Preliminary studies to the future EU Copyright review : about (some) exclusive rights and (some) exceptions

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Since the Juncker Commission has launched the work on a new reform of copyright, we thought it could be useful to provide a summary of the various studies which the Commission had asked us to do on a number of topics which had been selected in preparation of this future reform.

After the adoption of the Information Society Directive in 2001,(1) several studies had been conducted to examine its effect, in terms of harmonisation of copyright, on the internal market. In November 2006, the Institute for Information Law (University of Amsterdam) published a report, "The Recasting of Copyright and Related Rights for the Knowledge Economy" and, shortly after, in 2007, the "Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society."(2)

The European Commission ordered a follow-up study to assess to which extent the 2001 Directive was appropriate to the economic and technological realities of digital markets and whether further harmonisation is required to maximise the opportunities of the "digital single market." This Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive") was published in December 2013 (hereafter the "Study.")(3) The purpose was not to repeat and update the vast work that the IViR has done in its Implementation Study, but to examine specific topics, selected by the Commission. The research did not cover all Member States of the European Union but focused on 11 Member States (Germany, France, UK, Italy, Spain, Poland, Denmark, Hungary and Benelux). Based on this research, the Commission could assess the degree of harmonisation on these specific points within the European Union and decide whether the leeway left to the Member States led to actual impediments to the cross-border provision of services and information in the internal market. Two other reports have been prepared : one on the legal framework of "text and data mining"(4) and one to complement the Study on inter alia the relation between the making available right and the reproduction right.(5) In addition, the European Commission ordered economic studies on related topics.(6)

In this contribution, we will give an overview of the questions that we have researched and summarise the main findings. As a summary, it can not include all the many subtleties and references contained in the study (counting over 580 pages). The Study covers selected legal issues, divided in two parts. The first part treats selected exclusive economic rights, in particular the making available right and the right of cable retransmission. The second part examines various exceptions : existing exceptions in favour of libraries and archives, research and educational purposes, for people with a disability and for press reviews and the (possible) need for new exceptions for "user generated content" (UGC) and "text and data mining" (TDM).

(1) 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, *O.J.* L 22 June 2001, hereafter Information Society Directive or InfoSoc Dir.

(2) *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Final Report. Part I. The Impact of Directive 2001/29/EC on Online Business Models*, Amsterdam, Institute for Information Law, University of Amsterdam, 2007, http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm ; *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Amsterdam, Institute for Information Law (IViR), 2006, www.ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

(3) J.-P. Triaille, S. Dusollier, S. Depreeuw, J.-B. Hubin, F. Coppens and A. de Francquen, *Study on the application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society*, Brussels, 2013, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

(4) J.-P. Triaille, *Study on the legal framework of text and data mining,* 2014, available at http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf.

(5) J.-P. Triaille, S. Depreeuw and J.-B. Hubin, *Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions*, Brussels, 2014, http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf.

(6) G. Langus, D. Neven and G. Shier, *Study "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU"*, 2013, available at http://ec.europa.eu/internal_market/copyright/docs/studies/131001-study_en.pdf ; G ; Langus, D. Neven and S. Poukens, *Study "Economic Analysis of the Territoriality of the Making Available Right in the EU"*, 2014, available at http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf.

I. Exclusive rights in the digital environment

A. Making available right and its localisation

One legal issue examined in the Study was the "territoriality of the making available right" and its consequences for the functioning of the internal market. The making available right can be relevant in a variety of situations and technologies but often it will be applied in cross-border exchanges: the person making the content available may be in one country, it may be hosted in another country and the public may be spread over several countries. The question of interest to the Commission was where, in such situation, a protected act of making available to the public takes place. The consequence of finding a protected act in several countries is that the making available right may be subject to different legal regimes in different Member States. Copyright is, at least for the time being, a matter for the national legislatures and, even if there have been important efforts of harmonisation at the European level, many issues remain regulated at the national level.

This may be illustrated by means of an example. A song is offered for download in a "Polish" online music store and can be accessed from the Polish but also the Belgian, Italian and Austrian territories. Such cross-border accessibility could imply that acts of making available are performed in Poland, Belgium, Italy, Austria and possibly other Member States where the work is accessible. Each of those countries could then apply its own copyright legislation, with its own exceptions, rules for identifying the author or transferring rights, and its own rules for enforcing rights. It was assumed that such differences make the realisation of the digital internal market more difficult and this Study contributes to understanding the questions and mapping the complications.

Scope of the making available right. – The Study first examines the origin of the making available right and its current scope. The notion of "making available to the public" is not defined and an important uncertainty exists concerning its scope of protection. The national courts have contributed to the clarification of this exclusive economic right by applying it to various online services. The making available right requires that the protected matter be uploaded so it can be accessed at a distance (at any time and from any location) and that access be offered to members of the public. The report provides illustrations from cases decided in the selected Member States and by the CJEU, in order to clarify the scope of the making available right and its constitutive elements. Also, the relation of the making available right to the rights of reproduction and communication to the public is considered (alternative or cumulative application).

