CDSM Directive.

3.1.2.22.5.4 TEXT AND DATA MINING

The Portuguese CDA does not contain any reference to text and data mining activities. Portugal has not implemented yet the CDSM Directive.

3.1.2.22.6 USES FOR INFORMATORY PURPOSES

3.1.2.22.6.1 PRESS REVIEW AND NEWS REPORTING

Article 75(2)(c) CDA (2004) allows using a regular selection of periodical press articles in the form of a press review. Acknowledgment of the source, when possible, is required under **Article 76 CDA.** These provisions transpose **Article 5(3)(c) InfoSoc** by adopting a greater level of flexibility in the permitted acts and by not limiting the nature of articles that can be used. Unlike the EU counterpart, the Portuguese exception does not envisage the possibility for rightholders to reserve their rights.

Article 189(3) CDA extends the scope of the copyright exceptions and limitations to the objects of related rights. **Article 75(2)(d) CDA** permits the fixation, reproduction and public communication, by any means, of fragments of literary or artistic works, provided that their inclusion in news reports is justified by the information purpose pursued. These provisions can be deemed to transpose **Article 10(1)(b) Rental**.

3.1.2.22.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc is implemented in **Article 75(2)(b) CDA** (2004). It allows media to reproduce and make available to the public for information purposes speeches, addresses and conferences held in public, if protected by copyright. This can be made either in extracts or in summarised form. **Article 76(2) CDA** requires that the use does not create confusion with the original work. **Article 189(3) CDA** extends the scope of the copyright exceptions and limitations to the objects of related rights.

Unlike the EU corresponding rule, the Portuguese provision restricts the array of beneficiaries to the media and imposes limits to the amount that can be used. At the same time, it imposes operational conditions absent in the EU counterpart.

Similar uses may be covered by the quotation exception, if the quote is made for the purpose of criticism, discussion or teaching.

3.1.2.22.7 USES BY PUBLIC AUTHORITIES

3.1.2.22.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 75(2)(n) CDA (2004) provides an exception covering the use of works for purposes of public security, or for ensuring the proper functioning of administrative, parliamentary or judicial proceedings and their reporting. **Article 76(1)** CDA requires acknowledgment of the source. This provision implements almost verbatim **Article 5(3)(e) InfoSoc**, except for it additionally imposes the indication of the source.

A similar exception is envisaged under **Article 15(c) PJBD**, allowing the extraction and re-utilisation of substantial parts of a database for similar purposes, in line with **Article 9(c) Database. Article 6(2)(c) Database** is implemented by **Article 10(1)(c) PJBD**.

3.1.2.22.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 75(2)(j) CDA (2004) allows the communication to the public and public performance of official national hymns or songs and of works having an exclusively religious character in the context of official celebrations and during acts of worship or religious practices. The provision implements almost identically **Article 5(3)(g) InfoSoc.** Also, **Article 189(3) CDA** extends the scope of copyright exceptions and limitations to the objects of related rights.

Aside from this, Portuguese copyright law does not contain any other explicit reference to flexibilities covering uses by public authorities.

3.1.2.22.8 SOCIALLY ORIENTED USES

Article 75(2)(p) CDA (2004) allows the reproduction of works transmitted by radio broadcasting by non-profit social institutions, such as hospitals and prisons. According to **Article 76(1)(d) CDA** fair compensation is due to rightholders. This exception is perfectly in line with **Article 5(2)(e) InfoSoc**. Also, Article 189(3) CDA extends the scope of copyright exceptions and limitations to the objects of related rights.

Article 108 CDA, in force since 2008 and amended in 2019, provides an exception that permits the not-for-profit communication to the public and performance of protected works within the family circle.

3.1.2.22.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.22.9.1 PUBLIC LENDING

Article 6 of the D.L n. 332/1997 (last amended in 2008)[845] transposing the Rental and Lending Directive states that rightholders are entitled to remuneration for the lending of their works. Yet, **Article 6(3)** of the same law exempts public libraries of Central, Regional and Local Administration, schools and universities from such compensation.

3.1.2.22.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 75(2)(e) CDA (2004) allows a public library, archive, museum, non-commercial documentation centre or scientific or educational institution to reproduce all or part of a published work for the purpose of preservation and archiving, as long as such copies are not

[845] DL n.º 332/97, de 27 de Novembro, Transpõe para a ordem jurídica interna a Directiva n.º 92/100/CEE, do Conselho, de 19 de Novembro de 1992, relativa ao direito de aluguer, ao direito de comodato e a certos direitos conexos ao direito de autor em matéria de propriedade intelectual.

intended for the public, and to the extent strictly necessary for the purpose. **Article 189(1)(e) CDA** extends the scope of this provision to the objects of related rights.

Pursuant to **Article 76(1)(e) CDA** a fair compensation is due to rightholders and, in the analogical sphere, to the published by the entity that has reproduced the work. This provision implements **Article 5(2)(c) InfoSoc** by imposing more stringent operational conditions for it requires a fair compensation.

Article 189(1)(e) CDA (2004) allows public entities or concessionaires of public services to make fixations or reproductions of protected works for exceptional interest of documentation or for archiving.

Portugal has not yet implemented **Article 6 CDSM.**

3.1.2.22.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

No other provisions of the CDA, apart from those already mentioned above, refer to uses by cultural heritage, education, and social institutions and/or may be linked to Article **5(2)(c)-(d) InfoSoc**.

3.1.2.22.9.4 ORPHAN WORKS

Article 75(2)(u) CDA, in force since 2015, implements in the CDA **Article 6 Orphan Works Directive**. The Portuguese implementation does not deviate from the EU standard.

3.1.2.22.9.5 OUT-OF-COMMERCE WORKS

To date the Portuguese CDA applicable law does not feature provisions on out-of-commerce works. At the same time, Portugal has not yet implemented the CDSM Directive into its legal framework.

3.1.2.22.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 5(3)(b) InfoSoc is implemented in Article **75 (2)(i) CDA.** The provision allows the reproduction, public communication and making available to the public of a work for the benefit of persons with disabilities, provided that the act is directly related to such disability, and to the extend required by the same. The exception does not apply when the uses are made for profit purposes. **Article 189(3) CDA** extends the scope of the copyright exceptions and limitations to the objects of related rights.

The exception envisaged in the **Marrakesh Directive** has been transposed into the Portuguese CDA in **Articles 82(a)-(b) CDA.** These provisions entered into force in 2019.

Article 82(a) CDA transposes the definition of beneficiaries and authorized entities by adopting the same language of the EU source, whereas **Article 82(b) CDA** implements *verbatim* the exception in **Article 3 Marrakesh.**

3.1.2.22.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

None reported.

3.1.2.22.12 THREE-STEP TEST

Article 75(4) CDA (2004) contains an explicit reference to the three-step test, which follows verbatim the text of **Article 5(5) InfoSoc.**

3.1.2.22.13 PUBLIC DOMAIN

3.1.2.22.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 7(1) CDA (1985) expressly excludes from protection news of the day and reports of various events having a merely informative nature. Similarly excluded are requests, allegations, complaints and other texts presented in writing or orally before public authorities or services, texts and speeches delivered before assemblies or other collegial, political and administrative bodies, or in public debates on matters of common interest, including political speeches.

3.1.2.22.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.22.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Portugal provides for a mandatory collective management of the right to retransmission of broadcasts **(Articles 7(1)(2)** and **8 DL. n. 333/97**),[846] the right for the communication to the public by satellite simultaneously to a terrestrial broadcast by the same broadcaster (Article 6 Decree-Law 333/97), the right of performers to an annual supplementary remuneration **(Article 183-A (7) CDA)**, the rights of performers and/or phonogram producers to remuneration for broadcasting and communication to the public of phonograms **(Article 178(2) CDA)**. The same applies to compensation for private copying and reprography **(Article 75(2)(a) and Art. 6(1) of Law 62/98).**

Portugal has not implemented the CDSM yet.

3.1.2.22.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.22.15.1 FUNDAMENTAL (USERS') RIGHTS

Portugal treats the provisions implementing **Article 5 Software** as user rights. Other than this, the CDA refers to the notion of public interest when it rules that exclusive rights may not be exercised to the detriment of the legitimate rights and interests of publishers, producers, directors, broadcasters, and users in general, thus implying that when protecting rightholders' interests, the public interest shall be taken into due account.

[846] Decreto-Lei n.° 333/97, de 27 de Novembro (Radiodifusão por satélite e à retransmissão por cabo).

3.1.2.22.15.2 CONSUMER PROTECTION

No reference to consumer protection law as a source of balancing tools in the Portuguese copyright landscape has been reported. Despite this, it can be said that with law n. 22/2021, published in the Official Gazette on 18 October 2021, Portugal has implemented Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and services. The same law implements Directive (EU) 2019/771, which envisages identical remedies where restrictions resulting from intellectual property rights prevent or limit consumers from the use of goods with digital elements, which require digital content or a digital service to perform their functions.

3.1.2.22.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.22.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.23 ROMANIA

The Romanian Copyright and Related Rights Law (**RDA**), in force since 1996 and last amended in 2022,[847] is quite well harmonized with the EU copyright acquis, given that it contains the great majority of the E/L envisaged in the EU Directives, including the ones introduced with the CDSM Directive. Absent in the law is the exception for incidental inclusion, and those enabling socially oriented uses. Until recently, the RDA did not envision an exception covering pastiche, but the 2020 amendment has extended the parody exception to cover also such purpose of use. Also, when the RDA has not directly transposed a specific EU flexibility, such flexibility is enabled by other categories of flexibilities, as is the case with reprography, private study and uses of public speeches and lectures.

While many of the Romanian flexibilities are in line with the EU standard (uses of out-of-commerce-works, Orphan Works, uses by people with disabilities), it is necessary to note that a handful of exceptions are more restrictive than the corresponding EU regime (e.g., freedom of panorama, private copy, and illustration for teaching and research, text and data mining).

3.1.2.23.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.23.1.1 TEMPORARY REPRODUCTION

Article 35(3) RDA, as republished in 2018, implements **Article 5(1) InfoSoc** and its exception for temporary reproductions which are transient or incidental and an integral and essential part of a technological process, providing for the same conditions and requirements.

[847] Lege nr. 8 din 14 martie 1996 privind dreptul de autor si drepturile conexe (modificată până la LEGE nr. 69 din 28 martie 2022pentru modificarea și completarea Legii nr. 8/1996 privind dreptul de autor și drepturile conexe, Publicat în MONITORUL OFICIAL nr. 321 din 1 aprilie 2022).

However, the Romanian exception also requires compliance with fair practice, other than compliance with the three-step test envisaged under **Article 5(5) InfoSoc.**

It is worth indicating that **Article 120 RDA** extends the scope of this provision to the objects of related rights.

3.1.2.23.1.2 EPHEMERAL RECORDING

Article 39 RDA, as republished in 2018, provides that the transfer of the broadcasting right of a work to a radio or television broadcaster entitles the broadcaster to record the work for the purposes of its own broadcasts but only for one-off authorised broadcast. The exception does not require broadcasting organizations to carry the recordings by their own facilities. Unless rightholders authorize the subsequent broadcast of the recording, such recording shall be destroyed within 6 months of the first broadcast. When authorization is given, rightholders are entitled to a non-waivable remuneration.

With some nuances and more stringent operational conditions, this provision implements Article **5(2)(d) InfoSoc,** while **Article 120 RDA** extends the scope of this provision to the objects of related rights.

3.1.2.23.1.3 INCIDENTAL INCLUSION

Romanian copyright law does not feature an explicit reference to **Article 5(3)(i) InfoSoc**. A legislative proposal for the inclusion of this exception was made in 2013, but it was rejected.

3.1.2.23.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The RDA contains several legal provisions to facilitate lawful user's access and use of computer programs, databases protected by copyright and sui generis rights, and works protected by TPMs.

While **Article 78(1) RDA** implements **Article 5(2) Software** verbatim, **Article 78(2) RDA** does the same for **Article 5(3) Software. Articles 79** and **80 RDA** transpose **Article 6 Software** and its mandatory exception allowing the use of a computer program for interoperability purposes. **Article 5(1) Software** is transposed in **Article 77 RDA,** also in full adherence to the EU model.

Article 142(1) RDA, as republished in 2018, implements **Article 8 Database.**

Article 36^5(3) RDA and **Article 185(4) RDA** implement safeguards for the exercise of permitted uses when TPMs are in place. These provisions has been in force since 2005 and was amended in 2018. The list of exceptions to be safeguarded is in line with **Article 6(4) InfoSoc.**

3.1.2.23.1.5 FREEDOM OF PANORAMA

Article 5(3)(h) InfoSoc is transposed in **Article 35(1)(f) RDA**, as republished in 2018. The Romanian provision allows the non-commercial reproduction, except for any means involving direct contact with the work, distribution or communication to the public of the image of an

architectural work, a sculpture, a photographic work or a work of applied art permanently located in a public place. The exception does not cover cases where the image of a work is the main subject of the reproduction, distribution or communication. Uses must conform to proper practice and comply with the three-step test. When available, the source, including the name of the author, shall be acknowledged. In the case of sculptures, photographs or architecture works, the mention should also indicate the place where the work can be found.

The Romanian freedom of panorama exception is wide in scope, for it allows performing acts of distribution. Despite this, it presents more stringent operational conditions than the EU model, such as the limitation in the way of presentation (i.e., the work itself must not be the main subject of the image) and the acknowledgment of the source.

3.1.2.23.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.23.2.1 REPROGRAPHY

Romania features the reprography exception of **Article 5(2)(a) InfoSoc** in **Articles 36 and 114 RDA**, in force since 1996 as republished in 2018.

The former provision permits the reproduction of a publicly disclosed work, as long as the copy is made for personal use or within the family circle and in compliance with the three-step test. The exception requires fair compensation to rightholders, which is collected through the imposition of a private levy on the sale price of devices allowing the reproduction of protected works. The amount due is established by negotiation in commissions[848] every 3 years. The remuneration right cannot be waived. The category of devices covered by the private levy scheme has been interpreted broadly by courts, including, e.g., also gaming consoles.[849]

Pursuant to **Article 114 RDA**, the levy should be paid by manufacturers and/or importers of such devices, regardless of whether the process used is analogue or digital.

Limiting the purpose makes the Romanian reprography exception narrower than the EU model.

[848] Said commission shall be made up of: a) one representative each of the main collective management bodies, operating for each category of rights, on the one hand; b) one representative each of the main associative structures mandated by the manufacturers and importers of media and apparatus, appointed by the respective associative structures, and one representative each of the top 3 major manufacturers and importers of media and apparatus, established on the basis of turnover and market share in the respective field.

[849] Bucharest Tribunal judgement No. 1768 of 10 November 2020. In this case the applicant requested the court to find that the imported/marketed gaming consoles Microsoft XBOX and Sony PlayStation 4 do not fall technically and conceptually as "supports on which sound or audio-visual recordings can be carried out or on which the reproduction of graphically expressed works can be carried out", nor are they "devices designed for making copies", and consequently they cannot even be taken into account when paying any compensatory remuneration for private copies. The Bucarest Court rejected the applicant's request and stated that the devices in question have the technical capabilities to perform sound and audio-visual recordings, and also to play videos, being irrelevant that the purpose of their design was not storage and playback. The decision has been challenged by the applicant.

3.1.2.23.2.2 PRIVATE COPY

The scope of **Article 5(2)(b) InfoSoc** is covered by **Article 36 RDA** whereas the scope of this provision is extended to the objects of related rights by **Article 120 RDA**. **Article 9(a) Database** is implemented verbatim in **Article 142(4)(a) RDA.**

3.1.2.23.3 QUOTATION

Article 35(1)(b) RDA (republished 2018) allows the use of brief quotations from a work for the purpose of analysis, illustration, commentary or criticism, to the extent justified by the purpose and in accordance with fair practices. The exception is subject to the three-step test. The provision implements **Article 5(3)(d) InfoSoc. Article 35(4) RDA** requires acknowledgement of the source. It also slightly extends the purpose of quotation. By contrast, the Romanian transposition adopts a more restrictive approach towards the amount of works that can be quoted. The scope of this provision is extended to the objects of related rights by **Article 120 RDA**.

3.1.2.23.4 PARODY, CARICATURE, PASTICHE

Article 5(3)(k) InfoSoc is regulated under **Article 37(b) RDA** (republished 2018), which allows to freely reproduce and alter a protected work for the purpose of parody or caricature. The exception operates as long as the result does not cause confusion with the original work or with its author. This provision has been recently amended by Law n. 69/2022, [850] transposing the CDSM into the Romanian Copyright framework to cover pastiche. **Article 120 RDA** extends the scope of this provision to the objects of related rights, except for the related rights over broadcasts, due to the provision of **Article 134 RDA**.

Article 128^2 (6) RDA extends the exception to cover online uses, in line with **Article 17(7) CDSM.** Yet, if compared to the EU model, the Romanian parody exception imposes more stringent operational conditions, for it requires not creating confusion with the original work.

3.1.2.23.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.23.5.1 PRIVATE STUDY

Article 35(1)(d) RDA (republished in 2018) allows the reproduction of brief excerpts from works, for information or research, within the framework of libraries, museums, film archives, sound archives, and archives of non-profit cultural or scientific public institutions. [851] Uses should conform to fair practices and comply with the three-step test. Acknowledgment of the source is required, unless proven impossible. No possibility for rightholders to reserve their rights is envisaged. Neither is required that the acts are performed within the premises of the beneficiaries through dedicated terminals. Uses for private study may also be covered by

[850] LEGE nr. 69 din 28 martie 2022pentru modificarea și completarea Legii nr. 8/1996 privind dreptul de autor și drepturile conexe, Publicat în MONITORUL OFICIAL nr. 321 din 1 aprilie 2022

[851] The content of this provision overlaps with the specific uses by cultural heritage, education and other social institutions. See below.

flexibilities concerning uses for illustration for teaching and scientific research.[852] However, there is no concrete evidence to suggest that **Article 5(3)(n) InfoSoc** has been implemented in the RDA.

3.1.2.23.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

The RDA contains two provisions implementing **Article 5(3)(a) InfoSoc.**

Article 35(1)(c) RDA (republished in 2018) allows public education and social welfare institutions to reproduce and communicate to the public isolated articles or brief excerpts from works, television or radio broadcasts or sound or audio-visual recordings for teaching purposes, and to the extent justified by the purpose.

Article 35(2)(1)(d), RDA permits the reproduction, distribution, broadcasting or communication to the public of works, in so far as these acts are made for the sole purpose of illustration for teaching or scientific research. The act shall lack commercial or economic advantage. Uses should conform to fair practices and comply with the three-step test. Acknowledgment of the source is required unless proven impossible.

It shall be noted that **Article 120 RDA** extends the scope of this provision to the objects of related rights.

Article 142(4)(b) implements verbatim the exception contained in **Article 9(b) Databases.**

3.1.2.23.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Law n. 69/2022 implements **Article 5 CDSM** into the Romanian Copyright in **Article 36^3 RDA**. The Romanian transposition follows the EU model closely, except for it that it allows rightholders to limit the number of copies made. Moreover, the Romanian exception applies as long as the uses do not replace or affect the purchase of works intended for the educational market.

3.1.2.23.5.4 TEXT AND DATA MINING

Articles 36^1 and **36^2 RDA**, introduced by Law n. 69/2022, transpose *verbatim* the exceptions for Text and Data mining contained in **Article 3** and **4 CDSM**, by providing for the same conditions and allowed uses therein envisaged. However, unlike the EU model, in the case of reproductions made under **Article 36^1** (corresponding to **Article 3 CDSM**), **Article 36^5** allows rightholders to limit the number of copies that can be made.

3.1.2.23.6 USES FOR INFORMATORY PURPOSES

3.1.2.23.6.1 PRESS REVIEW AND NEWS REPORTING

Article 35(2)(a) RDA [853] (republished 2018) allows the reproduction, distribution, broadcasting or communication to the public of short extracts from press articles and radio

[852] See uses for illustration and scientific research, Article 35(2)(d), Section V) b).
[853] For related case law, see: Judgement nr. 2384/2018 - 23/03/2018; Judgement nr. 1441/2017 - 28/12/2017; Judgement nr. 1793/2019 - 20/11/2019.

or television reports, for the purpose of giving information on current events, unless such rights have been reserved by rightholders.

A similar exception for the same purpose is provided by **Article 35(2)(b) RDA** with regard to short excerpts from conferences, speeches, pleadings and other similar works that have been orally communicated in public.

Article 35(2)(c) RDA permits the use of short fragments of works in the context, within the information regarding the current events, but only to the extent justified by the purpose of giving the information.

Uses should conform to fair practices and comply with the three-step test. Also, acknowledgment of the source is mandatory unless proven impossible.

To note, **Article 120 RDA** extends the scope of these provisions to the objects of related rights.

These provisions implement **Article 5(3)(c) InfoSoc** by closely following the EU model, except for it limits the amount of work that can be used. However, unlike the EU standard, the Romanian exception requires compliance with fair practice. At the same time, the provision is broader than the EU counterpart, for it also covers the exception envisaged in **Article 5(3)(f) InfoSoc.**

3.1.2.23.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc falls under the umbrella of the exception for press review and current events (**Article 35(2)(b) RDA**).

3.1.2.23.7 USES BY PUBLIC AUTHORITIES

3.1.2.23.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 35(1)(a) RDA (republished 2018)[854] allows the reproduction of a published or otherwise made available work in connection with judicial, parliamentary or administrative proceedings or for purposes of public safety. Uses should conform to fair practices and comply with the three-step test. **Article 120 RDA** extends the scope of this provision to the objects of related rights.

Except for the requirement of compliance with fair practices, the Romanian exception is in line with **Article 5(3)(e) InfoSoc.**

In addition, **Article 142(4)(c) RDA** transposes **Article 9(c) Database** in complete adherence to such rule.

[854] For related case law, see: Decision no. 889/2014 regarding copyright and related (neighbouring) rights, High Court of Cassation and Justice of Romania.

3.1.2.23.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 35(1)(h) RDA (republished 2018) permits the use of works during religious celebrations or official celebrations organized by a public authority. Uses should conform to fair practices and comply with the three-step test. This exception implements **Article 5(3)(g) InfoSoc** by adding the requirement of compliance with fair practices. **Article 120 RDA** extends the scope of this provision to the objects of related rights.

3.1.2.23.8 SOCIALLY ORIENTED USES

None reported.

3.1.2.23.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.23.9.1 PUBLIC LENDING

Article 18(2) RDA (republished 2018) allows public libraries to lend works held in their permanent collection, subject to the payment of a non-waivable equitable remuneration to rightholders. In line with **Article 6(1) Rental**, the remuneration is not due when the lending is made by libraries of educational establishments and public libraries with free access. In the case of sound and audio-visual works, lending is allowed only six months after the first distribution of the work.

3.1.2.23.9.2 PRESERVATION OF CULTURAL HERITAGE

Preservation of cultural heritage is partially possible by leveraging the exception provided by **Article 35(1)(d) RDA**, which allows the reproduction of brief excerpts from protected works present in CHIs for private study and research purposes. The same provision also allows CHIs to reproduce in full works held in their permanent collections, to replace them if they have only one copy in the event of their destruction, severe deterioration or loss. **Article 120 RDA** extends the scope of this provision to the objects of related rights.

Article 36^4 RDA, introduced by Law n. 69/2022, transposes verbatim **Article 6 CDSM,** but rightholders may limit the number of copies that can be made.

3.1.2.23.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

These uses are generally covered under **Article 35(1)(e) RDA** (see teaching and research uses).

3.1.2.23.9.4 ORPHAN WORKS

The Orphan Works Directive was transposed in Article 123 RDA.[855] The provision is in line with **Article 3 OW.**

[855] Romania implemented the Orphan Works Directive a few months after the expiry of the transposition deadline, upon the notice of the launch of the infringement procedure triggered by the European Commission

3.1.2.23.9.5 OUT-OF-COMMERCE WORKS

Article 128^4 RDA, introduced by Law n. 69/2022, transposes the exception contained in **Article 8(2) CDSM**. The Romanian provision closely follows the wording of the EU model, and it does not feature any diverging elements.

3.1.2.23.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Article 35[1] RCA transposes into national law **Article 3** Marrakesh Directive (2017/1564). The notion of persons with disability benefiting from the exception is in line with the definition contained in the EU text and so are the permitted uses and conditions therein envisaged.

3.1.2.23.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 38 RDA allows trading companies selling or producing sound or audio-visual recordings equipment the reproduction or communication to the public of protected works, and the presentation extracts from works, as long as this is made for the purpose of testing those devices, and to the extent necessary therefor. This provision implements **Article 5(3)(l) InfoSoc** by limiting the amount of works that can be used. The Romanian exception is also less flexible than the EU counterpart, for it specifically lists the type of devices and beneficiaries to which the exception applies.

Article 35(1)(i) RDA allows the reproduction and communication to the public of images of protected works of art for the purpose of advertising their exhibitions with public access, sale and public auctions to the extent necessary for the purpose. Other commercial uses are excluded. Compared to the corresponding **Article 5(3)(j) InfoSoc,** the Romanian provision is slightly more flexible, for it also covers uses in public auctions.

3.1.2.23.12 THREE-STEP TEST

Article 35(1) RDA implements almost verbatim the three-step-test, adding to the text of **Article 5(5) InfoSoc** only the need for unauthorized uses to conform to fair practices.

3.1.2.23.13 PUBLIC DOMAIN

3.1.2.23.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 9 RDA[856] (republished in 2018) excludes from protection ideas, theories, concepts, scientific discoveries, proceedings, functioning methods or mathematical concepts as such, and inventions contained in a work, whatever the mode and form of expression. The same can be said for official texts of a political, legislative, administrative or judicial nature, official symbols of the State, public authorities and organizations, such as armorial bearings, seals,

on 27 May 2015, See: IRIS 2006-8/27 and IRIS 2015-5/30. For related case law on Orphan Works, see: Hotărâre nr. 1049/2019 din 24/06/2019 - Proprietate Intelectuală - drept de autor şi drepturi conexe.

[856] For related case law, see: Decision no. 340/2015 - Înalta Curte de Casație și Justiție - Secția I Civilă (High Court of Cassation and Justice, Civil section I).

flags, emblems, shields, badges and medals, means of payments, simple facts and data. The law also excludes news and press information.

Notably, works of folklore are not in the public domain but protected by law no. 26/2008 on the protection of the intangible cultural heritage. According to the Romanian Supreme Court: [857] this right is "a form of ownership over the elements of traditional cultural expression, which belongs to the community in which they were created. Ownership is exercised collectively and is inalienable, the legislator expressly providing for the impossibility of individual appropriation of these elements through copyright, both by individuals belonging to that community and by third parties. […]". The presence of this entitlement does not exclude, in principle, the copyright protection of works elaborating on elements of traditional cultural expression, provided that they are original in the sense that they represent the author's own intellectual creation, bear their touch, and are thus sufficiently distant from the original folkloristic source.

3.1.2.23.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.23.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

The RDA features mandatory collective management of the right of retransmission of broadcasts, including digital retransmission **(Article 145(1)(g); 138(1)(5)** and **159(1)(4) RDA)**, the right of performers and/or phonogram producer to remuneration for broadcasting and communication to the public of phonograms (**Article 145(f) RDA**), right of broadcasting and communication to the public of musical works (**Article 145(1)(d)** and **145(3) RDA)**, compensation for resale rights (**Article 145(1)(c) RDA**), remuneration rights for private copying/ reprography (**Article 114** and **145 (1)(a)**) **RDA** and, lending rights (**Article 145(1)(b) RDA**). **Article 168 RDA** provides for CLEE with regard to transmission via satellite and communication to the public of musical works.

Article 128^4 RDA, introduced by Law n. 69/2022, transposes verbatim **Article 8 CDSM.**

3.1.2.23.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.23.15.1 FUNDAMENTAL (USERS') RIGHTS

Fundamental rights might act as a balancing tool. There are 51 references to using "fundamental rights" when trying to achieve a fair balance in copyright matters in the Romanian case law. [858] References to the notion of public interest can also be found in the Romanian case law (796 references), and in copyright legislation. Reference to user rights can also be found in both case law (80) and copyright law (6).[859]

[857] Decision no. 597/2013 from February 8, 2013, of the High Court of Cassation and Justice of Romania, 1st Civil Section.
[858] See, Indaco lege5.ro, online platform/portal of Romanian legislative documentation.
[859] Ibid.

3.1.2.23.15.2 CONSUMER PROTECTION

No reference to consumer protection law as a source of balancing tools in the Romanian copyright landscape has been reported. Other than the above, it can be mentioned that Romania has implemented Directive 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services with Government Emergency Ordinance No 141/2021,[860] and Directive 771/2019 on certain aspects concerning contracts for the sale of goods with Government Emergency Ordinance No 140/2021 on certain aspects of contracts for the sale of goods.[861]

3.1.2.23.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.23.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.24 SLOVAKIA

The Slovakian Copyright Act **(**Act No. 185/2015 Coll), amended in 2018, in force since 2016 (ZKUASP) and last amended in 2022,[862] implements the great majority of the copyright flexibilities introduced by EU Directives, including the exceptions envisaged in the CDSM Directive, which have been recently transposed into the Slovakian law. Moreover, Slovakia makes a broad use of ECLs, including for the use of out-of-commerce works. It is also worth noting that Slovakia is one of the few Members States providing for paying public domain schemes.

Slovakian copyright flexibilities are in the great majority of the cases aligned with EU L&E. Some provisions adopt a more restrictive approach, as in the case of the parody exception or, to the contrary, a more relaxed take, as in the case of reprography. Significantly, the Slovakian transposition of Article 17 CDSM references the fundamental rights and freedom of users.

3.1.2.24.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.24.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc has been implemented by **Article 54 ZKUASP (2015)**, which follows the EU text verbatim. The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

[860] Official publication: Monitorul Oficial al României; Number: 1248; Publication date: 30/12/2021.
[861] Official publication: Monitorul Oficial al României; Number: 1245; Publication date: 30/12/2021.
[862] Zákon č. 185/2015 Z.z. o autorskom práve a právach súvisiacich s autorským právom (v znení zákona č. 306/2018 Z.z.). The CDSM Directive has been implemented by Zákon č. 71/2022 Z. z., ktorým sa mení a dopĺňa zákon č. 185/2015 Z. z. Autorský zákon v znení neskorších predpisov.

3.1.2.24.1.2 EPHEMERAL RECORDING

Section 40 ZKUASP (2016) allows broadcasters to create a temporary recording of the work through their own equipment, as long as such recording is made for the purpose of their own broadcast. Copies cannot be stored unless the recording has a special documentary value and only upon the conditions and modalities defined by a separate law.

This rule implements **Article 5(2)(d) InfoSoc** almost verbatim by closely following its standards, except for the stricter conditions imposed to allow the archiving of recordings.

The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

3.1.2.24.1.3 INCIDENTAL INCLUSION

Article 5(3)(i) InfoSoc has been implemented by **Section 55 ZKUASP** (2016). The provision allows the reproduction, communication to the public and distribution of a work if embedded into another work. The national rule offers more flexibility than the EU model with regard to the permitted acts, provided in **Article 5(4) InfoSoc.**

The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

3.1.2.24.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The **ZKUASP** contains several provisions exempting certain acts when needed for the access and normal use of certain works by a lawful user. **Section 134 ZKUASP** corresponds to **Article 6 Database**, whereas **Section 138(3) ZKUASP** implements **Article 8(1) Database**. Also, **Section 89 ZKUASP** corresponds to **Articles 5 and 6 Software**.

Section 134 ZKUASP, which implements **Article 6(1) Database**, limits the exclusive rights of the author/owner of databases for the benefit of a lawful user when such acts are necessary to have access to the database and its contents for the proper use.

Section 89(2) ZKUASP implements Article 5, and Article 89(2) ZKUASP implements **6 Software,** in both cases, with a language closely following the EU provisions. The Slovakian implementation states that the exception applies if the interoperability information was not previously readily available.

Article 60(4) ZKUASP implements safeguards for permitted uses when TPMs are in place. The provision allows the otherwise prohibited circumvention of effective TPMs, to ensure that lawful users are not prevented from enjoying a range of specific exceptions, such as reproductions by broadcasters, private copy, uses by public official procedures, uses for the benefit of disabled persons, uses for educational or scientific research purposes or uses made by cultural heritage institutions. The list of exceptions to be safeguarded is in line with **Article 6(4) InfoSoc.**

3.1.2.24.1.5 FREEDOM OF PANORAMA

Section 41 ZKUASP (2016) allows the reproduction, communication to the public and distribution by transfer of title of a work permanently located in public places. The reproduction of copies of architectural work by means of building is expressly prohibited. The provision envisages an interesting combination of restrictive and flexible approaches towards the permitted acts, if compared to **Article 5(3)(h) InfoSoc.**

3.1.2.24.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.24.2.1 REPROGRAPHY

Article 5(2)(a) InfoSoc finds correspondence in **Section 43 ZKUASP (2016)**, which allows both, a legal person when acting for its own need, and natural persons or a third person acting on their behalf to make a paper copy employing reprographic device or other similar means. The copy may also be publicly distributed, but only if for free. The provision excludes from its scope the reproduction of full literary work or of its substantive part, sheet music, and graphical expression of architectural works. Rightholders are entitled to fair compensation, the amount of which is determined under **Section 36** and **Annex 2 ZKUASP**. The criteria laid down in the annex consider, among others, the type of technical equipment used.

The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

Again, compared to the EU source, the Slovakian reprography exception is slightly more restrictive regarding the types of works that can be reproduced. On the other side, the array of beneficiaries is significantly broader.

3.1.2.24.2.2 PRIVATE COPY

Section 42 ZKUASP (2016) permits a natural person to make copies of a protected work for private non-commercial purposes. Rightholders are due a compensation, in line with the criteria laid in **Section 36** and **Annex 2 ZKUASP**. The provision follows closely the wording of the correspondent **Article 5(2)(b) InfoSoc**, except for the lack of explicit reference to the possibility of making copies by any medium.

The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

Section 134(3) ZKUASP implements **Article 6(2)(a) Database,** while **Section 138(4) ZKUASP** implements the exception contained in **Article 9(a) Database** by following the standards therein.

3.1.2.24.3 QUOTATION

Section 37 ZKUASP (2016) allows quoting a published work, or parts of it, as long as this is made primarily for reviewing or criticising the quoted work. The use of the work shall be made in accordance with customs, and it shall not exceed the scope justified by the purpose. This provision implements **Article 5(3)(d) InfoSoc,** yet it differs from it in that the Slovakian provision does not require the acknowledgement of the source.

The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

3.1.2.24.4 PARODY, CARICATURE, PASTICHE

Section 38 ZKUASP (2016) allows the use of a work by means of caricature, parody or pastiche. The exception is made subject to the condition that the use does not give rise to a likelihood of confusion with the original work. This requirement is absent in **Article 5(3)(k) InfoSoc.** The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

The Slovakian legislator introduced **Article 17(7) CDSM** by adopting a broad exception. Pursuant to **Section 64(d) ZKUASP** the proceedings for the removal of contents shall not restrict the use of exceptions and limitations under the ZKUASP or fundamental rights and freedoms. Moreover, the provider of the online content-sharing service shall provide the user with information on the possibility of using the work pursuant to Sections 37 to 57 ZKUASP by means of the general terms and conditions of the service.

3.1.2.24.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.24.5.1 PRIVATE STUDY

Section 48 ZKUASP (2016) follows the wording of the corresponding **Article 5(3)(n) InfoSoc.** The exception allows libraries, archives, museums or schools to make a copy or communicate to the public, on dedicated terminals that are located in their premises, works permanently held in their collections, for the benefit of a natural person, and for purposes of private education, scientific study or research. Permitted uses should align with the purchase or licensing terms under which each work has been acquired.

The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

3.1.2.24.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Section 44 ZKUASP (2016) implements **Article 5(3)(a) InfoSoc** almost verbatim. It allows the reproduction, public performance or communication to the public of published works as

background materials for educational or research purposes. The act shall not cause any direct or indirect economic benefit.

Section 44(4) ZKUASP specifies that educational establishments mean a school, a higher education institution, and a childcare facility for children under three years.

Section **45 ZKUASP** (2016) also falls under the umbrella of **Article 5(3)(a) InfoSoc**. The rule allows the use of a published work by a school, university and other educational institutions, including their employees and any natural person offering educational services therein or participating in their social and educational activities.

The exception operates only if the use occurs within the framework of a school performance organized exclusively by the school and does not generate any economic benefit. Schools are also permitted to use school works to perform tasks belonging to the subjects of the school's activities.

Section 134(2) ZKUASP implements **Article 6(2)(b) Database** whereas **Section 138(4)(d) ZKUASP** introduces the exception contained in **Article 9(b) Database**.

3.1.2.24.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

The law implementing the CDSM Directive introduced **Section 44(2) ZKUASP,** which allows educational establishments to use a published work by digital reproduction, public performance or public transmission for the purpose of demonstration in teaching in a school, on the responsibility of a school or over a school's secure electronic network for a non-commercial purpose. The notion of educational establishments under **44(4) ZKUASP** applies.

A similar exception, covering the digital uses of original and non-original databases for educational purposes, is introduced in **Sections 134(2)** and **138(4)(d) ZKUASP**. **Section 138(4)(d) ZKUASP** requires acknowledging the source, including the name of the developer of the database.

3.1.2.24.5.4 TEXT AND DATA MINING

Before implementing the CDSM Directive, the ZKUASP did not contain any reference to text and data mining. The law implementing the CDSM Directive has transposed Articles 3 and 4 CDSM by introducing **Sections 51(b)** and **(c) ZKUASP**.

Section 51(b) ZKUASP benefits archives, museums, schools or a legal depository according to special regulations. These are allowed to make reproductions and extraction of works for the purpose of text and data mining for scientific research. The definition of text and data mining is provided in **Article 51(b)(2) ZKUASP** by following the CDSM Directive. The national transposition permits, in line with the EU counterpart, the conservation of the results, including for verification purposes, as long as an appropriate level of security is ensured.

The Slovakian implementation, thus, differs from the EU model in the seemingly narrower subjective scope. Indeed, the Slovakian legislator opted for a closed list of beneficiaries

instead of relying on the broader notion of CHI and Research Organizations contained in the CDSM directive.

Section 51(c) ZKUASP implements **Article 4 CDSM** with no significant divergencies.

Section 138(4)(e) extends the scope to databases protected by sui generis rights. Additionally, the scope of this provision is extended to performances by **Section 103(1) ZKUASP,** to phonograms by **Section 121 ZKUASP,** to broadcasts by **Section 127(1) ZKUASP,** and to databases by **Section 134(3) ZKUASP**.

3.1.2.24.6 USES FOR INFORMATORY PURPOSES

3.1.2.24.6.1 PRESS REVIEW AND NEWS REPORTING

Sections 39(1) and **(2) ZKUASP (2016)** implement **Article 5(3)(c) InfoSoc.** The provision allows the reproduction and communication to the public through mass media of articles or broadcasted works on current economic, political or religious topics, to the extent justified by the informatory purpose. Rightholders may explicitly reserve their rights. In this respect, however, the Slovakian Constitutional Court held that the author's right to object the use of his photographs can be restricted in favour of freedom of expression, if the society needs to be informed of current events, subject to certain additional conditions.[863]

Leveraging on the possibility offered by **Article 5(4) InfoSoc,** the provision extends the exception to also cover the right of distribution, subordinated to the same purpose-based requirement; while the scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

3.1.2.24.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Under **Section 39(3) ZKUASP** (2016), it is possible to make a copy, communicate to the public or distribute a political speech or a public lecture, for the purpose of informing the public and to the extent justified by said purpose. The provision implements **Article 5(3)(f) InfoSoc** and broadens its scope in line with **Article 5(4) InfoSoc.**

3.1.2.24.7 USES BY PUBLIC AUTHORITIES

3.1.2.24.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Section 53 ZKUASP (2016) permits the reproduction, communication to the public, technical performance or public distribution of a work, provided that this is made for public security purposes or to ensure the proper functioning of administrative, criminal or judicial proceedings, and to the extent justified by the purpose. The exception also covers the use of works necessary to ensure the proper functioning of meetings of the National Council of the Slovak Republic and its committees, municipal assemblies and assemblies of self-governing regions.

[863] Constitutional Court, judgement n. II. ÚS 647/2014.

Compared to **Article 5(3)(e) InfoSoc**, the Slovakian exception does not explicitly cover uses for reporting the proceedings but broadens the flexibility by including also governmental meetings and proceedings.

Section 134(3) ZKUASP implements **Article 6(2)(c) Database;** while **Section 138(4)(c) ZKUASP** implements **Article 9(c) Database** by covering only reuses and extractions for public safety, administrative, criminal and judicial proceedings. Additionally, it covers uses for proceedings of the National Council of the Slovak Republic and its committees, municipal council, or council of a higher territorial unit.

3.1.2.24.7.2 OTHER USES BY PUBLIC AUTHORITIES

Section 47 ZKUASP (2016) permits the reproduction, public performance, communication to the public or public distribution of a work in the course of a religious or official ceremony, an event organized abroad by a central authority of state administration, or a celebration of State holiday, public holiday, Memorial Day or other extraordinary celebration having national relevance.

This exception implements **Article 5(3)(g) InfoSoc.** It partially restricts the scope of the EU rule departing by specifying the types of events covered by the exception, while broadening the coverage of the provision with the addition of the right of distribution, leveraging **Article 5(4) InfoSoc**.

3.1.2.24.8 SOCIALLY ORIENTED USES

The **ZKUASP** does not contemplate any other socially oriented uses than those indicated under “other uses by public authorities”.

3.1.2.24.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.24.9.1 PUBLIC LENDING

None reported. However, see below under licensing schemes.

3.1.2.24.9.2 PRESERVATION OF CULTURAL HERITAGE

Section 49 ZKUASP (2016) allows a library, archive, museum or school to make a copy of a work permanently held in their collections, as long as the copy is made to substitute, archive or secure the original of the work or its copy against loss, destruction or damage. This provision falls under the umbrella of **Article 5(3)(c) InfoSoc**, but with a specific purpose limitation.

The law implementing the CDSM Directive into the Slovakian landscape introduced Section **49(a) ZKUASP**, which implements the exception for preserving cultural heritage. The national transposition follows the text of the EU counterpart, except for it adopts a narrower list of beneficiaries. These are identified in museums, libraries, archives or statutory depositories pursuant to special regulations. The scope of this provision is extended to

performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

To implement **Article 6 CDSM**, a new provision, **Section 49a ZKUASP**, which closely follows the EU rule, has been adopted. **Section 89(7) ZKUASP** extends the scope of this exception to computer programs; while **Section 138(4)(e)** extends the scope to databases protected by sui generis rights. Also, the scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP**.

3.1.2.24.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

None reported.

3.1.2.24.9.4 ORPHAN WORKS

Section 51 ZKUASP implements the exception contained in the OWD by following its text almost verbatim, except for the array of beneficiaries. It allows a library, archive, school or legal depositary, as defined by specific laws, to use orphan works in order to make copies in digital format, to index, catalogue, preserve or restore, or to make them legally accessible to the public, for educational or cultural purposes and fulfilment of their services in the public interest. No remuneration is due to rightholders.

3.1.2.24.9.5 OUT-OF-COMMERCE WORKS

The ZKUASP did not contain any provision explicitly addressing the use of out-of-commerce works and their preservation. However, before the adoption of the CDSM Directive, uses of this kind could be authorized via extended collective licenses, broadly regulated under **Sections 79** and **80 ZKUASP**.

Article 8 CDSM has been explicitly transposed under **Section 51(a) ZKUASP**. This rule permits libraries, museums, archives and other legal depositaries the reproduction, public transmission, reuse and extraction of out-of-commerce works, including the public dissemination of computer programs in absence of a CMOs sufficiently representative of the category of works at issue. Nevertheless, rightholders may reserve their rights. The notion of out-of-commerce works is defined following the CDSM Directive, though the Slovakian transposition requires such works to be permanently held in the collection of libraries, archives, museums or a statutory depository pursuant to special regulations. Section 12 ZKUASP provides cut-off dates for considering as out-of-commerce certain works, such as audiovisual works, computer programs and cartographic works.

3.1.2.24.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

Section 46(1) ZKUASP (2016) implements **Article 5(3)(b) InfoSoc.** It allows any person to perform acts of reproduction, public performance, communication to the public, distribution and lending of a published work, provided that such use is intended solely for the benefit of

persons with disability, and to the extent required by the type and degree of disability. The exception allows the production of works in an accessible format, including the addition to the audiovisual work verbal descriptions of visual elements, and the creation of an audible version of literary work. No direct or indirect commercial benefit shall be pursued. The scope of this provision is extended to performances by **Section 103(1) ZKUASP**, to phonograms by **Section 121 ZKUASP**, to broadcasts by **Section 127(1) ZKUASP**, and to databases by **Section 134(3) ZKUASP.**

Section 46(a) ZKUASP transposes **Article 3 Marrakesh Directive** by following almost *verbatim* the definition of beneficiaries, permitted uses, and the operational conditions of the exception.

3.1.2.24.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Section 50 ZKUASP (2016) allows the use of a photographic work, other works of fine art, and the original of literary work for its public exhibition, by their owner or a person to whom such works have been lent unless rightholders have expressly reserved such rights. Any person not regularly holding public exhibitions as part of their activities is allowed to use photographs they own for the same purposes. The use shall have no commercial purpose. This provision implements **Article 5(3)(j) InfoSoc** with a rather restrictive approach to beneficiaries and conditions for the application of the exception.

Section 57 ZKUASP (2016) permits the reproduction, communication to the public or distribution of artistic works for the purpose of advertising their public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use, in line with **Article 5(3)(j) InfoSoc**. The exception does not cover the use of such works after completion of their sale.

Section 52 ZKUASP (2016) envisages an exception covering uses of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing/renovating the building. The provision specifies that "renovation" shall be understood as specialized artistic and craftsmanship activities and other professional activities resulting in maintenance, conservation, repair or reconstruction of a building or its part with the aim of preserving its artistic value and function. This provision implements very closely **Article 5(3)(m) InfoSoc**.

Section 56 ZKUASP (2016) allows the reproduction, technical performance or communication to the public of a work by means of a technical device, as long as such uses are in connection with the demonstration or repair of the device or its features, in complete alignment with **Article 5(3)(l) InfoSoc.**

3.1.2.24.12 THREE-STEP TEST

An explicit reference to the three-step test can be found under **Section 34 ZKUASP** (2016), which recalls *verbatim* **Article 5(5) InfoSoc.**

3.1.2.24.13 PUBLIC DOMAIN

3.1.2.24.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Section 5 ZKUASP (2016) excludes from copyright protection ideas, systems, methods, concepts, principles, discoveries or information that have been expressed, described, explained, depicted or incorporated into a work. Similarly excluded are legislative texts, judicial or administrative decisions, technical norms, including draft materials and translations thereof, land-use planning documents, speeches delivered in discussions on public affairs, irrespective of whether the latter may qualify for copyright protection. Copyright does not cover either state symbols, municipality symbols, symbols of self-governing regions (but may apply to works used to create them), nor does it protect daily news, intended as information on events or circumstances, and the result of the activity of expert, interpreters or translators acting under special laws.

Notably, works of folklore are also expressly excluded from protection.

3.1.2.24.13.2 PAYING PUBLIC DOMAIN SCHEMES

Paying public domain schemes are regulated under Section 10 of the Art Funds Act,[864] which has been in force since 1994.

The provision requires legal entities and natural persons authorized to conduct business under special regulations to pay a contribution for each allowed use of literary, scientific or artistic works. The Art Funds is entrusted to collect such contributions, also via CMOs.

3.1.2.24.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Section 80 ZKUASP (2016) regulates extended collective license schemes, broadly applicable to different uses and works, to be managed by CMOs. Paragraph **(a)** applies ECL to the performance or public transmission of works in an establishment or other premises through technical equipment, excluding broadcasting and retransmission. Paragraph **(b)** uses ECLs to permit the reproduction, making available to the public or distribution of copies of out-of-commerce works by a library or a museum, while subsequent paragraphs cover the live performance of literary works and broadcasting of works (including by satellite, paragraph **(c)**, the reproduction of literary works (paragraph **(d)**), the rental or lending of works (paragraph **(f))**, and the retransmission of works other than cable retransmission, public transmission by an online content sharing service providing and making a musical literary or visual artwork available to the public (paragraphs **(g-h)).**

Sections 146 and **147 ZKUASP** (2016) subject to collective management the exercise of certain economic rights in specific instances, such as private copy, reprography, and resale of original works of fine art.

[864] Act No. 13/1993 Coll. as amended.

3.1.2.24.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.24.15.1 FUNDAMENTAL (USERS') RIGHTS

In connection to the press review exception, the Slovakian Constitutional Court in Judgement n. II. ÚS 647/2014 held that the author's right to object to the use of his photographs can be restricted in favour of freedom of expression, if the society needs to be informed of current events, subject to certain additional conditions.

As mentioned before, the Slovakian legislator introduced **Article 17(7) CDSM** by referencing fundamental rights and freedoms. Pursuant to **Section 64(d) ZKUASP** the proceedings for the removal of contents shall not restrict the use of exceptions and limitations under the ZKUASP or fundamental rights and freedoms.

Apart from what already reported above, nothing was indicated by the national experts nor can be otherwise traced on publicly available sources on the use of fundamental rights by Slovakian Courts in relation to the copyright balance, nor on the qualification of exceptions as users' rights.

3.1.2.24.15.2 CONSUMER PROTECTION

No reference to consumer protection law as a source of balancing tools in the Slovakian copyright landscape has been reported.

Other than the above, it can be mentioned that Slovakia has not implemented Directive 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services and Directive 771/2019 on certain aspects concerning contracts for the sale of goods, thus Slovakian law does not feature any further provision protecting consumers/users from adverse effects stemming from TPMs.

3.1.2.24.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.24.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.25 SLOVENIA

The Slovenian Copyright Law (ZASP), in force since 1995 and last amended in 2019,[865] implements the great majority of the copyright flexibilities introduced by EU Directives, while it does not feature a specific exception for reprography (which is covered, however, by the private copy exception), for building renovation, and for socially oriented uses. It is worth mentioning that ZASP provides an exception for parody, but it does not cover pastiche. As the CDSM is yet to be transposed, Slovenia does not feature exceptions for text and data mining,

[865] Zakon o avtorski in sorodnih pravicah; Zakon o spremembah in dopolnitvah Zakona o avtorski in sorodnih pravicah – ZASP-H (Uradni list RS, št. 59/19 z dne 4. 10. 2019).

or digital teaching. Certain uses of out-of-commerce works and for preservation purposes are envisioned in the ZASP, but with a limited scope of permitted acts, covered subject matter and beneficiaries if compared to the CDSM Directive.

The degree of flexibility offered by the ZASP varies. For instance, the exceptions for private copy and benefitting lawful users of software feature quantitative limitations in the number of copies that can be made. Similarly, the exceptions for quotation, freedom of panorama, uses for repair and testing are less flexible than the EU standard. Other provisions closely follow their EU counterparts.

3.1.2.25.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.25.1.1 TEMPORARY REPRODUCTION

Article 49(a) ZASP (2004) implements verbatim **Article 5(1) InfoSoc.**

3.1.2.25.1.2 EPHEMERAL RECORDING

The **ZASP** does not feature any explicit exception or limitation for ephemeral recordings. **Article 77(2) ZASP** provides that the transfer of a right to broadcast also includes the transfer of the right to make ephemeral recordings. This provision has been in force since the adoption of the Statute in 1995. The flexibility could find correspondence in the baseline structure of **Article 5(2)(d) InfoSoc.** The article provides that only one reproduction can be made.

3.1.2.25.1.3 INCIDENTAL INCLUSION

Article 52 ZASP allows the free inclusion of disclosed works in other materials, if they may be regarded as accessory works of secondary importance vis-à-vis the actual purpose of the latter. Such use is permitted while exploiting the object that incorporates the work. The exception has been in force since 1995. This may explain the more restrictive operational conditions of the Slovenian rule compared to the EU standard.

3.1.2.25.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Articles 53(a) ZASP, in force since 2001, is in line with **Article 6(1) Database**. It allows lawful users of a disclosed database to copy or alter the database, even partially, when such acts are necessary for accessing and using its contents.

Article 141(d) ZASP (1995), by implementing **Article 8 Database**, permits lawful users of a disclosed database to use qualitatively or quantitatively insubstantial parts of it, with no limitation on the purpose of use, but in compliance with the three-step test. The provision is not overridable by contract.

Article 114 ZASP (2001) introduces limits to exclusive rights on computer programs. The provision implements **Article 5 Software** verbatim. Accordingly**,** lawful users are allowed to copy or alter the program if necessary to use it in accordance with its intended purpose, and to observe, study or test its functioning of a program in order to determine the ideas and principles that underlie any element of the program. While, in principle, parties can agree

otherwise, in *VSL Sodba V Cpg 697/2017* of 12 October 2017,[866] the Ljubljana High Court specified that contractual overridability of the exception is excluded.

Back-up copies of the program are permitted, but up to a maximum of two copies, with a quantitative limitation that is added on top of what is required by **Article 5(1) Software.**

Article 115 ZASP implements *verbatim* the exception allowing the reproduction and transformation of computer programs for achieving interoperability with other programs. The Slovenian operational conditions of the exception and limits as regards the allowed uses are in line with those laid down in **Article 6 Software.**

Article 166(c) ZASP Act implements **Article 6(4) InfoSoc** with regard to safeguards for permitted uses when TPMs are in place. The rule allows the otherwise prohibited circumvention of effective TPMs, to ensure that lawful users are not prevented from enjoying specific uses, such as private copying; use for the purpose of teaching; performance of official proceedings; use for the benefit of people with disability; and ephemeral recordings made by broadcasting organizations. Where a rightholder fails to fulfil this obligation, lawful users may request a mediation of the dispute.

3.1.2.25.1.5 FREEDOM OF PANORAMA

Article 55 ZASP allows the free use of works permanently placed in parks, streets, squares, or other publicly accessible locations. The reproduction of such works in a three-dimensional form is excluded if the act entails economic gain or is made for the same purpose as the original work. The mention of the name of the author is required unless this is proven impossible. The provision has been in force since the adoption of the ZASP in 1995. This may explain the more restrictive operational conditions of the exception and the likewise narrower scope of permitted uses, if compared to the EU standard.

3.1.2.25.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.25.2.1 REPROGRAPHY

Article 50(2)(1) ZASP implements the reprography exception enshrined in **Article 5(2)(a) InfoSoc**. It permits a natural person to reproduce a disclosed work, on paper or any similar medium, using reprographic techniques or any other similar medium, as long as the copy is made for private use and non-commercial purposes, with a maximum of three copies allowed. The exception does not cover the reproduction of entire literary works, unless they have been out of print for more than two years, sheet music, unless performed by handwriting, electronic databases and computer programs, and in the form of a building of architectural structures.

[866] Ljubljana High Court, Judgement of 12 October 2017, VSL Sodba V Cpg 697/2017.

3.1.2.25.2.2 PRIVATE COPY

Article 50(2)(2) ZASP regulates the private copy exception in connection with **Article 37 ZASP. Article 50** was introduced with the adoption of the **ZASP** and was amended in 2004.

Pursuant to **Article 37 ZASP** rightholders are due an equitable remuneration, subject to mandatory collective management by CMOs.[867] It is worth noting that **Article 75** of the Slovenian Act on Collective Management of Copyright (ZKUASP)[868] provides that when there is no appropriate CMOs, rights can be managed individually until a competent authority issues authorization to an appropriate CMO. Slovenian higher courts have confirmed this.[869]

Article 37 was introduced with the adoption of the ZASP in 1995 and has been amended twice. The first amendment of the Slovenian Copyright Act in 2001 assimilated the term appliances for sound or visual fixation to other appliances. The provision was amended for a second time in 2007, with the introduction of a new paragraph **37(4) ZASP**, which indicates criteria for determining the amount due.

Compared to the corresponding **Article 5(2)(b) InfoSoc,** the Slovenian private copy exception is less flexible due to the many restrictions imposed on the subject matter that can be reproduced and the number of copies that can be made.

3.1.2.25.3 QUOTATION

Article 51 ZASP permits to quote parts of a disclosed work and of a single disclosed photograph, work of fine arts, architecture, applied art, industrial design and cartography. Slovenian Courts have confirmed that quotation is also allowed for audio-visual works or films,[870] while they have denied the applicability of the exception for the use of an adaptation of a copyright protected work.[871] The quotation of musical works as excerpts from a partiture has also been allowed by case law.[872] The exception applies only if the quotation is necessary for the purpose of illustration, argumentation or referral. The purpose is assessed on a case-by-case basis.[873] The indication of the source is mandatory, if included in the work used.

It is worth noting that, while the law refers to *parts* of works, in case VSL II Cp 4863/2008 of 24 June 2008, it was ruled that, in certain cases – such as when quoting a picture or a

[867] For related case law on Article 37 ZASP. See: Judgements of the Ljubljana High Court no. V Cpg 744/2018; V Cpg 802/2018, and V Cpg 808/2018/.
[868] Zakon o kolektivnem upravljanju avtorske in sorodnih pravic (Uradni list RS, št. 63/16).
[869] See, for example the judgements of Ljubljana Hight Court no. V Cpg 828/2017 and Slovenian Supreme Court no. III Ips 33/2014. In these judgements, the Slovenian courts ruled that if no CMO has been authorized to administer rights which, pursuant to the law, have to be managed collectively, rightholders are permitted to manage and exercise their own rights individually. A different explanation would lead to a situation, where the rightholders could not, in any way, exercise their own rights, which would contradict the Constitution of the Republic of Slovenia.
[870] VSL II Cp 1392/2013, 27.9.2013. Previously, in the same sense: VSL II Cp 4863/2008, 24.6.2008.
[871]VSL V Cpg 362/2015, 17.6.2015.
[872] VSRS II Ips 213/2008, 26.2.2009.
[873] This being a crucial element of the exception. See in this sense: VSL V Cpg 200/2016, 1.6.2016.

photograph – an interpretation of the exception consistent with the Slovenian Constitution permits to stretch its scope to cover the use of works in their entirety.

This provision finds correspondence with **Article 5(3)(d) InfoSoc.** It entered into force with the adoption of the Slovenian ZASP in 1995**.** While, as opposed to the EU rule, the Slovenian exception is more restrictive regarding the amount and type of work that can be quoted, it r has been interpreted in a user-friendly manner by courts.

3.1.2.25.4 PARODY, CARICATURE, PASTICHE

This exception is regulated in **Article 53(2) ZASP**, under the title "free transformations". In force since the adoption of the ZASP in 1995, the rule allows the transformation of a work into a parody or caricature, as long as such transformation does not (or is not likely to) create confusion about the source of the work. Whereas **Article 53 ZASP** does not currently cover pastiche, thus the scope is narrower than **Article 5(3)(k) InfoSoc,** the proposed draft for the implementation of **Article 17 CDSM** is expected to bridge this gap by expanding the general exception instead of introducing a new provision limited to online uses on OCSSPs.

3.1.2.25.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.25.5.1 PRIVATE STUDY

Article 5(3)(n) InfoSoc has been implemented in **Article 49(b) ZASP**. It allows publicly accessible archives, libraries, museums and educational institutions to freely communicate to the public works held in their collections, for the purpose of private study and research, on dedicated terminals located within their premises. The exception does not apply where theuses are excluded by the licensing or purchasing terms of the works concerned. This ZASP provision, which entered into force in 2015, closely resembles the corresponding EU rule.

3.1.2.25.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 49 ZASP, first introduced in 1995, finds correspondence in **Article 5(3)(a) InfoSoc** but as opposed to the EU model, the Slovenian exception does not envisage the purpose of illustration for scientific research. It is worth noting that this exception will substantially change to fully implement Article 5 CDSM into the Slovenian copyright law.

According to the provision currently in force, it is possible to publicly perform and communicate to the public a disclosed work, only in the form of direct teaching or at school events with free admission, as long as performers do not receive payment for their performances. The exception also covers the rebroadcast of a radio or television school broadcast. Acknowledgment of the source, including indicating the author's name, is required.

Article 47(1) ZASP (1995) allows the reproduction and communication to the public of works of authorship and of individual works in the fields of photography, fine arts, architecture, applied arts, industrial design and cartography, provided that they are already

published works and for the purpose of preparing reading books and textbooks intended for instruction. Rightholders shall be granted an equitable remuneration.

Whereas there is no concrete information to suggest that **Article 6(2)(b) Database** has been implemented, **Section 141g(1)(2) ZASP** transposes **Article 9(b) Database**.

3.1.2.25.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

To date, the **ZASP** does not envisage any rule regulating digital use for illustration for teaching, and Slovenia has not implemented the CDSM Directive yet. The consolidated draft for implementing CDSM, tabled in February 2022, proposes to amend the wording of Article 49 from "Pouk" ("Lesson") to "Poučevanje" ("Teaching"), so as to encompass also online lessons. The proposed mandatory exception allows the reproduction in electronic form and communication to the public of published works, including databases, for the sole purposes of illustration in distance or cross-border instruction. In line with **Article 6 CDSM,** the Slovenian proposed exception covers uses carried out under the responsibility of the educational establishment on its premises, other premises or through a secure electronic environment accessible, in particular through authentication procedures, only to pre-school children, pupils or students enrolled in that program and to teachers (including kindergarten teachers) and other persons providing instructions. The source and authorship of the work must be indicated, if they appear on the work used. However, the exception does not cover further reproductions of extracts or parts of the same work in a manner that would substitute the actual purchase of the work.

The Slovenian proposal uses the margin of discretion left by the **CDSM Directive** to exclude the use of textbooks, workbooks, tutorials, sheet music and other teaching materials intended primarily for use in teaching , when appropriate and easily accessible licenses for their use are available on the market. To this end, licensors shall publish the conditions of use in a conspicuous and easily accessible format on their website and shall inform the representative association of kindergartens or educational establishments and the Ministry responsible for education thereof. Apart from this caveat, no remuneration is due to rightholders.

3.1.2.25.5.4 TEXT AND DATA MINING

To date, **ZASP** does not feature any text and data mining exception. According to the proposed draft of implementation on the CDSM Directive (25 May 2021), **Articles 3 and 4 CDSM** are to be introduced in **Articles 57a** and **57b ZASP. Article 57a** transposes *verbatim* **Article 4 CDSM** and **Article 57b ZASP** implements Article 3 CDSM.

3.1.2.25.6 USES FOR INFORMATORY PURPOSES

3.1.2.25.6.1 PRESS REVIEW AND NEWS REPORTING

This exception was introduced in 1995 under **Article 48 ZASP** and amended in 2015. It finds correspondence in **Article 5(3)(c) InfoSoc.**

It allows the reproduction and communication to the public of works as a part of a current event being reported on, and to prepare and reproduce abstracts of published newspapers and similar articles in the form of press reviews. The use also covers the reproduction of political speeches and other public speeches made at hearings before state, religious or similar bodies and of news the day which have the nature of a press release.[874] Slovenian Courts have ruled that the mere fact that a speech is sent in the form of a recorded interview does not exclude the application of the exception,[875] but also that the use is allowed if news reporting is otherwise endangered. However, the mere fact that the inclusion in the news of a protected work might enhance the visibility of certain information falls outside the scope of the exception.[876]

In line with the EU rule, the Slovenian exception requires the source and authorship to be indicated. Slovenian Courts have regarded this requirement satisfied if the article´s title includes a YouTube link and the statement that the interview in question was removed from YouTube.[877]

Article 47 (2) ZASP Act allows the reproduction and communication in the periodical press of topical articles dealing with general issues, unless expressly prohibited by the author, and subject to the payment of equitable remuneration. Slovenian Courts have held that whereas the clipping performer is liable for the payment of the remuneration, not everything written by a journalist is a work of authorship (e.g., short daily news or press release with factual content and no degree of originality are in the public domain). Consequently, the use of certain works of journalistic authorship may be free. [878]

3.1.2.25.6.2 USES OF PUBLIC SPEECHES AND LECTURES

The exception envisaged under **Article 5(3)(f) InfoSoc** is covered by the provision relating to press review and news reporting, which also covers the reproduction of public political speeches and public speeches made at hearings before state, religious or similar bodies and the use the news of the day, which have the nature of a press release (**Section 48(1)(3) ZASP**).

3.1.2.25.7 USES BY PUBLIC AUTHORITIES

3.1.2.25.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 56 ZASP allows the use of protected works when necessary for public security purposes or for the functioning of any judicial, administrative and other official proceedings, such as those in the National Assembly or National Council of the Republic of Slovenia.[879]

[874] The scope of this exception partially overlaps with uses of public speeches and lectures (see above).
[875] VSRS III Ips 119/2015, 24.1.2017.
[876] SL V Cpg 907/2014, 28.8.2014.
[877]VSRS III Ips 119/2015, 24.1.2017.
[878] VSL0079315, 28.05.2014.
[879] As confirmed in VSL I Cpg 1013/2012, 4.7.2013.

It shall be noted that while the original wording of **Article 56 ZASP** (1995) allowed the use only in evidentiary procedures, the amendment of 2004 to implement **Article 5(3)(e) InfoSoc** broadened the scope of the exception, which now is in full adherence to the EU standard.

While **Article 6(2)(c) Database** has not been transposed, **Article 9(c) Database** finds correspondence in **Section 141g(3) ZASP.**

3.1.2.25.7.2 OTHER USES BY PUBLIC AUTHORITIES

None reported.

3.1.2.25.8 SOCIALLY ORIENTED USES

The **ZASP** does not feature any other provision mentioning uses by public authorities.

3.1.2.25.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.25.9.1 PUBLIC LENDING

The Slovenian Copyright Act does not feature any exception or limitation for public lending. **Article 36 ZASP,** introduced with the adoption of the Copyright Act in 1995 and amended in 2004, considers the public lending right as a remuneration right, regulated in amount and management under the Libraries Act. However, **Article 36(2) ZASP** excludes the need to pay equitable remuneration for the lending of originals or copies of library material by the National Library, school and academic libraries and special libraries. The rule can find correspondence with **Article 6 Rental.**

3.1.2.25.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 50(3) ZASP allows certain acts of reproduction of works by CHI, which could broadly fall within the purpose of preserving cultural heritage. This exception permits publicly accessible archives and libraries, museums and educational or scientific establishments to reproduce, on any medium, works held in their collections, for their internal use and without any economic gain. The provision was introduced in 2004 to implement **Article 5(2)(c)-(d) InfoSoc.** As opposed to the EU standard, the Slovenian provision is less flexible with regard to permitted acts, subject matter and the number of copies that can be made.

Against these limits, in the explanatory memorandum to the draft proposal to implement the CDSM Directive, the Slovenian legislator indicates the need to introduce a new specific exception for the preservation of cultural heritage in line with Article 6 CDSM.

The proposed text (May 2021) introduces a mandatory provision in **Article 57c ZASP**, which follows *verbatim* the EU model for it concerns the beneficiaries, the permitted uses and the conditions therein set.

3.1.2.25.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Beyond **Article 50(3) ZASP** mentioned above, Slovenia does not feature any further flexibility falling within this category of uses.

3.1.2.25.9.4 ORPHAN WORKS

The amendment ZASP-G in 2015 introduced **Article 50(a) ZASP** to implement the exception envisaged in the **Orphan Work Directive.** The Slovenian exception the text of the EU directive closely as to the identification of beneficiaries, possibility to delegate the performance of permitted acts, the definition of orphan works and diligent search, purposes of the exception, limitation to the revenues admitted, and need to mention the source and author of the work if known.

3.1.2.25.9.5 OUT-OF-COMMERCE WORKS

Since adopting the ZASP in 1995, Slovenia envisaged a provision regulating certain uses of out-of-commerce works in Article 50(5), amended in 2004. This exception, in connection with Article 50(3) ZASP, allows publicly accessible archives and libraries, museums and educational or scientific establishments to reproduce, in any medium, entire written works which have been out of print for at least two years, but for internal uses only.

The draft proposal for implementing the CDSM Directive (May 2021) introduces a mandatory provision under **Article 57c ZASP** to transpose **Article 8(2) CDSM**, which is perfectly in line with the EU standard.

3.1.2.25.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The exception for visually impaired persons has been amended several times. Currently envisaged under **Article 48(a) ZASP**, the exception was first introduced with the amendment ZASP-B in 2004 to implement **Article 5(3)(b) InfoSoc.** At the time of its introduction, the exception allowed the reproduction and distribution of a work for the benefit of disabled persons, provided that the work was not available in an accessible format. In addition, the use was subject to remuneration. These requirements were eliminated in the amendment of 2015.

Thus, from 2015, the exception allows disabled persons to perform acts of reproduction, which also includes necessary non-substantive adaptations, distribution of published works, if the use is for the benefit of a person with disability, as long as the use is non-profit, directly related to that disability, and to the extent required by the same.

Article 48a ZASP was subsequently amended in 2019 to include within the permitted acts the communication and making available to the public, and to broaden the range of beneficiaries to align the Slovenian text with **the Marrakesh Directive.** The amendment also introduced in **Articles 48b** and **48c ZASP** the notion of beneficiary persons and authorized entities, both notions closely resembling the EU source. Again, following the Directive, the

two new Articles 48b and 48c ZASP allow authorized entities to produce and communicate accessible copies to beneficiaries and to exchange them with other authorized entities within the internal market. These amendments entered into force on 18 October 2019.

3.1.2.25.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 54 ZASP permits the organiser of a public exhibition or sale of artistic works to freely use them, to the extent necessary to promote the event, provided that this is not done for direct or indirect economic advantage. When indicated on the work used, the source and authorship of the work must be acknowledged. The exception has been in force since 2004, as the result of the implementation of **Article 5(3)(j) InfoSoc.** However, the Slovenian rule presents some limitations and operational conditions absent in the EU source, such as, for instance, the mandatory mention of the source and the exclusion of any commercial gain.

Article 57 ZASP permits establishments and shops that manufacture or sell phonograms, videograms, equipment for their reproduction or public communication and equipment for reception of broadcasts, to freely reproduce and communicate works, only in the context of testing the functioning of the devices at the time of manufacture or sale, and to the extent required by the purpose. This includes, according to Slovenian case law, the use of phonograms in sound adjustment testing.[880] Courts have also confirmed that the duration of the use is limited to what is strictly necessary for the device to be tested.[881] This exception was introduced with the adoption of the Act in 1995, yet it can find correspondence in **Article 5(3)(l) InfoSoc.** However, compared to the EU rule, the Slovenian exception is less flexible, for it limits the array of beneficiaries.

3.1.2.25.12 THREE-STEP TEST

An explicit reference to the three-step test can be found in **Article 46 ZASP**, which is stricter than **Article 5(5) InfoSoc,** as it also adds the need to comply with fair practice.

3.1.2.25.13 PUBLIC DOMAIN

3.1.2.25.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 9 ZASP (1995) provides a list of unprotected creations, encompassing ideas (such as, a TV show concept or business idea),[882] discoveries, and official legislative, administrative and judicial texts.[883]. However, translations thereof fall in the public domain only if they are not published as official texts. Works of folklore (folk art) are not covered by copyright either.

[880] See: VSL I Cp 3494/2015, 9.3.2015.
[881] See: VSRS II Ips 126/2012, 6.11.2012.
[882] See, VSRS III Ips 4/2017, 24.4.2018 (for "a TV show concept"). However, note that the decision is been highly controversial in Slovenia. See also III Ips 3/2011, 28.2.2012 (for "a business idea").
[883] See, II Ips 678/2006, 9.11.2006 (for "mathematical examination papers for high school in official administrative procedure"). See also, UPRS III U 45/2016, 6.5.2016 (for a building project documentation that becomes a part of the building permit documents in official procedures).

3.1.2.25.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.25.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Article 101 ZASP regulates the attribution of exclusive economic rights over copyright protected works generated in the context of an employment relationship. While the Slovenian Copyright Act protects the principle of authorship, for it provides that copyright is originally always attributed to the natural person who created the work, it introduces the rebuttable presumption of transfer of certain rights to the employer for a fixed period of ten years, which runs from the completion of the work. Employment contracts or collective agreements may provide otherwise. After ten years, all rights revert to the author with no formalities needed. In connection to this latter, Article 101/2 ZASP provides a compulsory license, according to which the employer may claim the re-transfer of rights from the author, but upon the payment of adequate remuneration. More generally, the Collective Management Act[884] provides that several of exclusive rights should be subject to mandatory collective management, such as the cable retransmission of broadcast (Article 9(4)); the right of performers to an annual supplementary remuneration (Article 9(5)); rights of performers and/or phonogram producers to remuneration for broadcasting and communication to the public of phonograms (Art. 9(1)); rights to broadcasting and/or other communication to the public (Article 9(1)); Resale rights (Article 9(1)); compensation for private copying (Article 9(3)); reproduction of musical works on phonograms and videograms (Article 9(3)).

No information has been reported on the implementation of **Article 8(1) CDSM.**

3.1.2.25.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.25.15.1 FUNDAMENTAL (USERS') RIGHTS

Apart from the cases reported above, nothing was indicated by the national experts, nor can it be otherwise traced on publicly available sources on the use by Slovenian Courts of fundamental rights in relation to the copyright balance. In the Slovenian Copyright Act, the only direct reference to the notion of "public interest" is included in the provisions introducing the exception for orphan works (**Articles 50.a – 50.d ZASP**). However, it can be understood that the whole section related to E/L exceptions and limitations (**Articles 46 – 57 ZASP**) serves the public interest.

3.1.2.25.15.2 CONSUMER PROTECTION

No reference to consumer protection law as a source of balancing tools in the Slovakian copyright landscape has been reported. Other than the above, it can be said that Slovenia has not implemented Directive 770/2019 on certain aspects concerning contracts for the supply

[884] Zakon o kolektivnem upravljanju avtorske in sorodnih pravic (Uradni list RS, št. 63/16).

of digital content and digital services and Directive 771/2019 on certain aspects concerning contracts for the sale of goods.

3.1.2.25.15.3 COPYRIGHT CONTRACT LAW

Certain provisions in the Obligation Code of the Republic of Slovenia (OZ)[885] may provide a balancing mechanism in obligational relationships. In this sense, Article 4 OZ mandates that participants in obligational relationships may be equal. Article 6 OZ imposes the party to act with good diligence in legal transactions and Article 7 OZ prohibits the abuse of rights by stating that the rights deriving from obligational relationships are limited by the equal rights of others. The same rule imposes parties to exercise their rights in accordance with the code and their purpose.

3.1.2.25.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.26 SPAIN

Copyright law in Spain is governed by Real Decree n. 1/1996, as subsequently amended (**TRLPI**)[886]. Spain has transposed the CDSM Directive by Royal Decree n. 24/2021,[887] which now regulates the mandatory E/L contained therein and introduces some other amendments to the **TRLPI.**

Spain has introduced the vast majority of exceptions and limitations enshrined in EU Sources. Absent in the law are the exceptions allowing uses for reparation, renovation or exhibition purposes. Significantly, whereas the **TRLPI** envisioned a general exception covering the uses for parody and caricature, it did not cover pastiche. The transposition of the CDSM has added the uses for pastiche to the Spanish copyright landscape. Already before the implementation of the CDSM Directive Spain had provided for an exception covering digital uses for illustration and teaching.

The degree of flexibility of the Spanish catalogue of E/L varies, with exceptions such as the temporary reproduction, uses in administrative proceedings, and uses of orphan and out-of-commerce works, following the standard of the corresponding EU rule, and others like the private copy, private study or parody imposing more stringent conditions. The quotation and

[885] Obligacijski zakonik – OZ (Uradni list RS, št. 83/01 z dne 25. 10. 2001).
[886] Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia.
[887] Articles 67-72 Real Decreto-ley 24/2021, de 2 de noviembre, de transposición de directivas de la Unión Europea en las materias de bonos garantizados, distribución transfronteriza de organismos de inversión colectiva, datos abiertos y reutilización de la información del sector público, ejercicio de derechos de autor y derechos afines aplicables a determinadas transmisiones en línea y a las retransmisiones de programas de radio y televisión, exenciones temporales a determinadas importaciones y suministros, de personas consumidoras y para la promoción de vehículos de transporte por carretera limpios y energéticamente eficientes.

uses for illustration for teaching and research, including digital uses, feature a combination of elements of flexibility and others more restrictive.

3.1.2.26.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.26.1.1 TEMPORARY REPRODUCTION

Article 31.1 TRLPI [888] implements **Article 5(1) InfoSoc** and its exception allowing provisional acts of reproduction of works which are transient or incidental and form an integral and essential part of a technological process by providing the same conditions therein.

Article 132 TRLPI extends the scope of the exceptions and limitations enlisted within Title III Chapter 2 (Articles 31-40), however with the exception of Article 37 TRLPI, to the objects of related rights.

3.1.2.26.1.2 EPHEMERAL RECORDING

Spain does not envisage any explicit exception or limitation for ephemeral recordings as provided in **Article 5(2)(d) InfoSoc** or **Article 10(3) Rental**.

Yet, **Article 36.3 TRLPI**, in force since 2006, [889] provides that the transfer of the right of public communication of a work, when carried out through broadcasting, also includes the right for the broadcasting organization to record the work by its own means and for its own wireless broadcasts. This is allowed in so far as the recording is made with the purpose of carrying out, for one time, authorized public communication.

3.1.2.26.1.3 INCIDENTAL INCLUSION

Article 35.1 TRLPI [890] allows the reproduction, distribution and communication to the public of any works that may be seen or heard on the occasion of information on current events. The use shall not extend beyond what is necessary for the information purpose.

The interpretation of the exception has been quite restrictive. For instance, the Madrid Court excluded its application because when the information was outdated.[891]

The Spanish flexibility for incidental inclusion is in force since 1998, thus it precedes the corresponding **Article 5(3)(i) InfoSoc.** On the one hand, it expands the permitted acts compared to the EU counterpart. On the other, the Spanish exception features a purposive limitation, absent in the EU model.

[888] For related case law, see: SAP Madrid 92/2015, 27 March 2015 (Collective management. Intellectual property rights of performing artists. Rooms in the establishment. Acts of public communication of audiovisual recordings) and STS 3942/2012 - ECLI:ES:TS: 2012:3942.
[889] For related case law, see: STS 1251/2009 - ECLI:ES:TS:2009:1251 and STS 208/2008 - ECLI:ES:TS:2008:208.
[890] For related case law, see: SAP Madrid 415/2016, of 28 November 2016 SAP Madrid of 10 January 2013, Aranzadi Civil marg. No. 2013/847.
[891] *SAP Madrid* of 4 November 2008.

3.1.2.26.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

The **TRLPI** provides several exceptions for facilitating access and use of computer programs, databases and works protected by TPMs.

Article 100.1 TRLPI, in force since 1996,[892] introduces the exception contained in **Article 5(1) Software** in full adherence to the EU model**. Article 100.2 TRPLI** implements verbatim **Article 5(2) Software,** whereas **Article 100.3 TRPLI** does the same for **Article 5(3) Software**, except for it adds that unless agreed otherwise, the rightholder may not prevent assignees/licensees who hold the exploitation rights from making or authorising the making of successive versions of his program or of programs derived therefrom.

Article 100.5 TRPLI transposes the mandatory exception contained in **Article 6 Software** by adopting the same wording and conditions.

Article 34 TRLPI envisages an exception with regard to databases, which permits a legitimate user of a disclosed database to carry out all acts necessary for its normal use and to access its content. In line with **Article 6(1) Database,** the exception cannot be overridden by contract. **Article 134 TRLPI** implements **Article 8 Database**.

