

LILIIA OPRYSK

Reconciling the Material and
Immaterial Dissemination Rights
in the Light of the Developments under
the EU Copyright *Acquis*



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LIST OF ABBREVIATIONS

AG	Advocate General
BC	Berne Convention
CFR	Charter of the Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMO	Collective management organisation
DRM	Digital rights management
EC	European Commission
ECHR	European Convention on Human Rights
EEA	European Economic Area
EEC	European Economic Community
EU	European Union
IP	Intellectual Property
MS	Member State
NCA	Norwegian Copyright Act
PPBC	Possible Protocol to the Berne Convention
SCA	Swedish Copyright Act
TFEU	Treaty on the Functioning of the European Union
TPM	Technological protection measure
WIPO	World Intellectual Property Organisation
WIPO CT	WIPO Copyright Treaty
UCC	Universal Copyright Convention

FOREWORD

My doctoral studies have been a great journey both academically and personally. It has been a privilege to dedicate this time to exploring and reflecting on the developments with full freedom of thought, for which I am most grateful to my supervisors, colleagues, friends, and the University of Tartu.

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1. INTRODUCTION

Copyright protection ought to serve the public interest by incentivising artistic labour and facilitating dissemination of creative works. Inevitably, granting exclusive rights, as one of the means of achieving the objectives of copyright protection, comes at the cost of reduced public access to protected works and distorted competition. Therefore, control conferred by exclusive rights is not absolute but must be confined to what is necessary to serve the rationales of copyright protection.

Development of technology has challenged the established approaches to defining the appropriate scope of exclusive rights. Not least, the emergence of the digital environment as a new dissemination channel has contested the traditional distinction between the rights of material and immaterial dissemination enshrined under secondary EU law in the field of copyright. Whereas the secondary law seemingly denies any general limit to the right holder's control over any primary or secondary acts of immaterial dissemination, the recent developments under CJEU jurisprudence suggest that variable circumstances of exploitation of a work call for a more flexible approach.

This thesis explores the development of the key economic rights under the EU copyright *acquis* against technological advancements and the distinction drawn between material and immaterial dissemination rights under secondary EU law. The thesis advances the idea that the assumption enshrined under the EU copyright framework at the very outset of copyright harmonisation is outdated and suggests reconciling the approaches to regulating dissemination-related rights in the light of the developments under the *acquis*, the changing circumstances of a work's exploitation, and the background outlined below.

1.1. Copyright, technology, and online dissemination

A significant share of works protected by copyright is disseminated online.¹ Whether one searches for a movie on a DVD on Amazon, purchases Kindle e-books, or streams music on Spotify, the Internet seems to accommodate any possible way of accessing and consuming the copyright-protected content. Likewise, performances and concerts, traditionally confined to concert halls and theatres, can now be enjoyed in real time and without leaving the comfort zone of one's home.

The diversity of ways of accessing works offered by a vast number of intermediaries is accompanied by a variety of restrictions on their consumption.

¹ Distribution through digital channels accounts for more than fifty percent of the global music recording industry income and a substantial part of film and publishing industry revenue. International Federation of the Phonographic Industry. Key Statistics of 2018. Available at <http://www.ifpi.org/global-statistics.php> (July 14, 2019).

Whereas a person might keep a DVD forever, opt to lend it to a friend, or even sell it, their control over an e-book purchased from Amazon Kindle or a Netflix subscription generally ends at the time of purchase. The individual will learn that e-books downloaded are licensed and, hence, cannot be transferred, resold, or even retrieved from the particular application enabling them to actually read it. Equally, a user will discover that the Spotify subscription cannot be passed on and, even though they paid an annual fee equivalent to approximately ten music albums, they will be left with nothing more than the free version of the service once they discontinue the paid subscription.²

While a person might choose to open a second-hand store to resell books and tangible copies of multimedia, they are also likely to be charged with the infringement of copyright for launching a webpage for resale of legitimately acquired e-books.³ Besides, they might want to refrain from setting up a publicly accessible webpage for the exchange of digital files, as users may happen to share infringing copies of works.⁴ Similarly, posting a link to content of unknown origin on a personal webpage can get them in trouble, in particular, if the webpage in some way generates income.⁵

An individual may understand that downloading a cat drawing and uploading it on their webpage might not be acceptable, even if the drawing is already freely accessible to the Internet community.⁶ However, other restrictions on the disposal of the legitimately acquired digital content may raise questions. Why cannot someone lend an e-book to a friend, donate it to a library, or even resell it, if they are not making it publicly accessible to anybody with an Internet connection? Someone may have used to exchange physical books with their fellow Nordic noir fans, but a similar exchange is not possible with e-books. Providers usually do not allow any transfer and, even if they did, the different digital formats used by readers would not necessarily be compatible.

Nonetheless, a person will also learn, to their big surprise, that Bandcamp allows them to download purchased music albums as many times as they need.

² The free version allows users to stream music but not to cache songs for offline access or to decide in which order to play the recordings.

³ Tom Kabinet is a platform for the resale of DRM-free e-books and a party in an ongoing dispute in the Netherlands. The Court of The Hague has referred several questions on the interpretation of EU secondary law to the CJEU, Request for a preliminary ruling in *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet and others* (2018) Case C-263/18.

⁴ Essentially, the circumstances of the *Ziggo* case examined by the CJEU, where the Court held that providing a platform for an exchange of infringing copies of a work infringed the exclusive right of communication to the public. See CJEU, *Stichting Brein v Ziggo BV and XS4All Internet BV*. (2017) Case C-610/15, Judgment of 26 April 2017 and section 5.2.3.2.2.3.

⁵ Pursuant to the criteria developed by the CJEU in the *GSMedia* case. See CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016 and section 5.2.3.2.2.3.

⁶ Consider the circumstances of the *Renckhoff* case, CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018. See also section 5.2.3.1.2.

The files are also DRM (digital rights management)-free, which allows backup copies and transferring them between any device. Readers may be surprised to discover that some retailers offer e-books without DRM. Not all the items in the Amazon Kindle store are actually supplied with DRM, but there is no way to know in advance. These other platforms do not seem to be scared of a user copying the files hundreds of times and sharing it with their friends. Even if they do, they do not show it, and they let users pay the artist a little extra on top of what is asked and pass along a personal note to them.⁷

This brief discourse into the dos and don'ts of online behaviour in relation to copyright-protected content illustrates the shift that has taken place in the past two decades. Whilst no permission is required to dispose of an acquired tangible copy of a work, users are now forced to accept the limits on what is permissible in the online environment. Whereas the practices of platforms offering access to works differ, the greater the variety of the supply or the higher the demand for it, the more restrictions on its disposal seem to be in place. There is no simple explanation for the current practices. Business models rely on a complicated mixture of licensing arrangements, contracts, and rights under copyright, the scope of which is examined here.

The digital environment has enabled a variety of services and made on-demand access to works, de facto, the new standard.⁸ Besides a new dissemination channel, technology has also enabled unprecedented control over the works, be it in the context of online access or transfer of digital copies.⁹ Whereas copyright protects the exploitation of a work, the individual copies traditionally remained largely out of reach for copyright holders once distributed.¹⁰ However, the situation has changed in the online setting, where control over digital copies reaches beyond authorising initial access and encompasses the circumstances of consuming a work.¹¹ Mere consumption of a work as such is outside of the copyright regulation.¹² However, the demarcation between uses which are relevant for copyright and those which are not becomes increasingly less evident.¹³

⁷ The feature of Bandcamp's service, where artists list minimum prices, and the platform allows fans to pay a higher price and to send a personal note.

⁸ On benefits for the right holders and consumers, see Waldfogel (2017), pp. 208–210; Longhini (2016), p. 106.

⁹ For instance, technological protection measures do not only enforce provisions of license agreements but also de facto expand control over a work and copies thereof. See Poort (2018), p. 291.

¹⁰ Exploitation of a work is enabled by the fact that transfer of a copy does not entail transfer of the rights in a work. See Koktvedgaard (1970), p. 229; Rognstad (2018), p. 138.

¹¹ On the role of technological protection measures in securing control over consumption, see Hilty (2018), p. 877.

¹² Dusollier (2018), p. 166.

¹³ On consumption being outside the scope of copyright protection, see Hugenholtz (2000a), p. 486; Wiebe (2019), UrhG § 15 Allgemeines Rn. 6–8. In the contemporary setting, see Hilty (2018), p. 874.

The opportunities offered by the emergence of new distribution channels prompted the expansion of the scope of exclusive rights under copyright.¹⁴ Major additions to the international copyright framework were negotiated in the 1990s at the outset of the online environment as a channel of a work's exploitation.¹⁵ Besides subjecting any online communication of a work to the authorisation of the right holder, the negotiated provisions also secured the non-interference with the right holder's implementation of technological protection measures (TPMs) applied in connection with the exercise of exclusive rights.

The influence of such a legislative development has been two-fold. On the one hand, such a legal regime combined with the technological possibilities facilitated the development of a variety of business models offering access to legitimate copyright-protected content. On the other hand, it has essentially either restricted or discouraged secondary use of a work, whether by a third party or by an end user. As has been illustrated at the beginning of this section, the latter often clashes with the expectations of users which were formed by the circumstances of the analogue world.¹⁶

The tendency of expanding control accorded by exclusive rights is also evident at the European Union (EU) level, where copyright harmonisation under the *acquis* is guided by the goal of a high level of protection.¹⁷ The development of the scope of exclusive rights and the permissible limitations under the *acquis* has been influenced by this objective, which has attracted extensive critique from scholars.¹⁸ The combination of broad, all-encompassing rights and an exhaustive list of narrowly defined limitations results in an asymmetry implicating the task of balancing the divergent objectives of copyright protection and interferes with the freedom of MS to devise their own solutions.¹⁹

One of the reasons why online usages which appear functionally equivalent to traditional tangible distribution are treated differently is because the EU copyright framework does not explicitly draw a boundary of the right holder's

¹⁴ See Synodinou on copyright resisting new technologies and gradually expanding the scope of the rights, Synodinou (2014), p. 81. Also, Ohly on the history of copyright as expanding exclusive rights, Ohly (2009), p. 238.

¹⁵ First and foremost, the adoption of the WIPO Copyright Treaty, adopted in Geneva on 20 December 1996 (WIPO Copyright Treaty) and the Agreement on Trade-Related Aspects of Intellectual Property Rights signed on 15 April 1994 (TRIPS Agreement).

¹⁶ See Guibault (2008).

¹⁷ EU copyright *acquis* refers to the body of common obligations for EU Member States in the field of copyright. Secondary EU law refers to the part of the *acquis* comprising the Directives and Regulations in the field of copyright. Jurisprudence refers to the body of the case law of the Court of Justice of the EU interpreting the *acquis*.

¹⁸ See Ohly on the need to adopt a level-playing field approach rather than an author-centric one, Ohly (2009), pp. 239–240. Also, see van Gompel arguing against the high level of protection as a goal in itself, since it does not necessarily contribute to enhanced creativity and innovation, van Gompel (2017), p. 307.

¹⁹ See Ohly (2009), p. 236; van Eechoud et al. (2009), pp. 94–118; Hugenholtz (2019), Rosenmeier et al. (2019), pp. 17–24.

exclusive control over dissemination unless it concerns distribution of tangible copies. Whereas the exhaustion principle recognised under the right of distribution implies that control of the tangible copies by virtue of the exclusive right expires once the right holder has marketed the copy, no such limit exists in regard to digital copies or other forms of online dissemination. Such a differential treatment has been explained, *inter alia*, on the basis of the distinction between material and immaterial dissemination of a work, where only the former type justifies placing a general limit on the reach of the exclusive right.

This distinction has influenced legislative choices made in the 1990s. Material dissemination is associated with the distribution of tangible copies, which enables the right holder to obtain compensation through the initial act of dissemination. Immaterial dissemination, on the other hand, encompasses communication of a work without providing any tangible copies, hence, through a performance, broadcast, and the like. The rationale behind the distinction lies essentially in the economic underpinning of exclusive rights. Through sale of copies the right holder would be able to obtain remuneration for each copy. On the other hand, value of a work might not be realised through first exploitation in the form of performance.

The distinction has been used to differentiate between the exclusive rights under copyright and justify their respective boundaries. In the EU, the main dissemination-related rights, the right of distribution and the right of communication to the public, have been harmonised accordingly. Whereas the scope of the right of distribution, as corresponding to material dissemination, has been limited by means of the exhaustion principle to the acts of first distribution, the right of communication to the public, associated with immaterial dissemination, covers both the initial and any subsequent act of communication of a work.