Notion of territoriality. – The notion of territoriality is explored in the second chapter of the first part of the Study. Harmonisation efforts at the international and European levels have not altered the competence of the national legislators to regulate copyright. Moreover this principle of "national territoriality" is confirmed by the Court of Justice of the European Union, although the criteria for attaching an act to a territory vary. It was found that the territorial reach of the making available right is uncertain, while clarity on this point is a prerequisite for applying mitigating principles such as the "country of origin" principle in relation to satellite broadcasting or the "exhaustion" principle in relation to the distribution right.

Selected legal issues. – Because of these uncertainties, constitutive elements of a (cross-border) act of making available may be found in different Member States. This may lead to a situation where one act of exploitation (offer of a song in an online music store in Poland) is subject to several legal regimes (e.g. from all countries where the music can be used: Poland, Belgium, Italy, Austria and other Member States). At the request of the Commission, the Study focuses on three legal issues and how these are affected by the absence of a clear definition and localisation criterion.

– *Private international law.* – The lack of clarity causes issues of private international law in case of infringement. The courts of several Member States may have concurrent jurisdiction to decide on a case of infringement to the making available right (but not all courts have equal competence to state on e.g. the whole damage). Moreover, the rules determining the applicable law may lead to inconsistencies: depending on the Member State where the claim is lodged, these rules can refer to the application of one single or several copyright legislations.

– *Authorship, ownership, transfer of rights.* – Disparities exist on these points in the copyright legislation of the Member States. Consequently, depending on where a relevant act is localised, different persons may be identified as the author or the owner of copyright. Where acts of exploitation can be found in several Member States, this may (at least in theory) lead to conflicts, so the authorisation of different people is required for the same cross-border act (in particular where the making available right is fragmented).

– *Reproduction right.* – Turning to the relation between the making available right and the right of reproduction, the Study identifies the existence of different acts of reproduction in the process of the act of making available. This may complicate the licensing of works for online use and have an impact

on the localisation of the protected acts in case of infringement, in particular where these rights are held by different persons (and the reproduction is not exempted under the exception for temporary acts of reproduction).

Having presented the legal issues related to the current situation, the second part of the Study examines whether specific localisation criteria would help solving the bottlenecks identified in the first part.

This part of the Study first examines different possibilities to define and delineate the scope of the making available right. It then analyses two criteria for localising the protected act of making available right (i.e. the "country of origin" principle and the exploitation criterion) and assesses the consequences of localising the making available according to each criterion on the issues of conflict of laws, authorship, transfer of rights and reproduction right.

– *Country of origin.* – Following this criterion, the act of making available is localised in one single Member State ("country of origin"). The "country of origin" principle has been used in several directives and may refer to different material criteria, depending on the directive in which it was used.

Applied to the making available right, the country of origin principle could localise the protected act either in the country where the act of upload takes place or in the country where the uploader is established. For example, the song in the Polish online music store would be made available in Poland only, not in Belgium, Italy or Austria – even if the work is accessible from these countries.

It is then verified whether this approach would provide a satisfactory answer to the bottlenecks identified in the first part. It is concluded that the country of origin principle solves some but not all the bottlenecks and that it may generate new bottlenecks with regard to the applicable law.

– *Exploitation/targeting.* – The second criterion localises the acts of making available in those countries where the exploitation of the work takes place. According to this criterion, the act of making available is localised in each country where a public is targeted.

The result is that a work, accessible via the Internet, may be "made available" in a more reduced number of countries, instead of finding protected acts in each country where the work is accessible. For example, the song in the Polish online music store would be made available in Poland if it "targets" the Polish public (e.g. interfaces in Polish, local Polish stars, references to Polish festivals or hit charts, …) and any other Member State where the exploitation of the work is organised (e.g. by means of variable interfaces per country where the music is offered).

The exploitation approach does not solve the bottlenecks identified in the first part of the Study but it helps reducing their impact.

B. Right of retransmission by cable

Among the exclusive rights examined was the right of retransmission by cable, as regulated in the Satellite and Cable Directive,[7] and we examined whether this right could be applied to the transmission of protected subject matter via digital networks.

In order to answer this question, as an introduction, the legal context of the directive and its regime for cable retransmissions are described and the scope of application of the SatCab Directive and its relation to the Information Society Directive are presented. The Study focuses on the definition of "cable retransmission" and its constitutive elements, rather than the legal consequences such qualification entails.

Cable retransmission right and right of communication to the public. – The decisions of the CJEU in cases involving a transmission via a cable network are examined; the CJEU has consistently assessed the question of the protection of cable transmissions by reference to the InfoSoc Directive, rather than the SatCab Directive. The SatCab Directive does require the existence of a cable retransmission right as such and it does not provide a definition or a certain scope of the cable retransmission right; it merely requires the collective management of the cable retransmission right (regardless of the legal heading under which it is protected).