Article 197 TRPLI, in force since 2018 and amended in 2019, implements safeguards for permitted uses when TPMs are in place, in line with **Article 6(4) InfoSoc**. The rightholder is required, upon request of the lawful user, to make it possible for the latter to benefit from the exceptions, such as those related to private copying **(31.2 TRPI)**, public official procedures, and uses for the benefit of disabled persons **(31 *bis* and *ter*)**, quotation for educational purposes **(Article 32.2)**, uses of databases for illustration for educational or scientific research purposes, and for security purposes (**Article 34.2(b)(c))**, preservation purposes made by certain institutions **(Article 37.1).**

However, according to the Spanish provision, beneficiaries of the private copy exception cannot demand the removal of TPMs adopted by rightholder that are aimed at limiting the number of copies that can be made.

3.1.2.26.1.5 FREEDOM OF PANORAMA

This flexibility is transposed in **Article 35.2 TRLPI.**[893] The provision is in force since 1998, thus, it precedes **Article 5(3)(h) InfoSoc**. It allows the free reproduction, distribution and communication to the public of works permanently placed in parks, streets, squares, or other thoroughfares, when such acts are performed by means of paintings, drawings, photographs and audio-visual procedures.

[892] For related case law, see: SAP Soria 136/2017, 18 October 2017; SAP Balearic Islands 335/2010, 23rd September 2010.
[893] For related case law, see: SAP Valencia 673/2019, 23 of May 2019 SJPI nº 4, 7 of February 2011, Salamanca.

The Spanish exception features greater flexibility than the EU model, for it expands the permitted acts. However, at the same time, said scope is limited as the law explicitly dictates the permitted ways of use.

Article 132 TRLPI extends the scope of the exceptions and limitations enlisted within Title III Chapter 2 (Articles 31-40), however with the exception of Article 37 TRLPI, to the objects of related rights.

3.1.2.26.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.26.2.1 REPROGRAPHY

No other reference to reprography has been reported than **Article 37.1 TRLPI**, covering certain acts of reproduction for conservation purposes.

3.1.2.26.2.2 PRIVATE COPY

Article 31.2 TRPLI regulates the private copy exception contained in **Article 5(2)(b) InfoSoc.**[894] The provision is in force since 2006, as subsequently amended in 2014.

It permits the reproduction of works lawfully made public, on any medium, and without the assistance of third parties, as long three conditions are concurrently met. First, the copy should be made by a natural person exclusively for private, non-professional or business use, and without any direct or indirect commercial aim. Second, the reproduction should originate from a legal source to which the person making the copy has lawful access. Third, the obtained copy must not be exploited collectively or distributed in exchange for a price.

The provision expressly excludes some types of works from the scope of the exception. This is the case of works that are made available to the public by wired or wireless systems and accessible by the user at anytime from anywhere, electronic databases or computer programs.

The exception is subordinated to the payment of fair compensation, which is regulated under **Article 25 TRLPI**. It applies to the reproduction of works disseminated in the form of books or similar publications, phonograms, videograms, and visual or audio-visual supports, made by means of non-typographic technical equipment.

The determination of the equipment, devices and material supports which are subject to the payment of fair compensation, the amounts that debtors shall pay to rightholders and the distribution of sums so obtained are defined by a separate instrument.

The Spanish private copy exception is less flexible than the EU standard, for it explicitly excludes certain types of works from its scope. More restrictive are also its operational conditions, as it does not allow making copies with the assistance of third parties.

[894] For related case law, see: SAN, 8 of June 2020 (Audiencia Nacional. Contentious-Administrative Chamber, Section 7). and STS 4505/2007 - ECLI: ES:TS:2007:4505.

Article 34.2 TRPLI allows the reproduction of a non-electronic database, as long as such use is made for private purposes, in line with **Article 6(2)(a) Database. Article 135.1 (a) TRPLI** adopts verbatim **Article 9(a) Database**.

3.1.2.26.3 QUOTATION

Article 5(3)(d) InfoSoc is transposed in **Article 32.1 TRLPI**, in force since 2006 and amended in 2019.[895] It allows quoting fragments of literary, musical and audiovisual works already made lawfully available, as well as isolated figurative or photographic works, for purposes of analysis, commentary or critical judgement, or for teaching or research purposes, to the extent justified by the purpose. The name of the author and the source shall be indicated. The law considers periodical compilations made in the form of reviews or press reviews as quotations, except for compilations of journalistic articles which consist essentially of their mere reproduction, and if such activity is carried out for commercial purposes. In the latter case, rightholders are entitled to equitable remuneration. However, such uses can be expressly excluded by rightholders.

The reproduction, distribution, or public communication, in whole or in part, of isolated journalistic articles in press reviews distributed within an organization is subject to the authorization of rightsholders.

Unlike the EU model, the Spanish quotation exception narrows down the type of works that can be quoted and, for some of them, it adopts a less flexible approach than the EU counterpart, for it limits the amount of works that can be quoted. On the other hand, the Spanish provision offers a greater flexibility by expanding the allowed purposes of quotation.

Yet, **Article 132 TRLPI** extends the scope of the exceptions and limitations enlisted within Title III Chapter 2 (Articles 31-40), however with the exception of Article 37 TRLPI, to the objects of related rights.

3.1.2.26.4 PARODY, CARICATURE, PASTICHE

Under Article **39 TRLPI,**[896] a parody of a disclosed work is permitted, provided there is no risk of confusion or negative interference with the original work or its author. In force since 1996, the Spanish provision is less flexible than the corresponding **Article 5(3)(k) InfoSoc,** for it imposes additional operational conditions. Unlike the EU model, the Spanish exception does not expressly cover uses for pastiche or caricature.

Article 132 TRLPI extends the scope of the exceptions and limitations enlisted within Title III Chapter 2 (Articles 31-40), however with the exception of Article 37 TRLPI, to the objects of related rights.

[895] For related case law, see: STS 426/2013 - ECLI: ES:TS:2013:426. On the interpretation of "quotation", see, more recently: ECLI: ES: APM:2019:8211RES:392/2019 REC:1094/2018.
[896] For related case law, see: SAP Barcelona 287/2020, 12 February 2020; SJMer nº 6, 13 January 2010, Madrid; SAP Barcelona, 10th October 2003; SAP Barcelona, 24 April 2002; SAP Madrid, 2 February 2000.

The Royal Decree n. 24/2021 transposing the CDSM Directive did not implement **Article 17(7) CDSM** with a special provision regulating exclusively the online parody. Instead, it introduced in **Article 70** of the same Decree, entitled "pastiche", which allows the transformation of d works by taking certain characteristic elements and combining them in such a way as to give the impression of an independent creation. The exception is subordinated to the condition that the pastiche does not create risk of confusion with the original work, and it does not harm the original work or its author. Furthermore, it is expressly stated that the exception also to non- digital uses.

The scope of (online) parody is covered by **Article 32.1 TRPLI** (quotation).

3.1.2.26.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.26.5.1 PRIVATE STUDY

Article 5(3)(n) InfoSoc is transposed in **Article 37.3 TRPLI**, in force since 2006.[897] It permits museums, archives, libraries, newspaper and periodicals archives, sound or film archives, which are public or belong to non-profit cultural, scientific or educational entities of general interest, or to educational institutions integrated into the Spanish educational system to communicate to the public works in their collections or make them available to their patrons for their research purposes, on dedicated terminals installed for this purpose within their premises. Rightholders are entitled to receive an equitable remuneration.

The exception does not apply when the use is covered by specific purchasing or licensing conditions.

Compared to the corresponding EU provision, the Spanish private study exception features a greater level of flexibility in the array of beneficiaries.

3.1.2.26.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 5(3)(a) InfoSoc is implemented in Spain in a rather articulated manner, featuring some elements of great flexibility and traits introducing some more restrictive aspects than the EU model. In particular, the Spanish provision is more flexible than the EU counterpart with regard to the permitted acts. Still, this expansion is contradicted by a limited approach to the type and amount of work that can be used, and by confining the exception to a detailed array of beneficiaries. Some uses are allowed upon rightholders' compensation.

Article 32.3 TRLPI, introduced in 2015, allows teachers in educational establishments integrated within the Spanish education system, and staff of universities and public research bodies to reproduce, distribute and publicly communicate small fragments of (already disseminated) works and isolated figurative or photographic works, as long as these acts do not have a commercial nature and are performed solely for teaching or research purposes. A small fragment of a work is understood as an extract or a quantitatively insignificant portion

[897] For related case law, see: SAN 1337/2020 - ECLI: ES:AN:2020:1337 Decision Central Administrative Contentious Court n. 9 Madrid, 19 of November 2019.

of the work as a whole. The use cannot go beyond the extent necessary for the purpose. The exception covers both face-to-face and distance learning.

Special rules apply in the case of textbooks, university manuals or similar publications.[898] Here, reproduction or public communication is allowed if this does not involve making the work or its fragments available to recipients. In these cases, a location from which the students can legally access the protected work must be expressly included. Copies of works can be made and distributed exclusively among collaborating research personnel of each specific research project. The use cannot go beyond the extent necessary for the project.

The name of the author and the source shall be included, unless proven impossible. When the above conditions are met, no remuneration to rightholders is due.

Article 32.4 TRPLI allows the partial reproduction, distribution and public communication of works or publications by the personnel of universities or public research centres, performed through the university or centres' means and instruments for the exclusive purpose of illustration for teaching or scientific research. The acts shall be confined to one chapter of a book, a single article in a journal, or up to 10 per cent of the total of the work. It is irrelevant whether the copy is generated through one or several acts of reproduction.

Copies can be distributed exclusively among students and teaching or research staff of the same centre where the reproduction is made, through the internal and closed networks to which only such beneficiaries have access or within the framework of a distance education program offered by said beneficiaries.

Absent a specific agreement between rightholders and the university or research body, and unless the latter holds the corresponding exclusive rights over the works partially reproduced, distributed and publicly communicated, rightholders have a non-waivable right to receive equitable remuneration, which shall be paid to collecting societies.

Article 32.5 TRPLI excludes from the scope of the exception music sheets, single use works (e.g. exercise books) or compilations of fragments of works, and figurative and photographic works.

Article 34.2 (b) TRPLI implements verbatim **Article 6(2)(b) Databases** and **Article 135.2(b)** does the same for **Article 9(b) Database.**

3.1.2.26.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Along with the exception illustrated above, Spain has implemented **Article 5 CDSM** with Royal Decree n. 24/2021, which introduces **Article 68**, entitled "use of works and other subject matter in digital and cross-border educational activities".

[898]To this end, the law defines a textbook, university manual or similar publication shall be understood to mean any publication, printed or likely to be published, intended to be used as a resource or material by teachers or students in regulated education to facilitate the teaching or learning process.

Unlike the EU counterpart, the Spanish provision also covers the acts of distribution by digital means of works and other subject matter for purposes of illustration for teaching. However, the Spanish exception applies only if the acts are carried out by teachers operating in centres integrated into the Spanish educational system and by the staff of universities and research bodies.

3.1.2.26.5.4 TEXT AND DATA MINING

Articles 3-4 CDSM and their text and data mining exceptions have been introduced by Royal Decree n. 24/2021 in **Article 67** of the same Decree.

The Spanish transposition of **Article 3 CDSM** closely follows the standards therein, except for it also covers the translation, adaptation, arrangement and other transformation of computer programs. As to the transposition of **Article 4 CDSM**, the only divergent feature is that the national provision imposes additional conditions for conserving the results obtained. Pursuant to the law, reproductions and extractions may be kept for as long as necessary to fulfil the text and data mining, in full compliance with the principles of legality and the rules on the protection of personal data and the guarantee of digital rights.

3.1.2.26.6 USES FOR INFORMATORY PURPOSES

3.1.2.26.6.1 PRESS REVIEW AND NEWS REPORTING

Article 5(3)(c) InfoSoc finds correspondence in **Article 33.1 TRLPI**, in force since 1996.[899] It allows the reproduction, distribution, and public communication of works and articles on current affairs published by mass media or any other similar means, except when the rightholder has reserved these rights. The author and the source shall be mentioned, and the exception is subordinated to the payment of the remuneration agreed with the rightholder or, absent an agreement, an equitable remuneration.

The Spanish exception features more stringent conditions than the EU counterpart, for it requires compensation for the uses. At the same time, it expands the scope of the permitted acts to cover the acts of distribution.

Article 132 TRLPI extends the scope of the exceptions and limitations enlisted within Title III Chapter 2 (Articles 31-40), however with the exception of Article 37 TRLPI, to the objects of related rights.

3.1.2.26.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc finds regulation in **Article 33.2 TRLPI**, in force since 1996. It permits the reproduction, distribution, and public communication of lectures, speeches, reports to the courts and other works of the same nature that have been given in public, for the purpose of reporting on current events, except for speeches made at parliamentary or public

[899] For related case law, see: AAP Madrid 76/2010, of 21 May 2010; SAP Barcelona 118/2010, of 3 May 2010.

corporation meetings. The right to publish such works in a collection is reserved to the author.

Compared to the EU counterpart, the corresponding national provision features a greater degree of flexibility in the permitted acts, but it is slightly less flexible in the kind of works that can be used. However, it is worth noting that **Article 132 TRLPI** extends the scope of the exceptions and limitations enlisted within Title III Chapter 2 (Articles 31-40), however with the exception of Article 37 TRLPI, to the objects of related rights.

3.1.2.26.7 USES BY PUBLIC AUTHORITIES

3.1.2.26.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 31 *bis* TRLPI[900] was introduced in 2006 to implement **Article 5(3)(e) InfoSoc.** It allows the reproduction, distribution, and public communication of works for purpose of public security or the proper functioning of administrative, judicial or parliamentary proceedings. **Article 132 TRLPI** extends the scope of the exceptions and limitations enlisted within Title III Chapter 2 (Articles 31-40), however with the exception of Article 37 TRLPI, to the objects of related rights.

Article 34.2(c) TRPLI extends the same rule to publicly available databases, and **Article 135(c) TRPLI** to sui generis databases.

3.1.2.26.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 38 TRLPI[901] dispenses from authorization of the author the performance of musical works at official State and public administration events and religious ceremonies, provided that the public can attend free of charge. The exception applies only if the artists involved do not receive specific remuneration for their performance. This provision has been in force since 1996 and corresponds to **Article 5(3)(g) InfoSoc**. It features less flexibility than the EU model, for it narrows the type of acts and works covered. It also imposes additional operational conditions. **Article 132 TRLPI** extends the scope of the exceptions and limitations enlisted within Title III Chapter 2 (Articles 31-40), however with the exception of Article 37 TRLPI, to the objects of related rights.

3.1.2.26.8 SOCIALLY ORIENTED USES

Spanish copyright law does not feature an explicit implementation of **Article 5(2)(e) InfoSoc**, or other provisions addressing socially oriented uses, other than the exception related to official events and religious ceremonies.

[900] For related case law, see: STSJ Castilla-La Mancha 239/2017, 20 of October 2017.
[901] For related case law, see: SAP Madrid 257/2016, 27 of Junio 2016; SAP Valencia 496/2011, 23 of December 2011; SAP Albacete 262/2010, 20 of December 2010; SAP Sevilla 122/2010, 15 of March 2010.

3.1.2.26.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.26.9.1 PUBLIC LENDING

In line with **Article 6 Rental, Article 37.2 TRLPI**, in force since 2006 and as amended in 2007 and 2019,[902] allows museums, archives, libraries, newspaper and film libraries that are publicly owned or belong to non-profit cultural, scientific or educational institutions of general interest, or to educational institutions integrated into the Spanish education system, to lend the works in their collection to the public. Rightholders are entitled to a remuneration, managed through CMOs collective management bodies, in the amount determined by Royal Decree or Provincial Councils. Publicly owned establishments serving municipalities with less than 5,000 inhabitants, as well as libraries of educational institutions integrated into the Spanish education system, are exempted from this obligation.

3.1.2.26.9.2 PRESERVATION OF CULTURAL HERITAGE

Royal Decree n. 24/2021 implements in **Article 69** the exception envisaged in **Article 6 CDSM.** The Spanish transposition closely follows the EU model, except for it also makes explicit that copies can be made in the necessary quantity and at any time during the life of a work, as long as they do not extend beyond the necessary for the purpose of conservation.

A greater degree of flexibility than the EU model is featured in the national provision, for it explicitly allows the acts of reproduction made by third parties acting on behalf of cultural heritage institutions and under their responsibility.

The **TRLPI** features two other flexibilities covering preservation purposes.

Article 40 TRLPI (1996)[903] stipulates that if on the author's death or declaration of death, his beneficiaries exercise their right not to disclose the work, in a manner that violate the Constitution, the judge may order the appropriate measures at the request of the State, the Autonomous Communities, local corporations, public cultural institutions or any other person with a legitimate interest.

Article 37.1. TRLPI, in force since 1996 and amended in 2006, [904] allows museums, libraries, sound and film libraries, newspaper libraries or archives that are publicly owned or integrated into institutions of a cultural or scientific nature to reproduce works exclusively for research or conservation purposes. The act shall be for non-profit purposes.

3.1.2.26.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

None reported.

[902] For related case law, see: STS 2040/2016 - ECLI:ES:TS:2016:2040; STS 2367/2016 - ECLI:ES:TS:2016:2367.
[903] For related case law, see: SJMer nº 2 30/2015, 30 of January 2015, of Palma.
[904] For related case law, see: STS 4505/2007 - ECLI:ES:TS:2007:4505.

3.1.2.26.9.4 ORPHAN WORKS

Article 37 *bis* TRLPI, in force since 2014, transposes the **OWD** and its exception regulated under **Article 3 OWD** by providing the same conditions, beneficiaries, uses and definitions therein.

3.1.2.26.9.5 OUT-OF-COMMERCE WORKS

Royal Decree n. 24/2021 transposes in **Article 71** the exception contained in **Article 8(2) CDSM** by providing for the same conditions and permitted uses therein. The definition of out-of-commerce- works is in line with the EU counterpart.

3.1.2.26.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The **TRLPI** featured in **Article 31*bis* paragraph 2** an exception allowing the reproduction, distribution and communication to the public of works for the benefit of persons with disabilities, providing for the same conditions envisaged in **Article 5(3)(b) InfoSoc.**

This provision was amended and integrated by Law n. 2/2019 of 1 March 2019, which transposed into the Spanish law the **Marrakesh Directive**. The flexibility is now organically regulated under the new **Article 31*ter* TRPLI.**

Article 31*ter*.1 TRPLI corresponds to **Article 5(3)(b) InfoSoc.** The Spanish exception also covers the acts of distribution. The operational conditions are in line with the EU model.

Article 31*ter*.2 TRPLI implements the exception contained in **Article 3 Marrakesh** by following the standard therein. The addressees of the exception are authorized entities and beneficiary persons, which are also defined following **Articles 2(2)** and **2(4) Marrakesh.**

3.1.2.26.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

None reported.

3.1.2.26.12 THREE-STEP TEST

An explicit and verbatim reference to the three-step test as envisaged in **Article 5(5) InfoSoc** can be found in **Article 40*bis* TRLPI,** in force since 1998.

3.1.2.26.13 PUBLIC DOMAIN

3.1.2.26.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 13 TRLPI (1996) [905] excludes from protection legal or regulatory provisions and their drafts, decisions of courts and tribunals, acts, agreements, deliberations and opinions of public bodies, as well as official translations thereof.

[905] For related case law, see: SAP Asturias 925/2020, 9 of June 2020; SJMer nº 3 226/2019, 10 of September 2019, Gijón; SAP Madrid 435/2017, 29 of September 2017.

Spain has implemented **Article 14 CDSM** with **Article 72** Royal Decree n. 24/2021. This provision excludes from copyright protection any material resulting from an act of reproduction of work of visual art that has fallen into the public domain. The exclusion applies as long as the resulting material is not original.

3.1.2.26.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.26.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

The **TRLPI** features mandatory collective management for the right of cable re-transmission (**Article 20.4 TRLPI)**, resale right (*droit de suite*) to authors and author's beneficiaries of art works (**Article 24 TRLPI)**, the compensation for private copy (**Article 25 TRLPI)** and the equitable remuneration to authors of press articles used in commercial press-clipping services (**Article 32.1 TRLPI**), the statutory license to higher education institutions and public research centres (**Article 32.4 TRLPI**), the agreed remuneration to authors of works on current events disseminated by media, when used by other media (**Article 33.1 TRLPI**), the equitable remuneration for public lending of works (**Article 37.1 TRLPI**), the equitable remuneration for making available via specialized terminals in libraries' premises (**Article 37.3 TRLPI**), the equitable compensation for the use of orphan works when the status of orphan works ends (**Article 37*bis* TRLPI**), the equitable remuneration for rental of audio-visual recordings and phonograms (**Article 90.2 TRLPI**), the remunerations to co-authors of audio-visual works for communication to the public (**Articles 90.3, 90.4 and 90.6 TRLPI**), equitable remuneration to performers for the presumption of transfer of the right of making available to the producers (**Article 108.3 TRLPI**), the equitable remuneration to performers (shared with producers) for the public communication of phonograms and of audio-visual recordings (**Article 108.4** and **108.5 TRLPI**), the equitable remuneration to performers for the rental of phonograms and of audio-visual recordings (**Article 109.3 TRLPI)**, the additional annual remuneration to performers (**Article 110 bis TRLPI)**, the equitable remuneration to the producers of phonograms for the communication to the public of phonograms (**Article 116.2 TRLPI**), the remuneration to the producers of audio-visual recordings for the communication to the public of audio-visual recordings, subject to mandatory collective management **(Article 122.2 TRLPI).**

It shall be noted that Spain previously envisaged a mandatory collective management scheme in favour of press publishers for news aggregation (former **Article 32(2) TRPLI**). Royal Decree n. 24/2021 transformed this exception in the neighbouring right of press publishers, regulated under **Article 129 *bis* TRPLI**.

Furthermore, Royal Decree n. 24/2021 introduced **Article 71**, which implements the ECL scheme provided by **Article 8(1) CDSM** by following the EU model in all its features.

3.1.2.26.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.26.15.1 FUNDAMENTAL (USERS') RIGHTS

Article 20(1)(b) of the Spanish Constitution, which protects literary, artistic and scientific creation, must be understood as the constitutional enshrinement of the "right to freedom of creation" or the "right to free intellectual creation", which implies the protection of intellectual property, in line with Article 1 of the TRLPI, which is fully drafted in accordance with the aforementioned constitutional provision. Freedom of creation is a reference to intellectual property, while freedom of expression is regulated in other sections of Article 20 of the Constitution.

In this direction, the Supreme Court, in a 2015 decision,[906] stated that copyright is a fundamental right and that "(…) [*A]lthough in some international human rights texts this right is not recognized as an autonomous right with respect to freedom of expression and information, in our legal system it is an autonomous right"*.

Such autonomy has been declared by the Constitutional Court. In the decision no.51 of 14 April 2018, the Court ruled that "the main objective of this right is to protect the freedom of the creative literary process itself, by keeping it immune from any form of prior censorship (Article 20.2) and protecting it from any illegitimate interference from public authorities or private individuals".

While under Spanish law there is no reference to "user rights", the TRPLI mentions "public interest" in several provisions, such as **Article 31*ter*** on the disability exception and **Article 37*bis*** on orphan works.

3.1.2.26.15.2 CONSUMER PROTECTION

Article 25.4 TRLPI (levy for private copy), which regulates the determination of equipment, apparatus and material support subject to the payment of fair compensation, establishes that prior to the approval of the compensation, the Council of Consumers and Users will be consulted, and the First Section of the Intellectual Property Commission will issue a mandatory report.

Article 25.7 TRLPI (exceptions to the payment of the levy for private copy), includes among the beneficiaries, legal or natural persons acting as final consumers. A similar exemption is enshrined in **Article 25.8 TRPLI**, which rules that legal or natural persons not exempted from the payment of the compensation may request reimbursement of the compensation when they act as final consumers.

Provisions under RPLPI may protect consumers who are lawful users from being inhibited access to protected works by technical protection measures. As mentioned above, Article 197.2 TRLPI, makes it possible for lawful users and entities acting for the defence of

[906] STS 4000/2015 - ECLI:ES:TS: 2015:4000.

consumers to file a court complaint if, upon request, the rightholder denies or fails to give them access to works protected by TPM to benefit from specific exceptions and limitations.

While no other reference to consumer protection law as a source of balancing tools in the Spanish copyright landscape has been reported, it can be added that Spain has implemented Directive 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services, and Directive 771/2019 on certain aspects concerning contracts for the sale of goods with Real Decree n. 7 of 27 April 2021.[907]

3.1.2.26.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.26.15.4 OTHER INSTRUMENTS

None reported.

3.1.2.27 SWEDEN

The Swedish Copyright Act (*Upphovsrättslagen*, URL),[908] in force since 1960 and last amended in 2022,[909] implements several copyright flexibilities introduced by EU Directives, excluding the exceptions envisaged in the CDSM Directive, which still need to be transposed into Swedish law. Despite this, Sweden already includes certain uses for preservation purposes. Moreover, Sweden broadly uses ECLs, including for digital illustration for teaching. However, explicit exceptions for reprography, parody, private study, and an explicit reference to the three-step-test are absent in the law.

One remarkable aspect of the Swedish E/L is their often-overlapping function, as is the case with reprography and private copy, or incidental inclusion, which is broadly intertwined with uses for press review and reporting of current events. Several exceptions feature elements of rigidity, combined with others of flexibility if compared to the EU standard (e.g., incidental inclusion, quotation, uses of public speeches and lectures). The so-called "freedom of panorama" exception is featured in a rather restrictive manner, and so has been the approach taken by the judiciary.

[907] Official publication: Boletín Oficial del Estado (B.O.E); Number: 101/2021; Publication date: 2021-04-28 ; Page: 49749 to 49924.
[908] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.
[909] Lag om ändring i lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk Utfärdad den 19 maj 2022. This amendment does not concern the implementation of the CDSM Directive.

3.1.2.27.1 TEMPORARY, DE MINIMIS AND LAWFUL USES

3.1.2.27.1.1 TEMPORARY REPRODUCTION

Article 11a URL, in force since 2005, implements **Article 5(1) InfoSoc** by adopting the same conditions provided therein.[910] By explicit reference, temporary copies of computer programs or compilations are excluded from the scope of this exception.

The scope of this provision is extended to performances by **Section 45(3) URL**, to audio and audiovisual recordings by **Section 46(3) URL**, to broadcasts by **Section 48(3) URL**, to sui generis database rights by **Section 49(3) URL**, and to photographs by **Section 49a(4) URL**.

It is worth noting that until the CJEU's ruling in Case C-527/15 *Stichting Brein* v *Filmspeler* the temporary copying limitation also applied to unlawful copies (which expressly follows from preparatory works, Regeringens prop. 2004/05:110, p. 97).

3.1.2.27.1.2 EPHEMERAL RECORDING

Article 5(2)(d) InfoSoc is regulated under **Article 26e URL**, in force since 1994 and amended in 2020. The Swedish ephemeral recording is flexible for it expands the purposes and conditions in which the recording is allowed. It also benefits other non-broadcasting organizations, provided the recording is made within the specified purpose established in the law.

The provision states that when broadcasting organizations are entitled to broadcast a work, this also entitles them to record that work on a device from which it can be reproduced. The recording is allowed only for their own broadcasting, on a few occasions, and during a limited time. The recording is also allowed if made to secure evidence concerning the content of the broadcast, or when aimed at permitting a governmental authority to exercise supervision over broadcasting activities.

When the law imposes on broadcasting organizations, identified by Chapter 5, section 3 of the Regulation of the Freedom of the Press and Freedom of Expression Act (SFS 1991:1559), the obligation to record a program which is provided as TV on-demand, said organizations are allowed to make copies of works which are included in the program to secure evidence of the content or in order to allow governmental authorities to supervise their activities. The provision allows the preservation of the recordings in case they have documentary value through their deposit at the National Library of Sweden.

As per the amendment of 2020, a government authority whose task is to supervise advertising in radio and television broadcasts and programs may reproduce works contained therein to the extent justified by the purpose of supervision.

[910] See in this regard: Svea Court of Appeal, case no T 2028-08, judgment delivered 19 May 2014 (*Infopaq*). Essentially identical circumstances and the same parties as in the CJEU *Infopaq* case (which came from Denmark). The Court held that 11 a § URL applied (applying C-5/08 *Infopaq* which came back in the meantime).

The scope of this provision is extended to performances by **Section 45(3) URL**, to audio and audiovisual recordings by **Section 46(3) URL**, to broadcasts by **Section 48(3) URL**, to sui generis database rights by **Section 49(3) URL**, and to photographs by **Section 49a(4) URL**.

3.1.2.27.1.3 INCIDENTAL INCLUSION

Article 20a URL, in force since 2005, implements **Article 5(3)(i) InfoSoc.** It allows to make, disseminate, display and communicate to the public copies of works of art by means of a film or television program, provided that the inclusion of the work is only incidental to the content of the film or the television program. Such uses are allowed only if the master copy of the work has already been made public or the author provide it. The exception also covers works of art that appear in the background or form an insignificant part of an image.

In a ruling of 2010, the Swedish Supreme Court held[911] that the inclusion on a webpage of a screenshot of another webpage which included photographs of works of art, as part of a customer reference, did not constitute incidental inclusion, concluding *inter alia* that the legislator did not intend the term 'image' under Article 20a to include webpages.

The Swedish incidental inclusion exception is restrictive compared to the EU model, for it limits its applicability to certain types of works. While it features a greater flexibility in the permitted acts, this flexibility is counterbalanced by a specific list of means of use.

The **URL** contains other sector-specific provisions regulating incidental inclusions of other subject matter into another work, which precede the InfoSoc Directive. **Article 25 URL** (1994) allows the reproduction of works that are seen or heard in a daily event if the act is made for informing about that event by means of radio, television, direct transmission or film. However, the works may only be reproduced to the extent necessary to convey information. **Article 25a URL** (1997) extends the exception to the reproduction of extracts of works that are seen or heard in the course of a television broadcast.

3.1.2.27.1.4 ACTS NECESSARY TO ACCESS AND NORMAL USE BY LAWFUL USER

Under the URL, access and normal use by lawful users are permitted with regard to computer programs and databases.

Articles 26g(5) and (3) URL, in force since 1994 and amended in 1997, transpose **Article 5(1) Software** by making explicit that copies cannot be used for other purposes, nor when the right to use the program has expired.

Whereas **Articles 26g (2) and (6) URL** implement the mandatory exception contained in **Article 5(2) Software** by following the standard therein**, Articles 26g (4) and (3) URL** does the same for **Article 5(3) Software.** The exception provided in **Article 6 Software** is transposed *verbatim* in **Article 26h URL.**

[911] T3440-08, judgment delivered 5 March 2010 (Screenshot on webpage containing photographs); alt. citation NJA 2010 s. 135.

In a ruling of 2018, the Swedish Supreme Court[912] held that passive storage of a computer program, not involving reproduction, after the expiration of the licence did not constitute copyright infringement. The Supreme Court concluded that neither the Copyright Act nor the Computer Programs Directive obliged a user to destroy a back-up / user copy. Reference was made to the CJEU case C-128/11 *UsedSoft* as an example where a party may be required to destroy or make unusable copies of programs, but the circumstances were distinguished.

With regard to databases, under **Article 26g (5) URL,** lawful users are allowed to carry out acts of reproduction that are necessary for the access and normal use of the work, in line with **Article 6(1) Database. Article 49 URL** implements **Article 8(1) Directive.**

Sweden regulates under **Article 52(f) URL** the provision permitting the otherwise prohibited circumvention of technical protection measures (TPMs), in line with **Article 6(4) InfoSoc.**

3.1.2.27.1.5 FREEDOM OF PANORAMA

Article 5(3)(h) InfoSoc is transposed in **Article 24(1) URL**. The provision has been in force since the adoption of the Act in 1960 and was amended in 2005. It allows the free depiction (reproduction) of works of art and buildings permanently located in public spaces.

Significantly, the Swedish Supreme Court [913] interpreted restrictively the meaning of "depict" (*avbilda*) under Article 24(1) in light of the three-step test and excluded on this basis that Wikimedia could use this exception to make available to the public photographs of works of art permanently located in public places.

The Swedish exception is more restrictive than the EU model with regards to the permitted uses and has been interpreted so by the judiciary.

3.1.2.27.2 PRIVATE COPY AND REPROGRAPHY

3.1.2.27.2.1 REPROGRAPHY

Under the **URL** there is no specific reprography provision. Sector-specific provisions, including digital uses, instead govern reprography.[914]

Reprography may be covered within the private copying exception, and by extended collective licensing (ECL) schemes, as will be detailed in the section on special licensing schemes below.

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[912] T3440-08, judgment delivered 5 March 2010 (Screenshot on webpage containing photographs); alt. citation NJA 2010 s. 135. T 1738-17, judgment delivered 25 September 2018 (Storage of computer program after licence expiry) alt. citation NJA 2018 s. 725.

[913] Case Ö849-15 of 4 April 2016 (*Wikimedia,* NJA 2016, s. 212).

[914] See specific uses by cultural heritage institutions, education (Article 16 URL), infra. Other similar relevant sector-specific provisions are found under Article 45 (3) URL for performances, Article 46 (3) URL for sound and video recordings, Article 49(3) URL for sui-generis databases and Article 49a(4) URL for non-original photographs.

3.1.2.27.2.2 PRIVATE COPY

Article 12 URL, lastly amended in 2005, transposes **Article 5(2)(b) InfoSoc**.

It allows individuals to make copies of works published or otherwise already lawfully made available to the public for private use only.[915] In respect of literary works, copies can only be made of limited parts or of entire works of limited size. The copies may not be used for purposes other than private use.

The private copy exception does not apply to building architectural works, making copies of computer programs or making digital copies of compilations. Similarly excluded from the scope is making copies through third parties of a musical or cinematographic work, useful articles, sculptures, and other works of art.

The exception application is also excluded when the original work used for reproduction was unlawfully acquired or accessed.

The scope of this provision is extended to performances by **Section 45(3) URL**, to audio and audiovisual recordings by **Section 46(3) URL**, to broadcasts by **Section 48(3) URL**, to sui generis database rights by **Section 49(3) URL**, and to photographs by **Section 49a(4) URL**.

According to **Article 26k URL,**[916] rightholders are entitled to fair remuneration to be paid by manufacturers, sellers and importers of devices on which sound or moving images may be recorded and which are specifically designed for making copies of works for private use.

3.1.2.27.3 QUOTATION

Article 22 URL regulates the quotation exception. The Swedish provision entered into force with the adoption of the Act in 1960 and was amended in 1994; thus, it precedes **Article 5(3)(d) InfoSoc.**

It allows the quotation of works that have already been published or made lawfully available to the public. The exception is subject to compliance with good practice. The quoted amount of work should be limited to the extent justified by the purpose.

Compared to the EU counterpart, the Swedish exception is less flexible, for it limits the amount of work that can be used. On the other side, unlike the EU rule, the corresponding national rule does not require acknowledgment of the source.

The scope of Section 22 URL is extended to performances by **Section 45(3) URL**, to audio and audiovisual recordings by **Section 46(3) URL**, to broadcasts by **Section 48(3) URL**, to sui generis database rights by **Section 49(3) URL**, and to photographs by **Section 49a(4) URL.**

The scope of Section 23 is extended to photographs as well, by **Section 49a(4) URL.**

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[915] It is to be noted that since the implementation of the InfoSoc Directive the provision applies only to lawful copies. Case law post-InfoSoc exists on private copying levies but does not affect the scope of this provision (levies are governed by different provisions).

[916] For related case law, see: NJA 2017 s 1164 (*Musikmobilen* / *W715 Walkman*);NJA 2016 s 490 (*iPhone*); NJA 2017 s 1164 (*Musikmobilen* / *W715 Walkman*); NJA 2017 1164 (*Musikmobilen* / *W715 Walkman*).

3.1.2.27.4 PARODY, CARICATURE, PASTICHE

There is no specific parody provision in Sweden. Explicit implementation of **Article 5(3)(k) InfoSoc** was not considered necessary during the Swedish transposition of the Directive.

In accordance with preparatory works of the URL, parodic uses have been generally covered by the "*freie Benutzung*" provision contained in Article 4(2) URL, which allows the translation or adaptation of works into another literary or artistic form.

To align Swedish copyright law with the EU acquis and the indications provided by the CJEU in *Deckmyn,* in the *Metal Pole* case (2019), the Patent and Market Court of Appeals (PMÖD) excluded the need for the parody to be original in order to be covered by the exception. The decision, upheld by the Supreme Court, was later confirmed by the PMÖD decision in the *Swedish tiger*, [917] which largely followed the Deckmyn doctrine, thus introducing via case law the parody exception within the tangles of Swedish copyright along the lines envisaged by the EU legislator.

The Swedish legislator appears not to have the intention to fill in the gaps and introduce a general parody exception in response to the evolution in case law. It is quite telling that in the most current version tabled by the Swedish Ministry of Justice in October 2021 (Ds 2021:31), the Swedish implementation of the CDSM Directive will introduce, under Article 52(p) URL, an exception for quotation, criticism, review, and for the purpose of caricature, parody or pastiche, but only limited to users of online content sharing services, in line with a strict and slavish transposition of **Article 17(7) CDSM.**

3.1.2.27.5 USES FOR TEACHING AND RESEARCH PURPOSES

3.1.2.27.5.1 PRIVATE STUDY

Article 5(3)(n) InfoSoc has not been explicitly implemented, but this use is covered by the provision relating to private copy. The scope of this provision is extended to performances by **Section 45(3) URL**, to audio and audiovisual recordings by **Section 46(3) URL**, to broadcasts by **Section 48(3) URL**, to sui generis database rights by **Section 49(3) URL**, and to photographs by **Section 49a(4) URL**.

3.1.2.27.5.2 ILLUSTRATION FOR TEACHING OR SCIENTIFIC RESEARCH

Article 14 URL (1993) allows teachers and students to record their own performances of works, when such recordings are made and used exclusively for educational purposes.

Furthermore, **Article 18 URL** (1993, amended in 2005) permits the reproduction of smaller portions of literary or musical collection of works (i.e., works from a large number of authors) for educational purposes, as long as five years from the publication have elapsed, and such reproduction does not have a commercial nature. Works of art may be reproduced in conjunction with the text if five years have elapsed since the work was published. Works

[917] Case n. B 12315-20, 23 June 2021.

published specifically for educational use are excluded from the scope of the exception. This use is made subject to remuneration due to the author.

If compared to the corresponding **Article 5(3)(a) InfoSoc, Article 18 URL** not only limits the amount and types of work that can be used, but also imposes more restrictive operational conditions (e.g., compensation, cut-off dates).

Article 49(3) URL extends the above exception to cover also uses of original and *sui generis* databases, for illustration for teaching or scientific research, thus, adopting a more restrictive approach than **Articles 6(2)(b)** and **Article 9(b) Database.**

This use is also covered by rules related to extended collective licensing (ECL) arrangements.[918] In this context, **Article 42c URL** allows making copies of published works for teaching purposes if there is an extended collective licence (ECL) available[919] and to the extent reproductions are made during activities covered by the ECL agreement.

3.1.2.27.5.3 DIGITAL USE FOR ILLUSTRATION FOR TEACHING

Already before the entry into force of the CDSM Directive, digital uses for illustration for teaching have been covered under **Article 42(c) URL** on ECL for teaching uses.

As of today, the proposal tabled by the Swedish Ministry of Justice to implement the CDSM Directive, published in October 2021 (Ds 2021:31), contains a provision transposing **Article 5, CDSM** which closely follows the EU model. However, the application of the exception is excluded when an ECL covering such uses and works is easily available on the market.

3.1.2.27.5.4 TEXT AND DATA MINING

The Swedish Copyright Act currently in force does not contain a specific text and data mining exception. The current ECL arrangement for the university sector with *Bonus Copyright Access* appears to be limited to teaching activities and basic uses, thus, not to include text and data mining expressly. However, upon fulfilment of certain conditions, text and data mining might fall within the scope of the exception of temporary reproduction (Article 11(a) URL).

The draft proposal of the Swedish Ministry of Justice implementing the CDSM Directive, published in October 2021 (Ds 2021:31), contains a provision transposing **Articles 3 and 4 CDSM**, which features no divergence from the EU standard.

3.1.2.27.6 USES FOR INFORMATORY PURPOSES

3.1.2.27.6.1 PRESS REVIEW AND NEWS REPORTING

The Swedish Copyright Act features several provisions falling under the umbrella of **Article 5(3)(c) InfoSoc.**

[918] Specific ECL arrangement for use for teaching are envisaged under Article 42c URL – see below.
[919] Currently ECL arrangement for the university sector is in place under *Bonus Copyright Access.*

Article 23(3) URL, in force since 1994 and amended in 2005, allows the use of published works in a newspaper or a periodical, in connection with the reporting of current events, provided that the work has not been created exclusively with the purpose of being conveyed in such a publication. Other allowed uses include the permission to include excerpts of published works in a scientific presentation which has not been prepared for commercial purposes. The exception is subordinated to the operational condition that uses are made in accordance with good practices and to the extent necessary for the intended purpose. Unlike the EU counterpart, under the national rule no acknowledgment of the source is required.

The Swedish exception is less flexible than the EU counterpart, for it excludes certain works from its scope. With regard to the requirement that the work must have been 'published', the Patent and Market Court of Appeals (PMÖD) in case PMT 722-17 of 5 October 2018 (*Facebook photos*) accepted that this condition is satisfied when the publication of photographs occurs on a Facebook page. The Court also considered that the concept of 'newspaper' also covers its website and Twitter-posts, since both are deemed an extension of the newspaper itself. This use is also covered by the already mentioned exception contained in **Article 25 URL**, referred to incidental uses of works.

Article 48(a) URL (2010) allows broadcasting companies to reproduce and rebroadcast excerpts of a television program to the extent justified by the information purpose and for a duration that is no longer than what is justified by the public interest in the event. The broadcaster may also reproduce the extract when a recording of the news program is subsequently transmitted to the public in such a way that individuals can access the recording from a place and at a time of their choice. The provision corresponds to Article **10(3) Rental.**

In a case concerning the use of images and excerpts from a video recorded on a mobile phone, showing an incident involving politicians walking with metal poles and respectively published by SVT (public broadcaster/ news agency), the Swedish Supreme Court[920] excluded the applicability of both Article 23(3) and Article 25 URL, since SVT could not prove that the images had been published, and the video excerpts had been seen or heard prior to the reporting. It is worth noting that the Court opted for a strictly literal interpretation of the two exceptions, disregarding the fact that other excerpts from the same video had already been published on the YouTube channel of the political party involved.

3.1.2.27.6.2 USES OF PUBLIC SPEECHES AND LECTURES

Article 5(3)(f) InfoSoc is transposed in **Article 26 URL**. In force since 1994 and amended in 2009, the provision allows the reproduction of oral or written statements in public debates or hearings on matters of public interest. The exception does not allow their reproduction in radio or television broadcasts. Similarly excluded is information for which there is a confidentiality obligation pursuant to Article 31, Ch. 23 of the Public Access to Information

[920] Swedish Supreme Court (HD), case T 4412-19, judgment delivered 18 March 2020 (*Mobilefilm* aka *Metal pole case*); alt. citation NJA 2020 s 293.

and Secrecy Act (SFS 2009:400). The law reserves to the author the exclusive right to publish compilations of his or her statements.

The Swedish exception features more flexibility than the corresponding EU model, for it does not require acknowledgment of the source. Conversely, the scope of the permitted acts is narrower than the EU counterpart.

3.1.2.27.7 USES BY PUBLIC AUTHORITIES

3.1.2.27.7.1 USES IN ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Article 5(3)(e) InfoSoc is regulated under the umbrella of **Article 26 URL**, related to uses of public speeches and lectures, which second paragraph also covers uses of oral or written statements when made before authorities or for reporting proceedings.

Along the same lines, **Article 26(b) URL** states that public documents shall be made available in accordance with Chapter 2 of the Freedom of the Press Act, which allows in all circumstances the use of a protected work in the interest of the administration of justice or public security.

Despite the nuances in the wording, the Swedish exception is quite well harmonized with the EU standard, except it slightly limits the type of work that can be used.

In this context, the Patent and Market Court of Appeals (PMÖD) in case PMT 4717-18 of 16 April 2018 ruled that Article 26b shall be interpreted so as to allow individual claimants, on the basis of an objective case-by-case assessment, to freely use materials covered by copyright for the purpose of using them as evidence in judicial proceedings. PMÖD referred to the CJEU decision in *Painer,*[921] which according to the Swedish Court, emphasises the broad discretion left to Member States by Article 5(3)(e) InfoSoc on the definition of public security.

At the moment of the issuance of this report, a case currently pending before PMÖD (PMFT 12151-17) is asking the Court whether the submission of evidence can constitute an act of distribution/communication to the public.[922]

Article 49(3) URL extends the above exceptions also to cover uses of original and sui generis databases, in line with **Articles 6(2)(c)** and **Article 9(c) Database.**

3.1.2.27.7.2 OTHER USES BY PUBLIC AUTHORITIES

Article 5(3)(g) InfoSoc finds correspondence in **Article 21 URL**, in force since 1994 and last amended in 2017. The provision allows the public performance of published works in a context where the performance itself does not represent the primary purpose. For the exception to apply, the admission to the performance should be free, and the event should not have a commercial purpose. The same rule applies to public performances of published works during teaching or religious services. The exception does not cover cinematographic

[921] Judgement of 1 December 2011, C-145-10, Eva-Maria Painer v Standar VerlagsGmbH and Others, ECLI:EU:C:2011:798, §101, 104.
[922] Judgement of 28 October 2020, C-637/19, *BY* v *CX,* ECLI:EU:C:2020:863.

works and scenic works, but for uses by the Swedish Parliament and all governmental and municipal authorities, only on their premises, and by means of a connection to an external network that is supplied for the purpose of satisfying the public interest in receiving information.

The Swedish exception is broader than the EU counterpart, for it does not feature a subjective limitation. At the same time, it imposes additional operational conditions absent in the EU model.

3.1.2.27.8 SOCIALLY ORIENTED USES

Apart from the exception under Article 21 URL, already listed under "other uses by public authorities", the URL currently in force does not feature any other exception corresponding to **Article 5(2)(e) InfoSoc.**

3.1.2.27.9 CULTURAL USES (ACCESS, PRESERVATION, REUSE)

3.1.2.27.9.1 PUBLIC LENDING

Article 19 URL, first codified in 1969 and last amended in 2005, permits the distribution, rental and lending of works that have been transferred with the rightholder's consent. Despite a seemingly broad exhaustion provision, Sweden has a long tradition of remunerating rightholders for public lending through a state-organised scheme.

3.1.2.27.9.2 PRESERVATION OF CULTURAL HERITAGE

Article 16 URL, as last amended in 2017, contains certain uses for preservation purposes in the benefit of CHIs.

The provision allows state and municipal archive institutions, public scientific and specialized libraries and public libraries to make copies of works, except for computer programs, for preservation, integration or research purposes. Said beneficiaries are also allowed to make copies of articles or of excerpts of articles, except for computer programs, to make them available or to loan them to individuals. However, this applies only if the lending or making available of the works in their original shall be avoided for preservation purposes. The second paragraph, added in 2017, extends those uses to other archives and libraries open to the public if the reproduction is made for preservation purposes.

The scope of this provision is extended to performances by **Section 45(3) URL**, to audio and audiovisual recordings by **Section 46(3) URL**, to broadcasts by **Section 48(3) URL**, to sui generis database rights by **Section 49(3) URL**, and to photographs by **Section 49a(4) URL**.

The draft proposal of the Swedish Ministry of Justice to implement the CDSM Directive will amend the wording of Article 16 of the Swedish Copyright Act to extend the array of

beneficiaries and to prevent contractual overridability, in line with **Article 6 CDSM.** [923] The remaining part of Article 16 will remain substantially unaltered.

3.1.2.27.9.3 SPECIFIC USES BY CULTURAL HERITAGE/EDUCATIONAL/SOCIAL INSTITUTIONS

Other than the uses mentioned in the previous section, and those referred to in orphan works, provisions allowing specific uses by cultural heritage institutions, educational or other social institutions may be found under extended collective licensing schemes, which represent the most used instrument to manage such flexibilities.

Article 42(d) URL, as amended in 2017, permits archives and libraries to make copies of works which are included in their own collections, including the making available of such works to the general public, provided there is a valid ECL. However, rightholders may reserve this right, and the ECL does not apply when a special reason is to believe that the author would oppose such exploitation.

An example of ECL in the field is the one concluded between the consortium *Digisam*, which incorporates several different cultural heritage institutions such as museums and public authorities, and *Bildupphovsrätt*, the Visual Copyright Society, to digitise collections for the purpose of their digital archiving and making available on the Internet.

3.1.2.27.9.4 ORPHAN WORKS

Article 16a-d URL, in force since 2014 and amended in 2016, transposes into the Swedish copyright framework the **OWD** by closely following the language and the standards set by the Directive.

The exception contained in **Article 6 Orphan Works** is regulated under **Article 16a URL.** The national transposition covers for the same uses with regard to orphan works, and it provides the same conditions laid in **Article 6** and **Article 1** of the Directive, except that under Swedish law to be considered a beneficiary, film and audio heritage institutions should be designated by the government to manage the national film or audio heritage. Orphan works are defined in **Article 16b URL** line with **Article 2 OWD.**

3.1.2.27.9.5 OUT-OF-COMMERCE WORKS

Generally, out-of-commerce uses are regulated by ECLs where available [924] or by contractual arrangements in specific sectors and for specific purposes. An example is the Publishing Agreement between the Swedish Publishers' Association and the Swedish Writers' Union (Förlagsavtalet mellan *Svenska Bokförläggareföreningen* och *Sveriges Författarförbund*) on publishing rights.

[923] The only amendment of this part is the addition of the word "also" so as to add other beneficiaries to those mentioned in the previous wording.
[924] See for instance Article 42d URL for archives and libraries (see "Specific uses by CHI" above).

In this respect, **Article 34 URL**, in force since the adoption of the Act in 1960 and concerning publishing contracts, contains an explicit reference to out-of-commerce works although it does not regulate them as such. It states that if the work has not been published within two years (or, if a musical work, within four years) from the date when the complete manuscript or other material has been submitted, the author may terminate the agreement and keep the compensation received, even if the delay is not attributable to the fault of the publisher. The same applies to out-of-commerce works when the publisher is entitled to publish a new edition but fails to do so within one year from the author's request to proceed. The provision does not apply to contributions to newspapers and periodicals or to 'other collections' (*andra samlingsverk,* Article 38 URL).

The draft proposal of the Swedish Ministry of Justice to implement the CDSM Directive, published in October 2021 (Ds 2021:31), introduces a new **Article 16(e)** to transpose the exception envisaged under **Article 8(2) CDSM.** The Swedish proposal is in line with the standards and conditions set by the Directive, except for it allows rightholders to reserve the rights of reproduction and communication to the public.

3.1.2.27.10 FLEXIBILITIES FOR PERSONS WITH DISABILITIES

The URL envisages provisions regulating uses for persons with disabilities in **Articles 17-17a-f URL.** These provisions have been introduced and have amended the existing **Article 17 URL** in 2018 following the transposition of the **Marrakesh Directive** into the Swedish copyright landscape.

End beneficiaries of the exception are people with visual impairment. These are defined in **Article 17 URL** following **Article 2(2) Marrakesh**. The same **Article 17 URL** mirrors the allowed uses enshrined in **Article 3(1)(a) Marrakesh**, if made for the benefit of person with disabilities and provided that the beneficiary person has lawful access to the work.

Article 17a URL defines authorized entities as per **Article 2(4) Marrakesh**. The same rule allows the reproduction in an accessible format of works the entities have lawful access to, inclusing their communication and dissemination to individual beneficiaries and to other authorized entities established in the European Economic Area, in line with **Article 3(1)(b) and 4 Marrakesh.** A remuneration is due to rightholders if the copy so made is distributed and (permanently) retained by the individual beneficiaries.

None of the above permitted uses can be overridden by contract, as stipulated in **Article 3(4) Marrakesh.**

Alongside these provisions, **Article 17e URL** permits every person to reproduce and disseminate copies of published literary and musical works, and published works of visual art, which persons with disabilities need to be able to access the works. This use is allowed, however, as long as it does not entail recording.

The provision explicitly allows libraries and organisations which work towards participation by persons with disability, to publicly communicate the copies of works made

under this exception to individual beneficiaries. These institutions are also allowed to make sound recordings of published literary works and communicate and disseminate those copies to persons with disabilities. They are also permitted to copy and disseminate radio and television broadcasts and cinematographic works to meet the access needs of persons who are deaf or have other forms of hearing impairment, with no commercial purpose. Rightholders are entitled to remuneration if the copy made in an accessible format is distributed and (permanently) retained by the individual beneficiaries. The same applies if more than one copy is distributed.

Under **Article 17f URL** the Government may also implement regulations on the procedures to be followed by an authorized entity established in Sweden when reproducing, transferring or distributing copies to persons with visual or other reading impairments in another EEA State or to other authorized entities in another EEA State.

3.1.2.27.11 OTHER NON-INFRINGING USES (MISCELLANEOUS)

Article 24(2) URL allows the free reproduction and making available of works of art made for advertising an exhibition, or a sale of works of art, but only to the extent necessary to the purpose. The exception also allows the reproduction in catalogues of works that are part of collections, but with the exclusion of reproduction in digital form.

This provision implements **Article 5(3)(j) InfoSoc** by narrowing down the permitted act, as it excludes certain digital reproductions.

Article 26 URL (1994)[925] allows the owner of a building or useful items to modify it without requiring the consent of the author. This provision corresponds to **Article 5(3)(m) InfoSoc.**

3.1.2.27.12 THREE-STEP TEST

The three-step test has not been implemented in the URL as a separate provision. Despite preparatory works clearly state the intention not to introduce it, and to interpret the provision as a rule directed to the legislature only, the test has recently been applied by the Supreme Court (HD) and the Patent and Market Court (PMD) in high-profile cases.[926]

3.1.2.27.13 PUBLIC DOMAIN

3.1.2.27.13.1 WORKS OR SUBJECT MATTER EXCLUDED FROM COPYRIGHT PROTECTION

Article 9 URL, in force since 1960 and last amended in 2000, excludes from the scope of protection decisions by public authorities, reports and statements by Swedish public authorities, as well as translations thereof.

[925] For related case law, see: Supreme Court in T625-92, judgment delivered 11 June 1993; alt. citation NJA 1993 s. 263.
[926] Supreme Court in case Ö849-15, judgment delivered 4 April 2016 (*Wikimedia*); NJA 2016, s. 212 and Patent and Market Court (PMD) in case B 7348-20, judgment delivered 9 October 2020 (*Swedish tiger*).

Despite this, the law expressly indicates that when such documents include maps, works of visual art, musical works or poetry, copyright law resumes application.

3.1.2.27.13.2 PAYING PUBLIC DOMAIN SCHEMES

None reported.

3.1.2.27.14 SPECIAL LICENSING SCHEMES (COMPULSORY, STATUTORY, ECLS)

Sweden envisages ECL for specific uses and beneficiaries in Chapter 3a URL, **Article 42a URL** being the basis for such schemes. **Article 42b URL** envisages ECL covering the reproduction, performance, making available and public communication of literary works and works of fine art which have been made public by the Parliament, decision-making municipal assemblies, governmental and municipal authorities, as well as enterprises and organizations to satisfy the need for information within their field of activities. Rightholders may opt-out.

Article 42c URL regulates the already mentioned ECL for uses for educational activities, and **Article 42d URL** does the same for the uses made by certain archives and libraries. Rightholders may opt-out.

Under **Article 42e URL,** ECL may be granted to sound radio or television organizations to broadcast literary and musical works and works of fine art that have been made public. The license may cover the communication to the public so that users can access the work from a time and at a time chosen by them. In respect of transmission via satellite, the extended collective license applies only if the broadcasting organization simultaneously carries out a broadcast through a terrestrial transmitter. **Article 42f URL** envisages the same scheme for sound radio or television organizations in respect of the communication to the public of works that have been made public and form part of their own productions. In both cases, rightholders may opt-out.

Article 42h URL regulates a general ECL scheme (i.e., without any subjective limitation), as long as the license is granted within a delimited exploitation area.

The draft proposal of the Swedish Ministry of Justice to implement the CDSM Directive, published in October 2021 (Ds 2021:31), introduces a new **Article 42(i)** to transpose the out-of-commerce ECL scheme envisaged under **Article 8(1) CDSM.** The proposal follows the EU scheme.

Other than the above, Sweden features compulsory collective management for the annual supplementary remuneration of performers (**Article 45a-b URL**), and for the remuneration for the resale right (**Article 26n 26 URL**), as well as the compensation for the private copy (**Article 26k URL**).

3.1.2.27.15 EXTERNAL COPYRIGHT FLEXIBILITIES

3.1.2.27.15.1 FUNDAMENTAL (USERS') RIGHTS

The challenge for fundamental rights balancing in Swedish copyright law is twofold. On the one hand, courts have recently embraced the CJEU case law on the matter and the ECtHR precedents on the balance between intellectual property and freedom of expression. On the other hand, copyright enjoys independent constitutional protection in Sweden (Article 2, Ch. 16 *Regeringsformen*), not under the constitutional property clause.

At the same time, however, although the constitutional provision emphasizes the need to protect authors (and applies only to *authors* as opposed to holders of related rights), its adoption was justified by the objective to promote freedom of expression. As such, on a constitutional level copyright is an instrument that should foster rather than restrict expression (Prop. 1975/76:209 s.129).

The notion of "public interest" can be found in Article 26(b) URL, which stipulates that copyright does not prevent the use of a work in the interest of the administration of justice or public security. While this was historically construed as an exception in favour of public authorities, courts have recently confirmed the possibility for private individuals to benefit from the provision.

Another example is **Article 51 URL**, in force since 1978, which can prevent presenting literary and artistic works in a manner that violates cultural interest, after the authors' death. Proceedings can only be commenced by the Swedish Academy, the Musical Academy and the Academy for Fine Arts.

Quotation under **Article 22** URL has been interpreted as a user right and commonly referred to as the "quotation right" in case law. Similarly, the right to publicly display published works under Article 20 has been framed as a "right to publish" for users, despite being classified by law as a limitation. The same can be said for the possibility of reproducing works of art in the pictorial form under Article 24. As mentioned above, several provisions also expressly refer to a 'right to' exploit (or not to exploit) works in a specific manner. However, these distinctions do not appear to have any special legal significance. Moreover, courts have tended to be consistent in approaching limitations as exceptions to general rules, in accordance with the CJEU's earlier approach to the matter, which arguably may be changing after the Grand Chamber trio of July 2019.

3.1.2.27.15.2 CONSUMER PROTECTION

One aspect worth mentioning in connection with the implementation of this Directive is the asymmetry of treatment with regards to TPMs (52 f § URL). Lawful users have been entitled to complain to a court when TPMs have prevented access, together with libraries and a few other organized users, whereas other users (i.e., consumers) are merely allowed to attempt to circumvent such technology without being able to complain to a court if they fail.

Other than this, Swedish law recognizes the principle of 'in dubio pro autore' (*specifikationsgrundsatsen* or *specifikationsprincipen*). In the case of agreements concluded with consumers, this approach may produce results that run counter to the EU principle, also followed in Sweden, of interpreting unclear contract terms in favour of consumers. However, 'in dubio pro autore' is usually intended to refer to authors rather than to intermediaries, which are often the contracting party in EULAs.

It can be furthermore mentioned that Sweden has implemented Directive 770/2019 on certain aspects concerning contracts for the supply of digital content and digital services, and Directive 771/2019 on certain aspects concerning contracts for the sale of goods with Law SFS 2022:260 of 7 April 2022.

3.1.2.27.15.3 COPYRIGHT CONTRACT LAW

None reported.

3.1.2.27.15.4 OTHER INSTRUMENTS

None reported.

3.2 MAPPING OF PRIVATE ORDERING SOURCES

It was assumed, and, in light of the relevant legislative framework, it was also confirmed that not all specific research topics find an equally meaningful relevance with respect to all main categories and/or the individual platforms. Among others, "*family sharing*" is not an issue for platforms that are not primarily dedicated to "sharing" copyright protected materials (e.g., social networking sites), or which can be freely accessed by anyone (e.g., free-of-charge music streaming platforms). Similarly, the reproduction of *"back-up copies"* is irrelevant for those services that do not offer the reproduction of files at all. The study further noticed that the majority of "*cultural uses*", intended lato sensu as including e.g., parody and news reporting, are almost never reflected in the terms and conditions. On the one hand, that might be due to the limited nature/purpose of the majority of the analysed platforms (e.g., gaming sites are not dedicated to news reporting). On the other hand, the majority of such culturally relevant activities are covered by public sources of law, and hence are directly binding on platforms (e.g., audio-visual materials covering the news of the day might, at least theoretically, be lawfully available via YouTube under the news reporting exception of the InfoSoc Directive). We have noticed a significant number of private regulations regarding UGC, which can indirectly allow for numerous culturally-relevant private uses.

The terms and conditions show a significant difference regarding their *language* (smooth/everyday language v. detailed/normative language), their *scope* (focusing on the most important features of the service v. overarching/complete regulation of topics; alternative regulate topics + adding external terms and conditions on further practical matters); and their *flexibility or user-friendliness* (e.g. with respect to the grants assigned, the

formalities related to the termination/modification of the terms and conditions themselves or the specific terms of user subscriptions). It was also immediately visible that the majority of platforms intend to follow the more detailed *notice-and-take-down procedure* of the DMCA of the United States,[927] rather than the less detailed set of rules of the EU E-Commerce Directive 2000/31/EC.[928]

In the first phase empirical research, the study ultimately found that platforms, which either host primarily or partially user-generated content (UGC), reached a higher user-flexibility score, while platforms that only provide access to the protected subject matter, without any possibility to interact over the platform or create permanent copies of contents, scored less (*UGC effect*). This conclusion is partially due to the fact that existing public norms limit end-user flexibilities in the case of streaming services and allow for more flexibilities in the case of UGC-related platforms (*regulatory lock-in effect*). Furthermore, the fierce (vertical and horizontal) competition of platforms necessitates the offering of more competitive and hence more flexible services. Platforms that mainly offer one-way streaming services coupled occasionally with a license of limited offline users impose stronger limits on end-users' access to the sites. That is mainly due to their selected business model to build and monetize an all-encompassing, wide repertoire of professional contents that are subject to initial licensing schemes negotiated by them and the copyright holders (*business flexibility effect*).

In the second phase empirical research, conducted after the implementation deadline of the CDSM Directive the study found that the selected OCSSPs' terms of uses continue to focus on two main aspects: the exclusion of primary liability of platform operators and an effective notice and takedown procedure that protects the legitimate interest of the rightholders. The majority of the terms of uses examined include guarantees to allow users to challenge the lawfulness of content removal, but neither the guarantees in Article 17 CDSM of the CDSM Directive appear *expressis verbis*, nor is there any specific reference to general prior content filtering mechanism in the contractual terms. This is certainly instructive for two reasons. On the one hand, it seems that online content sharing platforms are sticking to well-established liability limitation clauses, shifting the liability to the end-user, thus weakening the viability of the new liability regime envisaged by the CDSM Directive. On the other hand, some platforms, such as YouTube, also actively filter uploaded content through their automated systems, which they can remove at their own discretion without notifying the right holders. In other words, the balance between the actors concerned by the operation of the platforms - operators, rightholders and end-users - continues to tip in the direction of the first two stakeholders, while it is not clear how the platforms protect freedom of expression, freedom of creative creation and freedom of access to information, which have been among the main watchwords for criticism of the provisions of Article 17 CDSM.

[927] 17. U.S.C. §512 [Digital Millennium Copyright Act, Pub. L. 105-304 (1998)].

[928] Unsurprisingly, our research might be directly affected by the normative developments of the European Union regarding the "Digital Services Act".

4 PUBLIC REGULATORY SOURCES: RESULTS OF THE COMPARATIVE ANALYSIS

As already explained above, **comparative reports** were prepared on the basis of the taxonomy on which the research was based since its outset and limited to the categories for which the amount and relevance of data collected could allow a well-grounded and verifiable assessment. This led, for instances, to the exclusion of sectors which would have required, in light of their non-statutory basis, a reporting of sufficient judicial decisions by a substantial number of national experts, which unfortunately was not reached in the 24-month span of this research (e.g., fundamental rights, public interest and users' rights). Similarly, heterogeneous sectors such as consumer protection law, contract law, media law and the like were not subject to comparative analysis for the extremely fragmented nature of national experts' responses, which made it impossible to draw meaningful considerations.

Each report outlines convergences and divergences of Member States' solutions under each category of flexibility and, per each category of flexibility, under each provision or group thereof, looking at beneficiaries, rights, uses/rights and works covered, conditions and requirements imposed for the enjoyment of the flexibility, and other relevant aspects to be taken into account. To the extent possible, comparative reports incorporate the state of implementation of the CDSM Directive by Member States and verify the compliance of national laws and judicial decisions with the indications provided by the CJEU as to the interpretation of specific exceptions and limitations. Each report strives to assess the degree of harmonization of national responses and to evaluate the comparative degree of flexibility of Member States' solutions, in order to provide a sound objective basis for the normative conclusions and policy recommendations which will be issued at the end of September 2022.

4.1 TEMPORARY REPRODUCTIONS, LAWFUL USES, DE MINIMIS USES

De minimis uses is an umbrella-term used to group several copyright flexibilities – mostly in the form of copyright E/Ls – which, although they seem to have nothing or very little in common, share the common rationale to allow uses of protected works when they amount to such a degree of *triviality* not to be a threat to rightholders. In this sense, they represent an area that is worth investigating, since they provide users with a set of liberties and freedoms against the rightholders' monopoly beyond the most traditional and settled copyright flexibilities.

A potential misunderstanding that should be immediately clarified up-front is that such allowed uses are not an application of the general clause *de minimis non curat lex*. While allowing certain uses of protected works by virtue of their minimality might be akin to the spirit of the *de minimis* general clause, and even the operational result might look similar, copyright de minimis rules are punctually defined by law and not regulated by an open clause that operates as an independent defence. This alone makes the thesis of their "legal

irrelevance" extremely easy to rebut. And whereas to apply the general clause courts would need to grapple with fundamental questions such as what makes a use relevant for copyright law, and *what* is that triggers the reaction of the legal system in copyright-related matters, in EU and national copyright laws de minimis flexibilities follow explicit, clear-cut provisions, with relatively well-defined conditions and requirements.

For the purpose of this mapping, de minimis and temporary uses have been classified and analysed together, and flanked by lawful uses which, even if less trivial in terms of potential impact on rightholders' interests, are still considered worth of a greater protection than rightsholders' exclusive rights. To this end, the following sections will provide a comparative overview of Member States' regulation of temporary reproduction, ephemeral recording, incidental inclusion, and lawful uses allowed in the field of computer programs and databases.

Despite at a first glance it may appear purposeless to carry out a joint analysis of such uses in EU copyright law, using an umbrella term that encompasses extremely different copyright exceptions and limitations, the analysis will unveil several hidden interconnections and common rationales, which may have relevant implication for the construction of EU copyright law.

Given the variety of de minimis uses, this part will be divided into three subsections, each of them devoted to a different category of uses and offering a comparative overview of Member States' statutory provisions and case law on the matter.

4.1.1 TEMPORARY REPRODUCTION

Article 5(1) InfoSoc provides that Member States must introduce an exception to the reproduction right of the copyright-holder for *transient* or *incidental* temporary acts of reproduction of *no economic significance*, which are an *integral and essential part of a technological process*, on the condition that their sole purpose is to enable a *lawful use* of the protected material or a *transmission by an intermediary* between third parties. According to Recital 33 InfoSoc for 'lawful use' we must consider any use which is authorised by right-holders or not restricted by law. The same recital mentions examples of activity which should typically fall within the scope of this exception under "acts necessary for transmissions by intermediaries", namely acts enabling browsing and catching, and acts to make a transmission system run efficiently. The provision can be broken down into five main elements, namely (1) the temporary nature of the reproduction, (2) its transiency/incidentality, (3) the necessity for a technical process, (4) an action of intermediation/ lawful use, (5) the economic insignificance of the act. Also, as clarified in the *Infopaq* decision,[929] such conditions are cumulative, so that they must all be present in order for the exception to apply. There are no subjective requirements.

[929] Order of 17 January 2012, *Infopaq International*, C-302/10, EU:C:2012:16, para. 55.

This exception is mandatory and, accordingly, all Member States have implemented it in their national jurisdictions. It is worth highlighting that Member States have been exceptionally consistent in the implementation of this exception in their jurisdictions, with only a handful of departures from the general model, which, however, might not create substantial differences in the practice. Austria, Belgium, Bulgaria, Czechia, Denmark, Germany, France, Greece, Malta, Lithuania, Italy, Luxembourg, Netherlands, Malta, Poland, Portugal, Romania, Sweden, Slovakia, Slovenia, and Spain present all five elements mentioned above, worded and structured similarly to Article 5(1) InfoSoc. One minor difference features the Spanish transposition, which lightens the necessity benchmark by stating that the reproduction shall not be "necessary to allow/enable" a technical process, but simply to "facilitate" it. Another minor difference can be found in the Portuguese Copyright Act (Article 75(1) CDA), which adds a detailed explanation of what shall be covered by the necessity benchmark. This includes "acts enabling navigation on networks and temporary storage, as well as those enabling transmission systems to function efficiently." It is furtherly requested that the intermediary does not alter the content of the transmission and does not interfere with the lawful use of the technology in accordance with recognised good market practice to obtain data on the use of the information, and in general with the purely technological processes of transmission.

The Estonian version (Section 18^1 AutÕS) slightly varies requirement (2) (that it the incidentality requirement), in that it does not mention explicitly the transiency/incidentality of the reproduction. The same happened for the Latvian implementation (Section 33 LaCA). However, this requirement can be deduced by looking holistically at the other parameters mentioned by the two provisions. The Estonian one differs from the InfoSoc model also on the "economic insignificance" requirement, which is translated into a reproduction having no commercial purpose. This is not likely to create any practical difference though. Finally, the implementation by the Cypriot Copyright Act. (Article 7(5) CL, in 2004) differs from Article 5(1) InfoSoc for it does not mention the economic insignificance requirement at all, while neglecting the importance of the necessity benchmark. Also, the applicability of the exception is conditioned to the fact that the intermediary shall not modify the information nor interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information.

Despite these differences, it can be well concluded that Article 5(1) InfoSoc has been implemented with a very high degree of consistency across Member States. However, that the five operational requirements introduced by the EU provisions are all expressed with very general formulations. This may lead to interesting evolutions in national case laws, not necessarily homogeneous as their statutory implementations of the EU provision were. Unfortunately, national experts have not reported enough case-law to significantly elaborate on the issue.

Still, a very interesting development came from the Spanish case law. In the judgement STS 3942/2012,[930] the Supreme Court (Tribunal Supremo) held that the incorporation of a web page in the results produced by a Google query did not infringe copyright. This, however, did not follow from the application of Article 31(1) TRPLI on temporary reproduction which could not be applied due to the lack of the lawful use requirement, but rather because of the *ius usus innocui* doctrine. The principle, derived from a combined interpretation of Article 7(1)-(2) of the Spanish Civil Code and the principle of social function of property enshrined in the Spanish Constitution, required the Tribunal Supremo to verify *in concreto* whether the rightholder's legitimate interest had been suffering a substantial damage, both directly and indirectly. Spanish case law suggests striking the balance by looking at the core of the right in question, and the *expressive meaning* of the allegedly infringing act. With quite a revolutionary turn, the decision applied a general principle instead of relying on a specific exception, arguing that even though the limits to copyright must be interpreted restrictively, neither of the two Articles in question of the TRLPI, 31(1) or 40 bis, excludes the application of the doctrine of *ius usus inocui* to allow safe use in accordance with the principles of the TRLPI or the consideration of Articles 7 CC, 11 LOPJ and 247.2 LEC. Rather, the claim that Google's search engine shall be closed or that it should be ordered to pay compensation for an activity that benefits the plaintiff, by generally facilitating access to its website and knowledge of its content, should be considered prohibited by Article 7(2) CC, as an abuse of copyright and antisocial exercise of it, inasmuch as it relies on a restrictive interpretation of copyright limitations to harm Google without obtaining any benefit of its own, such as fame, notoriety or compensation. This decision might be considered as a pure application of the *de minimis* general clause, where the minimality of the use lies in that it leads to no concrete damage to authors' rights.

4.1.2 EPHEMERAL RECORDING

Broadcasting organisations are the beneficiaries of two de minimis flexibilities in EU copyright law. In the first place, Article 5(2)(d) InfoSoc states that Member States might allow an exception to the exclusive right of reproduction in favour of broadcasting organisations which perform ephemeral recordings of protected works for the purpose of their own broadcasts and using their own recording facilities. Under this provision, member states might allow such organisations to store these recordings in an archive, provided that they have a peculiar documentary value. Secondly, the Rental Directive extends this flexibility vis-à-vis related rights by stating that Member States might implement a limitation to broadcasting, communication to the public, distribution and fixation rights of performers, broadcasters, film and phonogram producers in favour of broadcasting organisations, which might carry out ephemeral fixations of protected works by means of its own facilities and for its own broadcasts.

[930] STS 3942/2012 - ECLI:ES:TS: 2012:3942.

Both exceptions are optional, which resulted in some Member States not transposing them (Austria, France, and Greece).

However, even among the States that have implemented them, substantial differences emerge with regards to key aspects such as (1) the subjective scope of the provision, (2) the purpose of "their own broadcast" and the necessity to use "their own means", (3) conditions and requirements to comply with in the process, and (4) the possibility to store such recordings in an archive when they have a documentary value. It is interesting to flag the exceptional case of Slovenia, which implemented the flexibility in question on the side of the right of broadcasting. When this is assigned, indeed, the presumption is that the broadcasting organisation is also licensed with the right to make "fixations" of the work, under conditions roughly corresponding to the ones provided in the InfoSoc baseline structure (Article 77(2) ZASP).

As to the **subjective scope** of the provision, some countries require that the broadcasting organisation should also have the right to use the protected work for a broadcast (Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Germany, Hungary, Ireland, Latvia, Luxembourg, Netherland, Slovenia, and Spain). On the contrary, Belgium, Italy, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, and Sweden remain silent on the issue.

On the side of the requirement of using the broadcaster's means for the purpose of one's own broadcasting, the vast majority of Member States follow the InfoSoc and Rental Directives' structure verbatim. Belgium, Bulgaria, Czechia, Denmark, Estonia, Germany, Lithuania, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia, and Spain require the broadcaster to use its own facilities and to exploit the recording for its own broadcasting. A slight variation can be found in the Latvian implementation (Sec 27 LaCA), which asks for the broadcaster to make the recording of the protected work "on its account" and to exploit "for its use". No mention is made of the requirement to use "its own facilities". Similarly, the Croatian exception (Article 189 NN) asks that the recording is performed by means of the broadcaster's own facilities but allows purposes beyond mere broadcasting by stating that such recordings can take place for broadcaster's "own needs". This might widen the scope of the exception, since, under a literal interpretation of the provision, the purpose of the recording can go beyond broadcasting and even third parties can perform the recording, provided that they do so on behalf and request of the broadcaster. Furthermore, the Croatian lawmaker has used its margin of discretion to enable the re-use of ephemeral recordings (Article 81 NN). However, no case law has been reported from Latvia and Croatia that may help understanding whether these apparently broader provisions have been interpreted more flexibly than their EU counterparts.

Along the same lines, Cyprus (Article 7(2)(k) CL) does not subordinate the exception to the pursuance of any specific purpose, but simply requires the recording to happen by means of the broadcaster's own facilities. This is likely due to the fact that Cypriot implementation of the exception preceded the InfoSoc Directive, dating back to 1976. Oppositely, Denmark,

Hungary, Sweden, and Italy recall the purpose of broadcasting but leave out the own facilities requirement.

The Portuguese implementation is worthy of a separate mention. Under Article 189(1)(d) CDA (titled "free uses") of the Portuguese Copyright Act, ephemeral recordings made by broadcasting organisations are excluded from the scope of protection. The provision was codified in 1985, thus way before of the InfoSoc and Rental Directives. This meant that the Portuguese exception could keep operating because deemed of "minor importance" and not affecting the free circulation of goods and services in the EU market.

Some Member States set up a number of additional requirements and conditions to enjoy the exception. The vast majority of them require the destruction of such recordings. Croatia, Cyprus, Estonia, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, and Slovenia require the recording of the broadcasting to be deleted/destroyed after the broadcasting, with different deadlines, running from after the reproduction (Croatia, Germany, Poland, Latvia, and Slovenia allow one month; Estonia and Lithuania, thirty days; Hungary and Ireland, three months; Cyprus six months). Italy and Sweden feature very vague provisions. The former requires that the broadcasting its cancelled "after its use", without specifying any time frame, although it is likely that the lexeme is interpreted and applied as "without undue delay". The latter, instead, provides that the reproduction shall be destroyed after "a small number of reproductions is performed".

Some countries feature a quantitative limit on the number of reproductions that is possible to make. Slovenia (Article 77(2) ZASP) and Spain (Article 36.3 TRLPI) provide that only *one* reproduction can be made. Sweden (Article 26e URL) states that "a small number of reproductions for a limited time" is allowed, after which the recording should be destroyed. The Italian exception, finally, requires the recording to be carried out only for reasons "necessitated by time and technology," thus restricting greatly the scope of the provision (Article 55 l.aut).

One last point of divergence is the storability of such recordings. The vast majority of countries, in fact, gives broadcasters the possibility to store the recording on the condition that it has a remarkable documentary value. Only Belgium, Bulgaria, Ireland, Portugal, and Spain are silent on the matter, thus not allowing any room for preservation. However, national laws present relevant variations. In the first place, the quality/value requested is of different degree. Most of the countries allows the preservation of such recordings when they are of (exceptional/extraordinary) documentary/documentation value/character (e.g., Croatia, Germany, Hungary, Italy, Lithuania, Luxembourg, Malta, Netherlands, Romania, Slovenia, and Sweden). Cyprus (Article 7(2)(k) CL) makes explicit what is intended by documentary value. Indeed, it is deemed to be subsistent only when the recording has "an exceptional portrayal or recording of objective facts". Slovakia, instead, asks simply for the recording to have a generic "audio-visual value" (Section 40 ZKUASP).

Countries also differ as for where the recording should be preserved. Germany, Italy, Latvia (Section 19(1) (8) and Section 27 LaCA), Malta (Article 9(1)(e) MCA), the Netherlands (Article 17b (2) AW), and Romania (Article 35(1) paragraph 3 RDA) require the storage in an "official archive", while Luxembourg (Article 10 (9) LuDA) specifies that storage requirements are to be determined by a Grand-Ducal regulation. Similarly, Hungary (Section 35(6) SZJT) and Slovenia (Article 77(2) ZASP) ask for a "public archive" and Lithuania (Article 29 (2) LiCA) for an "official State archive". Germany (Section 55 UrhG-G) also requires that the inclusion in the official archive should happen upon notification to the relevant rightholder. Croatia (Article 189(2) NN), instead, allows the recording to be stored in a "public or own [of the broadcasting company] official archive". Finally, Cyprus (Article 7(2)(k) CL) wants the recording to be stored in the archive of the broadcasting authority, while Estonia (Section 23 AutÕS) requires it to be stored in the "archive of the broadcaster". Denmark (Section 31 DCA) refers to additional rules laid out by the Ministry of Culture, while Sweden requires the recordings to be stored in the National Library of Sweden, when conditions apply.

One last significant difference is to be found in the implementation by Malta (Article 9(1)(e) MCA), in that it limits the subject matter to certain categories of works. The provision, indeed, reads that the flexibility applies *only to* "audio-visual work, a database, a literary work other than in the case of a computer programme, a musical or artistic work".