Hence, although the online environment has enabled a variety of ways to communicate a work, resembling both distribution and performance, online dissemination under the EU *acquis* is treated as essentially immaterial in nature. The latter has resulted, *inter alia*, in denying any general limits to the right of communication to the public comparable to the exhaustion principle for the right of distribution. The broadly defined right of communication to the public accompanied by narrowly construed permissible exceptions under the EU *acquis* has led to a drastic expansion of control accorded to the right holder.²⁰

However, the recent jurisprudence of the Court of Justice of the European Union (CJEU) interpreting secondary EU law in the field of copyright has challenged this enshrined perception of the homogeneous nature of online dissemination. Among other things, the Court has sanctioned the resale of software which was distributed online by extending the exhaustion principle to online dissemination resembling the sale of tangible copies.²¹ Furthermore, the Court has on a few

²⁰ See Hilty on the short list of limitations applicable to digital uses, Hilty (2004), p. 766.

²¹ In the famous *UsedSoft* case. See CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012 and section 4.2.3.3. The impact of the ruling, however, is so far confined only to software, as other subject matters of copyright are regulated under a different instrument.

occasions restricted the reach of the right of communication to the public beyond the authorisation of primary communication, employing arguments resembling exhaustion.²²

The importance of the overall development is three-fold. First and foremost, it undermined the legal certainty as to the extent of protection conferred by exclusive rights under the *acquis*. Functionally similar acts are potentially subject to different treatment, depending on whether dissemination is taking place online and what type of a work it concerns. The technology-specific approach to defining the rights under secondary EU law and the constantly evolving jurisprudence of the CJEU make it difficult to apprehend the peculiarities of assessing the possibility to limit the rights. Second, the broad wording of the right of communication to the public has a chilling effect on possible secondary uses of a work, as it appears to preclude generating any additional value for a user even though the right holder has obtained remuneration through first dissemination. Finally, the absence of legal certainty complicates the clearance of the rights as well as their management by collective management organisations (CMO). The latter, for instance, have been seeking additional compensation on the basis of the broad scope of the right of communication to the public.²³

The recent developments resulted in numerous calls for reconsidering the approach to regulating the exclusive rights under the EU copyright *acquis*, in particular with respect to delineating their scope in the online environment.²⁴ The main concern is that the EU copyright framework provides very little flexibility in apprehending the variety of ways in which a work could be disseminated online, which is particularly problematic considering the high degree of harmonisation of the economic rights under secondary EU law.²⁵ Furthermore, the CJEU, entrusted with interpretation of the secondary law, must navigate issues arising in an online setting on the basis of the concepts enshrined into the Directives even before such kinds of exploitation could be anticipated.

Evolving circumstances of exploiting a work might call for new approaches to regulating the scope of protection.²⁶ Holding on to the traditional paradigms may not be warranted in the age of new technological possibilities.²⁷ The extent

²² Sganga (2018b), pp. 213, 227–228.

²³ For instance, for the public receipt of a broadcast. See section 5.2.3.2.1.3.4.

²⁴ For a summary of the main arguments see Rendas (2018), pp. 155–160. In the context of online dissemination see Hugenholtz et al. (2018), Ginsburg (2002), Rognstad (2015), Geiger (2017), Westkamp (2017), Depreeuw (2014).

²⁵ Rognstad (2009), pp. 532, 536. See also Hilty holding that, by limiting the elbowroom for the MS, EU legislation also interferes with their ability to respond to newly emerging needs to balance the interests. Hilty (2004), p. 766.

²⁶ Jenner calls the discussion whether it is a download or a stream, under what section of the act does it fall and where and who owns it “an arcane Medieval teleological discussion”, Jenner (2011), p. 59.

²⁷ See Heide on copyright as an invention of legislature, whose contours can be shaped towards what we need it to be. Heide (2004), p. 102.

to which consumption of a work and any secondary use can be controlled in the online environment stretches well beyond what would be possible or permissible in the analogue world and is not necessarily justified by the underlying rationales of copyright protection.²⁸ In the light of the developments under the EU *acquis*, this thesis undertakes to illustrate the role of the assumptions made at the outset of the EU harmonisation, demonstrate how they have been challenged by the need to sustain a flexible approach to the boundaries of exclusive rights, and provide an outlook on how the approaches to material and immaterial dissemination rights could be reconciled to better serve the rationales of copyright protection.

1.2. Scope of this thesis

Against the background outlined in the previous section, this thesis explores the role of the distinction between material and immaterial dissemination in shaping the scope of the dissemination-related rights under the EU copyright *acquis*. The analysis focuses on the scope of the exclusive control conferred by the rights reaching beyond authorising every initial act of dissemination. For this purpose, the development of the two main rights covering dissemination of a work under the EU *acquis* is studied: the right of distribution and the right of communication to the public.

The scope of conferred control and the limits thereof depend essentially on the rationales and the objectives of copyright protection.²⁹ Hence, the analysis in this thesis is based on the assumption that none of the theories underlying the rationales of copyright protection calls for a single blanket right entailing complete control over a work. When it comes to the results of the development of the EU *acquis* in the light of the distinction between material and immaterial dissemination, they are evaluated towards the incentive rationale of copyright protection with the emphasis on the economic underpinning of the rights and their limits.

Two primary objectives are pursued in this thesis. The first objective is to demonstrate how the changing circumstances of exploitation of a work have driven the convergence of approaches to defining the scope of material and immaterial dissemination rights under the EU *acquis*. The second objective is to offer a way to reconcile the approaches by outlining a normative framework for assessing the justifiability of subjecting secondary dissemination to the exclusive right holder's control, pursuant to the developments under the EU copyright *acquis*.

²⁸ For example, the economic rationale of copyright protection on the basis of mitigating a market failure does not support extension of exclusive rights to acts that lack market failure, such as control of individual copies on a downstream market. See Poort (2018), p. 331.

²⁹ See Rognstad on the delineation of the exclusive rights as depending on the policy choices. Rognstad (2018), p. 123.

1.2.1. Research design

Historically, the distinction between material and immaterial dissemination triggered the application of different rights with a diverse scope, enabling exploitation of a work while maintaining appropriate limits of control. However, the emergence of new exploitation opportunities, in particular in an online environment, has challenged that distinction. The absence of a material medium as a primary indication of material dissemination, where exclusive control could be restricted to primary dissemination, has prompted legislators to approach the new ways of exploitation from the perspective of immaterial dissemination.

Under the EU *acquis*, the distinction between material and immaterial dissemination has been used early on in the process of harmonisation. First, the CJEU relied on it to justify a divergent treatment of the exclusive rights when their exercise conflicted with the objectives of the Treaties. Second, the distinction became a basis for harmonising the exclusive rights under EU secondary law. Nevertheless, the recent developments under the CJEU jurisprudence have questioned the assumptions enshrined under secondary EU law at the very outset of copyright harmonisation.

The Court has shown flexibility when interpreting the right of communication to the public, which had been harmonised based on its seemingly immaterial nature and, hence, lacking any general limits under secondary law. Although there could be other grounds justifying placing no general boundaries on the particular right, the criterion of tangibility is too simplistic and has rarely been explicitly employed by the CJEU.³⁰ Instead, the Court has resorted, *inter alia*, to the functional equivalent approach when assessing online dissemination resembling the conventional distribution of tangible copies.³¹ Also, the CJEU has developed a number of criteria which, in certain circumstances, exempt the secondary acts of communication from the exclusive control of the right holder.³²

These developments resulted in a substantial impairment to legal certainty. The limits of protection are decided on a case-by-case basis. Any new ruling from the CJEU is rigorously studied in an attempt to systematise the Court's approach and to predict the boundaries of the rights under the *acquis*.³³ This thesis contributes to the body of research on the EU copyright *acquis* by focusing on a single yet significant distinction between material and immaterial dissemination rights. Employed at the very outset of harmonisation, it has influenced the

³⁰ The tangible nature of copies was discussed explicitly in the *VOB* case concerning the lending right under the Rental and Lending Rights Directive, CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. (2016) Case C-174/15, Judgment of 10 November 2016. Also, see sections 3.2.4.3. and 3.3.1.3.

³¹ In particular, in the *UsedSoft* case. See section 3.3.3.

³² Such as a new public criterion, different technical means, etc.

³³ Few empirical studies of the CJEU jurisprudence have been recently conducted: Favale et al. (2016), Favale et al. (2018), Rendas (2018), Rosati (2019).

development of the rights but might no longer adequately reflect the relevant considerations.

1.2.1.1. Research questions

This thesis questions the assumption enshrined under secondary EU law in the light of developments under the *acquis* and the changing circumstances of a work's exploitation. Besides examining the background to the harmonisation of the rights and their scope under secondary law, it explores whether the distinction between material and immaterial rights has been maintained under the subsequent CJEU jurisprudence. Next, the thesis investigates how the approaches to material and immaterial dissemination rights could be reconciled for the assessment of justifiability of submitting secondary dissemination to the exclusive control of right holder under the *acquis*.

This thesis asks two overall research questions:

1. How does the development of the rights of distribution and communication to the public under the EU *acquis* reflect the distinction between material and immaterial dissemination rights?
2. How could the approaches to material and immaterial dissemination be reconciled to define the scope of exclusive rights beyond authorising every communication of a work?

Answering the two overall questions is supported by asking supporting sub-questions. Namely, answering the first overall question relies on addressing the following questions:

- How and for what purpose is the distinction between material and immaterial dissemination drawn in the context of copyright? How does the distinction relate to copyright rationales and how has it been challenged by technology development?
- What has enshrining the distinction between material and immaterial dissemination rights under the EU framework meant for national laws and the freedom of MS to legislate?
- How was the distinction between material and immaterial dissemination enshrined under secondary EU law and what were the driving forces?
- What circumstances have influenced the need and the form of harmonisation of the right of distribution, the right of communication to the public, and the exhaustion principle under the EU *acquis*?
- What role has the exhaustion principle played in limiting the scope of the exclusive distribution right pursuant to material dissemination under secondary EU law?
- Does the development of the right of distribution under the EU copyright framework reflect material dissemination and, if so, how? Does the development of

the right of communication to the public reflect immaterial dissemination and, if so, how?

- How does the exhaustion principle perform its function of limiting the right of material dissemination given the subsequent development of technology and the *acquis*?

Answering the second overall research question, in turn, is supported by the conclusions of the analysis addressing the first overall question and answering the following supporting sub-questions:

- What are the indications of the convergence of the approaches to material and immaterial dissemination rights under the EU *acquis*?
- What common criteria can be used to systematise the extent of control over secondary communication, relying on initially authorised communication, under the EU *acquis*? How do these criteria relate to the incentive rationale and the objectives of protection under the *acquis*?
- What are the main shortcomings of the current EU copyright framework in accommodating the developed criteria?

The thesis refers to dissemination of a work broadly as to any way to communicate its content to the public, e.g. through distribution of copies, performance, recitation, broadcast, streaming. Communication of a work might be a somewhat better term from the linguistic perspective and will be used interchangeably with dissemination, in particular in the last chapter of the thesis (Chapter 6). However, to avoid confusion between communication in the broad meaning of disseminating a work and communication falling within the scope of the rights of communication to the public, the term dissemination is preferred for the analysis of the scope of the exclusive rights.

1.2.1.2. Methods and sources

The first overall research question aims to ascertain what role the distinction between material and immaterial dissemination rights has played in EU copyright harmonisation. Given the structure of the EU legal framework, it is necessary to examine two aspects to answer this question. The first relevant aspect is how the distinction between material and immaterial dissemination influenced harmonisation under secondary EU law. The second related aspect is whether the subsequent development under the CJEU jurisprudence supports the distinction drawn under EU secondary law.

The second overall research question aims to offer a way to reconcile the approaches to material and immaterial dissemination rights on the basis of the developments under the EU *acquis*. In order to answer the second question, two aspects must be examined. The first aspect is what common criteria for approaching the scope of the rights beyond authorising every initial communication can be derived from the development of the rights under the *acquis*. The second

aspect is how these criteria could be reconciled under a common framework for assessment and in accordance with the rationales of the EU copyright *acquis*.

The analysis combines both descriptive and normative methods in order to answer the research questions. The first question, although being normative in nature, also requires a descriptive analysis of the legal framework in force. In order to set a stage for the analysis of the development of the rights under the *acquis*, first, the distinction between material and immaterial dissemination is explored towards the rationales of copyright protection. Second, the significance of employing the distinction under the EU copyright for the national laws of the MS is examined using the Scandinavian countries as an example.³⁴ In addition to the analytical method, the comparative method is applied to assess the divergent approaches to implementing the obligations under the *acquis* under national laws.