Initial transmission. – The national provisions and court decisions of some Member States (the Netherlands, Belgium, Denmark – where the cable network is well developed) were examined. The main issue regarding the initial transmission identified was the qualification of direct communications between the "broadcaster" and the cable operator (e.g. "direct injection"). There seems to be no uniform understanding of the notion "*initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public*" (Art. 1(3) SatCab Dir). Most courts require a "public," as interpreted by the CJEU in *Lagardère* and subsequent cases, both for the initial transmission and for the retransmission, for these transmissions to be covered under the right of communication to the public.

The relation between the initial transmission and the retransmission is however not clarified. The

(7) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyrights and rights related to copyright applicable to satellite broadcasting and cable retransmission, *O.J.* 6 October 1993, L 248, (15), hereafter "SatCab Directive".

consideration that the cable operator "depends" on the initial transmitter is sometimes understood as a technical requirement that the cable transmitter should *receive* the signal and *retransmit* that signal to its public. In other cases, it has been held sufficient that the retransmission occurs simultaneously with the initial transmission (even if the retransmission is technically not based on the initial signal).

Retransmission by cable. – Member States have divergent interpretations of the notion of "retransmission by cable", some restricting it to retransmissions by coaxial cable or micro-wave system, others adopting a technology-neutral understanding (which could then cover retransmissions via "new" technologies such as streaming via mobile platforms).

The analysis of two national decisions with relevance for the right of retransmission by cable (Austria, Germany) leads to the conclusion that there is divergence on the technology-specific nature of the retransmission by cable. While Austria has implemented the definition of the retransmission by cable in order to cover retransmissions by all technical means, the German legislature has opted for a technology-specific implementation.

Conclusion. – The right of retransmission by cable is unevenly used in the Member States and important divergences exist on its definition and interpretation among the Member States. This makes it more difficult to apply this right generally to the retransmission of protected subject matter via digital networks and, in the end, to contribute to the digital internal market.

II. Selected limitations and exceptions to copyright and related rights

The second part of the Study addresses the possible need to revise some exceptions of the InfoSoc Directive. The following exceptions were examined: those benefiting libraries, archives, museums, educational and research institutions and the public lending right, the exception covering uses for the benefit of people with a disability and press review. We also examined whether the creation and distribution of "user generated content" could be exempted based on existing exceptions or if a new exception should be adopted. A similar exercise was done for "text and data mining."

A. Limitations and exceptions to copyright and related rights for libraries, research and teaching uses

The system of copyright exceptions in EU law. – Exceptions are scattered in four directives without a unifying regime, which raises questions of applicability of some exceptions, notably to databases and computer programs, still governed by *lex specialis* regimes. In a series of decisions, the Court of Justice of the European Union has developed the key principles and objectives to interpret and apply the exceptions, including the principle of a strict interpretation, that should however enable the effectiveness of the exception and the observance of its purpose. The Study also discusses the undecided status of unpublished works as to the application of exception in the EU law and the relationship of exceptions with licensing and market provision of works or other subject-matter. On that last point, save for the compliance of the exception with the three-step test, the availability of licensing or access to the work on the market should not, as a rule, preclude the benefit of an exception.

1. Exceptions for libraries

The activities and role of libraries, archives and museums are likely to be relevant in copyright as they engage in a number of uses of copyrighted works, from traditional uses to new ones namely resulting from digital development and opportunities. They go from the setting up of a collection, the preservation, the copying of works for patrons and visitors, the making available for consultation, and the lending. The directive 2001/29 enables libraries to carry out some activities under an exception, i.e. some specific acts of reproduction, the making available for on-site consultation, and the public lending.

a. The exception for specific acts of reproduction

The scope of the exception. – Article 5(2) c) of the InfoSoc Directive allows Member States to enact an exception for specific acts of reproduction by publicly accessible libraries, museums, educational establishments, and by archives which are not for direct or indirect economic advantage. No precise objective is determined but the legal history of the provision indicates that preservation and archiving were thought of as relevant purposes. "Preservation" and "archiving" are vague and undefined notions, that do not help in assessing whether reproduction for format-shifting or mass digitization are covered. The limitation to 'specific' acts of reproduction is generally understood as excluding large-scale digitization projects, which was recently confirmed by the CJEU in the Technische Universität Darmstadt case. As to the works concerned, the *lex specialis* treatment of computer programs and of databases could be an issue for libraries, particularly concerning videogames that are a hybrid work oscillating between software and graphic work. The notion of 'not for direct or indirect economic advantage' seems

to apply both to the beneficiaries of the exception and to the acts concerned, but is not further defined.