4.1.3 INCIDENTAL INCLUSIONS

Article 5(3)(i) InfoSoc allows Member States to introduce an exception or limitation to the rights of reproduction and communication to the public rights for the incidental inclusions of a protected work (or another kind of protected subject-matter) in other material.

Being this an optional exception, not all Member States have implemented it. To date, no incidental inclusions are allowed in Bulgaria, Croatia, Estonia, France, Greece, Hungary, Italy, Latvia, Italy, and Romania. Other EU countries provide some flexibility for the inclusion of protected works in other materials, but outcomes greatly vary across Member States, resulting in a highly inconsistent framework.

Additional fragmentation stems from the fact that some Member States features this exception way before the adoption of the InfoSoc Directive. For this reason, it is possible to divide national solutions in two categories – those which follow – possibly with minor deviations – the InfoSoc baseline, and those which are totally atypical in their formulation, particularly with regard to beneficiaries, works that can embed the incidental inclusion, works that can be embedded, and additional conditions and requirements.

Among InfoSoc-based national solutions, i.e. transpositions where there are no additional requirements or conditions, Malta, Portugal, and Slovakia have implemented Article 5(3)(i) InfoSoc almost verbatim stating that "the incidental inclusion of a protected work in other material" is to be considered "lawful without the copyright's owner consent" (Portugal - Article 75(2)(r) CDA), that copyright does not include the right to authorise or prohibit "the

incidental inclusion of a work or other subject matter in other material" (Malta - Article 9(1)(q) MCA), and that copyright is not infringed by a person who "uses work which was incidentally included into different context," provided that such works are "only […] used in connection with such context." The Slovakian implementation is also consistent with the EU baseline structure (Section 55 ZKUASP). The Maltese structure (Article 9(1)(q) MCA) is worth mentioning since it is quite different from other national implementations, in that the flexibility features more as a scope limitation of the copyright protection rather than an exception properly so-called. The German version (Section 57 UrhG-G) issued way before the InfoSoc Directive (in 1965), rules that "it shall be permissible to reproduce, distribute and communicate the public works if they are to be regarded as works incidental to the actual subject-matter being reproduced, distributed or communicated to the public." The formulation differs from the EU baseline structure, but it is still functionally consistent with it in the practice.

Other InfoSoc-based implementations differ slightly from the plain structure of the EU provision, for they explicitly provide the parameter according to which the "incidentality" of the inclusion shall be assessed. According to the Czech implementation (Section 32c CzCA), the inclusion is incidental when the primary purpose of the derived work is connected with "an intended primary use of another work or element"). Ireland (Section 52 CRRA), instead, evaluates the incidentality of the inclusion on the basis of the prejudice to the rightholder's interests ("a work shall not be regarded as included in an incidental manner in another work where it is included in a manner where the interests of the owner of the copyright are unreasonably prejudiced"). The Dutch (Article 18a AW) and Slovenian (Article 52 ZASP) exceptions, instead, look at the overall relevance of the work incidentally included within the work embedding it. This is a more restrictive standard as regards the operational conditions of the exception (e.g., for the Netherlands version, it is required that the inclusion should be of "minor significance", while for the Slovenian one the inclusion should be of secondary importance vis-à-vis the actual purpose of the derivative work). Finally, the Austrian version (Section 42e UrhG-A) simply asks for the "incidentality of the inclusion". This parameter is substantiated with reference to both the activity performed or the overall work presenting the inclusion. No reference to the original work is needed. This indication might be interpreted as a parameter to assess incidentality as well, in the sense that the inclusion can qualify as incidental insofar as the object of the exploitation is not autonomously recognisable in the final work. However, the OGH has held that the incidentality shall be assessed on the basis of the importance played by the included work in the overall composition of the final work. In the judgement OGH 4 Ob 81/17s, the OGH held that in order to be *insignificant* within the meaning of Section 42e UrhG-A, the accessory must be an object which is of *even less than* of "minor or subordinate" importance. However, it was also clarified that such limit shall not be interpreted too restrictively in order not to deprive the exception of its practical and operational scope.

Atypical versions of this exception can be found in Belgium, Cyprus, Denmark, Finland, Luxembourg, Poland, and Sweden.

Cyprus, Denmark, Finland and Sweden all limit the scope of the exception to specific types of final works. Cyprus (Article 7(2)(d) CL), for instance, allows incidental inclusions only into films and broadcasts, without hinting at any parameter to assess the incidental nature. Denmark (Section 23(3) DCA), instead, allows it into newspapers, periodicals, films and television programmes, and states that an inclusion is incidental when "the use is of subordinate importance in the context in question," i.e., the final work. Both provisions date back to the 1960-70s, which explains the divergence with the baseline InfoSoc structure.

Similarly, Finland limits allowed works to photographs, films, or television programmes, and states that an inclusion is incidental "if the reproduction is of a subordinate nature in the photograph, film or programme." In Sweden, only films, TV programmes, and images can include other protected works when such inclusion is *incidental,* i.e., it is "in the background, or otherwise [it is] not a material aspect" of the final work (Article 26e URL). Interestingly, the Swedish Supreme Court has further narrowed down the scope of the exceptions, crossing out the inclusion on a webpage of a screenshot of another webpage containing pictures, arguing that the lawmaker did not intend the term 'image' to include webpages.[931]

Finally, the Maltese implementation (Article 9(1)(q) MCA) exclude the applicability of the exception to computer programs.

It is important to note that France has not implemented this exception in the French CPI, but has consistently admitted such uses through the judicial *théorie de l'accessoire,* [932] according to which the inclusion of a protected work into another one which is later communicated does not amount to an infringement of the right of communication to the public over the former, when the inclusion is *accessoire* to the main subject matter of the final work. Rather than an exception, this represent a limitation of the scope of exclusive right, in this being much more similar to a pure application of the *de minimis* defence than to a formal exception.

The last atypical implementation that is worth mentioning comes from Poland (Article $29^{(2)}$ UPA), which requires the inclusion to happen "unintentionally".

Summing up, the national implementation of the incidental inclusion exception across the EU is a mosaic of very different and poorly harmonized solutions. Not only criteria to assess the incidental nature of the inclusion vary quite heavily, but they also read into other limitations on the works that may be included and can embed. Moreover, its application often overlaps and gets confused with the scope of other exceptions, which contributes to create

[931] T3440-08, judgment delivered 5 March 2010 (Screenshot on webpage containing photographs); alt. citation NJA 2010 s. 135.
[932] CA Paris, 12 Septembre 2008, n° 07/860.

an even more complex patchwork of national solutions, misunderstanding as to the scope of each provision, and additional fragmentation.

4.1.4 LAWFUL USES

4.1.4.1 LAWFUL USES OF A DATABASE

Article 5 Database lists the so-called "restricted acts", i.e., those acts that database users can perform only under the authorisation of the right-holder. Article 6(1) Database provides an exception to Article 5 by stating that lawful users of the database, for the part of the database they are authorised to access, are allowed to perform otherwise restricted acts where they are "necessary for the purposes of access to the contents of the databases and normal use of the contents." This exception is mandatory, which means that all Member States feature at least one provision transposing this flexibility.

The key elements of the exception, as laid out in the InfoSoc Directive, are (1) the fact that the user performs lawful access and use of the database, and (2) a strict necessity benchmark, meaning that the performance of such acts is allowed for the purpose of accessing the database and making a *normal* use of it.

All Member States have implemented this exception in a very consistent manner, with very limited departures from the EU model.

The necessity benchmark is set to include all acts that are necessary to gain access and exercise a "normal use" (the vast majority of Member States), "proper use" (Hungary), "appropriate use" (Latvia), for the "intended purpose" (Sweden), for "the usual purpose" (Slovakia) or simply "to use and access the database" (Ireland, Latvia, Portugal) of the database the user has lawful access to. A major variation in the formulation of the exception come from France one, where the lawful user can perform any of the restricted acts according to "the needs and within the limits of the use provided for by contract" (Article L. 122-5-5° CPI). This formulation is likely to entail no practical difference, since parameters such as the "normality"/ "appropriateness" of use will be reasonably interpreted and applied along the line of the contractual relation between the user and the provider of the database. Unfortunately, national questionnaires have reported a very small number of decisions on the notion of normal/proper use. However, it is safe to interpret the "reasonability and normality" along the lines of "commercial uses".

Another element on which there is some divergence is the possibility to waive such rights by contractual agreement. Against the silence of Article 6(1) Database, the vast majority of Member States (Austria, Belgium, Bulgaria, Croatia, Denmark, Estonia, Finland, Germany, Greece, Latvia, Lithuania, Malta, Netherlands, Portugal, Romania, Slovenia, Spain, Sweden) provides that any contractual clause intended to prevent the lawful user to perform any acts needed to access and properly use the database shall be considered void. Among these, some countries (e.g., Austria) while stating that the exception cannot be waived contractually allow

the scope of "intended uses" to be determined by contract. This is likely to reduce the degree of protection provided. On the contrary other countries (Cyprus, Czechia, France, Hungary, Ireland, Italy, Romania, Luxembourg, Poland, and Slovakia) have not implemented this safeguard at all.

The only additional aspect that is worth mentioning is the quality of this flexibility. In fact, while most of the States consider it as an exception, some countries have implemented it in the form of a *right.* These are Sweden (Article 26g URL), which defines the user "*entitled*" to perform such acts and states that "contractual stipulations which limit the *right* of the user" are void; Austria (Section 40h(3)), which provides that "this *right* cannot be effectively waived"; Estonia (Section 25^1 AutÕS), which declares void "any contractual provisions which prejudice the exercise of the *right*" of the user; and finally, Lithuania (Article 32 LiCA), which affirms that "a lawful user of a database or a copy thereof shall have the *right*, […], to perform" the restricted acts.

Other EU provisions allowing lawful uses of databases are Article 7(5), 8(1) and 8(2). Under Article 7(5) "the repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted"; under Article 8(1), "[t]he maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part. (…) A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database". These provisions are mandatory, which means that Member States are forced to implement them.

The combination of these two articles allows users to extract and re-use insignificant and insubstantial parts (evaluated qualitatively and/or quantitatively) of the database, for any purpose, provided that such uses comply with a criterion of "normal exploitation" and do not create an unreasonable prejudice to the legitimate interest of the rightholder. Key requirements are: (1) the *insubstantiality* of the portion of the database, (2) the insignificance of uses, i.e., the *normality* of the exploitation and the *reasonability* of the eventual prejudice to the legitimate interest of database maker. When these three conditions are met, the use of the portion of the database is not an infringement of copyright.

This flexibility appears to be codified by several Member States as a limitation of the scope of protection rather than as an exception. For instance, the Croatian (Article 176 NN), Italian (Article 102 bis(1) (b) (c) l.aut), Latvian (Section 57(2) LaCA), Luxembourgish (Article 67 LuDA), Belgium (Article XI.307 CDE) and French (Article L.342-2 CPI) implementations are focused around the object of protection. Rather than being structured as exceptions properly so-called, they are implemented as a prima facie qualification of the right, bringing insubstantial

parts of the database out of the scope of the protection (insofar as not used repeatedly and systemically, or abnormally and contrary to the interest of the producer). This allows a *de minimis* use based on the insubstantiality of the portion of the database involved and the *insignificance* of the use.

Other countries do not differ much from this baseline structure, and they hesitate between the object-of-protection versus scope-of-right formulation.

Aside from this, all key elements of the provisions are recalled in all national implementations, with an almost verbatim language. The fact remains, however, that such requirements are extremely vague and unsubstantiated, as testified by the recurrent interventions of the CJEU on some of their key concepts, such as the normality and the substantiality of the use.

4.1.4.2 LAWFUL USES OF A COMPUTER PROGRAM

Other de minimis uses exceptions are provided by the Software Directive. The first is the *technically necessary uses exception*, which allows the lawful user to perform temporary or permanent acts (including reproduction, translation, adaptation, arrangement and any other alteration) necessary for the use of a computer program against the reproduction right and the translation, arrangement, and alteration rights, including for the correction of mistakes (Article 5(1) Software). This is the only provision that can be contractually overridden. The second is the *back-up exception*, which allows the production of a back-up copy by lawful user of computer program if necessary for its use (Article 5(2) Software). The third is the *testing purposes exception*, which allows the observation/study/testing of the program by lawful user (Article 5(3) Software). The last is the *interoperability exception,* which permits lawful users to reproduce/translate the code when this is indispensable to achieve its interoperability with another independently created and not substantially similar program, to the extent necessary for the purpose (Article 6(1) Software).

All these exceptions are mandatory. Accordingly, all Member States have implemented them, with quite a consistent and harmonized approach.

On the side of the *technically necessary uses exception*, all Member States restrict the subjective scope of the provision to lawful users or people acting on their behalf, set a fairly high necessity benchmark so to allow acts required for the intended use/agreed use of the computer program only, and include the correction of mistakes. The sole country that diverges from this structure is Austria (Section 40d(2) UrhG-A), which does not mention the correction of mistake but the “adaptation to user’s needs”, which substantially broaden the scope of the EU baseline provision (which instead only includes the acts necessary to carry out the intended use of the software and mistake correction). Other countries adhere more closely to the text of Article 5 Software, and they all face the same difficulties in defining the notion of “intended use”, “errors”, the extent to which the software can be adapted, and the like, thus triggering the risk of diverging national decisions.

While national statutory sources have implemented the exception almost verbatim, a minor degree of convergence is that of the contractual overridability of the exception, which is not mandated by the EU text, and is therefore remitted to the discretional decision of Member States. For instance, the Dutch version declares this exception non-overridable when the reproduction is made in connection with the loading and displaying of the program or the correction of its errors (Article 45j AW). The same approach is followed by Lithuania (Article 30 LiCA). Other countries have achieved a similar result by case-law. For instance, while the Slovenian statutory implementation allows parties to agree otherwise (Article 114 ZASP (2001)) the Ljubljana High Court specified that contractual override is excluded.[933]

Moving on to the "back-up exception", it has been implemented quite harmoniously across Member States. However, there are some differences worth highlighting. The German version slightly modifies the *necessity benchmark* so to allow only back-up copies that are necessary to secure a "future use" of the programme (Section 69d UrhG-G). Lithuania provides that back-up copies can be made and used only "in the event that the computer programme is lost, destroyed or unfit for use" (Article 30 LiCA). Poland, Slovenia, and Sweden set up additional conditions for the enjoyment of this exception. Poland provides that, unless otherwise agreed, back-up copies shall not be used simultaneously (Article 75(1) UPA). Slovenia lays out a quantitative limit of maximum two copies (Article 114 ZASP (2001)). Sweden requires to immediately cease the use of back-up copies as soon as the period of lawful use of the original copy of the software has expired (Article 26g URL), while the Swedish Supreme Court[934] held that the passive storage of the copy after the expiration of the licence is not a copyright violation, since no EU or national source requires the destruction of the copy when the condition for its subsistence ceases to exist, but simply demands to user stop making use of it. Other countries do not even mention the duty to stop using the copy after the license period is over. In fact, they only ask the user to be *lawful* in order to *make* the back-up copies, but are silent on the possibility to use it after the license to the software has expired. However, it is very likely that the same constraint is achieved by applying the notion of "intended use", which circumscribe the lawfulness of the use to the license time frame.

The "testing purpose exception" is implemented in a similarly consistent fashion, and the reference to technical matters leaves small room for interpretative questions. In general, all national implementations refer to the fact that lawful users, while performing any of the act they are entitled to, can examine, study and test the program as a whole or in its components, with the purpose of finding out what are the principles and the main ideas that support the functioning of the software.

[933] See: *VSL Sodba V Cpg 697/2017* of 12 October 2017.

[934] Swedish Supreme Court, in case T 1738-17, judgment delivered 25 September 2018 (*Storage of computer program after licence expiry*); alt. citation NJA 2018 s. 725. Reference was made to Judgment of 3 July 2012, *UsedSoft v Oracle International Corp*, C-128/11, EU:C:2012:407 as an example where a party may be required to destroy or make unusable copies of programs but the circumstances where distinguished.

Not differently than for the other provisions on lawful uses, Member States have implemented the interoperability exception introduced by Article 6(1) Software verbatim, with minor divergences that are worth noting. The Bulgarian implementation (art 71(3) BCA) for instance, does not include acts of reproduction but only translations, does not mention that the software with which it is necessary to achieve interoperability must be "independently created", and does not ask for the information not to be readily accessible, but requires it not to be provided at all, thus offering quite a restrictive transposition of the EU provision.

National experts have not reported any relevant decisions on the interoperability exception.

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Compared to other areas of EU copyright flexibilities, this category shows a high degree of harmonization and remarkable convergences, mostly due to the mandatory nature of great parts of the exceptions, limitations and other balancing tools that may be classified under this umbrella (e.g., temporary reproduction, software interoperability and backup copy exceptions). However, also sectors covered by non-mandatory provisions have witnessed a general convergence of national solutions (e.g., ephemeral recording, freedom of panorama). Still, the devil often lays in the details, and what keeps on fragmenting national responses in this area are the oft-substantial differences Member States feature in the definition of the specificities of generic EU exceptions, or the introduction of additional conditions of applicability.

4.2 PRIVATE COPY

This comparative report is purposefully devoted only to national provisions covering private copy, which are analysed jointly with reprography when the two areas overlap in national sources. The analysis encompasses both rules that preceded and rules that were adopted or amended in response to the InfoSoc Directive, which regulates the private copy exception in **Article 5(2)(b)** and the reprography exception in Article 5(2)(a).

The original taxonomy of copyright flexibilities sketched at the beginning of this study envisages a category labelled "private uses", which was aimed at encompassing all tools that had the direct or indirect purpose of preserving end users' private sphere and carve out from the copyright monopoly acts which did not have a substantial impact on the economic exploitation of the work. While analysing and classifying the responses of national experts, however, it became soon clear that such a classification would have caused several conceptual overlaps with other categories, such as teaching and research (e.g., private study), cultural uses (e.g. reproduction in CHI premises), lawful uses (particularly in the sectors of software and databases), and many others. For this reason, the category was limited to provisions having the sole purpose of addressing the need of making private non-commercial reproductions, having no other specific aim.

Article 5(2)(b) InfoSoc allows natural persons to reproduce a work or other subject matters on any medium for private use and for ends that are neither directly nor indirectly commercial, on condition that rightholders receive fair compensation also by taking into account the application of TPMs. A flexibility for private copy can also be found within **Article 10(1)(a) Rental** and **Article 6(2)(a) Database**, the former specifically designed for reproductions of non-electronic databases, the latter entailing an optional exception for private copies of fixations and broadcasts. In this respect, additional flexibilities for private copying stem from the wording of **Article 9(1)(a) Database**, which allows the reproduction of substantial parts of databases for private purposes, thereby covering acts of private copying.

Despite its importance in the copyright balance, not all Member States feature an exception for private copy. Some of them mention reproductions for private uses, but under other provisions (e.g., private study, flexibilities devoted to CHIs etc). In some instances, private copy provisions existing before the InfoSoc Directive entered into force were not modified accordingly.

The following pages will provide a comparative overview of the implementation of private copy exceptions across the EU, with the aim of assessing the degree of harmonization and the different grades of flexibility offered by each Member State. More specifically, national responses will be evaluated on the basis of their (i) **subjective** scope; **objective** scope, from the perspective of the number and the extent of **work** that can be covered (**ii**), as well as from the one of the array of **permitted uses** (**iii**); (**iv**) **other criteria** that play a key role in shaping the scope of the exception, such as terms and criteria for fair remuneration, the role of TPMs, or explicit references to the three-step-test.

4.2.1 SUBJECTIVE SCOPE

As to the beneficiaries of the exception, a consistent degree of harmonization has been reached across the EU. Very few countries present features that are worth being mentioned as substantial departures from the EU model.

An issue on which Member States diverge is the potential extension of the provision to cover copies made by third parties on behalf of the beneficiary of the exception. Some countries deny this possibility, while others admit it. Under the first group it is possible to find Sweden (Article 12 URL), Spain (Article 31.2 TRLPI), Latvia (Section 34 (1) LaCA), Italy (Article 71-sexies l.aut) and Denmark (Section 12(4) DCA). Specifically, the Danish exception is slightly more flexible, for it limits third party copying to cases of strict non-commercial purposes. The same can be said for Sweden (Article 12 URL), which excludes third party copyright only for specific categories of works. Specifically, the Swedish provision excludes third party copying of musical, cinematographic works, useful articles as well as other artistic works. In addition, third party copying is excluded in the case of unlawfully accessed works. The second group includes only two countries which explicitly admit third party copying: Finland (Section 12(2) TL) and Germany (Section 53(1) UrhG-G), despite the latter conditions it to the circumstance

that third party shall not receive remuneration in return. Other national laws do not provide any indication, although this result has been reached via judicial decisions.

It is interesting to note that some Member States include within the provision also business organizations and legal persons. In this sense, Section 30(3) CzCA allows legal persons and sole traders to make private copies. By contrast, Article 18(1) GCA (Greece), as amended in 2018, explicitly excludes enterprises, services and organizations. The same result is reached via case law within the Lithuanian system. In fact, the Vilnius District Court ruled that legal persons cannot benefit from the exception.[935] Ultimately, the case of Ireland can be mentioned. Despite enacted before Article 5(2)(b) InfoSoc and never afterwards, In Ireland, which does not feature a general private copy exception, Section 101 CRRA explicitly allows the private copying via recordings of a broadcast or cable program, as well as of the programs included therein, also by an establishment. Therefore, not only natural persons can be deemed included in the objective scope of the exception.

4.2.2 OBJECTIVE SCOPE: WORKS COVERED

The highest degree of fragmentation amongst national private copying exceptions can undeniably be observed with regards to the array and amount of works covered, where harmonization is low and several national solutions present points of divergence from the model enshrined in Article 5(2)(b) InfoSoc, which does not distinguish among the various types of works. On the contrary, a considerable degree of harmonization features the correspondent exceptions for private copy in Articles 6(2)(a) and 9(1)(a) Database.

Countries emphasizing work-specific differences to reduce the objective scope of the provisions are the vast majority: Bulgaria (Article 25(2) BCA), Croatia (Article 186 NN, unless provided otherwise by contract), Denmark (Section 12(2) DCA), Estonia (Section 18 AutÕS), Finland (Section 12(3)(4) TL), France (Article L. 122-5-2° CPI), Greece (Article 18(1) GCA), Italy (Articles 68 and 71-sexies l.aut), Lithuania (Article 20 (1) LiCA), Luxembourg (Article 10(4) LuDA), Poland (Article 23(1) UPA)), Slovenia (Article 50 ZASP), Spain (Article 31.2 TRLPI), Hungary (Section 35(1) SZJT) and Sweden (Article 12 URL).

Architectural works are the most frequently excluded. See, e.g., Denmark (Section 12(2) DCA), Finland (Section 12(3)(4) TL), France (Article L. 122-5-2° CPI generally excludes artistic works), Slovenia (Article 50 ZASP), Greece (Article 18(1) GCA), Hungary (Section 35(1) SZJT), Lithuania (Article 20(1) LiCA) and Poland (Article 23(1) UPA).

Single national solutions, as highlighted in the national reports above, may feature other specific-work exclusions. Most of Member States exclude software and electronic databases, in line with the EU model. In this context, the Finnish exception is particularly restrictive, for it crosses out also 3D objects (Section 12(3)(4)) TL). Again, in most instances, this carve-out is specified so as to include non-electronic databases, in line with Article 6(2)(a) Database. Apart from this EU-based distinction, Article 10(13) LuDA covers under private copy also state-

[935] *Vilnius District Court*, Civil case No. e2A-179-881/2017, 12 October 2017.

owned databases, although the technical means and conditions to make private copies are fixed by a separate regulation. Furthermore, a selective exclusion of databases and computer programs can be found in French copyright law. In this vein, Article L. 122-5-2° CPI outright excludes the private copying of databases, thus contrasting with Article 6(2)(a) Database.

Several restrictions can be found under the Croatian exception for private copy. Article 183 NN includes a long list of exclusions, such as architectural works, non-original and copyright databases, computer programs, cartographic, musical works, and sheet music. In addition, the Croatian exception also excludes literary works in their entirety such as books unless their copies have been sold out for at least two years. Yet, it must be noted that the provision leaves some room for flexibility by establishing that this regime merely operates by default, thus it can be derogated by law or contract. Similarly, Section 12(2) DCA (Denmark) also carves out numerous works from the scope of the exception. Specifically, cinematographic, literary, and musical works cannot be reproduced via the technical equipment made available in freely accessible libraries, business related entities and other public places. A quick glance at the Estonian copyright law unveils approximately the same degree of inflexibility. In fact, beyond the exclusion of architectural works and electronic databases, Section 18 AutÕS excludes sheet music and works of visual art in limited edition, whilst Section 756(1) AutÕS transposes Article 9(1)(a) Database verbatim.

A long list of selected work-specific exclusions can be observed under Finnish copyright law. Apart from excluding architectural works, databases, and software works, Section 12(3)(4) TL states that musical, cinematographic, 3D objects, as well as any other artistic work including sculptures are not subject to the private copying exception. The exclusion of artistic works in general can also be found in the French exception, along with databases and software (Article L. 122-5-2° CPI) unless for backup copies. Other work-specific limitations can also be inferred from Greek copyright law. In this respect, Article 18(1) GCA excludes sheet music and works of visual art circulating in limited edition via technical means. Sheet music is also exempted in Slovenia (Article 50 ZASP), whose private copying exception carves it out unless performed by handwriting, and Belgium (Article XI.190, 9° CDE). Notably, the Slovenian exception can be considered highly inflexible. Apart from architectural works in the form of building, Article 50 ZASP also exempts from the flexibility reproductions of literary works in their entirety, unless unavailable for at least two years, as well as databases and computer programs. A limitation in the amount of literary work that can be reproduced for private copying is also present under Swedish copyright law. Beyond the exclusion of digital copying of compilations, thus following a logic like the Danish exception, Article 12 URL asserts that literary works can only be reproduced in part or in their entirety only if they are small-sized.

More strikingly, the Italian exception for private copy of phonograms and videograms excludes all works that are available by contract, thus consistently encroaching the objective scope of the provision. In addition, albeit in the same logic, the exception cannot cover works that are otherwise available to the public or accessible via protected terminals allowing reproduction on a time-shifting basis. Similarly, the Spanish legislator also specifies in Article

31.2 TRPLI that works accessible anytime by electronic means and thus reproducible on a time-shifting basis do not belong to the objective scope of the private copying exception. In addition to other limitations, the Swedish exception (Article 12 URL) stands out for it prevents third party copying on a work-specific basis, excluding it for sculptures, cinematographic and musical works, works of visual art, as well as of any other artistic work.

Against all these restrictive approaches, the Czech private copying exception (Section 30(1) CzCA) broadens the EU baseline by extending its objective scope to cover the reproduction of architectural works, works of fine art by way of imitation and ephemeral recordings of audio-visual works. Yet, it cannot remain unnoticed that Article 9(2) Database and Article 10(1)(a) Rental have not been transposed within Czech copyright law. Therefore, broadcasts and private copies of substantial parts of databases are excluded from the objective scope of the private copying exception.

Less expansively, but still quite flexibly, the Latvian exception for private copy (Section 34 (1) LaCA) also covers those types of works that are generally excluded from the objective scope of private copying exceptions, such as lawfully disclosed films, phonograms and visual works, with the sole exclusion of software and databases. In Lithuania Article 20(1) LiCA allows also audiovisual copies of protected works. In the same fashion, the Dutch exception for private copy, introduced in Section 16(c) AW in 2006 with a view to implementing Article 5(2)(b), allows the reproduction of literary, artistic, and scientific works.

A particular regime can be found in German copyright law. Purpose-specific rules are in fact established for different kinds of works. Section 53(2) UrhG-G provides that works included in personal archives can be reproduced to the extent justified by the purpose of archiving, and insofar this is necessary to obtain a model for copying. Furthermore, a different regime is provided with regard to copies of broadcasts, fragments or extracts from published newspapers or periodicals for personal information, as well as individual articles and works that have become unavailable since at least two years.

Section 12(2) DCA carves out from the scope of permitted acts the construction of a work of architecture; the reproduction of a work of art by casting, by printing from an original negative or base, or in any other manner which may lead the copy to be considered as an original; the reproduction of computer programs in digitized form, reproduction in digital form of an electronic database already copied in digital form, reproduction in digital form of other works, unless this is done exclusively for the personal use of the person making the reproduction or his household. Similarly, the provision does not allow the reproduction by digital means of a work that has been lent or hired (Section 12(3) DCA), and it excludes the possibility to make copies of musical works and cinematographic works by using technical equipment made available in libraries, business premises, or in other places accessible to the public. The same applies for literary works if the technical equipment has been provided for commercial purposes.

The Irish case deserve a separate mention. While Irish law does not have a general copy exception, nor has it introduced it after the InfoSoc Directive, Section 101 CRRA, enacted prior to the InfoSoc and never brought in line with the EU text, allows only time-shifting copying of broadcasts and cable programs, also including works therein. In fact, the Recommendations of the Copyright Review Committee of 2013, siding for its inclusion within the CRRA, were not addressed in the amendments of 2019.

4.2.3 OBJECTIVE SCOPE: PERMITTED USES

On the side of permitted uses, Member States feature different approaches. Primarily, those private copying flexibilities consistently delimiting the number of permitted copies must be highlighted. In this sense, the Lithuanian (Article 20(1) LiCA), Italian (Articles 68, 71-sexies l.aut., specific for phonograms and videograms), Latvian (Section 34(1) LaCA), Polish (Article 23(1) UPA) and German (Section 53(1) UrhG-G) exceptions for private copy merely allow one copy per user, while the Slovenian exception (Article 50 ZASP) goes up to three copies. Specifically, in Italy Article 68 l.aut., introduced in 2000 and later modified to implement Article 5(2)(b) InfoSoc only allows the reproduction of single works or excerpts, by handwriting or copying devices, without dissemination or commercial use.

Another source of divergence stems from the existing specificities and limitations in the mode of copying. Under the work-specific German regime, Section 53(2) UrhG-G allows private copying for specific purposes, also specifying the modes of reproduction. Accordingly, a different regime and limitations in the methods of copying is provided for private copies for inclusion in personal archives, for works broadcasted for personal information about current affairs, and works or individual articles taken from newspapers and periodicals. In these cases, the provision establishes that reproduction can only occur on paper and similar mediums, by photocopying and similar techniques, or if exclusively analogue use takes place. Like Germany, a use-specific regime can also be found in Irish copyright law, enshrined in Section 101 CRRA.

Italian copyright law endorses a restrictive approach towards the means of private copying. Article 71-sexies l.aut., introduced in 2003 to implement Article 5(2)(b) InfoSoc for phonograms and videograms, does not permit private copies if the work is easily accessible via dedicated terminals in specific public places in a way that everyone can make digital copies on a time-shifting basis. Moreover, the Italian exception for private copy prohibits use of protected works in the case the same are otherwise accessible and thus copiable by contract, as well as in the case such works is protected via TPMs.

Alternatively, limitations may concern the extendibility of the exception to digital copying, as in Sweden (Article 12 URL), which excludes the digital private copying of compilations.

Slovenia represents a particular case, for it does not feature a private copy exception but regulates everything under the reprography exception. Article 50 ZASP, in connection with Article 37 ZASP, amended in 2004, permits a natural person to reproduce a disclosed work,

on paper or any similar medium, using reprographic techniques or any other similar medium, as long as the copy is made for private use and non-commercial purposes, with a maximum of three copies allowed. The exception does not cover the reproduction of entire literary works, unless they have been out of print for more than two years, sheet music, unless performed by handwriting, electronic databases and computer programs, and in the form of building of architectural structures.

Private copying via any medium, in line with Article 5(2)(b) InfoSoc, is explicitly allowed in most national exceptions: Luxembourg (Article 10(4) LuDA), Malta (Article 9(1)(c) MCA), Slovakia (Section 42 ZKUASP), Spain (Article 31.2 TRPLI), Italy (Article 71-sexies l.aut) and Germany (Section 53(1) UrhG-G).

On the side of more extensive readings and approaches, it is noteworthy to mention that in Latvia Section 34 (1) LaCA specifically states that digital copying of works included in lawfully acquired films, phonograms and visual works is allowed. Ultimately, a particularly expansive take can be found in Section 30(3) CzCA (Czechia), which also encompasses private copies by means of fixation and imitation. Ultimately, it is worth highlighting that the Croatian exception for private copy (Article 185(1) NN) is also extended to related rights.

4.2.4 OTHER CONDITIONS

National remuneration schemes and criteria are articulated quite differently among Member States. While a detailed comparative overview goes beyond the scope of this study, some specificities are still worth being highlighted.

In all Member States, remuneration is managed through CMOs, and criteria of collection and distribution are usually specified within national copyright laws, with reference to external sources that are entrusted to determine specific amounts or more detailed calculation criteria and distribution schemes.

Rather, the Greek exception, enshrined in Article 18(1) GCA, provides different remuneration criteria if private copying takes place via analogical or mechanical means, such as in the case of photocopying. In this specific situation, Article 18 GCA also defines the measures that CMOs can take in case of lack of payment. In line with that, the Greek Supreme Court confirmed that photocopying comes in conflict with the normal exploitation of a work, thus falling outside of the exception for private copy.[936] With a particular specification, in Slovenia Article 75 ZKUASP provides that if no CMO is competent to collect private copy remuneration, which has to be administered by CMOs according to ZASP, then the sums due can be collected individually until a competent authority appoints a CMO in this regard. In this context, it is also worth highlighting that according to Article 26(1) BCA, in Bulgaria remuneration duties are not contractually overridable.

[936] Greek Supreme Court, 1327/2018 of 8 August 2019.

In terms of conditions of applicability, the Spanish exception for private copy stands out for its degree of articulation and details. Three conditions apply, in fact, to Article 31.2 TRPLI. First, works must be copied for strictly private and non-business-related purposes, neither direct nor indirect. Second, works shall have a lawful source, or the beneficiary of the exception must have received access to such works on a lawful basis. Third, the copy must not be exploited collectively or distributed in exchange of a price.

Further restrictions stem from the interplay between TPMs and the private copying exception. Under French copyright law a specific provision, Article L. 331-5 CPI, that transposes Article 6(4) InfoSoc, establishes that the use of TPMs shall not interfere with users' prerogatives such as, inter alia, the exception for private copy. Yet, in the landmark *Mulholland Drive* case, the French Supreme Court held that the exception for private copy merely amounts to a procedural defence, thus users cannot oppose it against the use of TPMs.[937] The same can be said for Article 71sexies l.aut. (Italy), which allows the private reproduction of phonograms and videograms made by a natural person for personal non-commercial use but specifies that the exception does not apply if TPMs are in place or if the same use of the protected work is available otherwise under license. At the same time, however, Article 71-sexies(4) l.aut. obliges rightholders to ensure that users have access to the protected works in order to benefit from the private copying exception.

In some instances, and for some works, Member States require the rightholder's authorization to make private copies. This is the case of Section 53(7) UrhG-G, which establishes that recordings of private lectures, performances of a work via audio and recording devices, as well as private copies of architectural and artistic works for projects and drafts always require such consent.

It is worth mentioning that the strictly non-commercial purpose of private copies was sometimes highlighted and further articulated in national case law, in a way that ultimately restricted the objective scope of the private copying exception. In a Dutch case (*In Met spybril opnemen van examenvragen),*[938] for instance, it was held that the recording of exam questions for a driving school were to be considered outside of the objective scope of the Dutch exception for private copy, since the aim of the copy was to enhance the position of a driving school that competed with the driving school the questions of which were copied.

As to the three-step test, three national exceptions for private copy explicitly refer to it as an additional condition of applicability, directly or indirectly citing its prongs. This is the case for Greece (Article 28C GCA), Italy (Article 71-sexies l.aut.) and Portugal (Article 81(b) CDA).

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The state and degree of harmonization of the private copy exception across the EU is not homogeneous. While most of the EU countries already featured such a flexibility or have

[937] Cass., 1ère civ., 19 juin 2008, *Mulholland Drive*.

[938] Gerechtshof Amsterdam, 9 June 2017, ECLI:NL: GHAMS:2021:2934 (*Met spybril opnemen van examenvragen*).

implemented Article 5(2)(b) InfoSoc, along or together with Article 5(2)(a) on reprography, their approaches are various, apart from a few basic points of convergence. On the side of beneficiaries, some Member States extend the exception to cover third party copying and, more rarely, legal persons. As to the objective scope of the provision, the lack of harmonization goes hand in hand with a general rigidity on the amount of works that can be copied, which is variously limited by quantitative or qualitative caps, or on the types of works covered, with different national carve-outs. These rigidities are widespread and differently framed, in a way that common trends are difficult to trace. Permitted uses are usually limited to reproduction, with a few countries opening to digital copies, while remuneration schemes converge to private levy models sharing common features, also thanks to the repeated interventions of the CJEU. National courts also contribute to create fragmentation with different interpretations of additional criteria and conditions of applicability, such as the three-step test, the impact of TPMs on the exercise of the exception and the remuneration due, and the notion of non-commercial use.

4.3 PARODY, CARICATURE AND PASTICHE

Parody is a creative work that borrows some element from a pre-existing creative work to convey a humorous message by satiric or ironic imitation. The kind of message conveyed varies. It can be simply a comment, but also a critique, a political opinion, even propaganda, but also bare entertainment. This makes parody important for artistic freedom and, most importantly, for freedom of expression. Similar considerations apply to caricature (ironic and satiric imitation that targets a real person or a fictitious character) and pastiche (ironic and satiric imitation of a style usually targeting a collection of different works).

The key feature of parody/caricature/pastiche is the fact that it refers to pre-existing creative work, which are often protected by copyright. This is why national laws have traditionally included an ad hoc flexibility to strike a fair balance between the moral and economic interests of authors on the one side, and the freedom of expression and artistic creativity of users (who are subsequent, transformative authors themselves) on the other side. The balance is sometimes hard to achieve, particularly since the “rules of the genre” make parody/caricature/pastiche usually borderline with rudeness, and outrageous and offensive behaviour, thus potentially overlapping with defamation, and other institutions protecting the reputation and honour of authors. Also, moral rights of authors are at stake, which furtherly complicates the scenario.

Article 5(3)(k) InfoSoc states that Member States can derogate from the reproduction and communication to the public rights when the work is used “for purpose of caricature, parody or pastiche”.[939] The implementation of the provision is optional. However, in light of the importance of parody for freedom of expression, even the countries that have not implemented it in their legislation have opened paths to allow parody through case law.

[939] From now on we will use the term parody as to include pastiche and caricature, unless otherwise specified.

Relying on the same margin of flexibility, national copyright systems – and, in particular, their judges - have also set up additional requirements and conditions, making their national versions of the parody exception more restrictive than its EU counterpart.

Due to its conciseness, the EU provision leaves undefined *what* parody is, and what are the features that distinguish parody from bare imitation/copying of a pre-existing creative work.

In 2014, the CJEU *Deckmyn* case[940] intervened to offer some specifications and further harmonize the notion of parody across the Union as an autonomous concept of EU law.

According to the CJEU, to define parody there are only two parameters to take into account, namely whether the alleged parody "evoke[s] an existing work while being noticeably different from it" [941] (structural parameter), and, secondly, whether it "constitute[s] an expression of humour or mockery"[942] (functional parameter).[943] The Court also identified criteria that are usually applied at a national level but should be abandoned if they result in a stricter interpretation than the one offered by the new EU-wide definition, such as (1) whether the work has an original character of its own, (2) whether it could reasonably be attributed to a person other than the author of the original work itself, (3) whether the message conveyed target the original work itself, and (4) whether it mentions the source of the parodied work. In addition, it is worth noting that *Deckmyn* makes no reference to moral rights, thus clarifying that these factors should not be taken into account in the definition of parody.

The following pages will compare and analyse national implementations of the parody exception against this background, to check their compliance with the InfoSoc Directive and the guidance provided by the CJEU in *Deckmyn*.

4.3.1 PARODY IN NATIONAL COPYRIGHT ACTS

Member States may be grouped into four different categories. The first group is made by those countries that offer a verbatim implementation of Article 5(3)(k) InfoSoc, simply stating that when the reproduction and the communication to the public of a protected work are carried out to create a parody, there is no copyright infringement (e.g., Czechia (Section 38(g) CzCA), Germany (Section 51a UrhG-G), Latvia (Section 19(1)(9) LaCA), Ireland (Section 52(5) CRRA) and Malta (Article 9(1)(s) MCA)).

[940] Judgment of 3 September 2014, *Deckmyn*, C-201-13, EU:C:2014:2132.
[941] Ibid, para 20.
[942] Ibid, para 20.
[943] There is settled case law concerning the necessity of the humorous character: Judgment of 30 January 2014, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, CJEU C-285/12, EU:C:2014:39, para. 27; Judgment of 22 December 2008, *Friederike Wallentin- Hermann v Alitalia*, C-549/07, EU:C:2008:771, para. 17; Judgment of 22 November 2012, *Josef Probst v mr.nexnet GmbH*, C-119/12, EU:C:2012:748, para. 20; and Judgment of 5 July 2012, *Content Services Ltd v Bundesarbeitskammer*, C-49/11, EU:C:2012:419, para. 32.

The second group consists of those countries that present a distinctive implementation, that is they lay at least one additional requirement, scope limitation, subjective or objective condition. Belgium, France, Netherlands, and Poland present very general clauses. The Belgian exception (Art. XI. 190. § 1. CEL) provides that parody must respect *des usages honnêtes* (honest practices), while the French (Article L. 122-5-4° CPI) and Polish (Article 29[1] UPA) provisions refer to the artistic genre of parody, the former stating that the application of the exception must take into account the rules and practices of the specific artistic genre, and the latter ruling that "works may be used for the purposes of parody, pastiche, or caricature, to the extent that it is justified by the rights of these artistic genres". Finally, the Dutch implementation (Article 18(b) AW (2004)) asks for the parodic work to comply with what social customs regard as reasonably acceptable.

On the contrary, Romania (Article 37 (b) RDA), Slovakia (Section 38 ZKUASP), Slovenia (Article 53(2) ZASP), and Spain (Article 39 TRLPI) require that there is no risk of confusion between the original work and the new derivative one, and the Spanish exception also demands that no damage to the work or its author is made (Article 39 TRLPI).

Another possible condition (set up by Croatia (Article 206 NN), Estonia (Section 19(7) AutÕS), and Lithuania (Article 58(12) LiCA) is to provide, unless this is proven impossible, the name of the author and an indication of the original work targeted by parody. Croatia (Article 206 NN) and Estonia (Section 19(7) AutÕS) also set up a "necessity benchmark", in the sense that parody can borrow from the original work only elements that are necessary for the parodic purpose. Interestingly, with the aim of implementing article 17(7) CDSM, Lithuania introduced an additional parody flexibility, way wider in its formulation and more consistent with the InfoSoc baseline structure (Article 21(1) LiCA). This provision, however, has not repealed the original Article 58(12) LiCA.

The Luxembourgian implementation (Article 10(6) LuDA) appears to be the strictest of all. It requires parody to comply with "good practices", that it borrows only the elements that are strictly necessary for the intended purpose, and that it does not denigrate the work or its author.

Last, some countries (Estonia (Section 19(7) AutÕS), Lithuania (Article 58(12) LiCA,) Luxembourg (Article 10(6) LuDA) expressly include *parody* and *caricature* only, thus seemingly excluding *pastiche* from the scope of the provision. However, Czechia will soon amend the provision to include pastiche as well, in response to Article 17(7) CDSM (Section 38(g) CzCA), while national experts from Latvia highlight that pastiche might be included by means of interpretation, especially post-*Deckmyn*, even if the exceptional nature of parody asks for a restrictive interpretation. Czechian national experts have also reported that the repealing of the section to add pastiche to the list of allowed products will entail a higher of flexibility. This is likely to mend the slightly more restrictive approach adopted by Section 38(g) CzCA compared to Article 5(3)(k) Infosoc. Lithuania, not mentioning pastiche explicitly, had included it in Article 21(1) LiCA following Article 17(7) CDSM.

The third group is made of those countries which have not implemented the InfoSoc parody exception. They are Austria, Bulgaria, Denmark, Finland, Italy, Greece, Portugal, Sweden. This remark concerns only general parody-related flexibilities, since some of the countries here mentioned have implemented specific flexibilities to allow parody, caricature and pastiche in online settings (e.g., Austria with Section 42f UrhG-A, Italy with Article 102-*nonies* (2) l.aut). Among the country that are not provided with a general exception, Cypriot and Greek national experts have not reported specific national provisions nor case law in their respective copyright legal systems that could cover the matter. Finland and Sweden have implemented parody through their general provision on free uses (Section 4(2) TL for Finland, Article 4(2) URL for Sweden), which allow re-elaborations of earlier protected works when their features get dissolved in the adaptation into a new work, and the latter reaches the threshold of autonomous creativity and originality, so that it can be independently protected by copyright.

Bulgaria, Italy, Denmark and Portugal include parody under quotation. In this regard, the approach of Portugal is the most particular, for it recognises the existence of parody as a creative, independent work but does not devote a specific exception to it (see, quotation, Article 75(2)(g) CDA). In Denmark and Bulgaria parody is consistently allowed through case law on the basis of the quotation exception. In Denmark (Section 22 DCA), this translates in a very restrictive implementation,[944] while for Bulgaria the scope of the flexibility seems consistent with the InfoSoc standard.[945] Finally, Austria allows parodic works, even in the lack of a specific exception, through a direct application of freedom of expression.[946]

4.3.2 PARODY AS A LIVING CONCEPT IN COURTS

While the legislative texts are usually formulated plainly and very generally, national case laws usually introduce additional conditions to the parody exception. In order to assess whether such a living interpretation by national courts is in line with Deckmyn, this section will compare national judicial decisions in their approach to all criteria set by *Deckmyn,* both as guidelines to follow[947] and as additional restrictive criteria to avoid.[948] These are: (1) the difference from the original (structural parameter), (2) whether there is a component of humour or mockery (functional parameter), (3) whether the parody target the earlier creative work specifically, (4) whether there are any doubts concerning the fact that the derivative work was made by an author other than the one of the earlier protected work, (5) whether there is an indication of the paternity of the earlier work, (6) whether there is an intention to compete with the original work or profit from its fame, (7) a necessity benchmark, limiting

[944] See, *Ugeskrift for Retsvæsen* 2007.280SH; *Ugeskrift for Retsvæsen* 1999.547Ø; *Ugeskrift for Retsvæsen* 2019.1294.
[945] The Bulgarian Supreme Court of Cassation has extended the scope of the subjective criteria of quotation exception also to uses for the purposes of parody. See, case no. 1771/2016 of 2 August 2017.
[946] See: OGH 4 Ob 66/10z.
[947] Judgment of 3 September 2014, Deckmyn, C-201-13, EU:C:2014:2132, para 20.
[948] Ibid, para 21.

how much you can borrow from a protected work, (8) the need to respect moral rights or comply with other legal institutions protecting honour and reputation.

While the functional and structural parameters are introduced by *Deckmyn*, the other criteria are fairly country-specific and, at least theoretically, may be considered against EU law if they result in greater restrictions to the parody exception than what allowed at the EU level.

4.3.2.1 PERCEIVABLE DIFFERENCES FROM THE ORIGINAL WORK

In *Deckmyn*, the exact formulation of the structural parameter is that parody should "evoke an existing work while being noticeably different from it",[949] which does not have to be interpreted as if "parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work".[950] However, the concept of "difference from the original work" was a long-settled and widely used criterion across national courts way before *Deckmyn*, which makes its national applications greatly differ among each other and from the new formulation offered by the CJEU.

Some countries interpret the notion as an originality and independence threshold, while others focus on the risk of confusion with the original work, or on the amount taken from the original work. These declinations of the structural parameter are largely different – a circumstance that is likely to prevent the possibility to reach a unitary notion of parody across the EU.

Countries using the requirement of "risk for confusion" are Romania (Article 37(b) RDA), Slovakia (Section 38 ZKUASP), Slovenia (Article 53(2) ZASP), Spain (Article 39 TRLPI), which explicitly mention it in their legislative text. However, also France (Article L. 122-5-4° CPI) and the Netherlands (Article 18(b) AW**)**, albeit silent about it in their copyright acts, consistently apply this criterion in their case law. French decisions hold that parody should not confuse the public, in the sense that there should not be any risk that the public thinks it is presented with the parodied work itself instead of the parodic version.[951] Also, the risk of confusion rules out the possibility to justify infringements of authors' moral rights.[952] The concrete definition of the concept is everything but straightforward, as very well highlighted by the *Douce Transes*[953] and the *Les Feuilles Mortes* cases,[954] where high French courts stated that a reproduction of the original music accompanied by a modification of the lyrics is sufficient to

[949] Judgment of 3 September 2014, Deckmyn, C-201-13, EU:C:2014:2132, para 20.
[950] Ibid, para 21.
[951] This is stated very clearly in CA Paris, pôle 5, 2ème ch., 18 février 2011; TGI Evry, 9/07/2009, RG n° 09/02410; confirmed Paris, 18/02/2011, RG n°09/19272, Propr. Int. 2011 n°39 (Saint-Tin case), where it is stated that parody is the "result of a work of distortion or subversion and thus, a detachment from the original work, in order for the public not to be mistaken on the impact of the words and on the author of the parody" (transl. by Jaques); see also Supreme Court of France, 1st Chamber, 3 June 1997, Bulletin 1997 I, no. 184, p. 123.
[952] Supreme Court of France, 1st Chamber, 27 March 1990, Bull. Civ. I, no. 75.
[953] Douces Trances case Cass., 12 janvier 1988, RIDA, n°137, 98.
[954] Court of Appeal of Paris, 1st Chamber, 11 May 1993.

avoid the risk of confusion; by the *Tintin's* cases, where an adaptation of Tintin using drugs and involved in sexual acts was not allowed because the style and the setting were not different enough to avoid confusion;[955] and by *Peter Klase* case,[956] where a mere change of colour and an incorporation in another work was not considered enough to distinguish the parody from the original work, and thus to avoid confusion.[957] Similarly, in a case concerning the inclusion of Hergé's character Tintin in paintings in the style of Edward Hopper, a French court required "perceptible differences" so that the parody is sufficiently different form the copied work and can be immediately identifiable as a parody of it.[958]

Dutch courts have developed a similar criterion, but without introducing an independent originality threshold. On this basis, the use of an image of "Rudolph the red-nosed reindeer" on a bottle of an alcoholic beverage,[959] a parody of Yellow Pages commercial,[960] and the use of a cartoon in a satirical video[961] were not allowed due to the risk of confusion with the original works.

Some countries interpret the structural requirement much more strictly. Rather than asking for a sufficient differentiation between the two works, they require that the parody present a degree of creativity and originality so that it may count as an independent work autonomously protected by copyright. These Member States can be divided into two different groups. On the one hand, Finland (Section 4(2) TL), and Sweden (Article 4(2) URL) ask for the independent originality of the parody because of the structural limits of their parody exception. In fact, these countries do not have a specific exception for parodic works in their national legislation, but parody is generally included under the umbrella of the free uses provisions, which requires that the new work is new and independent from the one used as an inspiration. This has been consistently confirmed by Finnish and Swedish courts in decisions concerning the application of the free uses clause, both in general and in parody-specific cases.[962]

The Finnish Copyright Council and the Helsinki Court of Appeal held that a web page titled "Save the Paedophiles", intended as a parody of "Save the Children", could not be considered parody because it did not fulfil the requirement of being a new and independent work, for

[955] Court of First Instance of Paris, 11 June 2004, "*Moulinsart et Fanny R. c. Eric J.* ", Propr. intell. 2005, 55.
[956] Court of Appeal of Paris, 1st Chamber, "*Malka c. Klasen*".
[957] Other relevant decisions are: Danone case (GI Paris, 4 juillet 2001, Société Compagnie Gervais Danone et Société Groupe Danone v Olivier M., Réseau Voltaire et autres, www.legalis.net, upheld on appeal, Paris, 30 avril 2003), sequel to Tintin (TGI Nanterre, 1ère ch., 22 mai 2008, n°06/11732, Garcia c/ Sté Moulinsart confirmed by Versailles 17 septembre 2009), minor amendments to lyrics or drawing not allowed (TGI Paris, 9 janvier 1970, RIDA, février 1970, p. 172; Paris, 17 octobre 1980 D. 1982, somm. 42).
[958] Tribunal judiciaire de Rennes, 2ème ch. Civ., n. 17/04478 10/05/2021, *Soc. Moulinsart c/ Xavier Marabout*.
[959] Court of First Instance of Maastricht, 18 September 2006, ECLI:NL: RBMAA:2006: AY8784.
[960] Gouden gids, Court of First Instance of Breda, 24 June 2005, IER 2005, 80.
[961] Court of First Instance of Northern-Netherlands, 18 November 2014, ECLI:NL: RBNNE:2014:6095.
[962] See, for Germany, Federal Supreme Court, 11 March 1993, Case No. I ZR 263/91, GRUR 1994, 206, 208 (alcolix case); for Finland TN 2010:3/ Helsinki Court of Appeals HO 15.5.2011 no. 1157 (*Helsingin hovioikeus*).

the mere replacement of the word "Children" with the word "Paedophiles" could not count as such.[963]

Interestingly, until 2021, Germany presented the same structure, allowing parody under this free uses flexibility (Section 23(1) UrhG-G). However, it now presents a specific parody provision ex Section 51a UrhG. This provision allows the reproduction, communication and distribution of protected works for the purpose of parody, caricature and pastiche, thus implementing the InfoSoc provision almost *verbatim*. The application by German courts revolves around the *Blaessetheorie* (fading away theory), which requires a significantly high degree of novelty and independence of the new work. However, even if the original work has not *faded away*, a parody can still be allowed when there is a sufficient *innerer Abstand* (internal distance) between the original work and the parody,[964] so that the work can receive independent copyright protection on its own. This happens usually, but not exclusively, when there is a direct *antithematische Behandlung* (anti-thematic treatment) of the original work[965] or of its "environment".[966] After the implementation of the parody-specific flexibility (Section 51a UrhG-G), it is not clear whether courts will maintain the same criteria.

After *Deckmyn*, which clarifies that the application of the EU parody exception shall not depend on the originality of the parodic work, it is doubtful that such criteria may still be upheld. For instance, the Swedish Patent and Market Court of Appeal (PMÖD) stated that parody needed not to be original to be a free use, explicitly mentioning the *Deckmyn* case to justify the interpretative turn against Article 4(2) URL, which textually requires originality.[967] The German case law experienced a similar change in the reading of the free use provision with the *Auf fett getrimmt* case[968] In this decision, the BGH stated that the appellate court should have given more weight to the *Deckmyn* interpretation of the concept of parody, and held that parody can be allowed under German law even if the *Blaessetheorie* does not apply and there is not *antithematische Behandlung*,[969] thus admitting that the originality of the new work is not required to apply the free use clause.[970] This comes with the caveat that Germany has now implemented a parody-specific exception (Section 51a UrhG-G), and courts might vary their way to approach such cases

[963] TN 2017:4, TN 2010:3/ Helsinki Court of Appeals HO 15.5.2011 no. 1157 (Helsingin hovioikeus).
[964] BGH, decision of 11 March 1993, file no. I ZR 263/91 – ALCOLIX; BGH, decision of 20 March 2003, file no. I ZR 117/00 – GIES-ADLER.
[965] Federal Supreme Court, 26 March 1971, Case No. I ZR 77/69, GRUR 1971, 588, 589 – *Disney-Parodie*; Federal Supreme Court, 15 November 1957, Case No. I ZR 83/56, GRUR 1958, 354, 356.
[966] Federal Supreme Court, 20 March 2003, Case No. I ZR 117/00, GRUR 2003, 956, 958 – Gies-Adler.
[967] Patent and Market Court of Appeals (PMÖD) in case PMT 1473-18, judgment delivered 15 July 2019 (*Mobilefilm* aka *Metal pole case*).
[968] German Bundesgerichtshof of July 28, 2016, file no. I ZR 9/15.
[969] German Bundesgerichtshof of July 28, 2016, file no. I ZR 9/15, para. 35.
[970] German Bundesgerichtshof of July 28, 2016, file no. I ZR 9/15, para. 28.

A significant difference from the pre-existing work, amounting to independent originality, is also required by other countries, such as Belgium.[971] Also the Austrian OGH held that, to qualify as a parody, the new work needs to show an independent, individual and autonomous character so that the features of the earlier one fades away in the new adaptation,[972] and the comparison between the parody and the parodied work should prove that the former is not a dependent creation. Similarly, the Polish Supreme Court stated that the parody should transform the meaning and the context of the earlier protected work so that the public could recognise an innovative and creative character in the parodic creation, and many Italian courts require for the application of parody that "the parodic work of art (…) conveys a creative, original and autonomous message that is clearly perceptible," [973] and that this assessment "must be conducted not so much by highlighting identities and similarities with the original work, but by considering whether the derivative work as a whole, while reproducing – to a greater or lesser extent – the original work and in any case drawing inspiration from it (…), deviates from it in order to convey a different artistic message."[974] No further case law can be reported to evidence a relaxation of this stricter requirement after *Deckmyn*.

4.3.2.2 THE HUMOROUS OR MOCKERY COMPONENT

The second requirement singled out by *Deckmyn* is the functional parameter, that is the ability of the parody to achieve humour or mockery. Being the humoristic component intrinsic to the concept of parody itself, all countries allowing parody somehow to refer to it. However, they do it in very different manners.

Countries implementing parody through free use (Finland, Germany until 2021, and Sweden) never consider the humoristic or mocking effect in the application of parody, even if they generally recognise that parodies are, as a matter of principle, transformations of works with a comical or satirical intent.[975] Similarly, countries allowing parody through the quotation exception are more likely to refuse parody for reasons other than the absence of humour or mockery, but rather on more formalist grounds such as the lack of proper attribution.

On the contrary, countries having a specific exception dedicated to parody often expressly require the humour or mockery component, which is then likely to be the decisive factor in the application of the exception. In general, the requirement is interpreted very widely,

[971] See Court of Appeal of Antwerp, 8th Chamber, 11 October 2000, A&M 2001, 357 (*Pommeke* – where an adaptation of a comic was not allowed because it could not figure aas an independent work, even if there was no risk of confusion), Court of First Instance of Antwerp, 12 May 2005, A&M 2005, 304; appeal rejected by Court of Appeal of Antwerp, 2 May 2006, Mediaforum 20006, 201 (*Mercis en Bruna/Code* case); and Court of First Instance of Brussels, 14th Chamber, 29 June 1999, A&M 1999, 435 (*Michel Vaillant* case).
[972] See: OGH 4 Ob 66/10z.
[973] Trib. Venezia, Sez. spec. Impresa, 07.11.2015.
[974] Trib. Milano, 13.07.2011, *Fondazione Giacometti c. Fondazione Prada*.
[975] Federal Supreme Court, 26 March 1971, Case No. I ZR 77/69, GRUR 1971, 588, 589 – *Disney-Parodie*.

looking not at the *effect*, but at the *intention* of the author of the parody. In this sense, the Court of Appeal of Antwerp[976] stated that a pornographic adaptation of a popular comic strips might present a humorous intention because it targets a very specific group of readers. France has been equally liberal in recognising the humorous character of parodies. French courts consistently recognise that the humorous component shall not be assessed on the basis of the success of the parody in front of the general public, for this is highly dependent on social and cultural factors, as well as the talent of the artist. In order not to allow successful parodies only, which would violate the principle of equality and freedom of expression, the evaluation of humour and mockery should be "irrespective of the result, which is embodied in the manifestation of laughter or smiles, both of which are subject to the talent of the artist and diverse sensitivities of the public, two parameters which are beyond the grasp of the court". [977] However, it happens sometimes that the humorous intention requirement is waived in favour of a bare humorous effect,[978] as reported in Belgium.

With quite an interesting approach, Austrian courts allows parody through an application of freedom of expression. As a consequence, the humorous character of parody is not interpreted as *mere fun at the expense of others*, but it should be finalised to the conveyance of a specific *message*.[979]

4.3.2.3 CLEAR REFERENCING TO THE PRE-EXISTING WORK

As anticipated, this and the requirements that follow are generally not consistent with the *Deckmyn* decision. However, they are systematically used by Member States, and no comparative analysis of the state of the parody exception in Europe can avoid offering an account of their use. However, it should be borne in mind that in time these criteria may lose grip and be disapplied to align with the *Deckmyn* requirements.[980]

Not all countries require parody to specifically target and/or make a clear reference to a pre-existing work. French decisions applied the exception even in cases where the message conveyed by the parody was not addressed to the original work. Dutch courts follow a similar path. While they generally recognise that in theory parody should make mockery of the original work,[981] they have opted for a broader interpretation of the exception. For instance, in *Staat der Nederlanden/Greenpeace*, the use of a government logo to convey a parodic message which was aimed neither at the government nor at the work itself was considered

[976] Court of Appeal of Antwerp, 8th Chamber, 11 October 2000, A&M 2001, 357 (*Pommeke*) p. 358.

[977] Court of First Instance of Paris, 3rd Chamber, 14 May 1992, "Michel *SARDOU et autres c. André LAMY et autres* "RIDA 1992-4 (no. 154), 174, 178.

[978] Court of Appeal of Versailles, 1st Chamber, 17 March 1994, "Agent *Judiciaire du Trésor et autres c. Sté Philip Morris,* "RIDA 1995-2 (no. 164), 350, 352.

[979] See the NR for additional references.

[980] See for instance Bauret v Koons, (TGI Paris, 9 mars 2017, RG n°15/01086), where the French tribunal of first instance endorsed the two main requirements set out in Deckmyn as sufficient to define the purpose of parody. Or see also German Bundesgerichtshof of July 28, 2016, file no. I ZR 9/15.

[981] Gerechtshof Amsterdam, 13 September 2011, ECLI:NL: GHAMS:2011:BS7825 *(Mercis en Bruna/Punt.nl).*

as parody.[982] With an opposite take, Germany and Belgium, have a much stricter approach, requiring parody to target specifically the parodied work. In Belgium, the use of a famous comic strip for political advertisement, picturing a party leader as the main character and his main opponents as the bad guy, did not fall within the parody exception because it conveyed a political message and did not target the comic strip itself.[983] It was held that the only case where the inherence of the message to the parodied work can be waived is the one where the parody mocks its formal expression, as well as conveying a message that does not relate to it.[984]

In Germany, the situation is particularly complicated because the necessity to target the specific parodied work is *internal* to the structural requirement of parody, for it derives from the need to recognize an internal distance (*innerer Abstand*) with the original work to apply the free use clause. More specifically, the need for an *antithematische Behandlung* (anti-thematic treatment) of the subject matter of the parodied work or its author[985] implies that the parody should explicitly target the original work in order to be considered as a free use under Section 24 UrHG-G. However, even before *Deckmyn*, this requirement was softened, first by extending the target to include the *thematic environment* of the work, and not only the work itself,[986] then by admitting under the exception the drawing of a German politician in the Asterix-and-Obelix style, which was not a parody aimed at the comic strip itself was allowed as *caricature* of the politician rather than a parody of Asterix and Obelix.[987] Following the latest developments brought by the *Auf fett getrimmt* decision, however, it is likely that the necessity to target the original work might become less and less relevant. Of course, as clarified supra, everything that concerns Germany is hugely qualified by the caveat that Germany has provided itself with a parody-specific exception, thus tackling the root of the problem and eliminating the need to fall back on free uses provisions.

Another requirement mentioned in *Deckmyn* as something *not* to consider when assessing parody is whether the parodic work is likely to be attributed, by the general public, to a person that is not the author of the original work. No national experts have reported case law on the matter, but the criterion is likely to be integrated in the evaluation of the structural parameter.

4.3.2.4 INDICATION OF THE SOURCE

While the CJEU in *Deckmyn* has explicitly stated that an indication of the paternity of the pre-existing work is not needed for parody, some Member States explicitly require it, such as

[982] Court of First Instance of Amsterdam, 22 December 2006, AMI 2007, 62 (*Staat der Nederlanden/Greenpeace*).
[983] Court of Appeal of Ghent. - De Bevere-Blanckaert en Lucky Comics/Dedecker e.a. (supra, n 24), p. 329. See also HUMO case (Court of First Instance of Brussels, 14th Chamber, 8 October 1996, A&M 1997, 71).
[984] KBVM et al./LS Music en Deloyelle - Court of First Instance of Brussels, 19 March 1999, A&M 1999, 373.
[985]Federal Supreme Court, 26 March 1971, Case No. I ZR 77/69, GRUR 1971, 588, 589 – *Disney-Parodie*; Federal Supreme Court, 15 November 1957, Case No. I ZR 83/56, GRUR 1958, 354, 356 - para 34.
[986] Federal Supreme Court, 20 March 2003, Case No. I ZR 117/00, GRUR 2003, 956, 958 – Gies-Adler.
[987] Federal Supreme Court, 11 March 1993, Case No. I ZR 264/91, GRUR 1994, 191 – Asterix-Persiflagen.

Croatia (Article 206 NN), while others might require it indirectly, since they implement parody through the quotation exception (Bulgaria, Hungary, Italy and Portugal).

4.3.2.5 COMMERCIAL PURPOSE AND RISK OF ECONOMIC HARM

Another factor that courts happen to use in the application of the parody exception is whether the parodic work is motivated by a commercial purpose, that is whether the author of the parody wants to compete with the parodied work, unduly profit from its fame, or potentially undermine its normal exploitation. The criterion is outside the *Deckmyn* list, and it is also responsible for a dangerous fragmentation of national responses, since countries assess commercial interests in quite an inconsistent fashion.

As a general take, the outer limit of parody seems to be its use as an advertisement. Even countries that appear to be very liberal on the notion of commercial interest tend to exclude the application of the exception in this case. A German court, for instance, considered that the use of a painting by Magritte on a condom package had only a commercial and advertising purpose, and was thus banned.[988] Similarly, Dutch courts state that for a parody to be legitimate, there must an intention other than a purely commercial one, and, most importantly, no intention to compete with the original work. In this sense, imitations of commercials are usually considered out of the scope of the exception.[989] Similarly, French courts do not protect parodies having the primary intent to commercially promote objects other than the original work. Along these lines, the modification of pictures taken from a fashion magazine to promote an operating system[990] and the reproduction of movie scenes to promote fashion items were not considered parodies.[991] This does not mean that parodies that indirectly generate revenue through dissemination are always carved out from the exception. On the contrary, French decisions have admitted this possibility, insofar as the parody was not finalised to produce revenue in the first place, and its dissemination was functional to the exercise of freedom of expression. This is usually the case for parodies having a political value, which are subject of a settled trend in French case law.[992]

There are countries embracing a stricter approach as well. Belgium, for instance, has a long history of decision that do not apply the parody exception when the work is used to draw

[988] Court of Appeal of Frankfurt am Main, 25 April 1995, ZUM 1996, 97, 99; see also District Court of Berlin, 13 December 1972, GRUR 1974, 231, 232.
[989] Court of First Instance of Haarlem, 26 June 2001, KG 2001, 207 (imitation of a commercial was considered unfair competition); Court of First Instance of Breda, 24 June 2005, IER 2005, 80 (Gouden Gids; imitation of a commercial for the Dutch Yellow pages had a competitive instead of humorous intention).
[990] *SNC Prisma Presse et FEMME c. Charles V.* (reproduction of pictures from and part of the website of the magazine FEMME with the addition of humorous captions in order to promote the operating system LINUX was not allowed).
[991] Court of First Instance of Paris, 1 Chamber, 30 April 1997, "*Pagnol c. Sté Vog*", not published (recreation of movie stills to show off products of fashion not allowed).
[992] A political parody may be commercialized on small badges Cass., 13 janvier 1998 (n 242). political parody disseminated via newspapers (case Fluide Glacial; case Paris, 20 septembre 1993, Agrif c/ Godefroy, légipresse, n°108, II, p. 9; Caroline Grimaldi c/ Société Kalachnikof, légipresse, n°108, II, p. 10; Paris, 8 juillet 1992, légipresse 1992, n°100, p. 40).

attention to the parody by exploiting the established fame of the protected work.[993] In Austria, the impact of the parodic work on the author's economic interests and the risk that the parody, if communicated to the public, may undermine the normal exploitation of the original work are considered to be decisive in deciding on the application of the exception.

This is also the case in Member States covering parody under the quotation exception, which in some national laws is subordinated to the lack of commercial purpose or exploitation. An example comes from the Italian Article 70-l.aut., which requires the absence of commercial exploitation, and from the Spanish Article 39 TRLPI, which demands that parodies should not create any damage to the author. However, no case law has been reported to detail the notion of damage in practice.

4.3.2.6 THE NECESSITY BENCHMARKS

Another criterion used by national courts is the necessity benchmark, which requires that the parody "borrows" from the original work only those elements that are strictly necessary for the parodic purpose. This requirement is usually taken from the statutory text of the exception, as it is the case in Croatia (Article 206 NN), Estonia (Section 19(7) AutÕS), Luxembourg (Article 10(6) LuDA), stating that parody is allowed when it imitates the original work to the extent required by the purpose), and Poland (which refers to what is necessary for the rules of the genre ex Article 29[1] UPA). The same benchmark can be found in Member States covering parody under the quotation exception. Belgium presents a necessity benchmark introduced by courts, which consistently held that parodies should be limited to elements that are strictly necessary to make fun of the earlier work.[994] The Netherlands followed a similar path, they recently moved away from it in light of the *Deckmyn* decision.[995] Germany used to present a similar structure, but this is likely to be qualified under the newly implemented Section 51a UrhG.

Austria presents also in this case particular traits. Since parody is admitted through a direct application of the constitutional provision on freedom of expression, the necessity benchmark applies to this purpose rather than to the parodic aim. In this sense, Austrian courts have required that no alternative means are available, except parody, in order to allow the author to adequately exercise their freedom of expression and artistic freedom.[996]

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[993] Court of First Instance of Brussels, 14th Chamber, 8 October 1996, A&M 1997, 71 (HUMO; use of adapted Tintin covers by the publication HUMO not allowed); Court of First Instance of Brussels, 14th Chamber, 29 June 1999, A&M 1999, 435 (Michel Vaillant; use of the name Michel Vaillant in radio commercials for a go-karting operator not allowed); Court of First Instance of Antwerp, 12 May 2005, A&M 2005, 304 (Mercis en Bruna/Code; use of the character Miffy (Nijntje) on the front page of the publication Deng not allowed), Court of Appeal of Ghent, 7th Chamber, 2 January 2011, A&M 2011, 327 (De Bevere-Blanckaert en Lucky Comics/Dedecker e.a.

[994] See Wittevrongel en csrten/Aspeslag en Cocquit Court of First Instance of Ghent, 13 May 2013, A&M 2013, 352.

[995] See, for Germany, Federal Supreme Court, 13 April 2000, Case No. I ZR 282/97, GRUR 2000, 703, Court of Appeal of Munich, 23 October 1997, ZUM-RD 1998, 124.

[996] OGH 4 Ob 66/10z.

4.3.2.7 RESPECT FOR MORAL RIGHTS AND RISK OF REPUTATIONAL HARM

Some countries have enshrined the moral rights of authors in the legislative formulation of the parody exception, such as Luxembourg, which requires that parody does not denigrate the protected work or its author, and Spain, whose exception explicitly asks that no damage is made to the author of the work.

In Member States where this requirement is not explicitly spelled out, two approaches may be traced. On the one hand, countries like France and the Netherlands do not take into account the author's personal interests in assessing the applicability of the exception. In France, for instance, the *Douce trances* decision held that mockery is a legitimate parody provided that there is not an obvious intention to degrade the original work.[997] However, French courts rarely consider the damage to the author's personality as an independent ground to refuse the application of the parody exception.[998] A good example of when a parody is *too much* is one of the TinTin's cases (the *Société Moulinsart* case) where a depiction of Tintin performing sexual acts and using drugs was considered too degrading to be considered a parody.[999] Dutch courts have been equally reluctant to refuse parody on the sole ground of authors' moral rights. At most, in fact, the violation of authors' personality rights has been considered a concurrent ground for rejecting the applicability of the exception.[1000]

On the contrary, Austrian and German courts have used moral rights-based considerations in parody cases much more abundantly and freely. Austria admits parody only as long as the message conveyed by the parodic medium is true and not defamatory or degrading. Similarly, the BGH, in the *Alcolix* case, held that the respect of moral rights is a relevant factor to recognise a free use, and in the *Auf fett getrimmt* decision, complying with *Deckmyn*, held that, while moral rights of authors are not a decisive factor to define what parody is, they shall be considered in the second step of the assessment, where a fair balance is struck between the interests of authors and parody-makers. In this context, the BGH took into account the principle of non-discrimination, ruling that the moral right filter should not result in a political-correctness test. As already mentioned, this state of things is to be qualified under the caveat that Germany has now implemented a new parody-specific provision (Section 51a UrhG).

4.3.2.8 IMPACT OF THE IMPLEMENTATION OF ARTICLE 17(7) CDSM

As to the implementation of art 17(7) CDSM, countries present different degrees of implementation.

[997] CA Paris, 13 octobre 2006.
[998] Cass., 2 mars 1997, JCP II jurispr. N°5, 28 janvier 1998, p. 185; Paris, 28 février 1995, légipresse, 1995, n°8125, I p. 92; TGI Paris 12 janvier 1993, légipresse n°108 II p. 11; TGI Paris 26 février 1992 légipresse n°96 1992 p. 127; Cass, 13 février 1992, légipresse, n°93, p. 87.
[999] TGI Paris, Société Moulinsart, Mme Fanny R. c/ Eric J., 11 juin 2004.
[1000] Mercis en Bruna/Code Court of First Instance of Antwerp, 12 May 2005, A&M 2005, 304.

To date, Latvia, Ireland, Poland, Belgium, Slovenia, Slovakia, Croatia, Greece, Finland, Estonia, the Netherlands, have not implemented art 17(7) with reference to parody.

Other countries, instead, have adopted an almost verbatim implementation of art 17(7): Malta (Law n. 261 of 2021, adding Article 16(7) to the MCA), France (Article L. 331-32-1 of ARCOM), Denmark (Section 52c(10) DCA), Luxembourg (Law n. 158 of 5 April 2022 resulting in the new Article 70bis (8) LuDA), Austria (Section 42f(2) UrhG-A), Italy (Article 102-nonies (2) in l.aut). All these countries have preferred a sectorial approach, and the newly-implemented provision only apply to the online context. This divided approach has resulted, for instance, in the fact that Italy has now a specific online-parody exception but keeps lacking a general one. Sweden followed the same path, refusing general parody-flexibility and limiting it to online uses, implementing art 17(7) verbatim. The same goes for Hungary (Section 34/A(1) SZJT).

A different cluster of countries have implemented article 17(7) CDSM as to include pastiche in their already-existing exceptions. For instance, Spain, with the Royal Decree n. 24/2021 modified Article 32.1 TRPLI as to include pastiche, specifying that the exception applies also to non-digital uses. Similarly, Article 21(1) LiCA, included pastiche in the Lithuanian parody-related flexibility (Article 21(1) LiCA). Romania included pastiche (Article 128 ^2 (6) RDA) and has specified the application of the Article to online uses.

Germany has opted for a wider approach, simply extending the applicability of Section 51a UrhG-G to online contexts.

National experts have also signalled that some countries are on the way of implementing 17(7) CDSM so as to include pastiche in those versions of the InfoSoc article where it is missing. This is reported, for instance, with reference to Slovenia and Czechia. The transposition, however, is still in progress.

Other countries are having some additional difficulties in implementing the provision, whose transposition is thus still in progress. This is happening, for instance, for Bulgaria and Sweden. The latter is in the process of implementing a slavish version of Article 17(7) CDSM. Portugal was on the way of implementing a general parody flexibility, but the proposal has fallen through due a change in the political majority.

Similarly, Portugal was on the way of implementing under 17(7) CDSM a general parody flexibility, but the proposal has fallen through. Furthermore, the Swedish implementation of the CDSM Directive will introduce, under Article 52(p) URL, an exception for quotation, criticism, review, and for the purpose of caricature, parody or pastiche, but only limited to users of online content sharing services, in line with a strict and slavish transposition of Article 17(7) CDSM.

4.3.2.9 PARODY AND FREEDOM OF EXPRESSION

Given the importance of parody for the exercise of freedom of expression and artistic freedom, it is no surprise that its regulation has been profoundly shaped by them. The role of freedom of expression in defining parody is more prominent in those countries not featuring a specific parody exception. Austria represents a paradigmatic example. Along the same lines, and absent a parody exception in copyright law, the Bulgarian Supreme Court of Cassation authorised parody in 2007 through the quotation exception, by reference to the constitutional right to freedom of speech.[1001]

Even in countries featuring a specific parody exception, the constitutional relevance of parodic acts had an impact in the evolution of the regulation. The best example comes from Czechia, where the constitutional court used freedom of expression to interpret Section 38(g) CzCA so as to strike a fair balance between the protection of authors and users' rights and annulled a preliminary injunction that ordered the removal of the parodied audio-visual work from Facebook, arguing that the measure unreasonably restricted freedom of expression, with no certainties concerning the alleged copyright infringement.[1002]

In France freedom of expression is usually taken into account in decisions concerning parody, and, while a direct reference to human rights was not used to create the exception, its human right-related value is consistently acknowledged across case law,[1003] despite it never really resulted in more permissive decisions. An example comes from the *Bauret v Koons* case,[1004] where the court first excluded the applicability of the parody exception, and then assessed whether the re-adaptation of the protected work could be allowed to protect the freedom of expression of the transformative author. Ultimately, the decision denied the legitimacy of the adaptation for it considered it an unjustified and disproportionate limitation to author's rights, while the prohibition to use the parodied work was not judged as an unreasonable limitation of the parodic author's freedom of expression. Interestingly, and element taken into account in the evaluation was the fact that the earlier work was not so famous to constitute a shared and essential cultural reference. On a similar note, in e *Glam & Shine*,[1005] the changes from the original work were considered too light to make the new work a *parody,* and freedom of expression was not deemed violated in light of the commercial nature of the new work and the difficulty of perceiving the message conveyed by the alleged parody. The court also stated that in order to have a transformative work, protected under freedom of expression as a transformative work even if not covered by parody under the CPI, the burden of proof was on the person who claimed their freedom was restricted. In practice,

[1001] Decision n. 112 of 02.08.2017, case 1771/2016 of the Supreme Court of Cassation.
[1002] Constitutional Court I., ÚS 3169/19, 31. 3. 2020.
[1003] See CA Paris, pole 5, 2ème ch., 18 février 2011, *Arconsil c/ Moulinsart*.
[1004] TGI Paris, 3e ch. 4e section, 9 mars 2017, Bauret v Koons, N° RG: 15/01086.
[1005] Decision (TGI Paris, 31 janvier 2012, *Alix Malka v Peter Klasen*, n° RG 10/02 (First instance); Paris, 18 septembre 2013, *Alix Malka v Peter Klasen*, N° RG 12/02480 (appeal); Cass., 1ère Civ., *Alix Malka v Peter Klasen*, 15 mai 2015, n° 13-27.391 (Supreme Court); Versailles, 16 mars 2018, *Alix Malka v Peter Klasen*, n° RG 15/06029 (case remanded).

the only operative effect of the application of freedom of expression in parody-related cases in France has been the waiver of the non-commercial purpose requirement when the revenue is linked to freedom of expression and political messages.

As the comparative analysis demonstrates, national implementations of the parody exception are far from being harmonized. On the contrary, they show remarkable divergences, to the point that the exception has not been implemented in several Member States, its space being functionally occupied by an extensive use of the quotation exception, or by resorting to free uses.