Next, the analysis turns to the exclusive rights under the EU copyright *acquis* as reflecting the distinction between material and immaterial dissemination rights. The inquiry starts with a historical analysis of the background to the harmonisation of the exclusive rights of communication and distribution at the international and EU levels. Against this background, the scope of the rights under secondary EU law is addressed using the literal, contextual, and teleological interpretation methods. Next, the subsequent development of the exclusive rights under CJEU jurisprudence is analysed through the prism of the distinction between material and immaterial dissemination rights as entailing limiting or extending the reach of the right beyond initial authorisation of each dissemination.

The analysis and conclusions to the first overall research question form a basis for deriving the common criteria for a normative framework for assessing the justifiability of submitting acts of secondary dissemination to the exclusive right holder's control. These criteria are evaluated towards the incentive rationale of copyright and the economic underpinning of the rights under the EU *acquis* and divided into primary and ancillary elements of the framework accordingly. The primary elements shall form a basis for the assessment, whereas the ancillary ones can complement the primary elements provided that the objectives of the exclusive rights under the *acquis* are clarified. Last, the main shortcomings of the current copyright framework under secondary EU law in accommodating the offered criteria are emphasised.

The analysis is supported by a variety of sources, including legislation, preparatory works, jurisprudence, and legal scholarship. When it comes to the EU copyright *acquis*, which is the main focus of this thesis, primary and secondary

³⁴ As will be elaborated in Chapter 2, Scandinavian copyright is characterised by the weight of public interests in copyright law-making and the broad right of making a work available, which is meant to withstand the challenges of law-making following the technology development. Harmonisation under the EU *acquis* has limited the ability to serve the public interest and adapt the copyright framework to technological advancements. See section 2.3.

EU legal sources as well as CJEU jurisprudence are analysed.³⁵ Whereas the historical analysis of the development of the rights of distribution and communication to the public examines a variety of the Directives in the field of copyright, the primary focus of the analysis is the InfoSoc Directive, which is the main instrument of harmonisation of the economic rights.³⁶ The CJEU jurisprudence also takes an essential place in the assessment of the development of the rights under the *acquis*, as the Court plays an increasingly important role in EU copyright harmonisation despite the absent system of binding precedents.³⁷ Besides the legal sources and jurisprudence, preparatory works to the legislative instruments are analysed.

Whereas the purpose of the analysis of the international instruments is not to provide an all-encompassing picture of the obligations under international law but to place the developments in the broader context of copyright evolution, the variety of sources are taken into consideration. Of primary interest are the provisions of the Berne Convention (BC), the WIPO Copyright Treaty (WIPO CT), and the TRIPS Agreement.³⁸ Besides these instruments and their preparatory works, the analysis includes the provisions of the Universal Copyright Convention (UCC) and the negotiations on the Model provisions for legislation in the field of copyright and on a possible Protocol to the Berne Convention (PPBC), ongoing in the 1990s. Although the negotiations on a Model Law and a possible Protocol did not result in the adoption of binding instruments, they laid the ground for the subsequent adoption of the WIPO CT and contribute to the understanding of the circumstances leading to the harmonisation of the rights.

Last but not least, the discussion on the impact of the EU harmonisation on national laws relies on the analysis of Scandinavian copyright, with the focus on copyright legislation in Sweden and Norway. It explores the discussion preceding the adoption of the Swedish and Norwegian copyright acts in the 1960s, and the developments taking place since the adoption of the acts, including the new Norwegian Copyright Act (NCA) of 2018. Besides the copyright acts, the preparatory works to the acts and to subsequent amendments are analysed, as they constitute an important source of interpretation under Scandinavian copyright.

³⁵ Primary EU law comprises the Treaties, whereas secondary EU law in the context of this thesis consists of the Directives and Regulations in the field of copyright. EU copyright *acquis* is used in this thesis as referring to both primary and secondary EU law, complemented by the CJEU jurisprudence.

³⁶ 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. 22.6.2001. OJ L 167/10.

³⁷ See Rosati on no formal system of precedents but the crucial role of the CJEU preliminary rulings, Rosati (2019), pp. 73–85. Also, Hartley on the role of the jurisprudence in the EU law-making and van Eechoud on the role of preliminary procedures and scholarly engagement: Hartley (2014), pp. 71–72.; van Eechoud (2012).

³⁸ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), WIPO Copyright Treaty, adopted in Geneva on 20 December 1996; Agreement on Trade-Related Aspects of Intellectual Property Rights signed on 15 April 1994.

1.2.2. Theses set forth for the defence

On the basis of the research conducted in this thesis, the following theses are set forth for the defence:

1. The development of the rights of distribution and communication to the public under the CJEU jurisprudence conflicts with the envisaged scope of the rights under the InfoSoc Directive.
2. Whereas the CJEU appears to exercise greater flexibility when interpreting the scope of exclusive rights than supported under the InfoSoc Directive, the development further limits the freedom of the MS to legislate and is to the detriment to legal certainty.
3. Reconciling the approaches to material and immaterial dissemination rights under the *acquis* would be a logical step given the developments, advancing flexibility while improving legal certainty.
4. Reconciling the approaches to material and immaterial dissemination could be achieved by defining common criteria for assessing the justifiability of subjecting secondary communication to the exclusive control of the right holder rather than operating the all-or-nothing rule under Article 4(2) of the InfoSoc.
5. The main shortcomings of the current EU copyright framework in accommodating a flexible approach to the appropriate scope of control accorded by exclusive rights is the ambiguity of Article 3(3) of the InfoSoc Directive and the all-or-nothing rule of the exhaustion principle enshrined under Article 4(2).

1.2.3. Limits of the study and future research

Evaluating the development of the rights under the EU *acquis* based on the distinction between material and immaterial dissemination rights implies that the conclusions drawn here serve to inform copyright policy without necessarily taking a definite stance on the appropriate boundaries of protection or each specific right. The objectives of copyright policy go beyond providing the incentives to create and do not necessarily require the grant of the exclusive rights. Hence, this thesis assesses the adequacy of assuming a rigid stance on acceptable limits to the control accorded by the rights in the light of the dynamic nature of exploitation of a work.

Accordingly, the normative framework, drawn on the basis of the developments on the assumption of the predominantly incentive-based rationale of the EU copyright *acquis*, provides the indications on whether extending control beyond the first dissemination is desirable. The final position on the matter will have to be taken by national courts, taking into consideration the rationales beyond providing incentives and, likely, aspects outside of the copyright domain. In the light of technological development, it is only sound that the EU *acquis* provides a flexible framework rather than operating with all-or-nothing criteria.

Furthermore, the analysis focuses on the specific dissemination-related rights, and the findings are without prejudice to the application of other rights, in particular, the right of reproduction. This is not to suggest that the right of reproduction is, as such, irrelevant. It may well be the case that the scope of the right of reproduction will cover an aspect of secondary dissemination, which, according to the developed framework, ought to fall outside the reach of the exclusive right to control dissemination. Recommendation to reconsider the approach to regulating the right of reproduction towards the communicative function of the exclusive rights is supported.³⁹ Further discussion of the right of reproduction is, however, outside of the scope of this thesis.

Similarly, the right of rental, which is closely linked to the right of distribution, will be examined here insofar as it illustrates the fine line between material and immaterial dissemination rights or the impact that the recognition of a separate right of rental has had on the scope and the wording of the right of distribution and the exhaustion principle. The right of rental will also serve as an example for where technological development prompted extending the right holder's exclusive control over secondary dissemination through recognising a separate right. Introduction of a single broad right of communication to the public not subject to exhaustion, however, means that there is little need to recognise new rights for subjecting particular acts of dissemination to extensive control. On the contrary, some form of categorisation of the acts falling under the broad right of communication to the public would be necessary if any of these acts ought to be exempted from the reach of the exclusive right.

Another important limitation of the thesis is the way to implement the suggested normative framework in practice. The mechanisms of the EU harmonisation are rather complex and require a thorough assessment of the different options. The scope of the analysis under this thesis does not allow this task to be undertaken. As will be shown, a relatively simple restriction of the right, as in the case of the exhaustion principle in the analogue world, is far from achieving a comparable result in the online environment.⁴⁰ Nevertheless, the concluding part of the thesis will briefly outline the main shortcomings of employing the criteria under the current system of secondary EU law.

As to the more concrete restraints of the analysis, four major points are identified. First, for the purposes of the analysis, no differentiation is made between the potential holders of the exclusive rights under copyright. Although the focus is on the author's rights as opposed to the neighbouring rights, the analysis does not distinguish whether the person exercising the right is an author, a publisher,

³⁹ On the ambiguity of the right of reproduction since the extension of its scope to temporary copies, see Rognstad (2018), p. 113. Also, see van Eechoud et al. (2009), pp. 73–76, 84–89; Hugenholtz (1996), pp. 95, 100.; Rognstad and Poort (2018), p. 134.

⁴⁰ See Oprysk (2019a).

or an intermediary. Hence, right holder means any person or an entity who is entitled to exercise the exclusive rights granted under copyright legislation.⁴¹

The second limitation is the focus on the boundaries of the exclusive right with respect to secondary acts of dissemination, which rely on the initial lawful act authorised by the right holder. This is to distinguish the relevant circumstances from the cases where the initial dissemination was not authorised and, thus, is infringing. In latter cases, the assessment of secondary dissemination will call for considering secondary or contributory liability, which is outside the scope of this thesis.

Third, the exhaustion principle, despite its presence in various Intellectual Property (IP) fields, is addressed solely as employed under copyright law. The principle can be attributed a variety of functions. Nevertheless, addressing the scope of exclusive rights from the perspective of allowing or restricting control beyond the first authorisation calls for considering the principle of exhaustion as a boundary of the right of distribution inherent to material dissemination.

Finally, the EU *acquis* is analysed outside the realm of the European Convention on Human Rights (ECHR), the Charter of the Fundamental Rights of the EU (CFR), or the property theory of copyright.⁴² Whereas the CFR is likely to be more often considered by the CJEU in cases requiring balancing diverse interests, it does not allow inferring the justifications for copyright protection or the structure of the rights.⁴³ Whereas historically, the rules under copyright were influenced by regulations connected to tangible property, property analogies are more misleading than guiding and detached from their purpose in the context of the online environment.⁴⁴

All these delimitations call for future research. Here, two important aspects shall be highlighted. If it is accepted that the right holder's exclusive control over any subsequent acts of dissemination is not justified by virtue of the incentive rationale, and, hence, could be restricted, alternative approaches should be considered. First, it is important to highlight the need for further research on the in-

⁴¹ Unless indicated otherwise, the term “author” is used interchangeably with the term “right holder”, similarly to the InfoSoc Directive. The Directive has been contested on this unfortunate generalisation, see Westkamp (2017), pp. 24, 38. Whereas it is important to distinguish between the different groups of right holders in every particular case, it falls outside the scope of this thesis.

⁴² The European Convention on Human Rights signed in Rome on 4 November 1950 and the Charter of Fundamental Rights of the European Union, 18.12.2000. OJ C 364/1 recognise IP as a property right.

⁴³ See Rognstad on the CFR addressing IP as property in the meaning of an asset. Rognstad (2018), pp. 68–70. Also, he emphasises that the protection of IP as property under the human rights instruments only means that legitimate expectations of right holders created by existing law should be secured. *Ibid.*, p. 197.

⁴⁴ On the analogies to property being misleading in the IP context, see Ross (1945), p. 349; Rognstad (2018), p. 66. More generally, see Sganga criticising the contamination of IP with property rhetoric for political arguments rather than using it as a systematic ground for dealing with IP under civil law. Sganga (2018a), p. 11.

fluence of the exclusive rights on competition, in particular in the context of secondary dissemination following an authorised act. Likewise, the influence of the extent of the rights beyond the initial authorisation shall be subject to an assessment in the context of consumer protection.⁴⁵ Whereas, as will be demonstrated, some concerns stemming from these two fields were mitigated with a rather simple but inflexible tool of the exhaustion principle, it is unlikely that any comparable solution fitting all the circumstances of exploiting a work can be easily construed.

This thesis sets to contribute to the overall discussion on the need to reconsider the approach to regulating the exclusive rights and their scope under copyright in the light of the recent developments, in particular in the online environment.⁴⁶ More precisely, it advances the argument on the necessity to take a holistic approach to the scope of the exclusive rights instead of relying on the assumptions enshrined under the EU framework under different circumstances.⁴⁷ Although examining the exhaustion principle primarily through the prism of its function of limiting the reach of the distribution right pursuant to the material dissemination approach, the thesis also contributes to the scholarship on the exhaustion principle's potential in the context of online dissemination.⁴⁸

The thesis also serves to inform copyright policy at the EU level as well as at the MS level. EU harmonisation has greatly restricted the freedom of the MS to devise their own solutions and has not always been favourable to the diverse objectives of copyright under national laws.⁴⁹ The thesis provides an understanding of the background of the obligations arising under the EU law and the main driving forces behind the evolving scope of exclusive rights, as well as of the tendencies observed under the CJEU jurisprudence.⁵⁰ In turn, the analysis also emphasises the impact the assumptions under secondary EU law have on national laws and the freedom of the MS to serve the rationales of copyright beyond incentivising creative labour, such as serving the broad public interest.