Implementation and bottlenecks. – The analysis of the implementation of the exception in some Member States shows some disparities between countries regarding the beneficiaries of the exception only (libraries, or libraries, museums and archives, or only educational establishments, …), the purposes of the reproduction (preservation, conservation, archiving, protecting collections, format-shifting, …), the types of works that can be reproduced (all types of works or only some of them), the reproduction format (prohibition to make digital copies or not), the amount of the work that can be copied (in whole or in part), the number of copies (specified or not). No Member States explicitly allow bulk copying to digitize the whole collection of a library or archive. Restrictive approaches by Member States result in some issues: the purpose of preservation has been generally interpreted strictly and prohibits libraries and other eligible institutions from carrying out some acts of preservation of their collections, notably acts of format shifting; not all categories of works are covered by the national laws, which leads to inconsistencies in the cultural heritage that can be preserved by libraries; the making of digital copies is not allowed in some national laws, which seems rather anachronistic and particularly worrisome for film heritage institutions. The cross-border dimension of the exception for preservation is at first sight limited as the act of reproduction will be located in one country. But it appears to be more indirect as different conditions depending on the State of the concerned establishment might result in difficulties and unequal treatment of libraries across Europe to participate to the safeguarding of European cultural heritage, which could be an argument for further harmonisation of the exception.

Alternative legislative options. – Several initiatives can be taken to address the exclusion of some uses for preservation purposes from the exception and the fragmented scene of national transpositions. An adequate balance should in any case be found between the need for digitization of cultural heritage that is high on the European agenda and the protection of rights and interests of copyright holders.

One option would be to revise the exception or to adopt an interpretative document to clarify its scope and objective. The essential point that needs to be determined is *the objective of the acts of reproduction*. The "specific acts of reproduction" referred to in the InfoSoc Directive can encompass a continuum of activities from restoration of damaged parts of a work, replacement of a lost or decayed item, anticipative preservation of fragile works, format-shifting to web harvesting, copying and supplying upon request, mass digitization. Our recommendations would be to include in the exception any act of preservation of selected works (restoration, replacement or anticipative preservation), acts of format-shifting and of mass-digitization. As to the latter, it would become necessary to achieve effective accessibility to works maintained in a library or archive, especially for some types of works (broadcasts, films, newspapers, negatives…). The digital format also enables the addition of search tools that enhance the accessibility of material for research, which is a primary objective of the eligible institutions. As such, copying works in digital format does not harm the normal exploitation of the work, but further acts of provision of search capabilities or making available should be scrutinised on their own as to their legitimacy and compliance with the three-step test. Web harvesting, supplying a copy upon request and making available should conversely be out of the scope of the revised exception.

Further conditions applying to a revised exception are further discussed in the Study, namely regarding outsourcing, the application of the exception to unpublished works, to works available on the market, to born-digital works, to computer programs and databases, or the multiple copying.

Other measures could be required to achieve a better harmonisation of the national laws regarding that exception. It could be made mandatory as it conveys a declared European public interest (the safeguarding and availability of European cultural heritage) or at least, its objectives or conditions could be precisely defined so as to bind the Member States in the application of the exception, by virtue of recent CJEU case law that limited somewhat the leeway of national legislations when the purpose and conditions of an exception are clearly determined at the EU level.

For the uses left outside of a revised exception or should the exception be left as it is now, copyright clearance should be made easier for libraries, by recourse to e.g. a Memorandum of Understanding or other arrangements between stakeholders, as well as to collective management.

b. The exception for on-site consultation

The scope of the exception. – Article 5(3) n) of the InfoSoc Directive allows Member States to enact an exception for making works available by libraries, museums, educational institutions or archives, for the purpose of research or private study, on dedicated terminals and on their premises. The exception does not apply to works subject to licensing terms. The exception does not lead to much uncertainty as to its scope but has been regularly denounced for its narrowness. The spatial (the premises of the establishment) and technical (the dedicated terminals) limitations are blamed for being outdated in the digital context. The Court of Justice (Technische Universität Darmstadt) has recently opened up a bit the

scope of exception by allowing libraries to digitise some material before making it available under that exception.

Implementation. – By contrast with the former exception for libraries, the on-site consultation limitation has been generally transposed in a similar way by the national laws we have analysed. No cross-border issue arises for the current scope of the exception as it is limited to the physical premises of the libraries and other beneficiaries.

Alternative legislative options. – The exception for on-site consultation could be considered as being of minor importance as it does not convey a fundamental public interest or objective of the European Union but it has a practical relevance for libraries. Licensing conditions could as well prevail over the exception, which indicates that market-based solutions could be preferred.