This already quite fragmented scenario is made worse by the fact that the concept of parody itself, and humour, is difficult to grasp and, even if some clarifications came from the CJEU, national courts keep working and reworking its substance and boundaries. This happens also with regard to the "structural" parameter of parody. In addition to this, Member States have introduced other conditions of applicability, some of them ruled out by the CJEU but still emerging in national case law, such as the prohibition of reputational damage against the author of the original work, the necessary non-commercial nature of the parody, and the necessity-based limitation used to define the maximum amount that can be taken from the original work. Last, *Deckmyn* has also admitted that the parody exception can and should be disapplied when its exercise results in discriminatory messages and activities, thus introducing yet another element of uncertainty into an already problematic framework.

This patchwork is unlikely to be harmonised by Article17(7) CDSM. Even if the provision brought some beneficial effects, most Member States have implemented it verbatim, without any coordination with their parody exception, aside from a few countries that have taken this opportunity to extend the latter to pastiche and caricature when missing. Member States without general parody exception have not taken this opportunity to fill in the gaps, thus now their copyright acts feature explicitly parody only for users of OCSSP services. This has further increased the degree of fragmentation of regimes and national solutions, while the harmonizing impact of *Deckmyn* is still yet to be seen.

4.4 QUOTATION

The quotation exception finds its international roots in Article 10 BC, which states that quotations of a published work are allowed in compliance with fair practices and within the limits justified by the purpose, provided that the source and the author's name are properly mentioned. Quotation is the only mandatory exception in the Convention. On the contrary, Article 5(3)(d) InfoSoc regulates quotations as an optional provision, and it states that Member States can derogate from the reproduction and communication to the public rights to allow quotations of protected works for purposes such as criticism or review, provided that (1) the protected work has been already published, (2) there is a mention of the source and author's name, (3) the quotation happens for a specific purpose, such as review and critique, (4) the protected work is used to the extent necessary for the particular purpose and (5) its

use complies with fair practices. As outlined above, the CJEU has offered significant guidance on the interpretation of such conditions.

Despite its optional nature, the EU quotation exception has been implemented by all Member States. However, national transpositions present some differences. By and large, they differ mainly with regards to their objective scope, which encounters limits both on *what* can be quoted and the amount that can be quoted (i.e., entire works rather than excerpts), in conjunction with the proportionality test. There is instead a certain degree of uniformity about *who* can quoted – an aspect on which none of the 27 Member States imposes any. The following sections will offer an overview of convergences and divergences of national solutions on such key aspects, concluding with some references to the horizontal application of fundamental rights on the matter.

4.4.1 THE PURPOSE OF QUOTATION

Quotations should be justified by a purpose, such as critique and review. While the InfoSoc mentions only the purpose of critique and review but is theoretically open to any kind of purpose, provided that the user engages in a sort of *intellectual dialogue* with the quoted material, not all national jurisdictions provide a similar degree of flexibility. The list of allowed purposes, at the national level, appears in the vast majority of cases *closed*, even if several purposes, more than simply criticism and review, are mentioned as lawful. However, how much this may result in a narrower implementation of the exception is not clear, since not only such lists are very detailed and comprehensive, but also interpreted and eventually widened by case-law.

Cyprus (Article 7(2)(f) CL), Denmark (Section 22 DCA), Estonia (Section 19(1) AutÕS), Finland (Section 22 TL), Hungary (Sections 34 and 34/A(1) SZJT), Ireland (Section 52(4) CRRA), and Sweden (Article 22 URL) are the only countries that do not include any purpose-based limitation, thus allowing a broad interpretation of the provision.

A second group of countries provides a list of “suitable/allowed” purposes. A first cluster mentions only the purpose of criticism and review [Bulgaria, Article 24(1)(2) of the Bulgarian CA; Lithuania, Article 21 LiCA; Malta, Article 9(1)(k) and (o) MCA; and Slovakia, Section 37 ZKUASP)]. Italy (Article 70-l.aut.) allows the purpose of “criticism and discussion”, Greece (Article 19 GCA) requires that quotations happen when necessary to support an argument advanced by the user, or to critique the position of the author. Romania (Article 35(1)(b) RDA), in addition to criticism, allows quotations for any analytical, commentative, or illustrative purpose.

Some other countries build up on this baseline scenario by adding the scientific research and teaching purpose (Belgium Article XI.189, §1er CDE; Article XI.191/1, §1er, 1°, and §2 CDE), Croatia (Article 202 NN), Czechia (Section 31(1) CzCA), Latvia (Section 20(1) LaCA), Luxembourg (Article 10(1) LuDA), Poland (Article 29 UPA), Portugal (Article 75(2)(g) CDA), and Spain (Article 32.1 TRLPI)). For instance, Belgium (Article XI.189, §1er CDE; Article XI.191/1,

§1er, 1°, and §2 CDE) implemented a wide range of possible purposes: Article XI.189, §1er CDE allows the quotation for the purpose of review or criticisms, while Article XI.191/1, §1er, 1°, and §2 CDE extend the flexibility when the purpose is one of scientific research or teaching.

The French, Luxembourgian, and Dutch exceptions adopt an original approach, by listing the *nature* of the work that is intended to incorporate the quotation, rather than simply providing a list of allowed purposes. The French CPI (Article L. 122-5-3° a) CPI), for instance, allows quotations when they are "justified by the critical, polemic, educational, scientific or informative nature of the work in which they are incorporated", thus allowing short quotations only within a critical, polemic, educational, scientific, or informatory work. Similar textual formulations have been implemented by the Netherlands (Article 15(a) AW (2004)) whose Copyright Act states that it is possible "to quote from the work in an announcement, review, polemic or scientific treatise or a piece with a comparable purpose" (Article 15(a) AW). Similarly, Luxembourg (Article 10(1) LuDA) adopts an almost *verbatim* copy of the French provision, thus providing that the quotation must be *justified by the critical, controversial, educational, scientific or informational nature* of the work in which they are incorporated.

Austria (Section 42f(1) UrhG-A) and Germany (Section 51 of UrhG-G) are also worth a separate mention. Even if they open with a very general statement that allows quotation, they continue by adding that quotation "is particularly permissible if…" (Austria, Section 42f(1) UrhG-A) and "is, in particular, permitted where…" (Germany, Section 51 of UrhG-G), then proceeding by listing several very specific purposes. Austria allows quotation if individual works are included, after their publication, in a scientific work or if published works of fine arts are publicly performed in a scientific or educative lecture (in both cases the quoted work must constitute the main subject matter of the derivative one). Other allowed purposes are the quotation of excerpts of a literary work in an independent work, passages of a musical work in a literary work, and, finally, if individual passages of a published work are cited in an independent new work (Austria, Section 42f(1) UrhG-A). Germany does it where "1. subsequent to publication individual works are included in an independent scientific work for the purpose of explaining its content; 2. subsequent to publication passages from a work are quoted in an independent literary work; 3. individual passages from a released musical work are quoted in an independent musical work" (Section 51 of UrhG-G).

4.4.2 OBJECTIVE SCOPE: WORKS COVERED

One of the areas where national implementations feature more divergences it the one related to the types of protected works that can be quoted. Despite the CJEU clarified in *Pelham*,[1006] *Funke Medien*,[1007] and *Spiegel Online*[1008] that the InfoSoc Directive quotation exception does not set any limitation in this respect, remarkable limitations still persist.

[1006] Judgment of 29 July 2019, *Pelham*, C-476/17, EU:C:2019:624.
[1007] Judgment of 29 July 2019, *Funke Medien*, C-469/17, ECLI:EU:C:2019:623.
[1008] Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625.

The vast majority of national laws provide users with the possibility to quote *any type* of protected work. This happens either by not mentioning any kind of works specifically (Belgium (Article XI.189. § 1 CDE), Bulgaria (Article 24(1)(2) BCA), Croatia (Article 202 NN), Cyprus (Article 7(2)(f) CL), Czechia (Section 31(1) CzCA), Estonia (Section 19(1) AutÕS), Finland (Section 22 TL), France (Article L. 122-5-3° a) CPI), Germany (Section 51 of UrhG-G), Greece (Article 19 GCA), Hungary (Section 34(1) SZJT), Ireland (Section 52(4) CRRA), Italy (Article 70-l.aut.), Latvia (Section 20(1) LaCA), Romania (Article 35(1)(b) RDA), Slovakia (Section 37 ZKUASP), Sweden (Article 22 URL)), or by specifying that all kinds of work are protected regardless of their nature ("*other people's works, whatever their kind and nature*", Portugal - Article 75(2)(g) CDA).

Conversely, some countries specify *which* types of works can be lawfully quoted. Unsurprisingly, this results in a great number of inconsistencies across Member States. For instance, the Dutch implementation (Article 15(a) AW (2004)) applies the quotation exception only to quotations of literary, scientific and artistic works thus casting doubts on the possibility to quote works of a different nature, such as audio-visual one. A far more inclusive approach is adopted by Malta, Poland, Slovenia, and Spain, which all present a long and very detailed list of included items. Malta (Article 9(1)(k) and (o) MCA), for instance, mentions audio-visual, musical, artistic, literary works, and even databases. Poland (Article 29 UPA) refers also to "graphic works, photographic works, and minor works", Slovenia (Article 51 ZASP) to "photographs, works of fine arts, architecture, applied art, industrial design and cartography" (but Slovenian Courts have confirmed that quotation is also allowed with respect to audio-visual works or films),[1009] and Spain (Article 32.1 TRLPI) to works of "figurative plastic or photographic nature". However, the Spanish approach, for some of the works that can be quoted proves less flexible than the EU counterpart.

Even for countries not setting any limitations, the all-encompassing nature of the quotation exception was not a straightforward achievement. France (Article L. 122-5-3° a) CPI) and Finland (Section 22 TL), for instance, while presenting a very general formulation, still had to confirm via case law that photos are included in the exception.[1010] In some jurisdictions such a confirmation was needed even where the possibility to quote visual works in their entirety was provided explicitly.[1011]

Once again, Austria (Section 42f(1) UrhG-A) and Germany (Section 51 of UrhG-G) deserve specific attention. In the German list of "particularly permissible uses", there is no mention of graphic and visual art. Austria, instead, explicitly mentions works of fine arts, and even scientific works expressed graphically, as pictorial representations, models or miniatures.

[1009] VSL II Cp 1392/2013, 27.9.2013. Previously, in the same sense: VSL II Cp 4863/2008, 24.6.2008.
[1010] See, for France, Court of Appeal of Paris, 4ème ch., 12 octobre 2007, where it was stated that photographic works, and not only literary works, fall within the scope of art. L. 122-5-3° a). See, for Finland, TN2020:7 (citation rights exist with regard to photos too, on the condition that moral rights of authors are respected); TN 2016:16 (citation rights exist with regard to photos and photos' captions too, on the condition that moral rights of authors are respected). note that the TN (*Tekijänoikeusneuvosto* – Copyright Court) is not formally part of the judiciary.
[1011] See, *VSL II Cp 1392/2013, 27.9.2013.*

Despite three countries (Hungary (Section 34(1) SZJT), Italy (Article 70-l.aut), and Portugal (Article 75(2)(g) CDA)) do not mention expressly the necessity for the work to be already published, the functional result is really unlikely to differ from other countries, both because the interpretation of relevant provisions at the national level must be in conformity with the EU exception, and because the use of a work that was not lawfully accessed or even unpublished is likely to result in the infringement of both moral and economic rights of the copyright holder.

4.4.3 OBJECTIVE SCOPE: HOW MUCH CAN BE QUOTED

A second very significant ground of divergence concerns the amount of a work that can be quoted. This is a crucial requirement, which is likely to impact the scope of the provision more than any other requirement. A quotation is, by common sense, an excerpt, a passage, a portion of something which is bigger in size and length. However, Article 5(3)(d) InfoSoc Directive prefers to use a different criterion to define the amount of protected content that can be freely used for a quotation, that is the proportionality test. Under the EU framework, in fact, how much of a given work can be quoted is not a fixed amount and, in theory, it is possible to quote freely to the extent necessary to the purpose. Member States show a great variety of approaches.

A relevant number of countries make an explicit reference to the fact that quotations should be in the form of passages or short extract [Croatia ("excerpts", Article 202 NN), Cyprus ("passages", Article 7(2)(f) CL), Czechia ("*excerpt from a work or small works in their entirety*", Section 31(1) CzCA), France ("*analyses and short quotations*, L. 122-5-3° a) CPI), Greece ("*short extracts*", Article 19 GCA), Hungary (Section 34(1) SZJT), Ireland (Section 52(4) CRRA), Italy ("*fragments or parts of a work*", Article 70-l.aut), Latvia ("*quotations and fragments*", Section 20(1) LaCA), Lithuania ("*a relatively short passage*", Article 21 LiCA), Luxembourg ("*short quotations*", Article 10(1) LuDA), Poland ("*fragments of distributed works*", Article 29 UPA), Romania ("*brief quotations*", Article 35(1)(b) RDA), Slovenia ("*parts of a disclosed work*", Article 51 ZASP) Spain ("*fragments of other works*", Article 32.1 TRLPI). In addition, only few of them provide a specific rule for the quotation of works which require, for their nature, an integral quotation not to be senseless (e.g. pictures)].

Austria (Section 42f UrhG-A), Belgium (Article XI.189, §1er CDE; Article XI.191/1, §1er, 1°, and §2 CDE), Bulgaria (Article 24(1)(2) of the Bulgarian CA), Denmark (Section 22 DCA), Estonia (Section 19(1) AutÕS), Finland (Section 22 TL, Section 25(1) TL), Germany (Section 51 of UrhG-G), Netherlands (Article 15(a) AW (2004)), Portugal (Article 75(2)(g) CDA), Slovakia (Section 37 ZKUASP), and Sweden (Article 22 URL) do not limit the size or length of quotations, while Malta (Article 9(1)(k) and (o) MCA) allows the quotation of "reasonable extracts" of public readings or recitations and is silent concerning other kinds of works.

The proportionality test is implemented very consistently across Member States. There are only minor swerves in the Netherlands, which explicitly refers proportionality to "the number and size of the quoted parts" (Article 15(a) AW (2004)), while other countries

generically refer to "quotation". The test is passed when the quotation is of a sufficient extent to enable a sort of *intellectual dialogue* with the original source – but no more than that. For instance, and consistently with the CJEU's interpretation, the Polish Supreme Court has held that quotations should be as small as possible, but extensive enough to make the conclusions stemming therefrom understandable for the general public. On the contrary, the Austrian OGH uses a different criterion, that is whether there was another way to achieve the same purpose, either by asking the authorisation of the author or by re-adapting the content of the quotation (reasonable-alternative criterion).[1012]

The application of the proportionality test in practice does not always lead to consistent results. For instance, the French *Cour de Cassation* has clarified that the integral reproduction of a work of art, whatever its format, cannot be considered as a short quotation and, as such, is necessarily out of the scope of the quotation exception.[1013] Similarly, the Italian case law has consistently held that an integral reproduction is *never* justified, even when there is no risk of competition with the original work and the purpose of the quotation is of pure critique and discussion.[1014] On the contrary, the Polish Supreme Court (Sąd Najwyższy) has stated that integral quotations of entire works might be lawful if justified by an adequate purpose,[1015] allowing the integral reproduction of a poster from the 1989's election as front-cover of a newspaper, and has clarified in a subsequent decision that Article 29 UPA does not make any refence to the size and length of the quotation.[1016] The Slovenian Supreme Court also aligned to a similar interpretation.[1017] This conflicting outputs are grounded in the different benchmarks used by national courts to assess proportionality. The French approach looks at the ratio between the original work and the extract taken as a quotation, thus neglecting the ratio between the quotation itself and the new work it is contained in. On the contrary, the Polish Supreme Court interprets the proportionality test as a check on the proportion between the original quoted work and users' own creative inputs, which led to approving the integral reproduction of a poster,[1018] but to rule out the partial reproduction of a footage in a new documentary because the additional creative input was too weak.[1019] The Lithuanian Supreme Court has similarly denied the application of the exception because the excerpts from the original work were used as primary sources rather than additional/ secondary ones.[1020] Similarly, the Slovenian Supreme Court allows quotations when the passage quoted is significantly less extensive than the new work,[1021] but still admits integral quotations when

[1012] OGH, 4 Ob 81/17s.
[1013] Cass., 1ère civ., 13 novembre 2003, *Utrillo.*
[1014] This principle was first stated in Trib. Roma, 23/05/1981 and consistently deployed since then (see eg. Tribunale Torino Sez. spec. propr. industr. ed intell., 26-02-2009; Trib. Roma, 26/06/2001).
[1015] Judgement of Sąd Najwyższy (Supreme Court) of 23rd November 2005 I CK 232/04, OSNC 2005/11/195.
[1016] Judgement of Sąd Najwyższy (Supreme Court) of 22nd February III CSK 11/17, Legalis nr. 1878767.
[1017] *II Ips 276/2006, 9.10.2008.*
[1018] Judgement of Sąd Najwyższy (Supreme Court) of 23rd November 2005 I CK 232/04, OSNC 2005/11/195.
[1019] Judgement of Sąd Najwyższy (Supreme Court) of 22nd February III CSK 11/17, Legalis nr 1878767.
[1020] The Supreme Court of Lithuania civil case No 3K-3-270-687/2017, 15 June 2017.
[1021] *II Ips 213/2008, 26.2.2009.*

requested by the purpose of the quotation.[1022] The only external limit appears to be the one of adaptation, in the sense that the derivative work needs to present a sufficient degree of elaboration so as not to be classified as an actual "new work" and not a mere adaptation of the original protected one.[1023]

It is worth highlighting that national case laws often feature an overlap between the proportionality test and the duty to comply with fair practices. The Austrian, French, Polish, and Portuguese interpretations of the proportionality test, in fact, all include economic considerations, such as the potential commercial damage caused by the quotation to the original work. For instance, the Austrian OGH stated that a proportionate use of the freedom of quotation should never result in the value of the protected work being undermined in any relevant way.[1024] Similarly, French and Polish courts take into account the commercial effect of the quotation, and requires that the latter does not result in less interest in the original work, nor substitute or compete with the protected work to the point that the user can avoid consulting the original,[10251026] a criterion also recalled by *AG Szpunar* in *Spiegel Online*,[1027] but not recalled in the final decision. Similarly, the Portuguese Supreme Court stated that a proportionate quotation shall never damage the original work or its author. Such considerations, however, are better addressed within the context of the fair practice principle, rather than contaminating the proportionality test, which should perform an assessment on the quotation itself, with criteria that look at the effects of the quotation on the market.

In some cases, even the nature of the quoted work has a role for the proportionality test. Since, for example, works of visual art (e.g., photographs, works of fine arts, works of architecture, pieces of industrial design etc) cannot be fragmented, a reasonable quotation is likely to involve the work in its entirety. To this end, Poland (Article 29 UPA), Slovenia (Article 51 ZASP), and Spain (Article 31.2 TRLPI) explicitly provide that, while published works should be quoted rigorously in fragments, graphic works can be quoted even entirely.

Some national courts are increasingly referring to the fundamental freedom of expression as parameter to assess the proportionality of the quotation. In such instances, the flexibility of the proportionality test changes in favour of the user, and, when it does not, courts are more likely to refuse the application of the exception due to a lack of proportionality.[1028] The Austrian OGH, for instance, while discussing whether refusing the application of the quotation exception might be considered a violation of the freedom of expression granted by Article 10 ECHR, excluded it by arguing that the proportionality test ensures that quotations are justified

[1022] *II Ips 276/2006, 9.10.2008.*
[1023] *VSL V Cpg 362/2015, 17.6.2015.*
[1024] OGH 4 Ob 7/19m; Austrian Copyright and Related Rights Act BGBl. Nr. 111/1936, OGH 4 Ob 16/20m.
[1025] Cass., 1ère civ., 9 novembre 1983, *Microfor*, Judgement of Sąd Najwyższy (Supreme Court) of 9th August 2019, II CSK 7/18 LEX nr 2730923, MoP 2019/19/1022.
[1026] Tribunale di Milano,10/2/2000.
[1027] Advocate General Szpunar, 10 January 2019, Spiegel Online GmbH v Volker Beck (C 516/17), par. 48 and 49.
[1028] OGH 4 Ob 81/17s; 4 Ob 7/19m; 4 Ob 16/20m.

insofar they are needed for the lawful exercise of freedom of expressions of users.[1029] In this sense, according to the OGH, the proportionality test shall be used as a tool to check that quotations does not interfere with authors' right more than it is necessary for the exercise of freedom of expression. This was further confirmed in a subsequent decision, where it was held that the scope of freedom of expression is such that it can be used to oppose an injunctive relief sought under the Copyright Act, and that the dispute should be assessed by checking whether the quotation was necessary for the exercise of the freedom of expression of the user.[1030]

In conclusion, the proportionality test, as implemented at the national level, is still far from the model sketched by the CJEU, where considerations concerning the purpose of the quotation and the means necessary to achieve it only are taken into account. In the practice of national courts, it has proven difficult to abandon the notion of quotations as necessarily partial in nature, as well as to resist from incorporating external elements, proper of the compliance with fair practices, with an additional deviation from the EU format and thus increasing the risk of fragmentation.

4.4.4 INDICATION OF AUTHOR/SOURCE, COMPLIANCE WITH FAIR PRACTICES AND OTHER ADDITIONAL CRITERIA

According to the InfoSoc Directive, the quotation shall always mention the source and author of the work, unless this is proven impossible. This is a crucial requirement and failing to comply with it is generally an independent ground for refusing the application of the exception in all jurisdictions.[1031] Nevertheless, a few Member States (Austria (Section 42f(1) UrhG-A), Denmark (Section 22 DCA), Poland (Article 29 UPA), Portugal (Article 75(2)(g) CDA), Romania (Article 35(1)(b) RDA), Slovakia (Section 37 ZKUASP), Spain (Article 32.1 TRLP), and Sweden (Article 22 URL) do not expressly mention it. Once again, this unlikely to turn into any relevant difference in practice. To be mentioned as author, in fact, is not only a condition for the application of the quotation exception, but also part of moral rights of author.[1032]

Article 5(3)(d) InfoSoc also requires that quotations comply with fair practices. Unsurprisingly, the open-endedness of this requirement has resulted in a very inconsistent implementation at a national level, with some countries not even mentioning it, and other detailing it much more precisely. In addition, the criterion has hardly been used as an independent ground for refusing the application of the quotation exception in case law. Usually, it has been considered as an additional element, and sometimes its analysis overlaps with other criteria, such as the proportionality test and the respect for moral rights of authors. In fact, the CJEU itself considers it more as a tool to balance users' and authors' rights (at the

[1029] OGH 4 Ob 7/19m
[1030] OGH 4 Ob 16/20m.
[1031] See e.g. The Supreme Court of Lithuania civil case No 3K-3-270-687/2017, 15 June 2017; and TN 2015:13 (Finland).
[1032] Tribunale Sez. Proprietà Industriale e Intellettuale - Milano, 15/12/2010, n. 14256.

level of national legislation) rather than a condition to follow in the application of the exception.[1033]

Some inconsistencies emerge in the national implementations. A first group of countries sticks to the baseline structure of Article 5(3)(d) InfoSoc, requiring quotation to comply with "fair practices" (Bulgaria (Article 24(1)(2) BCA), Croatia (Article 202 NN), Cyprus (Article 7(2)(f) CL), Czechia (Section 31(1) CzCA), Denmark (Section 22 DCA), Greece (Article 19 GCA), Malta (Art. 9(1)(k), (o) MCA), Lithuania (Section 21 LiCA), Finland (Section 22 TL)) or using slightly different wordings unlikely to create any practical difference (e.g. Belgium, asking to comply with "honest practices of the profession" (Article XI.189, §1er CDE), Netherlands (Article 15(a) AW (2004)) and Slovakia (Section 37 ZKUASP), asking to comply with "social customs", and Sweden (Article 22 URL), requiring the quotation to comply with "good practice").

A second group of countries does not mention fair practices at all (Austria (42f(1) UrhG-A), France (L. 122-5-3° a CPI), Germany (Section 51 of UrhG-G), Poland (Article 29 UPA), Portugal (Article 75(2)(g) CDA), and Slovenia (Article 51 ZASP)). However, the absence of an explicit textual clue does not mean that users are exempted from the duty to comply with good faith and fair practices, since this condition is likely to overlap with a more general assessment of a fair balance between users' and authors' rights, which is embedded in the application of any exception from the InfoSoc Directive. Furthermore, as outlined above, some elements of the fair practice requirement are often taken into account in the proportionality test.

The third group of countries significantly diverges from the InfoSoc structure, introducing additional conditions, or simply ignoring the text of the Directive and providing other conditions to comply with. This is the case of Estonia (Section 19(1) AutÕS requires that "the idea of the work as a whole which is being summarised or quoted is conveyed correctly"), Hungary (Section 34(1) SZJT requires that there is no commercial exploitation of the resulting work), Italy (Article 70-l.aut provides that the quotation is allowed as long as the quotation does not compete, on the market, with the original work),[1034] Luxembourg (Article 10(1) LuDA requires that quotations "comply with fair practice, do not pursue a profit-making purpose and do not harm neither the work nor its exploitation"), and Romania (Article 35(1)(b) RDA asks quotations to "conform to proper practice" and to comply with the three-step test). Spain is a sort of outlier, since it lays out fair-practices-alike requirements for press reviews only (Article 32.1 TRLPI). When such activity is carried out for commercial purposes, authors of original pieces are entitled to a fair compensation, and the activity shall immediately cease in case of an explicit opposition by the rightholder.

[1033] Judgment of 29 July 2019, Funke Medien, C-469/17, ECLI:EU:C:2019:623, para 43; Judgment of 29 July 2019, Spiegel Online GmbH v Volker Beck, C-516/17, ECLI:EU:C:2019:625, para 28.

[1034] Corte d'Appello Roma, Sez. spec. in materia di imprese, Sent., 02-11-2017 which states that this requirement should not be interpreted as a mere commercial exploitation of the resulting work, but that a concrete risk of competition between the original work and the resulting one is needed. See also Cass. 7/3/1997, n. 2089; Tribunale Bologna, Sez. spec. in materia di imprese, Sent., 10-05-2017; Tribunale Roma, Sez. spec. propr. industr. ed intell., 16-12-2009; Tribunale Torino, Sez. spec. propr. industr. ed intell., 26-02-2009.

Undoubtedly, this last group features the highest degree of confusion between the proportionality test, the compliance with fair practices, and other criteria aimed at striking a fair balance between users' and authors' rights. Each additional condition may act as an independent ground for refusing the application of the quotation exception. However, this might result in a minor degree of inconsistency with other countries than expected. In fact, other countries, such as Austria, France, Poland, Portugal have reached an analogue functional result in their case law, despite the silence of their statutes, embedding the condition that no harm is made to the commercial value of the original work in the proportionality test.[1035]

4.4.5 IMPACT OF THE IMPLEMENTATION OF ARTICLE 17(7) CDSM

Article 17(7) CDSM provides that all members states must ensure that users online content-sharing service providers (hereinafter "OCSSP") can rely on the quotation exception. The degree of implementation of this provision changes across Member States.

France (Article L. 331-32-1 of ARCOM), Luxembourg (Article 70bis (8) LuDA), Lithuania (Article 21 LiCA, as broadened by Law n. XIV-970 of 24 March 2022), Italy (Article 102-nonies (2) l.aut), Malta (Article 16(7) of Law 261/2021), Romania (Article 182^2 RDA) have implemented the online quotation exception expressly and following the EU text almost verbatim or by meeting all the standards set therein.

Germany (Section 5 UrhDaG) provided an extension of the rules on quotation ex Section 51 UrhG-G to the communication to the public of works and parts of works protected by copyright by the user of an online content-sharing service.

Other countries have not proceeded to transpose Article 17(7) CDSM with reference to quotation. To this date, Belgium, Bulgaria, Croatia, Czechia, Estonia, Finland, Ireland, Greece, Hungary, Latvia, the Netherlands, Portugal, Poland, Slovakia, Slovenia, Spain and Sweden are missing a specific online-quotation exception. It shall also be noted that whereas Austria (Section 42f(2) UrhG-A) and Denmark (Section 52c(10) DCA) have introduced Article 17(7) CDSM to their national laws, these exceptions do not extend to online quotation but only to online parody.

4.4.6 QUOTATION AND FUNDAMENTAL RIGHTS

The relation between the quotation exception and fundamental rights and freedoms, such as freedom of expression and information or artistic freedom, has been widely examined by scholars.[1036] National case laws show two main trends. The first one, which is exemplified by Austria and Italy, applies freedom of expression *within* the limits of the quotation exception, integrating it as a benchmark to offer an evolutive interpretation of the provision. The second

[1035] See OGH 4 Ob 7/19m; OGH 4 Ob 16/20m; Cass., 1ère civ., 9 novembre 1983, *Microfor* (Austria); Judgement of Sąd Najwyższy (Supreme Court) of 9th August 2019, II CSK 7/18 LEX nr 2730923, MoP 2019/19/1022 (Poland); Case No.103/04.2TVLSB.L1. S1 of the Portuguese Supreme Court of 17.11.2011 (Portugal).
[1036] Aplin and Bently (n 9).

trend is represented by the reliance on freedom of expression and information *beyond* the quotation exception, to cover situations which would fall outside its scope if the provision would be interpreted too strictly.

In the contexts of the first trend, relevant inputs come from the Austrian case law. The OGH has made a very interesting use of Article 10 ECHR when interpreting the quotation exception, similarly to the path followed on parody, holding that the application of the provision should pass through a freedom of expression-related assessment, so that the court should check whether the refusal to apply the exception complies with the standard of the ECtHR's case law on the interferences to freedom of expression, that is to verify that there is an urgent and pressing social need justifying such interference.[1037] Freedom of expression is also used to check the purpose of the quotation. It has been held, in fact, that the purpose of quotation should be checked according to the parameter of freedom of expression, so that when the quotation is not functional to the exercise of freedom of expression, then it is not justified by its purpose, and it is thus unlawful. In this sense, the publication of a picture in the form of a quotation in a report was not allowed because it was held that the publication was not related to any purpose such as critical examination, or conveyance of an intellectual message, but only to draw the interest of the general public to the report by means of sensationalism and morbid curiosity.[1038] Finally, freedom of expression is used by Austrian courts as benchmark within the proportionality test as well.

Italy offers an interesting example of how freedom of expression contributes to defining the operational scope of quotation. Italian courts, in fact, use the provision as an argumentative tool to prevent profit-seeking behaviours from users. In this context, the Court of Appeal of Rome[1039] has stated that, since the quotation exception is a way to enable freedom of expression and other constitutional rights, when the interest of the user is not to exercise such right but only to seek an economic profit, quotation should not apply.

As to the second trend – i.e., the expansive interpretation of the quotation exception beyond its literal constraints- thought-provoking inputs come from France, Lithuania, Germany, and the Netherlands. French and Lithuanian high courts have used freedom of expression to state that some pieces of information cannot be monopolised and thus their quotations is always lawful. The Lithuanian Supreme Court has stated that the application of the quotation exception shall pass through an assessment of whether the information contained in the quotation is suitable of monopolisation. When this is not the case, the quotation should be considered lawful even if the conditions of the exception are not respected in full.[1040] The French *Cour de Cassation*[1041] is of a similar opinion. In a dispute concerning the use of the picture of the FIFA World Cup on the front-cover of a football

[1037] OGH 4 Ob 81/17s, 4 Ob 7/19m, 4 Ob 16/20m.
[1038] OGH 4 Ob 81/17s, 4 Ob 7/19m.
[1039] Corte d'Appello Roma Sez. spec. in materia di imprese, Sent., 02-11-2017.
[1040] The Supreme Court of Lithuania civil case No e3K-3-513-916/2016, 14 December 2016.
[1041] Cour de Cassation (France), 2 October 2007, 214 *R.I.D.A*. 338 (2007), *HFA v FIFA*.

magazine, the Court held that the Cup was not suitable of monopolisation, since it "symbolizes every professional footballer's dream"[1042] and is "inseparable from the act of informing the public on the course of this major news event".[1043] Therefore, its use for quotation, while not covered by the statutory exception, could be allowed through a direct application of freedom of expression and information.[1044]

Other direct applications of freedom of expression *beyond* the quotation exception *stricto sensu* come from Germany and the Netherlands. The Federal Constitutional Court of Germany (BVerfG) did not shy away from making a wide use of freedom of expression and artistic freedom in the *Germania 3* decision, stating that "in the context of an independent artistic creation the freedom to use quotations extends beyond the use of the other text as evidence, i.e. as a means of clarifying concurring opinions, of promoting the better understanding of one's own statements or of justifying or deepening what has been written".[1045] Accordingly, the Court clarified that when rights guaranteed by the Basic law are involved, some of the requirements of the quotation exception can be waived by stating that "the artist may bring copyright texts into his own work even in the absence of connections of this kind *[the purpose of critique/discussion]*, as long as they remain the objects and creative components of his own artistic statement."[1046]

Lastly, the Court of Appeal of Hauge, in the case *Scientology v. XS4ALL,*[1047] stated that, while the application of the quotation exception was impossible because the text quoted had not been published before the quotation taking place, still it was allowed through a direct application of Article 10 ECHR, since restricting it would have been an unlawful interference on freedom of expression and information. In this case, quotations were from secret documents of the Church of Scientology and were used in order to criticise the questionable believes and infamous methods of the Church.[1048]

* * * * * * *

Despite quotation represents the only mandatory exception under the Berne Convention, and part of Member States' tradition much before the EU harmonization, national provisions are still far from being standardized. Differently than parody, all EU countries feature a quotation exception, which share basic elements such as the undefined category of beneficiaries, the need to mention the author's name and the source of the work quoted and, to a certain extent, the purposes(s) of quotation. However, such a uniformity fades away when it comes

[1042] Translation by Hugenholtz and Senftleben (n 9) 11, fn 44.
[1043] Ibid.
[1044] Cour de Cassation (France), *HFA v FIFA*, cit.
[1045] *Germania 3 Gespenster am toten Mann*, Federal Constitutional Court 29 June 2000, *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2000, p. 867, Para 26. Translation provided by Elizabeth Adeney and Christoph Antons, 'The Germania 3 Decision Translated: The Quotation Exception before the German Constitutional Court' (2013) 35 European Intellectual Property Review 646.
[1046] *Ibid.*
[1047] Court of Appeal, the Hague, 4 September 2003 (Scientology/Spaink), *AMI/Tijdschrift voor auteurs-, media- en informatierecht* 2003, p. 217-223.
[1048] See the comment by Hugenholtz and Senftleben (n 9) 11.

to the objective scope of the quotation (which types of works can be copied and to what extent). At the same time, many countries have added further requirements, not enshrined in the InfoSoc Directive, the most common being the compliance with fair practice and the non-commercial use of the quotation. And while some CJEU decisions have provided additional guidance and requirements (e.g., the need to enter into a dialogue with the quoted work, the possibility to quote entire works, or not to embed the quotation into the citing work but to quote via hyperlinks), national case laws are still far from being fully aligned with the CJEU's doctrines. As for parody, also in the field of quotation Article 17(7) CDSM is having a limited impact, being usually implemented verbatim and thus adding only the mention to online quotation in favour of users of OCSSPs' services.

4.5 INFORMATORY PURPOSES

In light of the key importance of the press for the thriving of a free and democratic society, the EU has dedicated particular attention to embed into the copyright system flexibilities that could strike a reasonable balance between rightholders' interests and the freedom of the press and information.

The most relevant provision is Article 5(3)(c) InfoSoc, which gives to Member States the option to introduce an exception or limitation derogating from the rights of reproduction and communication to the public for the purpose of reporting current events. This flexibility is accompanied by a number of conditions and regulates two different scenarios. One covers the reproduction by the press and communication to the public of already published articles, broadcasts or other similar kinds of works dealing with economic, political and religious themes, provided that the name of the author and the source are mentioned, and that rightholders have not expressly reserved such rights. It is worth noting that the EU provision does not envision any limitation on the amount of protected work that can be used, nor does it introduce proportionality test or necessity benchmarks. This provision is commonly known in the copyright literature as the "press review" exception.[1049]

The second part of Article 5(3)(c) InfoSoc covers uses of protected works in connection with the reporting of current events, which are considered lawful only if limited to the extent justified by the informatory purpose, and if the name of the author is indicated. The provision does not include any limitations as to the topics that may be covered, nor any possibility for rightholders to reserve their rights

The last InfoSoc provision dedicated to freedom of the press and information is contained in Article 5(3)(f). It states that political speeches, extracts of public lectures and works of a similar character can be freely reproduced and communicated to the public to the extent

[1049] Even if it is usually referred to as "the "press review" exception", we will not use this formulation as it might increase confusion with the theme of press reviews.

necessary to achieve the informatory purpose and with a clear indication of source and author, unless impossible.

This section will explore the implementation of these three exceptions in the laws and judicial practice of Member States.

4.5.1 THE PRESS REVIEW EXCEPTION

The press review exception is characterized by five key elements: 1) the necessity to indicate the author's name and source; 2) a limitation in the objective scope, which limits the exception to articles on current religious, economic, or political matters ; 3) the limitation as to the subjective scope; 4) the absence of any quantitative limits on how much can be taken from such articles; 5) the possibility for right-holders to avoid the application of the exception by expressly reserving their rights. Another element that ought to be considered is whether the exception is subordinated to the payment of a fair remuneration to rightholders – a possibility not mentioned by the InfoSoc Directive but still featuring a number of national implementations.

All Member States implemented this exception, but for Belgium, Denmark, Estonia, Greece, Luxembourg, Latvia, Ireland, Portugal, Romania, Sweden. These countries feature only the "reporting current events" and quotation exceptions, linked to a strict proportionality test and to the informatory purpose. As seen above (Section "Quotation"), the possibility to rely on the quotation exception to achieve a partially similar result is furtherly confirmed by the fact that the informatory purpose figures among the lawful purposes of quotation in several countries.

National transpositions are very various and often inconsistent with the baseline provided by the InfoSoc Directive, as well illustrated by the findings commented on below.

4.5.1.1 SUBJECTIVE SCOPE AND THE OBLIGATION TO MENTION THE SOURCE

Another point on which national transpositions tend to diverge is the definition of the beneficiaries of the exception. Croatia (Articles 201(1) and 201(2) NN), Cyprus (Article 7(2)(g) CL), France (Article L. 122-5-3° b) CPI), Malta (Article 9(1)(j) MCA), Slovakia (Sections 39(1) and (2) ZKUASP), and Slovenia (Article 47 (2) ZASP) do not mention any beneficiary, neither for the reproduction nor for the communication to the public, while other countries specifically mention the media sector, with various degrees of specifications, and potential impacts on freedom of information and the democratisation of the news industry.

Austria (Section 44(1) UrhG-A) allows articles to be "reproduced and distributed in other newspapers and magazines"; Germany (Section 49(1) UrhG-G) similarly states that reproduction and distribution are allowed "in other newspapers or information sheets of this kind"; Czechia (Section 34 CzCA) states that a work can be used "in periodical press or in broadcasting or in any other mass media"; according to the Finnish exception (Section 23(1) TL), articles can be "included in other newspapers and periodicals"; the Italian version (Article

65 l.aut.) states that they can be "reproduced or communicated to the public in other magazines or newspapers also in broadcast news programs"; under the Dutch implementation (Article 15 AW) it is possible to use allowed items only if the use is made by a daily or weekly newspaper, a weekly or other periodical, a radio or television programme or other medium that has the same function (Article 16a AW (2004); similarly, Poland (Article 25 UPA) states that it is possible to disseminate articles "through press, radio and television", complementing the list with a very wide notion of "press"; and Spain (Article 33.1 TRLPI) and Bulgaria (Article 24(1)(5) of the Bulgarian CA) provide that permitted articles might be reproduced, distributed, and publicly communicated by "mass media" only. Limitations to the press only as subjective-scope limitations can be found in the Hungarian (Section 36(2) SZJT) and Lithuanian (Article 24(2) LiCA) implementation as well.

The French exception has been interpreted in the sense that the allowed use consists only in the production "of a journalistic column produced by a press publisher", which might restrict the subjective scope of the provision (Article L. 122-5-3° b) CPI).

An area where the subjective limitation has been elaborated on by courts, in order to respond to the challenges raised by new technologies and news-dissemination models, is the one related to news websites and online information services. Member States' approaches to the matter are quite various. The Austrian Supreme Court, [1050] for instance, while acknowledging that exceptions may be subject to a broad interpretation and to an application by analogy, ruled that an article on a website is not comparable to a newspaper article, but rather to a brochure or a flyer on which the plaintiff expresses their personal point of view, thus excluding the application of the exception. On the contrary, in Bulgaria, the category of beneficiaries is interpreted very liberally. Bulgarian case law, in fact, does not provide any explicit definition of "mass media", but courts generally include all websites, without dividing them on the basis of their function, commercial purpose, or connection with a traditional offline journal or broadcasting station.

The Dutch application of the exception is, instead, more precise in evaluating the circumstances at stake on a case-by-case basis. For instance, Dutch courts held that a reproduction of articles by a news reporting organisation was covered by the exception since its goal was to create a digital news service,[1051] but a similar activity carried out by a service provider was instead excluded, because it looked more similar to the creation of a news' archive rather than to a tool to diffuse articles in the first place.[1052] Poland opts for a more conservative approach. The Court of Appeal of Gdansk[1053] stated that the Polish press review exception should be interpreted strictly, with the exclusion of websites from the range of beneficiaries, on the basis of a literal interpretation of the term "press" in line with the definitions provided in the Act on Press Law, which dates back to 1984 and covers only press,

[1050] OGH 4 Ob 230/02f.
[1051] Rechtbank Utrecht, 12 May 2010, ECLI:NL:RBUTR:2010:BM4200 *(Eredivisiee).*
[1052] Rechtbank Breda, 30 May 2012, ECLI:NL:RBBRE:2012:BW7204 *(Cozzmoss/Belastingplanet)*.
[1053] Judgement of Sąd Apelacyjny (Appellate Court) in Gdańsk of 6th April 2017 V ACa 687/15; LEX nr 2343498.

radio and television. Even if the Act itself recognises that the list is only exemplificative, and that it might change in light of technological evolution, still the activity of reprinting and posting articles on a website was considered not "journalistic enough" to match the definition. Finally, the Polish court also noted that such reasoning was not in contrast with Article 5(3)(c) InfoSoc. However, it might be of some interest to note that in a former decision the Regional Administrative Court of Warsaw[1054] stated that the compatibility of a website with the exception in question depends on the informatory nature of the website at stake.

For the "press review" exception to apply, the user must report the author's name and the source of the work, unless this turns out to be impossible. This requirement is interpreted very consistently across Member States, also because the necessity to indicate the paternity of the work is enshrined in moral rights, and it is thus unlikely to be waived, even in the case of a partial transposition.

4.5.1.2 OBJECTIVE SCOPE

The InfoSoc provision introduces a subject-matter limitation to the "press review" exception circumscribing its scope to "published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character". The limitation concerning the topic such works should deal with (political, economic, religious) is partially contrasted by the absence of any limitation concerning the subject-matter they are included in (articles, broadcasts, other works of the same kind). However, not all the countries that have implemented this exception have stayed consistent with such formulation, particularly with regard to the inclusion of any kind of subject-matters, and they present a wide array of both restrictive and expansive transpositions.

As to the topic limitation, only two countries depart from the InfoSoc text. These are Hungary (Section 36(2) SZJT), which allows uses of "articles on daily events and on current economic or political issues", omitting religious topics while allowing the use of articles dealing with "daily events", and Slovenia (Article 47(2) ZASP), which does not set any limitation but allows "the reproduction of published newspaper and similar articles" in very general terms.

As to the subject-matter limitation, France (Article L. 122-5-3° b) CPI) represents the most particular case, with its very laconic provision allowing, in general, "press reviews" with no further conditions. This might lead to believe that no limitations exist, but this is not the case. According to commentators, in fact, courts have introduced several conditions restricting the seemingly wide scope of the French exception, from the definition of a press review as a joint and comparative roundup of several comments authored by different journalists but all

[1054] Judgement of Sąd Apelacyjny (Appellate Court) in Warsaw, of 19th August 2005, VI ACa 330/05, Wokanda 2006 nr 11, str. 42, Legalis nr 76271.

dealing with the same theme or event,[1055] to the need for the event or events constituting the subject-matter of the press review to have an informational value.[1056]

Other countries are more consistent with the InfoSoc version. On a scale going from the most restrictive to the most flexible implementation, one first finds Bulgaria (Article 24(1)(5) of the Bulgarian CA), Finland (Section 23(1) TL), and Slovenia (Article 47 (2) ZASP), which allows only uses of *articles;* then Croatia (Articles 201(1) and 201(2) NN) and Poland (Article 25 UPA), which include articles and photos; Lithuania (Article 24 LiCA), Slovakia (Sections 39(1) and (2) ZKUASP) and Hungary (Section 36(2) SZJT) which cover also broadcast works; and last, the encompassing definition offered by Cyprus (Article 7(2)(g) CL), Italy (Article 65 l.aut.), Malta (Article 9(1)(j) MCA), the Netherlands (Article 15 AW (2015)), Germany (Section 49(1) UrhG-G) and Austria (Section 44(2) UrhG-A) which mention articles, broadcast works and other similar subject matter, following the EU provision.

These divergences increase with the introduction of additional limitations by national courts. Bulgaria, for instance, accepts only articles that are "journalistic enough" and where the creative element does not prevail.[1057] Poland[1058] admits the coverage of photo, but limits it to a "press" or "reporting photo", and requires its diffusion to serve an informatory purpose. In this sense, the portrait photo of a company's management was not considered of such nature and thus prohibited.[1059] While understandable, this approach is not consistent with the EU provision, which does not require the informatory purpose, but defines the scope of the exception on the basis of the topics covered by the material used.

Spain deserves a separate mention. Article 33.1 TRLPI offers a verbatim implementation of the EU exception, Article 32(1) TRLPI states that "in any case, the reproduction, distribution or public communication, in whole or in part, of *isolated journalistic articles* in a press kit that takes place within any organisation will require the authorisation of the rights holders". While theoretically this could limit the scope of the exception, it has been argued that Article 32(1) TRPLI represents a general provision, while Article 33(1) TRPLI a special rule, which should then prevail according to the "lex specialis derogat generali" principle.

4.5.1.3 THE ABSENCE OF QUANTITATIVE CRITERIA ON THE AMOUNT OF WORK THAT CAN BE USED

Another key element of the InfoSoc press review exception is the absence of any quantitative limit on the amount of work that can be used, in stark contrast with several other InfoSoc provisions, which use the proportionality test or necessity benchmark to suggest the

[1055] Cass., crim., 30 janvier 1978.
[1056] TGI Seine, 3ème ch., 17 juin 1964.
[1057] *Decision No 193, Sofia Appellate Court* - Case No 3149/2015.
[1058] Judgement of Sąd Apelacyjny (Appellate Court) in Warsaw, of 19th August 2005, VI ACa 330/05, Wokanda 2006 nr 11, str. 42, Legalis nr 76271.
[1059] Judgement of Sąd Apelacyjny (Appellate Court) in Warsaw, of 19th August 2005, VI ACa 330/05, Wokanda 2006 nr 11, str. 42, Legalis nr 76271. In the case at issue the Court found that a portrait photo of a company's management is not of such a nature, thus, it was not covered by the exception.

need to contain the use of protected works into strict limits. A control over the length of excerpts used under exceptions is part of Member States' copyright traditions, which might explain why some countries have further restricted the InfoSoc provision by adding quantitative criteria to determine the lawfulness of the use.

A number of Member States indirectly introduced something similar to the proportionality test under the quotation exception. Croatia requires that works can be reproduced freely only "to the extent necessary for informing the public", and then reiterate the point by stating that uses are free " to the extent justified by the purpose and manner of reporting" (Articles 201(1) and 201(2) NN). Similarly, Czechia allows the free use of allowed materials "to a justifiable extent", where the purpose is not specified but it is likely to be interpreted as to be informatory (Section 34 CzCA); Cyprus requires that the use keeps within the extent justified by the reporting purpose (Article 7(2)(g) CL), while Poland (Article 25 UPA) rules that the reproduction and making available to the public of allowed materials must be carried out "for information purposes", which is likely to set a loose but still effective proportionality test. Very few cases have been reported on the matter, and surely not enough to draw well-grounded conclusions. The only reported decision where one of such clauses was effectively used comes from the Regional Administrative Court of Warsaw, where the informational purpose of the activity was used to exclude a website from the scope of the exception, but not to determine the "quantity" of the use.

4.5.1.4 THE POSSIBILITY FOR RIGHTHOLDERS TO RESERVE THEIR RIGHTS

Article 5(3)(c) InfoSoc Directive provides rightholders with the possibility to exclude the application of the exception by expressly reserving the rights to reproduce and communicate to the public the protected works covered by the provision. All Member States have implemented this caveat, with the exception of France.

Member States diverge on what is considered as being a "sufficient reservation" of the rights. The vast majority of countries adopt a concise formulation as in the EU provision. More precise indications come from the German and Austrian implementations. Section 44(1) UrhG-A, for instance, provides that "the reservation of rights on the article or on the head of the newspaper or magazine is sufficient". Similarly, Section 49 UrhG-G requires the article to contain a "statement reserving rights". Among the countries abiding to the EU formulation, Bulgaria is the one which diverges from the statutory definition in the practice of courts, which admits a reservation ex post facto, by filing a claim for copyright infringement,[1060] or sending an email requesting to remove a work from a website.[1061] The express reservation by the publisher was equated to the one by the author.[1062]

[1060] Decision No 193, Sofia Appellate Court - Case No 3149/2015.
[1061] Decision No 787, 14.05.2015, Sofia City Court - Case No 3908/2014.
[1062] See Decision No 484 of 26.03.2012, Sofia Appellate Court - Case No 1260/2011.

Opting for a more liberal approach, the Slovakian Constitutional Court has ruled that the possibility for rightholders to reserve their rights should be limited when the use of such articles is necessary for informing the public on current relevant events, in order to protect the constitutional freedom of expression and to receive and impart information. This represents a clear-cut case of use of constitutional provisions not merely to interpret but even to *change* the meaning of the textual provision.[1063]

4.5.1.5 COMPENSATION

Article 5(3)(c) makes no mention to the need to remunerate rightholders whose works are reproduced and communicated to the public under this exception.

The vast majority of Member States follows the same approach, not requiring any form of compensation for rightholders. On the contrary, Germany, Poland (Article 25 UPA), and Spain (Article 33.1 TRLPI), require some form of remuneration to be paid. Poland simply states that rightholders have the right to be remunerated (Article 25 UPA). Section 49(1) UrhG-G states that "the author shall be paid an equitable remuneration for the reproduction, distribution and communication to the public, unless the reproduction, distribution and communication to the public is of short extracts of several commentaries or articles in the form of an overview", thus excluding proper press reviews. According to the Spanish version, permitted uses should be carried out without prejudice to the rightholder's right to receive a fair remuneration. In the absence of an agreement between rightholders and beneficiaries of the exception, the former should receive a remuneration that is "deemed equitable" (Article 33.1 TRLPI). Similarly, for Poland, when the remuneration is not contractually agreed on, it should be collected by a competent authority (Article 25 UPA).

4.5.1.6 PRESS REVIEWS AS QUOTATION?

While press reviews might be covered by this exception if they match the topic requirement and are carried out by the right beneficiaries, the production of press reviews usually relies on other provisions, such as quotation. Some Member States acknowledge this interpretation also in their copyright acts. In Cyprus, for instance, the quotation exception states that copyright does not include the right to control the quotation of passages from published works "including extracts from newspaper articles and magazines in the form of press summaries" (Article 7 (2)(f) CL). Latvia allows the use of fragments and passages "for use in news broadcasts and reports of current events" (Section 20(1) LaCA)). The Dutch exception provides that "in this article [Article 15(a) AW] the term quotation also includes quotations in the form of press surveys of articles appearing in a daily or weekly newspaper and other periodical". And the Spanish TRPLI states (Article 32(1)) that "periodic compilations in the form of reviews or press reviews shall be considered as quotations", and - differently than for general quotations - when the purpose of "intellectual dialogue" is not apparent and

[1063] Constitutional Court SR, II. ÚS 647/2014.

the compilation consists of a mere reproduction of protected works for commercial purposes, rightholders should be entitled to equitable remuneration and may oppose such uses.

Countries not including press reviews in the quotation exception explicitly, usually achieve similar results by means of case law. Poland, in a dispute concerning the use of press articles in a media monitoring service, applied to the fact pattern the quotation exception and not the press review exception, ultimately rejecting the defence since the quotation did not comply with the "intellectual dialogue" requirement.[1064]

4.5.2 THE "REPORTING OF CURRENT EVENTS" EXCEPTION

The second part of Article 5(3)(c) InfoSoc includes the "reporting current events" exception, which revolves around four key requirements/features: 1) the connection with the reporting of current events; 2) the proportionality-test, having as a benchmark the informatory purpose of the use, 3) the indication of the author's name unless it is proven impossible; and 4) the absence of any objective or subjective limitation, as to types of subject-matters and beneficiaries covered. Compared to the press review exception, this provision does not have qualitative but only quantitative limitations.

The CJEU provided some guidelines for the interpretation of this rule in *Spiegel Online.*[1065] It held that "reporting an event" means going beyond a mere announcement, but that a detailed description is not required either. The attribute of "current", instead, means that the event must be of informatory interest to the general public, no matter when it too place. The Court also offered indications on the proportionality test, stating that, as in the case of quotation, the use shall not exceed what is necessary to achieve the informatory purpose and excluded the need for rightholder's consent before publication. Still, this was and will probably be not enough to streamline national approaches to the exception, as proven by the comparative analysis of the Member States' regulation of its main features.

4.5.2.1 SUBJECTIVE SCOPE

Despite the fact that the InfoSoc provision does not explicitly foresee this option, some countries limit the enjoyment of the exception to media only. This is the case for Bulgaria (Article 24(1)(5) of the BCA), circumscribing beneficiaries to "mass media", Croatia (Articles 201(1) and 201(2) NN), Estonia (Section 19(4) AutÕS), and Lithuania (Article 24 LiCA), limiting them to "press, radio or television". Other countries reach the same functional results by limiting the types of works included in the exception. In this sense, Germany allows uses by "broadcasting or similar technical means in newspaper, periodicals and other printed matter or other data carriers mainly devoted to current events, as well as on films" (Section 50 UrhG-G); the Netherlands opens the exception to derived works in the form of "a photographic,

[1064] Judgement of Sąd Najwyższy (Supreme Court) of 9th August 2019, II CSK 7/18 LEX nr 2730923, MoP 2019/19/1022.
[1065] Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625.

film, radio or television report"; and Romania allows uses in "press articles and radio or televised reportages" (Article 35(2)(a)). Denmark, Finland and Sweden, instead, provide two different rules, whose application depends on the nature of the derived work. Although minor differences are present, newspaper, periodicals, film, radio and television broadcasts are included in the list of permitted final works. It is very interesting to note that Sweden has adopted an evolutionary and expansive approach in its case law, so that the concept of "newspaper" was held to include Twitter posts too, since they published information related to the information website.[1066]

With regards to limitations concerning the original work that can be used, Denmark, Finland, France do not put forward any condition, but for the fact that the work itself should have not been originally intended to be used in newspaper or periodicals. This requirement recalls the main tenets of the fair practice principle, rather than acting as an objective limitation. Other limitations can be found in Portugal and Lithuania, which mention artistic and literary works only, while the Dutch exception includes scientific works as well.

4.5.2.2 OBJECTIVE SCOPE: CONNECTION WITH CURRENT EVENTS, PURPOSE, PROPORTIONALITY TEST

The InfoSoc provision requires uses to happen "in connection with the reporting of current events", adopting a very general statement that -unsurprisingly - has been implemented very variously across the Union. National transpositions can be categorized into different groups.

A group of Member States require a connection but does not specify its nature. These are Belgium (Article XI.190, 1° CDE use is possible "on the occasion of reports of current events"), Bulgaria (possible to use "works related to a current event" Article 24(1)(5) of the Bulgarian CA), Croatia (Articles 201(1) and 201(2) NN, under which it is possible to use "works that are part of current event that is being reported on"), Czechia (in Sec 34 CzCA it is provided that it is possible to use "a work within the course of reporting on current events"), and Malta (Article 9(1)(j) MCA, where it is allowed to use a work "in connection with the reporting of current events"). Another group implements the connection through the proportionality test, by stating that it is possible to use protected works when such use is justified by the purpose of reporting current events (Cyprus Article 7(2)(g) CL, France, Hungary Section 36(2) SZJT, Ireland, Luxembourg Article 10(3) LuDA, Netherlands Article 16a AW (2004), Portugal, Romania Article 35(2)(a) RDA, and Slovakia). Differently, Denmark, Finland Section 23(1) TL and Section 25b TL, Latvia, and Sweden provide two different exceptions for reporting current events. One allows the reproduction of protected works in newspapers and periodicals for the purpose of "reporting current events", the other allows the use of performance or exhibition by film, radio, and television. This is allowed in Denmark when it is part of a current event "to the extent the works forms a natural part of the reporting of the current events",

[1066] Patent and Market Court of Appeals (PMÖD) in case PMT 722-17, judgment delivered 5 October 2018 (Facebook photos).

and in Finland (Section 25b TL), Latvia (Section 20(1) and Section 25 LaCa), and Sweden when the work is visible or audible in the current event.

Other jurisdictions define the required connection more specifically, asking for the works used to be *part* of the event reported, i.e. perceivable thereat. This is the case in Austria, which allows the use of "works which become publicly perceptible during events which are being reported on" (Section 42c UrhG-A). Similarly, Estonia (Section 19(4) AutÕS) allows uses of "works seen or heard *in the course* of an event" for the purpose of reporting it, and Germany does it where the distribution and communication to the public of "works which become perceivable in the course of these [*current*] events" is permitted (Section 49 UrhG-G). Greece permits the reproduction of "works seen or heard in the course of current events" (Article 25(1)(a) GCA), Italy that of "protected subject matter utilised during current events" (Article 65 l.aut.), Poland of works "made available in the course of those [*current*] events" (Article 26 UPA), and Slovenia "of works which are capable of being seen or heard as a part of a current event that is being reported on" (Article 48 ZASP).

In such countries, the point returns also in the case law. The Austrian OGH, for instance, has repeatedly stated that the rationale of the provision is based on the consideration that some events cannot be reasonably reported without reproducing works that are transmitted, performed and thus perceived in its course. Accordingly, the exception shall not be considered a general limitation to copyright for reporting purposes, but is only intended to ensure that current events of the day can be reported without having to consider the interests of rightholders whose works become publicly perceivable in the event.[1067] Accordingly, the free use of works in connection with the reporting of current events applies only to works that become publicly available during such events, and cannot be interpreted, for instance, as a legal basis to reproduce protected photographs that picture the event in question.[1068] Following the same reasoning, the OGH held that the work cannot be the sole object of the event, but should appear in the context of another event which is the subject-matter of the report.[1069] Similarly, the Supreme Court of Estonia has interpreted the provision in the sense that only reproductions of works that have been directly perceived by the author of the article during the events reported are allowed.[1070]

Almost all countries set up a proportionality test that explicitly forbid uses that go beyond what is needed for the purpose of informing the public. On the contrary, Cyprus (Article 7(2)(g) CL), Ireland (Section 89 CRRA), Romania (Article 35(2)(a) RDA), and Slovenia (Article 48 ZASP) do not introduce the test explicitly, but only require the use to happen "for the purpose of reporting current events/informing the public". This, however, is not to say that the proportionality assessment is not used in these jurisdictions, since it might still be implemented by case law.

[1067] OGH 4 Ob 92/08w.
[1068] OGH 4 Ob 7/19m:.
[1069] OGH 4 Ob 53/19a; OGH 4 Ob 92/08w.
[1070] Case 3-2-1-167-04 (decision by the Supreme Court of Estonia, 02.03.2005).

In general, the proportionality test puts quantitative limits on permitted uses. Some countries, however, provide for such limits independently, by stating that only the use of "short excerpt or passages" is allowed. This opens up to a variety of interpretations.[1071] Countries featuring this formulation are Belgium (Article XI.190, 1° CDE), Lithuania, Luxembourg (Article 10(3) LuDA), Netherlands, and Romania (Article 35(2)(a)). However, even copyright acts that do not make this explicit apply the proportionality test as a pure control on the length of the protected work used, rather than a check on the real proportionality of the use vis-à-vis the purpose. A glaring example is a decision of the Court of Appeal of Sofia, which declared the exception inapplicable when a work is reproduced in full, and ruled that only uses of limited portions can benefit of the provision.[1072]

As to the purpose of reporting current events, which represents the rationale of this exception, all Member States have implemented it similarly with no further specifications. Given the open nature of the clause, however, the judicial interpretation of the notion is of particular importance to define the real scope of the provision across Member States. National courts tend to interpret this requirement strictly. For instance, the Sofia Court of

Appeal stated that the provision is not applicable to situations where a work representing an event is used to report on another event.[1073] Similarly, the Supreme Court of Estonia gave a very strict definition of "current", acknowledging that a daily event can be considered "historical" and no longer "current" following the emergence of new circumstances – an assumption now rebutted by the CJEU's decision in *Spiegel Online*. the court ruled that the reporting activity shall be consistent with the rationale of the provision, which is to inform the public, and, accordingly, the use of the work is permitted as long as it provides information concerning the events. This means that, hypothetically, other purposes (e.g., criticism) are not included.[1074] Other restrictive interpretations come from the Slovenian Supreme Court, which stated that, in order to comply with the informational purpose, it is not enough that the report spread current information, but it should come in a context where the news reporting is otherwise endangered.[1075]

Although it is not mentioned in the EU provision, national copyright traditions tend to stretch the requirement that the protected work used has already been made publicly available to cover all flexibilities, usually in order to preserve rightholders' moral rights. Despite its straightforwardness, the interpretation of the notion has challenged national courts vis-à-vis the online press. Two Swedish decisions come as paradigmatic cases in point. In the *Facebook photos* case,[1076] the Patent and Market Court of Appeal stated that in order to consider a work "published", a publication on a Facebook page was not enough. Then, in a

[1071] See quotation in Section 4.3 above.
[1072] Decision No 2376, 1.11.2017, Sofia Appeal Court - Case No 3290/2017.
[1073] Decision No 2625, 1.11.2019, Sofia Appeal Court – Case No 3480/2019).
[1074] Case 3-2-1-167-04 (decision by the Supreme Court of Estonia, 02.03.2005).
[1075] VSL V Cpg 907/2014, 28.8.2014.
[1076] Patent and Market Court of Appeals (PMÖD) in case PMT 722-17, judgment delivered 5 October 2018 (Facebook photos).

dispute concerning the publication of a short passage from a video, it was held that the fact that other excerpts from the same video were already published on YouTube could not waive the publication requirement for the excerpt in question.[1077]

Last, according to Article 5(3)(c) InfoSoc, all types of work can be included within the scope of the exception. the vast majority of countries do not set up any limitations in this respect.

4.5.2.3 ADDITIONAL REQUIREMENTS: MENTION OF THE SOURCE

Several Member States explicitly require the mention of the author's name and of the source of the work used, unless it is proven impossible. The implementation of such a requirement in the judicial practice, however, is not always uniform.

For instance, Bulgarian case law has been very consistent in stating that the mention of the author and the source are cumulative requirements,[1078] while other countries show more flexibility, such as Slovenia, where a YouTube link has been considered a suitable indication of authorship and source.[1079]

4.5.3 THE "PUBLIC SPEECHES" EXCEPTION

Article 5(3)(f) InfoSoc offers to Member States the possibility to allow the free use of political speeches, extracts of public lectures and similar works, for informatory purposes, and provided that the author and source of the work used are mentioned, unless it is proven impossible.

The vast majority of Member States have implemented this exception. In those who are. Missing, users may revert to the quotation exception or the general informatory purpose exception. Given the open-endedness of the InfoSoc definition, it comes as no surprise that national implementations are quite various in terms of features and scope.

4.5.3.1 SUBJECTIVE SCOPE

While the InfoSoc provision does not require any subjective limitation for this exception, some Member States restrict the possibility of using public speeches to specific categories of beneficiaries. Countries may be divided in two groups.

The first group features a more inclusive approach, without limitations (Austria Section 43 UrhG-A, Cyprus Article 7(2)(i) CL, Finland Section 25b TL, Hungary Section 36(1) SZJT, Ireland Section 89 CRRA, Latvia Section 20(2) LaCa, Luxembourg Article 10(13) and Article 10(8) LuDA, Poland Article 26(1), Romania 35(2)(b) RDA, Slovakia, Spain Article 33.1 TRLPI,

[1077] Swedish Supreme Court (HD), case T 4412-19, judgment delivered 18 March 2020 (*Mobilefilm* aka *Metal pole case*); alt. citation NJA 2020 s 293.

[1078] See, for instance, Decision No 785 of 27.05.2014, Sofia City Court - Case 8144/2013; Decision No 478 of 11.03.2015, Sofia Appeal Court - Case No 3824/2014; Decision No 1307 of 31.07.2014, Sofia City Court - Case No 8142/2013.

[1079] VSL V Cpg 120/2017, 18.5.2017.

Sweden Article 26 URL). The second group limits beneficiaries to mass media only as in Bulgaria ("periodicals and other mass media"), Croatia ("press, radio and television"), France ("press and broadcasting"), Germany ("newspapers, periodicals, other printed matter or data carriers which mainly record current events"), Greece ("mass media" Article 25(1)(b) GCA), Italy ("magazines and newspaper, also if broadcast or in electronic format" (Article 65 l.aut.)), Lithuania ("newspaper and periodicals"), Portugal ("media"). The problem that is likely to emerge is how to interpret the category of "media" in relation to online news services. While some countries, such as Germany (Section 48 UrhG-G) and Italy (Article 65 l.aut.), explicitly state that it is possible to assimilate news services in electronic format to traditional media to the purpose of this exception, other countries remain silent in this respect.

Interestingly, Sweden does not allow the reproduction of public speeches and lectures in television and broadcasts (Article 26 URL).

4.5.3.2 OBJECTIVE SCOPE

The objective scope of the exception is quite homogeneous among Member States. They seem to converge on public speeches of various nature, such as public hearings, public debates, before public authorities, in government bodies, and during official ceremonies. Only minor differences emerge at a closer look, such as the mention of sermons, speeches given by church organs, and religious ceremonies by Croatia, Germany (Section 48 UrhG-G) and Slovenia which, however, constitute specifications that are not likely to cause any significant difference in practice.

4.5.3.3 PURPOSE, PROPORTIONALITY TEST AND QUANTITATIVE LIMITATIONS

The InfoSoc exception requires that the use is carried out for the purpose of informing the public. Only very few Member States fail to explicitly include this element in their statutory provisions (Croatia, Finland, France, Germany (Section 48 UrhG-G), and Sweden (Article 26 URL)). However, among them, only the Swedish (Article 26 URL) and Finnish (Section 25c TL) exceptions are completely devoid of an informatory-oriented nature, since Croatia and Germany limit beneficiaries of the exception to media services, and Bulgaria and France allow the publication of such speeches only "as current news".

National transpositions greatly differ on the application of the proportionality test as well. There is no mention of it in the Austrian, Bulgarian, Croatian, French, Irish, Portuguese, Slovenian, and Spanish exceptions, probably due to the fact that, since the subject-matter of the provision is a speech held in public, the informatory purpose generally covers it in its entirety, and this makes the test superfluous.

While the InfoSoc provision relies on the proportionality test to put quantitative constraints on lawful uses, some Member States have preferred to make them explicit. In this sense, Hungary, Luxembourg (Article 10(13) and Article 10(8) LuDA), Portugal, and Romania (Article 35(2)(b)) allow free use of short passages, sections, and fragments only. On the contrary,

other countries distinguish between political speeches, which might be quoted in full, and other materials, which are to be used in excerpts and short passages (Czechia Section 34(d) CzCA, Greece Article 25(1)(b) GCA, Ireland Section 89 CRRA, and Poland Article 26(1) UPA).

A number of countries reserve the right to publish collections of public speeches to their authors (Austria, Czechia, Finland, Germany Section 48 UrhG-G, Hungary, Poland Article 26(1) UPA, and Spain).Other additional conditions set up at a national level are the fact that the use of the material was not expressly prohibited (Ireland), that the date and the place of the delivery of the speech are mentioned in addition to the name of the author and the source (Italy, Article 66 l.aut), and that the used does not derive any direct or indirect commercial advantage by the use (Romania Article 35(2)(b)).

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Flexibilities related to "informatory purpose" present a simplified structure at the EU level but a much greater complexity in national implementations.

All Member States, in fact, recognize in one way or another the prevalence of the public interest in receiving information on current events over copyright, but they are far from converging on the practical implementations of such exceptions. Differences range from less significant elements to much more radical ones.

First, the three informatory purposes exceptions included in the InfoSoc Directive are not always transposed in their entirety by all EU countries. Second, the pool of beneficiaries and stakeholders they apply to varies a lot across the Union, ranging from countries that open such flexibilities to anyone and countries that are less prone to follow this path. Whether the possibility to use protected work to inform the public is a prerogative of, *strictu sensu*, "mass media" only, or of other stakeholders too, is likely to have a significant impact in the new online information industry, especially given the role that information plays in a free and democratic society. Third, their overlap with quotation and other exceptions protecting freedom of expression has been often highlighted – a circumstance that may increase the degree of flexibility available to uses but has also created confusion and uncertainties in their judicial application. Last, the advent of new technologies and new business models has heavily challenged the operation of provisions the boundaries of which are defined on the basis of traditional concepts, anchored in the analogical world and looking at traditional media publishers. This has evidenced their general rigidity, and at the same time their different operation in the judicial practices of single Member States.

4.6 TEACHING AND RESEARCH USES

The first attempt to harmonize copyright flexibilities for teaching and research purposes came from **Article 5(3)(a) InfoSoc**. This all-encompassing provision – normally referred to as the exception for illustration for teaching and research – was enacted to cover non-commercial reproductions and communication to the public of works for purposes of teaching and research, without distinction between the two, and provided that the source and author

of the work used are properly cited. Article 5(3)(a) InfoSoc, as many other instances in Article 5, is concise and essential, leaving ample discretion to Member States. In addition, the EU harmonization intervened in a field where a number of national statutes already featured rules in favour of (mostly) teaching and (more rarely) research uses, yet with very different and sometimes highly specific or sectoral focuses. Not all of these provisions were modified as a response to the InfoSoc Directive. As a result, national solutions are the most various and fragmented.

From the types of works covered (sometimes specified in detail) to the uses involved (not only reproduction and communication to the public, but also public performance, inclusion in textbook et al), the array of national solutions is wide and sometimes picturesque in its variety. The scenario became even more fragmented as some countries decided to allow uses only to a limited extent, or to introduce remuneration duties. The advent of a mandatory exception such as the one for digital teaching (Article 5 CDSM) impressed only limited changes, both due to its circumscribed subject matter, and because it still left Member States free to decide on a number of key features of the flexibility. Yet, the provision overcomes the problems created by the territoriality of E/Ls by introducing the principle of the country of origin to determine the law applicable to each permitted use, even if cross-border.

The following section will provide an overview and assessment of the state of the art of the harmonization and the various degrees of flexibility offered by Member States in the field of (**1**) **traditional teaching and/or research exception**, (**2**) **digital teaching** and (**3**) **text and data mining**, looking at (**i**) **subjective** scope; objective scope analysed per type, extent, and number of works (**ii**), as well as per type, extent, and number of **permitted uses** (**iii**); **(iv)** other **conditions of applicability** of each exception.

4.6.1 "TRADITIONAL" TEACHING AND RESEARCH EXCEPTIONS

4.6.1.1 SUBJECTIVE SCOPE

Member States adopted two different approaches to the definition of beneficiaries of this exception. Most of them are silent on the matter (a), adopting an approach that may be the most flexible alternative, as it leaves space to a broad interpretation of the subjective scope; others provide a closed or open list of selected beneficiaries, either restricting or broadening what would be the normal target of the teaching/research exception (b).

4.6.1.1.1 UNSPECIFIED

Several Member States do not specify the array of beneficiaries. This is the case for Austria (Sections 42f, 45, 51, 54(1)(3), 56c, 59c, 65c(3) UrhG-A), Belgium (Article XI.191/1, §1er, 2°-5° CDE), Bulgaria (Article 24(1)(3) BCA), Croatia (Articles 198(2) NN), Czechia (Section 31(1)(c) and 92(b) CzCA - specific for databases), Denmark (Section 23(1) DCA), Estonia (Sections 19(2), 75(1)(2) AutÕS), Finland (Sections 14 TL), Greece (Articles 20, paragraphs (1)-(3), 21 GCA), Hungary (Sections 34(2), 68(2) SZJT), Ireland (Section 53 CRRA), Italy (Articles 70(1)(2), 64-

sexies l.aut.), Latvia (Section 21 LaCA), Lithuania (Articles 22(1), 58(1)(7) LiCA), Luxembourg (Article 10(2) LuDA), Malta (Articles 9(1)(h), 32(b) MCA), the Netherlands (Article 16 AW), Poland (Article 27(1) UPA), Portugal (Articles 75(2)(e)-(f) CDA), Romania (Article 35 RDA) and Slovenia (Articles 47, 49 ZASP), Sweden (Sections 14, 18 URL).

Polish courts, as indicated in the national report, have specified that libraries cannot invoke Article 27 UPA to be exempted from remuneration duties and benefit from the exception for teaching purposes, as they are not classifiable as educational or academic establishments.[1080] This tendency, which has been indicated also by other national experts yet without providing adequate case law in support, is in line with the general strict reading of exceptions characterizing the traditional approach to the matter by national courts. In this sense, unspecified lists of beneficiaries may result in much limited flexibilities than what they look at the first sight.

4.6.1.1.2 LIST OF BENEFICIARIES

Other national exceptions for teaching and research purposes contain an open list of beneficiaries. In most of the cases, this entails a specification of the concept of educational establishment, which is left undetermined in EU law.

In this vein, in Austria Sections 42(6), 42g, 56c UrhG-A address universities, schools, and other educational establishments, mentioning some entities in a merely exemplificative way. By contrast, in Croatia, Article 198 NN encompasses a broad list of selected beneficiaries, as the exception has a wide and heterogenous subjective scope and it is intended to cover acts within the premises of public libraries, charitable and social welfare entities, as well as of educational, academic and pre-school establishments. In Denmark, Section 13(4) DCA specifically regards teachers and students. Similarly, in Czechia, Section 35 CzCA is dedicated to teachers and third parties involved in direct teaching, as well as students. Along the same lines, in Lithuania, Section 22 LiCA covers public performances within school premises specifically made by teaching staff and pupils, provided that the audience is restricted (teachers or caregivers, parents and relatives of the pupils involved, and any other third person connected with the educational entity). In Estonia, which features an exception very similar in content and scope to the Lithuanian one, the Supreme Court read the place requirement in a broad way, thus admitting performances held also outside the school premises,[1081] and extending the exception to cover also those entities playing educational functions on a merely amatorial level. Likewise, in France Article L.122-5-4° e) CPI also restricts the audience in the case of representation of protected works.

In Germany, § 60a(2) UrhG-G includes an exception intended for students, teachers and third parties to the extent these subjects are involved in a specific educational activity, such as a course or an examination or in a research project. § 47 UrhG-G rather encompasses an open list of beneficiaries on the grounds of the public interest in promoting right to education

[1080] Wyrok Sądu Apelacyjnego (Appellate Court in Łódź) of 4th February 2016, I ACa 1107/15; Legalis 2055849.
[1081] Case 3-2-1-159-16, Supreme Court of Estonia, 27.02.2017.

and scientific research (teachers, students and training institutions, image archives, youth welfare entities and other publicly owned places fulfilling these tasks). As in Croatia, in Hungary, Section 35(4)(5) SZJT shelters use made by both CHIs and educational establishments under the umbrella of the same exception for teaching, research, and private study. Much more restrictively, instead, in Ireland Section 53(1) CRRA merely targets those subjects receiving and imparting specific instructions during an educational or research activity.

One of the broadest readings of the subjective requirement can be found in Slovakia, in Section 45 ZKUASP, which covers educational, and academic institutions, their employees playing pedagogical roles and any other person involved in a socio-educational or research-valuable process. Mid-way, the Spanish Article 32(3)(4)(5) TRLPI extends the teaching and research exception to all public research bodies and any other entity operating in the field of research.

Very few exceptions are addressing specific beneficiaries appointed by law, as in Belgium, where Article XI.191/1, §1ter 1° and 4° CDE refers to educational establishments, academic entities and other childcare institutions that need to be appointed by law in order to benefit from the flexibility.

4.6.1.2 OBJECTIVE SCOPE: USES COVERED

Most EU countries restrict the exception for teaching to selected uses, and some States – like Germany and Spain – further delimit it with very detailed provisions. In general, it is possible to distinguish national rules that are silent on the matter from those rules which, instead, offer very detailed list of uses. By contrast, the last group of – inflexible – national provisions cover only one single kind of use. It is worth noting that most countries usually have a separate exception for specific uses – such as inclusion of protected works in collective textbooks and anthologies and public performance for teaching and research purposes. Consequently, it is necessary to have a comprehensive look at all provisions, without a "clustered" view, in order to understand whether and to which extent the national framework can be deemed flexible, and what the degree of harmonization is across the EU.

4.6.1.2.1 UNSPECIFIED

This very flexible approach is endorsed by a restricted number of countries: Bulgaria (Article 24(1)(3) BCA), Czechia (Section 31(1)(c) CzCA), Estonia (Section 19(2)-(3) AutÕS, covering reproduction and a general right of use), Finland (Section 26 TL: the amended version does not specify the uses covered by ECL – thus, abstractly, any use can be included); Hungary (Section 34(1)(4) SZJT covering any use if to the necessary extent to fulfil the purpose otherwise it becomes borrowing (3)(b)), Latvia (Section 19(1)(2) LaCA) and The Netherlands (Article 16 AW).

4.6.1.2.2 LIST OF PERMITTED USES

A selected number of permitted uses is usually included in the exception for teaching and research. This means that the degree of flexibility, and thus the array of permitted uses, changes consistently from one exception to another also within the same national legal framework. Austria is a perfect case in point, with its long list of teaching and research-related exceptions. Here, Section 42(6) UrhG-A merely covers acts of reproduction and distribution of copies of protected works for teaching and scientific research purposes. Instead, Section 42f UrhG-A encompasses a much larger set of uses, spanning from reproduction, distribution, broadcasting to communication to the public. And while Section 42j UrhG-A merely allows communication to the public, Section 45 UrhG-A allows the reproduction, distribution, communication to the public. In addition, the ECL system embedded in Section 59 UrhG-A is devised for the permitted uses listed in Sections 51, 54 and 45 UrhG-A.

In this sense, a more homogenous approach characterizes Belgium. In Articles XI.191/1, §1er 3°-4° and §2 CDE only selected beneficiaries appointed by law can reproduce and make the protected works available to the public. In Finland, Section 14 TL covers acts of reproduction via any mean other than radio and television, as well as photocopying and communication to the public under ECL. Instead, in France Article L.122-5-3° e) CPI sticks to the InfoSoc baseline by allowing the reproduction, performance and communication to the public of lawfully disclosed works.