On a more general level, the findings of the analysis serve to inform copyright policy faced with the challenges of law-making in the constantly changing

⁴⁵ In particular with a view of the recent adoption of the Digital Content Directive that provides consumers with a claim for remedies when the use of digital content is prevented or limited as a result of restrictions imposed by a third party, including on the basis of IP rights. See Article 10 of the Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. 22 May 2019. OJ L 136/1.

⁴⁶ Jütte (2017), Gervais (2017), Hugenholtz et al. (2018), Westkamp (2017).

⁴⁷ Rognstad and Poort (2018), Strowel (2018).

⁴⁸ Mezei (2018), Karapapa (2014), Sganga (2018b), Hilty (2016), Spedicato (2015), Benabou (2016).

⁴⁹ On the diminishing freedom of MS to devise their own solutions, see Hugenholtz (2019). For an example of the conflicting objectives, see Kelli et al. (2017). The exhaustive list of exceptions and limitations to the exclusive rights under the EU Directives comes into conflict with the preservation of Estonian language through the development of language technologies.

⁵⁰ See Rosati on the role of the CJEU in copyright law-making and an attempt to rationalise the Court's rulings to identify standards, Rosati (2019).

circumstances of exploitation of a work that would safeguard competition while providing sufficient incentives to engage in creative work. Drawing conclusions on the basis of the analysed development, every attempt is made to leave behind the contemporary ways of dissemination and the existing business models. Just as it was detrimental to the legal certainty to legislate the exclusive rights on an assumption that made sense at the time, it would be disadvantageous to attempt to offer a rigid framework for drawing normative conclusions on the basis of a clear-cut categorisation pursuant to the contemporary circumstances. Instead, what this thesis seeks to achieve is to rationalise the importance of reconciling the approaches to material and immaterial dissemination on the basis of the notions which are well familiar in copyright law-making even if not always explicitly acknowledged.

1.2.4. Outline

The thesis is divided into three main parts. The first part contextualises the analysis by outlining the framework towards which the development of the rights under the EU *acquis* is assessed in the later chapters. The second part of the thesis concentrates on the analysis of the development of dissemination-related rights under the *acquis* against the outlined framework. The third and final part of the thesis discusses the findings of the analysis and presents the answers to the two overall research questions.

Chapter 2 provides a basis for the analysis by placing the distinction between material and immaterial dissemination into the wider context of copyright rationales and, in particular, the economic rationale of protection. Given that the main focus of the thesis is on the EU copyright framework, the chapter also draws attention to the significance of enshrining the distinction under secondary EU law for national laws. Next, the distinction between material and immaterial dissemination rights is also discussed towards technological development constantly changing the circumstances of a work's exploitation and the appropriate scope of protection, emphasising the risk entailed by drawing normative conclusions on the assumptions of the past.

Chapters 3 to 5 present the analysis of the development of the rights of distribution and communication to the public towards the findings and the outlined framework under Chapter 2. The exhaustion principle as an inherent boundary of the right of distribution is separated from the analysis of the right and is dealt with at greater length in Chapter 4. Each of the chapters 3 to 5 starts with identifying the background to harmonising the rights at the EU level, including the relevant obligations under international law. The analysis then proceeds to assessing the development of the rights in the light of the distinction between material and immaterial dissemination rights. The last part of each chapter compares the findings of the analysis with the characteristics of material or immaterial dissemination to illustrate how the approaches converge.

Finally, Chapter 6 presents a discussion of the findings of the analysis and the answers to the two overall research questions. The first part of the chapter is dedicated to summarising the identified developments pointing towards the convergence of the approaches to material and immaterial dissemination rights under the *acquis* and forming a basis for reconciling the approaches through a common framework. In this part, the conclusions on the first overall research question are provided along with the outlook on the normative framework in the second part.

The second part of Chapter 6 presents the normative framework offering criteria for the assessment of justifiability of subjecting secondary dissemination to the right holder's control, based on reconciling the approaches to material and immaterial dissemination pursuant to the observed developments under the *acquis*. The part outlines primary and ancillary elements of the normative framework and highlights the main shortcoming of employing the framework under the current system of secondary EU law. Chapter 6 concludes by summarising the answer to the second overall question.

2. DISTINCTION BETWEEN MATERIAL AND IMMATERIAL DISSEMINATION IN THE CONTEXT OF COPYRIGHT RATIONALES AND COPYRIGHT LAW-MAKING

Whereas the distinction between material and immaterial dissemination has been used to systematise exclusive rights under national laws before EU harmonisation, it has been given a distinct normative expression under the *acquis*. The scope of the two main dissemination-related rights was harmonised under EU secondary law relying, *inter alia*, on the distinction. Nearly three decades from the start of copyright harmonisation under secondary EU law and after numerous requests for its interpretation, the normative scope of the harmonised dissemination-related rights no longer fits into the originally intended boxes. At the same time, the CJEU must commence every assessment of the scope of the right departing from the normative constructs of the early 1990s.

To assess the developments under the EU *acquis* in the light of the distinction drawn at the outset of harmonisation of the exclusive rights, it is essential to start from the rationales of copyright and how the justifications for protection impact the scope of control under exclusive rights. The distinction between material and immaterial dissemination is based essentially on the economic rationale of copyright, which will be paid special attention. Next, the suggested rationales of the EU copyright harmonisation ought to be explored to emphasise the challenges of serving the diverse rationales of copyright under national laws of MS.

The harmonisation of exclusive rights under the *acquis* has had a tremendous impact on national laws, both when it comes to the normative scope of the rights and, even more important, the MS freedom to legislate in the field of copyright.⁵¹ The scope of this thesis does not encompass a detailed analysis of the impact of harmonisation. Nevertheless, this chapter will briefly address the influence of harmonising the rights under secondary EU law on the basis of the distinction between material and immaterial dissemination by taking a look at the jurisdictions traditionally characterised by a less dogmatic stance on the scope of exclusive rights.

Namely, the chapter will look into the Scandinavian copyright framework. Important for the overall focus of this thesis, Scandinavian copyright has long recognised a broad right of making available of a work encompassing any protected acts of dissemination to the public, exemplifying categories of the acts falling under the right. Although, depending on the category, the consequences of exercising the right of making available would be different, the tendency has been to refrain from strict fitting of the acts into the boxes and focusing on the circumstances of the work's exploitation at large. The development ought to

⁵¹ On the CJEU jurisprudence indicating the preemption in the field of copyright, see Rosati (2019), pp. 73–85. Also, see Rosenmeir et al. (2019), pp. 24–26.

better match the ever-changing circumstances of a work's exploitation, although EU harmonisation has substantially limited such leeway.

Furthermore, initially, Sweden and Norway implemented the obligations arising from the InfoSoc Directive, which is the primary focus of this thesis, differently. However, subsequent developments under CJEU jurisprudence have recently prompted Norway to introduce a separate category of communication of a work to the public under the broad right of making available to the public under the national law. Although Norway is not an EU MS as is Sweden but an EFTA MS, its copyright framework is likewise affected by the EU copyright *acquis*. Lastly, Scandinavian copyright offers novel rationales for determining the scope of copyright protection which have not been explicitly acknowledged under the *acquis* but might be of help where the traditional underpinnings fail to provide mechanisms for striking an appropriate balance.

This chapter serves to provide the background to the analysis of the development of the rights under the EU copyright *acquis* and outline the framework towards which the development will be evaluated. Before attempting to answer the two overall research questions of this thesis, it is necessary to recall the rationales of copyright and their influence on the scope of the exclusive rights. Depending on the perspective taken, the analysis of the development will deliver different results. Furthermore, the background would not be complete without introducing the distinction between material and immaterial dissemination as understood at the time of harmonisation in the 1990s and without also addressing its relation to the rationales of copyright protection. This chapter contributes to the understanding of the background by addressing following sub-questions:

How and for what purpose is the distinction between material and immaterial dissemination drawn in the context of copyright? How does the distinction relate to copyright rationales and how has it been challenged by technology development?

What has enshrining the distinction under the EU copyright framework meant for national laws and the freedom of MS to legislate?

To address the first two questions, it is appropriate to start with the rationales of copyright. First, the leading theories for state intervention are recalled with an emphasis on the economic justifications for copyright, which underpin the distinction between material and immaterial dissemination. The aim is to illustrate how the rationales of protection shape the scope of the exclusive rights by accommodating interests other than that of right holder's and to introduce the objectives of the EU copyright *acquis* expressed under secondary EU law.

Next, the chapter will turn to the challenges of determining the optimal scope of protection given the ever-increasing and diversified channels of a work's dissemination. Here, the distinction between the material and immaterial dissemination shall also be introduced. Whereas the distinction has been useful to systematise the rights in the past, including at the very outset of rapid technological development, the distinction becomes rather confusing in a contemporary

setting. Hence, any rigid rules formulated on that basis could become misleading and counterproductive.

To address the third question, the impact of the harmonisation of the exclusive rights on the basis of material and immaterial dissemination is explored using the example of Scandinavian copyright. First, the background for the unique rationales of Scandinavian copyright is provided through addressing the Scandinavian realism movement. Second, the premises of the broad right of making available with its categories is explored. Third, the impact of the EU harmonisation on national laws is summarised by looking into further categorisation of the making available right under Scandinavian copyright.

The chapter is divided into four parts. Part 2.1. provides the background by addressing the rationales of copyright and in particular the economic justifications behind the exclusive rights. It then proceeds to the rationales of copyright under the EU *acquis* with the emphasis on the InfoSoc Directive. Part 2.2. is dedicated to the impact of the development of dissemination channels on copyright law-making and the distinction between material and immaterial dissemination as a basis for differentiating between exclusive rights.

Part 2.3. is set to explore how the harmonisation under the *acquis* has impacted the flexibility of the MS in addressing the proper boundaries of protection through determining the scope of exclusive rights. Focusing on Sweden and Norway, this part explores legal realism thinking as impacting the rationales of Scandinavian copyright, the structure of economic rights and the changes that followed the harmonisation under the EU copyright *acquis*. Finally, Part 2.4. summarises the findings of the chapter and outlines the prism through which the analysis in chapters 3–5 will be undertaken.

2.1. Rationales of copyright

Copyright legislation is essentially a result of state policy intervening in private relationships to facilitate certain behaviour that is considered to contribute to the common good. Hence, the copyright policy is formed according to the needs of society and is subject to change.⁵² Although many aspects of copyright protection are harmonised internationally, much of the regulation takes place on the national or, at most, regional levels. The extent of state intervention and the scope of the granted protection depend on the assumed rationales of the intervention.

This part provides a stage for further analysis of the scope of the rights by recalling the diverse rationales of copyright protection and the premises of harmonisation under the EU copyright *acquis*. More precisely, it places the distinction between the material and immaterial dissemination in the context of the justifications for protection and, in particular, the economic underpinning of the rights. First, it briefly outlines the leading copyright theories underpinning the

⁵² Heide (2004), p. 102.

rationales of copyright protection.⁵³ Depending on the theory and the respective justifications, the desirable extent of protection and the scope of the exclusive rights will differ. In this part, particular focus will be paid to the economic considerations, which also will form a basis for further analysis of the development of the rights.

In-depth analysis of copyright theories is outside of the scope of this thesis. Even though the theories present justifications for the grant of protection, the extent of protection is not absolute and must be aligned with the interests of society at large.⁵⁴ Furthermore, neither of the theories endorse an absolute conception of copyright but allow boundaries to be maintained to account for competing interests.⁵⁵ Besides granting control over intellectual creation, copyright establishes the limits of such control in order to meet the goals of the system.⁵⁶

2.1.1. Theories of copyright and rationales of protection

Multiple theories attempt to explain and justify copyright protection. Although some theories are primarily associated with particular legal systems, the arguments from multiple theories often blend and do so inconsistently.⁵⁷ The mix of theories can be traced in legislation, legal scholarship, and jurisprudence.⁵⁸ Europe is no exception. Whereas the multiple aspects of copyright protection are harmonised, the underlying rationales differ between jurisdictions, which poses challenges to EU harmonisation.⁵⁹ Guidance on how the different rationales should be reconciled under the EU *acquis* is missing.⁶⁰

While, traditionally, European copyright is predominantly based on the authors' rights and thus, natural rights theories, more "rational" rationales are also recognised.⁶¹ Natural rights philosophy provided grounds for developing the personality and labour theories, which emphasise the connection of an author with the product of their work.⁶² While the personality theory considers an intellectual creation to be an extension of the author's personality, the labour theory accentuates one's entitlement to the outcome of their efforts or labour.