One initiative could be however to adapt the exception to better address the relevance of consultation of works in libraries for research or private study. It should address the current limitation to dedicated terminals and physical premises and define the adequate extent of the shift to a new criterion. Dedicated terminals should not be the only mode of accessing works, but personal devices of the user should be allowed too, which would require however that the works are made available in a format that prevents further copying or transmission. Beyond the technical protection of the work, the only limitation would remain spatial or related to the beneficiary of the exception, but could be declined in different degrees: the sole physical premises of the library, any location of the institution hosting the library, the members of the institution benefiting of the exception wherever their location, or, and it is the broadest and less justified approach, any researcher or person justifying an objective of private study.

c. The public digital lending right

The context of public lending and e-lending. – Diverse situations of lending can be distinguished between generalist public libraries and academic or research libraries, depending on the frequency of lending, the type of users and their purpose in checking out some books or other works, as well as the impact on the different markets of general books and scientific books are addressed. Lending is an exclusive right for copyright and related rights but Member States can transform public lending to a right of remuneration and even exempt some establishments from any payment. The making available of works online is not covered by the public lending right regime of the Rental and Lending Directive but is considered as an act of making available governed by the InfoSoc Directive. As a consequence, libraries are currently not allowed to digitally transmit works to their patrons in lending, but have entered into licenses with publishers to develop an offer of lending of e-books, also called e-lending, with the intermediation of dedicated platforms operated by commercial actors. Compared to physical lending, e-lending is not based on ownership of the book by libraries but on its provision by this intermediary. Terms of use are defined jointly and try to emulate the conditions of physical lending (e.g. one user at a time, disabling of the e-book when the lending period has elapsed, …).

The extension of public lending right to e-lending. – The existing licensing models demonstrate that e-lending could be developed on a market-based solution. That being said, that does not prove that it should be the only solution. We plead in the Study in favour of some and controlled extension of the public lending right to cover the lending of e-books and other digital content, for the role of libraries is essential in providing access to works and culture to readers who would or could not rely only on normal acquisition of books or other items on the market, to works that are not provided by the market, and to material for research. Those objectives will still be relevant for e-books or other digital works. Libraries are a third sector providing access to works, aside the market and non-market exchanges between individuals. This role should not lose its relevance in the digital context or it would culturally impoverish future generations of readers. The development of license-based models of e-learning, involving commercial actors and intermediaries, also present some risks for the cultural diversity and for the *privacy* of readers, two key concerns of public libraries.

The impact of an extension of the public lending right to e-lending should be assessed, but should not be based on a criterion of direct substitution of a book on loan at the library to a book bought at a retailer. By definition, libraries are substitutes to normal trade. Instead, the overall effect of lending to the commercialisation of books and other works should be verified.

The Study discusses how the objective of enabling libraries to engage in e-lending should be achieved and what would be the proper dividing line between market-based solution, as developing today, and a limitation to exclusive rights. The specific technique of e-books that requires an open format to be sent to any user and any reading device might result in a more complex regime than for physical lending. Particular conditions for a limitation in favour of lending are addressed, and notably the types of works concerned, the technical requirements, the modalities of lending (a limited duration, one simultaneous user per title, …), the provision of an embargo period, the obligation of a remuneration, as well as the possible cross-border offer of e-books by libraries.

2. Exceptions for teaching and research

With the development of digital technologies and networks, educational and research activities increasingly imply uses of copyright works covered by exclusive rights. Article 5(3) a) of the InfoSoc Directive provides for an exception for illustration of teaching and for research.

The scope of the exception. – Article 5(3) a) of the InfoSoc Directive has counterparts in the Berne Convention, the Rome Convention and in previous EU directives. The objective of the exception is twofold: illustration of teaching or scientific research. In the absence of a definition in the directive or its legislative history, the Study gives some indications as to the scope of both purposes. It clarifies that the requirement of illustration only applies to teaching and not research. The beneficiaries of the exceptions are not determined by the directive and the exception rather applies to the function of education than to recognised establishments. The only limitation pertains to the non-commercial purpose that should restrict the benefit of the exemption. E-learning is specifically addressed in a recital of the directive, which confirms that the European legislator had already considered the digital development of education.

Implementation and bottlenecks. – Despite the openness of the exception, the national implementations are far more restricted. A particular concern results from the exclusion of digital uses and e-learning from the scope of the exception in some national laws. The complexity of the conditions that greatly differ from one country to another constitutes an obstacle to the development of e-learning that has a cross-border dimension. The Study considers four scenarios of e-learning with varying degrees of international dimension: 1) e-learning tools provided to students enrolled in a traditional course, 2) e-learning offered as a stand-alone educational course, 3) e-learning in MOOCs (Massive Open Online Courses), 4) e-learning offered by transnational collaborations between universities. The localisation of the use relevant for the exception, hence the determination of the law(s) governing the use and possibly exempting it by an exception, is a difficult exercise attempted by the Study, that demonstrates the challenge of developing an educational content online in full legal compliance. Teachers and educational institutions when engaging in e-learning, might be subject to consider the laws of different countries (namely the law of the State where the establishment is based, of the many States where students reside, of the State where the content is hosted, …) with diverging and maybe incompatible conditions applicable to the exception. That difficulty pleads for a more compelling harmonisation of the exception.