With a different twist, in Germany Section 60a UrhG-G allows the reproduction – although up to 15% -, distribution and communication to the public. In this context, the BGH embraced a restrictive reading of the right to communication to the public encompassed by the objective scope of the exception (Cordoba II). With a decision in line with the CJEU's holding in *Renckhoff*, the German Supreme Court held that a student cannot publish a protected photo – included in a presentation - on a school website, targeting what would amount to a new public compared to what previously envisaged by the rightsholder, for this would cross the boundaries of the flexibility provided under German copyright law. To complement the framework, Section 60b UrhG-G encompasses the same number and array of permitted uses of Section 60a UrhG-G, allowing up to 10% of protected works at issue to be reproduced, distributed, and made available to the public for the purpose of including them in media collections for teaching purposes. More restrictively, instead, the Hungarian Section 35(4) SZJT includes the right to make copies and reproduce protected works to fulfil teaching and research related tasks. A case-specific approach towards the objective scope of the exception can rather be observed in Ireland. Here, Section 53(1)(5) CRRA entitles those imparting and receiving instructions to reproduce and communicate protected works to a limited public, for the purpose of answering, making questions and explaining arguments during an examination or a course. By contrast, the general rule enshrined in Section 57 CRRA only allows to make copies and communicate them up to 5% of each protected work within an academic year.

In Italy, Article 70(1) and (2) l.aut. merges the exception for illustration for teaching with quotation-related flexibilities. In fact, the provision allows the quotation, abridgement,

reproduction and making available to the public of protected works for teaching and research purposes, also extending the provision to include the same works in anthologies and textbooks (Article 70(2) l.aut.). In Lithuania, Section 22 LiCA encompasses a broad list of rights, putting under the umbrella of the same exception acts of reproduction, communication to the public, public display, and performance of protected works, and the same can be said for Section 58 LiCA. Endorsing a narrower perspective, in Luxembourg Article 10(2) LuDA merely targets acts of reproduction and communication to the public, slavishly following the InfoSoc threshold. In the same way, in Austria Section 45 UrhG-A encompasses the right of reproduction, dissemination, and communication to the public.

An expansive attitude can be tracked in Malta, where Article 9(1)(h) MCA covers the reproduction, translation, distribution, and communication to the public of protected works for teaching and scientific research purposes. In this fashion, in Portugal Article 75(2)(f) CDA comprehensively includes the right of reproduction, distribution, and communication to the public, and an equally flexible approach can be found in Spain, where Article 32(3)(4)(5) TRLPI allows to make copies, distribute, publicly perform, and communicate protected works to a restricted audience within the premises of educational centres and research bodies.

4.6.1.2.3 A SINGLE TYPE OF USE

A consistent number of national exceptions for teaching and research is use-specific. As mentioned above, many national copyright statutes have in fact envisaged exceptions for the inclusion of protected works in collective works for teaching purposes and public performances within school premises, such as plays, school concerts and other kinds of educationally relevant exhibitions involving pupils and teachers. In Austria, this is the case of Sections 56c UrhG-A, specifically destined to cover public performances within school premises, and 59c UrhG-A, allowing use in schoolbooks and examinations. The same Act also contains an exception addressing acts of reproduction of substantial parts of databases to fulfil teaching and research related aims (Section 76d UrhG-A).

Similar exceptions can be found, with several variations, across the EU. Under the former group of exceptions, covering public performance rights, we could mention Article XI.191/1, 2° CDE in Belgium, Article 179 NN in Croatia, Section 35 CzCA in Czechia, Section 22 LiCA in Lithuania – specific for public performances in direct teaching -, Section 38(1)(b) SZJT in Hungary, Article 12(5) MCA in Malta. Under the second group – covering those exceptions derogating to the database sui generis right – we can enlist Article 64sexies-(1)a l.aut. in Italy, which merely allows access and visualization, and the very similar Article 26(2)(b) MCA in Malta.

Also, Member States often provide specific exceptions for the inclusion of protected works in media and paper teaching collections, textbooks, and anthologies. Exceptions of this kind – thus covering a single type of use - can be found in Section 18(1) DCA in Denmark, Section 18 TL in Finland, Article 22(1) GCA in Greece – specifically addressing the reproduction of protected works only in those textbooks and teaching materials that are officially

recognized by the Minister of Education for primary and secondary schools -, Article 27(1) UPA in Poland that, like in Italy, allows the quotation of excerpts of protected works for inclusion in teaching materials. In this context, the Appellate Court of Lódź[1082] also specified in 2016 that the reproduction of the whole work for inclusion is not to be held within the objective scope of the exception as it would amount to a substitution of the protected work, rather than a reuse in an independent work.

Conversely, other national provisions solely encompass the right to reproduction, yet often to a limited extent. Similarly, in Sweden Section 42c URL merely allows to make copies of protected works licensed under ECL, whilst Section 18 URL solely covers the reproduction and inclusion of copyrighted works in other works for teaching and research purposes. Section 14 URL, instead, covers the right to make copies of students and teachers' performances via broadcasting in exchange of remuneration, administered through CMOs under an ECL scheme. Covering similar uses, in Germany Section 47 UrhG-G creates a flexibility for the right of making and transferring copies in recordings and media for teaching and research purposes.

Some Member States feature narrow and very specific provisions, such as Italy, having a teaching and research exception allowing the dissemination of low-resolution versions of pictorial and musical works online; or Malta, where Article 33(b) MCA allows the reproduction of topographies made by the creators of semiconductors for the purpose of explaining and commenting technical processes for research purposes.

4.6.1.3 OBJECTIVE SCOPE: WORKS COVERED

4.6.1.3.1 UNSPECIFIED

Many national exceptions chose to leave the type, number and amount of work that can be used for teaching unspecified, yet sometimes delimiting the extent of use to fragments of brief works. This was the choice of Austria (Section 42(6) UrhG-A), Belgium (Articles XI.191/1, 2°, 6° CDE), Bulgaria (Article 24(1)(3) BCA), Croatia (Article 198 NN), Czechia (Section 31(1)(c) CzCA), Denmark (Section 18(1) DCA), Estonia (Section 19, paragraphs (2)-(3) AutÕS), Lithuania (Article 22), Finland (Sections 18, 26 as amended TL – the ECL can abstractly cover any kind of work), France (L.122-5-3° e) CPI), Germany (Section 47 UrhG-G); Greece (Article 21, 22 GCA), Hungary (Sections 34(2), 35(4) SZJT), Ireland (Sections 53, 57 CRRA), Italy (Article 70(1)(2) l.aut.), Latvia (Sections 19(1)(2), 22 LaCA), Luxembourg (Article 10(2) LuDA), The Netherlands (Article 16 AW), Poland (Article 27(1) UPA), Portugal (Articles 75(2)(f) CDA – in the latter case, only parts of published works), Romania (Article 35(2) RDA), Slovakia (Section 45 ZKUASP), Slovenia (Article 49 ZASP), Spain (Article 32(3)(4) TRLPI) and Sweden (Section 18 URL - only fragments of works or works of limited scope yet unspecified in kind -, 42c-h URL).

[1082] Wyrok Sądu Apelacyjnego (Appellate Court in Łódź) of 4th February 2016, I ACa 1107/15; Legalis 2055849.

4.6.1.3.2 LIST OF WORKS

Alternatively, several national exceptions include a – yet usually open - list of selected works that can be variably used for educational and research purposes.

In other cases, national legislators also introduced work-specific limitations or divergences in regime. For example, in Austria Section 42f UrhG-A introduces an exception covering three specific types of works: those included in a scientific subject matter, works of fine arts included to explain the content of another work, and individual passages of linguistic works also embedded in another independent collective work. Work-specific limitations can also be found in Section 42f UrhG-A, covering all works (but films) if two years have not elapsed since the date of the first publication. Likewise, in Belgium Article XI.191/1, 3° CDE covers all works but for music scores, while in Latvia Section 21 LaCA includes all works except for computer programs. By contrast, in Croatia Article 179 NN contains a long open list of lawfully disclosed works, brief fragments of which can be used for teaching and research purposes. This is the case for works of fine and applied art, architectural, audiovisual, and cinematographic works, photographic and cartographic works, scientific, literary, and artistic works in general, as well as presentations of technical and scientific nature. The German legislator also distinguished different works to determine whether their full use is allowed. Section 60a UrhG-G, for instance, permits it for illustrations, isolated articles from the same professional or scientific journal, and other small-scale and out-of-commerce works, while in all the other cases uses are allowed only in part.

The type of work seems also relevant under Greek copyright law. Article 22(1) GCA states that only part of the overall output of a specific author can be reproduced for inclusion in textbooks officially approved by the Minister of Education for primary and secondary school. Particularly, the provision points to lawfully published literary, artistic, visual, and photographic works. In contrast, Article 21 GCA specifically addresses extracts from periodicals and works of fine art. In the same fashion, in Ireland Section 53(1) CRRA encompasses a very broad list of works, thereby putting under the umbrella of the exception literary, dramatic, musical and artistic works, as well as typographical arrangements, sound recordings, films, broadcasts, cable programs and original databases. Likewise, in Hungary Section 34(2) SZJT explicitly allows the reproduction in part of literary, film, musical and architectural works, as well as of works of applied design and fine art. In the same expansive way, in the Netherlands Article 16 AW generally addresses parts of published literary, scientific, and artistic works. Similarly, in Slovenia Article 47 ZASP generally refers to disclosed works of photography, architecture, fine and applied art, as well as of industrial design and cartography. Not highly dissimilar is the wording deployed by the Spanish legislator in Article 32(3)(4)(5) TRLPI. The provision is devised to allow the inclusion – backed by the pursuit of teaching and research related aims - of small fragments of published works such as – inter alia – of cinematographic and plastic works thus excluding those expressively crafted for school use. Section 58(1)(5) LiCA specifically targets performances, phonograms and fixations of audio-visual work or broadcast.

4.6.1.3.3 A SINGLE TYPE OF WORKS

Very few national provisions specify the kind of work covered by the flexibility – thereby deciding to address one specific type only. In this sense, Austrian exceptions for teaching and research purposes are very work-specific (Sections 45, 51, 54(1)(3), 56c(1) UrhG-A), although the Austrian Supreme Court also hinted at an extensive reading of these provisions.[1083] In this sense, the Court ruled that Section 56c(1) UrhG-A should be understood as implicitly covering also the right to use literary and artistic works that are inseparably embedded into a cinematographic work legitimately used under the exception.[1084] Along the same lines, in Belgium Article XI.191/1,°5 CDE uniquely refers to literary works of deceased authors for inclusion in other independent works useful for teaching. Likewise, in Greece Article 20(1)(2) GCA shields from copyright infringement the use of parts of literary works. In this regard, it is also worth mentioning national exceptions specifically devised for databases, such as Article 93g(2) BCA in Bulgaria, Article 64sexies-(1)a l.aut. in Italy, and Article 26(2)(b) MCA in Malta.

4.6.1.4 OTHER CONDITIONS OF APPLICABILITY

Other criteria can affect the degree of flexibility of the exceptions transposing Article 5(3)(a) InfoSoc in the EU. Additional conditions of applicability can be classified in the following categories: (a) remuneration and related issues – such as the existence of ECL systems; (b) the purpose-oriented limitation and necessity criteria, mandated under EU law; (c) miscellaneous, that groups a plethora of remaining heterogenous conditions.

4.6.1.4.1 COMPENSATION

EU legislators embraced a very diversified approach in this regard. As a result, many discrepancies exist about whether remuneration is due in exchange of uses for teaching and research purposes and – if so – how this right shall be managed. An ECL is present to cover uses for teaching and research purposes in Austria (Section 59c(1) UrhG-A), Denmark (Section 23(1) DCA), Finland (Section 14a LT, as well as the draft version of Section 19a(2) LT) and Sweden (Section 42c URL).

Other national provisions plainly establish the obligation to pay remuneration: Croatia (Article 179 NN), France (Article L.122-5-3° e) CPI) that prescribes due compensation on a flat-rate basis), Italy (Article 70(2) l.aut. that also establishes that compensation shall be fixed according to national law), the Netherlands (Article 16 AW), Bulgaria (Article 24(1) BCA mentions the right of performers to receive compensation for the performances held within educational establishments), Lithuania (Articles 22(1)(2), 58 LiCA), Poland (Article 27(1) UPA), Slovenia (Article 47 ZASP), Belgium (Article XI.191/1, §1er 3° and 4°, as well as §2 CDE) and Spain (Article 32(3)(4)(5) TRLPI). Under the Belgian CDE, if parties are unable to reach an agreement, the judge is entitled to fix it by law in accordance with customary practices. The

[1083] OGH 4 Ob 131/08f.
[1084] OGH 4 Ob 227/08y.

same rule also applies under Section 18 URL in Sweden where, in the lack of an agreement, the Copyright License Tribunal will fix the amount of compensation due.

Remuneration rights have triggered several disputes. The Lithuanian Supreme Court ruled in 2007 that compensation can be excluded if only short fragments of protected works are used, the defendants' publication was in very small edition and the target public was limited to pupils, teachers and the like.[1085] In this way, the court made it explicit that compensation can be excluded on a case-by-case basis considering the nature, extent, and scope of the use. Similarly, the Slovenian Supreme Court in 2014 ruled that also clipping performers are entitled to receive compensation for their performance, although this was not envisaged by the Slovenian legislator at the time of adoption of the Copyright Act.[1086] The Spanish Supreme Court also intervened on the issue in 2013, adding further clarity over the criterion of non-commercial purpose.[1087] Asked to determine whether the use by university professors, selling copies of teaching materials containing protected works, could still enjoy the teaching exception, the Tribunal Supremo excluded that a commercial sale of this kind could be covered by Article 32(3) TRLPI.

4.6.1.4.2 PURPOSE-ORIENTED LIMITATION AND NECESSITY BENCHMARK

Almost all national exceptions expressively include a purpose-oriented limitation in their text, allowing the use for teaching and research purposes to the extent justified thereby. Yet, in some cases national courts intervened to clarify the reading of this additional criterion.

In Austrian copyright law, each exception for teaching and research shows an articulated limitation in purpose. Section 42(6) UrhG-A admits the making of copies in the number that is necessary for a specific course, research activity or examination, and a similar wording is sculpted in Section 42j UrhG-A. Section 42f UrhG-A allows uses for public lectures, performances and presentations to the extent justified by the purpose of quotation and solely to explain the contents embedded in an independent work. This wording is also slavishly transfused within the text of Section 45 UrhG-A. Sections 56c and 42j UrhG-A, instead, present a vaguer language, as the former allows the use of protected works strictly for school uses, whilst the latter covers the showing of protected content to a student audience during a lecture, course or examination. Likewise, Section 54(1)(3) UrhG-A covers uses for the sole purpose of explanation of the content of a textbook, to enhance art education of young people, whilst Section 40h(2) UrhG-A covers the reproduction of substantial parts of databases to the extent justified by the specific research or teaching use. The Austrian Supreme Court outlined[1088] that the performance of cinematographic works, including also musical works, for teaching in individual classes at compulsory school courses, to the extent necessary by the purpose, constitutes public communication within the meaning of Section 56c UrhG-A, triggering the obligation to pay compensation to rightsholders pursuant to

[1085] Supreme Court of Lithuania, case n. 3K-3-28/2007 of 30 January 2007.
[1086] SL V Cpg 907/2014, 28.8.2014.
[1087] STS 287/2013 - ECLI:ES:TS:2013:287.
[1088] OGH 4 Ob 131/08f.

Section 56 (2) UrhG-A. The same court offered an extensive reading of the purpose-oriented limitation in other cases.[1089] As already mentioned above, it highlighted that the scope of the right to use cinematographic and musical works under Section 56c (1) UrhG-A also includes - if reasonably justified by the educational purpose -, also the right to use the literary and pictorial which are inseparably connected with the film predominantly use without consent.

A case-by-case approach towards the duty to compensate rightsholders can be found in Bulgaria in Article 24(1)(3) BCA. In this respect, the Bulgarian Supreme Court held that the manner and volume of reproduction permitted under the national exception for teaching purposes is a factual issue that is to be evaluated by an expert.[1090] The use of works and sound recordings may be admitted not only to pursue strictly educational aims, but also exceptionally extended to other activities such as concerts. As a result, the conditions of applicability based on the purpose of the use can also be read expansively on a case-by-case basis. Yet, Bulgarian courts have also proposed more restrictive readings. For instance, the Sofia Appeal Court has repeatedly affirmed that the conditions of applicability of the exception for teaching and research purposes are cumulative. Consequently, the fulfilment of the teaching purpose is not sufficient to ensure the applicability of the exception, which also requires element of analysis, commentary and scientific research.[1091] It follows that the purpose-oriented limitation imposes a standard of review that is higher than expected. Judicial outcomes are quite contradictory, though, since other judgements go in the opposite direction of smoothening the burden of proof, requiring only the educational purpose to justify the use.[1092]

An articulated limitation is embodied in the Czech Section 35 CzCA. Accordingly, uses of protected works for teaching and research purposes are admitted if they fulfil the internal needs of the educational or research establishment at issue, arising from specific assignment or tasks of students, researchers and/or teachers involved. More generally, instead, the French Article L.122-5-3° e) CPI allows uses of protected works for the exclusive purpose of illustration within the context of teaching and research, including their development and dissemination for examinations or competitions. Similarly, Article 21 GCA prescribes the pursuit of teaching and research related aims within the premises of an educational or academic establishment. In the same vein, in Hungary Section 35(5) SZJT encompasses a flexibility for the purpose of enhancing the public role of selected beneficiaries such as, inter alia, educational establishments and research entities, solely to the extent justified by the number of students, researchers and teachers involved. More specifications can be found in Ireland, where Section 53(1) CRRA details the number of copies and permitted acts under the teaching exception.

[1089] OGH 4 Ob 227/08y.
[1090] Supreme Court of Cassation, case n. 828/2009 of 27 January 2010.
[1091] Sofia Appeal Court, case n. 741/2013 of 9 May 2013.
[1092] Sofia Appeal Court, case n. 3303/2012 of 19 April 2013.

In Italy, Article 70(2) l.aut. leaves the definition of manners and extent of uses allowed to specific Regulations. In this sense, some national courts endorsed a broad reading of the limitation,[1093] holding that also the exchange of experiences and suggestions can be deemed within the educational scope. The same broad approach features Section 22 LiCA in Lithuania, which holds that acts are permitted if related to study program to the extent that is necessary to foster learning and the professional developments of teachers and researchers during any teaching-related activity. This has led to extend the exception so as to cover also concerts and exhibitions as parts of the students' educational pathways. With an opposite approach, however, a Lithuanian court held that, despite the educational purposes showcased by the defendant, the amount of work copied, the extent of the presentation and the obvious commercial advantage extracted thereof constituted a valid reason not to justify the defendant's publication under the teaching exception.[1094]

Equally narrow is the interpretation to the general teaching exception under Article 16 AW provided by Dutch courts. In this respect, the Rechtbank of Rotterdam specified that showing a video to impart instructions to volunteers belonging to an organization, in order to help them recognizing the sounds of birds, could not qualify as an educational objective for the purpose of the exception.[1095]

In Malta, Article 32(b) MCA features a specific exception covering the explanation of technical processes, systems, concepts, and other technicalities of topographies. Article 9(1)(h) MCA is more restrictive and general at the same time, covering activities that exclusively pursue scientific research and educational aims, if they are included in official curricula or study plans. In the same fashion, in Romania Article 35(1)(2) RDA restricts the objective scope of the exception for illustration for teaching to those acts that are necessary to identify and organize the subject matter of a specific lesson. A similar wording exists in Slovenia under Article 47 ZASP. However, the new text proposed to the Parliament contains a wider formula – for illustration for teaching ("Poučevanje"), replacing the older, more specific versione "for the purpose of the lesson" ("Pouk"). A more open formulation is embodied in the Slovak Section 49 ZKUASP, that endorses any act performed in the fulfilment of the not-for-profit objectives and tasks of the specific educational and research establishment

To conclude, it is worth mentioning that most Member States feature a general formula plainly enabling beneficiaries to use protected works for teaching and research-related objectives, without specifying any further conditions of applicability, the determination of which is therefore remitted to national courts. This applies also to countries featuring more specific exceptions. Inter alia, national exceptions for teaching and research showing a general formula concerning the purpose-oriented limitation are Estonia (Sections 19(2)(3), 22 AutÕS), Greece (Article 20(1)(2) GCA), Hungary (Section 34 SZJT), Latvia (Section 21 LaCA),

[1093] Tribunale di Milano, Sez. spec. Impresa, n. 11564, 17.09.2013.
[1094] Court of Appeal of Lithuania civil case No 2A – 250, 29 July 2002.
[1095] Rechtbank Rotterdam, 21 December 2017, ECLI:NL: RBROT:2017:10388 (*Vogelfoto's*).

Lithuania (Sections 22, 58 LiCA), Italy (Articles 70(1)(2), 64sexies-(1)a l.aut.), Luxembourg (Article 10(2) LuDA), Malta (Articles 9(1)(h), 26(2)(b), 32(b) MCA), the Netherlands (Article 16 AW), Poland (Article 27(1) UPA), Slovenia (Articles 47, 49 ZASP), Spain (Article 32(3)(4)(5) TRLPI), Sweden (Sections 14, 18 URL) and Portugal (Article 75(2)(f) CDA).

4.6.1.4.3 MISCELLANEOUS

Other criteria are sometimes taken into consideration by Member States to curtail the applicability of the teaching exception. The majority of them puts the emphasis on the place requirement, under which acts must necessarily occur within the premises of the educational or research establishment at stake. Examples are the clear wording of Section 19(2) AutÕS in Estonia and Article 75(2)(f) CDA in Portugal. However, in most cases this requirement is read extensively. In February 2017, the Estonian Supreme Court held that the condition should be interpreted as to cover any place chosen by the school for the specific teaching activity, such as museums, theatres and any other similar entity. [1096] Extensive approaches feature also Belgium, where the very same language of the provision offers the same opening to activities taking place both within and outside the school premises (Article XI.191/1, § 2 CDE).

Another frequent and crucial requirement concerns the kind and number of members composing the audience admitted as a public for the performances covered by the teaching exception. Usually, national provisions restrict the category to those people who are directly involved in the educational process, such as teachers and other subjects related to the teaching staff, students and – exceptionally in the case of public performances – parents, relatives and caregivers willing to watch the performance occasionally performed by their pupils. This is the language used by Section 22 AutÕS in Estonia, which, as highlighted above, was read restrictively, ruling that third parties may be admitted only if involved directly in teaching or in the performance.

In France Article L.122-5-3° e) CPI mentions the same condition of applicability. More sophisticatedly, some national provisions prescribe as a further condition that rightsholders need to ensure – via secured networks – that the works are accessible only to those benefitting from the exception. Additional conditions of this kind can be found in the Netherlands (Article 16 AW), in the proposed text of Article 49 ZASP (Slovenia) and in Article XI.191/1, 3° CDE (Belgium). Alternatively, national provisions pinpoint the respect of the integrity and paternity of the work, and the respect of the three-step test. The mention of the source features all Member States' laws, with different degrees of specification. For instance, Croatia requires authors' moral rights to be respected when applying the teaching and research exception, and Article 20 of the Greek Copyright Act imposes not to include in an independent work for teaching purposes only a small part of one author's overall output. In Hungarian case law, the risk of abuse of moral rights have been taken into account to curtail

[1096] Case 3-2-1-159-16, order of the Supreme Court of Estonia, 27.02.2017.

their application when this would harm the public interest underlying the teaching and research exception.

The three-step test features in several provisions, such as Article 70(2) l.aut. in Italy, according to which a work can be used for teaching and research purposes if this does not conflict with its normal exploitation and the name of the author and source are mentioned. Notably, Article 70(1)-bis l.aut. hints at the possibility for the Minister to set additional conditions of applicability after hearing the competent parliamentary commissions. In 1997, the Italian Supreme Court also outlined that the inclusion of protected works in other pieces for criticism, review, research and teaching purposes can be justified to the extent the use is made to complement a work that has an independent scope and nature than the originals included, in a way that the fragments reproduced and included do not affect the market of the original works nor do they potentially prejudice the rightsholders' economic interests.[1097] In some cases, it is the text of the provision that requires the copy not to substitute an act of purchasing or licensing of the entire protected work (Article 49 ZASP and Article 16 AW).

To pursue similar aims, in the Netherlands no more than one reproduction per time can be made if two protected works are to be communicated to a restricted audience on a single occasion. In Spain, under Article 32(4) TRLPI, only up to 10% of the protected works can be reproduced and such works can be displayed only within the educational or research establishment where the act of reproduction took place. A circumscribed area of exploitation is also mandated under Section 18 URL in Sweden, while in other cases national provisions requires conformity with fair practices (the Netherlands (Article 16 AW), Luxembourg (Article 10(2) LuDA) and Greece (Article 21 GCA).

National statutes may also put time limits. For example, in Sweden Section 18 URL allows the inclusion of predominantly descriptive works in other pieces, predominantly used for teaching purposes from copyright infringement, if five years have passed since the year of first publication.

4.6.2 DIGITAL TEACHING

Already before the CDSM Directive some countries provided for some uses for digital education in teaching, albeit with a rather limited scope. Italy – for instance – allowed under Article 70(1) bis l.aut the online publication of low-resolution photographs and music works. Ireland is also another case deserving a separate mention, for it already allowed students to make a copy of work digitally communicated as part of a lesson or examination in order to be able to use it at a more convenient time (time-shifting, Section 57A CRRA).

To date, not all countries have transposed the Directive and its Article 5 CDSM yet. Despite this, Poland (Article 27(2) UPA) and Slovakia (Section 44(2) ZKUASP) already feature in their national laws certain provisions enabling digital education, in the case of Poland limited to the digital making available of works, exclusively for the benefit of a limited circle of teachers

[1097] Cassazione Civile, 7 March 1997, n. 2089.

and students of educational institutions identified by the Law on Higher Education and Science. In Sweden, such digital uses are covered within the broader ECL schemes applicable to uses of works for illustration and teaching.

Thanks to the mandatory and detailed nature of Article 5 CDSM, halfway down the road of national transpositions, the approach adopted by most countries follows closely the CDSM scheme, which ensures a high degree of harmonization on the key features of the exception/limitation. This is the case for permitted acts, operational conditions (such as acknowledgment of the source, works covered and non-contractual overridability). Still, a few departures from the original EU model are worth being mentioned.

With regard to the works covered by the exception, Austria (Section 42g(1) UrhG-A), Lithuania (Article 22(1) LiCA), Hungary (Section 35(5) SZJT), France (Article L.122-5-12 CPI) slightly limit the scope by allowing the use of published works. Some countries have used the degree of freedom left by Article 5(2) CDSM to exclude from the scope certain categories of works, but here the approach taken by national legislators differ significantly. Some countries have excluded or limited the use of certain categories of works only where voluntary licenses are readily available, while other Member States do so albeit regardless of the availability of such licensing schemes.

Among the first group, Italy excludes works intended principally for the educational market, sheet music and musical scores, in so far as suitable voluntary licenses are available on the market and where such licenses answer to the needs and special characteristics of educational establishments and are readily available and accessible to them. A similar carve out can be found in the German transposition.

Within the second group, Austria limits (but does not exclude) the use of works which, by their nature and designation, are intended for school or teaching, as well as cinematographic works if at least two years have passed since their first performance either in Austria or in Germany or in a language of an ethnic minority recognized in Austria (Section 42g(2) UrhG-A), whereas France excludes the reproduction and communication to the public of illustration for teaching designed for non-digital environment and sheet music (Article L. 122-5-4 CPI). Malta adopts a more intermediate approach, for it does not exclude the use of sheet music, and it imposes the beneficiaries to make use of licensing schemes – if available – for the use of works or other subject-matter which are intended primarily for the educational market (Law n. 261/2021, Article 6(2)). Similarly, Romania does not subordinate the operation of the exception to the unavailability of voluntary licensing, but it does set a clear prevalence for such a scheme by stating that “the exception applies as long as the uses do not replace or affect the purchase of material intended for the educational market” (Article 36^3 RDA).

A more restrictive approach is taken by France and Ireland, where the whole exception can be excluded where licensing schemes are readily available (Article L. 122-5-4 CPI), and in Ireland (Section 57C CRRA), which does the same where a certified licensing scheme in accordance with Section 173 CRRA is available for the use of the works. By contrast, other

countries decided not to subordinate the operation of the provision to the non-availability of commercial licenses, and to cover all categories of works and other subject matters, as Estonia (Section 19 AutÕS) and Luxembourg (Article 10(2), Sub-paragraph 2-bis LuDA).

Whereas the Directive is silent on the specific amount of work that can be used, some countries have set quantitative limits on the matter. Austria specifies that the use of works intended for school or teaching, as well as certain cinematographic works cannot exceed 10% of the work. Along the same lines, in Germany only up to 15% of a work can be reproduced, distributed, and communicated to a limited public, and Section 60b UrhG-G allows producers of media collections for teaching purposes to make available up to 10% of protected works to a limited public. Italy narrows down the amount of work that can be used to cover "excerpts, passages or parts" [of works or other subject matter] (Article 70-bis l.aut), whereas Lithuania and Austria only allow the use of "excerpts of published works and minor works" (Article 22(1) LiCA; Section 42g(2) UrhG-A), although none of them impose a defined quantitative criterion. Romania does not impose any quantitative constraint, yet it allows rightholders to limit the number of copies that can be made (Article 36^4 RDA).

Hungary deserves a special mention, as it combines restrictive and flexible elements. Adopting a strict approach, Section 35(5) SZJT permits the reproduction of excerpts of works that have been published as books and newspaper and periodical articles for educational purposes with a number of copies that corresponds to the number of students in a group or class, and for examinations in public education, vocational training, and/or tertiary education. With a rather opposite take, the same provision stretches the rights covered to permit also the distribution of such copies to students and scholars.

Beyond these cases, the majority of countries circumscribe the uses to the extent justified by the non-commercial purpose to be achieved, in line with the baseline scheme of the Directive (e.g., France, Malta, Luxembourg).

As regards to the beneficiaries ("educational establishment" allowed to carry the exempted acts), the approach is slightly restrictive in Croatia, where after stating in Article 199(2) NN that the exception applies to "all educational levels", Article 199(6) NN restricts the category to learning activities carried out by state institutions, public institutions and other entities authorized to undertake such activities. Same applies in Ireland, where in Section 2 CRRA the notion of "educational establishments" is linked to specific beneficiaries identified in separate instruments, and in Spain, where the beneficiaries are teachers operating in centres integrated in the Spanish educational system and by the staff of universities and research bodies (Article 68, Royal Decree n. 24/2021).

While all countries transpose almost verbatim the conditions laid in Article 5(1)(a) CDSM as regard to the requirement of uses through secure environment (e.g., Croatia, Section 199(1) NN), France – Article 122.5-4 CPI), Ireland specifies how that secure environment shall be accessed by requiring appropriate authentication procedures, including password-based authentication.

France expands on the concept of "purpose of illustration and teaching" by adopting a more functional approach to encompass uses for vocational training, including apprenticeship, as well as for the development and dissemination of subjects for exams or competitions organized as an extension of the teaching, except for activities for recreational purposes. An isolated yet highly friendly approach is taken by the Maltese legislator, for it makes it explicit that the exception also covers the digital use of works for the benefit of persons with disability in the context of illustration for teaching.

Lastly, only few countries – France, Austria, and Malta - exercised the space of freedom left by the Directive under Article 5(4) CDSM and entitled rightholders to fair compensation. Austria allows – but does not impose - the collective management of the right, whereas France permits ECL for such uses, via order of the Ministry of Culture.

4.6.3 TEXT AND DATA MINING

Many Member States have not (fully) implemented the CDSM Directive yet, thus do not feature any provision allowing TDM in their copyright laws. In facts, to date, only Austria (Section 42h UrhG-A), Croatia (Articles 187 and 188 NN), Czechia (Sections 39c and 39d CzCA), Estonia (Sections 19^1 and 19^2 AutÕS), France (Article L. 122-5-3 CPI), Germany (Section 60d and Section 44b UrhG-G), Hungary (Section 35A SZJT), Ireland (Section 53B, 82(1) and 225A CRRA), Italy (Articles 70ter, quarter l.aut.), Lithuania (Articles 22(1), 22(2) and 32(7) LiCA), Luxembourg (Articles 10(15) and 10(16) LuDA), Malta (Articles 4 and 5 Law n. 261 of 2021), Netherlands (Articles 15n, 15o AW), Romania (Articles 36^1 and 36^2 RDA) Spain (Article 67 Royal Decree n. 24/2021) have transposed the exceptions envisaged under Article 3 and 4 CDSM.

It is worth mentioning that even before the adoption of the CDSM Directive Germany featured an exception for TDM purposes (within Section 60d UrhG-G), corresponding to Article 3 CDSM Directive. The same can be said for Ireland, which under Section 53A CRRA allowed reproductions of works to carry computational analysis of works for the sole purpose of non-commercial research, and to the extend necessary to explain the result of such analysis. In both cases, the provisions have been integrated to bring the exception in line with the mandatory features of the EU Directive.

The approach adopted by most of the Member States that so far have implemented the exceptions is that of following closely the baseline model (Articles 3 and 4). Luxembourg, Croatia, Estonia, Lithuania, Malta and Netherlands are perfect cases in point of verbatim implementation, with any or no significative feature departing from the EU counterpart.

The same can be said with regard to the beneficiaries of the flexibility contained in Article 3 CDSM since, with very few exceptions, most countries define the notions of CHIs and research organizations in line with Articles 2(1) and 2(3) CDSM. Ireland had even introduced the notion by making an explicit reference to the Directive. Only Austria (Section 42h(1) UrhG-A) and Germany (Section 60d(3) UrhG-G) have attempted to draw a more detailed and

in a certain sense broader range of beneficiaries, encompassing individual researcher occasionally involved in a research activity or projects, as long as they pursue non-commercial purposes. And while the array of beneficiaries in the French transposition does not depart from that laid in the Directive, France allows beneficiaries to perform the acts through third parties acting on their behalf (Article L. 122-5-3-2 CPI), thus showcasing a higher degree of flexibility than the EU baseline model.

Also, with regards to permitted acts most countries maintained full adherence to the EU baseline scheme. Few countries opted for a greater degree of flexibility, encompassing other exclusive rights beyond what scoped by the Directive. Yet, the range of rights covered is quite various. For instance, in Italy Article 70-ter (1) l.aut., correspondent to Article 3 CDSM, encompasses acts of communication to the public of the reproductions made, as long as expressed in a new work, and in an original way. In Spain, the all-encompassing provision including both Articles 3 and 4 CDSM (Article 67 Royal Decree n. 24/2021) also covers the translation, adaptation, arrangement and other transformation of computer programs. Similarly, Section 42h(2) UrhG-A (Austria) and Section 60d(3) UrhG-G (Germany) enable the making available of the reproductions and extractions made to a specifically delimited group of persons for their joint scientific research, or to anyone for the purpose of verification of research results and quality, provided that this is justified for the pursuit of non-commercial purposes. With a rather opposite approach, the Romanian exception allows rightholders to limit the number of copies that can be made (Article 36^5 RDA, corresponding to Article 3 CDSM).

Whereas most Member States follow the EU model in merely requiring copies to be stored with an appropriate level of security, it is worth noting that only Ireland has attempted to draw a more detailed guideline on the specification of the security measures to be adopted ("access and validation through IP address or user authentication" (Section 53A(3A) CRRA)). The Irish provision also entitles rightholders to request information about the security proceedings adopted. In addition, only a few countries (e.g., Spain, France, Italy) recall within the text of their TDM provisions the CDSM indication that rightsholders, CHIs and research organizations are encouraged to draft voluntary codes of conducts and best practices to settle the manner of elaborating protected works through TDM to generate research and other types of data. For example, under Section 42h(2) UrhG-A access to copyrighted works for TDM-related purposes is ensured through TPMs in a way that is dictated by jointly drafted codes of conducts and best practices. In fact, technical measures to prevent further unauthorized access to copyrighted works are deemed appropriate only if they have been recognized within the framework of the good practices signed between rightsholders, CHIs and research organizations.

When it comes to the reservation of rights under Article 4 CDSM, almost none of the implementing laws depart from the wording of the Directive, except for Ireland, which specifies that the rightholders' express reservation can also be made through the terms and conditions of a website or service (Section 53B CRRA), as suggested by the CDSM Preamble.

It must be finally noted that all the exceptions for TDM and TDM for research purposes contain a limitation as to how long the results can be retained or stored. In fact, most national exceptions merely assert that copies can be retained to the extent justified by the purpose of the TDM analysis and, in the case of Article 3 CDSM, also afterwards for scientific research purposes, including the verification of results. Only the Spanish provision is worded in an original manner, mandating compliance with legal rules, digital rights, and data protection law pending the conservation of the result obtained.

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Copyright flexibilities for uses in research and teaching are among the most fragmented and less harmonized E/L in the EU. This is not only due, as usual, to the optional nature of great part of the EU provisions regulating the field, but also to the fact that all EU Directives but for the CDSM always covered the two purposes – teaching and research – under the same general, vaguely worded exception. This paved the way towards the enactment of a wide variety of national solutions, covering either both categories or just one (usually teaching), and addressing the definition of beneficiaries and permitted uses in a similarly various fashion.

Fragmentation of national solutions can be noted at all levels. Member States present a highly diversified approach towards the definition of the subjective scope of their teaching and research L/Es, by choosing either not to identify beneficiaries, or to provide open or closed list of educational (and more rarely research/scientific) entities. Vague or too general definitions often lead to restrictive judicial interventions, which bring rigidity without adding legal certainty.

Lack of harmonization is even more evident in the case of the objective scope, both with regard to the array of permitted uses and the works covered. In some situations, national exceptions for teaching and research encompass a general right of use, opening the door to broad interpretations. Much more frequently, Member States define a circumscribed number of permitted uses. However, options are too various to sketch common trends. The same can be said for the limits to the types or quantity of works that can be used, where Member States present a wide array of very specific (and different) provisions, or to additional conditions of applicability such as limitations in purpose, necessity benchmarks, three-step test and remuneration. Limitations as to the purpose are also prone to be strictly interpreted by courts, which tend to read narrowly the notion of educational activities and goals. On top of this, research purposes are almost completely neglected, for the great majority of national provisions are directly and solely addressed to teaching or general educational activities.

As expected, the implementation of Article 5 CDSM on digital teaching, which is a mandatory provision not overridable by contract, is leading to a greater convergence. However, every time a detail is left to the discretion of Member States (e.g. whether to impose a duty to remunerate, or whether to subordinate the operation of the exception to the absence of adequate licenses), differences emerge again. Aware of this, the EU legislator introduced the country-of-origin principle, which aims at solving the problem of the

territoriality of exceptions and of legal certainty in cross-border uses by applying the law of the country of establishment of the beneficiary of the provision all across the Union.

The first research-oriented-only flexibility introduced in EU copyright law – Article 3 CDSM on text and data mining for research purposes – has also been implemented almost verbatim by Member States so far, with only a few divergences on permitted uses and on the list of beneficiaries, usually in favour of broader approaches. This represents a novelty in the interplay between EU and national legal systems and, despite all the criticisms raised by the TDM exceptions and their flaws, it shows a path that may be successfully followed in the future.

4.7 CULTURAL AND SOCIALLY ORIENTED USES

EU copyright law encompasses a wide range of flexibilities for the purpose of enhancing culturally oriented uses of protected works and other subject-matter, to foster access to culture and the preservation of cultural heritage. For the purpose of this mapping and the comparative assessment that ensued, these flexibilities were grouped into six sub-categories: exceptions for public lending **(Article 6(1) Rental**), exceptions for the preservation of cultural heritage or selectively addressing CHIs **(Article 6 CDSM** and **Article 5(2)(c) InfoSoc**), exceptions for orphan works **(Article 6 OWD)** and out-of-commerce works **(Article 8 CDSM).** Subsidiarily, an umbrella category groups those piecemeal provisions which evaluate other culturally relevant uses of protected works and other subject-matter.

This section aims at sketching the degree of harmonization across the Union for each of those categories, and the degree of flexibility showcased by national solutions vis-à-vis the EU model. To this end, the analysis is articulated around three pillars, i.e. (**i**) **subjective** scope; (**ii**) **objective** scope; (iii) additional criteria and **conditions of applicability** (e.g., limitations in purpose, strict necessity, any other statutory constraint or additional flexibility, ECL and mandatory licenses included).

4.7.1 PUBLIC LENDING

According to **Article 6(1) Rental,** authors and other related rightholders have the right to authorize and prohibit lending, defined as "making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public". **Article 6(2) Rental** provides that Member States may derogate from this exclusive right in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives. Where they do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration. In addition, Member States are free to exempt certain categories of establishments from this obligation.

In *VOB*, the CJEU admitted the possibility to extend the public lending exceptions to e-books, not only embracing an evolutionary reading of the exception, but also shedding light on the consistent degree of freedom left to Member States in this regard. Accordingly, they can freely introduce the condition that the ownership of the digital copy must be first transferred or put in circulation by the rightholder, or under their consent, under **Article 4(2) InfoSoc**. Therefore, the exception can be significantly restricted by national legislators, potentially exacerbating the fragmentation of solutions across the EU.

4.7.1.1 SUBJECTIVE SCOPE

Member States usually specify the beneficiaries of Article 6(1) Rental on a functional level, mostly emphasizing the cultural purpose rather than the open character of the list of entities allowed to make protected works available to (a limited) public within their premises. In a range from more to less flexible, countries may be grouped into four categories, i.e. (a) not specifying the list of beneficiaries, leaving room to a broad interpretation of the subjective requirement; (b) providing a non-exhaustive list of entities characterized by culturally oriented goals; (c) delimiting the exception to a closed list of beneficiaries; (d) limiting the exception to one specific category of entities.

4.7.1.1.1 UNSPECIFIED

Countries of group (a) present the highest flexibility possible as to the subjective scope of the exception. Notably, this lack of specification resizes the culturally oriented character of the exception, as it does not distinguish amongst beneficiaries in relation to their functional role on the ground of public interest. This is the case of Denmark, Luxembourg, and Sweden. Section 19(1)(3) DCA (Denmark) held that a copy of a work sold and further distributed in the EEA with the consent of the author can be distributed to the public through lending without the author's consent – yet in exchange of compensation. From this perspective, it is noteworthy that the lack of culturally oriented spirit of the provision can be held in correlation with the amount of compensation due to rightholders. In this light, compensation is also required in the case of public lending of copies of copyright protected works. Similarly, Section 42A(5) CRRA (Ireland) provides that lending by an establishment to which members of the public have access gives rise to a payment of which does not exceed that which is necessary to cover the operating costs of the establishment. In fact, (4) does not go further the general notion of establishments to which members of the public have access, without specifying the kind of beneficiaries of the exception. Article 36 ZASP (Slovenia) leaves the nature of beneficiaries equally blurred, plainly stating that the right to compensation for public lending is excluded on several work-specific occasions, also including, among others, works for the purpose of public communication and lending among organizations. Section 19 URL (Sweden) embraces a similarly dry formula. Accordingly, copies of specific types of works can be disseminated – also including lending - in a vague yet all-encompassing way.

4.7.1.1.2 OPEN LIST OF BENEFICIARIES

Member States belonging to this group are those presenting the most particular features. In fact, the choice to restrict the number and kind of beneficiaries to a non-exhaustive list of culturally promoting entities reveals the public interest in disseminating cultural and scientific products. It is also notable that the majority of EU countries adopted this solution. Bulgaria, Czech Republic, the Netherlands, Poland, Cyprus and Spain provide a non-exhaustive list of entities among the beneficiaries of the exception. Some countries stand in between group (a) and (b), choosing ambivalent formulas. For example, in Austria, Article 16(a)(3) UrhG-A generally mentions facilities accessible to the public. Then, it goes further by including a non-exhaustive list of beneficiaries (libraries, image, or sound carrier collections, museums and the like). Similarly, in Germany Section 27(2) UrhG-G generally addresses publicly accessible institutions, but it also mentions subject-specific entities (libraries, collections of video or audio recordings). These countries potentially offer the opportunity to opt for extensive readings of beneficiaries. Similarly, and apart the already mentioned Section 42A(4)-(5) CRRA, in Ireland the addition of Section 39 CRRA in 2019 now offers the possibility to a librarian or an archivist of a library or an archive identified by the government for the purpose of lending to freely make copies of protected works for lending without infringing copyright or returning any compensation.

Copyright statutes belonging to group use general labels to identify the category of beneficiaries of single exceptions. Several examples can be made in this regard. In Bulgaria, Article 22a(4) BCA exempts of libraries, schools, universities, and municipal libraries from the duty to pay remuneration. More expansively, in Czechia Section 37(2) CzCA mentions libraries, archives, museums, galleries, schools, universities, and other non-profit school-related and educational establishments. Further, it excludes the duty to pay remuneration in other specific cases, emphasizing the public role of educational premises and certain state-owned libraries (schools and universities, libraries, the National Library of the Czech Republic, the Moravian Land Library in Brno, the State Technical Library, National Medical Library, the Comenius National Pedagogical Library, Library of the Institute of Agricultural and Food Information, Library of the National Film Archive and the Library of the Parliament of the Czech Republic). The same approach features Article 15c AW in the Netherlands, under which the duty to pay lending compensation does not apply to educational establishments, research institutions, the Royal Library and other specific state-owned library facilities. Likewise, in Poland Article 28(1)(1) UPA mentions educational institutions, universities, research institutes within the network of the Policy Academy of Sciences, public libraries, museums and archives. Similarly, in Spain Article 37(2) TRLPI encompasses a wide list of beneficiaries, including museums, archives, libraries, newspaper, and film libraries that are publicly owned or belong to non-profit cultural, scientific or educational institutions of general interest, or to educational institutions integrated in the Spanish education system. Like the CzCA, Article 37.2 TRLPI distinguishes on a subjective basis amongst the entities entitled to the duty to pay lending compensation, thus specifically exempting publicly owned establishments serving municipalities with less than 5,000 inhabitants, as well as the libraries of the educational institutions integrated into the Spanish educational system from such duty. The choice to

adopt a different regime reflects the public interest in the dissemination of protected works involving specific categories of beneficiaries, such as educational establishments and state-owned libraries. The aim lies in enhancing access to cultural works within local communities.

4.7.1.1.3 CLOSED LIST OF BENEFICIARIES

Under group (c), the exception is limited to a closed list of beneficiaries, reducing the degree of flexibility consistently in comparison with the former two groups. Belgium, Greece, and Luxembourg adopted a similar approach towards the subjective scope of the exception. Under Article 65 LuDA, a Grand-Ducal regulation needs to specify the kind and number of beneficiaries – lending establishments exempt from the payment of remuneration. Likewise, in Belgium Art. XI.192 CDE establishes that the King should appoint the number and kind of entities allowed to distribute and make protected works available to the public for the purpose of lending in the light of educational and cultural purposes. Similarly, Article 22(2) GCA delimits the exception to two groups of entities: secondary and primary education institutions and academic libraries belonging to the Academic Libraries Association. In this sense, the Greek provision goes even further than the wording adopted in the TRLPI and CzCa counterparts, specifically addressing one kind of educational establishments and referring to libraries that belong to a specific network.

4.7.1.1.4 SPECIFIC TYPES OF BENEFICIARIES

The last group (d) encompasses those Member States where only one specific kind of beneficiaries is covered by the exception for public lending. The group includes Croatia, France, Hungary, Latvia, Italy, Estonia and Romania. Articles 34 NN (Croatia) and 13^3 AutÕS (Estonia) generally refer to public libraries. Put it differently, L.133-1 CPI (France) provides for an ECL scheme addressing public libraries. Section 39 SZJT (Hungary) further curtails the subjective scope of the exception as to merely encompass national libraries. Along the same lines, Section 69 l.aut. (Italy) refers to libraries and other lending establishments led by the state and public authorities. More openly, in Latvia, Section 19(1)(2) LaCA covers the libraries of the State, local governments or other derived public persons and in relation to private libraries, while in Romania Article 18 RDA generally refers to libraries, also including those associated with educational establishments.

4.7.1.2 OBJECTIVE SCOPE

4.7.1.2.1 UNSPECIFIED TYPE AND QUANTITY OF WORKS

The objective scope of the exception for public lending, that is the types and number of works covered by national exceptions, does not present the same fragmentation as its subjective scope. Most of the countries are silent on the matter (a) or provide an open list of works that may be subject to extensive reading (b). With a more restrictive approach, some Member States carve out some categories from the scope of the provision (c), or they require remuneration or introduce other conditions of applicability in case of specific works (d).

4.7.1.2.2 BROAD LIST OF SELECTED WORKS

Group (a), which represents the most flexible option, encompasses most of the Member States: Bulgaria (Article 22a(2) BCA), Estonia (Section 13^3 AutÕS); France (Articles L. 133-1 to L. 133-4 CPI); Germany (Section 27(2) UrhG-G), Greece (Article 22(2) GCA), Hungary (Section 39 SZJT), Ireland (Section 42(4) CRRA), Latvia (Section 19 LaCA), Lithuania (Article 15 LiCA), Luxembourg (Article 65 LuDA), Spain (Article 37.2 TRLPI).

4.7.1.2.3 WORKS EXCLUDED

With a lower degree of flexibility, group (c) includes exceptions that carve out specific categories of works. Few countries belong to this category: Croatia, Czech Republic, Denmark, Sweden and Finland. Under Article 34(10)NN, in Croatia, the flexibility for public lending does not apply to databases, buildings and works of applied art. In this vein, in Czechia, Section 37(3) CzCA excludes lending of works in audio and audiovisual form, unless such works are lent for on-the-spot reference use. Equally, in Denmark, Section 19 DCA carves out cinematographic works and copies of computer programs in digital form unless the lending is authorized by rightholders. In Sweden, Section 19 URL excludes lending of copies of cinematographic works and computer programs in machine-readable form, and works of applied art. Likewise, in Finland Section 19(3) TL excludes cinematographic works and computer-readable programs. Notably, (5) of the same provision extends the exception to works lawfully disclosed outside the EEA. In this case, lending and making available to the public are permitted if the copy has been lawfully acquired by a natural person or a CHI.

4.7.1.2.4 WORK-SPECIFIC CONDITIONS OF APPLICABILITY

The last group of countries provides additional conditions of applicability and/or requires remuneration in the case of lending of specific categories of works. In Italy cinematographic and audiovisual works can be lent only 18 months after their first distribution or, if never distributed, 24 months after production (Article 69(1) l.aut.). With an opposite additional flexibility, libraries and audio and video archives owned by the State or by other public bodies can reproduce in a single copy cinematographic and audiovisual works held in their permanent collections. Similarly to Italy, in Romania Article 18 RDA introduces a time-limit for lending of specific kinds of works – works incorporated in audiovisual recordings, which can be lent only after six months from the first distribution, and in Estonia Article 13^3 AutÕS introduces a fixed a time-limit for the lending of audio and audiovisual works of four months after the first distribution. This limitation, however, does not apply to libraries providing services to an educational institution operating in the fields of study of audiovisual arts or music or for teaching and research purposes.

In Poland, Article 28(4) UPA imposes specific remuneration duties for works expressed in words, as well as printed works in Polish language. In addition, Section 35 UPA sets a mandatory collective management scheme administered by CMOs appointed by the Minister of Culture to collect and distribute lending remuneration. In Slovenia, Article 36(2) ZASP exempts specific works from remuneration duties, such as (1.) originals or copies of library

material in the national library, school and academic libraries and special libraries; (2.) architectural structures, (3.) originals or copies of works of applied art and industrial design; (4.) originals or copies of works for the purpose of public communication; (5.) works, for on-the-spot reference, or for lending among organisations; (6.) works, by persons acting within the scope of their employment, if such use is intended exclusively for the execution of their work-related duties. This function-based distinction between works may help offering a broad interpretation and might further the number of cases where remuneration is not required. An equally constraining attitude towards the scope of the exception on work-based grounds can be found in Article XI.243 CDE, which are allowed to import no more than five copies. In Romania, Article 18(3) RDA also contains a work-specific differentiation with regard to lending remuneration rights. In general, paragraph (2) prescribes that rightsholders are entitled to equitable remuneration in exchange for public lending. Yet, a selected group of works numbered under (3) is exempt from this duty: (a) originals or copies of written works in public libraries; (b) projects for architectural structures; (c) originals or copies of art works applied to products intended for practical use; (d) originals or copies of works for communication to the public, or for the use of which there is a contract; (e) reference works for immediate use or for lending between institutions; (f) works created by the author within the framework of his individual contract of employment, if they are used by the author's employer as part of the latter's usual activity.

4.7.1.3 OTHER CONDITIONS OF APPLICABILITY

Several parameters can be considered to assess whether this exception is to be curtailed due to additional conditions of applicability, with the effect of thwarting or furthering its effectiveness on a case-by-case basis. These nuances can be grouped in two macro-categories: (a) remuneration schemes and (b) purpose-oriented limitations and necessity criteria.

4.7.1.3.1 REMUNERATION SCHEMES

Several countries do not provide an exception to remuneration rights for public lending. This can be deemed in contrast with Recital 10 Rental, which explicitly recommends the enactment of more favourable regimes to promote cultural objectives pursuant to national public interests. However, most EU Member States provides different combinations opening to greater flexibilities.

For instance, in Belgium Article XI.243 CDE states that the King must determine the list of beneficiaries that are exempted from remuneration duties and the amount of remuneration in all the other cases. Section 13^3 AutÕS (Estonia) requires CMO to collect the remunerations due, determined by law light of the state budget funds allocated for this purpose, taking also into account how many loans were registered by public libraries within the calendar year. Moreover, Section 13^3(10) AutÕS sets as upper limit for the remuneration four times the average gross wages of the preceding year in Estonia as reported by Statistics Estonia, and

Section 133(3) excludes the need for prior consent and remuneration if the copies are lent by an educational establishment or an entity operating within the field of music and audio-visual arts for teaching and research purposes. The same is provided by Section 19 LaCA (Latvia), which establishes that author's consent is not required but remuneration is due by specific entities, and statutorily fixed by the Cabinet, together with the conditions for reimbursement and methods of distribution. In Czechia Section 37(2) CzCA statutorily sets the amount of payment only when the published works subject to public lending are lent for on-the-spot reference, while in Ireland Section 42A CRRA provides that remuneration is due except from some culturally relevant categories of establishments, such as libraries and archives selected by the Minister. In addition, Section 11 of the Public Lending Remuneration Scheme provides specific calculation criteria for the distribution of the amount of remuneration received among authors, illustrators and translators.

In Spain, Article 37.3 TRLPI provides a double-track regime. The provision exempts from remuneration only those lending activities taking place within specifically set terminals at the premises of selected beneficiaries, provided that a licensing mechanism is not already in force. This hampers the effectiveness of the exception, which remains a merely subsidiary option operating anytime a license is not concluded. In all other cases, lending remuneration is due and statutorily fixed by Royal Decree n. 624/2014. Notably, the remuneration scheme envisaged by the Spanish legislator was challenged before the Supreme Court twice in 2016.[1098] In particular, claimants complained that the calculation criteria embedded in Royal Decree infringed Article 6(1) Rental. Yet, the Court quashed both complaints, confirming the ample room left to Member States in the articulation of a remuneration system pursuant to the objective of promoting the dissemination of cultural products. Specifically, the Court admitted that the kind of works, thus not merely the modes of lending, can be held as additional criteria to determine the amount of remuneration. Following similar arguments, on the same year the Court upheld the exemption from remuneration duties covering municipal and state-owned libraries.

In Sweden, Section 19(3) URL sets the amount of remuneration following the criteria enshrined in the Public Lending Rights Remuneration Act. In the same vein, in Luxembourg Article 65 LuDA provides that loans cannot be prohibited but the amount of remuneration is due and to be fixed under Grand-Ducal regulation. Other highly flexible countries do not even require the payment of lending remuneration for public lending. This is the case of Hungary (Article 39 SZJT), Spain (Article 37(2) TRLPI only with regard to specific entities of cultural and public relevance within local communities), the Netherlands (Article 15c AW only with regard to specific entities fixed by law - provided that the works were firstly disseminated with the consent of the author), Poland (Article 28(6) UPA excludes remuneration only if lending occurs within the premises of a public library), Romania (Article 18 RDA settles that remuneration is undue only by educational establishments and freely accessible libraries, whilst - in all the

[1098] STS 2040/2016 - ECLI:ES:TS:2016:2040; STS 2367/2016 - ECLI:ES:TS:2016:2367.

other cases - it cannot be waived and it is not exhausted after the first sale), Slovenia (Article 36 exempts from remuneration only specific kind of uses and lending acts).

Section 19 URL enables free use by CHIs except for certain categories of works and acts - lending included. Similarly, Article 39 SZJT allows the free use of protected works by public libraries without restrictions. Some countries substantially leave remuneration rights untouched: Austria (Section 16A UrhG-A), Croatia (Article 33 NN holds that remuneration rights cannot be waived), Germany (Section 27(2) UrhG-G states that remuneration cannot be waived), Bulgaria (Article 22a(5) BCA holds that - if provided - remuneration must be freely negotiated). However, it is noteworthy that in Bulgaria Article 22a(4) BCA exempts a broad list of entities pursuing public missions from remuneration duties: the State, municipal cultural organizations, libraries, including those of schools, universities, and community centres from the payment of remuneration.

4.7.1.3.2 PURPOSE-ORIENTED LIMITATIONS AND NECESSITY BENCHMARK

Member States introduced constraints to the applicability of the exception for public lending. In these cases, public lending and the number of lendable copies must satisfy a purpose-oriented requirement and it is curtailed by a necessity criterion. Examples are Article XI.193(3) CDE (Belgium), where the beneficiaries of the exception for public lending are to be designated by the King in the light of their educational and cultural role. In this vein, 13[3] AutÕS (Estonia) distinguishes amongst the beneficiaries of the exception for public lending on functional grounds, thereby exempting from remuneration those acts of lending taking place in a library or in establishments providing educational and research services. Not dissimilarly, in Poland, Article 28(1) UPA links the purpose-oriented character of the beneficiaries of the exception with the types of uses permitted, ruling that culturally relevant entities can make copies of protected works for lending to pursue their public interest mission.

Most of the purpose-based conditions of applicability envisaged by national statutes relate to the number of lendable copies and the extent of lending-related flexibilities. Examples are In Italy, Section 69 l.aut. provides that only the loans made exclusively to promote the dissemination of culture and private study by public libraries, video and audio archive do not require prior authorization. Likewise, in Slovenia Article 36 ZASP provides that lending rights cannot be enforced to prohibit specific act, identified on functional grounds and subject to purpose- and place-based limitations, such as uses for on-the-spot reference, or to perform work-related duties.

4.7.2 PRESERVATION OF CULTURAL HERITAGE

4.7.2.1 NATIONAL EXCEPTIONS BEFORE THE CDSM DIRECTIVE

Amongst the wide array of E/Ls introduced to the EU copyright acquis by InfoSoc is Article 5(2)(c), which encourages Member States to adopt further E/Ls to the exclusive right of reproduction. While being an optional E/L, Article 5(2)(c) InfoSoc provides for a broad margin

of discretion to Member States, for it imposes restrictions neither on the subject-matter nor on the purpose of use – except for the requirement set for non-commercial nature of the permitted uses. Indeed, this provision promotes adoption of E/Ls "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct and indirect economic or commercial advantage."

Even though Article 5(2)(c) InfoSoc has not been formulated for the preservation of cultural heritage, there is a tendency in the literature to acknowledge this provision as the forebearer of Article 6 CDSM, which is explicitly dedicated to the purpose of preservation of cultural heritage. This mainly stems from the fact that Article 5(2)(c) InfoSoc sets the overarching tone of Article 6 CDSM, by identifying a group of beneficiaries, which are to be compiled under "CHIs" by CDSM along with public sector broadcasting organisations, and due to focalizing on the reproduction of any work and other subject-matter deemed necessary for the activities of these beneficiaries by Member States.

This section will offer a comparative overview of the approaches adopted by Member States on flexibilities oriented toward the purpose of cultural heritage preservation. The focus will be on provisions which preceded the entry into force of Article 6 CDSM, both in countries that have already implemented it and in countries that have already concluded the transposition process. As to the latter group, the following pages will give an account of the impact that the CDSM Directive had on existing exceptions, that is whether Article 6 CDSM was independently implemented or intervened on existing provisions, and with which effects.

In fact, as very few EU countries have amended their InfoSoc provisions or, alternatively, introduced Article 6 CDSM-compliant exception in their national copyright statutes, it is worth analysing the degree of harmonization and flexibility of the existing provisions implementing Article 5(2)(c) InfoSoc in the EU, in the case they have not been already amended in the light of the CDSM transposition process.

As usual, the comparative analysis will be articulated around the three key pillars of each flexibility, i.e. (i) **subjective** scope (number and array of beneficiaries); (iii) **objective** scope (rights and works covered); and (iii) other sources of flexibility and **conditions of applicability**.

4.7.2.1.1 SUBJECTIVE SCOPE

In the pre-CDSM scenario, a high degree of fragmentation can be found with regard to the array of beneficiaries addressed by national provisions implementing Article 5(2)(c) InfoSoc. As a general benchmark, we can refer to those EU countries that addressed museums, archives and libraries, as well as educational establishments in their pro-preservation exceptions and those which, conversely, restricted to a selected number of CHIs or even more inflexibly, solely addressed specific entities on a subject-specific basis. Yet, it must be noted that sometimes subject-specific provisions are flanked by other more general ones, such as in the case of Greece and Ireland. In addition, we can also number several provisions which go beyond the general benchmark and, for this reason, show a remarkable degree of flexibility.

The copyright laws of some Member States already address quite a vast number of entities, i.e., publicly accessible museums, archives, libraries, and educational establishments in their pre-CDSM provisions for preservatory purposes. Thus, the high number of these EU countries allows to set a highly flexible benchmark, also illustrating that quite a desirable degree of harmonization has been reached in the area. This is the case of Austria (Section 56a UrhG-A); Belgium, yet in this case the subjective requirement can be deemed satisfied by combining two provisions (Articles XI.190, 12° CDE, XI.217, 11° CDE); Bulgaria (Article 24(1)(9) BCA), Cyprus (Article 7(2)(j) CL); Czechia (Section 37(2) CzCA), Luxembourg (Article 10(10) LuDA), Malta (Article 9(1)(d) MCA), the Netherlands (Article 16n AW), Slovakia (Section 49 ZKUASP), Romania (Article 35(1)(d) RDA) and Slovenia (Article 50(3) ZASP).

Other national exceptions are far more restrictive, mostly extirpating educational establishments from their objective scope yet, in most cases, also adding other subject-specific requirements. In this sense, the Latvian exception for preservation purposes (Section 23(1) LaCA) specifically addresses state-owned libraries, archives and museums, thereby excluding educational establishments. Also quite restrictively, the Swedish provision merely targets various types of public libraries and archives, without mention to schools or educational institutions. Similarly, Article 22(1) GCA, enacted in 1993 to complement Greek copyright law, only entitles the same prerogatives to non-profit libraries and archives. Educational establishments are also exempted from the objective scope of the Finnish counterpart of Article 5(2)(c), enshrined in Section 16a TL. In particular, an additional subject-specific provision can be noted within Finnish copyright law, transfused in Section 16c TL. This exception targets the National Audiovisual Institute, attributing to it the same prerogative entitled to publicly accessible libraries, archives and museums according to the general exception for CHI preservation, corresponding to Article 5(2)(c) InfoSoc.

A similar, equally subject-specific rule is enshrined in Section 65 CRRA, which provides additional flexibilities for librarians and archivists, yet to a lesser extent and subject to strict a purpose-oriented limitation. While Section 68A CRRA suffers from a laxer purpose-oriented limitation, Section 65 CRRA is specific for replacement. Yet, it ought to notice that in Ireland, the transposition of Article 5(2)(c) is made through a plethora of provisions, that are not duplicative of the EU benchmark and thus need to be further discussed in the next sub-section dedicated to GLAM uses. For the purpose of tackling pre-CDSM preservatory exceptions within EU, it suffices to say that the original subject-specific exceptions Sections 65 and 68 CRRA were kept unaltered but for being reinforced by establishing their mandatory character

Beyond the national transposition of Article 5(2)(c) InfoSoc, the Austrian legislator also inserted in national copyright law a subject-specific exception for CHI preservation, thus addressing only “those federal institutions” recognized under public law.

Under Danish copyright law, the subjective scope is far more articulated. In fact, Section 16(1) DCA establishes some flexibilities for a reduced number of entities, excluding educational institutions yet also furthering the subject-specific conditions. In accordance with that, libraries must be public or at least partially funded by public authorities, thus potentially

enlarging the subjective scope in comparison with those EU countries mentioned above that merely targets publicly accessible institutions. Yet, the provision adds other requirements, such as the fact that museums must be state-owned or compliant with the Museums Act. In addition, Section 16(b) DCA introduces an additional flexibility for libraries, which flanks the general one also addressing a selected number of museums and almost all types of libraries whose management is grounded in the public interest. All in all, the Danish exception can be considered comprehensively less flexible than the group of exceptions mentioned above, that generally refers to publicly accessible libraries, museums, archives and educational establishments. In fact, nor archives or educational institutions are mentioned within the subjective scope of Section 16 DCA, and the array of museums covered by the exception is potentially restricted in virtue of the Museums Act.

An intermediate approach of the like can be found in Spanish copyright law. Prior to the national implementation of Article 6 CDSM, the Spanish cornucopia of copyright law provisions also encompassed two provisions relevant for the purpose of implementing Article 5(2)(c) InfoSoc. Yet, they show different degrees of flexibility on a subject-specific basis, as the former is general, while the second is strictly subject specific. In fact, the former, Article 37.1. TRLPI, which is the very true counterpart of Article 5(2)(c) InfoSoc, addresses various kinds of libraries (film, newspaper and sound libraries), as well as museums, archives, educational and research institutions integrated in the national system. Therefore, this Spanish rule can be considered above the EU threshold with regard to the subjective requirement. By contrast, the latter (Article 40 TRLPI) has been devised for the benefit of selected entities identified in the light of their public interest-led role, such as the State, Autonomous Communities and other public institutions backed by a legitimate interest in having a copyrighted work disclosed despite the contrary intentions of beneficiaries in the case of author's death.

A restricted group of Member States goes even further those EU countries, mentioned above, whose provisions refer to libraries, archives, museums and educational institutions. This list is enlarged by comprising universities and research institutes specifically appointed by Polish law (as defined by Act of 30 April 2010 on Research Institutes) according to the text of Article 28(1) paragraph (2) UPA, firstly enacted in 1994 and last amended in 2018. Rather encompassing a peculiar formula for archive-alike entities, the Portuguese implementation of Article 5(2)(c) InfoSoc, enshrined in Article 75(2)(e) CDA, generally refers to "non-commercial documentation centres", as well as scientific and educational institutions, public libraries, archives and museums. Quite more extensively, an additional provision within Portuguese copyright law contains an extremely broad subjective requirement, addressing public service providers and public entities in general. In this sense, Article 189(1)(e) CDA, in force since 2004, allows all these institutions to make fixations and reproductions in order to pursue objectives bounded to documentary and archiving purposes of high relevance.

4.7.2.1.2 OBJECTIVE SCOPE: WORKS COVERED

Notably, many national implementations of Article 5(2)(c) InfoSoc do not distinguish on a work-specific level, therefore sticking to the EU benchmark without further specifications or restrictions. Yet, in some cases, national legislators envisaged additional work-specific exceptions in a way to confer further prerogatives to selected entities for preservatory-alike purposes. Although separately taken these exceptions do not mirror a high degree of flexibility, if read in combination with other more general provisions within the same copyright law framework, the whole picture is likely to sound comprehensively flexible. Here we are going to deal with work-specific limitations or provisions amongst those devised for preservation and archiving functions prior to the transposition of Article 6 CDSM within national copyright law statutes.

Primarily, it must be observed that a group of EU countries introduced work specific provisions other than the general exception corresponding to Article 5(2)(c) InfoSoc: Austria (Section 56a UrhG-A), Denmark (Section 16(b) DCA), Finland (Section 16a-c TL), Ireland (Section 65 CRRA), Latvia (Section 23(1) LaCA), Lithuania (Article 58(4) LiCA) and Greece (Article 23(1) GCA). In three cases (Section 65 CRRA, Section 16a TL and Section 23(1) LaCA), the national legislator prescribes that the works in question must have been lost, damaged or otherwise no longer usable. In others, the provisions in question are devised to further flexibility with regard to selected or single categories of works. In this sense, the Danish system also features an exception that is strictly work-specific. In fact, Section 16(b) DCA specifically addresses extracts from newspapers, magazines, books, and other literary works, also encompassing musical works or illustrations connected with the text. Endorsing a more expansive perspective towards work-specific limitations, another specific exception for CHI preservation under Finnish copyright law, enshrined in Section 16c TL, merely excludes cinematographic works deposited by a foreign producer in the National Audiovisual Institute. Likewise, under Greek copyright law, Article 22(1) GCA specifically addresses cinematographic works of high artistic value. Rather, in German copyright law, Section 56a UrhG-A includes an additional CHI preservation provision specific for image and audio recordings, although excluding those that have been reproduced or distributed against copyright (Section 56a(2) UrhG-A).

Rather, another group of Member States added work-specific restrictions to the national counterparts of Article 5(2)(c), with a remarkably negative impact on the objective scope of such provisions: Bulgaria (Article 24(1)(9) BCA), Denmark (Section 16(1) DCA), Romania (Article 35(1)(d) RDA), Lithuania (Article 58(4) LiCA) and Sweden (Article 16 URL). Some of these exceptions (Article 16 URL) exclude some types of works. The national exceptions feature different kinds of exclusions. Computer programs are excluded in the Swedish case and, similarly, software in digital form is excluded according to the Danish exception, which rather peculiarly includes videogames. Instead, unpublished works and works protected by neighbouring rights are not encompassed by the Bulgarian exception. The Lithuanian exception for related rights rather excludes subject matter made available online. Ultimately,

the high degree of inflexibility of the Romanian transposition of Article 5(2)(c) InfoSoc cannot remain unnoticed, as this provision merely encompasses the reproduction of brief excerpts of protected works.

In other cases, added work-specific flexibilities leverage the EU threshold. Under Luxembourgish copyright law, Article 10(10) LuDA provides that published works of any kind within CHI-collections can be copied and distributed for CHI preservation yet only audiovisual works connected with them can also communicated to the public for the same purposes. Similarly, under Slovenian copyright law, Article 50(3) ZASP can be held above the EU threshold also regarding the subject matter.

4.7.2.1.3 OBJECTIVE SCOPE: PERMITTED USES

Such as subject- and work-specific peculiarities, discrepancies across EU can also be observed with regard to the array of permitted uses covered by pre-CDSM national exceptions for CHI preservation. Here below, we will take into consideration those exceptions that go beyond or fall below the EU threshold, respectively encompassing rights other than mere reproduction for CHI preservation or, conversely, delimit the objective scope by, e.g., restricting the number of copies that can be made.

Primarily, it must be said that a consistent number of provisions amplifies the array of uses in respect to the EU counterpart, going well beyond the mere reproduction of protected works. In this vein, whilst Section 42(7) UrhG-A only allows the beneficiaries to make copies for inclusion in their archives, Section 42(8) UrhG-A is formulated in a way to include lending, exhibition, and communication to the public of the copies made for preservatory functions. Under Belgian copyright law, Article XI.217, 11° CDE extends the flexibility for CHI preservation to related rights. In Danish copyright law, Section 16(1) DCA generally encompasses a right to use and distribute the copies of protected works by CHIs. However, the same provision disallows the broadcasting via radio and TV, as well as the making available of the same works on a time-shifting basis. In fact, the Danish general exception for CHI preservation also features use-specific sub-provisions, enshrined in Sections 16(3) and 16(4) DCA, both enabling CHIs to supplement their collections by making copies of protected works. In contrast with the Danish exception, despite being strictly subject-specific, Section 16c TL allows the National Audio-visual Institute to make copies of protected works and make them available via TV and radio transmission, for inclusion in their collection and thus keeping the preservatory function. Rather, the general exception for preservation under Finnish copyright law, embedded in Section 16 TL, establishes that beneficiaries are also entitled to lend the copies previously made of protected works. Quite peculiarly, also the previous version of the German exceptions for CHI preservation encompasses, beyond the reproduction of protected works, other uses, such as the right to make subsequent reproductions as well as the prerogative of altering the works in question, also via technical means (Sections 60e(6) and 60f(3) UrhG-G). An expansive approach towards the number of permitted uses is also present in Swedish copyright law. The existing version of Article 16 URL, dated to 2017 and on the verge of being amended due to the CDSM transposition, allows to make copies of protected

works, although only in part. However, quite flexibly, the same provision also encompasses communication to the public and the possibility of lending the works in question to natural persons. Communication to the public is also covered by the Luxembourgish exception for CHI preservation, antecedent to the CDSM implementation in the country (Article 10(10) LuDA).

Even more flexibly, under some copyright law statutes, reproduction is explicitly allowed via any mean, also including digital formats. Inter alia, this is the case of the Austrian (Section 42(8) UrhG-A) and Slovenian exceptions (Article 50(3) ZASP), that expressly mention the possibility of reproducing the protected work in any format. Similarly, the Czech provision (Section 37(1) CzCA) mentions the prerogative of making copies "in the number and formats necessary for the intended use of the work". By the same token, Section 16(b) DCA fixes the mode of reproduction as it specifically allows it in digital format for specific kinds of works, also covered by an ECL scheme under Section 50 DCA. Format-shifting of the copies made for the purpose of CHI preservation is also permitted under Irish copyright law. Section 68A CRRA, enacted in 2019 and prior to the CDSM transposition in Ireland, allows acts of making copies thereby altering the original format of the work.

A few restrictions stem from the number of copies that can be made. In fact, some provisions have an objective scope restricted to one single copy. In this light, Section 65 CRRA only allows librarians and archivists to make a single copy of a work of their collection that went damaged or lost. Yet, it must be noted that this is not the sole provision for CHI preservation within Irish copyright law. In fact, the general exception, enshrined in Section 68A CRRA, does not suffer from this limitation in the extent of use. However, this is not always the case. The highly inflexible pre-CDSM Latvian exception for CHI preservation, enshrined in Section 23(1) LaCA, permits to make only one single copy to supplement a CHI-collection. Yet, some room for flexibility stems from the fact that the same provision allows subsequent acts of reproduction on unrelated occasions, such as in the previously tackled German case.

The Polish exception for CHI preservation can also be considered quite inflexible. However, in this case restrictions are not to be observed in the maximum number of copies covered by the exception. Rather, Article 28(2) UPA states that reproductions of protected works within CHI-collections are admitted as long as they are supported by strict supplementary or preservatory reasons and they shall not lead to an increase of the number of copies in such collections. In addition to that, the array of permitted uses under the Polish exception for CHI preservation were also better defined by the Polish Supreme Court in correlation with the strict limitation in purpose featuring Article 28(1)(2) UPA.[1099] An explicit source of inflexibility, although in line with the EU counterpart, can be found in the Portuguese exception for CHI preservation (Article 75(2)(e) CDA), that expressly prohibits the making available of protected works previously copied by CHIs for archiving and preservation.

[1099] Judgement of Sąd Najwyższy (Supreme Court) of 20th March 2015, II CSK 224/14, LEX nr 1711682. The judgement is prior to the amendment of 2015 which specified that reproduction is allowed only with regard to works permanently held in the collection of the beneficiaries' institutions.

As a counterweight, it must be noted that another general provision containing a flexibility for CHI preservation under Portuguese copyright law (Article 189(1)(e) CDA) also allows the fixation of protected works for archiving and preservation-related interests of high importance. Interestingly, a pre-CDSM provision unique in the EU panorama regarding the array of prerogatives entitled to its beneficiaries surely lies in Article 40 TRLPI. This very use and subject-specific provision allows those interested in disclosing protected works whose author died in the case of contrary intent of rightsholders, in the case such consent contrasts with the Constitution, the judge can take measures to ensure the disclosure, upon request of some selected public authorities. Therefore, the array of permitted uses is to be determined on a case-by-case basis, so potentially very ample according to the specific circumstances of the case.

4.7.2.1.4 OTHER CONDITIONS OF APPLICABILITY

In most EU countries, national exceptions for CHI preservation feature additional conditions of applicability. The first that comes to our attention can also be hinted at by reading the EU provision, and undoubtedly lies in the purpose-oriented character of the exception for CHI preservation. Hence, the extent of use of permitted works in nearly all national exceptions is curtailed in virtue of a limitation in purpose and a correlated strict necessity criterion. However, not all national provisions have this requirement articulated in the same way, or, at least, envisage it in an equally stringent manner.

Inter alia, limitations in the extent of use on a purpose-specific basis are widespread. In fact, several provisions delimit use to the extent justified by the purpose of ensuring preservation of CHI-collections in a way to allow only a limited number of copies in the light of a particularly stringent limitation in purpose. Under Belgian copyright law, Article XI.190, 12° CDE permits the reproduction of a limited number of copies of lawfully disclosed works. Similarly, the Bulgarian provision Article 24(1)(9) BCA underlines that the copies of protected works must be made in the “necessary quantities”. A wording of the like features Section 37(1) CzCA, implementing Article 5(2)(c) InfoSoc in Czech copyright law. Accordingly, reproduction shall be in the “number and formats necessary for the intended use” of the protected work at issue. Even more restrictively, Section 65 CRRA and Section 23(1) LaCA restrict the permitted uses to the making of one copy of a protected work for supplementary reasons.

In other cases, the purpose-oriented limitation is particularly articulated or encroached so as to encompass only supplementary operations, such as the replacement of a missing element within a CHI-collection. Amongst the EU countries which have a particularly articulated limitation in purpose, we can number Croatia (Article 193 NN), Finland (Section 16 TL), Luxembourg (Article 10(10) LuDA) and Poland (Article 28(1) paragraph (2) UPA). Specifically, Article 193 NN encompasses several purposes, thus appearing quite flexible. Provided that non-commercial use of the works is ensured, works can be used by CHIs for collection management. The provision also mentions the need to ensure technical restoration, repairment, also via technical means, securement, or preservation of cultural

heritage materials. According to the Croatian exception, CHIs are allowed to use protected works for their internal purposes. In this sense, the provision contains an example of purpose requirement that is likely to enlarge rather than curtail its field of applicability. Resembling this wording, Section 16 TL allows the reproduction of protected works for the administration, organization, preservation, restoration or repairment of CHI-collections.

Similarly, the pre-CDSM version of Sections 60e(1) and 60f(1) UrhG-G under German copyright law allowed the reproduction of protected works for cataloguing, indexing, preservation and restoration of protected works. In an equally expansive fashion, the Greek exception for CHI preservation enshrined in Article 22(1) GCA also allows the reproduction for the purpose of enhancing the exchange of cultural materials and works of the like between non-profit libraries. The Luxembourgish exception is also notable for its potentially broad reading of the purpose requirement. In fact, Article 10(10) LuDA allows CHIs to reproduce works and make a specific kind of work (audiovisual) available to the public for the purpose of "making cultural heritage known". Like in the Greek provision, this exception is nuanced by a CHI-dissemination spirit, as it allows communication to the public of protected works also outside of the CHI-premises, as long as such communication occurs to the same extent.

Article 16n AW also contains a peculiar statement, which is eager to broaden the applicative field of the exception. According to the wording of such provision, works within CHI-collections can be reproduced for the purpose of restoration, in order to avoid that cultural heritage works become obsolete in relation to the available technology. Likewise, the Polish exception for CHI preservation mentions the purposes of restoring, protecting and preserving CHI-collections. Furthermore, the Supreme Court outlined the limits of the permitted use of protected works in the light of the purpose requirement, which was read in a restrictive manner by the court.[1100] While dealing with a dispute regarding the admissibility of the communication to the public of protected documentary films online, the Supreme Court highlighted that the activities undertaken by CHIs under the umbrella of Article 28(1), paragraph 2 UPA, the antecedent of Article 6 CDSM, shall be strictly correlated with the purposes mentioned above and sculpted in the provision. Yet, the Court went also further a literary interpretation of the Polish exception, by articulating the purpose requirement in a far more detailed way. In line with that, preserving and protecting works means that copies must serve to supplement a CHI-collection where some elements are missing. Therefore, the activities dealing with protected works undertaken by CHIs can only be justified by the need to ensure the restoration of an incomplete collection and they must have a strictly supplementary purpose. In this sense, the preservatory and genuinely archivistic characters of the provision are down pinned, while the purpose of "restoration" is put forefront, thus restricting the reading of the purpose requirement in a substantial manner and well beyond the limits imposed by the Polish text.