⁵³ On discussing ideas rather than theories, as the latter must be contextualised, see Rognstad (2018), p. 114.

⁵⁴ Ramahlo (2016), p. 72.

⁵⁵ *Ibid.*, p. 217.

⁵⁶ Ramahlo (2009), p. 11.

⁵⁷ Quintais (2017), p. 329. Also, Rognstad (2018), p. 88.

⁵⁸ Fisher (2001), p. 173.

⁵⁹ Ramahlo (2016), p. 7.

⁶⁰ Rognstad (2018), p. 92.

⁶¹ Hugenholtz (2000a), p. 483.

⁶² Philosophical foundations of the theories can be found in the works of Locke and Hegel. See Locke (2008), Hegel (1991).

Both personality and labour theories entitle authors to inherent exclusive rights of a moral and economic nature. They are often associated with the continental European legal systems, where the moral rights of an author are of the utmost importance.⁶³ The basis of these theories lies in the vision of IP as conferring property right, which emphasises a person's entitlement to the results of their labour.⁶⁴ Personality and labour theories have traditionally been seen as advocating for more extensive protection than the utilitarian considerations.⁶⁵ Nonetheless, these theories also accept the societal function of recognising natural rights under the positive law. Hence, they also recognise the possible necessity to restrict these rights.⁶⁶

Utilitarian theory, which has mostly been associated with US copyright, has also influenced development in Europe.⁶⁷ It has constantly been gaining importance at the EU level.⁶⁸ The theory builds on the idea that, towards a diversity of individual interests, a collective good should be promoted.⁶⁹ In the context of copyright, the theory seeks to promote the creation of works and their dissemination to the public through the grant of protection.⁷⁰

Ultimately, what amounts to a collective good is no easy question to answer. This led to the development of multiple derivatives offering a framework for establishing one. As utilitarian philosophy also became one of the grounds of modern economics, the most prominent derivatives are to be found in the economics domain.⁷¹ In the search for a definable collective good, two major lines of economic thinking have been extensively applied to copyright: the welfare economics and the theories of social justice.

The welfare economic theory has been widely used to justify contemporary copyright rules.⁷² Welfare is a broad term on its own, which can include both monetary norms and non-monetary ones, such as privacy and freedom of speech.⁷³ In the context of copyright, the welfare economic theory became a basis for the incentive theory. The incentive theory justifies protection against acts that, as a consequence of market failure, negatively and significantly influence exploitation opportunities and, thus, the incentives to create.⁷⁴

⁶³ Guibault (2002), pp. 8–9.

⁶⁴ On philosophical foundations see van Gompel (2011), pp. 197–200.

⁶⁵ Elkin-Koren and Salzberger (2012), p. 62.

⁶⁶ van Gompel (2011), pp. 255–256.

⁶⁷ Waelde and MacQueen (2006), p. 6.

⁶⁸ Elkin-Koren and Salzberger (2012), p. 66.

⁶⁹ *Ibid.*, p. 63.

⁷⁰ Guibault (2002), p. 10.

⁷¹ Elkin-Koren and Salzberger (2012), p. 63.

⁷² Rognstad and Poort (2018), p. 124.

⁷³ Poort (2018), p. 288.

⁷⁴ *Ibid.*, p. 293.

Another approach to maximising utility relies on individual choices and society functions rather than on welfare.⁷⁵ One example is scholarship building on the relatively recent theory of distributive justice, which provides alternative grounds for considering copyright outside the welfare economics.⁷⁶ Besides recognising the need to provide incentives in general, such theories also differentiate between the authors, actual right holders, and the intermediaries.⁷⁷

These theories by no means form an exhaustive list of possible justifications for copyright protection.⁷⁸ Besides the theories outlined above, there are other less studied rationales such as free expression, culture and industry.⁷⁹ This chapter will proceed with a closer look at the economic underpinnings of exclusive rights. The economic considerations have gained importance following the development of digital technologies and the changing circumstances of a work's exploitation. Furthermore, the distinction drawn between material and immaterial dissemination rights to determine the extent of appropriate control relies on the economic underpinnings of the rights.

2.1.2. Economic approaches to copyright

The prevailing approach to analyse IP through the prism of law and economics is the incentive theory.⁸⁰ The theory relies on the conception that the production of cultural goods ought to be incentivised in the name of the collective good. Incentives typically translate into the grant of exclusive rights, although not necessarily.⁸¹ What is then transacted on the basis of the rights is the access to a work

⁷⁵ Elkin-Koren and Salzberger (2012), p. 64. Examples of such scholarship are works on social justice in the context of copyright. See, for instance, Shaver on promoting access to works despite the existing disadvantages, and on advancing the interests of individual creators within disadvantageous communities. Shaver (2014), pp. 117–168.

⁷⁶ The distributive justice theory builds upon more recent philosophical work, the theory of justice by John Rawls, where a person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. See Rawls (1999), p. 53. Interpretation of Rawls' theory in the context of IP holds that welfare should be maximised for all groups as long as the worst off are not made even worse off, see Hughes and Merges (2017), p. 520. According to Poort, some aspects of copyright explicitly have a distributive justice character, such as the *droit de suite* or measures advancing position of authors. See Poort (2018), p. 284.

⁷⁷ The utilitarian approach has been criticised, inter alia, for focusing too much on regulating reward for creators, while it is essentially intermediaries who benefit the most, see Hughes and Merges (2017), pp. 514–516. On the distributive justice theory initially being at the core of IP harmonisation, see Yanisky-Ravid (2017), p. 6.

⁷⁸ On the impact of the distinction on the differences between the legal systems, see Goldstein and Hugenholtz (2012), pp. 6–8.

⁷⁹ Hugenholtz (2000a), pp. 483–484.

⁸⁰ Elkin-Koren and Salzberger (2012), p. 72.

⁸¹ Guibault (2002), p. 11.

or its temporary possession without acquiring ownership.⁸² Whilst the incentives are not a necessary precondition to the creation of a work, it is generally accepted that granting the exclusive right to exploit a work increases production at least of the works that are to be exploited commercially.⁸³

Copyright is thus often explained through a trade-off. The granted protection “trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place”.⁸⁴ According to the incentive theory, copyright protection is justified as long as it does not reach beyond “the minimum necessary to provide authors with an incentive to create and make their works available to the public”.⁸⁵

Seen from the perspective of the trade-off, granting rights in order to secure incentives to create a work comes at the cost of access to a work. From an economic standpoint, the objective is to find an optimal point of protection at which a maximum amount of social welfare is created.⁸⁶ However, the focus of the economic approach has predominantly been on the role of exclusive rights, without considering the role of the exceptions to these rights.⁸⁷ The following sections outline the main considerations under the incentive theory, both traditional and alternative ones.

2.1.2.1. Justifications based on market failure

Public good is one of the most evoked concepts to justify the exclusive rights under copyright and a leading foundation of the incentive theory. Under this approach, intellectual creations are considered public goods, the production of which will be undermined due to market failure. Therefore, under the incentive paradigm, state intervention is justified to safeguard incentives to create such public good and, hence, eliminate market failure.⁸⁸

The two underlying attributes of public goods are non-excludability and non-rivalry. The non-excludability of a good lies in the absence of mechanisms to exclude other persons from using it or the high costs of such exclusion. The non-rivalry nature of a good means that consumption of good by one person does not hinder consumption by other persons.⁸⁹ These attributes lead to a market failure, where the good is likely to be underproduced due to the lack of incentives.

⁸² Watt (2004), p. 154.

⁸³ Blomqvist (2003), p. 64. Also, on copyright as a costly measure to inhibit unauthorised copying and use, see Handke (2011), p. 4.

⁸⁴ Landes and Posner (1989), p. 326.

⁸⁵ Netanel (2007), p. 18.

⁸⁶ Picard and Toivonen (2004), p. 29.

⁸⁷ Heide (2004), p. 89.

⁸⁸ Elkin-Koren and Salzberger (2012), pp. 72–77.

⁸⁹ *Ibid.*, pp. 75–76.

For instance, if the good is non-excludable and there are no mechanisms to exclude others, there is a potential for free riding. Where the investment for creating a good is significantly higher than the actual cost of producing subsequent units, others could free-ride on the investment and act in competition without bearing these initial costs of creation.⁹⁰ Further, if a good is non-rivalrous, it can be consumed by multiple persons without being exhausted. This means that providing it to a marginal individual comes at zero cost. On the other hand, it is also in the general interest of society that non-rivalrous good is used by as many as possible, as it creates positive externalities, which contribute to maximising welfare.⁹¹

In essence, both attributes of public good result in externalities, which arise when an economic activity influences an unrelated third party, whether positively or negatively. Market failure arises where a public good is underproduced because of the first investor not recouping the investment due to another party entering the market.⁹² From this perspective, copyright-protected works are treated as public goods, for which an intervention is justified to incentivise their production. However, the non-rivalrous nature of such goods justifies limiting the scope of control over the goods to facilitate the broadest of possible usage for the greatest collective welfare.⁹³

Correcting market failure through granting exclusive rights comes at the cost of the monopoly it facilitates.⁹⁴ First, exclusive control in combination with profit-maximising behaviour results in deadweight losses that reduce social welfare.⁹⁵ Second, it also increases the overall cost of the production of such goods, ultimately decreasing social welfare.⁹⁶ Third, it increases transaction costs associated with obtaining authorisation from the right holder, which slows down the production of new works.⁹⁷

In economic terms, regulation is justified on the basis of correcting one or more market failures. Nonetheless, regulatory failures are likely to be worse than market failures themselves.⁹⁸ Thus, the incentive theory on the basis of the public good concept justifies providing the incentives to produce a work, followed by maximising collective usage and welfare once the work is created.⁹⁹ Economic

⁹⁰ On the example of book publishing, see *Ibid.*, pp. 74–75.

⁹¹ *Ibid.*, p. 76.

⁹² Rognstad (2018), p. 18.

⁹³ Elkin-Koren and Salzberger (2012), p. 76; Brennan (2002), p. 350.

⁹⁴ See Boyle for the discussion on the monopoly concerns Boyle (2000), pp. 2025–2026.

⁹⁵ Maximising profits can lead to pricing out certain consumers that are willing to acquire a good at the marginal cost of production, which results in a deadweight loss. See Elkin-Koren and Salzberger (2012), p. 76. Also, Boyle (2000), p. 2029.

⁹⁶ van der Noll, R. et al. (2012), p. 1.

⁹⁷ Hugenholtz (2000a), p. 483; Elkin-Koren and Salzberger (2012), pp. 76–77.

⁹⁸ Regulatory failures should not be mitigated by more regulation but instead by repealing the failed regulation. See Paces and Van den Bergh (2011), pp. 4–6.

⁹⁹ Elkin-Koren and Salzberger (2012), p. 65.

theory only provides arguments for copyright protection which is justified, for example, on the basis of market failure of public good. However, it does not provide guidance on the extent of appropriate protection.¹⁰⁰ What is too broad or too narrow for granted rights can be difficult to determine only with the help of economic theory and must take into account the circumstances.¹⁰¹

2.1.2.2. Challenges to justifications based on market failure and alternative approaches

The traditional approach to copyright under the incentive theory has been contested.¹⁰² The reliance on the concept of market failure of public goods appears to emphasise only a part of the involved externalities and promote extending the scope of the exclusive rights. For instance, the traditional approach was criticised for considering the exceptions to the rights solely through the prism of market failure and without considering their market effects.¹⁰³ More fundamentally, it has been doubted whether the public good characteristic of works is a problem or actually an opportunity.¹⁰⁴

A major line of critique is directed to the inability of the traditional approach to point towards achieving a necessary balance between the incentives to create and ensuring access to a work. For instance, absolute protection is unlikely to be socially optimal, as it is costly to exclude the non-payers from access, considering that they do not impose direct costs.¹⁰⁵ Moreover, it is relatively costless to provide exclusive rights. Where the potential positive effect for users is great, it could be tempting to broaden the rights.¹⁰⁶ Boyle, for instance, questions copyright protection going beyond the grant of exclusive rights that would provide enough incentives to create. The exhaustive control over a work in all aspects would clearly be excessive.¹⁰⁷

Furthermore, some argue that if a substitute market of pirated or second-hand copies exists, it does not necessarily mean that the whole society is worse off. Right holders might well be able to appropriate the profits from these markets, which is not only socially beneficial but also increases the welfare of right holders

¹⁰⁰ Poort (2018), p. 2089.