Alternative legislative options. – No revision of the exception in the Directive should be necessary as it is apt to tackle the needs of education and research. The primary issue would be to reduce the restrictive conditions and discrepancies of national implementations that do not ensure an effective benefit of the exception for e-learning, particularly when it has a cross-border dimension.

That would require either making the exception mandatory for Member States or imposing a precise objective and conditions that should be guaranteed by national legislations. At least, digital uses should be allowed, as well as uses in the context of e-learning with the requirement that the making available is only done to students enrolled in the course. Works primarily intended for teaching or education could be excluded from the benefit of the exception.

An alternative would be to address the cross-border issue by leaving intact different exceptions in the Member States but localise the use and apply only one national law to the educational use. The principle of the mutual recognition in the Orphan Works Directive and the solution for the making available or distribution of an adapted work to another country in the Marrakech Treaty of 2013 are rapidly explained and compared with the situation of the exception for teaching.

3. Exception for research

Uses of works can also be authorised for research purposes without any further requirement, but those applying for the illustration of teaching. The Study has analysed the research activities separately as the uses concerned might differ from those relevant in an educational context. Research is also carried out in an increasingly cross-border environment. However, drawing the boundaries of a separate exception would be difficult. It should distinguish the use of copyrighted works as a topic for research, the use of scientific works or databases as tools for research and text and data mining. The development of open access for scientific papers and datasets could be relevant in the definition of the exception.

B. Uses for the benefit of people with a disability

The Information Society Directive allows Member States to provide for exceptions or limitations to the exclusive rights covering 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 (Art. 5(3) (b) InfoSoc Dir).

Implementation and bottlenecks. – We examined how this exception has been implemented in the 11 Member States under consideration and we have found important divergences with regard to the exempted acts (reproduction, distribution and/or communication to the public), the beneficiaries

and the existence of additional conditions. The bottlenecks of the national implementations were analysed with a focus on the cross-border accessibility of accessible versions of a work or other subject-matter within the EU. We found that in the current situation, legal obstacles exist to (i) the distribution of accessible copies of a work or other subject matter in tangible form and (ii) the cross-border accessibility of such copies via networks or intangible means.

Alternative legislative options. – Several initiatives can be taken to deal with these obstacles to cross-border access to accessible format copies. One option is to refrain from any legislative initiative and to stimulate cooperation between the actors involved (2010 Memorandum of understanding on access to works by people with print disabilities; ETIN). Other options involving amendments to the existing legal framework are the implementation of the WIPO Marrakech Treaty and the adoption of similar provisions stimulating the cross border access to accessible works (both in tangible and intangible forms) in the EU legal framework. This would entail harmonising at least the restricted acts (reproduction, distribution, making available to the public), providing that an accessible copy, made under the national exception of one Contracting State, can be legally distributed or made available in other Contracting States and clarifying the status of imports by beneficiaries under a national law. Further measures could include a more compelling harmonisation of the national exceptions and limitations. The exception in favour of people with a disability could have a mandatory (rather than optional) character, it could define more compellingly which exclusive rights are restricted by this exception (reproduction, communication to the public including making available to the public and distribution to the public). The beneficiaries and the roles of people acting on behalf of the beneficiaries or (trusted) intermediaries could be clarified and, where necessary, subject to certain conditions. Finally, other conditions could be harmonised where required (commercial in/availability, remuneration) and the priority of the exception to contracts or TPMs could be clarified.

C. Press review

The "press review" exception was also examined, in particular the extent to which it applies to institutions and enterprises that offer press-clippings to their subscribers or employees.

First we have described the exception for press review in the Information Society Directive (Art. 5(3)(c)). By way of introduction we have briefly recalled its origin, its objectives and the conditions to which it is subject.

Then we have examined the notion of "press clippings" and some related concepts (press review, press summary, media monitoring service, news aggregator), the stakeholders involved in the application of this exception and we have briefly analysed the copyright protection of press clippings.

We have then considered, at the request of the Commission, three scenarios and we have verified whether the existing exceptions allow the uses involved without the right holders' prior consent:

(i) The use of press clippings by an employer for its employees (in-house press clipping);

(ii) The commercial offer of press clippings to subscribers; and

(iii) The offer of press clippings by any person to the general public.

For each scenario, we verified whether the use was covered by the national press review exceptions in the selected Member States.

We found that this exception permitted under the Information Society Directive was implemented in the Member States' copyright laws in a disparate way and that the purpose of harmonisation was not achieved. This may create difficulties for persons who wish to offer press clipping services under the exception without restricting it to the borders of one Member State.