[1100] Ibid.

Rather, the supplementary character of the act is sometimes requested on a compulsorily basis under the very same text of the exception, thereby further reducing its field of applicability on an ex-ante basis. This is the case of Romania (Article 35(1)(d) RDA), Slovakia (Section 49 ZKUASP), The Netherlands (Article 16n AW) and the previously mentioned Latvia (Section 23(1) LaCA) and Ireland (Section 65 CRRA). In most of these countries (Romania, Slovakia, Latvia and Ireland), the limitation in purpose enshrined in the provisions also impacts on the number of copies that can be made.

With regard to the purpose requirement, we can also mention two cases of respectively very lax (Slovenia) and potentially lax (Portugal) limitations of this kind. In this regard, Article 50(3) ZASP merely envisages that CHIs can reproduce copyrighted works for their internal use under a non-commerciality criterion. Ultimately, it must be noted that the Portuguese provision for preservatory missions of high relevance is remarkable, as it encompasses a very lax purpose requirement. Enacted in 2004, Article 189(1)(e) CDA states that fixations and reproductions of protected works can be made in order to satisfy an exceptional interest in documentation and archiving by any public entity or entity providing a public service. Yet the threshold seems high, it is mostly undetermined and therefore it may open the door to an extensive interpretation.

Other conditions that are likely to impact on the very same effectiveness of the exception for CHI preservation stem from the fact that, in most cases, the same can be applied only if copies of the protected work at stake are not easily purchasable on the market. A similar condition exists in the copyright laws of Latvia (Section 23(1) LaCA), Ireland (Section 65 CRRA), Greece (Article 22(1) GCA), Finland (Section 16 TL) and Denmark (Section 16(3) DCA). Moreover, the text of some national provisions directly refers to the three-step-test as an additional condition: Belgium (Article XI.190, 12° CDE, Article XI.217, 11° CDE), Cyprus (Article 7(2)(j) CL), Latvia (Section 23(1) LaCA) and Luxembourg (Article 10(11) LuDA). Furthermore, some divergences can be noted within the field of remuneration duties, that are not imposed under the EU model, yet sometimes added by Member States showing a restrictive attitude in this regard. Remarkably expansive are the case of Croatia (Article 193 NN) and Greece (Article 22(1) GCA), where the provision for CHI preservation explicitly asserts that remuneration is not due to rightsholders. In other cases, the same is expressly prescribed by law: Denmark provides an all-encompassing ECL also covering, inter alia, these CHI-sensitive uses under Section 50 DCA and Portugal (Article 75(2)(e) CDA). In addition to that, it shall be noted that in all Member States the non-commercial character of the use is imposed in each provision implementing Article 5(2)(c).

Finally, it should be observed that some provisions are peculiar in their formulation and purpose, also containing highly specific conditions of applicability. Two examples are paradigmatic. The former can be found under Greek copyright law. Article 22(1) GCA asserts that if the rightholder withholds consent abusively, the National Cinematographic Archive can reproduce cinematographic of particular artistic value without prior consent or payment by decision of the Ministry of Culture and given the affirmative opinion of the Cinematography

Advisory Council. Beyond being strictly highly work-, subject- and use-specific, this provision is submitted to several stringent conditions of applicability, ultimately rooted in the public interest in the dissemination of culture that underlies this Greek rule. Instead, the latter interesting provision is enshrined in Spanish copyright law and precedes the transposition of Article 6 CDSM. Article 37.1. TRLPI, introduced in 1996, provides that, if after the author's death, successors in title object the disclosure of a protected work in a manner which is contrary to Constitution, public authorities such as the State and any other person backed by a legitimate interest can request the judge to take appropriate measures in this regard. This provision, additional to the Spanish transposition of Article 5(2)(c) InfoSoc, is highly peculiar and subject to very specific conditions of applicability. Yet, it may be useful to discourage a manipulative retrieval of rightsholders' consent to disclosure and therefore dissemination of cultural materials. In this sense, the logic is not highly dissimilar from the one behind Article 22(1) GCA.

4.7.2.2 THE IMPLEMENTATION OF ARTICLE 6 CDSM

Article 6 CDSM has recently introduced a mandatory exception or limitation "in order to allow cultural heritage institutions (CHIs) to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation […] and to the extent necessary for such preservation." This exception has a fixed purpose, and it is limited by a necessity criterion. It adopts a broad approach while identifying its beneficiaries; thus, it addresses CHIs, which include publicly accessible libraries, museums, archives, film and audio heritage institutions; national libraries and archives, educational establishments, as well as public broadcasting organisations. Despite the broad articulation of its beneficiaries, the E/L herein specifically targets the works and other subject-matter permanently located in the collections of the beneficiaries. Recital 29 states that works permanently located in CHI-collections must be intended as those owned or permanently held by these institutions, as well as those whose ownership has been transferred by license, legal deposit obligations or custody arrangements. The mandatory character of the exception is confirmed by Article 7 CDSM, which rules that any provision contrary to Article 6 CDSM shall be unenforceable. Noticeably, the scope of the uses permitted by the E/L enshrined in Article 6 CDSM constitutes a relatively narrow one, for it covers only the InfoSoc right of reproduction, the exclusive rights on databases and software, and the press publishers' right.

It is worth noting that Article 6 CDSM has been transposed only by eleven EU Member States (Austria, Croatia, Estonia, France, Germany, Hungary, Italy, Lithuania, Malta, Romania, and Spain); whereas Article 16n AW, which is in force since 2014, has been considered by the Netherlands to satisfy the standards by the EU rule. Thus, this section will offer a comparative overview of the approaches adopted by these Member States with regard to (i) the subjective scope (number and array of beneficiaries); (ii) the objective scope (rights and works covered); and (iii) other sources of flexibility and requirements for applicability.

4.7.2.2.1 SUBJECTIVE SCOPE

CHIs are defined in under Article 2(3) CDSM. Member States have implemented the provision adopting two different approaches, i.e. (a) verbatim identification of beneficiaries; (b) increasing the degree of flexibility regarding the number and categories of beneficiaries yet using a closed list.

4.7.2.2.1.1 IMPLEMENTATION VERBATIM

All the EU Member States that transposed the Directive have adopted verbatim the list of beneficiaries identified within Article 2(3) CDSM. However, it is also worth noting that amongst these countries, Austria, Germany, Hungary, and Italy slightly extend this category of beneficiaries, which is explained in detailed right above (see national reports).

4.7.2.2.1.2 BROADER LISTS OF BENEFICIARIES

Group (b) includes those Member States that broadened the subjective scope of Article 6 CDSM, mainly by including the beneficiaries indicated within Recital 13 CDSM (e.g., educational establishments, public sector broadcasting organisations). In this sense, Sections 60g and 60f UrhG-G (Germany) encompass educational establishments. Along the same line, the newly amended Section 35(4)(b) SZJT (Hungary) includes a vast array of educational establishments - public libraries, public educational institutions, specialized vocational, academic and research entities. In this vein, Article 70ter-(3) l.aut. (Italy) encompasses archives, libraries, museums open and freely accessible to the public, also related to educational, research and public audio-visual institutions, on top of the ones already encompassed by Article 2(3) CDSM.

Additionally, Austria, with the newly introduced Section 47(7) UrhG-A, refers to publicly accessible institutions which act upon non-commercial purposes, and which collect, and exhibit works, amongst the beneficiaries. Also, Germany allows publicly accessible libraries with commercial purposes to enjoy this exception by Sections 60e(6) and 60f(3) UrhG-G.

4.7.2.2.2 OBJECTIVE SCOPE

As to the objective scope, it is possible to divide Member States in two groups, i.e. (a) countries that have implemented Article 6 CDSM verbatim, and (b) countries which have departed to different extent from the text of the Directive as to works and uses/rights covered.

As to the first group, all Member States but France and Hungary have transposed Article 6 CDSM quite slavishly, stating that CHIs are allowed to make copies of any works or other subject matter 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. No further specifications have been made with regards to works covered or other uses allowed.

France and Hungary, instead, do not mention that works must be permanently located in CHI-collections, as in Article L. 122-5-8° CPI (France), and Article 35(4) SZJT (Hungary).

Also, with regard to rights and uses covered, the majority of national legislatures that have implemented Article 6 CDSM limited their provisions to the right of reproduction, in line with the EU text. Only four Member States have complemented the provision transposing Article 6 CDSM with other flexibilities covering other exclusive rights. In this sense, Section 47(7) UrhG-A (Austria) permits the beneficiaries to exhibit or lend the copies of reproduced works. Section 20(1) AutÕS (Estonia) allows the use of the reproduction to replace a lost, destroyed or rendered unusable work, without necessarily specifying the further "use" of such copies. Similarly, Article L. 122-5-8° CPI (France) and Section 35(4) SZJT (Hungary) permit distribution of such copies as well.

4.7.2.2.3 OTHER CONDITIONS AND CRITERIA

Recital 28 CDSM recognizes the needs of CHIs and educational instructions for technical assistance for digital and analogue reproduction and preservation of the works and other subject-matter in their permanent collection. Therefore, it encourages Member States to adopt measures that would enable public-private partnerships for this purpose. Amongst the EU Member States which have transposed Article 6 CDSM, Germany (Section 60e(1) and Section 60f(1) UrhG-G) and Spain (Section 69 Royal Decree n. 24/2021) stand out as the only countries to acknowledge this need and permit for third parties' assistance in reproducing the collections of the beneficiaries.

No additional criteria, conditions or requirements have been added on top of what is already provided by Article 6 CDSM by any Member State.

4.7.3 OTHER USES BY CULTURAL/ EDUCATIONAL/ SOCIAL ESTABLISHMENTS

The last miscellaneous category of culturally relevant uses includes residual, yet multifaceted copyright flexibilities scattered in Member States' laws and not otherwise covered by specific EU provisions. Usually, these additional flexibilities create overlaps with the previously mentioned for CHI preservation and operate on a subsidiarily basis. Most of these exceptions address specific categories of works (such as works of folklore or audio-visual media), and they also have a preservatory function. In other cases, the provision the socially oriented character comes into play. For this reason, these exceptions are commonly known as other uses permitted in the GLAM sector, as they comprehensively aim at promoting further dissemination – also through digitalization - of cultural products, as well as of archives, museums, and libraries' collections relying on a copyright law-based toolbox. Therefore, the remaining exceptions can be classified according to the following criteria: (a) a group of flexibilities has a preservatory and archiving purpose; (b) a second group regards educational establishments, whilst (c) the third group contains all the remaining exceptions involving that cannot be inserted in the first two categories.

4.7.3.1 OTHER USES BY CHIS

Residual exceptions concerning lawful uses by CHIs are scattered - inter alia - in Irish copyright law. Section 61 CRRA allows CHIs - libraries and archives - to supply an extract from a periodical to a natural person if no more than a copy is supplied and it can be proven that the previous copy has gone lost, destroyed or it is unavailable in any other way. Additional restrictions regard the extent of use (no more than 10% of the volume) and the timing (a reasonable time must have elapsed since the date of first publication). Similar rules can also be found in Section 62. Rather, Section 63 CRRA allows the supply and exchange of copies of works lawfully made available to the public, also including the extracts from articles and periodicals therein, between libraries appointed by law. An interesting provision of this kind is entrenched in Section 66 CRRA, which allows archivists and librarians to reproduce a work to obtain insurance cover, as well as for the exhibition of their collections, and to inform the public about their existence or about an incoming presentation. The same provision also covers the inclusion of works in a catalogue, provided that the source and the author's name are mentioned and that the use pursues a non-commercial purpose. Section 67 also allows CHIs to make a copy of unpublished works for their internal use if the author has not expressly reserved such right.

Like the CRRA, Section 20 AutÕS (Estonia), last amended in 2021, hosts a plethora of exceptions for CHIs. Specifically, as already seen above, CHIs are entitled to replace copies of protected works if the original are unusable or have been destroyed (Section 20(3) AutÕS), as well as to make such copies to give them to public authorities (Section 20(6) AutÕS) or natural persons for private use (Section 20(5) AutÕS) upon request. Interestingly, this provision cannot be waived by contract and the use must never result in a commercial advantage.

In Austria, Section 56b UrhG-A allows publicly accessible libraries, image, sound carrier collections and other similar institutions to use image and sound carriers for public lectures, performances and presentations for no more than two patrons at a time and only if not for profit. Image and sound carriers need to come from a lawful source and equitable remuneration (Article 56(2) UrhG-A) shall be paid to rightsholders. Collection and distribution of such remuneration should be mandatorily managed by CMOs.

In general, these residual provisions are particularly rare in the EU framework. Irish and Austrian copyright laws stand out for the great number of residual provisions covering cultural uses. Still, they all refer to very specific instances, subordinated to several conditions and limitations. Broader provisions only feature in Nordic countries, such as Sweden, in the light of their coverage under ECL schemes. An example is Article 42(d) URL, which provides an ECL scheme for uses and display of protected works by libraries and archives, provided that the works belong to their collection.

4.7.3.2 OTHER USES BY EDUCATIONAL ESTABLISHMENTS

Residual exceptions of this kind can be found in Ireland (Section 55 CRRA), Belgium (Articles XI.191/1, §1, 2°, XI.191/1, 6° CDE), Bulgaria (Article 24(1)(8) BCA), Czechia (Section 35(2)(3) CzCA) and Estonia (22 AutÕS).

Section 55 CRRA (Ireland) is framed with a remarkably flexible language. In fact, this fair dealing provision allows some selected educational institutions appointed by order of the Ministry to perform a selected array of works - literary, dramatic and musical works - before a restricted audience of pupils, teachers and other people related to the educational activities and establishment in question. Works can be performed only within the school premises to the extent justified by the teaching purpose at issue.

Article XI.191/1, §1, 2° CDE (Belgium) allows the public performance for non-commercial purposes of protected works, both within and outside the school premises, provided that the name of the author is mentioned if not impossible. Along the same lines, Article XI.191/1, 6° CDE covers the remaining uses - communication to the public and reproduction within school and pre-school premises. In this sense, the Belgian CDE provides a wide array of flexibilities for educational establishments.

Under Article 24(1)(8) BCA (Bulgaria), published works can be publicly performed and presented within educational establishments for non-commercial purposes and without remuneration to performers. Yet, the place-requirement is interpreted quite restrictively by national courts. In 2015, the Sofia District Court ruled that the exception does not apply to a university-based club of students reproducing a scenario in a play including a translated version of a previously published protected work, since it could not be proved that the translation had been previously lawfully disclosed.[1101] Under Bulgarian copyright law, this exception plays an auxiliary role, as it covers those performances that cannot be fall under other existing exceptions for teaching purposes. In this sense, Article 24(1)(8) was envisaged to exempt from copyright infringement indirectly educationally relevant activities such as amatorial concerts, exhibitions and performances run by institutions of historical since the Ottoman Empire.

Two Czech provisions can also be classified in this sub-section. The former - Section 35(2) CzCA - covers public performances exclusively run by students without direct or indirect commercial advantage, whilst the latter - Section 35(3) CzCA - generally encompasses a right of use of protected works within courses, examinations and presentations without for-profit purposes. A rule resembling Section 35(2) CzCA can also be found in Section 22 AutÕS (Estonia), a non-contractually overridable Estonian provision which allows the public performance of protected works within school premises by teachers and students before a restricted audience made of the same pupils, teachers, as well as the related staff playing a role in the educational establishment at stake and caregivers. The Supreme Court of Estonia

[1101] Sofia District Court, case no. 2706/2013 of 25 March 2015.

has interpreted these requirements in a broad way,[1102] admitting the possibility that the performance takes place outside the school, to the extent it is in some way connected with the teaching activities under which the performance plays an educational role. However, the place-requirement and the purpose-limitation are cumulative, and therefore they must be all satisfied in order to apply the flexibility. On a different occasion, the Supreme Court also interpreted the subjective requirement expansively, in a way that Section 22 AutÕS can also be applied to entities other than educational institutions.[1103]

Public performances of works within the context of teaching activities before a restricted audience of teachers, pupils and caregivers are also sheltered by copyright infringement under an ad hoc Greek provision, enshrined in Article 27(b) GCA. Not highly dissimilarly, Article 15 l.aut. allows performances, recitations and representations of protected works within a broader yet still well-defined audience consisting in the family circle and school-related persons. In addition, it can be noted that a provision of this kind is also present under Latvian copyright law since 2007 (Section 26(2) LaCA), yet the performance shall involve the audience directly involved and take place to the extent justified by the purpose on a strictly non-commercial basis. Similarly, the Lithuanian counterpart (Article 22(4) LiCA) settles the same rule yet amplifying the array of institutions where such public performance may take place. Accordingly, also informal and indirect educational and school-related institutions, such as childcare entities, kindergartens, nurseries, pre-school and other related entities are sheltered by the umbrella of this exception. Yet, the public performance and display of the work at issue must necessarily be correlated with the educational or study program of the children or students involved. Article 58(6) LiCA applies the same rule also as to cover related rights. An event-specific provision is enshrined in Article 31(2) UPA. Without inserting a place-requirement, the Polish exception prescribes that the public performance of protected works should rather apply to school and academic events, thus shifting the attention from the place to the context. It is also notable that such performance can occur via any device, and it is subject to the condition that performers shall not receive remuneration.

4.7.3.3 OTHER CULTURAL USES

With a very general clause, in Malta Article 9(1)(d) MCA explicitly allows acts of reproduction by CHIs and educational establishments, provided that no commercial purpose is pursued. Although potentially conceived as a CHI-promoting provision, this rule may stand in the middle between group (a) and (b).

Finnish copyright law also provides a rule endorsing an all-encompassing perspective, which plays a residual role within the context of CHI-related uses of protected works. In this sense, Section 16d TL potentially opens the door to any use of copyrighted materials by CHIs for cultural purposes, provided that such use is covered by the general ECL licensing scheme

[1102] See: Case 3-2-1-159-16 (decision of the Supreme Court of Estonia, 27.02.2017).
[1103] Case 2-16-17491 (decision of the Supreme Court of Estonia, 27.11.2019).

regulated under Section 26 TL. The system came in force in 2005 and it applies to agreements stipulated between CMOs approved by the Ministry of Culture and users with regard to the admitted uses of specific copyrighted works. A similar ECL licensing scheme is incorporated in Swedish copyright law. According to Article 42(d) URL, last amended in 2017, libraries and archives can reproduce and make available works within their collections provided that such uses are covered by an ECL and rightsholders do not object exploitation of it is at least assumable that the author may disagree to such uses. In this sense, the Swedish system can be deemed slightly more restrictive, as it adds author and rightsholder-centred carve-outs, amounting to an opt-out mechanism within the ECL.

A rule of a dual-nature can also be found in Section 47(1) UrhG-G. Although nuanced by an educational purpose, the German exception is shaped as a use-specific flexibility, allowing the reproduction of works on audio and video recordings as part of school broadcasts by educational environments. Yet, the same rule also applies to publicly owned, welfare, state image archives and other comparable entities, thus showing a very lax subjective requirement. However, the provision suffers from a time-limit, as the copies must necessarily be deleted by the end of the academic year if made for strictly educational purposes. It may be argued whether and to which extent such limits applies to genuinely welfare promoting institutions. A strongly culturally oriented provision yet devised to cover specific uses of specific works by a single entity can be found under Greek copyright law. In fact, Article 28(1) GCA exempts from copyright infringement the exhibition of works of fine art by museums without remuneration to rightsholders and as long as the exhibition takes place within the premises of the museum owning the physical carriers of the work in question or if such museum organizes the exhibition at issue. Moreover, it is worth mentioning that the same Italian rule which allows presentations within school-related premises tackled above, Article 15 l.aut., also permits CHIs to recite literary works for the exclusive purpose of enhancing the dissemination of culture, pursuant to the objectives identified in the light of the memorandums of understanding between SIAE and the Ministry of Culture.

4.7.4 ORPHAN WORKS

The Orphan Works Directive introduced a mandatory exception (Article 6 OWD) to facilitate the preservation of and access to orphan works across the EU. The Directive regulates each aspect of the flexibility in detail, which results in a relatively pervasive harmonization of the subject across the Union. Only slight differences between national provisions may be traced, with regards to (i) **subjective** scope; (ii) the number, type, and extent of **permitted uses**, as well as in virtue of (iii) the **other peculiarities** that may have been devised by legislators.

4.7.4.1 SUBJECTIVE SCOPE

With regard to the subjective scope, most Member States implemented the threshold embedded in Article 1(1) OWD verbatim. This is the case of Belgium (Articles XI.192/1 CDE),

Cyprus (7J(1) CL), Czech Republic (Section 37a(1) CzCA), Denmark (Section 75(f)-(m) DCA), Germany (Section 61 UrhG-G), France (Article L.113-10, L.135-1-7 CPI), Greece (Article 27A GCA), Ireland (Section 70A CRRA), Italy (Article 69bis-quinquies l.aut.), Malta (Article 9(1)(b)(2)(3) Regulation on Certain Permitted Uses of Orphan Works), The Netherlands (Article 16o AW), Portugal (Article 75(2)(u) CDA) and Slovenia (Article 50(a) ZASP).

Only Austria drew the notion in a general and thus potentially more open fashion. Section 56e UrhG-A, in fact, merely refers to publicly accessible institutions in an all-encompassing way. Rather, a consistent number of Member States extended the OWD-benchmark to tele-radio services. Section 71b(1) BCA (Bulgaria) also mentions public radio and media organizations. An expansive reading of the array of beneficiaries can be found in Section 2 of The Act on the Use of Orphan Works 764/2013 of 2013 in Finland, as well as in Article 123 RDA and Section 41/F(1) SZJT (Hungary). Other Member States adopted a wider perspective. Article 189 NN (Croatia) includes – beyond Article 1(1) OWD – any other legal entity performing GLAM-related tasks. In this vein, Section 27^{6} AutÕS (Estonia) generally refers to public heritage institutions, also expanding the list of Article 1(1) OWD in order to include research establishments and the Estonian Public Broadcasting Organization. Article 89(1) LiCA (Lithuania) is equally broad, comprehending scientific, cultural, educational organizations in general, as well as broadcasting services. Yet, the Lithuanian provision also specifies that broadcasting organizations are ought to refer to the public establishment Lithuanian National Radio and Television or similar organizations of other Member States. Endorsing a similar attitude, the Latvian legislator generally refers to those institutions whose functions include – inter alia – the preservation of film, sound and cultural heritage. This broad definition - enshrined in Section $62^{(1)}$ LaCA - leaves space to consider entities that usually perform non-GLAM related tasks but may start undertaking activities that aim at preserving and disseminating cultural heritage. A similar all-encompassing provision can be found in Slovakia, yet subject to a particular restriction. The wording of Section 51 ZKUASP encounters libraries, schools, archives, as well as any legal depositary pursuant to special law. This subsidiary clause is open-texture and thus can behave as a normative expansive tool to enlarge the number and kind of beneficiary institutions. By contrast, Article 37bis TRLPI generally covers libraries and specifically refers to film, newspaper and sound libraries. This ambiguous subject-specific requirement may be read in both an expansive and restrictive way on a case-law basis.

Finally, it ought to mention that the existing version of Section 16a URL (Sweden) does not mention broadcasters amongst the beneficiary institutions, with the risk of falling behind with the OWD-threshold.

4.7.4.2 OBJECTIVE SCOPE

The objective scope of the exception for orphan works embodied in Article 6 is implemented in a harmonized manner across EU. Only a few differences can be noted as to the number, kind and extent of permitted uses. In general, most Member States slavishly replicated the wording of Article 6 CDSM, encompassing the reproduction and making

available of orphan works to the public. Notably, most of them expressively mention the possibility of reproducing orphan works in digital form. Yet, Section 56e UrhG-A does not expressively specify the purposes of the permitted acts, raising doubts over a potentially restrictive interpretation of the objective scope.

EU countries implementing the Article 6 OWD-threshold verbatim are the followings: Belgium (Article XI.192/1 CDE), Croatia (Article 189 NN), Germany (Section 61 UrhG-G), France (Article L. 135-2(1)(2) CPI), Greece (Article 27A GCA), Hungary (Section 41/F SZJT), Ireland (Section 70A CRRA), Luxembourg (Article 6(2)(3) Law no.228 of 3 December 2015), Malta (Article 9(1)(b)(2)(3) Regulation on Certain Permitted Uses of Orphan Works), The Netherlands (Article 16o AW), Portugal (Article 75(2)(u) CDA), Romania (Article 123(1) RDA), Slovakia (Section 51 ZKUASP), Slovenia (Article 50 ZASP) and Spain (Article 37bis TRLPI). Some open national provisions do not indicate the array of permitted uses, leaving this aspect clouded in indeterminacy and thus implicitly availing an expansive reading. This approach can be found in Bulgaria (Article 71b BCA), Cyprus (7J(1) CL), Czech Republic (Section 37a CzCA) and Estonia (Section 27[6] AutÕS). Another group of countries encompass several permitted uses that seem going beyond the Article 6 OWD-benchmark. These Member States specify that the acts of reproduction and communication to a limited public – within the premises of the beneficiary institutions and via secured network – can also occur on a time-shifting basis. In this way, users can look at the relevant sources anytime they want. This added flexibility is explicitly mentioned in the Copyright Acts of Denmark (Section 75(f)-(m) DCA), Italy (Article 69bis(b) l.aut.), Latvia (Article 62(1) LaCA), Lithuania (Article 89(3) LiCA) and Poland (Article 35(5)-(9) UPA).

4.7.4.3 OTHER CHARACTERISTICS AND CONDITIONS OF APPLICABILITY

Considering the high degree of harmonization, very few differences can be observed with regard to the characteristics of the administrative procedure devised to regulate the termination of the orphan-works status, the formulation, number and extent of the purpose-oriented limitations, presumptions of consent and the rules to calculate the compensation for rightholders upon the termination of the orphan status.

In line with Article 6 OWD, most Member States identify as goals of the exception the promotion of educational and cultural purposes and the restoration and preservation of CHI collections.

In a few cases, these purpose-oriented limitations are not specified in detail or even unmentioned. For example, Section 272 AutÕS (Estonia) is silent on the matter, offering the possibility to read extensively the notion of public interest-related objectives pursued by the beneficiary institutions through the use and making available of orphan works. The same can be said with regard to Article L.135-2 CPI (France), and with regard to the very broad definitions offered by Section 37a(2) CzCA (Czechia), Section 75f URL (Sweden), Article 71b BCA (Bulgaria) and Article XI.192/I CDE (Belgium). Other countries rather chose to identify

purposes other than the two explicated by Article 6 OWD. Article 89(3) LiCA (Lithuania) states that the beneficiary institutions can fulfil their public-interest missions in the field of dissemination of culture, protection of cultural heritage, and promotion of education, science and public information. Similarly, Article 75(2)(u) CDA (Portugal) mentions the right of access to information, education and culture – yet ambiguously also referring to the enjoyment of intellectual property, enabling beneficiaries to perform any act that is linked to their public-interest missions. A similar functional link can be found in Article 35(5)-(9) UPA (Poland), which asserts that beneficiary institutions can fulfil their statutorily tasks also through the use and reproduction of works within their collections - orphan works included.

Several national provisions are peculiar in terms of conditions of applicability. In this sense, Article L.135-2 CPI (France) states that moral rights of authors shall be respected and that the use of each orphan work by CHIs cannot last more than seven years. Other time-limits and requirements may concern the maximum period allowed between the compliance with the informatory duties and the termination of the use of the orphan work in question. In this regard, Article 27A GCA establishes that sufficient information about the orphan work in question shall be delivered within seven years since the termination of the use to the Hellenic Copyright Organization.

Some EU countries devise specific rules which regulate the procedures for the acquisition and termination of the orphan work status, and offer to rightholders the possibility to claim damages for unauthorized uses, assigning to different entities the task to determine the amount of compensation due (e.g. Estonia to the Minister of Justice, Section 272 AutÕS, Hungary to a governmental decree, Section 41/K SZJT, holding also that compensation is not due the rightsholder exceptionally consents to further use), or providing relevant criteria in the text of the law, often in line with the OWD (i.e. by taking into account the actual harm suffered by rightsholders in order to calculate the amount of compensation due, the professional sector where the beneficiary institutions operated and therefore the orphan works were reproduced, the public interest mission of the CHI involved, etc.).

Member States differ as to the entity to which the information duties towards rightholders provided by the OWD or the definition of the sources to be consulted during the diligent search are attributed. Examples range from imposing specific informatory duties to the Minister of Culture, as under Austrian copyright law, to the French OW-framework, where the Council of State is free to set upon decree the sources of information that must be consulted. According to Section 56e UrhG-A, the Minister has informatory duties of a significant extent, having to draft a protocol filing the information about rightsholders for – at least – seven years from the termination of the diligent search provided by law. Moreover, the same Minister establishes by order the number and kind of sources that need to be consulted during the diligent search of rightsholders of the allegedly orphan work in account of the specificities of each work. By this token, under Article L-135-2 CPI the Council of State fixed upon decree the sources of information that must be consulted before holding a work as orphan under the ECL-regime provided by French law.

Ultimately, it remains to be noted that some national provisions draw particular attention to the prerogative of concluding private-public partnerships, hinting at the possibility of exploiting orphan works – yet to extent justified by the purposes provided by law – also on a commercial basis. Art. 69bis-(5) l. aut. (Italy) expressly states that the beneficiary institutions are allowed to conclude agreements with the aim of increasing the value of the orphan works at stake. Article 89 LiCA (Lithuania) sets a similar rule, according to which beneficiaries can conclude service contracts and embark on other forms of partnerships, agreements, and cooperation, yet subject to the additional condition that the other party is not entitled to use the orphan works. In line with the OWD-benchmark, instead, Article 189 NN (Croatia) plainly states that the freedom of contract of the beneficiary organizations must be respected.

4.7.5 OUT-OF-COMMERCE WORKS

The CDSM Directive intervened on the patchwork of national solution addressing the problem of the preservation and availability of out-of-commerce works with Articles 8 to 11 CDSM, drawing inspiration from some pre-existing national provisions, such as Sections 51 and 52 UrhG-G, the French scheme quashed by the CJEU in *Soulier and Doke*, and the text of the Memorandum of Understanding on the matter signed by associations representing stakeholders.

Some of the national provisions covering out-of-commerce works before the CDSM Directive have been analysed before, in the section devoted to preservation of cultural heritage. The following lines will strictly assess the degree of harmonization reached after the transposition of Article 6 CDSM and, if any, the features of national solutions departing from the EU model.

As most countries implemented or are planning to implement Articles 8-11 CDSM verbatim, only a reduced number of particularities within the newly introduced national regimes can be highlighted. In fact, many national exceptions share substantially the same text, corresponding to a slavish implementation of Articles 8-11 CDSM. Therefore, we will only take into consideration those elements that detach from the CDSM-derived wording in a remarkable way. Notably, a consistent number of Member States have already implemented OOC-related provisions: Austria (Sections 56f(1)-(4) UrhG-A, 25b of the Collecting Societies Act), Denmark (Section 50(2) DCA), Croatia (Article 192 NN, Article 218(3)(4)(c) NN), Czechia (Section 37b CzCA, Section 97f CzCA, Section 97e(4)(i) CzCA), Estonia (Sections 57^4 AutÕS), France (Articles L.122-5-13°, L.122-5-5 CPI), Germany (Section 61d UrhG-G, Section 52b of VGG), Hungary (Sections 41/L-N SZJT), Ireland (Sections 58A, 82A and 330A CRRA - as amended under Section 8(1)(2) of the Irish Regulations No. 567/2021), Italy (Article 102-duodecies(4) l.aut.), Lithuania (Article 102 LiCA, Article 65 LiCA, Article 101 LiCA), Luxembourg (Article 10 quarter (1) LuDA), Malta (Article 9), the Netherlands (Articles 18c, 44(3) AW), Poland (Articles 35(5)-(10) UPA), Romania (Article 128^4 RDA), Slovenia (Article 50(5) ZASP, Article 50(3) ZASP), Spain (Article 71 Royal Decree n. 24/2021). Yet, as mentioned before,

some exceptions are still waiting for the approval of the Parliament, for instance, Sweden (Section 16e URL).

Specificities may be found, for instance, on matters left undefined by the EU text, such as the procedural steps to attribute and terminate the out-of-commerce status. Some EU countries set a cut-off date of six months between the first act of use of the work and the moment in which the information on its status should be registered by EUIPO (Sections 57[4] AutÕS, Section 37(b)(4) CzCA and in Article 50 ZASP). Other countries add many procedural steps to the termination procedure, which mostly differ in terms of deadlines and competent authorities involved. For instance, Ireland (Section 8(2) of the Irish Regulations No. 567/2021) requires rightsholders to notify the competent CMO, giving sufficient details about the works at issue and asserting their exclusive rights over them. Then, the CMO shall notify the CHI with whom the ECL was concluded in written form within two weeks from the first notice. In response, the CHI must cease using the work at stake within the next four weeks and, meanwhile, upon receipt of the request in writing, the CMO shall cease signing ECLs with other potential beneficiary institutions. Under Section 61e UrhG-G (Germany), instead, it is the Federal Ministry of Justice and Consumer Protection that shall provide additional rules by ordinance concerning the consequences arising from rightsholders' objections, as well as the content of the informatory duties pending upon CMOs under Section 61d(3) UrhG-G. Section 25 of the Austrian Collecting Societies Act requires three months to pass between the filing of the information to the EUIPO, without any objection from rightholders.

The lack of a sufficiently representative CMO, which authorizes the shift from ECLs to the exception regime, is established on a country-specific basis. For instance, in Sweden under the newly proposed text of Section 16e URL, the lack of a representative CMO must be reported to the Minister of Culture in order to authorize the free use of the same works under the exception for out-of-commerce works. Similarly, in France Article L.138-2 CPI provides that ECLs cannot be freely set, yet they can only be issued by order of the Minister of Culture, that – additional to the requirements set by the CDSM-baseline, shall look at two conditions, which are the professional qualification of the managers of the CMO involved, and the material and human resources that the organization proposes to use to ensure an appropriate management of the rights involved. If the ECL is not issued, Article 122-5-5 CPI provides for the automatic application of the exception.

Notably, very few Member States have also introduced a presumption of out-of-commerce status for specific categories of works or even established that the OOC-status can be conferred only if certain additional conditions are fulfilled. In the former case, national provisions can be considered more flexible than the EU threshold, as they streamline the process under which a work can be considered out-of-commerce for the purpose of the related flexibility under copyright law. Conversely, in the latter, the conferral of such status is submitted to additional conditions or the very same notion of OOC suffers from work-specific restrictions. Thus, the field of applicability of the flexibilities for OOCs result in being

encroached. However, these kinds of presumptions or work-specific conditions are very rare in the EU landscape of newly implemented OOC-related provisions.

In the former case, the case of the German Law of Collecting Societies (VGG) is noteworthy. Section 52b VGG asserts that works published in books, journals, newspapers, magazines or other published writings shall be considered unavailable only if they were also last published at least thirty years before the commencement of the information to the public as such. Likewise, 41/L SZJT (Hungary) holds that out-of-commerce works shall include literary works that were last published in the territory of Hungary on or before 31 August 1999. Literary works that were published inside a period of eight years since the date they were last published shall not be considered out-of-commerce works. In this vein, the proposed text of the Section 16c TL (Finland) provides a presumption of OOC-status for the following categories of works: (a) works stored in a CHI-collection that were not sold or entered in channels of distribution within the next five years from the inclusion; (b) computer programs and videogames when seven years have elapsed since their first publication; (c) works that are unrepresented by a specific CMO. Yet, the same provision subjects the ECL to the circumstance that it does not prejudice the market of the work.

Following the latter trend, Article 35(10) UPA must be mentioned. This provision contains a specification concerning the subject matter of out-of-commerce works according to Polish copyright law. Yet, in this case, rather than a presumption streamlining the process to recognize the OOC-status, a restriction in the subject matter can be observed. In fact, the Polish provision provides that out-of-commerce works need to be identified with books, daily newspapers, and other forms of print publications, thereby restricting the objective scope of the provision, that are not sufficiently available to the public, only if first published in Poland before 24 May 1994. Foreign literary works translated in Polish are excluded from the related ECL scheme and the out-of-commerce works identified in this way are put into a specific national database that is public and freely available, ultimately administered by the Polish Ministry of Culture.

Notably, work-specific restrictions of this kind were common in the pre-CDSM scenario. Despite the draft proposal of Article 57c ZASP in the Slovenian copyright law framework closely follows the EU benchmark, flexibilities for OOCs were not absent in the Slovenian framework before, yet subject to work-specific curtailments. In this sense, Article 50(5) ZASP, amended in 2004, covers some uses of unavailable works by CHIs. Accordingly, the beneficiaries can reproduce - also in full and via any medium - literary works which have been out of print since at least two years for internal uses solely. Similarly, under Swedish copyright law, a provision of this kind is in force since 1960. Without expressly referring to out-of-commerce works as such through an ad hoc regulation, Article 34 URL refers to them. In general, the provision states that in the case of published works that have not been published in the last two years (four years in the case of musical works) since the first submission of the manuscript, the author shall terminate the publishing contract thereof keeping the compensation received and without ascertaining the publisher's fault. In addition, the same

provision regulates the case where the publisher is entitled to exploit a work yet the same has not been published within a year from the author's request to proceed. Yet, this rule is very use-specific, and it does not apply newspapers, periodicals and other collective works. Slightly use-specific remains the Swedish regime for OOCs also under the proposed text of the national transposition of Article 8(2) CDSM. In fact, the draft text of Article 16(e) URL published in October 2021 contains a carve out in favour of right-holders, who may reserve their rights of reproduction and communication to the public, therefore adding a new condition of applicability to OOC-related flexibilities.

A work-specific flexibility is devised by the Irish Regulations of 2021. According to the newly introduced 330A and 82A CRRA, copyright flexibilities and licensing mechanisms concerning OOCs can also be extended to databases and computer programs. Similarly, Article 50 ZASP– yet to be approved by the Slovenian Parliament – also extends the provision to databases. More strikingly, Article 71(7)(b) Royal Decree n. 24/2021 issued in Spain to implement the CDSM introduces a derogation to the sui generis database rights, thereby allowing the reproduction of substantial parts of databases included in out-of-commerce-works.

Beyond the reproduction and making available of protected works, it is worth nothing that the new Spanish provision also allows transformative acts. Similarly, in Sweden the proposed text of Section 42 URL covers a plethora of permitted uses - all exclusive rights except for the right of reproduction, communication to the public, thereby including the right of making works available, public performance, distribution, rental and lending. Similarly, In Slovenia, the proposed text of Section 37(b) ZASP does not mention reproduction amongst permitted uses, while an all-encompassing approach features Sections 79 and 80 ZKUASP, which include technical and live performance, reproduction, rental, lending, broadcasting, retransmission and communication to the public. Along the same lines, Article 102-duodecies(4) l.aut. In Italy includes the rights of adaptation, extraction, translation, as well as modification and transformation in general, and also software and databases. By contrast, the amended version of Article 44(3) AW (the Netherlands) seems to restrict the scope of the provision only to literary, artistic and scientific works, leaving to the Minister of Culture the possibility to provide additional rules to determine whether a work can be held commercially unavailable. Moreover, a work-specific restriction can also be found in the proposed text of Sections 16g and 16h TL, transposing Articles 8(1) and (2) CDSM within Finnish copyright law. Despite being largely close to the EU counterpart and as also hinted at before, Section 16h(4) TL restricts the objective scope of the OOC-related flexibilities to those works which were never commercialized for five years after being included in the CHI-collection. In addition, the Finnish framework for out-of-commerce works prescribes a particularly diligent search, also providing a tailormade assessment for two categories of works (computer programs and videogames). In this respect, the proposed text of Article 16h(2) TL imposes to beneficiaries the duty to inform right-holders about their intention to use determined OOCs and to ascertain whether it shall be assumed that the works in question have left commercial

channels. In addition, beneficiaries shall ensure that at least seven years have passed since the date of first publication of videogames and computer programs. Already licensed OOCs are also carved out from the scope of the related exception also under French copyright law (Article L. 122-5-13° CPI).

Furthermore, it is worth noting that the Italian provision settling the new ECL system covering OOCs also states that such scheme should have a circumscribed territorial scope. In fact, Article 102-duodecies(4) l.aut. expressively recommends the appropriate identification and circumscription of the territorial scope of the ECL. With regard to the ECL scheme, it is finally worth noting that some EU countries that are yet to implement Articles 8-11 CDSM already envisage an ECL scheme also covering OOCs. This is the case of Denmark (Section 50(2) DCA), Czech Republic (Section 37(b) CzCA), Slovakia (Sections 79 and 80 ZKUASP).

4.7.6 SOCIALLY ORIENTED USES

Very few national exceptions provide flexibilities for acts carried out by social institutions, such as prisons or hospitals, as well as those occurring at public for profit- and for-non-profit performances. These other options specifically designed by national copyright statutes to fuel activities gifted with a socially oriented nuance and are relevant to pinpoint the increasing role of copyright flexibilities to further access protected works within local communities in the EU. A separate categorization for these flexibilities stems from the fact that they do not primarily concern any of the key policy goals or conflicting rights and interests against which copyright is usually balanced, but rather aim at furthering the use of protected works within welfare-enhancing activities, in line with Article 5(2)(e) InfoSoc.

These scattered exceptions usually cover reproductions or broadcasts on a non-commercial basis within the premises of specific socially oriented entities such as hospitals, prisons, charitable organizations. The same rules can also encompass public performances of protected works on a non-commercial basis in socially valuable contexts, such as religious events, activities related to welfare services and so on. The main objective of these exceptions is to allow uses of protected works at events involving local communities to a significant extent. Yet, it must be noted that copyright law rules ascribable to this category are very rare in EU copyright law. Here below we will attempt to draw a wrap-up of the very few provisions implementing Article 5(2)(e) InfoSoc within national copyright law statutes, highlighting the degree of flexibility, as well as the divergences and convergences that seem of highest relevance.

As also outlined above, only a reduced number of Member States implemented Article 5(2)(e) InfoSoc in national copyright law and most of the national provisions are defective in some respects if compared to the EU threshold. However, not every Member State under-implemented Article 5(2)(e) InfoSoc or falls below the EU benchmark. Amongst the virtuous examples, the case of Cyprus is remarkable. Article 7(2)(q) CL allows the reproduction of broadcasts in a broad range of welfare entities, only exemplified as hospitals and prisons. Notably, the Cypriot provision transposes the EU counterpart almost verbatim, despite adding

the requisite of the compliance with the three-step-test as an additional condition of applicability. Beyond that, it must be highlighted that the uses covered by such exception are to be remunerated under an ECL scheme.

Under Czech copyright law, two provisions are dedicated to the implementation of Article 5(2)(e) InfoSoc. Section 23 CzCA, introduced in 2005 and last amended in 2012, covers reproductions and performances to the restricted audience of patients in hospitals – a term interpreted restrictively by the Czech Supreme Court in 2015.[1104] In this decision, spa facilities were excluded from the notion of health care institution covered by Section 23 CzCA. In addition, Section 38e CzCA provides an exception for acts of reproduction in selected social institutions beyond the case of hospitals and health care facilities, such as prisons, on a strictly not-for-profit basis and to the extent justified by the social purpose incorporated in the provision and provided that fair remuneration is paid to right-holders.

In Danish copyright law, Section 15 DCA encompasses a wide range of eligible beneficiaries, resembling the wording of Section 38e CzCA and Article 7(2)(q) CL. In fact, the Danish provision encompasses hospitals, nursery homes, prisons and other 24-hour institutions within the national welfare sector, that are allowed to make recordings of TV and radio broadcasted works for non-commercial purposes and within the premises of the entities in question. The subject- and place-specific requirement imposed by the provision was interpreted in a stringent manner by national courts, in parallel with Czech case law. In a Danish case of 2003,[1105] a performance of a music work within a dance school class was held outside of the social purposes covered by the exception. Yet, the boundary between educational and thus socially valuable activities sheltered by Section 15 DCA and those falling outside of the objective scope of the provision is quite blurred. As a confirmation of the oscillatory case law on the matter a more recent of 2018 can be mentioned.[1106] In this judgement, a performance of musical works during dance and physical training classes by a non-profit association was held an educational activity covered by Section 15 DCA. Furthermore, contrary to the EU model, the Danish provision does not request compensation to right-holders and therefore appears more flexible than the EU counterpart.

In Finland, Section 15 TL numbers many social institutions within the array of beneficiaries, in a way that resembles the wording of Section 15 DCA. Peculiarly, the Finnish provision explicitly refers to senior citizens' homes. Accordingly, hospitals, senior citizens' homes prisons and other similar social entities can reproduce and make available recordings of already disseminated radio and TV broadcasts for free, despite this is admitted only within a short time after the first recording and for temporary use. Like Section 38e CzCA, Section 15 TL only allows the use of brief excerpts by inmates and other subjects making recordings of broadcasts on radio and television, overcoming the EU threshold in terms of subject matter

[1104] Grand Chamber of the Civil and Commercial College of the Supreme Court in case No. 31 Cdo 3093/2013 of 14 October 2015.
[1105] Ugeskrift for Retsvæsen 2003.212Ø.
[1106] Ugeskrift for Retsvæsen 2018.516H.

yet adding further time-limits that were not envisaged by Article 5(2)(e) InfoSoc. Little room for flexibility in this regard can also be found under Hungarian copyright law. Although the Hungarian legislator has not implemented Article 5(2)(e) InfoSoc, a provision resembling the EU text can still be found within the national copyright statute. Enacted in 1999, Section 38(1)(c) SZJT allows public performances of protected works within social care entities and institutions for care of the elderly. In this sense, the array of beneficiaries and permitted uses is far below the EU benchmark. Following the Hungarian approach yet going a bit further in terms of beneficiaries, in Italian copyright law, Article 71-quarter l.aut. allows reproductions of broadcasts by public hospitals and prisons solely for internal uses, provided that rightsholders receive a compensation fixed by a decree issued by the Ministry of Culture. The Italian provision falls below the EU benchmark only in terms of conditions of applicability, as it imposes the use of the works in question for internal purposes solely.

In contrast with the previous examples, German copyright law encompasses a strictly use-specific provision, enshrined in Section 52(1) UrhG-G, allowing communications of published works to the public at non-profit making events, only if participants are admitted on a free-of-charge basis. This event can also consist in a public lecture, provided that, also in this case, performers are not remunerated. Rather, right-holders shall be remunerated, apart from events organized by youth welfare services, social and prisoners' welfare services, as well as geriatric welfare services, provided that the audience is restricted. Therefore, in this case, the work shall be communicated to a limited public. Section 52(2) UrhG-G provides a similar rule specific for religious events, that permits the communication of protected works at religious celebrations organized by church and religious communities, albeit compensation to right-holder shall be paid. Section 52(3) UrhG-G tightens the requirement in the case of public performance and screening, making available and broadcasting of a cinematographic work, by requiring prior consent of right-holders. Yet very use- and event-specific, the German cornucopia of provisions can be considered quite flexible. Nonetheless, it must be noted that no socially enhancing exception can be found amongst the provisions implementing Article 5(2)(e) InfoSoc in German copyright law. Rather, the German legislator decided to forward uses of protected works at specific events, enhancing copyright flexibility on occasions that may be deemed valuable for the local community. However, it shall be noted that all these rules are subject to strict conditions of applicability such as, above the others, the duty to remunerate right-holders.

It is noteworthy that the copyright law of the Malta features two kinds of provisions, the former addressing reproductions of protected works within social institutions, whilst the latter encompassing public performances for non-commercial purposes at specific events. In fact, Article 9(1)(f) MCA allows reproductions by selected social institutions, that are entitled to reproduce broadcasts of numerous works on a non-commercial basis. The list of works is open, including audio-visual, musical, artistic, literary works, as well as databases and computer programs. In addition, Article 9(1)(g) MCA is devised for public performances at non-profit events, without any specification as to audience and eligible beneficiaries. Two

socially nuanced provisions implementing Article 5(2)(e) InfoSoc are also present under Portuguese copyright law. Article 75(2)(p) allows the reproduction of works transmitted via radio broadcasting in non-profit social institutions, like hospitals and prisons, without need to compensate right-holders. Rather, Article 108 CDA is dedicated to public performances and communication to the public of protected works within the family circle, featuring a peculiar provision within the panorama of exceptions transposing Article 5(2)(e) InfoSoc in the EU. A similar rule can is embodied in Polish copyright law. In fact, Article 24 UPA allows the not-for-profit reproduction, public performance and communication to a limited (family-circle style) public of broadcasts by collective antenna or cable networks, even if devices are situated in public places.

Ultimately, the case of Ireland needs to be mentioned due to its high degree of flexibility. Sections 97 and 98 CRRA transpose Article 5(2)(c) InfoSoc in Irish copyright law. Going well beyond many provisions cited above in terms of degree of flexibility, Section 97 allows the reproduction of specific works (sound recordings, broadcasts and cable programs) within the premises of social institutions and prisons without remuneration to right-holders. With a stand-out provision, Section 98 CRRA allows sound recordings to be played for charity or backed by welfare-enhancing, educational or socially valuable aims without the need to pay remuneration. Section 246 CRRA provides the same flexibility for sound recordings. Instead, Section 90(1) CRRA contains a use-specific provision for public readings of extracts of lawfully disclosed literary and dramatic works, also mandating acknowledgement of the source.

A quick glance to the very few cases of implementation of Article 5(2)(e) InfoSoc does not deliver a sound picture in terms of harmonization, convergence and flexibility in the EU. Primarily, it must be said that only Portugal, Malta, Ireland, Hungary, Czech Republic, Italy, Finland, Denmark and Cyprus implemented this provision within their national copyright law statutes. In addition, some Member States under-implemented it (Italy, Hungary and Cyprus). In other cases, national courts embraced a restrictive reading of the subjective requirement (Denmark and Czech Republic), thus hampering the effectiveness of the exception in another way. Despite highly use- and event-specific, many advanced provisions can still be found in the EU (Germany, Ireland and Denmark), both in terms of eligible beneficiaries, permitted uses, remuneration duties and contexts where the exception may apply. Finally, it must be observed that some EU countries added the condition under which works can be used for socially valuable purposes yet for merely internal use of social institutions (Poland, Portugal, Italy). Remuneration is nearly always requested except for the case of the Malta and Ireland, whose provisions show a remarkable degree of flexibility in this regard.

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In the pre-CDSM era, the EU copyright acquis was characterized by a piecemeal approach to copyright flexibilities directed to target cultural uses and the preservation of cultural heritage. Despite targeting the same category of beneficiaries, both EU and national provisions were fragmented as to works covered and permitted uses. The optional nature and

very general wording of InfoSoc and Rental exceptions did not contribute to create a level playing field nor to push Member States to converge on similar paths.

In fact, the pre-CDSM exceptions for CHI preservation and the array of copyright flexibilities for public lending are paramount in illustrating the vacuum of harmonization in the area. Three different approaches are equally distributed across the EU with regard to beneficiaries (unidentified, closed or open lists of selected beneficiaries, single beneficiaries), works covered and permitted uses (general right of use, only a selected list of rights, one single use, as well as unspecified, a selected list of works or single categories thereof). Conditions of applicability - remuneration duties and limitations in purpose - are read in a highly diversified manner by national legislators and courts, exacerbating the patchwork of national solutions. The same fragmentation characterises other cultural, educational and socially oriented uses covered by national flexibilities, where there is little or no convergence in focus, and no possibility to conduct a real comparative assessment for the extreme heterogeneity of national solutions. In addition, only a few countries implemented Article 5(2)(e) InfoSoc.

The mandatory nature of the OWD exception pushed national laws towards a much greater standardization, with a handful or no countries departing from the EU model. It is yet to be seen whether this will be also the effect of Articles 6 and 8 CDSM, covering general reproductions of CHI collections for preservation purposes, and ECL/exceptions for the preservation and making available to the public of out-of-commerce works, again by CHIs.

Notwithstanding the welcome shift in the approach from optional to mandatory exceptions, this area is still characterized by the highest degree of fragmentation among all EU copyright flexibilities. Not only EU provisions envision different regimes for different works and limit cultural and preservation uses to mere reproductions but, as well-highlighted in the comparative analysis, national solutions showcase a plethora of distinctions, specifications and variety of approaches to permitted uses, linked or not to specific categories of works, and only a baseline uniformity of beneficiaries covered. This means that, apart from orphan and out-of-commerce works, and to a certain extent the reproduction of CHI collections for preservation purposes under Article 6 CDSM (here, however, already with some distinctions between Member States), there is very little harmonization across the EU, and a great variety of degrees of flexibility/rigidity in national solutions. This is detrimental to legal certainty, hinders the possibility to develop cross-border cooperation and exchanges, and it may ultimately create obstacles to the development of consistent EU cultural policies when protected works are involved.

4.8 COPYRIGHT AND DISABILITY: FROM INFOSOC TO MARRAKESH

4.8.1 THE DISABILITY EXCEPTION IN ARTICLE 5(3)(B) INFOSOC AND ITS NATIONAL IMPLEMENTATIONS

Copyright flexibilities for uses for disabled persons has the aim of guaranteeing the right to take part in cultural life for every citizen, by ensuring equality of access to copyright-protected works. In fact, blind or visually impaired people, as well as individuals with other physical and perceptual disabilities are usually unable to access works in traditional formats. The need for accessible works has been long neglected - back in 2012, only 5% of published works were available in this form – exposing the community of disabled individuals to a long-standing and severe cultural famine, which undermined their access to knowledge and enjoyment of cultural rights.[1107] Rights of disabled persons are expressly recognized in the Charter of the Fundamental Rights of the European Union (hereinafter "CFREU"),[1108] which provides as "the EU recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community",[1109] and prohibits discrimination "on the grounds of disability".[1110] In turn, although the ECHR does not directly recall the right to take part in cultural life nor the rights of the disabled community, these can certainly be considered included in the general prohibition of discrimination of Article 14 ECHR.

The 2006 UN Convention on the rights of persons with disabilities[1111] requires contracting States to take appropriate measures to ensure that all persons with disabilities "enjoy access to cultural materials in accessible formats" and that intellectual property laws "do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials". These principles were transposed into a legal framework some years later in the 2013 Marrakesh Treaty on the rights of print-disabled people.[1112] The Treaty provides a tailor-made copyright exception to remove the barriers mentioned above.

Recital 43 InfoSoc recalls "the importance for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible

[1107] S. Williams, 'Closing in on the Light at WIPO: Movement Towards a Copyright Treaty for Visually Impaired Persons and Intellectual Property Movements' (2012) 33.4 J Int'l L 1037 cited in L. Zemer, A. Gaon, 'Copyright, disability and social inclusion: the Marrakesh Treaty and the role of non-signatories' (2015) 10.11 Journal of Intellectual Property Law & Practice 839.
[1108] Charter of the Fundamental Rights of the European Union [2000] OJ C 364/1.
[1109] Charter of Fundamental Rights of the European Union, *cit.* (fn. 15), Art. 26.
[1110] Ibid, Art. 21.
[1111] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS 1525, Art. 30(1) and 30(3) (CRPD).
[1112] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (adopted 26 June 2013, entered into force 30 September 2016) UNTS 3162 (Marrakesh Treaty).

formats".[1113] **Article 5(3)(b) InfoSoc** introduces an optional copyright exception for the "uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability." Although optional nature, its scope left much more room for discretion to Member States compared to the subsequent Marrakesh exception, both in terms of beneficiaries and in terms of permitted uses, while it still imposed several conditions of applicability (such as a proportionality test and a necessity benchmark, as well as non-commerciality). According to Recital 38, national laws are free to introduce remuneration schemes for rightsholders. The exception is among those mentioned by Article 6(4) to provide that, absent voluntary measures undertaken by rights-holders, Member States should take appropriate measures to ensure that TPMs do not prevent their exercise.

Within a few years from the enactment of the Directive, all Member States decided to implement the provision.[1114] Yet, the openness and optionality of Article 5(3)(b) caused, as foreseeable, the creation of a fragmented patchwork of diversified national solutions.

Already on the identification of the types of disabilities involved, Member States' provisions range from a general indication of disability (e.g., Section 42d UrhG-A in Austria, Articles XI.190, 18° and 19° CDE, Article I.16, §1er/1, Article XI.217, 17° and 18°, and Articles XI.299, §4 and I.16, §1er/1 in Belgium, Article 194 NN in Croatia, Section 39 CzCA in Czech Republic, Sections 45b(1) UrhG-G in Germany, Section 41(1) SZJT in Hungary, Section 104 CRRA in Ireland, Article 71-bis l.aut. in Italy, Article 10 ter LuDA in Luxembourg, Article 9(1)(i) MCA in the Malta, Article 15i AW in The Netherlands, Article 33(¹) UPA in Poland, Article 75 (2) (i) CDA in Portugal, Section 46 (1) ZKUASP in Slovakia, Article 48(a) ZASP in Slovenia, Article 17 URL in Sweden to a limitation to blind people (Bulgaria yet implicitly through Article 26a BCA, Estonia, Article 31bis paragraph 2 in Spain) or blind and deaf (Article 28A(12) GCA in Greece and Section 19(1)(3) LaCa in Latvia), or to various combinations of impairments that negatively impact the ability to read common texts (Section 17(1) DCA in Denmark, Section 17a(1) TL in Finland, Article L. 122-5-1-2° CPI in France and Article 25 LiCA in Lithuania).

On the side of rights covered, some countries restricted the exception to the sole reproduction (Article 26a in Bulgaria, Article 193 NN in Croatia, Article 28A(2) in Greece, Article 25 LiCA in Lithuania, Spain), others included also distribution (Austria, Section 39 CzCA in Czech Republic, Section 19(6) AutÕS in Estonia, Section 45b(1) UrhG-G in Germany, Section 41(1) SZJT in Hungary, Section 104 CRRA in Ireland, Section 19(1)(3) LaCa in Latvia, Article 15i AW in The Netherlands, where it is identified in "publication", and Article 48(a) ZASP in Slovenia), others combined reproduction with one or more rights amongst communication to the public, making available, lending, or public performance, with a full plethora of different

[1113] Council Directive 2001/29/EC of 22 June 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L167/10, Recital 43.

[1114] This part, until "whose exceptions do not mention disability and raise doubts on the possibility to exercise the InfoSoc Directive exception on works protected by the sui generis right", is taken verbatim from Caterina Sganga, 'Disability, Right to Culture and Copyright: Which Regulatory Option?' (2015) 29 International Review of Law, Computers and Technology 88.

combinations (Article XI.190 CDE in Belgium, Section 17(1) DCA in Denmark, Section 17c TL in Finland, Article L. 122-5-7° CPI in France, Article 71-bis l.aut. in Italy, Article 10(11) LuDA in Luxembourg, Article 9(1)(i) MCA in Malta, Article 33(1) UPA in Poland, Article 75 (2) (i) CDA in Portugal, Section 46 (1) ZKUASP in Slovakia and Article 17 URL in Sweden). Since technological neutrality is not enshrined in the InfoSoc Directive, no national uniformity could be found, either, on the definition of accessible formats allowed.

Several states completely ignored the request of the InfoSoc Directive to implement measures to ensure that TPMs do not restrict the exercise of a number of exceptions listed in Article 6(3) and omitted from their law any reference to the issue (Section 42dUrhG-A in Austria, Article 26a BCA in Bulgaria, Finland, Section 41(1) SZJT in Hungary, Article 71-bis l.aut. in Italy, Poland, Slovakia and Spain); others just stated that conflicts should be avoided (Section 39 CzCA in Czech Republic, Section 104 CRRA Ireland); others admitted the possibility of conflict, and delegate their resolution to mediation or governmental, agency or court intervention (Article 193 NN in Croatia, Section 17 DCA in Denmark, Section 19(6) AutÕS in Estonia, Article L. 122-5-7° CPI in France, Sections 45a-45c UrhG-G in Germany, Article 28A GCA in Greece, Section 19(1)(3) LaCa in Latvia, Article 25 LiCA in Lithuania, Article 15i AW The Netherlands, Article 75 (2) (i) CDA in Portugal, Article 48(a) ZASP in Slovenia and Article 17 URL in Sweden). None of the solutions proved, eventually, effective, with the result of legitimating a TPM that enforces a contractual clause excluding the enjoyment of the exception.

Countries did not agree on the definition of the nature of the provision either, for they remained split between those considering it a gratuitous exception and those providing for the fair remuneration of the rights-holder and, thus, opting for an instrument similar in structure and content to a compulsory license (Section 42dUrhG-A in Austria, Section 17 DCA in Denmark only for visual and sound recordings, Sections 45a-45c UrhG-G in Germany, Article 15i AW in The Netherlands, Article 48(a) ZASP in Slovenia and Article 17 URL in Sweden if distribution of more than a few copies, or if distribution and communication by libraries and organizations). The situation was even worse in the field of import/export provisions, where the frequently unclear definition of the means of distribution allowed, the lack of harmonization on the side of the rights covered by the exception, the presence of national rules imposing restrictions on importation, and the general non-applicability of exhaustion (as the copy is generally distributed without the consent of the rights-holder) make it highly difficult to determine whether the distribution to and from organizations or beneficiaries located in other jurisdictions will be allowed or will constitute infringement.[1115] This fragmented framework worsened a situation already made complex by the lack of provisions similar to Article 5(3)(b) in other EU acts, such as the Database Directive, whose exceptions do not mention disability and raise doubts on the possibility to exercise the InfoSoc exception on works protected by the sui generis right.

[1115] A broader analysis of the issue can be found in Sullivan (n 3) 47–64.

4.8.2 THE MANDATORY EXCEPTION UNDER THE MARRAKESH DIRECTIVE AND ITS NATIONAL IMPLEMENTATIONS

The implementation at the EU level of the 2013 Marrakesh Treaty has partially changed the pre-existing framework. The European Union is a signatory party to the Treaty but only ratified it in 2018. Because of the ratification, the EU legislator issued Regulation 2017/1563/EU[1116] and Directive 2017/1564/EU.[1117] The first aims to establish a common framework to address sharing between EU Member States and non-EU Marrakesh countries, the second to govern the implementation of the mandatory exception requested by the Treaty.

Directive 2017/1564/EU requires Member States to adopt a mandatory exception to the rights of reproduction, communication, making available, distribution and lending and to give domestic effect to the Treaty's definitions of covered works, accessible format copies, beneficiary persons, and authorized entities (Article 3(1)). Recital 14 of the Marrakesh Directive prohibits the imposition of any additional conditions on the exercise of the exception, including commercial unavailability. Yet, Article 3(6) of the same Directive sets Member States free to provide for a fair remuneration for rightsholders, the level of which shall be set in light of a range of factors including the public interest in cross-border dissemination of covered works; the non-profit nature of authorized entity activities; and the extent of harm to right holders, which, if minimal, should not be compensated at all, in line with Recital 14 mentioned above.

As a result of the mandatory nature of this exception and of its detailed content, the degree of uniformity of national solutions have drastically increased, albeit only with regard to the specific scope of the Marrakesh Directive provision which, as mentioned above, is narrower than the scope of the InfoSoc disability exception. Mandatory nature notwithstanding, the great convergence between Member States is still tainted by some divergences, as illustrated in the comparative analysis below.

4.8.2.1 SUBJECTIVE SCOPE

The Marrakesh Treaty identifies the end beneficiaries of the exception as every person who has a print disability, i.e. a person who, according to Article 3, "(a) is blind; (b) has a visual impairment or a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person who has no such impairment or disability and so is unable to read printed works to substantially the same degree as a person without an impairment or disability; or (c) is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading". The same definition has been adopted almost verbatim by the

[1116] Council Regulation (EC) 2017/1563/EU.
[1117] Council Directive 2017/1564/EU.

Marrakesh Directive, which has also added to the InfoSoc Directive exception a safeguard clause, which specifies that Article 5(3)(b) InfoSoc is "without prejudice to the obligations of Member States under Directive (EU) 2017/1564 of the European Parliament and of the Council.

End beneficiaries, as well as persons acting on their behalf, are always entitled to produce accessible format copies for personal use. In addition to them, the Marrakesh Treaty and Directive introduced a new set of beneficiaries, identified in the so-called "authorized entities". The Directive defines "authorized entity" as "an entity that is authorised or recognised by a Member State to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis", which "also includes a public institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities, institutional obligations or as part of its public-interest missions". Authorized entities can perform a broader range of permitted uses, such as making an accessible format copy of a work or other subject matter to which they have lawful access, and also communicating, making available, distributing, or lending an accessible format copy to a beneficiary person or another authorized entity on a non-profit basis for the purpose of exclusive use by a beneficiary person.

In their national implementations, Member States have followed rather verbatim the EU text, often providing a precise indication of entities that can be authorized. As a result, very few divergences can be noted amongst national transpositions. In fact, authorized entities and end beneficiaries are usually identified in line with the Marrakesh Treaty and Directive.

It is noteworthy that in Austria and Denmark, the number of disabilities goes beyond the list indicated in the Directive. In particular, Section 17(3) DCA provides an open definition of the subjective scope, so as third parties in general are allowed to reproduce copies of protected works for the benefit of visually and hearing-impaired people by means of sound and visual recording devices. Specifically, in Denmark, the array of entities covered by the notion of "authorized institutions" is wide to encompass governmental or municipal entities, as well as any other social or non-profit institutions. The provision, generally framed in the Directive, is recalled and used in different degrees of details by most Member States.

France offers an even broader definition of disability (Article L. 122-5-7° CPI), covering motor, physical, sensory, mental, cognitive, or psychic disabilities that are effectively able to prevent access to works in their traditional format. At the same time, the definition of authorized entities is also quite broad, encompassing CHIs, as well as any other institution and legal person specifically appointed by the Ministry of Culture. Similarly, in Germany, Section 45a UrhG-G is entitled "Persons with disabilities", abstractly encompasses all forms of impairment and related health problems discouraging access to works. Greece (Article 28(12) GCA) and Lithuania (Article 25 LiCA) follow the same path, adding hearing impairments to the list of disabilities covered by the exception, while Ireland makes even a step further by referring (Section 2 CRRA) to Section 2 of the Disability Act (2005), which defines "disability" as "a substantial restriction of someone's ability to carry out a professional task, business, or

any other occupation in the State, as well as the lack of ability to take part in the social and cultural life of the State due to some kind of physical, sensory, mental health or intellectual impairment". As under Danish law, also in this case the list of authorized entity is to be specified by order of the Minister, who shall appoint the "designated bodies" entitled to make copies of and reproduce protected works for the exclusive access of disabled people.

Third party intervention is prevented in the Italian system, while the same provision (Article 71-bis l.aut.) also establishes that a governmental decree must define the concept of "disability" under Italian law, while the notion of authorized entities follows the EU model. Restrictive approaches to the definition of beneficiaries can be found in Latvia, where Section 19(1)(3) LaCa limits it to those visually impaired or incapable of reading for some health-related reason. The same limitation is also embedded in Article 15j AW (the Netherlands) and Article 17 URL (Sweden), while Article 35a UPA (Poland) requires the presentation before the competent authority of a certificate as a proof of the impairment, in writing and necessarily provided by a doctor.

4.8.2.2 OBJECTIVE SCOPE: WORKS COVERED

Article 2(1) Marrakesh specifies that the exception covers works "in the form of a book, journal, newspaper, magazine or other kind of writing, notation, including sheet music, and related illustrations, in any media, including in audio form such as audiobooks and in digital format", which are protected by copyright or related rights, and which are published or otherwise lawfully made publicly available. EU countries diverge in the implementation of Article 2(1) very rarely. Therefore, there are not many notable exceptions to be highlighted at a national level.

Some countries introduce specific exclusions, such as Denmark (Section 17(1) DCA), which carves out musical works and sound recordings.

The German system is more articulated, as two different provisions cover all types of works, in a way that those excluded in the former are included in the other. Section 45b UrhG-G is work-specific, as it was devised to cover works in text or any other format that may uneasily be accessed by visually impaired individuals. Hence, since it is dedicated to persons with visual and reading disabilities, Section 45b UrhG-G specifically addresses a list of works - published literary available in text as well as graphic recordings of musical works - also including illustrations. In fact, the general provision enabling use for private purposes by disabled people - Section 45a(2) UrhG-G - does not include these kinds of works.

A notable work-specific rule inspired by the public interest goal of fostering access to cultural works for the benefit of disabled people in digital format can be found in French copyright law. Article L. 122-5-1-2° b) CPI obliges publishers of textbooks to make such works available for reproduction and making available in digital format to disabled people within ten years from the date of first publication. Yet, it must be noted that the features of these works are highly regulated by law, thus this rule has a restricted field of application.

Similarly, in Italy Article 71*bis*(2)*bis* l.aut. establishes that Italian law shall provide the list of works falling under the umbrella of the exception amongst published literary works, photographs, visual art works, such as books, newspapers or other writings, music sheets, illustrations in any format. Moreover, the provision applies only to those works for which accessible versions are not commercially available, or it is otherwise impossible to ensure their accessibility to disabled persons in their existing format.

In Lithuania, Article 25 LiCA provides for a similar work-based limitation, inspired by the EU model, but in addition it explicitly excludes works expressly created for persons for disabilities. The same can be said for Article 33(¹) UPA (Poland). Under this provision, some kinds of works can be reproduced and disseminated only under the conditions set out in Articles 35a to 35e UPA.

In Sweden (Article 17e URL), authorized entities are the only ones allowed to use specific types of works, so as they can make sound recordings, distribute radio and TV broadcasts, as well as cinematographic works, in a format that also ensures access to people with hearing disabilities.

4.8.2.3 OBJECTIVE SCOPE: USES COVERED

The Marrakesh Treaty and Directive distinguish between permitted uses for the direct beneficiaries and permitted uses for the authorized entities. Under Article 1(a) Marrakesh, direct beneficiaries and people acting on their behalf are allowed to make an accessible format copy of a work or other subject matter to which the beneficiary has lawful access for the exclusive use of the beneficiary person. Under Article 1(b) Marrakesh, instead, authorized entities are also entitled to make an accessible format copy of a work or other subject matter to which they have lawful access, or to communicate, make available, distribute, or lend an accessible format copy to a beneficiary person or another authorized entity on a non-profit basis for the purpose of exclusive use by a beneficiary person. As an additional filter, Article 1(3) mandates the applicability of the three-step-test to evaluate the admissibility of each use on a case-by-case basis, while Article 1(5) establishes that such free uses shall not be overridden by contract, although Member States are free to introduce the duty to compensate rightholders.

The list of permitted uses does not vary substantially among EU Member States, and only some particularities can be found. Moreover, it shall be mentioned that many of the permitted uses were introduced before the implementation of the Marrakesh Directive, in order to implement the InfoSoc provision. An expansive approach dated to the pre-Marrakesh era can be found within the broad wording of Section 41(1) SZJT, that, rather than specifying a set of permitted uses, contains a free-use rule for the benefit of disabled persons. Likewise, in Poland Article 33(¹) UPA grants to authorized entities a general right to use protected works for the benefit and exclusive use of disabled people, expressly covering reproduction also in digital format and dissemination to selected beneficiaries. These ample formulas can

potentially encompass other uses as they leave room to further flexibility. More explicitly, Section 17(2) TL was introduced in Finnish copyright law to amend the existing provisions and thus implement the Marrakesh Directive, with the effect of extending the flexibility to the acts of lending, selling, as well as allowing the use of the copies made by authorized entities as such, except for radio and tv broadcasting.

Falling below the Marrakesh threshold in terms of permitted uses, as it does not include communication to the public, Section 42(1) UrhG-G is specific for reproductions of protected works in digital form for exclusive and personal use of disabled persons. Equally yet differently inflexible in relation to the Marrakesh benchmark, Article L. 122-5-1-2° CPI (France) only takes into consideration acts of reproduction and communication to the public of works whose copies have been deposited in the National Library of France, therefore significantly departing from the EU terminology. Under French law, additional requirements and obligations have been put under Law n° 2011-590 of 26 May 2011 on the possibility for authorized entities to reproduce (also digitally) specific kinds of works published after 2006 to make them accessible to disabled people.

Restrictions as to permitted uses can also be observed under Section 104(1)A CRRA (Ireland), which obliges authorized entities to incorporate an explicit statement in the copies of protected works they make to ensure access to disabled persons, declaring that the work is covered by the national Marrakesh exception. Adopting a very use-specific language, Article 25 LiCA (Lithuania) allows the making available of protected works in digital form, and the same is provisioned for authorized entities, that are rather entitled to reproduce the same works in digital format for the benefit of disabled persons. The national implementation of the Marrakesh Directive provides that the exchange of copies between Lithuanian entities and those belonging to other EU countries shall be regulated by the Government on a separate basis, therefore leaving room to additional restrictions that may reduce the degree of flexibility.

Similarly, Article 15i AW (the Netherlands) specifically covers the acts of conversion of protected works in order to make them accessible to persons affected by disabilities for their personal use. In order to be kept in line with the Marrakesh Directive, Articles 48b and 48c ZASP (Slovenia) extend the array of permitted uses compared to the previous version of the flexibility for disabled people. In this way, authorized entities are allowed to reproduce and distribute accessible copies to end beneficiaries. Whilst, use-specific divergence can be observed in Sweden, where Article 17e URL allows anyone to make and disseminate copies of an array of selected works, if the use in question does not entail recordings. Socially valuable entities can communicate protected works to a limited public of individual beneficiaries with disabilities, also distributing them the copies in accessible format. Moreover, remuneration is due when more than a copy is made, distributed, and permanently retained by individual beneficiaries. Like in Lithuania, the government shall specify the criteria of distribution, transfer, and exchange of the copies amongst authorized entities in the EU.

Adopting a much more flexible language, Article 9(1)(i) MCA (Malta) explicitly allows the reproduction, dissemination, and communication to the public and translation on behalf of disabled. It is worth mentioning that, even before the Marrakesh Directive, Section 46 (1) ZKUASP (Slovakia) encompasses also public performance right and specifies that elements contained in the protected works reproduced can be further specified through descriptions to help beneficiaries understand the content more clearly. Adaptations to works can be made only if unsubstantial and strictly necessary.

4.8.2.4 REMUNERATION

Remuneration of rightsholders is the only matter on which it is possible to find a number of divergences between national laws.

The majority of EU countries does not provide remuneration duties nor mandatory collective license schemes. Therefore, only those setting such remuneration duties - at least in some cases - are ought to be mentioned as examples of reduced access and flexibility at the expense of disabled persons. In this sense, Denmark, Sweden, France, the Netherlands, and Finland impose fair remuneration in all or specific circumstances. In Denmark, Section 17c DCA states that remuneration, established by law under an ECL scheme, is required only if the economic harm to rightsholders is not minimal. In Finland, remuneration duties are imposed under Section 17(3) TL, that requires remuneration only if an accessible format copy that has been reproduced through sound recording is left for the permanent use of the beneficiary person. The Swedish approach can also be deemed notable because of the divergences in whether remuneration duties are to be complied with according to the specific circumstances of the case. In this regard, Article 17a URL in fact establishes that remuneration is due only if more than one copy is distributed or permanently retained by the individual end beneficiaries for whom it was made. Remuneration duties are in force both in the case works are reproduced by third parties acting on behalf of end beneficiaries and in the one specifically appointed-by-law entities as authorized entities disseminate protected works for the benefit of disabled persons. Rather, French copyright law sets that remuneration rules operate solely under specific circumstance, as specific exemptions can be enlisted by the Ministry of Culture in favour of specifically identified entities. This may occur in the case authorized entities purchase recording and audio media to make copies autonomously (Article L. 311-8-I-3° CPI). Alternatively, rules for compensation are directly embodied in the copyright statute, such as in the Greek case (Article 28A(9) GCA), which provides it only to authors whose works are in use.

A more restrictive approach can be observed in Austria (Section 42d(8) UrhG-A) and The Netherlands (Article 15i AW), which both require payment in all circumstances. In particular, the text of the Dutch exception provides that additional conditions can be set by Order of Council, in a way that remuneration can be increased and therefore hinder access to culture for disabled people.

4.8.2.5 ADDITIONAL CONDITIONS AND TPMS

As outlined in the mapping of EU legislative sources above, the Marrakesh Directive states that accessible format copies should respect the integrity of the work, with due consideration given to the changes required for the purpose (Article 3(2) Marrakesh). More generally, the exception should be applied only in compliance with the three-step test, and rightholders should ensure that TPMs, when applied, do not hinder its enjoyment (Article 3(4) Marrakesh), unless the work is made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. **Recital 14** prevents Member States from imposing additional requirements for the application of the exception other than those laid in the Directive. Along these lines, Article 5 requires Member States to ensure that authorized entities comply with several obligations directed to prevent piracy and ensure adequate information on the list of works available in accessible format and their contact points.

National transpositions are almost fully in line with the text of the Directive. However, only the copyright laws of Belgium (Article XI.190 CDE), Luxembourg (Article 10ter), Romania (Article 35 1 RCA), Cyprus (Article 7R(3) CL) and Greece (Article 28C GCA) explicitly mention the need for the exception to comply with the three-step test, and only some countries mention the need to ensure that the integrity of the work is not hindered - Greece (Article 28A(4) GCA), Luxembourg (Article 10-ter LuDA), The Netherlands (Article 15j AW), Bulgaria (Article 26b(5) BCA), Croatia (Article 195(5) NN), Cyprus (Article 7R(5) CL) and Estonia (Section 19(6) AutÕS).

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National implementations of the InfoSoc and Marrakesh disability exceptions present a high degree of harmonization and tend to align to the EU text, particularly after the further push towards a more pervasive standardization impressed by the Marrakesh Directive. However, divergences can still be found across the EU. As to beneficiaries, some countries present more rigid approaches to the identification of authorized entities, with case-by-case appointments, strict criteria, and measures to comply with and related high costs to bear. On top of the EU baseline, a number of countries provide broader definitions of disability, which enlarge the roster of end beneficiaries, while a handful of national laws adopt more restrictive readings, and the same can be said vis-à-vis the possibility for third parties to exercise the exception on behalf of disabled individuals.

As to the objective scope, very few divergences can be found within the EU landscape. With regard to the various types of works covered by national exceptions, a restricted group of countries provides open lists following the EU model; few of them also encompass databases and software; others go as far as to provide different rules for different works. Permitted uses are generally regulated in a harmonized manner, except for some countries mentioning a general right to use, or adding on top of the EU list also other rights such as public performance. Remuneration duties is the only area where the level of harmonization

is low. In general, the majority of Member States chose not to provide remuneration. In very limited cases, remuneration is required, and in some countries, the same is provided only under limited circumstances. As to the criteria of applicability, national exceptions are consistently harmonized. Yet, it should be noted that the three-step-test is not mentioned in all EU countries, and that some national legislators provide additional rules to regulate rights and duties of authorized entities.

4.8.3 USES BY PUBLIC AUTHORITIES

In EU copyright law, specific provisions permit uses of protected works by public authorities, for purposes of public security or on the grounds of ensuring the proper conduct and reporting of administrative, parliamentary, or judicial proceedings, as well as of civil or religious ceremonies. These exceptions have been partially harmonized under the InfoSoc Directive yet diverging implementations can still be found amongst Member States, given their optional nature.