¹⁰¹ Ghosh and Calboli (2018a), p. 24.

¹⁰² On discussing the ultimate goal of maximising the economic welfare rather than focusing on market failure and minimising the externalities, see Kreiken and Koepsell (2013), p. 6.

¹⁰³ Heide (2004), pp. 88–89.

¹⁰⁴ Gordon (2003), p. xv.

¹⁰⁵ Watt (2000), p. 4.

¹⁰⁶ Ghosh and Calboli (2018a), p. 26.

¹⁰⁷ See also Boyle on that IP ought to focus on obtaining output of protection besides providing the input, Boyle (2000), pp. 2030–2032.

themselves.¹⁰⁸ Besides, most of the estimates on the costs of piracy are considered inadequate as they are based on incorrect assumptions of consumer behaviour.¹⁰⁹

Consequently, the efficacy of copyright as a tool to create a system promoting creation and access to a work has been questioned.¹¹⁰ Copyright protection has been regarded as not capable of achieving a balance between interests, which are anything but static.¹¹¹ Some contend that, unlike other property rights, copyright is easy to expropriate and most of the time society as a whole is better off without it.¹¹² To this end, a variety of alternatives to copyright protection have been presented, essentially corresponding to various market strategies.¹¹³

One of the proposed alternatives to the approach based on market failure is the wider perspective of externalities. Externalities arise when an economic activity influences the unrelated third party, whether positively or negatively. Heide argues that externalities can better explain the current structure of copyright as a system granting rights of different scope to different stakeholders in essentially the same underlying intangible.¹¹⁴ If viewed from the perspective of externalities, the system of copyright protection can be explained as attempting to internalise the externalities in two major ways; first, by allocating the rights that facilitate the existence of a market for works, accompanied by the exceptions to these rights which enable a secondary market; and, second, by permitting others to borrow ideas and elements of a work, facilitating existence of alternative suppliers.¹¹⁵

Externality is potentially maximised when a work is widely disseminated and available to the public. Hence, if a right holder can charge for every use or for identical repetitive uses, or ask for a different amount depending on the type of use, externalities are affected negatively. On the other hand, if the right holder can only charge a certain amount for the use, the extent of the externalities is affected positively.¹¹⁶ Through this lens, the exceptions and the limits of the rights are equally important, as they influence the externalities and have effect on a market.

Another issue which is overlooked by the preoccupation with market failure in economic research on copyright is competition, which should be of great

¹⁰⁸ Watt (2000), p. 29.

¹⁰⁹ *Ibid.*, p. 33; Liebowitz (2003), p. 20. For a recent study on copyright piracy, see Poort et al. (2018).

¹¹⁰ See Merges submitting that, whereas efficiency is the goal of any area of law, it cannot by itself explain the system of IP. Merges (2011), p. 6.

¹¹¹ *Ibid.*, p. 6.

¹¹² Watt (2000), p. 1.

¹¹³ Watt (2004), pp. 162–167.

¹¹⁴ Heide (2004), p. 92.

¹¹⁵ *Ibid.*, p. 92.

¹¹⁶ *Ibid.*, p. 98.

importance in the information society.¹¹⁷ Rather than addressing it through competition law regulating copyright from the outside, Heide suggests employing a competition perspective to understanding how the market works. He argues that rigorous competition could be a desirable and sound basis for understanding copyright law.¹¹⁸

This alternative approach emphasises the importance of maintaining the mechanisms of placing constraints on a right holder's ability to impose the price and the conditions of use through exclusive rights.¹¹⁹ Hence, it stresses the importance of exceptions and their effect on the market. For instance, if examined towards internalising externalities, the effect of the exhaustion principle on the market is rather minimal, as it accords only the copies produced by right holder or with their authorisation to be in circulation.¹²⁰

Recently, economic analysis of the borderlines of copyright protection in the context of digitisation has been conducted by Poort.¹²¹ Taking the normative welfare economics approach, the scope of copyright protection was assessed in a couple of concrete examples of a work's exploitation. It has been argued that digitisation has significantly influenced the envisioned market failure, and in some cases, may have even eliminated it.¹²² Extensive copyright protection could go beyond resolving a market failure and generate a new one if protection is wider than the one the right holder would have enjoyed in the absence of the original market failure. As the analysis showed, the current state of copyright is indeed going beyond the market failure justifications, extending to the acts lacking the underlining market failure, resulting in what Poort calls jealousy tax.¹²³

2.1.3. Rationales of copyright under the EU acquis

The harmonisation of copyright in the EU is based, first and foremost, on the competence of the Union to approximate national laws for establishing or furthering the internal market.¹²⁴ The approximation of national laws is achieved in two main ways. The first is negative harmonisation, which means the measures precluding the provisions of national law conflicting with the objectives of the internal market.¹²⁵ The second is positive harmonisation, which encompasses

¹¹⁷ Ibid., p. 102.

¹¹⁸ Ibid., p. 87.

¹¹⁹ Ibid., p. 87.

¹²⁰ Ibid., p. 98.

¹²¹ Poort (2018).

¹²² For instance, TPMs potentially eliminate market failure. See Poort (2018), pp. 290–292.

¹²³ Poort (2018), pp. 298–232.

¹²⁴ Ramahlo (2016), pp. 11–12.

¹²⁵ See, for instance, the case law examined in sections 3.2.2., 4.2.1., 5.2.1.

mainly the legislative measures to harmonise certain matters throughout the EU.¹²⁶

The EU copyright *acquis* as a regulatory framework for copyright and neighbouring rights consists of measures of both negative and positive harmonisation. Historically, the negative harmonisation preceded the positive harmonisation under the EU Directives in the field of copyright. However, the recent developments under the CJEU jurisprudence interpreting the provisions of secondary EU law underlies the continuously important role of the negative harmonisation.¹²⁷

The copyright traditions of the EU Member States (MS) are quite diverse even though many represent the *droit d'auteur* system relying on the natural rights theory, or evolved towards it.¹²⁸ While the cultural aspect of copyright harmonisation has been acknowledged on the EU level, the internal market approach to regulation took the lead.¹²⁹ Whereas the Directives and Regulations in the field of copyright are accompanied by lengthy recitals setting the stage for the intervention, the rationales of copyright protection under the EU *acquis* are far from clear and generally ambiguous.¹³⁰

Here, attention shall be drawn to the four important notions enshrined into the main instrument of positive copyright harmonisation under the EU *acquis*, the InfoSoc Directive.¹³¹ First is the objective to incentivise the creation of creative works through providing copyright protection. Second is the high level of protection as a necessary basis for providing the incentives to create. Third is the appropriate reward for the use of the works to the creators and producers, which is necessary to enable satisfactory returns on investment. Fourth is the intent to boost competitiveness and secure the freedoms of the internal market.

When it comes to the underlying rationale of harmonisation, recitals 2 and 4 of the InfoSoc Directive suggest that the legislation aims to provide the incentives for the creation of works.¹³² Copyright and related rights shall stimulate the development of products and creation and exploitation of creative content. Protection will foster substantial investment in creativity and innovation. Further, according to recital 9 of the Directive, harmonisation proceeds from an

¹²⁶ Ramahlo (2016), p. 12.

¹²⁷ For instance, see Rosati (2019), Geiger (2016).

¹²⁸ Ramahlo (2016), pp. 6–7. Also, see Quintais on the EU copyright *acquis* representing a mix of natural and utilitarian arguments, Quintais (2017), pp. 330–331.

¹²⁹ Ramahlo (2016), pp. 13–18. Also, Hilty argues that, although recourse to personality-driven approach is more sublime, to oppose the economic approach is far removed from realities of the culture industry. See Hilty (2004), p. 771.

¹³⁰ Rognstad (2018), pp. 89–90.

¹³¹ 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. 22.6.2001. OJ L 167/10.

¹³² Explicitly under recital 2 of the InfoSoc Directive: “[c]opyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.”

assumption that it must take as a basis a high level of protection, as rights are crucial to intellectual creation. Recital 11 further specifies that a rigorous, effective system of protection is one of the main ways to ensure that cultural production receives necessary resources.

Next, recital 10 emphasises that authors and performers have to obtain an appropriate reward for the use of their work. Hence, it is necessary to guarantee the availability of such reward and opportunity for satisfactory returns on the investment.¹³³ Last but not least, pursuant to recital 1, harmonisation of the copyright laws across the MS contributes to the establishment of the internal market and ensuring competition. Under recital 4, the harmonised legal framework will foster investment and competitiveness of European industry.

As evident, the objectives of the harmonisation include a variety of economic components such as incentives, competitiveness, and reward. They point to economic rationale as one of the main driving forces of the EU harmonisation. Recital 19 of the InfoSoc Directive excludes the author's moral rights from the harmonisation and leaves them outside of the scope of the Directive. The focus of the EU legislator appears to be to further the internal market by providing a regulatory framework that would encourage the creation of works while ensuring competition.

From this perspective, we could conclude that the extent of protection should ensure that the incentives to create do not go beyond what is necessary and do not unduly impede competition on the market.¹³⁴ In a sense, this resembles the argument under the incentive theory, which addresses market failure of a public good through the grant of the rights to make the good excludable. On top of that, the Directive aims to strike a balance between the exclusive rights and the competition.

On the other hand, the Directive also stipulates the high level of protection as the starting point of harmonisation, without explaining its role in the above equation.¹³⁵ Whereas the high level of protection appears to stem from considerations, *inter alia*, under the incentive theory, the scope of such protection and the limitations are not further explained.¹³⁶ This assumption may impede achieving the

¹³³ Also, see recital 2 of the recently adopted DSM Directive, stating that harmonised copyright framework stimulates investment and production of new content. 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. 17.5.2019. OJ L 130/92.

¹³⁴ To this end, Rognstad suggests that it could be argued that the right holder does not have legitimate interest in exclusive rights beyond the ones necessary to stimulate production of works. When the rights reach beyond this threshold, potential conflict with fundamental rights can arise. Rognstad (2018), p. 196. On the internal market and competitiveness as objectives of EU copyright harmonisation, see van Eechoud et al. (2009), pp. 11–12.

¹³⁵ On the CJEU relying on a high level of protection when interpreting economic rights, see Rosati (2019), pp. 40–42.

¹³⁶ See Westkamp on the absent relevant public interest rationale underlying each limitation, Westkamp (2017), p. 29.

above-mentioned goal of striking a balance. A high level of protection as the starting point for harmonisation has indeed been widely criticised. Peukert argues that the statement of a high level of protection is teleological and only focuses on the positive effects of IP.¹³⁷ Van Gompel, in turn, submits that such premise inevitably shifts the starting point of legislative intention. A high level of protection must not be a goal in itself. Rather, the goal should be striving for an equilibrium between the different interests.¹³⁸

Turning to the appropriate reward aspect, at first sight it seems to belong to the incentive rationale and a high level of protection. The concept of remuneration (whether reward or compensation) is at the very heart of copyright regardless of the underlying theory. While under the natural rights theory and especially labour theory, reward is justified by the very fact of invested labour, the utilitarian approach often looks at incentives in the form of compensation or remuneration on the investment.¹³⁹ Under the incentive theory, reward is considered from a broader perspective of rights being granted to secure continuity of cultural production. Accordingly, the extent of monetary incentives can be limited once the incentives are provided.¹⁴⁰

Reward appears to become a central consideration under the EU copyright *acquis*.¹⁴¹ On the one hand, it can be categorised towards a high level of protection and the adequate incentives, justifying the extensive scope of the rights in order to secure a reward. However, it has also been employed to achieve the opposite. For instance, the CJEU relied on an appropriate reward under recital 10 to hold that the reach of the exclusive right could be restricted following its exercise as the possibility to obtain appropriate remuneration has been provided.¹⁴² This is of particular interest as the case in question concerned the freedom to provide services. Hence, it suggests that an appropriate reward can be an instrument of balancing the high level of protection as a starting point for providing the incentives to create and the objectives of maintaining competition.

The recently adopted DSM Directive introduced the principle of appropriate and proportionate remuneration in cases where the authors and performers license or transfer their rights.¹⁴³ Emphasising appropriate remuneration for the authors

¹³⁷ Peukert (2011), pp. 67–68.

¹³⁸ van Gompel (2017), p. 307.

¹³⁹ The extent of such compensation is, however, a difficult matter to establish. Economic theory can only provide guidance, see Rognstad (1999), p. 172.