We also found that none of the three scenarios under examination meet the conditions of the press review exception in the InfoSoc Directive or, generally, the conditions of the exceptions under national copyright law. Exceptions are Denmark and Germany where in-house press clippings may be permitted under national law, provided that specific conditions are met. Legal or natural persons who qualify as being part of the "press" (which has to be interpreted restrictively) enjoy a larger exception. Consequently, in each of the scenarios under examination, the right holders' prior authorisation is required.

An extension of the press review exception to cover any of these three scenarios is unlikely to meet the three-step test. It may also be uncalled for where practical solutions are available (in the form of individual or collective licences). Furthermore, it is considered that the already dire financial and commercial situation of the "press" would not support the extension of the exception and that contractual practices are being further developed, e.g. for in-house press clipping and automated news aggregation.

D. User Generated Content (UGC)

The chapter on "user generated content" (UGC) starts with a definition of this notion, some available figures and a discussion of the Commission's position on this subject matter. We examined which exclusive economic rights apply to UGC (reproduction, communication to the public including making available to the public, adaptation) and which moral rights the authors may invoke (attribution,

integrity). It results that, in principle, the creation of user generated content requires the author's consent.

Existing exceptions and limitations. – We verified whether existing exceptions and limitations in the InfoSoc Directive may exempt the user from clearing the exclusive rights, in particular the exceptions for quotation for criticism or review (Art. 5(3)(d)), incidental inclusion (Art. 5(3)(i)) or caricature, parody or pastiche (Art. 5(3)(k)). We have then discussed some decisions of the CJEU where guidelines can be found on the interpretation of exceptions and the Member States' margin. No decisions on UGC from a national court within the EU have been found but the few American decisions on this subject matter have been examined. We concluded that the existing exceptions can be relied upon for only a fairly small number of UGC creations.

Other limitations and justifications. – We then examined whether there is in fact a "chilling effect" on UGC, resulting from the existing legal framework, taking into account the legal grounds (other than exceptions *sensu stricto*) the user could invoke (freedom of expression, freedom of trade and competition, the general exercise of balance of interests, the *ratio legis* of the exception, the misuse of copyright and implied consent). Overall there is very little case law and we concluded that user generated content has not met with great opposition from the copyright holders.

In the second part of this chapter, we examined which legal initiatives would accommodate UGC as an expression permitted under copyright. We distinguished between constructions within the current legal framework, i.e. without making any changes to the existing provisions, and those that would involve changes to the existing legislation and/or to the Directive:

(i) Within the existing legal framework. – Certain initiatives have been taken with regard to UGC in the context of "Licences for Europe." It would be useful to issue a Commission Communication on UGC, in which the Commission gives its own views as to which UGC uses are allowed and its interpretation of the existing exceptions relevant for UGC. Such Communication would however not be able to remedy the lack of harmonisation of the exception in the Member States. Similarly, initiatives encouraging education and information of the users could be useful (without providing a solution to the lack of harmonisation in the Member States).

(ii) New legal initiatives. – A first intervention could be aimed at a further harmonisation of the relevant exceptions to UGC (quotation, incidental inclusion and caricature). These exceptions could be made compulsory to ensure that users throughout the EU enjoy the same margin for their creations. The exceptions for quotation and parody could be made unwaivable by contract (at least to some extent). It should be paid attention that, overall, the beneficiaries of the limitations are the user/creators of UGC and not the commercial platforms. This requires further reflection on the relation between the exceptions and the provisions of the E-commerce Directive.

A second initiative could be the adoption of a specific exception for user generated content (as has been done in Canada). This was considered uncalled for, since UGC could be accommodated to a large extent by the existing exceptions.

A third option would be to provide a horizontal limitation (similar to a fair use provision), which would allow for more flexibility to the list of exceptions and limitations of the InfoSoc Directive. This is a politically delicate matter, it is doubtful whether such provision would create more legal certainty and it would affect more exceptions and limitations than UGC alone. Courts can however use the existing mechanisms to create some flexibility, in particular by operating and developing a balance of interests of the actors involved.

Finally, the issue of UGC could be taken up in a review of the e-Commerce Directive and the improvement of the notice-and-take down procedures.

To sum up: the existing exceptions with relevance for UGC could be further harmonised but no UGC exception needs to be created. Taking into account the time it takes before the effects of such intervention are felt, the Commission could in the meantime issue an interpretative document, providing guidelines on the interpretation of the existing exceptions with relevance for UGC. At the same time, the CJEU and the national courts could continue their endeavour of ensuring the effectiveness of the exceptions and the balancing of rights and interests at stake. Alternatively, the notice-and-take-down procedures of the e-Commerce Directive would be a second-best option.

E. Text and data mining (TDM)

In today's world, the amount of available information is growing at an exponential rate. Text and data mining ("TDM") is, according to some, a growing and very promising economic sector. Its applications seem to be full of potentialities, in a whole range of sectors, from forensic investigation, to predictive marketing and scientific research in all kinds of sectors (be they commercial or not). At the same time, in today's world, most information becomes available in a digital format, either from its first creation or because of the growing digitization of existing print archives.