Article 5(3)(e) InfoSoc concerns the reproduction and communication to the public of protected works for the purposes of public security, or to ensure the proper performance and reporting of administrative, parliamentary and judicial proceedings. Likewise, use during religious celebrations and other similar ceremonies organized by public authorities also fall under the umbrella of this provision. In addition, Articles 6(2)(c) and 9(c) Database also feature an exception to sui generis rights and copyright over databases for the same purposes.

Article 5(3)(g) InfoSoc contains a specific exception for official and religious ceremonies, thereby representing the second bundle of EU exceptions for uses by public authorities.

It must be noted that the CJEU offered a remarkable take on the boundaries of such flexibilities in *Painer*, which concerns the use by newspapers of portrait photographs of a person who was kidnapped. The Court argued that Member States, due to the absence in the InfoSoc Directive of any specification on when the interest in public security shall be invoked, enjoy broad discretion in defining its contours.

Not all the Member States have implemented Article 5(3)(e) and/or its Database counterparts (Article 6(2)(c) and 9(c) Database) in their entirety.

With regard to Article 5(3)(e) InfoSoc, not all EU countries strictly adhered to the EU text. Some Member States addressed only partially, with different combinations, the three purposes of the public exception for public authorities (national security, official proceedings, and official ceremonies). Some of them miss a provision on public security, such as Greece (Article 24 GCA) and Hungary (Section 41(2) SZJT), or have an incomplete one, such as in the case of Ireland (Sections 71 to 74 CRRA), which narrows down the notion so as to cover solely statutory inquiries. Instead, Croatia (Article 200 NN), Cyprus (Article 7(2)(m) CL), Denmark (Sections 27 and 28(1) DCA), Latvia (Section 24 LaCA) and Finland (Section 25d TL) only introduced an exception specific for administrative, parliamentary or court proceedings.

As far as the Database Directive is concerned, the situation is even more fragmented. In fact, only Belgium (Articles XI.191, 5°, XI.310, §1, 3° CDE), where the national transposition of the InfoSoc provision is missing, Croatia (Article 212 NN), Spain (Articles 34.2(c) and Article 135(c) TRPLI) and Sweden (Article 49(3) URL) seem to have adopted the related exceptions. Bulgaria, Cyprus, Estonia, Ireland, Italy, Lithuania, Luxembourg, the Malta and Spain opted for a partial implementation. In fact, Article 93s(3) BCA allows the reuse of substantial parts of databases for the same purposes, in line with Article 9(c) Database, whilst there is no evidence that Article 6(2)(c) Database has been transposed within Bulgarian copyright law. Likewise, Article 7C(3)(b)(iii)(c) CL (Cyprus) implements Article 9(c) Database, but the national implementation of Article 6(2)(c) Database is missing. Under Estonian copyright law, Article 9(c) has been transposed verbatim in Section 75^{6}(3) AutÕS, while there is no trace of the national implementation of Article 6(2)(c) Database. Database exceptions are implemented in part also in Irish copyright law. In fact, Sections 331-333 CRRA slavishly implement Article 9(c) InfoSoc, yet no references are made to Article 6(2)(c) Database. Similarly, since 1999, Article 64-sexies(1)(b) l.aut., Article 32(4) LiCA, Article 68(c) LuDA and Article 26(2) MCA only feature an exception in line with Article 6(2)(c) InfoSoc.

Numerous yet not all Member States implemented Article 5(3)(g) InfoSoc, despite often narrowing down its original scope. This is the case of Austria (Section 53(1)(2) UrhG-A), Bulgaria (Article 24(1)(14) BCA), Czech Republic (Section 35(1) CzCA), Denmark (Section 21 DCA), Germany (Section 46 UrhG-G, despite not strictly adhering to the EU text), Greece (Article 27(a) GCA), Hungary (Sections 38(1)(e) and (1a) SZJT), Latvia (under Section 26(1) LaCA), Lithuania (Articles 26, 58(10) LiCA), Malta (Article 9(1)(n) MCA), The Netherlands (Article 17c AW), Poland (Article 31(1)(3) UPA), Portugal (Article 75(2)(j) CDA), Romania (Article 35(1)(h) RDA), Slovakia (Section 47 ZKUASP), Spain (Article 38 TRLPI) and Sweden (Article 21 URL).

Along with several common traits, meaningful differences are detectable with respect to beneficiaries, works covered, and additional conditions which may further restrict the scope of such flexibilities. The following pages will offer a comparative overview of national implementations of Article 5(3)(e) InfoSoc, which represents the most spread provision, focusing on convergences and divergences as to their subjective scope, objective scope (works covered and permitted uses) and additional conditions of applicability. A final paragraph will be devoted to the very few national transpositions of Article 5(3)(g) InfoSoc, which encompasses residual uses by public authorities within the context of official public performances, religious and other celebrations grounded in the public interest.

4.8.3.1 SUBJECTIVE SCOPE

Generally, national transpositions do not mention their beneficiaries, but rather refer to the “free use” of protected works for the purposes indicated under Article 5(3)(e) InfoSoc, often narrowing them down. Yet, some remarkable examples of expansive approaches can also be mentioned.

Some Member States add to the general clause other provisions addressed to specific subjects. Under Danish copyright law, Section 27 DCA establishes that, in case a dispute needs to be brought before a judicial or administrative authority, the parties can request access to the transcript or the copies of a protected work. Thus, the rule applies to specific subjects, yet it can be extended to all persons involved in a specific judicial or administrative proceeding, beyond public authorities and the parties of the proceeding itself. Similarly, the Finnish exception for judicial, administrative proceedings and public security, enshrined in Section 25d(2) TL specifically states that a public document protected by copyright can exceptionally be used (only) when the administration of justice or public security authority so requires, therefore introducing a subject-specific restriction to the applicability of the exception.

The German exception also adds flexibility on a subject-specific basis. In this respect, Section 45 UrhG-G establishes that courts and public authorities are also permitted to make copies of portraits or have them reproduced in proceedings before a court, an arbitration court and other authorities. Similarly, the Hungarian copyright act, which contains several exceptions for public authorities and implements almost verbatim Article 5(3)(e) InfoSoc in Section 41(2) SZJT, specifies in Section 41(3) SZJT that the Parliament is allowed to use protected works for legislative purposes and related activities, provided that the non-commerciality requirement is respected.

Subject-specific flexibilities can also be inferred from the wording of Sections to 71 to 74 CRRA (Ireland), which implement Article 5(3)(e) InfoSoc by allowing the use of protected works for the purpose of parliamentary and judicial proceedings, as well as for statutory inquiries, including their use for reporting. However, the Irish exception goes further, as copies can be supplied to third parties, to the extent the purpose set by the provision is still respected.

A specification of the beneficiaries of the exception implementing Article 5(3)(e) InfoSoc can be found under Dutch copyright law. Article 22 AW is a subject-specific provision that specifically authorizes judicial authorities, as well as natural and legal persons acting on their behalf to make available protected works for the purpose of public security and criminal investigations.

Reference to the subjective requirement can be found in Swedish case law, where the Patent and Market Court of Appeals (PMÖD) in 2018[1118] ruled that Article 26b URL, the Swedish exception implementing Article 5(3)(e) InfoSoc, must be read in a way to allow individual claimants, on a case-by-case basis, to use copyrighted works as evidence in judicial proceedings.

[1118] Patent and Market Court of Appeals (PMÖD) in case PMT 4717-18 of 16 April 2018.

4.8.3.2 OBJECTIVE SCOPE: WORKS COVERED

Few divergences among national solutions can be highlighted with regard to the types of works covered by national implementations of Article 5(3)(e) InfoSoc. Still, a small number of Member States introduced restrictions in this respect.

Inter alia, this is the case of Croatia (Article 200 NN), which excludes collections from the scope of the provision. Similarly, Danish copyright law features an exception (Section 26 DCA) that resembles the EU counterpart, despite it was adopted in 1995 and never amended after the entry into force of the InfoSoc Directive, but it specifically addresses documents related to parliamentary and judicial proceedings, as well as those before municipal councils and other elected public authorities, also including public meetings. Section 24 LaCA excludes computer programs from the scope of the Latvian exception for judicial proceeding, while Article 22 AW (The Netherlands) on public proceedings excludes images. A similar approach is endorsed by the Swedish legislator, which in Article 26(b) URL defines in detail the types and modes of reproduction of public documents/protected works that can be used in the contexts of administrative and judicial proceedings, as well as for public safety.

In some cases, national courts have intervened to expand the scope of the provision, as in Poland, where the Provincial Administrative Court of Warsaw[1119] interpreted the objective scope of Article 33(2) UPA so as to cover both published and unpublished works.

As already mentioned above, only a few countries have implemented both Database exceptions (Articles 6(2)(c) and 9(c) Database) - Belgium, Croatia, Luxembourg, Portugal, Spain and Sweden.

4.8.4 OBJECTIVE SCOPE: PERMITTED USES

Contrary to the almost complete uniformity as to the works covered, the number and extent of permitted uses in the implementation of Article 5(3)(e) are not homogeneous across the Union.

Many Member States have broadened the scope of the exception in comparison with the EU model, going beyond the rights of reproduction and communication to the public. For instance, the Spanish Article 31 bis TRLPI covers distribution, while the Maltese exception (Article 9(1)(l) MCA) permits translations and distributions. Distribution and suppliance of the copies of copyrighted works to third parties for the purpose of judicial proceedings and statutory inquiries is also allowed under Irish copyright law according to the text of Sections 71 to 74 CRRA. In Lithuania, an ad hoc provision covering related rights is enshrined in Article 58(9) LiCA.

An equally flexible approach is endorsed by the German legislator with the formulation embodied in Section 45 UrhG-G, which covers also distribution and exhibition. In Slovakia,

[1119] Judgement of 11th October 2017, II SAB/Wa 175/17.

Section 53 ZKUASP also includes technical performance and distribution of protected works, yet not explicitly allowing use for reporting. The same omission on reporting features the Italian exception (Article 67 l.aut.). In addition, the Slovakian exception encompasses additional sector-specific uses that were not envisaged within the EU text, such as uses of protected works in order to ensure the proper functioning of meetings before the National Council of the Slovak Republic, as well as before other political and governmental meetings and committees, like municipal and regional assemblies. The same is done by Article 56 ZASP in Slovenia, which, however, does not cover governmental councils. The same expansive approach characterizes the Danish exception (Section 26 DCA), which permits free use of documents in proceedings involving political authorities and committees, such as parliamentary sessions, municipal councils and other related public meetings, and the Croatian exception (Article 200 NN), which stretches to cover private para-judicial proceedings, such as private and alternative dispute resolution mechanisms.

In other cases, the national provision merely includes the term "use". This vague language can be found in Article 75(2)(n) CDA (Portugal), Article 33(2) UPA (Poland) and Hungary (Section 41(2) SZJT). A similar wording is entrenched in Finnish copyright law, where several provisions are devoted to implementing Article 5(3)(e) InfoSoc. Section 25d(1) TL plainly states that copyright shall not encroach the statutory right to obtain information from a public document. As a consequence, Section 25d(2) TL confers a general right to use a protected work if the administration of justice or public security requires it. Section 25d(3) TL goes beyond the EU model and confers also the right to quote and publicly perform protected works.

On the contrary, Estonia stands out for its restrictive approach, for it does not mention communication to the public in Section 19(5) AutÕS.

4.8.4.1 ADDITIONAL CONDITIONS OF APPLICABILITY

The most frequent condition of applicability is the limitation as to the purpose of permitted uses. Several Member States articulate the requirement in much more details than Article 5(3)(e) InfoSoc, and national courts tend to read the limitation restrictively.

Some countries narrow down the scope of purposes allowed. An example is Hungary, where Section 41(2) SZJT does not mention public security, and also states that use of protected works in judicial and administrative proceedings is allowed only and to the extent necessary for the purpose of providing evidence. The same is the case for Slovenia (Article 55 ZASP).

Notably, the Austrian Supreme Court interpreted the concept of "public security" broadly, including also the use of unpublished photographs in a criminal proceeding by official order of public security authorities, despite the lack of author's consent.[1120] In another case from

[1120] OGH 4 Ob 170/07i.

2011,[1121] however, the Supreme Court embraced a more stringent reading, ruling out the possibility to use the exception during pending investigations, and allowing it only during criminal proceeding. The concept of public security and evidentiary purpose has also been emphasized and strictly implemented by the Swedish Patent and Market Court of Appeals (PMÖD). The Czech Constitutional Court,[1122] instead, introduced the use of a proportionality test to strike a balance between copyright and right to information in judicial and administrative proceedings, ruling that "administrative authorities need to make a clear and verifiable consideration when dealing with a request for information in respect of which an exclusion from the provision of information for reasons of third-party copyright protection may be applied. In administrative courts, it is then possible to request a proportionality test and the definition of general guidelines determining when administrative authorities are to provide information or, conversely, to prioritize copyright protection. Requests for information of this kind must be dealt with on a case-by-case basis, and upon a presumption of prevalence of the right to information, unless there are serious grounds for copyright protection which outweigh the right to information." According to this ruling, the character of the information related to the copyrighted content must be evaluated under both a strict necessity and proportionality criterion, assessing whether using the protected work at issue is effectively required for the specific purpose of facilitating administrative and judicial proceedings.

A particularly stringent purpose-oriented requirement is enshrined in Finnish copyright law. Section 25d TL, enacted in 2005 and last amended in 2015 allows the use of copyrighted works incorporated in other works in the public domain only for the enjoyment of the statutory right to obtain information from a public document in the context of a judicial proceeding or by request of public security authority.

Two further conditions appear in a few national transpositions. Conformity to fair practices is indicated as an additional condition of applicability in the Romanian exception for uses in administrative and judicial proceedings, enshrined in Article 35(1)(a) RDA, while acknowledgment of the source is required according to the Portuguese (Article 75(2)(n) CDA) and Italian (Art. 67 l.aut.) exceptions.

4.8.4.2 NATIONAL IMPLEMENTATIONS OF ARTICLE 5(3)(G) INFOSOC: A QUICK GLANCE

Article 5(3)(g) InfoSoc was devised by the EU legislator to cover the use of protected works "during religious celebrations or official celebrations organized by a public authority". In contrast with Article 5(3)(e) InfoSoc, this provision is much less implemented by EU Member States.

[1121] OGH 4 Ob 104/11i.
[1122] Czech Constitutional Court, case no. IV. ÚS 3208/16 of 21 March 2017.

Most of the transpositions are strictly use- and work-specific and required that the use is purely for non-commercial purposes. Most national provisions are in line with the EU model, with a few departures.

For instance, in Sweden Article 21 URL allows the public performance of published works only at events where the work does not play a main role, and performers should not be remunerated. The exception does not cover cinematographic and scenic works except for their use within the premises of the Swedish Parliament and other governmental authorities, if there is a public interest in extracting information from the work performed. In addition, the provision also allows such performances at educational and religious events.

Similarly, the Slovakian Section 47 ZKUASP also covers distribution, but specifies the kind of events where public performances of protected works are permitted (public and State holidays, Memorial Day and other national extraordinary celebration of high national relevance). In Lithuania, Articles 26 and 58(10) LiCA, considered together, permit the reproduction, communication to the public and public performance of protected works at religious ceremonies, provided that the source and author's name are mentioned, unless this is proven impossible. In addition, civil celebrations are not mentioned.

With a restrictive approach, the Spanish Article 38 TRLPI covers only public performances of musical works at official state and public administration-related events, as well as religious ceremonies, if performers do not receive remuneration in return. A use-specific restrictive approach also features Article 31(1)(3) UPA (Poland), which allows the use of works during religious celebrations or official celebrations organized by a public authority, as long as such use is not aimed at any financial benefit. The exception does not apply to uses during advertising, promotional or electoral campaign events. Also, the Dutch provision (Article 17c AW) covers only specific events (congregational signing and instrumental accompaniment during a service), and the same can be said for Section 21 DCA in Denmark, which does not encompass performances via radio or television, also if of non-commercial nature, and excludes the public performance of dramatic and cinematographic events at official and religious events.

Similarly restrictive is Section 53(1)(2) UrhG-A (Austria), enacted in 1936 and never amended after the InfoSoc, which allows public performances only of published musical works at religious, military or civil events if admittance is for free.

On the contrary, in Malta Article 9(1)(n) MCA consistently broadens the array of permitted uses by including the reproduction, translation, distribution and communication to the public of a work during official or religious celebrations organized by a public authority. The same result is achieved in Hungary by the combination of two exceptions. Section 38(1)(e) SZJT, enacted in 1999, is event- and use-specific, as it was envisaged to cover public performances of protected works for religious ceremonies and church festivals for strictly non-commercial purposes and without remuneration to performers. Section 38(1a) SZJT, introduced later in 2013, opens to many categories of events, spanning from national celebrations such as

national holidays to amatorial artistic performances, as far as they do not violate international law and the non-profit use of the protected work is ensured.

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While flexibilities for uses by public authorities are very much nation-based, the introduction of Article 5(3)(e) InfoSoc has triggered some basic harmonization. When Member States decided to transpose the provision, they generally followed the EU model, but for some circumscribed matters. For instance, some national implementations omit one or more of the purposes of the exception (e.g. public security, or judicial or administrative proceedings). In a few cases, Member States introduced subject-specific restrictions, carved out from the scope of the exception particular categories of works, or restricted/expanded the range of permitted uses, usually with regard to specific beneficiaries. Only limitations as to the purpose have been consistently introduced as additional conditions of applicability. On the contrary, only a few countries have implemented Article 5(3)(g) InfoSoc, in a much more fragmented fashion, and with a wide array of restrictions as to events and works covered.

4.9 OTHER NON-INFRINGING USES (MISCELLANEOUS)

4.9.1 USES FOR THE PURPOSE OF ADVERTISING PUBLIC EVENTS

Under Article 5(3)(j) InfoSoc, Member States can restrict the rights of reproduction and communication to the public by permitting the use of protected works for the purpose of advertising public art exhibition or sale, insofar as this is necessary to promote the event in question, excluding other commercial uses. To this day, this path has been chosen by very few Member States (Belgium (Article XI.190 CDE), Croatia (Article 205 NN), Denmark (Section 24(1) DCA), France (Article L. 122-5-3° d) CPI), Germany (Section 58 UrhG-G), Netherlands (Article 23 AW), Poland (Article $33^{(3)}$ UPA), and Slovakia (Section 50 ZKUASP).

National provisions are all quite similar and revolve around the necessity benchmark. Apart from France and Denmark, all national statutes explicitly refer to the fact that the exclusive rights of reproduction and communication to the public shall be compressed only to the extent necessary for the promotion of the public event in question. The Danish silence on the matter can be explained by the fact that the national provision entered into force in 1961, way before the emanation of the InfoSoc Directive. However, a much larger difference contraposes France to all other countries. While all countries do not give any indications on beneficiaries, but they simply ask the exhibition or the sale to be open to the public, regardless of the governmental or private nature of the body organising the event, Article L.122-5 CPI limits its scope to judicial sales, which can benefit from the possibility to reproduce graphic or plastic artworks in a catalogue, intended for the use of a participant to the sale, with the aim of describing the works of art that are being sold. This greatly restricts the scope of the provision, since only public bodies in charge of organising judicial sales are covered by it, while private and governmental bodies are fully excluded.

Other minimal divergences may be still found. One concerns the explicit inclusion of catalogues in the scope of the provision. While the majority of countries mention catalogues explicitly, Belgium, Germany, Netherlands and Slovakia make no reference to them. It might be argued that they are included since catalogues are necessary for the promotion of the event, but there is still ground for debate, since it is likely that a catalogue sold *after* the visit of the exhibition/sale will not satisfy this requirement. Unfortunately, no case law was reported on the point. Also, the necessity benchmark is left in haze. Which acts are considered necessary to promote a public event is a question that could raise great debates in courts and that has not been cleared by EU and national courts. If some predictions were to be made, the exception is likely to be applied restrictively, so that only those acts which are necessary *and* do not harm too much author's rights might fall within the scope of the provision under the proportionality test.

Another significant difference is the explicit prohibition of using protected works for any commercial purpose other than the promotion of the exhibition or sale. Czechia, Belgium, Netherlands, and Poland make this concept explicit, while Croatia, Germany, France, Denmark and Slovakia are silent on the issue. However, the necessity benchmark is likely to be applied strictly enough to prohibit *ex se* any other exploitation of the protected work. Slovakia even specifies that any use of the protected work after the termination of the public exhibition is not covered by the exception.

The Danish exception stands out because it does not contain any necessity benchmark, but it simply states that any work included in a collection, exhibition or sale can be included in catalogues and notices of the events. This provision widens the scope of the InfoSoc exception significantly, leaving open the question of whether Section 24 of the Denmark Copyright Act is compatible with Article 5(3)(o) InfoSoc.

One last minor difference is that only Czechia and Croatia ask for the name of the author and the title of the artwork to be clearly indicated in the communication. This, however, does not mean that other countries might allow a reproduction and communication to the public without due credit to the author, not only because attribution is part of the author's moral rights,[1123] but also because imagining the promotion of an art exhibition without a reference to the artists and the displayed work is quite unrealistic.

4.9.2 USES IN CONNECTION WITH THE DEMONSTRATION OR REPAIR OF EQUIPMENT

Article 5(3)(l) allows Member States to limit the rights of reproduction and communication to the public by allowing uses of the protected work when they relate to the

[1123] Recital (19) WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) UNTS 2186 (WPPT). The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

demonstration or repair of equipment. An example might be sound adjustment.[1124] The exception does not set any requirement with regard to beneficiaries. Being an optional exception, vaguely and generally formulated, its implementation by Member States has been quite heterogeneous. The countries that have implemented some versions of this exception are Croatia (Article 207 NN), Lithuania (Article 24(5) LiCA), Malta (Article 9(1)(t) MCA), Poland (Article $33^{(4)}$ UPA), Romania (Article 38 RDA), Slovakia (Section 56 ZKUASP), and Slovenia (Article 57 ZASP).

Among them, there appear to be four main grounds of difference, namely (1) the mention of testing/demonstration only as allowed use or the inclusion of repairs too; (2) the listing of subjective requirements; (3) the condition of deleting protected work right after the demonstration/repairment; and (4) the strength of verbal cues expressing the necessity benchmark.

As to the first point, the vast majority of the countries listed above allows also uses connected with the repair of devices. Romania and Slovenia, however, limit the exception to testing only, without mentioning repairment, which is then presumed to be excluded from the scope of the exception given the necessity to interpret them restrictively.

As to the subjective requirements, Croatia, Germany, Romania, and Slovenia allow only certain kind of commercial activities (thus excluding private citizens) to use protected works in connection with testing/demonstration and possibly repairment. National formulations vary slightly, but factually they all seem to include companies dealing with (i.e., producing, broadcasting, or selling to the public) phonograms, videograms, radio and television broadcast or equipment for their reproduction and reception. On the contrary, Lithuania, Malta, Poland and Slovakia have no limitation concerning the subjective scope of the provision, thus allowing private users to benefit from its extended flexibility.

Only two countries- Germany and Croatia - ask for the immediate/without delay deletion of the phonograms and videograms used for reasons connected to testing and repairment.

As to the "necessity benchmark", all countries refer to it, but in two different forms. Croatia, Germany, Romania, Slovakia, and Slovenia state that such uses are allowed "to the extent necessary for"/"where it is necessary to"/"for the purpose of"/"to the extent required for" testing and/or repairment, thus adopting a strict definition, which is reinforced in the case of Croatia and Germany by the requirement of erasing the protected object as soon as its use is no longer needed for the purpose.[1125]

On the contrary, Lithuania, Malta, and Poland allow limitations to the rights of reproduction and communication to the public rights whenever such uses are "in connection

[1124] See this Slovenian decision VSL I Cp 3494/2015, 9.3.2015, where it is stated that Sound adjustment is not making available of phonograms to the public, but instead falls under the exception of device testing from Art. 57 ZASP.

[1125] This approach is confirmed by one of the few national decisions reported on this exception, i.e., VSRS II Ips 126/2012, 6.11.2012 (Slovenia), where it is stated that the duration of the limitation to author's rights should be restricted to the extent necessary for the devices to be tested.

with" the activity of testing and/or repairment. Unfortunately, the lack of case law on the point does not provide hints to understand how strictly this *connection* is interpreted.

However, it is undeniable that the second formulation gives much more freedom of interpretation to courts. In this regard, it might be interesting to contrast two different cases. On the one hand, it is likely that national versions which do not ask for immediate cancellation explicitly, but lay out a strict necessity benchmark, will have the same operational result of those nations mentioning the deletion of the protected work.

Finally, it might be worth noticing that while only Lithuania expressly asks for the contextual attribution of the protected work at the time of its reproduction/communication to the public, this is likely to happen in all States implementing this exception, to avoid prejudices to the authors' moral rights.

4.9.3 USES FOR THE PURPOSE OF RECONSTRUCTING A BUILDING

Article 5(3)(m) InfoSoc provides Member States with the option of limiting the rights of reproduction and communication to the public rights on an artistic work in the form of a building or a drawing or plan of a building for the purpose of reconstructing the building in question. Only five countries have implemented this optional exception in their national jurisdictions (Bulgaria (Article 24(1)(15) BCA), Czechia (Section 38d(b) CzCA), Denmark (Section 29(1) DCA), Lithuania (Article 28(2) LiCA), Malta Article 9(1)u(1) MCA), Poland (Article $33^{(4)}$ UPA), and Slovakia (Section 52 ZKUASP), with quite a consistent structure and scope. They all set out a necessity benchmark, and only minor differences lie in the conditions to fulfil in order to benefit from this exception. Bulgaria, for instance (Article 24(1)(15) BCA), asks for a coordination with CMOs, while Slovakia includes the maintenance, conservation, or repair of the building in the scope of the exception, but then requires that such activities are performed with the intention to preserve its artistic value and function (Section 52 ZKUASP).

Another difference from the InfoSoc provision can be found in the Lithuanian version (Article 28(2) LiCA), which excludes from the scope of the exception any reconstruction that is done for direct or indirect commercial advantage, or to reproduce copies of sculptures and works of architecture and clarifies that if the main subject of the renovation is a work of architecture or a sculpture, the exception shall not apply. However, whereas not expressly excluded, it is likely that some other national versions of this exception will not cover copies of sculpture and work of architecture.

Slovakia (Section 52 ZKUASP) offers an original solution, by conditioning the building reconstruction exception to the intention of preserving its artistic value and function and being the only country, which provides some guidelines on what the substantial limits of a *reconstruction* are. Should the original appearance of the building be respected? And its original purpose? To what extent is it possible to change them? Grappling with such questions might be difficult enough, and the attempt of Slovakia to substantiate the term is valuable. It is reasonable to believe that Bulgaria, Lithuania, Malta, and Poland will apply the concept of

"reconstruction" with an eye to the preservation of the building's original features. A confirmation comes from a Polish decision,[1126] which states that the scope and the limit of the uses permitted under the exception at issue can be indirectly inferred from provisions on moral rights (in the case of Poland, Article 16 UPA). Building upon them, the court concluded that the allowed use to reconstruct the building cannot infringe any of the moral rights of authors, and particularly the right to integrity or the right to control the manner in which the work is used.[1127]

4.10 PUBLIC DOMAIN

Public domain covers works and other subject matters that fall outside the scope of copyright and more generally of IP and other exclusive rights on intangibles. In copyright, this includes either works that are either directly excluded from the list of protectable subject matters or works on which the term of protection expired.

While the terms of protection have been subject to a pervasive harmonization from 1993 on, there is no reference to non-protected subject matter and the public domain in EU sources, with the exception of the Database and Software Directives, which indirectly draw the boundaries of the public domain by excluding ideas and principles underlying the program and its interface (Article 1(2) Software), or by specifying that the copyright and sui generis rights on the database do not extend to its content (Article 3(2) Database). The CJEU touched the matter when it was called to determine the notion of protected work, from *Infopaq* and its progeny to the most recent *Levola Hengelo* case, which requires a creation to be original and integrate an expression in order to be protected under EU copyright law. However, as illustrated above, the boundaries remain indefinite and blurred. At the same time, this judge-made definition has had a relatively limited impact on the patchwork of national solutions which provide various lists of works and other subject matter excluded from copyright protection.

The lack of intervention by the EU legislature implies that Member States still rely on their local provisions to define what should be carved out from copyright protection, and to infer from them general principles that can be applied by national courts, possibly in line with the doctrines developed by the CJEU. As a result, this comparative report cannot go beyond sketching commonalities and specificities on non-protected subject matters in national copyright statutes, highlighting, where present, interesting principles developed by national court decisions. A separate focus will be devoted to those regimes commonly known as "paying public domain", which cover works on which copyright protection has elapsed or was

[1126] Judgement of Sąd Apelacyjny,(Appellate Court) in Gdańsk of 10th February 2009 II APo 8/08 Legalis Numer 177239; LEX nr 524897.

[1127] One Member State where this reconstruction might not hold valid is Sweden, as Section 26c URL provides that "[t]he owner of a building or a utility good may modify the property without the consent of the author." This provision entered into force in 1994 – before the emanation of the InfoSoc Directive – and it is thus discussed whether it might fall under the umbrella of the grandfather clause.

excluded, yet some form of remuneration is still due to public authorities on the grounds of public interest, such as - *inter alia* - providing financial support to living artists or fostering cultural heritage preservation.

National provisions may be categorized in four relatively homogeneous groups: (i) provisions excluding **official documents**; (ii) provisions excluding **facts - also in the case of daily news and press information, abstracts concepts and other principles**. This category embeds also implementations of the Database and Software Directives on the matter (iii) **miscellaneous** provisions. Each group will be analysed in a dedicated sub-section below, while the last sub-section will be devoted to **paying public domain regimes**.

4.10.1 OFFICIAL DOCUMENTS, SYMBOLS ET AL

A consistent number of national provisions explicitly exclude copyright protection in case of official documents of any type, such as treaties, conventions, resolutions, statements, judicial decisions, patent applications as well as any kind of procedural document or official text provided or delivered to public authorities, also including their translations. This model is the **most widespread in the EU**, e.g. in Austria (Section 7 UrhG-A), Belgium (Article XI.172 CDE), Bulgaria (Article 4 BCA), Czech Republic (Section 3 CzCA), Denmark (Section 9 DCA), Finland (Section 9 TL), Germany (Section 5 of UrhG-G), Hungary (Section 1(4)-(7) SZJT), Italy (Article 5 l.aut.), Latvia (Section 6 LaCA), Lithuania (Article 5 LiCA), The Netherlands (Article 11 AW), Poland (Article 4 UPA), Portugal (Article 7(1) CDA), Romania (Article 9 RDA), Slovenia (Article 9 ZASP), Slovakia (Article 5 ZKUASP), Spain (Article 13 TRLPI) and Sweden (Article 9 URL). In some cases, ad hoc rules provide specific lists of documents that cannot be covered by copyright protection, with a view to determining the external boundaries of copyright in a way to ensure a higher level of legal certainty. Sometimes national laws specify that the content of some official documents may be individually subject to protection in specific cases. This is the case of Finland (Article 9 TL), which specifies that independent works incorporated in public documents may be carved out from the public domain.

This category includes also norms that carve out from protection state and official symbols, signs, anthems and banknotes, as well as maps. In some countries (e.g. Latvia) the exclusion comes only upon the formal recognition of maps, anthems and other awards by national or international public authorities.

Lists are the most various. Under Austrian copyright law, Section 7 UrhG-A, which explicitly excludes from copyright protection legislative acts, ordinances, decrees, acts issued by public authorities of any kind, also including decisions, provided that the same acts are intended predominantly or exclusively for official use. Maps are also included, but for those officially made by the Federal Office of Meteorology and Surveying and therefore intended for distribution (Section 7(2) UrhG-A). Belgian copyright law specifically addresses one type of official acts - text of speeches held during official assemblies, public hearings, meetings, or court trials - in written form. Yet, Article XI.172 CDE ends with a general all-encompassing

formula, according to which any act issued by public authorities could ideally fall under the umbrella of the public domain.

Bulgaria (Article 4 BCA) does not only include acts issued by public bodies and decisions of national courts, but also translations thereof. In Portugal Article 7(1) CDA explicitly carves out requests, speeches, and allegations of any type to public authorities, while in Czechia Section 3 CzCA also mentions state and municipal symbols, freely accessible recording systems and draft documents, as well as the chronicles of some selected public bodies, such as the Chamber of Deputies and the Senate. Here courts used a teleological interpretation to exclude from protection also the opinion of an expert in court proceedings. Lithuanian law covers also draft versions of official documents, symbols, insignia, banknotes, flags, and other selected official works as provided by law. Interestingly, however, the Lithuanian Supreme Court has ruled that the list of subject matters that are to be exempted from copyright protection should be deemed as closed for reasons of legal certainty, with the effect of straightjacketing the boundaries of public domain. Symbols, armorial bearings, seals, flags and the like are covered in Estonia and Romania, the latter featuring a very articulated and complex provision. The same can be said for Poland, where Article 4 UPA, revised in 2004, provides a long list of works exempted from copyright protection.

Similar definitions can be found in Sweden (Article 9 URL), Ireland (Article 9 DCA), Spain (Article 13 TRLPI). With an original take, Slovakia (Section 5 ZKUASP) excludes from copyright protection - beyond administrative, legislative, and judicial acts - also public speeches, land use plan and other kinds of technical rules, as well as state and municipal symbols, documents ascertaining the service performed by an expert or a professional - translators included - within public proceedings. Germany (Article 5 UrhG-G) and the Netherlands (Article 11 AW) feature the most flexible approach, offering an open-ended definition.

In contrast, a work-specific approach can be found under Finnish copyright law. In fact, Section 9 TL - last amended in 2005 - includes laws, decrees, resolutions and a specific category of documents, published in full compliance with the rules provided under the Statutes of Finland and the Act on the Regulations of Ministries and other Government Authorities.

4.10.2 DAILY NEWS, ABSTRACT CONCEPTS, IDEAS AND FACTS

A second group of national copyright provisions provides that ideas, abstract concepts and facts, also contained or underlying databases and computer programs, as well as daily news and public information are to be excluded from copyright protection. This is the case of Slovakia (Section 5 ZKUASP), Portugal (Article 7(1) CDA), Romania (Article 9 RDA), Malta (Article 3(2) MCA), Poland (Article 74(2) UPA), Luxembourg (Article 1 LuDA), Latvia (Section 6 LaCA), Ireland (Section 17(3) CRRA), Hungary (Section 1(5)-(6) SZJT), Czech Republic (Sections 2(6), 65(2) CzCA), Bulgaria (Article 4 BCA), Cyprus (Article 3(3) CCL) and Greece (Article 3(2) GCA).

Most of these rules coexist with ones of the kind tackled under group (**I**). In these cases, national provisions feature the widest scope for public domain regime on a national level. This favourable attitude is quite common and can be found in Czech Republic (Sections 3, 2(6) CzCA), Bulgaria (Article 4 BCA), Estonia (Section 5 AutÕS), Hungary (Section 1(4)-(7) SZJT), Latvia (Section 5 LaCA), Poland (Article 4 UPA), Portugal (Article 7(1) CDA), Romania (Article 9 RDA) and Slovakia (Section 5 ZKUASP).

National provisions provide at times more specifications. For instance, Slovakia (Section 5 ZKUASP) mentions ideas, systems, methods, discoveries and concepts incorporated in a work with an explanatory purpose, as well as daily news, Romania (Article 9 RDA) stretches the provision to cover also functionality methods and mathematical formulas, and the same is for Poland (Article 74(2) UPA), which mentions also ideas and principles underlying databases and computer programs, as Malta (Article 3 MCA), Estonia (Section 5 AutÕS) and Czechia (Article 65(2) CzCA), which also mentions statistical measurements.

The exclusion of information as such is detailed in a more particularized way under Latvian copyright law. Along these lines, Section 6 LaCA - beyond excluding mathematic formulas, ideas, facts, methods, and processes -, also specifies that mere information within media, radio and TV broadcasts cannot be protected under copyright rules. More ambiguous is the formulation of Section 17(3) CRRA (Ireland), which states that any idea underlying an abstractly copyrightable work is susceptible of being encompassed under the notion of public domain.

Data, instead, are explicitly mentioned in Bulgaria (Article 4 BCA), while the Cypriot provision stands out (Article 3(3) CL) as it contains a rule under which ideas that can only be expressed in a unique way cannot be protected under Cypriot copyright law.

Other countries feature a more restrictive approach, such as Portugal (Article 7(1) CDA), which mentions only daily news and contents having a merely informative nature.

4.10.3 MISCELLANEOUS

The most frequent additional exemption from copyright protection under national laws concerns the works of folklore. These are excluded from copyright protection in several Member States: Bulgaria (Article 4 BCA), Estonia (Section 5 AutÕS), Greece (Article 3(2)-(5) GCA), Hungary (Article 1(7) SZJT), Lithuania (Article 5 LiCA), The Netherlands (Article 1(a) AW), Poland (Article 85 UPA) and Portugal (Article 7(1) CDA). The Dutch and Polish provisions explicitly address also performances undertaken by artists of folklore - pursuant to Article 2(a) WPPT.

With a different approach, Italian law considers such works protectable under copyright, but provides for a different regime under D.lgs. 22 January 2004, n.42 (Cultural and Natural Heritage Code), as it happens in Romania, which refers to a different regime under Law no. 26/2008 on the Protection of the Intangible Cultural Heritage. The Romanian Supreme Court had the opportunity to specify that these works are not alienable and cannot be individually

appropriated by individuals through copyright. Yet, the abstract copyrightability of these works is not excluded under Romanian copyright law, but subject to a collective exercise. Reproductions of works of folklore embodying the personal touch of the author, and being distinguishable from the original source, may still be independently protected.

4.10.4 PAYING PUBLIC DOMAIN SCHEMES

EU countries that established a paying public domain system are Slovakia (Section 10 of the Art Funds Act of 1994), France (Article 111-4-3 CPI), Finland (Section 47 TL), Hungary (100 SZJT) and Bulgaria (Article 179(2) of the Tax Code). Notably, French copyright law envisages a paying public domain system despite not containing any rule with regard to public domain in general.

In France, since 1964 Article 111-4-3 CPI provides that a fee shall be paid to an entity appointed by law if a foreign work published in France is not protected under copyright law due to the lack of agreement between France and the country of origin regarding the protective apparatus for authors. Respect of the moral rights of the author, including the integrity of the work shall be ensured. The Bulgarian system is CHI-oriented (Article 179 of the Tax Code), and admits that the reproduction, use and distribution of cultural heritage objects for personal, educational, scientific and exhibition-related purposes is free, and can be also used to create other cultural works or subject matter, like photographic, computer, image, video, labels and design products for advertising. Yet, this is subordinated to an agreement between the director of the CHI retaining the copy of the cultural heritage object at stake and those interested in its use or exploitation. Additionally, contracts must not imply the infringement of ad hoc rules for the preservation of cultural heritage objects enshrined in the Bulgarian Law on Cultural Heritage. It remains to be seen how the interplay between this provision and article 14 CDSM will be shaped.

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Beyond the wide array of objects often excluded from copyright protection, public domain and paying public domain regimes remain highly fragmented, uncovered and not harmonized in the EU.

While it is true that there is a generic convergence on the identification of two broad categories of subject matters excluded from protection, and that the idea-expression dichotomy emerges between the lines of several national legislations, it is similarly true that the specifications of such categories feature quite different details across Member States laws and judicial decisions, with the result that – no matter the good intentions of the CJEU – the boundaries of public domain are far from being harmonized in the EU. In this sense, the attempt made with Article 14 CDSM should be welcome, but it is still far not enough to reach the uniformity that is needed to ensure legal certainty and the correct functioning of the EU copyright law architecture.

5 PRIVATE ORDERING SOURCES: EMPIRICAL ANALYSIS OF THE FLEXIBILITIES OF PLATFORMS' EULAS AND THEIR COMPLIANCE WITH THE CDSM DIRECTIVE

5.1 STREAMING SITES AND HOSTING SERVICES

This section will illustrate the key findings related to the service providers mapped, with respect to the eight selected variables illustrated in Section 3.[1128] As will be shown, the service providers significantly differ with respect to some of these variables. Consequently, various issues will be elaborated in greater or smaller details, depending upon the exact service provider (its business model). First, the variables will be introduced (5.1.), and, second, the user-flexibility index of each platform will be provided (5.2.).

5.1.1 ANALYZED VARIABLES

From the five platforms listed in this category, YouTube is the market-leading platform of licenced and user-generated audio-visual and audio contents. Twitch serves a sub-cultural group: the gaming community. DailyMotion collects mostly news-related videos. Pornhub is one of the biggest sites for adult content. Finally, Soundcloud is an online audio sharing platform. The key feature of streaming sites with hosting service is that they simultaneously provide access to licenced content (of professional artists) and UGC. As such, their service fits into various and sometimes quite contradicting legal concepts, from copyright's communication/making available to the public to E-commerce Directive's hosting safe harbour.

The selected EULAs categorize *permitted acts* as "personal" (all platforms), "non-commercial" (YouTube, DailyMotion, Bandcamp), "limited" (Twitch, Pornhub, Soundcloud, Bandcamp), "worldwide" (Bandcamp), "non-sublicensable" (Twitch, Pornhub, Bandcamp), "non-assignable" (Soundcloud), "non-exclusive" (DailyMotion, Pornhub, Soundcloud, Bandcamp), "non-transferable" (DailyMotion, Pornhub, Soundcloud, Bandcamp), "revocable" (DailyMotion, Pornhub, Soundcloud), "conditional" (Pornhub, Soundcloud), and "royalty-free" (Pornhub). The typical uses are viewing, listening or displaying contents.[1129] Pornhub expressly allows users to "create and display transient copies of the Website and Works as necessary to view them".[1130] Pornhub furthermore grants a "download license" to allow users to "download or otherwise copy the works". Under this licence, users "are not buying or being

[1128] This section is taken verbatim from the pre-print, available in Open Access on SSRN at Péter Mezei and Harkai István, 'End-User Flexibilities in Digital Copyright Law – An Empirical Analysis of End-User License Agreements' (2022) 5 Interactive Entertainment Law Review (Forthcoming).

[1129] YouTube ToS, Permissions and Restrictions; Twitch ToS 7; DailyMotion ToU 6 and 6.9; Pornhub ToS, Conditional License to Use Our Intellectual Property; Soundcloud ToU, Your use of the Platform; Bandcamp ToU, Content and License.

[1130] Pornhub ToS, Conditional License to Use Our Intellectual Property.

gifted copies […] instead, they are licensing a limited, revocable, non-sublicensable, non-transferable and non-exclusive right to possess and use the copies for personal, non-commercial uses". [1131] This licence does not allow users to "reproduce, distribute, communicate to the public, make available, adapt, publicly perform, link to, or publicly display the Websites and/or Works or any adaptations". [1132] Soundcloud also allows users to download (copy, rip or capture) contents, supposed the uploader of the said content enabled the download functionality.[1133] If Bandcamp or the identified copyright holder permits so, users might be allowed to "use", "modify", "reproduce", "distribute" and "store" content of the platform.[1134] Social media functions (especially sharing and linking) are regularly provided by these platforms. Interestingly enough, Pornhub excluded the deep linking, framing or in-line linking of its content, if Pornhub's site or any portions of it may be "displayed or appeared to be displayed" as well.[1135]

The *restricted uses* are more broadly construed by these platforms. Users are not allowed to "reproduce" and "distribute" (YouTube, Twitch, DailyMotion, Pornhub, Bandcamp); "display" (YouTube, Twitch, DailyMotion, Pornhub); "download" (Twitch, DailyMotion); "store" (Bandcamp); "copy", "rip" or "capture" (Soundcloud); "transmit" or "broadcast" (YouTube, DailyMotion); "communicate to the public, make available" or "link to" (Pornhub); "sell" and "license" (YouTube, Twitch, DailyMotion); "modify" (YouTube, Twitch, DailyMotion, Bandcamp); "alter" (YouTube); "adapt" and "publicly perform" (Twitch, Pornhub); "create derivative works" (Twitch, DailyMotion); "redistribute", "delete", "deactivate any content protection mechanisms", "enhance", "edit", "translate", "reverse engineer", "decompile" and "disassemble" (Twitch, DailyMotion) the website/service or works/content, or "rent, sell or lease access to the platform" or "sell or transfer, or offer to sell or transfer, any SoundCloud account" (Soundcloud, also Bandcamp). [1136] Twitch further forbids users to cache pages; "create, upload, transmit, distribute, or store any content that is inaccurate, unlawful, infringing"; or to "delete, remove, circumvent, disable, damage, or otherwise interfere with" security features.[1137] Twitch's Soundtrack, a "streamer tool", allow users to play licensed music in the background of live streams. Users, however, "may not create on-demand content containing materials from Soundtrack, or live stream content that includes music or other materials from Soundtrack outside the Service".[1138]

The selected platforms generally allow for the *upload of one or more type of user-generated content* (e.g. audio-visual contents, including adult contents and live streams;

[1131] ibid.
[1132] ibid.
[1133] Soundcloud ToU, Your use of the Platform.
[1134] Bandcamp ToU, Content and License.
[1135] Pornhub ToS, Conditional License to Use Our Intellectual Property.
[1136] YouTube ToS, Permissions and Restrictions; Twitch ToS 7 and 9; DailyMotion ToU 4; Pornhub ToS, Conditional License to Use Our Intellectual Property; Soundcloud ToU, Your use of the Platform; Bandcamp ToU, Content and License.
[1137] Twitch ToS 9.
[1138] Twitch ToS 18.

messages; text; comments; audio/sound; images/photos; graphics; applications; code or other data), but uniformly require that the said content shall respect third parties' intellectual property rights.[1139] Soundcloud enables uploaders and users to interact with each other.[1140] YouTube, PornHub and Soundcloud expressly note that they might analyse the uploaded contents to detect infringements.[1141] Bandcamp grants the right to upload contents for "fans" and "artists" alike.[1142]

The following are common elements of the *licenses granted to the platforms*: "non-exclusive" and "royalty-free" (all services), "worldwide" (YouTube, Twitch, Pornhub, Soundcloud), "sublicensable" (YouTube, Twitch, Pornhub), "transferable" (YouTube, DailyMotion, Pornhub), "to the furthest extent", "for the maximum duration", "unrestricted" and "irrevocable" (Twitch), "limited" and "fully paid up" (Soundcloud), "unlimited" and "perpetual" (Pornhub). The license covers the following uses that platforms can carry out: "reproduce" and "distribute" (all services), "use" (YouTube, DailyMotion, Pornhub, Soundcloud), "modify" (YouTube, Twitch, DailyMotion), "display" (YouTube, Twitch, DailyMotion, Soundcloud), "perform" (YouTube, Twitch, Pornhub, Soundcloud), "publish" and "translate" (Twitch, Pornhub), "adapt" and "create derivative works" (Twitch, Pornhub, Soundcloud), "compile" (Soundcloud), "market" (DailyMotion, Pornhub), "represent", "stream", "replay", "exploit", "exhibit", "show", "compress" (Twitch), "listen to offline", "repost" and "transmit" (Soundcloud), "broadcast" (Pornhub), "communicate" and "make available" (Pornhub, Soundcloud).[1143] Users of the platforms are also entitled to use or view the content, e.g. reproduce, distribute, modify, perform, display and communicate as per the terms of YouTube, Pornhub and Soundcloud.[1144] On Bandcamp, both artists and fans shall grant an extensive license for the use of their uploaded UGC. Artists shall grant a license that includes the right to reproduce, distribute, publicly perform, publicly display, create derivative works of, communicate to the public, synchronize and otherwise exploit on behalf of the uploader and in line with the functionalities of the service; to allow end-users to receive contents and to reproduce them on any and all controlled devices for non-commercial purposes.[1145] Fans grant a slightly broader license: they shall accept that subsequent users might use, edit, modify, reproduce on any and all controlled devices, distribute, prepare derivative works of, display and perform their submissions for personal and non-commercial purposes.[1146]

[1139] YouTube ToS, User Content; Twitch ToS 8; Dailymotion ToU 6 and 6.1; PornHub ToS, Content Posted by Users and Models.
[1140] Soundcloud ToU, Your use of the Platform.
[1141] YouTube ToS, Your Content and Conduct Uploading Content; PornHub ToS, Content Posted by Users and Models; Soundcloud ToS, Liability for Content.
[1142] Bandcamp ToU, Intellectual Property Rights – Fans and Intellectual Property Rights – Artists.
[1143] YouTube ToS, Your Content and Conduct Licence to YouTube; Twitch ToS 8; DailyMotion ToU 3.1; Pornhub ToS, Content Posted by Users and Models.
[1144] YouTube ToS, Your Content and Conduct Licence to Other Users; Twitch ToS 7; DailyMotion ToU 3.2; Pornhub ToS, Content Posted by Users and Models; Soundcloud ToS, Grant of license.
[1145] Bandcamp ToU, Intellectual Property Rights – Artists.
[1146] Bandcamp ToU, Intellectual Property Rights – Fans.

None of the analysed platforms applies significant *technological restrictions* other than those that are necessary to enforce the terms and conditions related to the restricted uses.

Family sharing is neither an issue for this group of platforms, as registration is not a prerequisite for the use of standard service in the majority of cases. (Upgraded or premium models are not covered by our research.) *Other types of transfers*, e.g. resales or rental, either are excluded expressly, as introduced above or have no relevance in the lack of ability to acquire permanent and portable copies of contents via the platform.

The selected platforms unanimously declare their freedom to amend their terms and conditions and require end-users either to accept expressly (by confirmation) or impliedly (by continuous use) the changes of the terms.[1147] The termination of the rights (and licence) of users is possible either in case of illicit usage, or by the deletion or removal of the content from the platform by the user. Pornhub maintains the right to distribute, perform server copies of contents.[1148] YouTube, DailyMotion and Pornhub declare that users retain all rights over the contents generated by them.[1149] Bandcamp uses a rather unfriendly language regarding modification and termination. First, it transfers all responsibility to the end-users to check the ToU periodically but also declares that continued use of the service constitutes acceptance of the changes.[1150] Second, the termination of the access might happen "at any time, with or without cause, with or without notice, effective immediately, which may result in the forfeiture and destruction of all information associated with your membership, including, without limitation, any access to any Music you may have purchased through the Service".[1151]

Procedural safeguards are of crucial importance for hosting services, especially if the hosted content is UGC. YouTube removes or takes down such content that "is in breach of the agreement or may cause harm to YouTube or the users, or third parties".[1152] The removal is mandatory, "if the user does not have the rights to use the content".[1153] In case of material or repeated infringement, YouTube may terminate or suspend the access and the user's Google Account as well.[1154] YouTube's ToS limits the platform's liability for the content submitted by users,[1155] and also for third-party websites and online services.[1156] All other platforms exclude their liability for UGC. Illegal contents can be removed, screened, or edited by the service at any time, with or without notice, but the platforms exclude the obligation to

[1147] YouTube ToS, Modifying this Agreement; Twitch ToS 6; DailyMotion ToU 2; Pornhub ToS, Cancellation.
[1148] Content Posted by Users and Models see: 'Terms Of Service' (*Pornhub*, 25 April 2022) <https://www.pornhub.com/information/terms> accessed 8 July 2022.
[1149] YouTube ToS, Account Suspension and Termination by You; DailyMotion ToU 3.3; Pornhub ToS, Content Posted by Users and Models.
[1150] Bandcamp ToU, Modification of Terms of Use.
[1151] Bandcamp ToU, Termination.
[1152] YouTube ToS, Your Content and Conduct Removal of Content by YouTube.
[1153] YouTube ToS, Your Content and Conduct Removing Your Content.
[1154] YouTube ToS, Account Suspension and Termination by YouTube for Cause.
[1155] YouTube ToS, Other Legal Terms Limitation of Liability.
[1156] YouTube ToS, Other Legal Terms Third-Party Links.

monitor their sites on a general level and ex ante. The violation of the terms may result in termination or suspension of access.[1157] Per Soundcloud's ToS, copies available in offline mode will remain available for not more than 30 days after the removal of the contested content from the platform.[1158]

The selected platforms generally allow users to submit a complaint against the (allegedly) erroneous take-down of end-user content.[1159] YouTube allows to appeal both in case the uploaded content is removed in line with its DMCA policy,[1160] and in case YouTube's Content ID identifies a match between a protected content and the latter user-generated content. Users shall first dispute Content ID's finding, and if the copyright owner denies the dispute, the user can file an appeal.[1161] Any complaints and counter[1162] Users of Twitch can "arbitrate disputes with Twitch", but the way users can seek relief is limited. The process of arbitration prevents users from "suing in court or from having a jury trial". The dispute should be notified within 30 days.[1163] Any action taken related to the service must be commenced within one year.[1164] DailyMotion users can submit a copyright counter-notification if the uploaded content was removed in error, or it does not infringe third-party copyright. The appeal of the user is forwarded to the third party that has initiated the take-down of the content. Restoration is completely at DailyMotion's discretion.[1165]

5.1.2 USER-FLEXIBILITY INDEX

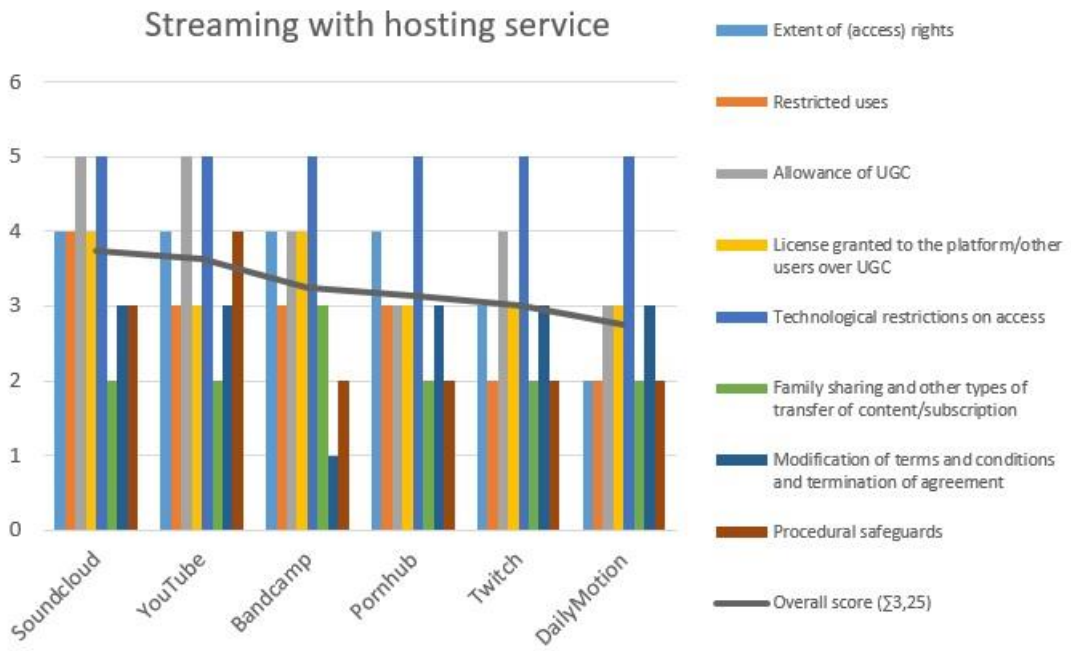
The key aspect of the flexibility of streaming sites with hosting service is that they are equally providing free-of-charge access to licenced/professional and user-generated contents. This business model clearly correlates with the architecture and flexibility of services. The way how services monetize their contents necessitates the allowance of broader access rights (which are still more limited than the grant of license to the platform), including social media functionalities. The technological restrictions on accessing contents are also more limited, in order to allow for the broader enjoyment of contents. Indeed, some platforms provide for even more flexible solutions, e.g., offline access or download option (in case the original uploader enabled that functionality). As these services are free to the general public, the relevance of family sharing or other transfer of access rights is limited. It is sensible

[1157] Twitch ToS 9; Dailymotion ToU 5.2; Pornhub ToS, Monitoring and Enforcement; Termination; Soundcloud ToS, Liability for Content; Bandcamp IPP.
[1158] Soundcloud ToS, Grant of license.
[1159] E.g., Pornhub, DMCA Takedown Form; Bandcamp IPP.
[1160] YouTube, Appeal Community Guidelines actions see: 'Appeal Community Guidelines Actions' (*YouTube*) <https://support.google.com/youtube/answer/185111> accessed 8 July 2022.
[1161] YouTube, Dispute a Content ID claim.
[1162] See: 'Removing Content From Google - Legal Help' (*Google*) <https://support.google.com/legal/troubleshooter/1114905?hl=en> accessed 8 July 2022.
[1163] Twitch ToS D.
[1164] Twitch ToS E.
[1165] Dailymotion ToU II.

that YouTube has the most developed procedural safeguard system,[1166] while the other services either mechanically comply with the standards introduced by the Digital Millennium Copyright Act, or – conversely – they miss to regulate complaint-and-redress mechanism in great details (so that end-users lack relevant information on this possibility). Based on our findings, we conclude that Soundcloud is the most, and DailyMotion is the least user-friendly streaming site with hosting service. The average score of this group of services is 3.25 points.

Variables / platforms	Soundcloud	YouTube	Bandcamp	Pornhub	Twitch	DailyMotion
Extent of (access) rights	4	4	4	4	3	2
Restricted uses	4	3	3	3	2	2
Allowance of UGC	5	5	4	3	4	3
License granted to the platform/other users over UGC	4	3	4	3	3	3
Technological restrictions on access	5	5	5	5	5	5
Family sharing and other types of transfer of content/subscription	2	2	3	2	2	2
Modification of terms and conditions and termination of agreement	3	3	1	3	3	3
Procedural safeguards	3	4	2	2	2	2
Overall score (∑3,25)	**3,75**	**3,63**	**3,25**	**3,13**	**3,00**	**2,75**

[1166] See e.g. Maayan Perel and Niva Elkin-Korel, 'Accountability in Algorithmic Copyright Enforcement' (2016) 3 Stanford Technology Law Review 277; Kristofer Erickson and Martin Kretschmer, '"This Video Is Unavailable": Analyzing Copyright Takedown of User-Generated Content on YouTube' [2018] Journal of Intellectual Property, Information Technology and E-Commerce Law 75; Sabine Jacques and others, 'An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity' (2018) 15 SCRIPTed 277.



5.2 STREAMING SITES WITHOUT (OR WITH LIMITED) HOSTING SERVICES

5.2.1 ANALYZED VARIABLES

The key feature of this group of service providers is that their business model is based on the on-demand provision of professional/licensed audio or audio-visual contents, and mainly disable (or limit to a certain degree) the uploading of UGC to their system.

Disney+ and Netflix grant users a limited, non-exclusive, non-transferable *right to access* and view or use their contents and the service; these licences are "non-sublicensable", "personal", and "non-commercial";[1167] as well as revocable in case of Spotify.[1168] Disney+ and Netflix further exclude that ownership interests are created or transferred by the purchase of a license to use their services.[1169] Netflix offers a feature called "Offline Titles", according to which "some content is available for temporary download and offline viewing on certain supported devices", but the number of downloadable content and the supported devices is limited.[1170]

The restricted uses are as follows: "reproduce" (Disney+, Spotify), "rip", "record", "transfer", "redistribute", "broadcast", "make available to the public" and "sell, rent, sublicense or lease" (Spotify), "distribute", "archive", "publish" and "modify" (Netflix), "display" and "perform" (Netflix, Spotify), "create derivative works", "circumvent", "decompile", "disassemble" and "reverse engineer" (Netflix and Disney+). Disney+ further

[1167] Netflix ToU 4.1. and 4.2; Disney+ ToU 2.A; Spotify §5.1.
[1168] ibid.
[1169] Netflix ToU 4.2; Disney+ ToU 2.A.
[1170] Netflix ToU 4.2.

prohibits the use of its product for "any commercial or business-related uses" and Disney also forbids users to sell or assign any rights in the Disney Products granted to them in the license agreement.[1171]

Netflix does not have any *UGC* functionality, and therefore there is no rule on the *grant of license* to the service provider. Disney+ permits to "create, post, upload, distribute, publicly display, or publicly perform UGC". Users of its service are also entitled to "create derivative works using […] copyrighted works."[1172] Disney does not claim ownership over UGC, but users grant a "non-exclusive, sublicensable, irrevocable and royalty-free worldwide license […] for the full duration of those rights to use, reproduce, transmit, print, publish, publicly display, exhibit, distribute, redistribute, copy, index, comment on, modify, transform, adapt, translate, create derivative works based upon, publicly perform, publicly communicate, make available, and otherwise exploit" the UGC, "without the requirement of permission from or payment to the users […]".[1173] Users of Disney+ shall "represent and warrant that they own the UGC" and "they have the necessary rights and permissions contained in the UGC", and if so, they paid all royalties, fees, or other payments due.[1174] Disney+ "may monitor, screen, post, remove, modify, store and review UGC or communication […] at any time and for any reason.[1175] Otherwise, Disney+ takes no responsibility for content posted or sent by the users.[1176] Spotify users are also allowed to upload or contribute content to the platform's service. These UGCs are nevertheless generally limited in their scope, as they mainly cover pictures, texts, messages, information, playlist titles, descriptions and compilations. At the same time, Spotify requests users to "promise" that none of these contents infringes third parties' rights.[1177] On the other hand, users shall grant a broad (non-exclusive, transferable, sub-licensable, royalty-free, perpetual, irrevocable, fully paid, worldwide) license for Spotify to use such UGC. Users are also required to "waive and not enforce" their moral (or any equivalent) rights.[1178]

Netflix applies *technological restrictions* to limit the access of its service on a geographical basis. As Netflix's ToU describes, "[u]sers may view the content primarily within the country in which they have established their account and only in geographical locations where Netflix offers their service and has licensed such content. The content that may be available to watch will vary by geographical location and will change from time to time".[1179] Portability of content is limited in line with the "chosen subscription plan".[1180] Spotify expressly prohibits

[1171] Netflix ToU 4.6; Disney+ ToU 2.B; Spotify TCU §5.1 and §9.
[1172] Disney+ ToU 7.B.
[1173] ibid.
[1174] ibid.
[1175] ibid.
[1176] ibid.
[1177] Spotify TCU §7.
[1178] Spotify TCU §8.3.
[1179] Netflix ToU 4.3.
[1180] Netflix ToU 4.3.

the circumvention of territorial restrictions of the platform.[1181] Disney+ is silent on this topic, but in general, it prohibits any circumvention of any content protection system or DRM technology, or to bypass, modify, defeat, temper with, or circumvent any of the functions or protections of the Disney Products.[1182] In the EU, the 2017/1128 Regulation on Cross-border Portability imposes restrictions on the online service providers regarding the portability of the content and subscription to the service. On the one hand, Article 3 obliges the service provider to enable cross-border portability. On the other hand, Article 7 expressly prohibits any contractual provisions that can prohibit cross-border portability or limit it to a specific time. Such contractual provisions are not enforceable.

Netflix applies a rather restrictive logic regarding *sharing the right to access the service*, except for family sharing. Its ToU states, "[t]he Service and any content viewed through the service are for personal and non-commercial use only and may not be shared with individuals beyond household".[1183] Bandcamp prohibits selling, licensing, renting or otherwise using or exploiting the contents for commercial purposes or if that violates any third parties' rights.[1184] Spotify expressly excludes all possible ways of dissemination of contents (as discussed above), but it remains silent on family sharing. Disney+ has no express rules on sharing.

The studied EULAs contain similar language regarding the *modification and termination of access*. Netflix maintains the right to change the "subscription plans and the price of the service from time to time." These changes apply no earlier than 30 days.[1185] Termination or restriction of access might take place "if users violate the Terms of Use or are engaged in illegal or fraudulent use of the service".[1186] Spotify applies similarly flexible terms related to the modification of its TCU (e.g. notification is provided, if "material changes" are made to the agreement).[1187] The infringing use of Spotify and Disney+ might lead to the termination of the user account.[1188]

The scope of *procedural safeguards* varies in this group of platforms. As Netflix does not offer any host service for UGC, it only regulates the possibility to submit copyright infringement claims,[1189] but it has no complaint-and-redress mechanisms for erroneous content removal. Disney+ allows for "any dispute, action, or other controversy, whether based on past present, or future events, between you and us concerning the Disney Products or this Agreement".[1190] The parties agree to arbitrate all disputes, "except disputes relating to the ownership or enforcement of intellectual property rights".[1191] Disputes that are not

[1181] Spotify TCU §9.7.
[1182] Disney+ ToU 2.B. i., ix.
[1183] Netflix ToU 4.1.
[1184] Bandcamp ToU, Content and License.
[1185] Netflix ToU 3.5.
[1186] Netflix ToU 4.6.
[1187] Spotify TCU §2.
[1188] Disney+ ToU 1.H and 7.B; Spotify TCU §9.
[1189] Netflix Legal Notices Copyright.
[1190] Disney+ ToU 8.
[1191] ibid.

subject to arbitration will be heard either in the state or federal courts located in Los Angeles or New York.[1192] Spotify operates a DMCA-compliant notice-and-take-down procedure, as also allows for the submission of counter-notices. Spotify, however, does not provide a blanket form to submit such counter-notice.[1193]

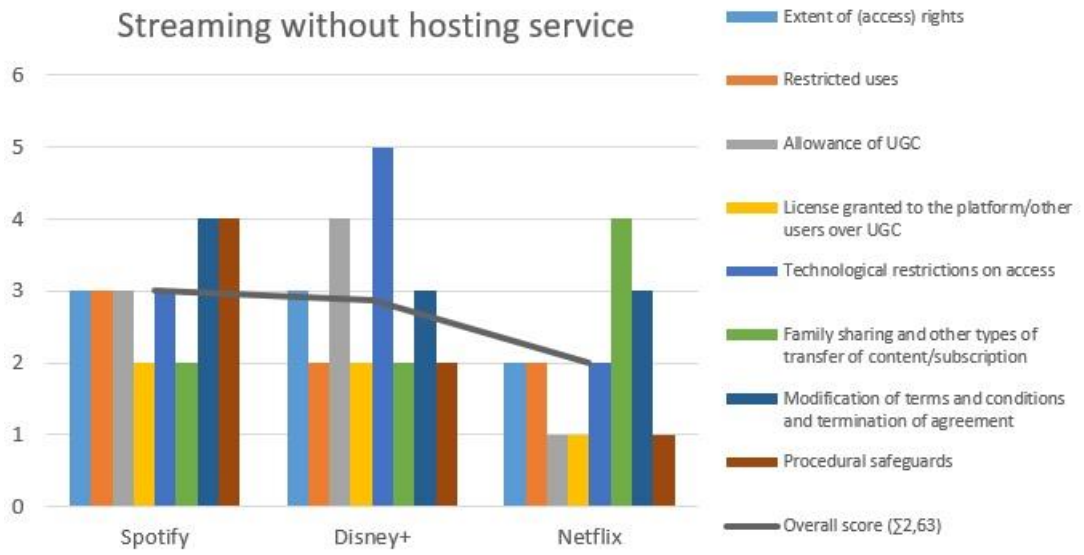
5.2.2 USER-FLEXIBILITY INDEX

Streaming sites without (or with limited) hosting service is mainly providing licenced/professional content on-demand. This business model is the primary reason for finding these platforms to be much less flexible than streaming sites with associated hosting services. The high risk of losing the revenues in audio and audio-visual contents necessitated rightholders and service providers to agree on stricter terms regarding the use of the platforms' services. This is clearly visible from the limited scope and strict language of the respective EULAs. More technical restrictions are applied, social media functionalities are mainly disabled, flexible solutions, e.g. offline access or download option are rare in the basic models of the services (indeed, they are core features of premium models). At the same time, e.g. Netflix applies an option of family sharing, which is a broad user-flexible solution. These platforms operate their own procedural safeguards, which are in line with the DMCA. These procedures are, however, mainly oriented towards the protection of rightholders' interests, and do not support end-users in complaining against (allegedly) extensive moderation of their contributions. Based on our findings, we conclude that Spotify is the most, and Netflix is the least user-friendly streaming site with hosting service. The average score of this group of services is 2,63 points.

Variables / platforms	**Spotify**	**Disney+**	**Netflix**
Extent of (access) rights	3	3	2
Restricted uses	3	2	2
Allowance of UGC	3	4	1
License granted to the platform/other users over UGC	2	2	1
Technological restrictions on access	3	5	2
Family sharing and other types of transfer of content/subscription	2	2	4

[1192] Disney+ ToU 9.A.
[1193] Spotify TCU §10 and Spotify CP.

Modification of terms and conditions and termination of agreement	4	3	3
Procedural safeguards	4	2	1
Overall score (∑2,63)	**3,00**	**2,88**	**2,00**



5.3 ONLINE MARKETPLACES

5.3.1 ANALYZED VARIABLES

This group of service providers contribute to the dissemination of predominantly digital contents by professional and, to a certain degree, private creators/developers. The model's leading challenge is how to regulate the acquisition of contents by end-users.

Online marketplaces generally provide "personal" and "non-commercial" (all services), "non-exclusive" (Steam, EA Origin, Amazon, Google Play), "non-transferable" (EA Origin, Amazon), "limited" and "non-sublicensable" (Amazon) *access right*, where the services and contents are licensed, not sold, granted or waived.[1194] All services might be used by signing up for the service, and open an account (and hence provide personal data) to the service provider. Steam, EA Origin and Google Play require a running client and permanent Internet connection to access the content/server of the service.[1195] Apple Media Services offers the most flexible solutions to access contents. It is allowed e.g. to use contents from up to five different Apple IDs on each device; to burn audio playlists of purchased music to discs for listening purposes up to seven times; to use Individual Apple Music membership on up to ten

[1194] Steam SA 2.A; EA Origin UA 2; Amazon CU, License and Access; Apple Media Service TC, Services and Content Usage Rules, and Licenced Application End User License Agreement; Google Play TS, 2.
[1195] Steam SA 2.A; EA Origin UA 1; Google Play TS, 2.

devices (from five only five can be computers); to use DRM-free contents on a reasonable number of compatible devices that users own or control; to use DRM-protected contents on up to five computers and any number of devices that users sync to from those computers; to download apps and videos on a permanent basis (although access to these contents terminates once the user's subscription ends); or to stream audio-visual contents on up to three devices simultaneously. Apple also recommends creating back-up copies for safety purposes.[1196] Google Play's TS applies the expressions "purchase", "buy" and "sale contract" in the same sentence, but elsewhere it declares that "Content that you purchase or install will be available to you through Google Play for the period selected by you, in case of a purchase for a rental period, and in other cases as long as Google has the right to make such Content available to you".[1197] As such, it effectively reduces "purchase" to a limited access right to browse, locate, view, stream or download content to synchronized devices. At the same time, Google Play, similarly to Apple's cloud service, allows for online storage (including scans and matches of files stored on local devices of users) of acquired contents.[1198]

The *restricted uses* include "copying", "distribution", "reverse engineering" or "use/derive source code" (Steam, EA Origin); "photocopy", "reproduce", "publish", "translate", "modify", "disassemble", "decompile", "create derivative works", "remove any proprietary notices", "sell", "grant security interest in", "transfer reproductions", "rent", "lease" and "license" the available contents (Steam); "resale", "collection and use of any product listings, descriptions, or prices; any derivative use of any Amazon Service or its contents; any downloading, copying, or other use of account information for the benefit of any third party; or any use of data mining, robots, or similar data gathering and extraction tools", "framing techniques"; as well as "compilation", "modify", "create derivative works", "distribute", "assign any rights to, or license the Amazon Software in whole or in part" and "reverse engineering" with respect to computer programs (Amazon).[1199] Google Play's TS similarly includes a broad range of restricted uses, which, among many of the above uses, include. the prohibition of redistribution, the use of stream-ripping, stream capture or similar software to record or create a copy, the circumvention, disabling or defeating any of the security features or components, the removal of watermarks, labels or other legal or proprietary notices.[1200] The restrictions under Apple Media Services' TC might be indirectly deducted from the scope of access rights (which are limited to personal and non-commercial uses).

Online marketplaces regulate *UGC* in a sensibly different manner. EA Origin is quite restrictive in this regard, and focuses mainly on the limitations of a UGC-experience. Users are not allowed to "publish, post, upload, or distribute" such illegal or unauthorized UGC.[1201] If the UGC violates EA Origin's terms, the platform is entitled to "remove, edit, or disable

[1196] Apple Media Service TC, Services and Content Usage Rules.
[1197] Google Play TS, 3 and 4.
[1198] Google Play TS, 2.
[1199] Steam SA 2.G; EA Origin UA 2; Amazon CU, License and Access and Additional Amazon Software Terms.
[1200] Google Play TS, 2.
[1201] EA Origin UA 6.

UGC". Otherwise, "EA is not responsible or liable for UGC, or for removing it. EA does not pre-screen UGCs".[1202] To the contrary, Steam enables interaction with other users, to create and to share via a more vivid and flexible user interface. Users can incorporate content into Fan Art. By doing so, they are entitled to "use, reproduce, publish, perform, display, and distribute Fan Art on a non-commercial basis".[1203] The Steam interface can be used for generating further UGCs other than Fan Art that can also be made available to other users or to Steam.[1204] Amazon allows for posting of reviews, comments, communications and other content on its site, as long as they are not infringing third parties' rights, including IP rights.[1205] Apple Media Services allows users to submit "materials" such as comments, pictures, videos, and podcasts, but only as long as users have the permission, right or license to do so.[1206] Google Play is designed to offer only authorized contents, rather than pure UGC. As such, even amateur content developers are treated to be rightholders in Google Play's ecosystem.

Both Steam and EA Origin necessitate the *granting of broad rights* and entitlements regarding their (and their users') use of UGCs. Such licences are generally "worldwide" and "non-exclusive" (Steam, EA Origin, Amazon, Apple Media Services), "perpetual" (EA Origin, Amazon, Apple Media Services), "irrevocable" (Amazon), "royalty-free" (Amazon, Apple Media Services), "sublicensable" (EA Origin, Amazon), "transferable" and the use is "without further notice, attribution or compensation to the user" (EA Origin). Among the permitted uses "use", "reproduce", "modify", "create derivative works from", "transmit", "communicate", "publicly display", "publicly perform" can be found.[1207] Steam further lists "distribute", "transcode", "translate" and "broadcast",[1208] while EA Origin acquires the right to "host" and "store" UGC.[1209] Google Play applies the same standard of rights granted to Google by all and any uploaders/sellers.

The rules on *technological restrictions* show significant differences, too. EA Origin does not guarantee permanent availability of the service, content, or entitlements in all locations. It does not either guarantee that its service can be accessed on all devices, or in all geographical locations.[1210] Steam requires the creation and running of an account, as well as to permanently maintain an Internet connection to use the content.[1211] Amazon is silent on technological restrictions. Apple Media Services, to the contrary, is generous in this regard, as it allows for simultaneous uses even if DRM is applied; but a significant amount of content is DRM-free on Apple Media Services. Google Play strictly protects the various technological

[1202] EA Origin UA 5.
[1203] Steam SA 2.D.
[1204] Steam SA 6.
[1205] Amazon CU, Reviews, Comments, Communications, and Other Content.
[1206] Apple Media Service TC, C.
[1207] Steam SA 6.A; EA Origin UA 5; Amazon CU, Reviews, Comments, Communications, and Other Content, Apple Media Service TC, C.
[1208] Steam SA 6.A.
[1209] EA Origin UA 5.
[1210] EA Origin UA 4.
[1211] Steam SA 2.A.

restrictions (it applies e.g. watermarks) and prohibits any possible circumvention of them. Google Play also expressly declared that the availability of contents might vary between countries.[1212]

Secondary dissemination (especially resales of contents and transfer of subscriptions) is generally excluded by online marketplaces. Nevertheless, some service providers grant flexible options to share contents with end-users. The "Subscription Marketplaces" of Steam allow users to trade, sell, or purchase "certain types of subscription", such as licenses related to virtual items.[1213] Besides offering access to contents on multiple devices and in multiple copies generously, Apple Media Services offers for a broad family sharing possibility as well. As such, users might share eligible contents up to six members of a family (although users can only belong to one family at a time, and cannot join any family more than twice a year).[1214] Google Play loosely declares that family sharing might be available.[1215]

Online marketplaces are uniformly strict regarding contract *modification and termination*. EA Origin might modify the agreement from time to time. If users continue to use the service, they accept the changes, but any revisions will become effective only 30 days after posting at EA Origin's website.[1216] Steam and Google Play obliges itself to notice user at least 30 days prior to the amendments; but continued use means acceptance of the modifications.[1217] Amazon, however, remains silent on how it intends to inform its clients on changes. To the contrary, it merely declares that it "reserve(s) the right to make changes" to its CU.[1218] Apple Media Services similarly reserves the right to make amendments to its terms, which become immediately effective; the continued use of services are deemed to be acceptance of such terms; but Apple misses to oblige itself to notify its clients on the changes.[1219] Online marketplaces generally allow for the termination of the service by the user, or by the platform, in case the user breaches any terms of the agreement, e.g. unlawful, improper, or fraudulent uses.[1220] Similarly to its modification terms, Apple Media Services might terminate the agreement with its client without noticing them about the decision.[1221]

Online marketplaces' *procedural safeguards* also show great diversity. Steam operates both a notice-and-take-down system to manage copyright infringements,[1222] and a complaint-and-redress mechanism for the benefit of users. This latter mechanism is two-staged. At first, users must try to seek for solution via the Steam support site.[1223] If the support

[1212] Google Play TS, 2 and 4.
[1213] Steam SA 2.D.
[1214] Apple Media Service TC, D.
[1215] Google Play TS, 2.
[1216] EA Origin UA 14.
[1217] Steam SA 8; Google Play TS, 2.
[1218] Amazon CU, Site Policies, Modification, and Severability.
[1219] Apple Media Service TC, Contract Changes.
[1220] Steam SA 9.B; EA Origin UA 8; Amazon CU, License and Access; Google Play TS, 2.
[1221] Apple Media Service TC, Termination and Suspension of Services.
[1222] Steam NCI.
[1223] Steam Support.

cannot provide remedy to the problem, the parties must arbitrate any claims related to either the agreement, the use of Steam, or user account, "except IP, Unauthorized Use, Piracy, or Theft".[1224] Claims in these fields must be brought in court with jurisdiction.[1225] EA Origin's mechanism is slightly similar. Users must first seek remedy via customer support.[1226] Every dispute, other than that related to intellectual property, falls under the scope of binding arbitration. The parties must try to informally settle the dispute 30 days prior to initiating the arbitration.[1227] Amazon, however, only operates a DMCA-compliant notice-and-take-down regime,[1228] and directs any user complaints to compulsory arbitration mechanism.[1229] Apple Media Services only regulate a general copyright notice system. It might be used by both professionals and users as well, if they believe that any content on Apple's services infringe a copyright of the given person.[1230] Google Play's TS is silent on copyright procedures related to allegedly infringing materials, but any such complaints and counterclaims might be submitted via Google's condensed, central page.[1231]

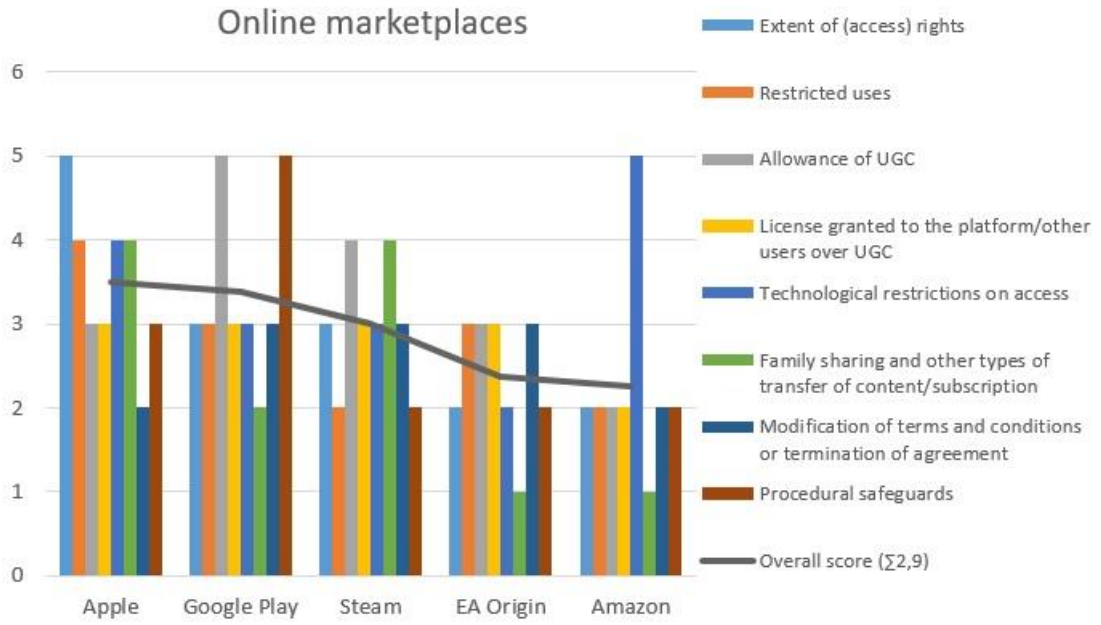
5.3.2 USER-FLEXIBILITY INDEX

Online marketplaces are generally shy on providing flexible access rights to end-users. This approach is mainly due to the online marketplaces' role in the dissemination of primarily third-party contents that are only licenced to these platforms by the content creators. Hence the stricter "as is" terms. Similarly, while online marketplaces creatively call "dissemination" of contents as sale, transfer or purchase, these acquisitions remain outside of the scope of the right of distribution and the doctrine of exhaustion. These, in conjunction with certain platforms' (e.g. Steam's) reliance on UGC/fan art, the requirement of broad grants of rights by users on UGC for the benefit of platforms in exchange of unpaid data sharing,[1232] the strict modification and termination terms, and (in the majority of cases) the underdeveloped complaint-and-redress mechanisms lead to an asymmetric contractual situation and limited user flexibilities. The fact that the overall average score of online marketplaces is still higher than that of streaming sites without hosting service is mainly due to various meaningful business model flexibilities, like Apple's broad service involving redownloads, family sharing and multiple devices uses or Google's well-developed complaint-and-redress mechanisms. Based on our findings, we conclude that Apple Media Service is the most, and Amazon is the

[1224] Steam SA 11.
[1225] ibid.
[1226] EA Help.
[1227] EA Origin 15.
[1228] Amazon CU, Notice and Procedure for Making Claims of Intellectual Property Infringement.
[1229] Amazon CU, Disputes.
[1230] Apple Media Service TC, Copyright Notice.
[1231] See: 'Removing Content From Google - Legal Help' (*YouTube*) <https://support.google.com/legal/troubleshooter/1114905?hl=en> accessed 8 July 2022.
[1232] On the monetization of "free labour" see S Kopf, '"Rewarding Good Creators": Corporate Social Media Discourse on Monetization Schemes for Content Creators' (2020) Social Media + Society 1-12.

least user-friendly streaming site with hosting service. The average score of this group of services is 2.9 points.