¹⁴⁰ Rognstad 1999, pp.169–170. On the difference between reward under the labour theory and monetary incentive under the utilitarian theory, see Guibault (2002), p. 11.

¹⁴¹ See, for instance, Rognstad (1999), pp. 169–170.

¹⁴² For instance, in the *FAPL* case, CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011. Also, see sections 5.2.1.1. and 5.3.2.2.

¹⁴³ 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. 17.5.2019. OJ L 130/92, Art. 18.

and the performers ought to promote the interests of creators when the rights are transferred and exercised by other right holders. Whereas under the InfoSoc Directive the appropriate reward was used as justification for the grant of the rights, in this context it is the distribution of generated remuneration which is at stake. Appropriate remuneration is also mentioned in recital 61 explaining the rationale behind Article 17 of the DSM Directive placing obligations on the online content-sharing services.¹⁴⁴ The recital refers to the right holder's inability to determine appropriate remuneration for the use of a work, which should be guaranteed.

Accordingly, the objectives of EU harmonisation under secondary EU law are rather blurry. Much emphasis is placed on the exploitation of creative content and the need to incentivise the creation and marketing of new products and services.¹⁴⁵ Given the specific circumstances of the culture industry, these could be two distinctive goals requiring separate sets of measures.¹⁴⁶ Furthermore, the CJEU appears to rely on the textual interpretation of the recitals to construct the objectives of protection.¹⁴⁷

On these grounds, proceeding from the high level of protection as a starting line of any assessment of the scope of protection can be questioned. It has been claimed that neither notion of a high level of protection nor appropriate reward claim requires courts to interpret the rights beyond what was envisaged by the legislature.¹⁴⁸ Nevertheless, proceeding from the notion of the high level of protection and the lack of articulated rationales has influenced further development of the *acquis*, not least under CJEU jurisprudence.¹⁴⁹

On the other hand, the Court has also shown flexibility when assessing cases concerning the acts of secondary dissemination, as will be shown in the following chapters. Such notions as remuneration corresponding to the economic value of a copy, knowledge of the infringing nature of an act, or use contemplated by the first authorisation stand out from the traditional copyright rules enshrined under international law. They appear to indicate the tendency to resort to extrinsic principles for balancing of the interests.¹⁵⁰

Given the ambiguity of the objectives of the *acquis*, there are numerous calls for reconsidering the approach to harmonisation. One suggestion is to clarify the rationale of copyright under the EU *acquis*, taking into account the developing

¹⁴⁴ Ibid, Art. 17 and recital 61.

¹⁴⁵ On the InfoSoc Directive drafted in anticipation of the demands of exploiters of copyright-protected works under the rationale to incentivise the establishment of online services, see Westkamp (2017), p. 24.

¹⁴⁶ There is also a need to consider the impact of copyright on business, as rewarding inventors is only one of the measures of enhancing innovation, see Mets and Kelli (2013), p. 100.

¹⁴⁷ van Eechoud (2012), pp. 72–74.

¹⁴⁸ Peukert (2011), p. 70.

¹⁴⁹ Ibid., p. 68; van Gompel (2017), p. 307.

¹⁵⁰ Westkamp (2017), p. 26.

needs of society.¹⁵¹ Another suggestion is to remove the superfluous constellations from the wording of the legislative tools, which unnecessarily complicate the weighing of the objectives.¹⁵² Clarification of the rationales ought to serve legal certainty by elaborating on the objectives of harmonisation and potentially leaving more freedom to the MS in attaining them.

2.2. Challenges of technology and the distinction between material and immaterial dissemination

As has been explored above, one of the main tasks of the copyright framework is to secure the creator's (or right holder's) control over exploitation of a work. The nature of copyright-protected works makes their exploitation highly dependent on technological advancements, which enable the content of a work to be conveyed to an ever-widening public. Technology development not only offers new dissemination channels but also has implications for the scope of copyright protection. A work that exists in a single tangible exemplar calls for one level of copyright protection, considering any other available protection, such as by virtue of property law. A possibility to produce an infinite number of copies or to communicate a work's content to a (virtually) endless circle of persons will call for a different level of exclusivity.¹⁵³

This part will briefly introduce the distinctive feature of copyright as intricately linked to both the development of technology and the rationales discussed in the previous section. Not only should the introduction of different exclusive rights necessarily be understood through the prism of copyright rationales and the need for protection at the specific time of their enactment, the development of the copyright framework as a whole should be assessed against its ability to continuously achieve the objectives it sought to serve. Hence, it will be discussed how the changing circumstances of a work's exploitation influence the rationales for intervention and the desirable scope of exclusive control.

Furthermore, against this background, this part will introduce the distinction between material and immaterial dissemination rights. The distinction has not been clearly articulated at the national or international levels, even though it served as an argument in harmonising the exclusive dissemination rights in the

¹⁵¹ For instance, by recognising social function of the copyright protection and exploring the position of a user, see Geiger (2017), pp. 73–109; Synodinou (2010). Also, by taking into account consumer expectations, see Guibault and Helberger (2005), Guibault (2008), Guibault (2017).

¹⁵² Such as the high level of protection or the provision claiming the non-exhaustion of the right of communication to the public, see Westkamp (2017), van Gompel (2017).

¹⁵³ On the digital age influencing the economic need for copyright protection, see Rognstad and Poort (2018), pp. 127–128.

1990s. The loose distinction between material and immaterial dissemination will be linked to the previous part and put in the context of the economic underpinnings of exclusive rights. Also, the challenges associated with holding onto the distinction for drawing any normative conclusions will be explored, raising the question of whether the rules justified on the basis of the distinction ought to be reconsidered.

2.2.1. Diversification of dissemination channels and challenges of copyright law-making

Copyright is closely linked to the development of technology, as protection is not awarded in the form of a blanket exclusive right but instead consists of the rights of a different scope. Therefore, every technological development potentially influencing the exploitation of works calls for considering the necessity to widen protection through subjecting new uses to the established rights or recognising new rights. In that sense, the rights are to a large extent not technology neutral, even if there is a tendency towards grouping the uses.¹⁵⁴ Given the variety of highly technical rights, legal certainty comes at a high cost.¹⁵⁵

For a long time, rights developed largely on a national basis, subject to state policies and rationales behind vesting the exclusive rights in authors. However, with the rise of international harmonisation a few decades ago, the development of national copyright laws became increasingly dependent on the negotiations at the international level. Whereas at the outset of international harmonisation only very specific uses were harmonised, the tendency has been to opt for more generally worded rights and, hence, a higher degree of harmonisation.¹⁵⁶

Understandably, the order in which the rights were recognised internationally is by no means incidental. It reflects not only their importance during the specific periods but also the ability to reach a compromise that would satisfy majority of the parties. The right of reproduction, which is the only general right provided under the BC, was harmonised as late as during the Stockholm conference in 1967.¹⁵⁷ The broad right of distribution, on the other hand, was only recognised under the WIPO CT and in conjunction with the broad right of communication to the public.¹⁵⁸

¹⁵⁴ Lund (2001), p. 621.

¹⁵⁵ Ohly (2009), p. 235; van Gompel (2011), p. 3.

¹⁵⁶ For instance, the BC provides the right of distribution solely in regard to cinematographic works, and a very fragmented right of communication to the public. The WIPO CT, on the other hand, provides broadly worded rights capable of capturing a vast variety of uses and stretching beyond the initial acts of dissemination.

¹⁵⁷ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

¹⁵⁸ WIPO Copyright Treaty, adopted in Geneva on 20 December 1996.

The rights to control dissemination gained importance with the diversification of the ways to communicate a work, first, when the potential reach of performance was substantially extended by the ability to broadcast it and second, when reaching an even wider audience was enabled via subsequent communication of a performance or a broadcast thereof through wire or wireless means. The interest of the copyright holder shifted from the production of the copies and authorising a performance to control over the circumstances of dissemination.¹⁵⁹

Control over communication of a work became even more crucial with the rise of the Internet as a new channel of dissemination. It presented an unprecedented opportunity to reach a broad audience, a possibility and a danger at the very same time. Whilst right holders could rely on the technology to reach a broader public and, hence, increase remuneration, unauthorised communication could harm not only the opportunities to profit from Internet dissemination but also impact the demand for a work through conventional analogue channels, such as through distribution of tangible copies. These changes did not happen overnight. Even when the Internet enabled access to the resources all over the world, it took years of technological development to enable file-compressing techniques and fast data transfers that could facilitate quick delivery of content or even a real-time broadcast over the Internet. Once these developments occurred, costs necessary to exploit a work online decreased.¹⁶⁰

Determining proper scope of protection online meeting right holders' interests and those of the public at large was a far from straightforward task. In the 1990s the rights were expanded to cover the new uses, whilst the established boundaries did not always follow. As the technologies had only recently emerged, this legislative development was based mainly on assumptions about how digitisation would affect copyright holders in the future.¹⁶¹ Drawing parallels between the emerging uses and the established concepts meant a danger of premature submission of new processes under the existing concepts.¹⁶²

From today's perspective, harmonisation at the international and the EU levels prompted by the emergence of the Internet took place rather early. Since then online dissemination has become much easier and less costly.¹⁶³ Control over dissemination is enforced by a legal framework and technological constraints well

¹⁵⁹ Some attribute it to the diminishing importance of the right of reproduction in light of the expansion of its scope, where communicating a work to persons outside the intended circle became the primary concern. See Lund (1954), pp. 136, 140.

¹⁶⁰ See van Gompel on high costs of exploiting a work in analogue ways versus on the Internet. Whereas before it could be assumed that whoever made an effort to exploit a work intended to rely on copyright protection, it is not always the case online. van Gompel (2011), p. 6. On the cost reduction associated with digitisation, see Waldfoegel (2017), p. 198.

¹⁶¹ Vinje (1996), p. 439.

¹⁶² Dreier (1998), p. 631. On the premature regulation of digital environment see also Hugenholtz (1996), pp. 100–102., Hugenholtz (2000b), p. 501.

¹⁶³ Jenner (2011), p. 60; Watt (2004), p. 155.

beyond the capabilities of the analogue era.¹⁶⁴ The online environment has not only enabled a new and effective dissemination channel but also made it easier to enforce the copyright rules.¹⁶⁵

The question that arises is what implications the development has for the copyright policy.¹⁶⁶ Should the assumptions that were driving policymaking at the outset of harmonisation still be observed or must they be reconsidered? Whereas they are not necessarily strictly followed anymore, they often result in a premature standpoint on the matters even before the start of the discussion. One of the main assumptions made at the time of EU copyright harmonisation under secondary EU law and significant for all the subsequent development of the exclusive dissemination right is that the new environment enabled communication of an exclusively immaterial nature.¹⁶⁷

Being considered of immaterial nature essentially meant that the acts of online dissemination were submitted to the right of communication to the public rather than to other rights, such as the right of distribution. Hence, the application of the rights of material distribution and the boundaries associated with them did not take place online. The notion has been contested and challenged not least by CJEU jurisprudence. The next part of this chapter will take a close look at the distinction and introduce its place under the *acquis*.

2.2.2. Material and immaterial dissemination rights and the challenges of the digital environment

Whereas the distinction between material and immaterial (or tangible and intangible) dissemination can be found in the policy debates justifying extending or limiting the right holder's control over a work's dissemination, the distinction itself has not been clearly defined. Stemming primarily from the two main exploitation rights, distribution and performance, it aims to distinguish between

¹⁶⁴ Here both TPMs and, more generally, the way technology shapes circumstances of a work's communication are meant.

¹⁶⁵ One example is the judgment of the CJEU in the *Renckhoff* case, where the plaintiff opposed the upload of his photo as part of a student's presentation on the school's webpage. Ultimately, the situation is unlikely to occur in a non-online setting. First, it is unlikely that an author would discover the very fact that his work was printed together with other materials. Second, it is also unlikely that an author would take it to a court. See CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018 and section 5.2.3.1.2.

¹⁶⁶ Liedes asked back in the 1990s whether there was a move to disregard copyright principles and consider solely the potential income from a work's exploitation. See Liedes (1992), p. 669.

¹⁶⁷ See, for instance, the Green Paper on Copyright in Information Society. COM(95) 382 final. 19 July 1995, pp. 28–30; The follow-up to the Green Paper on copyright and related rights in the Information Society. COM (96) 586 final. 20 November 1996, p. 30.

the uses of a work for the purpose of defining the appropriate scope of control accorded by exclusive rights.