Research is more and more relying on data analysis techniques and, as the quantity of information

grows, so does the need to be able to rely on data analysis. TDM also offers the possibility to uncover new relationships between information and data which science had always been unaware of.

A few countries in the world have adopted or are in the process of adopting specific copyright provisions to introduce a data analysis exception in their legislation. The purpose of the study has been to describe how TDM fits within the present legal context (both in terms of copyright and of database protection), to highlight the issues which may constitute obstacles or difficulties when applying the existing legal texts, and to analyze whether a new exception for data analysis would be useful or necessary.

We first tried to propose a definition of TDM and suggested "*the automated processing of digital materials, which may include texts, data, sounds, images or other elements, or a combination of these, in order to uncover new knowledge or insights*".

We first examined which exclusive rights were involved, from a copyright or database protection perspective :

– from a copyright perspective, except in very limited cases, TDM involve several acts of reproduction. When TDM is made on the basis of data and information held in a database, it will only in some cases but not often involve a reproduction or an adaptation of the database itself ;

– from a database protection law standpoint (regarding the *sui generis* rights), when the data analysis is made on the basis of data and information held in a database, it will in most cases involve "extraction" of all or substantial parts of the contents of the database but it will normally not amount to "re-utilizing" the same.

Since data analysis does trigger the exercise of several exclusive rights (reproduction for copyright ; extraction for the *sui generis* right), we then examined whether existing exceptions could apply to data analysis.

We first examined whether the temporary copy exception of the InfoSoc Directive (Art. 5.1.) could apply ; in our view, this would only be the case in limited circumstances. It means that the exception will not provide much relief (or only very rarely) for data analysis activities.

We then examined the exceptions for scientific research in both the InfoSoc Directive and in the Database Directive and analysed the extent to which they were adequate for TDM. The notions of "illustration," "scientific research", and "commercial purpose" were discussed.

It is worth remembering that, apart from the temporary reproduction exception, all other exceptions mentioned above are optional. The (not harmonized) manner in which they have been implemented in the Member States may cause difficulties for cross-border projects.

We then analyzed the initiatives which the European Commission could take : while encouraging MoUs between stakeholders may prove useful, adopting a simply interpretative document to try to clarify the present legal framework would, in our view, not be sufficient to solve the legal insecurity and remove unjustified obstacles to data analysis. Our suggestion is thus to have a new specific data analysis exception which would be inspired from, and contain partly the same conditions than, the existing scientific research exceptions, but which would have its own peculiarities.

The main reasons which, in our view, justify that a specific TDM exception be added to the existing legal framework are explained in the study and, in summary, are the following :

– the present situation regarding the research scientific exceptions in the InfoSoc Directive and in Database Directive is not harmonized ;

– the exceptions for scientific research can be (and seem to often be) waived by contract ;

– there is a controversy as to whether the exceptions apply to "illustrate scientific research" or "for scientific research as such" ; this controversy should be clarified ;

– the copyright exceptions in the InfoSoc Directive are limited "solely for scientific research", which may be seen as excluding projects where, in addition to a scientific research objective, there may be other ancillary objectives ;

– the two directives impose mentioning the authors' names and/or the sources, which may not always make sense for TDM.

On the other hand, the requirement that the exceptions are limited to non-commercial purposes should, in our view, not be changed in a possible new TDM exception.

The specific exception we are suggesting would have its own conditions of application, which would be partly similar to the conditions contained in the other scientific research exceptions and partly different. The specific TDM exception would thus not be subordinate or incorporated in the other scientific research exceptions : it would be a separate exception, to be added to the list of exceptions which already exist.

What could, in our view, be the main characteristics and contents of this new exception ?

– the exception would only apply where the purpose is mainly (and not "solely") scientific research ;

– it would not just serve "to illustrate scientific research" but would apply more broadly in cases of "scientific research ;"

– it would only apply where justified by non-commercial purposes[8];

– mentioning the sources or the names of the authors of the preexisting materials would not be an obligation but be left to the discretion of the researcher(s);

– it would be an exception to the reproduction right, partly to the adaptation right and to the extraction right;

– it would not apply to tools designed for data analysis (which should remain untouched by the exception);

– it would not apply if the data analysis output substitutes for the pre-existing works or databases and makes the consultation of these pre-existing elements useless;

– it would only benefit users having a lawful access to the data;

– it could not be overridden by contractual terms;

– it would not be optional for Member States but would be mandatory, so as to ensure a level playing field throughout the European Union.

(8) For a different opinion on this issue, see the report by the Expert Group (chaired by Ian Hargreaves), *Standardisation in the area of innovation and technological development, notably in the field of text and data mining*, 2014, http://ec.europa.eu/research/innovation-union/pdf/TDM-report_from_the_expert_group-042014.pdf