Variables / platforms	Apple	Google Play	Steam	EA Origin	Amazon
Extent of (access) rights	5	3	3	2	2
Restricted uses	4	3	2	3	2
Allowance of UGC	3	5	4	3	2
License granted to the platform/other users over UGC	3	3	3	3	2
Technological restrictions on access	4	3	3	2	5
Family sharing and other types of transfer of content/subscription	4	2	4	1	1
Modification of terms and conditions or termination of agreement	2	3	3	3	2
Procedural safeguards	3	5	2	2	2
Overall score (∑2,9)	**3,5**	**3,38**	**3,00**	**2,38**	**2,25**



5.4 SOCIAL MEDIA

5.4.1 ANALYZED VARIABLES

Social media's business model is predominantly based on the sharing of personal and publicly available information by and among end-users (including professionals who are willing to publicize their activities, including protectable subject matters). It is based on constant, general and public availability of data rather than proprietary or exclusive access to that (even if platforms offer space to privately host information, too).

Twitter provides a "personal", "worldwide", "royalty-free", "non-assignable" and "non-exclusive" license to *access and use* the service.[1233] Neither Facebook's ToS, nor Instagram's ToU includes any similar term. Both documents highlight the primacy of personalised experiences, and connected, global and free speech-oriented nature of the services.[1234]

As social media platforms primarily focus on the dissemination of user content, they rarely *restrict uses* by straight regulatory limitations. To the contrary, they either have general prohibitions (e.g. users cannot do anything that violates someone else's IP rights)[1235] or they encode the available functionalities, and expressly state that users shall use (and not misuse) the interface and instructions of the platform.[1236] Such "flexibility" is therefore delusive: end-users might only do what they are allowed to do by the code.

Social media services allow for the broad use of original contents and *UGC*, including literary (e.g. tweets), visual (e.g. images), audio (e.g. music), audio-visual (e.g. from clips and animations to longer videos). The analysed platforms unanimously declare that the users

[1233] Twitter ToS 3. Your Rights and Grant of Rights in the Content.
[1234] Facebook ToS 1.; Instagram ToU, The Instagram Service.
[1235] Facebook ToS 3.2.; Instagram ToU, Your Commitments.
[1236] Twitter ToS 4. Using the Services.

retain the rights on the contents submitted, posted or displayed by end-users.[1237] Twitter expressly requires users to warrant for the lawful nature of the said contents (including the acquisition of the necessary authorization to disseminate information).[1238] Platforms further declare that they retain the right (but are not generally obliged) to remove all and any infringing content from their services.[1239]

Social media platforms necessitate the *granting of broad* ["worldwide", "non-exclusive", "royalty-free", "sublicensable" (all services); "transferable" (Facebook; Instagram)] *rights and entitlements* to "to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute (…) for clarity, these rights include, for example, curating, transforming, and translating" UGC (Twitter);[1240] "to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content" (Facebook and Instagram).[1241]

Social media services are quite flexible with this respect to *technological restrictions*. The terms of Facebook and Instagram are generally silent on this topic, but the platforms' functionalities (their code) clearly delineate users' possibilities in this respect. Twitter has a distinct and detailed description of the technological features of the use of its service.[1242] These provisions (descriptions, rather than regulations) might limit the user experience at the user interface level (e.g. exclusion of download option), but they do not apply restrictions like geo-blocking.

Secondary – especially unchanged – *dissemination* of user submissions is of crucial importance for social media. All selected platforms regulate that end-user must allow fellow users, in line with the applied interface, to enjoy and share contents via social media. As, however, end-users do not transfer any ownership interests to platforms, platforms cannot either allow others to acquire any interests over the exact content posted on the social media. As such, at least theoretically, secondary uses are strictly limited to intangible postings rather than the acquisition and resale of any uploaded (maybe copyright protected) materials.[1243] Family sharing has no role in social media. All users have their own registration/identity, and the sharing of profiles is both unnecessary and excluded.[1244] Facebook and Instagram have recently limited end-users' flexibilities regarding secondary dissemination. With the effect of October 1, 2020, these platforms changed their terms to exclude the unauthorized embedding of third parties' images.[1245]

[1237] Twitter ToS 3. Your Rights and Grant of Rights in the Content; Facebook ToS 3.3.; Instagram ToU, Your Commitments.

[1238] Twitter ToS 3. Your Rights and Grant of Rights in the Content.

[1239] Twitter ToS 3. Content on the Services; Facebook ToS 3.2.; Instagram ToU, Content Removal and Disabling or Terminating Your Account.

[1240] Twitter ToS 3. Your Rights and Grant of Rights in the Content.

[1241] Facebook ToS 3.3; Instagram ToU, Your Commitments.

[1242] See: 'Using Twitter' (*Twitter*) <https://help.twitter.com/en/using-twitter> accessed 8 July 2022.

[1243] But See the famous Richard Prince case discussed below.

[1244] Facebook ToS 3.1.; Instagram ToU, Your Commitments.

[1245] DL Cade, 'Instagram Says You Need Permission to Embed Someone's Public Photos' (*PetaPixel*, 5 June 2020) <https://petapixel.com/2020/06/05/instagram-says-you-need-permission-to-embed-someones-public-

Social media services reserve the right to unilaterally *modify the terms of service*. Twitter explains that it "will try to notify" users of the changes, but upon the continuous use of the service the end-user agrees to be bound by the new terms.[1246] Facebook and Instagram notify users at least thirty days before the changes happen, and allow users the "opportunity to review" the new terms. This nevertheless leaves users with only two options: either to follow the new terms by continuous use of the service or terminate the user account.[1247] The platforms might terminate the user account upon the material breach of the terms of service. The user might voluntarily *deactivate* her account as well. In the case of Twitter, all information (including the username and the uploaded information) will be permanently erased following a thirty-day cool-off period, if the user does not request to reactivate the account.[1248]

These platforms offer a detailed set of *complaint-and-redress mechanisms*. Twitter's DMCA policy both offers for the rules on smooth content removal, as well as a clear mechanism to retract the mistakenly removed content.[1249] Facebook and Instagram offer only a general guideline on counter-notifications but miss to offer a helping hand to end-users in enforcing their rights against false removals.[1250]

5.4.2 USER-FLEXIBILITY INDEX

Since end-users are the primary generators of contents on social media, these platforms set up an architecture to offer the broadest and most flexible environment to share and access information with others. Professional creators are also able to (and many of them, especially influencers and celebrities, practically) use social media to share protected expressions. End-users' freedoms are nevertheless delusive in the sense that platforms strictly code the functionalities of their websites. This is best evidenced by the recent changes of Instagram's and Facebook's terms related to embedding. The recent US case law shows that certain courts are ready to sidestep the "server test" developed some time ago in the Perfect 10 v Amazon case.[1251] Most recently, various US federal courts argued that not only the person, who originally uploaded to and hosted a given content on a server, but subsequent link setters shall also be liable for the use of the content (especially

photos/> accessed 8 July 2022; Brittany Hillen, 'Mashable Embedded Image Copyright Case Revived over Surprising Facebook Statement' (*DPReview*) <https://www.dpreview.com/news/7591192231/mashable-embedded-image-copyright-case-revived-over-surprising-facebook-statement> accessed 8 July 2022.

[1246] Twitter ToS 6. General.

[1247] Facebook ToS 4.1.; Instagram ToU, Updating These Terms.

[1248] See Twitter's https://help.twitter.com/en/managing-your-account/how-to-deactivate-twitter-account accessed , Facebook's https://www.facebook.com/help/224562897555674?ref=tos accessed and Instagram's provisions https://help.instagram.com/370452623149242?ref=igtos accessed in this regard.

[1249] Twitter CP.

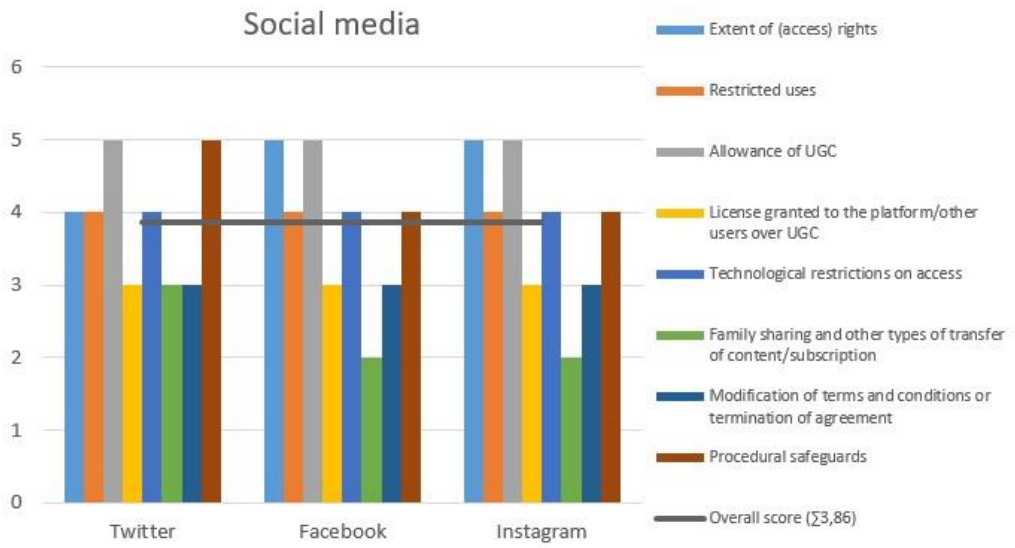
[1250] See Facebook's https://www.facebook.com/help/1020633957973118 accessed and Instagram's https://help.instagram.com/126382350847838?helpref=page_content accessed identical provisions in this regard.

[1251] Perfect 10, Inc. v Amazon.com, Inc., 487 *F.3d* 701 (2007).

framed/embedded images/videos).[1252] The changes to the terms of social media platforms is therefore to limit the chances of liability (of both users and the platforms themselves). However, such developments might have unexpected side-effects. In certain circumstances, the secondary use of UGC shared over social media might be found fair use under US law. But if Richard Prince displays enlarged UGC photos on the wall of art galleries or sells those photos with slight textual/visual complements to the image is lawful,[1253] then the limitation of resharing of images by news reporters or even non-commercial users by the code of platforms might seem to be unproportioned. Like the other analysed platforms, social media services have "as is" terms. Their modification and termination show therefore minor differences compared to the other EULAs. The termination of any user account has much more legal implications from a data protection or unfair competition perspective.[1254] Based on our findings, all platforms in this group scored 3.86 overall.

Variables / platforms	Twitter	Facebook	Instagram
Extent of (access) rights	4	5	5
Restricted uses	4	4	4
Allowance of UGC	5	5	5
License granted to the platform/other users over UGC	3	3	3
Technological restrictions on access	4	4	4
Family sharing and other types of transfer of content/subscription	3	2	2
Modification of terms and conditions or termination of agreement	3	3	3
Procedural safeguards	5	4	4
Overall score (∑3,86)	**3,86**	**3,86**	**3,86**

[1252] Justin Goldman v Breitbart News Network, LLC, et al., 302 *F.Supp.3d* 585 (2018); Sinclair v Ziff Davis, LLC, 454 *F.Supp.3d* 342 (2020); McGucken v Newsweek LLC, 2020 *WL* 2836427 (2020).
[1253] Patrick Cariou v Richard Prince, et al., 714 *F.3d* 694 (2013), *cert. denied*, 134 *S.Ct*. 618 (2013).
[1254] On social media and the "right to be forgotten" see e.g. Eugenia Georgiades, 'Down the Rabbit Hole: Applying a Right to Be Forgotten to Personal Images Uploaded on Social Networks' (2020) 30 Fordham Intellectual Property, Media & Entertainment Law Journal 1111. Court proceedings related to the unfair nature of WhatsApp's terms and the sharing of WhatsApp data with Facebook were initiated in Italy. See Alessandro Cervone, 'Unfair Contract Terms and Sharing of Data with Facebook, towards a Better Protection of Social Media Users: The WhatsApp Cases' (2017) 2 Italian Antitrust Review 204.



5.5 AFTER THE ENTRY INTO FORCE OF THE CDSM DIRECTIVE: NEW EMPIRICAL FINDINGS

In addition to the new liability regime for OCSSPs, Article 17 of the CDSM Directive also contains rules on user flexibilities. Article 17(7) provides that OCSSPs must not impede the availability of legitimate end-user content, and users can rely on a number of exceptions when receiving and transmitting information by using the platforms. Article 17(8) makes it clear that OCSSPs do not have a general monitoring obligation, i.e. they are not required to monitor the legality of end-user content in general or whether such content falls within the scope of the permitted exceptions. Finally, Article 17(9) obliges OCSSPs to put in place effective and prompt complaint and redress mechanisms and to inform users in end-user license agreements of the possibilities provided by limitations and exceptions under EU law.[1255] In its guidance on the implementation of Article 17, the European Commission made the liability regime conditional on the proper functioning of safeguards that also take into account the legitimate interests of end-users.[1256]

The range of platforms examined in the first phase of the research was narrowed down in the second phase. This was justified not only by the guarantees contained in Article 17 already mentioned above, but also by the fact that the new liability regime of Article 17 is limited in Article 2(6) and recital 62 to OCSSPs, whose main activity is the hosting and provision of access to the public of a substantial amount of copyright works or other protected subject matter uploaded by end-users, and in addition the aggregation and promotion of protected content for profit. Below, we examine the conditions of use of eight OCSSPs to see how they have met

[1255] Compare Sebastian F Schwemer and Jens Schovsbo, 'What Is Left of User Rights? Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (4th edn, Wolters Kluwer 2020).
[1256] Communication from the Commission to the European Parliament and the Council – Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, Brussels, 4.6.2021, COM(2021) 288 final, 18–25.

the requirements of the CDSM Directive. In addition, we examine what complaints and redress mechanisms are in place to address any complaints from end-users.

5.5.1 VIDEO-SHARING PLATFORMS

YouTube's end-user license agreement was last modified on 5 January 2022.[1257] According to it, uploaded contents may only include another person's copyrighted work or other subject matter if that party has given its consent or if the user is otherwise entitled to upload the said content (including by relying on exceptions or limitations).[1258] YouTube may use automated systems to analyse the legality of uploaded content and to identify infringements and abuse. Where infringing content is uploaded, operators may remove all or a specified part of the content, and the end-user concerned will be notified of this decision. In terms of end-user guarantees, the main text of YouTube's terms of use does not provide much further guidance, but the relevant information can be found in YouTube's Help Desk.

On the "Copyright Notices - Basics" page, the end-user is informed about the substance and procedure for notification and removal. YouTube provides three options for lifting the copyright warning. First, the end-user can wait until the warning period expires (90 days). In case of a first warning, the end-user must even attend a Copyright School. Second, the end-user can try to get the rights holders to withdraw the copyright claim. In this regard, the terms of use note very narrowly that "each creator will indicate on their channel how to contact them."[1259] A further point of reference for end-users seeking redress may be the requirement for contact details in removal requests.[1260] Third, end-users have the possibility to file a counter-notification if they believe that the video has been wrongly removed, for example because it is "fair use".[1261] YouTube will forward the counter-notification to the claimant, who will have 10 working days to respond. If the requester (the initiator of the notification and removal procedure) still wishes to prevent the content from being restored, it must provide evidence to that effect.[1262] Of particular interest is that YouTube refers to the use of the fair use test as regards European end-users as well, although this concept is not used in the

[1257] 'Terms of Service' (*YouTube*) <https://www.youtube.com/static?gl=GB&template=terms> accessed 8 July 2022.
[1258] "Your content and activities - upload content", Ibid.
[1259] Withdrawal of a claim for copyright infringement, see: 'Retract a Claim of Copyright Infringement' (*YouTube*) <https://support.google.com/youtube/answer/2807691#zippy=%2Cha-elt%C3%A1vol%C3%ADt%C3%A1si-k%C3%A9relmet-ny%C3%BAjtott%C3%A1l-be%2Cha-a-tartalmadat-elt%C3%A1vol%C3%ADtott%C3%A1k.> accessed 8 July 2022.
[1260] Contact details included in removal requests for copyright infringement, see: 'Contact Information for Copyright Takedown Requests' (*YouTube*) <https://support.google.com/youtube/answer/7580521?hl=hu&ref_topic=9282363.> accessed 8 July 2022.
[1261] Copyright warnings - basics. Settlement of copyright warnings, see: 'Copyright Notices: Basics' (*YouTube*) <https://support.google.com/youtube/answer/2814000#zippy=%2Cszerz%C5%91i-jogi-figyelmeztet%C3%A9sek-rendez%C3%A9se.> accessed 8 July 2022.
[1262] 'Filing a Copyright Counterclaim' (*YouTube*) <https://support.google.com/youtube/answer/2807684>.

Continental European copyright law at all. In any case, YouTube explains in detail the four steps of the fair use test and even gives examples of how it can be applied in practice.[1263]

YouTube uses Content ID tracking in addition to the notification and removal process and the end-user counter-notification that may be provided in response. This is an automatic claim that is triggered when an uploaded video matches another video or part of another video. It is essentially up to the rights holder to decide whether to block the video or to keep it available with advertising.[1264] End-users who upload Content ID-required videos may leave the content up, but they may also choose to remove it, in whole or in part, for that segment; and may even end up having to split the advertising revenue between the rights holder and the end-user.[1265] If the end-user does not agree with the Content ID claim, she may contest it, of which the copyright holder will be notified and will have 30 days to respond. The claimant can withdraw the claim, after which the system will automatically restore the content. If the claim is maintained by the rights holder, the end-user can appeal against it. As a third option, the rights holder can request the removal of the content or simply ignore the claim. If the end-user appeals, the rights holder has an additional 30 days to respond, which is essentially the same procedure as the pre-appeal procedure.[1266]

Viewed from the CDSM Directive's perspective, YouTube has transposed Article 17(7) to (9) obligations into its contractual practice only in principle. YouTube's procedure is not only slow and inflexible for end-users, but they also ignore Continental European copyright doctrine (namely, limitations and exceptions) and envisage the use of a typical American legal institution (namely, fair use). In addition, YouTube intends to exclude its primary liability for any infringing content uploaded by end-users.[1267] Such terms of liability exclusion is clearly incompatible with the CDSM Directive's new liability regime.

It shall also be noted that YouTube was the first OCSSP to publish a detailed transparency report on copyright infringements. The company's first report was published on 6 December 2021, covering the six months before the deadline for transposition of the CDSM Directive (January-June 2021).[1268] The second such report (covering July-December 2021, the first months of the post-implementation period of the CDSM Directive) was published recently.[1269]

[1263] Fair use on YouTube, see: 'Fair Use on YouTube' (*YouTube*) <https://support.google.com/youtube/answer/9783148?hl=hu.> accessed 8 July 2022.

[1264] 'What Is Content ID Claim?' (*Google*) <https://support.google.com/youtube/answer/6013276. [>.

[1265] Earning revenue from authorised videos containing processing, see 'Monetization of Eligible Videos Containing Processing' (*YouTube*) <https://support.google.com/youtube/answer/3301938> accessed 8 July 2022.

[1266] Content ID claim dispute, see: 'Dispute a Content ID Claim' (*YouTube*) <https://support.google.com/youtube/answer/2797454#appeal> accessed 8 July 2022.

[1267] 'Limitation of Liability' (*YouTube*) <https://www.youtube.com/static?gl=GB&template=terms>.

[1268] 'YouTube Copyright Transparency Report H1 2021' (*YouTube*) <https://transparencyreport.google.com/report-downloads>.

[1269] 'YouTube Copyright Transparency Report H2 2021' (*YouTube*) <https://transparencyreport.google.com/report-downloads>.

YouTube uses three types of copyright protection mechanisms (Webform, Copyright Match and Content ID), of which Content ID is by far the most important. During H1 2021, 722.6 million notifications passed through this system, which were initiated by 4893 rights holders (53.7% of the 9115 eligible clients of YouTube).[1270] For the 722 million complaints, there were around 3.7 million objections from content uploaders. Once these objections have been lodged, the rights holder could withdraw the complaint, maintain it, or take no further action and let the complaint expire after 30 days. According to YouTube, 2.2 million complaints against uploaded contents have been dropped and 1.47 million were upheld by rights holders. In the latter case, the end-user could file an appeal, against which the rights holder must have taken the dispute to the official removal procedure, which is governed by the US Digital Millennium Copyright Act (DMCA). This has happened in 38,864 cases. There were only 4471 cases where uploaders objected to these removals.[1271] YouTube's second transparency report, covering the second half of 2021, shows a sensible cca. 5% increase in the overall use of the Content ID regime, but the other numbers suggest that the regime has not been used much differently and with different success rate in this period than in H1 2021.[1272]

YouTube's data are raw numbers - it's very difficult to read the reality from them. For one thing, they do not answer the question of whether the contested uploads were actually infringing or whether they were just assumed to infringe exclusive rights under copyright law. It is also not clear whether the low number of end-user objections, appeals and counterclaims represents an admission of infringement or whether the average youtuber has little knowledge of how to defend her rights and may be frightened by the potential legal costs.[1273]

DailyMotion's service is very similar to YouTube's profile, and the fact that it is based in France, an EU Member State, is a particular reason to examine its terms of use. The last amendments of the terms of use took place on 19 January 2022.[1274] With regard to the legality of the content uploaded, the operators exclude any direct liability and any obligation to monitor the content uploaded in general, including prior filtering. The end-user uploading the content is solely responsible for the content.[1275] If a content has been deleted through a

[1270] YouTube Copyright Transparency Report H1 2021, 5.
[1271] For all data see, ibid., 10–11.
[1272] As such, 3,810,395 claims were submitted against removal, from which in 1.43 million instances did YouTube uphold its removal in favour of the rights holder. Rights holders issued a DMCA notice regarding 43,198 individual contents, and end-users submitted 3,965 counter-notifications in these cases. See YouTube Copyright Transparency Report H2 2021, 10–11.
[1273] For a first analysis of the report see: Paul Keller, 'YouTube Copyright Transparency Report: Overblocking Is Real' (*Kluwer Copyright Blog*, 9 December 2021) <http://copyrightblog.kluweriplaw.com/2021/12/09/youtube-copyright-transparency-report-overblocking-is-real/> accessed 8 July 2022.
[1274] Section 9: Miscellaneous, Point 9.5, also see: 'Terms Of Use – Dailymotion Legal' (*Dailymotion*) <https://legal.dailymotion.com/en/terms-of-use> accessed 8 July 2022. This is also evident from the fact that French law is applicable to any disputes that citizens of the EEA, the UK and Switzerland may have with operators.
[1275] Section 5: Our Liability as a Hosting Service Provider, Ibid.

notification and takedown procedure,[1276] the end-user concerned can send a counter-notification through the platform to the rights holder.[1277] The terms of use available online do not contain any further provisions. This is somewhat surprising in light of the fact that France has already implemented the provisions of the CDSM Directive well before 2022.

Under Twitch's terms of use, which were last amended on 1 January 2021, the operators of Twitch, the market leader in the online streaming of video game-plays, places all primary responsibility on the end-user who uploads the infringing content.[1278] The platform uses security measures to protect the uploaded content from unlawful acts of reproduction, distribution and communication to the public. In addition, the operators do not accept any liability for any infringements that occur despite these measures.[1279] For copyright infringement, the terms of use follow the rules of the DMCA, which allow rights holders to mark infringing content for removal through a notice and takedown procedure.[1280]

Interestingly, Twitch maintains a repertoire of licensed music that end-users can choose from to enhance their uploaded videos. Twitch, however, applies a caveat according to which the music cannot be used for any other purpose and that operators can make any element of the repertoire unavailable at any time if the usage contract for any of the sound recordings is terminated or expires.[1281]

Twitch has additional, separate music guidelines for musical works and sound recordings (Music Guidelines). End-users can not only choose from Twitch's music offerings, but can also upload content that includes otherwise licensed music.[1282] The terms recognize that there may be otherwise unauthorized music and sound recordings that are subject to the fair use test, including transformative uses or works in the public domain.[1283] Content removed under the notice and takedown procedure can also be restored by Twitch, also by filing a counter-notification, if the end-user "believes that his or her actions comply with free use under US law."[1284]

Users of the Hungarian Videa must warrant[1285] that they have the necessary copyright permissions to use the uploaded content and are responsible for any copyright infringement.[1286] The platform operators exclude any liability for any damage caused by the

[1276] 'Copyright – (I) Copyright Notification', (*Dailymotion*) <https://legal.dailymotion.com/en/copyright.>.
[1277] Copyright – (II) Copyright Counter Notification, Ibid.
[1278] User Content Representations and Warranties, see: 'Twitch.Tv - Terms of Service' (*Twitch.tv*) <https://www.twitch.tv/p/en/legal/terms-of-service/#8-user-content.> accessed 8 July 2022.
[1279] Content is Uploaded at Your Own Risk, Ibid.
[1280] Respecting Copyright, Ibid.
[1281] Specific Terms for Soundtrack by Twitch, ibid.
[1282] 'Sharing Music on Twitch' (*Twitch.tv*) <https://www.twitch.tv/p/en/legal/community-guidelines/music.>.
[1283] Uses Permitted by Law, ibid.
[1284] 'How to Make a Counter-Notification?' (*Impresszum*) <https://www.twitch.tv/p/hu-hu/legal/dmca-guidelines.>.
[1285] 'Impresszum' (*Impresszum*) <https://videa.hu/impresszum>.The last update of the terms of use is 31 May 2021.
[1286] 'Copyright' (*Impresszum*) <https://videa.reblog.hu/cimke/%C3%81SZF>.

content of the uploaded videos.[1287] Operators can remove all or any part of the infringing contents or contents that violate the terms of use, but they are not obliged to know the actual substance of the uploaded videos. If the rights holders wish to challenge the lawfulness of an uploaded content, they may request the removal of the content by a written notice. In this case, the operator's liability is governed by the terms of use[1288] in accordance with Articles 10 and 13 of the E-Commerce Act.[1289] Videa's end-user license agreement does not, however, contain any guarantees protecting end-users' interests.

Pornhub, one of the world's largest adult content providers, sets very detailed terms of use for end-users of its platform. This fact was already evident in the previous phase of the research. The terms and conditions have not been changed since then, with the last modification date being 5 May 2021. The end-user is fully responsible for the legality of the uploaded content, for which the operator is not responsible and does not generally, but at most randomly, check the uploads.[1290] The operator reserves the right to remove content without notice. The notification and removal procedure are also available on Pornhub.[1291] End-users may contest the lawfulness of the removal in a counter-notification, which is sent by the operator to the rights holder.[1292] Pornhub has implemented an automated audio-visual content recognition system (digital video fingerprints) to help identify infringing content before it is made available.[1293]

5.5.2 SOCIAL MEDIA PLATFORMS

Facebook, the flagship of the Meta products, warns users in its terms of use that it employs advanced technical systems and supporting human resources around the world to prevent abuse and harmful behaviour, and may remove infringing content or make certain features inaccessible or disable the user account.[1294] It uses automated systems to detect and remove abusive and dangerous activities.[1295] Operators may remove or disable content that violates community principles, is unlawful, including intellectual property infringing, misleading, discriminatory or fraudulent, where this avoids or mitigates legal or regulatory impacts that negatively affect Facebook. The user will be informed of the fact of removal, but may request a review of the content, which will not be possible if the user has seriously or

[1287] Liability, Ibid.
[1288] 'Removal of Videos' (*Impresszum*) <https://videa.reblog.hu/cimke/%C3%81SZF>.
[1289] 2001. évi CVIII. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről (Act CVIII of 2001 on certain aspects of electronic commerce services and information society services).
[1290] Limited, Conditional License to Use Our Intellectual Property, see: 'Terms Of Service' (n 1219).
[1291] DMCA Reporting Claims of Copyright Infringement, see: 'DMCA Notice Of Copyright Infringement' (*Pornhub*) <https://www.pornhub.com/information/dmca> accessed 8 July 2022.
[1292] Counter-Notification Procedures, Ibid.
[1293] Video Fingerprints, Ibid.
[1294] Combat harmful conduct and protect and support our community, see: 'Terms and Conditions' (*Facebook*) <https://www.facebook.com/terms.php> accessed 8 July 2022.
[1295] Use and develop advanced technologies to provide safe and functional services for everyone, Ibid.

repeatedly violated the terms of use, or if doing so would expose Facebook to liability, either for itself or for others, or, inter alia, if it is prohibited for legal reasons.[1296]

Facebook sets out a specific policy for content that includes music, stating that the uploader is responsible for the legality of the content posted, and emphasising that Facebook is not responsible for any conduct that could give rise to secondary liability, i.e. not inviting infringing conduct.[1297] The Music Directives also state that any use for commercial purposes beyond the scope of private use is prohibited, in particular if the user has not obtained the necessary licences. In addition, Facebook cannot be used to "create a listening experience",[1298] and infringing content may be removed or made inaccessible.

Although the conditions of use under consideration were last amended on 20 December 2020, well before the implementation of the CDSM Directive in the Member States, there are still provisions to protect the interests of end-users against unjustified removals. To this end, Facebook operates an IP Operations Teams, which are tasked with removing only content that is truly infringing. End-users have the possibility to contest the claim with the rights holder who notified the content. Interestingly, if the legality of the content is disputed under DMCA rules, the user can send a counter-notification.[1299]

The terms of use for Instagram, the other Meta-product under review, were last updated on 4 January 2022. Here, too, the posting of illegal content is prohibited, which will result in the removal or blocking of content or information if it is "reasonably necessary" or would result in a legal or regulatory consequence or impact negatively affecting operators. The end-user will be informed of the removal.[1300] Moreover, Instagram's terms of use are silent on procedural guarantees for the benefit of end-users.

Facebook's Transparency Center publishes the number of contents removed from the platform by year. As of June 2021, operators have received 147,000 copyright infringement notifications – 519,000 individual items (84.44% of the contested contents) have been removed. According to Instagram's transparency report, as of June 2021, Instagram received 59,500 copyright infringement notifications, involving a total of 289,000 pieces of content - 88.41% of which were removed.[1301] Facebook and Instagram operators filter content not only on a notification basis, but also proactively. In June 2021, 604,000 pieces of content were deleted or made inaccessible on Facebook as a result of proactive filtering, 53.76% of which was copyright infringing content. On Instagram, a total of 349,000 pieces of content were

[1296] What you can share and do on Meta Products?, Ibid.
[1297] 'Music Guidelines' (*Facebook*) <https://www.facebook.com/legal/music_guidelines.>.
[1298] Ibid.
[1299] 'Supporting People Whose Content Is Reported' (*Facebook*) <https://transparency.fb.com/data/intellectual-property/protecting-intellectual-property-rights>.
[1300] 'Content Removal and Disabling or Terminating Your Account' (*Instagram*) <https://help.instagram.com/581066165581870>.
[1301] 'Notice and Takedown' (*Facebook*) <https://transparency.fb.com/data/intellectual-property/notice-and-takedown/facebook>.

removed as a result of proactive filtering, 53.76% of which were related to copyright infringement.[1302]

Twitter's terms of use differ[1303] depending on whether the user lives within or outside the European Union, EFTA countries, the United Kingdom, or the United States.[1304]

As a general rule, end-users are responsible for the legality of the content. Any liability of the platform is excluded by its terms of use.[1305] The operators neither do undertake the monitoring or other control of the legality of the posted content. However, Twitter reserves the right to remove contents that violate the legal or community principles.[1306] If the content is removed, the uploader will receive a copyright complaint, which she can contest in a counter-notice and ask the operators to restore the content. In addition, based on the information provided in the DMCA notice, the end-user may contact the rights holder directly to request withdrawal of the notice. By issuing a counter-notice, the end-user also consents to the jurisdiction of the United States courts in the event of a potential dispute. The operators shall forward the return the notification to the rights holder in the correct form. Twitter's end-user agreement also stipulates that Twitter will not provide any further legal advice.[1307]

Twitter also uses automated copyright claiming for live streams to help copyright holders identify unauthorised contents. The uploader may contest the removal of the filtered videos, in which case Twitter may reinstate the broadcast as a replay. The legal basis for contesting the claim may be the existence of a licence agreement or the existence of the fair use test.[1308] If they reinstate the broadcast, which the rights holder continues to contest, they have the option to send a notice through the traditional channels and request the removal of the content, which can also be contested by the end-user as described above.[1309]

[1302] 'Proactive Enforcement' (*Facebook*) <https://transparency.fb.com/data/intellectual-property/proactive-enforcement/facebook>.

[1303] The terms of use were last amended on 19 August 2021, after the deadline for implementation of the CDSM Directive.

[1304] Twitter Terms of Service – If you live outside the European Union, EFTA States, or the United Kingdom, including if you live in the United States; Twitter Terms of Service – If you live in the European Union, EFTA States, or the United Kingdom.

[1305] 'Twitter | Terms of Service' <https://twitter.com/content/twitter-com/legal/en/tos> accessed 8 July 2022.

[1306] Content on the Services, Ibid.

[1307] 'Twitter's Copyright Policy | Twitter Help' (*Twitter*) <https://help.twitter.com/en/rules-and-policies/copyright-policy> accessed 8 July 2022.

[1308] 'Fair Use Policy' (*YouTube*) <, https://help.twitter.com/en/rules-and-policies/fair-use-policy.>.

[1309] 'Automated Copyright Claims for Live Video' (*Twitter*) <https://help.twitter.com/en/rules-and-policies/automated-claims-policy>.

6 CONCLUSIONS: DESCRIPTIVE FINDINGS AND THE ROAD AHEAD

The mapping of EU legal sources of copyright flexibilities has drawn an all-encompassing picture of the state of the copyright balance in the EU, by (a) covering not only statutory interventions but also the CJEU's contribution to the harmonization in the field; (b) tracking all uses, purposes, policy goals and conflicting rights and interests privileged in the copyright balance against rightholders' prerogatives; (c) creating a blended taxonomy that could help navigating the patchwork of EU legislative interventions, by classifying provisions on the categories of uses, purposes/goals and rights/interests balanced against copyright, coupled with horizontal, catch-all categories such as "public domain" and "external copyright flexibilities."

The mapping of **EU legislative sources** covered all secondary law sources that intervened in a substantial manner on the copyright balance. The substantiality criterion was introduced to limit the sample of acts to a reasonable range and avoid listing provisions that just secondarily and cursorily touched upon copyright matters and the position of end-users. The categorization and analysis of the sources confirmed the presence of promising step forwards compared to the criticisms already highlighted by decades of legal scholarship on the matter, yet with persisting problems, such as:

- A **conceptual fragmentation and "clusterisation" of copyright flexibilities, with persisting gaps**. The closed-list approach to E/L, which requires the legislative introduction of a new provision every time a new balancing need emerges due to developments in technology, markets and socio-cultural needs, led to the construction of an articulated and complex array of intertwined provisions. This net of clustered rules inevitably presents overlaps, while at the same time leaving uncovered beneficiaries, uses and purposes that share similar balancing needs.

- The **contemporary presence of multiple regimes**, ranging from optional to mandatory E/Ls, or E/Ls that are mandatory only in specific fields (e.g. Article 17(7) CDSM), **hampering legal certainty**. This leads now to a system where some uses or purposes may take place cross-border in a setting characterized by legal certainty and uniformity, while others risk facing extreme national fragmentations as to beneficiaries and works covered, additional conditions and requirements imposed, and the like.

- The **outdated nature of several provisions**, which due to the rigidity of the EU system of copyright flexibilities requires the constant (and inevitably slow) intervention of the EU legislator to adjust existing provisions to new technological, market and social-cultural developments, or to introduce new provisions to the same end. Examples are the very long conception of the TDM, cultural preservation and digital teaching E/L, the outstanding questions on digital exhaustion, and the problems created by the definitions of reprography and private copy.

The mapping of the **relevant CJEU case law** helped complementing this overview and providing a comprehensive assessment of the current state of the art of EU copyright flexibilities and the benchmarks of their harmonization. The dataset and contextual/systemic analysis of the arguments and doctrines developed by the Court, classified through the same taxonomy used for EU legislative sources, offered a heterogeneous picture, which can be summarized as follows.

- Some sectors have been **heavily harmonized** and defined in a wide range of details (see, e.g. private copy, reprography and temporary reproduction) while others have been **completely left uncovered**, with a positive, ameliorating trend in the past years.

- Some optional exceptions have been **indirectly declared mandatory** and their **requirements clarified or standardized** against the silence of the corresponding EU provisions (parody and quotation).

- Some provisions have been **broadened in scope** and reach to safeguard their effectiveness and the underlying fundamental rights and public interest goals they aim at protecting (private study, e-lending).

- The notion and boundaries of **public domain** have been indirectly drawn by identifying basic principles to distinguish protected from non-protected works.

- In some instances, the Court has offered **game-changing interpretations** of certain provisions (e.g. the three-step test), or even triggered the countervailing reaction of the EU legislature to **overrule by law** the effects of some of its decisions (as in the *Reprobel* case).

- The area where the CJEU has most incisively impressed its touch so as to reshape the boundaries and operation of copyright flexibilities is the **fair balance doctrine** and the horizontal effects of fundamental rights on copyright E/Ls. Here, the Court admitted that fundamental rights are not only a complementary addition to the literal and contextual interpretation of existing sources, the validity of which *vis-à-vis* fundamental rights should have been presumed, so that a departure from the legislative text could be justified only in cases of gross violation of the essence of a fundamental right, which happens when there is no other available means for its exercise and realization. On the contrary, it stated that courts must provide, in any case, a fundamental-right compliant interpretation of exceptions – a circumstance that allows extensive readings and applications by analogy of existing E/Ls when necessary to protect fundamental rights and freedoms. In this context, the CJEU went as far as to state that the InfoSoc exceptions attribute rights to users, crystallizing the link between exceptions and CFREU provisions, and opening the gate for a more tailored, personalized consideration of the specificities of the case in the fair balance exercise. In addition, the Court returned to the functions of copyright as a benchmark to define the core content of each exclusive right in the strict proportionality

assessment, making a significant step forward towards the direction of developing and reinforcing the fair balance doctrine, as most recently testified by the very detailed proportionality analysis offered by *Poland v Commission*.[1310]

The **mapping of national legal sources** of copyright flexibilities **and their comparative analysis** provided a detailed overview of the state of the art of copyright flexibilities in all the 27 Member States, organized in 27 **national reports** which illustrated national provisions using the same taxonomy applied to EU sources. The reports commented on the main features of Member States' rules and, in case of correspondence to an EU provision, they assessed convergences, divergences and degree of flexibility compared to the EU model. If and when relevant, sub-sections also mentioned and briefly described landmark judicial decisions that contributed to shaping the content of national flexibilities. Already this static analysis showed:

- a **full reception of EU Directives and Regulations**, with the only exception of the CDSM Directive, which to date has still to be transposed by almost half of the Member States;
- the **alignment of the majority of Member States around the flexibility categories provided by the InfoSoc Directive**, with just a handful of national legislatures standing out for creativity and originality in the provisions introduced along and/or beyond the model introduced at the EU level;
- the presence of **some variations in the conceptualization of some permitted uses** (e.g., among others, temporary reproduction, some lawful uses, private copy/reprography, private study, illustration for teaching and research), which are either classified or labelled differently in different Member States, or are qualified as acts outside the scope of copyright instead of L&Es.
- along the same lines, the presence of a **wave of amendments of national copyright flexibilities after 2001**, which, however, **regarded only certain categories** (e.g., among others, disabilities, cultural uses, temporary reproductions, private copy, ephemeral recording, various types of lawful uses), **but not others** (e.g. parody, quotation);
- the **non-homogeneous reception of CJEU doctrines by national courts**.

Comparative reports followed the common taxonomy underlying this study and were limited to the categories for which the amount and relevance of data collected could allow sound, significant and verifiable assessments. This led to the exclusion of sectors which would have required, in light of their non-statutory basis, the reporting of sufficient judicial decisions by a substantial number of national experts (e.g. fundamental rights, public interest and users' rights), and of heterogeneous sectors such as consumer protection law, contract law,

[1310] Judgment of 26 April 2022, *Republic of Poland v European Parliament and Council of the European Union*, C-401/19, ECLI:EU:C:2022:297.

media law et al., due to the extremely fragmented nature of national experts' responses, which made it impossible to draw meaningful considerations.

Each report outlined convergences and divergences of Member States' solutions under each category of flexibility and, per each category of flexibility, under each provision or group thereof, looking at beneficiaries, rights, uses/rights and works covered, conditions and requirements imposed for the enjoyment of the flexibility, and other relevant aspects to be taken into account. To the extent possible, comparative reports incorporate the state of implementation of the CDSM Directive by Member States and verify the compliance of national laws and judicial decisions with the indications provided by the CJEU as to the interpretation of specific exceptions and limitations. The aim was to assess the degree of harmonization of national responses and to evaluate the comparative degree of flexibility of Member States' solutions, in order to provide a sound objective basis for the normative conclusions and policy recommendations which will be issued at the end of September 2022.

The findings confirm the scenario illustrated by previous legal mapping with regard to the fragmentation of national solutions. Compared, however, to the very negative picture depicted in the past, the study highlighted also the presence – to different extent - of positive instances of convergences and increasing flexibility, while recent experiments of introduction of mandatory exceptions, such as those in the field of orphan works and uses for persons with disabilities have proven largely successful in terms of harmonization and achievement of greater legal certainty across the Union. On the contrary, areas not covered by the EU harmonization still present moderate to very high degrees of fragmentation, strongly calling for an intervention by the EU legislature.

More in detail, the findings of each comparative reports may be summarized as follows.

- **Temporary reproduction, lawful uses, de minimis uses.** Compared to other areas of EU copyright flexibilities, this category shows a high degree of harmonization and remarkable convergences, mostly due to the mandatory nature of great parts of the exceptions, limitations and other balancing tools that may be classified under this umbrella (e.g. temporary reproduction, software interoperability and backup copy exceptions). However, also sectors covered by non-mandatory provisions have witnessed a general convergence of national solutions (e.g. ephemeral recording, freedom of panorama). Still, the devil often lays in the details, and what keeps on fragmenting national responses in this area are the oft-substantial differences Member States feature in the definition of the specificities of generic EU exceptions, or the introduction of additional conditions of applicability.

- **Private copy and reprography.** The state and degree of harmonization of the private copy exception across the EU is not homogeneous. While most of the EU countries already featured such a flexibility or have implemented Article 5(2)(b) InfoSoc, along or together with Article 5(2)(a) on reprography, their approaches are various, apart from a few basic points of convergence. On the side of beneficiaries, some Member

States extend the exception to cover third party copying and, more rarely, legal persons. As to the objective scope of the provision, the lack of harmonization goes hand in hand with a general rigidity on the amount of works that can be copied, which is variously limited by quantitative or qualitative caps, or on the types of works covered, with different national carve-outs. These rigidities are widespread and differently framed, in a way that common trends are difficult to trace. Permitted uses are usually limited to reproduction, with a few countries opening to digital copies, while remuneration schemes converge to private levy models sharing common features, also thanks to the repeated interventions of the CJEU. National courts also contribute to create fragmentation with different interpretations of additional criteria and conditions of applicability, such as the three-step test, the impact of TPMs on the exercise of the exception and the remuneration due, and the notion of non-commercial use.

- **Parody.** As the comparative analysis demonstrates, national implementations of the parody exception are far from being harmonized. On the contrary, they show remarkable divergences, to the point that the exception has not been implemented in several Member States, its space being functionally occupied by an extensive use of the quotation exception, or by resorting to free uses.
  This already quite fragmented scenario is made worse by the fact that the concept of parody itself, and humour, is difficult to grasp and, even if some clarifications came from the CJEU, national courts keep working and reworking its substance and boundaries. This happens also with regard to the "structural" parameter of parody. In addition to this, Member States have introduced other conditions of applicability, some of them ruled out by the CJEU but still emerging in national case law, such as the prohibition of reputational damage against the author of the original work, the necessary non-commercial nature of the parody, and the necessity-based limitation used to define the maximum amount that can be taken from the original work. Last, *Deckmyn* has also admitted that the parody exception can and should be disapplied when its exercise results in discriminatory messages and activities, thus introducing yet another element of uncertainty into an already problematic framework. This patchwork is unlikely to be harmonised by Article17(7) CDSM. Even if the provision brought some beneficial effects, most Member States have implemented it verbatim, without any coordination with their parody exception, aside from a few countries that have taken this opportunity to extend the latter to pastiche and caricature when missing. Member States without general parody exception have not taken this opportunity to fill in the gaps, thus now their copyright acts feature explicitly parody only for users of OCSSP services. This has further increased the degree of fragmentation of regimes and national solutions, while the harmonizing impact of *Deckmyn* is still yet to be seen.

- **Quotation.** Despite quotation represents the only mandatory exception under the Berne Convention, and part of Member States' tradition much before the EU harmonization, national provisions are still far from being standardized. Differently than parody, all EU countries feature a quotation exception, which share basic elements such as the undefined category of beneficiaries, the need to mention the author's name and the source of the work quoted and, to a certain extent, the purposes(s) of quotation. However, such a uniformity fades away when it comes to the objective scope of the quotation (which types of works can be copied and to what extent). At the same time, many countries have added further requirements, not enshrined in the InfoSoc Directive, the most common being the compliance with fair practice and the non-commercial use of the quotation. And while some CJEU decisions have provided additional guidance and requirements (e.g., the need to enter into a dialogue with the quoted work, the possibility to quote entire works, or not to embed the quotation into the citing work but to quote via hyperlinks), national case laws are still far from being fully aligned with the CJEU's doctrines. As for parody, also in the field of quotation Article 17(7) CDSM is having a limited impact, being usually implemented verbatim and thus adding only the mention to online quotation in favour of users of OCSSPs' services.

- **Informatory purposes.** Flexibilities related to "informatory purpose" present a simplified structure at the EU level but a much greater complexity in national implementations. All Member States, in fact, recognize in one way or another the prevalence of the public interest in receiving information on current events over copyright, but they are far from converging on the practical implementations of such exceptions. Differences range from less significant elements to much more radical ones. First, the three informatory purposes exceptions included in the InfoSoc Directive are not always transposed in their entirety by all EU countries. Second, the pool of beneficiaries and stakeholders they apply to varies a lot across the Union, ranging from countries that open such flexibilities to anyone and countries that are less prone to follow this path. Whether the possibility to use protected work to inform the public is a prerogative of, *strictu sensu*, "mass media" only, or of other stakeholders too, is likely to have a significant impact in the new online information industry, especially given the role that information plays in a free and democratic society. Third, their overlap with quotation and other exceptions protecting freedom of expression has been often highlighted – a circumstance that may increase the degree of flexibility available to uses but has also created confusion and uncertainties in their judicial application. Last, the advent of new technologies and new business models has heavily challenged the operation of provisions the boundaries of which are defined on the basis of traditional concepts, anchored in the analogical world and looking at traditional media publishers. This has evidenced their general rigidity, and

at the same time their different operation in the judicial practices of single Member States.

- **Teaching and research uses.** Copyright flexibilities for uses in research and teaching are among the most fragmented and less harmonized E/L in the EU. This is not only due, as usual, to the optional nature of great part of the EU provisions regulating the field, but also to the fact that all EU Directives but for the CDSM always covered the two purposes – teaching and research – under the same general, vaguely worded exception. This paved the way towards the enactment of a wide variety of national solutions, covering either both categories or just one (usually teaching), and addressing the definition of beneficiaries and permitted uses in a similarly various fashion. Fragmentation of national solutions can be noted at all levels. Member States present a highly diversified approach towards the definition of the subjective scope of their teaching and research L/Es, by choosing either not to identify beneficiaries, or to provide open or closed list of educational (and more rarely research/scientific) entities. Vague or too general definitions often lead to restrictive judicial interventions, which bring rigidity without adding legal certainty. Lack of harmonization is even more evident in the case of the objective scope, both with regard to the array of permitted uses and the works covered. In some situations, national exceptions for teaching and research encompass a general right of use, opening the door to broad interpretations. Much more frequently, Member States define a circumscribed number of permitted uses. However, options are too various to sketch common trends. The same can be said for the limits to the types or quantity of works that can be used, where Member States present a wide array of very specific (and different) provisions, or to additional conditions of applicability such as limitations in purpose, necessity benchmarks, three-step test and remuneration. Limitations as to the purpose are also prone to be strictly interpreted by courts, which tend to read narrowly the notion of educational activities and goals. On top of this, research purposes are almost completely neglected, for the great majority of national provisions are directly and solely addressed to teaching or general educational activities. As expected, the implementation of Article 5 CDSM on digital teaching, which is a mandatory provision not overridable by contract, is leading to a greater convergence. However, every time a detail is left to the discretion of Member States (e.g., whether to impose a duty to remunerate, or whether to subordinate the operation of the exception to the absence of adequate licenses), differences emerge again. Aware of this, the EU legislator introduced the country-of-origin principle, which aims at solving the problem of the territoriality of exceptions and of legal certainty in cross-border uses by applying the law of the country of establishment of the beneficiary of the provision all across the Union. The first research-oriented-only flexibility introduced in EU copyright law – Article 3 CDSM on text and data mining for research purposes – has also been implemented almost verbatim by Member States

so far, with only a few divergences on permitted uses and on the list of beneficiaries, usually in favour of broader approaches. This represents a novelty in the interplay between EU and national legal systems and, despite all the criticisms raised by the TDM exceptions and their flaws, it shows a path that may be successfully followed in the future.

- **Cultural and socially oriented uses.** In the pre-CDSM era, the EU copyright acquis was characterized by a piecemeal approach to copyright flexibilities directed to target cultural uses and the preservation of cultural heritage. Despite targeting the same category of beneficiaries, both EU and national provisions were fragmented as to works covered and permitted uses. The optional nature and very general wording of InfoSoc and Rental exceptions did not contribute to create a level playing field nor to push Member States to converge on similar paths. In fact, the pre-CDSM exceptions for CHI preservation and the array of copyright flexibilities for public lending are paramount in illustrating the vacuum of harmonization in the area. Three different approaches are equally distributed across the EU with regard to beneficiaries (unidentified, closed or open lists of selected beneficiaries, single beneficiaries), works covered and permitted uses (general right of use, only a selected list of rights, one single use, as well as unspecified, a selected list of works or single categories thereof). Conditions of applicability - remuneration duties and limitations in purpose - are read in a highly diversified manner by national legislators and courts, exacerbating the patchwork of national solutions. The same fragmentation characterises other cultural, educational and socially oriented uses covered by national flexibilities, where there is little or no convergence in focus, and no possibility to conduct a real comparative assessment for the extreme heterogeneity of national solutions. In addition, only a few countries implemented Article 5(2)(e) InfoSoc. The mandatory nature of the OWD exception pushed national laws towards a much greater standardization, with a handful or no countries departing from the EU model. It is yet to be seen whether this will be also the effect of Articles 6 and 8 CDSM, covering general reproductions of CHI collections for preservation purposes, and ECL/exceptions for the preservation and making available to the public of out-of-commerce works, again by CHIs. Notwithstanding the welcome shift in the approach from optional to mandatory exceptions, this area is still characterized by the highest degree of fragmentation among all EU copyright flexibilities. Not only EU provisions envision different regimes for different works, and limit cultural and preservation uses to mere reproductions but, as well-highlighted in the comparative analysis, national solutions showcase a plethora of distinctions, specifications and variety of approaches to permitted uses, linked or not to specific categories of works, and only a baseline uniformity of beneficiaries covered. This means that, apart from orphan and out-of-commerce works, and to a certain extent the reproduction of CHI collections for preservation purposes under Article 6 CDSM (here, however, already with some distinctions

between Member States), there is very little harmonization across the EU, and a great variety of degrees of flexibility/rigidity in national solutions. This is detrimental to legal certainty, hinders the possibility to develop cross-border cooperation and exchanges, and it may ultimately create obstacles to the development of consistent EU cultural policies when protected works are involved.

- **Copyright and disability.** National implementations of the InfoSoc and Marrakesh disability exceptions present a high degree of harmonization and tend to align to the EU text, particularly after the further push towards a more pervasive standardization impressed by the Marrakesh Directive. However, divergences can still be found across the EU. As to beneficiaries, some countries present more rigid approaches to the identification of authorized entities, with case-by-case appointments, strict criteria and measures to comply with and related high costs to bear. On top of the EU baseline, a number of countries provide broader definitions of disability, which enlarge the roster of end beneficiaries, while a handful of national laws adopt more restrictive readings, and the same can be said vis-à-vis the possibility for third parties to exercise the exception on behalf of disabled individuals. As to the objective scope, very few divergences can be found within the EU landscape. With regard to the various types of works covered by national exceptions, a restricted group of countries provides open lists following the EU model; few of them encompass also databases and software; others go as far as to provide different rules for different works. Permitted uses are generally regulated in a harmonized manner, except for some countries mentioning general right to use, or adding on top of the EU list also other rights such as public performance. Remuneration duties is the only area where the level of harmonization is low. In general, the majority of Member States chose not to provide remuneration. In very limited cases, remuneration is required, and in some countries only in limited circumstances. As to criteria of applicability, national exceptions are consistently harmonized. Yet, it should be noted that the three-step-test is not mentioned in all EU countries, and that some national legislators provide additional rules to regulate rights and duties of authorized entities.

- **Uses by public authorities.** While flexibilities for uses by public authorities are very much nation-based, the introduction of Article 5(3)(e) InfoSoc has triggered some basic harmonization. When Member States decided to transpose the provision, they generally followed the EU model, but for some circumscribed matters. For instance, some national implementations omit one or more of the purposes of the exception (e.g. public security, or judicial or administrative proceedings). In a few cases, Member States introduced subject-specific restrictions, carved out from the scope of the exception particular categories of works, or restricted/expanded the range of permitted uses, usually with regard to specific beneficiaries. Only limitations as to the purpose have been consistently introduced as additional conditions of applicability. On the contrary, only a few countries have implemented Article 5(3)(g) InfoSoc, in a

much more fragmented fashion, and with a wide array of restrictions as to events and works covered.

- **Public domain.** Beyond the wide array of objects often excluded from copyright protection, public domain and paying public domain regimes remain highly fragmented, uncovered and not harmonized in the EU. While it is true that there is a generic convergence on the identification of two broad categories of subject matters excluded from protection, and that the idea-expression dichotomy emerges between the lines of several national legislations, it is similarly true that the specifications of such categories feature quite different details across Member States laws and judicial decisions, with the result that – no matter the good intentions of the CJEU – the boundaries of public domain are far from being harmonized in the EU. In this sense, the attempt made with Article 14 CDSM should be welcome, but it is still far not enough to reach the uniformity that is needed to ensure legal certainty and the correct functioning of the EU copyright law architecture.

The **mapping of private ordering sources** led to two sets of conclusions.

Based on the first phase empirical research, the study concluded that, first, users are granted a more limited range of flexibilities with respect to the use of intangible or service-like contents. These flexibilities are narrowed down by the legislation itself. On the other hand, the examination of selected EULAs evidenced that platforms also tighten the grip on the potential uses of their services. For example, limitations or bans are placed on access to contents on a geographical basis or secondary dissemination. Technical protection measures are strictly applied in many cases. EULAs are either silent on some significant end-user flexibilities (e.g. freedom of expression-based exceptions and limitations, which might be covered by fair use in the US) or they are not clear enough on the practical application of those flexibilities (e.g. well-developed notice-and-take-down regime, but loose(r) complaint-and-redress mechanisms). Similarly, various service providers apply misleading language, e.g. they speak of 'sale', 'purchase' and the like, although the EULAs are purposefully limited to offer a license to the clients of the service providers. In sum, the majority of private regulatory provisions are there to strengthen the platforms' position in this 'balancing game'. Second, the empirical findings showed that ownership-based user rights are the strongest ones and hence such users can unquestionably be ranked at the top of the end-user hierarchy. At the same time, the analysis suggests that social media users are granted broader flexibilities than users of streaming platforms. Users of social media platforms exercise greater control – both at the upload and the access level – over the available contents. (*UGC effect)*. Third, end-user flexibilities are heavily affected by the legislative framework. This means, on the one hand, that various service providers, especially those that offer licensed professional contents, are limited by the existing copyright rules. Vice versa, platforms that are based on or offer UGC as well enjoy an environment of greater flexibility (*regulatory lock-in effect)*. Fourthly, end-user experience is heavily affected by the fierce competition of various platforms. The horizontal (service-based, e.g. Facebook v Twitter) and vertical (company- or portfolio-based,

e.g. Apple v Facebook) competition of service providers necessitate learning from each other, and sometimes overbidding competitors' offers. Quite a lot of end-user flexibilities stem from this competition, e.g. secondary dissemination, family sharing or UGC-sharing and further user benefits, e.g. subtitles (*business flexibility effect).* [1311]

Based on the second phase empirical research, which analysed EULAs in the period following the implementation deadline of the CDSM Directive, it was possible to conclude that the selected OCSSPs' terms of uses continue to focus on two main aspects: the exclusion of primary liability of platform operators and an effective notice and takedown procedure that protects the legitimate interest of the rightholders. The majority of the terms of uses examined include guarantees to allow users to challenge the lawfulness of content removal, but neither the guarantees in Article 17 CDSM appear *expressis verbis*, nor is there any specific reference to general prior content filtering mechanism in the contractual terms. This is certainly instructive for two reasons. On the one hand, it seems that online content sharing platforms are sticking to well-established liability limitation clauses, shifting the liability to the end-user, thus weakening the viability of the new liability regime envisaged by the CDSM Directive. On the other hand, some platforms, such as YouTube, also actively filter uploaded content through their automated systems, which they can remove at their own discretion without notifying the right holders. In other words, the balance between the actors concerned by the operation of the platforms - operators, rightholders and end-users - continues to tip in the direction of the first two stakeholders, while it is not clear how the platforms protect freedom of expression, freedom of creative creation and freedom of access to information, which have been among the main watchwords for criticism of the provisions of Article 17 CDSM. The status quo seems to remain unchanged despite the much-debated new liability regimes, although there is no doubt that transposition of the CDSM Directive is still underway in some Member states. And maintaining this status quo seems to be helped by the fact that platforms with a North American background operate their contractual practices under the US copyright regime rather than EU copyright law. This may raise further serious private international law issues for future research in this field.

The aim of this final report was to provide a **comprehensive account, overview and analysis of the descriptive findings** of the mapping of EU and national public regulatory sources and private ordering sources. This wealth of data, information, explanations, comments and correlations **constitutes the background material on which more specific normative conclusions and related policy recommendations** will be formulated by mid-September 2022, workshopped with policymakers on 20 September 2022 in Brussels, and finally issued by 30 September 2022.

[1311] 'How Netflix Is Creating a Common European Culture' (*The Economist*, 31 March 2021), available at: https://www.economist.com/europe/2021/03/31/how-netflix-is-creating-a-common-european-culture (accessed 17 December 2021).

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Belgium

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Loi du 31 août 1998 transposant en droit belge la directive européenne du 11 mars 1996 concernant la protection juridique des bases de données [Law of 31 November 1998 transposing into Belgian law the European directive of 11 March 1996 concerning the legal protection of databases] (LBD) (repealed)

Loi n° 2006-961 du 1 août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information (Law n. 2009-961 of 1 August 2006 on copyright and related rights in the information society) (LDA) (repealed)

Bulgaria

Закон За Радиото И Телевизията, В Сила От 1.01.2011 Г., Бр. 101 От 28.12.2010 Г. (Radio and Television Act, As Last Amended by SG No. 101/28.12.2010, Effective 01.01.2011)

Закон За Културното Наследство, 13 Mar 2009 — 82 От 26.10.2012 Г., В Сила От 26.11.2012 Г. (Cultural Heritage Act, As Last Amended and Supplemented by SG No. 82/86.10.2012, Effective 26.11.2012)

Закон За Авторското Право И Сродните Му Права, В Сила От 01.08.1993 Г. Изм. ДВ. Бр.98 От 13 Декември 2019г. (Copyright and Neighbouring Rights Act Of 01.08.1993, As Last Amended by SG No. 94.2018, Effective 13 December 2019)

Croatia

Zakon o autorskom pravu i srodnim pravima, NN 111/21, na snazi od 22.10.2021 (Copyright and Related Rights Acts, NN 111/21, in force from 22.10.2021)

Cyprus

Ο περί του Δικαιώματος Πνευματικής Ιδιοκτησίας και Συγγενικών Δικαιωμάτων Νόμος του 1976 (Ν. 59/1976, όπως τροποποιήθηκε μέχρι το νόμο αριθ. 155 (Ι)/2022) [Law on Intellectual Property Rights and Related Rights (Law 59/1976) of 1976, as last amended by 155 (1)/2022].

Czechia

121/2000 Sb. Zákon ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (ve znění zákona č. 50/2019 Sb.) [Act no 120/2000 Sb., on Copyright and Rights Related to Copyright and on Amendment to Certain Acts of 7 April 2000 (as amended by Act 50/2019)]

Zákon č. 111/1998 Sb.Zákon o vysokých školách a o změně a doplnění dalších zákonů (zákon o vysokých školách) (Act No. 111/1998 Sb. on Higher Education Institutions and on Amendments and Supplements to Some Other Acts)

Denmark

Lov nr. 741 af 25. juni 2014, Lov om ophavsret, som maned af Lov nr. 2607 af 28/12/2021, Lov om ændring af lov om ophavsret (Act n. 741 of 25 June 2014, Copyright Act, as amended by Act n. 2607 of 28.12.2021, Act amending the Copyright Act)

Ov om radio- og fjernsynsvirksomhed, jf. lovbekendtgørelse nr. 429 af 27. maj 2009 med de ændringer der følger af lov nr. 426 af 30. maj 2009 (Radio and Television Broadcasting Act, cf. Consolidation Act No. 827 of 26 August 2009, as amended by Act No. 1269 of 16 December 2009)

Estonia

Autoriõiguse seadus (RT I 1992, 49, 615 - jõust. 12.12.1992) [Copyright Act (RT I 1992, 49, 615 - entry into force 12.12.1992)]

Meediateenuste seadus (RT I, 06.01.2011, 1 - jõust. 16.01.2011) [Media Services Act (RT I, 06.01.2011 – entry into force on 16.01.2011)]

Tarbijakaitseseadus (RT I, 31.12.2015, 1; RT I, 24.11.2021, 4 - jõust. 01.01.2022) [Consumer Protection Act (RT I, 31.12.2015; RT I, 24.11.2021, 4 - entry into force on 01.01.2022)]

Autoriõiguse seadus (RT I, 28.12.2021, 3 - jõust. 07.01.2022) [Copyright Act (RT I, 28.12.2021, 3 - entry into force 2022)]

Autoriõiguse seadus (RT I, 28.12.2021, 3 - jõust. 07.01.2022) [Copyright Act (RT I, 28.12.2021, 3 - entry into force 2022)]

Finland

Laki Kilpailu- ja kuluttajavirastosta 2012/661 (Act on Competition and Consumer Authority 2012/661)

Laki kulttuuriaineistojen tallettamisesta ja säilyttämisestä 1433/2007 (Act on Deposit and Preservation of Cultural Material 849/2018)

Laki ministeriöiden ja valtion muiden viranomaisten määräyskokoelmista 189/2000 (Act on the Regulations of Ministries and other Government Authorities 189/2000)

Laki orpoteosten käyttämisestä, 764/2013 (Act on the Use of Orphan Works 764/2013)

Laki Suomen säädöskokoelmasta 188/2000 (Act on the Statutes of Finland 188/2000)

Laki yleisradioverosta 2012/484 (Act on Public Broadcasting Tax 2012/484)

Tekijänoikeuslaki 404/1961; Lakitekijänoikeuslain muuttamisesta 849/2018 (Copyright Act 404/1961; Law Amending the Copyright Act 849/2018)

France

Autorité de regulation de la communication audiovisuelle et numérique, dernière modification le 13 avril 2022 (Regulatory Authority for Audiovisual and Digital Communication, last modified on 13 April 2022)

Code de la propriété intellectuelle, dernière modification le 22 mai 2020 (Act of Intellectual Property, last amended on 22 May 2020)

Déclaration des droits de l'homme et du citoyen de 1789 (Declaration of the Rights of Man and of the Citizen of 1789)

Loi n° 2011-590 du 26 mai 2011 relative au prix du livre numérique (Act n. 2011-590 of 26 May 2011 related to the price of digital books)

Loi n° 93-949 du 26 juillet 1993 relative au code de la consommation (Act n. 93-949 of 26 July 1993 related to the Code of Consumers)

Germany

Urheberrechts-Diensteanbieter-Gesetz vom 31. Mai 2021 (Act on Copyright Liability of Online Content Sharing Service Providers of 31 May 2021)

Urheberrechtsgesetz vom 9. September 1965, zuletzt geändert durch Artikel 25 des Gesetzes vom 23. Juni 2021 (Copyright Act of 9 September 1965, as last amended by Article 25 of the Act of 23 June 2021)

Verwertungsgesellschaftengesetz vom 24. Mai 2016, das zuletzt durch Artikel 2 des Gesetzes vom 31. Mai 2021 geändert worden ist (Act on Collecting Societies of 24 May 2016, as last amended by Article 2 of the Act of 31 May 2021)

Greece

Νόμος 2121/1993, Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά, όπως τροποποιήθηκε το 2021 από το ν. 4829/2021 Law 2121/1993 (Copyright, Related Rights and Cultural Matters, as amended by Law 4829/2021)

Hungary

1999. évi LXXVI. törvény. a szerzői jogról (1999 LXXVI. Law about Copyright)

2001. évi CVIII. törvény az elektronikus kereskedelmi szolgáltatások, valamint az információs társadalommal összefüggő szolgáltatások egyes kérdéseiről (Act CVIII of 2001 on certain aspects of electronic commerce services and information society services)

2010. évi CLXXXV. Törvény a médiaszolgáltatásokról és a tömegkommunikációról (2010 CLXXXV. Law on Media Services and Mass Communication)

2013. évi V. törvény a Polgári Törvénykönyvről (2013 V Law on the Civil Code)

Ireland

Copyright and Related Rights Act n.28 of 2000

Disability Act n. 14 of 2005

Qualification and Quality Assurance Act n. 28 of 2012

Statutory Instrument (S.I). No. 597/2008 - Copyright and Related Rights (Public Lending Remuneration Scheme) Regulations 2008, as amended by S.I. No. 221/2013 - Copyright and Related Rights (Public Lending Remuneration Scheme) (Amendment) Regulations 2013

Italy

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Decreto Legislativo 22 gennaio 2004, n. 42, Codice dei beni culturali e del paesaggio, ai sensi dell'articolo 10 della legge 6 luglio 2002, n. 137 (Legislative Decree No. 42 of 22 January 2004, Cultural Heritage and Landscape Code, pursuant to Article 10 of Law No. 137 of 6 July 2002)

Legge 22 Aprile 1941, n. 633, Protezione del diritto d'autore e di altri diritti connessi al suo esercizio, con le successive modificazioni ed integrazioni, da ultimo dai DD.Lgs. 8 Novembre 2021, n. 177 (Law No. 633 of 22 April 1941 (l.aut.) on the protection of copyright and of other rights related to its exercise, as supplemented and latest amended by D.Lgs. 8 Novermber 2021, n. 177)

Legge 24 Novembre 2006, n.286. Conversione in legge, con modificazioni, del decreto-legge 3 ottobre 2006, n. 262, recante disposizioni urgenti in materia tributaria e finanziaria (Law no. 286 of 24 November 2006. Conversion into law, with amendments, of Decree-Law No 262 of 3 October 2006, containing urgent provisions on tax and financial matters)
R.D. 18 maggio 1942, n. 1369. Approvazione del regolamento per l'esecuzione della L. 22 aprile 1941, n. 633, per la protezione del diritto di autore e di altri diritti connessi (Royal Decree No. 1369 of 18 May 1942. Approval of the regulation for the execution of L. 22 April 1941, n. 633, for the protection of copyright and other related rights)

Latvia

Autortiesību Likums (Ar Grozījumiem: 14.06.2017) Publicēts: "Latvijas Vēstnesis", 148/150 (2059/2061), 27.04.2000., "Ziņotājs", 11, 01.06.2000. likums Pieņemts: 06.04.2000. Stājas spēkā: 11.05. 2000. [Latvian Copyright law n 148/150 (2059/2061), adopted on 11.01.2000, published on 27.04.2000, in force since 11.05.2000]

Ministru kabineta 2007.gada 21. augustā noteikumi Nr. 565, Noteikumi par kārtība, kādā aprēķina, izmaksā un sadala atlīdzību par publisko patapinājumu (Grozīts: 14.12.2013) [Cabinet of Ministers Regulation No 565 of 21 August 2007, Regulations on the Procedure for Calculation, Payment and Distribution of Remuneration for Public Lending (Amended: 14.12.2013)]

Lithuania

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Luxembourg

Loi du 18 avril 2001 sur les droits d'auteur, les droits voisins et les bases de données (Copyright, Database and Related rights Law of 18 April 2001)

Loi du 25 avril 2018 relative à la gestion collective des droits d'auteur et des droits voisins et l'octroi de licences multiterritoriales de droits sur des œuvres musicales en vue de leur utilisation en ligne dans le marché intérieur (Law of 25 April 2018 on the Collective Management of Copyright and Related Rights and the granting of multi-territorial licences for rights in musical works for online use in the internal market)

Loi du 3 décembre 2015 relative à certaines utilisations autorisées des oeuvres orphelines (Law of 3 December 2015 on certain authorised uses of orphan works)

Malta

Chapter 415 of the Laws of Malta Act XIII of 2000

Law n. 234 of 2021, Copyright and Related Rights applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Program Regulations, 1 June 2021

Law n. 406 of 2021, Digital Content and Digital Services Contract Regulations, 29 October 2021

Subsidiary Legislation (SL) 415.05, Certain Permitted Uses of Orphan Works, 7 November 2014

Subsidiary Legislation (SL) 460.36, Permitted Use of Certain Works and Other Subject Matter Protected by Copyright and Related Rights for the Benefit of Persons who are Blind, Visually Impaired or Otherwise Print-Disabled Order, 13 November 2018

The Netherlands

Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Auteurswet 1912) [Act of 23 September 1912, containing new regulations on copyright (Authors' Act 1912)]

Besluit van 27 november 2002, houdende regels met betrekking tot het reprografisch verveelvoudigen van auteursrechtelijk beschermde werken door in het algemeen belang werkzame instellingen (Besluit reprografisch verveelvoudigen)[Besluit van 27 november 2002, houdende regels met betrekking tot het reprografisch verveelvoudigen van auteursrechtelijk beschermde werken door in het algemeen belang werkzame instellingen (Besluit reprografisch verveelvoudigen)]

Wet van 29 december 2008 tot vaststelling van een nieuwe Mediawet (Mediawet 2008) [Act of 29 December 2008 establishing a new Media Act (Media Act 2008)]

United States

17. U.S.C. §512 [Digital Millennium Copyright Act, Pub. L. 105-304 (1998)]

Poland

Ustawa o radiofonii i telewizji z dnia 29 grudnia 1992 r (Act on Radio and Television of 1992)

Ustawa z 4 lutego 1994r. o prawie autorskim i prawach pokrewnych (Act on Copyright and Related Rights of 4th February 1994 [Act on Copyright and Related Rights of 4th February 1994)

Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Act of April 23, 1964, of the Civil Code)

Ustawa z dnia 27 czerwca 1997 r. o bibliotekach (Act of 27 June 1997, Libraries)

Ustawa z dnia 30 kwietnia 2010 r. o Narodowym Centrum Badań i Rozwoju (Dz. U. z dnia 4 czerwca 2010 r.) [Act of 30 April 2010 on the National Centre for Research and Development (Journal of Laws) of 4 June 2010)]

Portugal

Código do Direito de Autor e dos Direitos Conexos (aprovado pelo Decreto-Lei n.º 63/85 de 14 de março de 1985 (Portuguese Copyright Law n. No.63/85 of 14 of March, in force since 14 March 1985)

Decreto-Lei n.° 252/94 de 20 de outubro de 1994 Protecção Jurídica de Programas de Computador (Decree-Law No 252/94 of 20 October 1994 Legal Protection of Computer Programs)

Decreto-Lei n.° 333/97, de 27 de Novembro (Radiodifusão por satélite e à retransmissão por cabo) [Decree-Law No 333/97 of 27 November 1997 (Satellite broadcasting and cable retransmission)]

Decreto-Lei n.º 122/2000, de 04 de Julho, Protecção jurídica das bases de dados (Decree-Law no. 122/299), of 4 July, Legal Protection of Databases).

DL n.º 332/97, de 27 de Novembro, Transpõe para a ordem jurídica interna a Directiva n.º 92/100/CEE, do Conselho, de 19 de Novembro de 1992, relativa ao direito de aluguer, ao direito de comodato e a certos direitos conexos ao direito de autor em matéria de propriedade intelectual (Decree-Law no. 332/97, of 27th November 1997, transposes into the internal legal order Council Directive no. 92/100/EEC, of 19th November 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Lei n.° 62/98, de 1 de setembro de 1998 Compensação Pela Reprodução Ou Gravação De Obras (Law 62/98, of 1st September 1998 Compensation for Reproduction or Recording of Works)

Romania

Lege nr. 26 din 29 februarie 2008 privind protejarea patrimoniului cultural imateria (Law No 26 of 29 February 2008 on the protection of intangible cultural heritage)

Lege nr. 8 din 14 martie 1996 privind dreptul de autor si drepturile conexe (Law No. 8 of 14 March 1996 on Copyright and Neighbouring Rights)

Slovakia

Zákon č. 71/2022 Z. z., ktorým sa mení a dopĺňa zákon č. 185/2015 Z. z. Autorský zákon v znení neskorších predpisov.(Act No. 71/2022 Coll., amending Act No. 185/2015 Coll., the Copyright Act)

Zákon č. 185/2015 Z.z. o autorskom práve a právach súvisiacich s autorským právom (Slovakian Copyright Act v. 185/2015 Coll)

Zákon Národnej rady Slovenskej republiky č. 13/1993 Z. z. o umeleckých fondoch (Law No. 13/1993 Coll. of the National Council of the Slovak Republic on Art Funds)

Slovenia

Zakon o avtorski in sorodnih pravicah (1995) [Copyright and Related Rights Act (1995)]

Zakon o kolektivnem upravljanju avtorske in sorodnih pravic (Uradni list RS, št. 63/16) [Act on Collective Management of Copyright and Related Rights (Official Journal of the RS, No 63/16)]

Obligacijski zakonik – OZ (Uradni list RS, št. 83/01 z dne 25. 10. 2001) [Code of Obligations - OZ (Official Journal of the RS, No 83/01 of 25 October 2001)]

Spain

Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia (Royal Legislative Decree 1/1996, of 12 April 1996, approving the revised text of the Intellectual Property Law, regularising, clarifying and harmonising the legal provisions in force on the matter)

Real Decreto-ley 24/2021, de 2 de noviembre, de transposición de directivas de la Unión Europea en las materias de bonos garantizados, distribución transfronteriza de organismos de inversión colectiva, datos abiertos y reutilización de la información del sector público, ejercicio de derechos de autor y derechos afines aplicables a determinadas transmisiones en línea y a las retransmisiones de programas de radio y televisión, exenciones temporales a determinadas importaciones y suministros, de personas consumidoras y para la promoción de vehículos de transporte por carretera limpios y energéticamente eficientes (Royal Decree-Law 24/2021 of 2 November on the transposition of European Union directives on covered bonds, cross-border distribution of collective investment undertakings, open data and re-use of public sector information, the exercise of copyright and related rights applicable to certain online transmissions and to broadcasts of radio and television programmes, temporary exemptions for certain imports and supplies, for consumers and for the promotion of clean and energy-efficient road transport vehicles)

Sweden

Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk [Act (1960:729) on Copyright in Literary and Artistic Works]

Lag (1991:1559) med föreskrifter på tryckfrihetsförordningens och yttrandefrihetsgrundlagens områden [Act (1991:1559) with regulations in the areas of the Freedom of the Press Act and the Freedom of Expression Act]

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The ReCreating Europe project aims at bringing a ground-breaking contribution to the understanding and management of copyright in the DSM, and at advancing the discussion on how IPRs can be best regulated to facilitate access to, consumption of and generation of cultural and creative products. The focus of such an exercise is on, inter alia, users' access to culture, barriers to accessibility, lending practices, content filtering performed by intermediaries, old and new business models in creative industries of different sizes, sectors and locations, experiences, perceptions and income developments of creators and performers, who are the beating heart of the EU cultural and copyright industries, and the emerging role of artificial intelligence (AI) in the creative process.

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