Before the rise of the digital environment, rights covering dissemination of a work were grouped into two major groups, rights concerning material dissemination (distribution rights) and rights covering immaterial dissemination (communication rights). The former would relate to distribution on a tangible medium where copies were sold to individual users. The latter related to dissemination where consumption by members of the public did not require possession of a tangible medium. Hence, material dissemination would primarily encompass the right to distribute tangible copies of a work, whereas immaterial would encompass different ways of communicating a work, e.g. through a performance or a recitation.

The distinction is not always clearly defined under national laws, but some kind of aggregation of the rights in these two major categories is often present.¹⁶⁸ One example of an explicit distinction is the German Copyright Act.¹⁶⁹ Article 15 divides exclusive rights into two groups: rights to exploit a work in material form and the right to communicate a work in immaterial form.¹⁷⁰ The former relates to instances where a work is fixed on a tangible medium (also on a sound carrier or in electronic memory) which presents a work for its consumption.¹⁷¹ The latter relates to making the content of a work accessible directly without the involvement of a material carrier.¹⁷²

In a similar manner, the distinction finds its manifestation in the systematisation of the rights by their relation to a copy. For instance, sometimes economic rights are divided into reproduction and dissemination in non-material form.¹⁷³ Similarly, the distinction can be drawn between the copy-related and non-copy related rights.¹⁷⁴ The former would encompass distribution and rental, whereas the latter would include broadcasting, performance, and communication to the public.¹⁷⁵ Copyright legislation in Scandinavian countries also distinguishes between two major ways of making a work available that have economic significance: performance of a work and a work's fixation in a way that enables others to consume it.¹⁷⁶

¹⁶⁸ Ricketson and Ginsburg (2006), pp. 580–581.

¹⁶⁹ Kirchner (1995), p. 274.

¹⁷⁰ German Copyright Act, § 15 UrhG Allgemeines.

¹⁷¹ Dreier and Schulze (2018), para. 25; Heerma (2019), UrhG § 15 Allgemeines Rn. 12.

¹⁷² Wiebe (2019), UrhG § 15 Allgemeines Rn. 6–8.

¹⁷³ Synodinou (2014), p. 84.

¹⁷⁴ Ficsor (1997), pp. 207–208.

¹⁷⁵ Ficsor (2002), p. 498.

¹⁷⁶ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 92. Also, the preparatory work to the recently adopted new NCA connects the right of distribution to tangible copies, Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), p. 30.

The distinction between material and immaterial dissemination is drawn predominantly for systematising purposes to distinguish between types of exploitation protected under copyright. Copyright is generally an incorporeal right over a work, hence regulating, *inter alia*, the creation of the copies but essentially their fate.¹⁷⁷ Hence, it is construed according to how a work can be presented, i.e. through its materialisation or performance. The primary aim is to empower the copyright holder to decide over access and consumption of a work through allocating them control over material circumstances that influence consumption.¹⁷⁸ Accordingly, the presence of a material object is only used to characterise a way to disseminate a work and convey its content.¹⁷⁹

Before the rise of the digital environment, the distinction between the two types of rights was more or less clear. The rights of distribution would relate to dissemination in a tangible (copy-related) form, hence classified as the rights of material dissemination. The rights of performance, broadcasting, and communication to the public would protect immaterial exploitation.¹⁸⁰ To the extent that a copy could also be used for performance, the rights of immaterial and material dissemination would not overlap but protect different aspects.¹⁸¹ It also goes without saying that the tangible medium must be distinguished from a work, which is essentially subject to copyright protection.¹⁸²

Whereas the systematisation of rights could be an aim in itself, the distinction served another important function. It was used for justifying the extent of the control accorded to the copyright holders by the different exclusive rights. Whereas control over the dissemination in a material form involving a tangible copy of a work would have to be limited to avoid the conflict with the marketing of copies and the resale of goods, control over immaterial dissemination would, in general, result in fewer conflicts with other fields of law. For this reason, limiting the control over material dissemination was more acceptable than limiting control over immaterial dissemination.

The distinction goes hand in hand with the incentive rationale of copyright and the economic approach to defining the scope of protection. From the economic standpoint, the exclusive rights under copyright help to internalise the externalities

¹⁷⁷ Ricketson and Ginsburg (2006), p. 656. On the immaterial nature of copyright, Knoph (1936), pp. 8–9. Also under the new NCA, see Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), p. 30. However, the intangible nature of a work should not be mistaken to mean that IP rights are associated with an immaterial object that is comparable to a physical thing, see Rognstad (2016), in particular, pp. 520–521.

¹⁷⁸ Ross (1945), pp. 346–347.

¹⁷⁹ Ross on reading a physical book being essentially a performance of a work to oneself. *Ibid.*, p. 346.

¹⁸⁰ Depreeuw (2014), p. 245.

¹⁸¹ *Ibid.*, pp. 259–262.

¹⁸² See Watt on IP good and delivery good, where consumption of a work is supported by a delivery good, such as a printed book. Watt (2004), p. 154.

in order to set up a market for a work, but these rights are accompanied by boundaries.¹⁸³ What is traded on the market is essentially access to a work for its consumption, which may require involvement of a delivery good such as a CD to facilitate consumption.¹⁸⁴ Hence, the economic underpinning of the distinction between material and immaterial dissemination does not concern itself with the presence of a tangible copy but rather exploitation of a work by putting it on the market.

Material dissemination through the sale of copies would allow the right holder to estimate the size of a market and to price copies accordingly. Hence, remuneration could be obtained through the first putting of copies into circulation. Restriction of the right holder's ability to further control the fate of such copies, including their resale, would be admissible as the function of the right (i.e. obtaining remuneration) has been fulfilled.¹⁸⁵ Immaterial dissemination, on the other hand, would not necessarily enable the right holders to obtain remuneration corresponding to the size of the audience through the first communication of a work. Accordingly, it would not prompt the same conclusion and generally justify the right holder's control over each and every act of immaterial dissemination.¹⁸⁶

If seen from the perspective of the right holder's control over subsequent dissemination, the main difference between the rights would be that the one allows for a downstream market and the extraction of value from a work for third parties, whereas the other does not. To be clear, both types of rights provide full control over separate acts of dissemination, be it a performance of a film or distribution of physical copies of a book. The only difference lies in the extent to which the right holder can exercise further control over each specific act of dissemination. For material distribution, such an example would be resale of copies, whereas for immaterial dissemination a good example would be a retransmission of a broadcast.

Notwithstanding any limits on control over such secondary communication, the right holder is always in the position to exercise their right to authorise or prohibit every primary act of dissemination. Hence, the only argument such distinction is capable of advancing is limiting the extent of subsequent control when the function of the right has been achieved. Seen from this perspective, the material and immaterial distinction has nothing to do with the presence of a tangible medium per se. Instead, it relies on the right holder's ability to obtain adequate remuneration that would indicate the proper boundary of protection. It just so happens that in the analogue era the most prominent example of such a situation would be the distribution of tangible copies.

Fast forward to today's realities; online dissemination comes in all shapes and sizes. Some ways of communicating a work closely resemble established channels, like the distribution of physical copies or broadcast. Others do not fit

¹⁸³ Secondary market for distributed copies would be one boundary, see Heide (2004), p. 92.

¹⁸⁴ Watt (2004), p. 154.

¹⁸⁵ On the remuneration theory of exhaustion, see Hugenholtz (1996), p. 96.

¹⁸⁶ Ghosh and Calboli (2018b), pp. 121–122.

squarely into the previous models. What they do have in common is that through them the right holder attempts to realise the value of their work. To hold at every outset that none of the models enables proper remuneration solely because no tangible mediums are involved would be rather naïve.

Similarly, to accept that the cases resembling material dissemination should be subject to the same treatment as in the analogue world would be too hasty.¹⁸⁷ As the online environment facilitates all the different models operating in parallel with each other, it might raise the need for additional considerations, such as competition and consumer expectations. Also, it might be necessary to reconsider the copyright relation to the profit made in (in)direct connection to a work. Should any created value be assigned to the right holder? Or should exclusive control be limited to enabling right holders to obtain remuneration through each act of primary exploitation? Obviously, it depends.

Not every conventional copy-related right calls for the same treatment as the right of distribution. The right of rental, for instance, could be categorised under material dissemination because of the presence of a tangible medium. On the other hand, it could also be categorised as the right of immaterial dissemination, which requires authorisation for each and every act of rental. Hence, it is a policy choice whether or not subsequent exploitation is subject to the right holder's control.

Different ways of categorising exploitation online were proposed. For instance, Hilty distinguishes between three stages of digital exploitation. The first is the move to tangible carriers carrying digital copies of a work, e.g. a CD with music on it. The second stage is the delivery of digital copies without the involvement of tangible mediums through the creation of copies on the user's end. The third stage is the one where there is no copy (whether tangible or not) at the user's end, and where access to work is the key aspect.¹⁸⁸ Similarly, Guibault distinguishes between three transactions taking place online: a physical purchase (e.g. a CD), digital download of a file, and streaming of a work, which does not entail a purchase per se but depends on authorisation from the platform.¹⁸⁹

What does this mean for the old distinction between material and immaterial dissemination? Inevitably, the nature of online transaction changes as technology evolves.¹⁹⁰ What might be a sound generalisation at some point might be quickly obsolete soon after. However, the nature of a transaction or exploitation is of importance not only to copyright for establishing the appropriate legal regime but also for other fields of law, such as contract law or consumer protection law.¹⁹¹ Consequently, the clearer the scope of the exclusive control under copyright is,

¹⁸⁷ For instance, Dreier has warned that qualifying all the acts of dissemination under material distribution would be premature qualification, as well as qualifying them under immaterial form. Dreier (1998), p. 631.

¹⁸⁸ Hilty (2018), p. 866.

¹⁸⁹ Guibault (2017), pp. 213–217.

¹⁹⁰ *Ibid.*, p. 217.

¹⁹¹ *Ibid.*, p. 210.

the easier it is to examine the right holder's conduct towards the concerns of competition and consumer protection law.

Where does that leave us with the material and immaterial dissemination rights distinction? According to Ficsor, "digital transmissions scramble the beautifully arranged, dogmatically duly characterised and justified picture of these two families of rights."¹⁹² In the absence of a material medium, the distinction between exploitation in material and non-material form is obviously blurred.¹⁹³ Whereas the intangible nature of communication at the first sight would point towards immaterial dissemination, certain uses would be more comparable to traditional material exploitation.¹⁹⁴

Not only did the distinction become vague, it also became misleading in the online context.¹⁹⁵ Drawing conclusions on the proper scope of protection online solely on the basis of the assumption that it falls under immaterial dissemination is questionable. Early on in the course of technological development and long before the emergence of the Internet, Reimer warned about subjecting any new way of communicating a work to the public to unlimited control, even if it falls under an immaterial form. Rather than automatically putting exploitation into one of the existing boxes, one must consider the involved interests before deciding which right to apply.¹⁹⁶

Furthermore, rejecting the application of any boundaries to the acts of seemingly immaterial dissemination solely on the basis of qualifying the use under one or another existing exploitation rights would amount to "conceptual jurisprudence".¹⁹⁷ To completely deny application of the exhaustion principle traditionally associated with material dissemination would be unfair if right holders had the option to obtain remuneration through first dissemination, comparable to analogue world.¹⁹⁸ Blindly relying on the rules developed for different technical circumstances would not do any justice.¹⁹⁹

The absence of the tangible medium is not the only difficulty with recognising the relevance of material dissemination rights in the online setting. The on-demand nature of work's communication is another factor. Before the advent of digital technologies, material dissemination mainly gave rise to the supply of works in a form where it could be consumed by a user at a time and place chosen by them. Performance, on the one hand, enabled consumption which lacked individual choices.²⁰⁰ The online environment, on the other hand, enabled

¹⁹² Ficsor (1997), p. 208.

¹⁹³ Dreier (1998), p. 630.

¹⁹⁴ *Ibid.*, p. 630.

¹⁹⁵ Ricketson and Ginsburg (2006), pp. 580–581.

¹⁹⁶ Reimer (1979a), p. 87.

¹⁹⁷ Berger (2002), p. 200.

¹⁹⁸ *Ibid.*, p. 200.

¹⁹⁹ *Ibid.*, p. 200.

²⁰⁰ Brennan (2002), p. 367.

communication of both types, thus resembling material and immaterial dissemination.

Towards this background, it is noteworthy that the distinction between immaterial and material dissemination rights has motivated the differentiation between the right of distribution and the right of communication to the public under secondary EU law. Whereas the former right is subject to exhaustion, legislation explicitly excludes the application of the principle to the right of communication to the public.²⁰¹ The legislative choice has been explained, *inter alia*, by the case law of the CJEU preceding copyright harmonisation under the Directives. When exclusive rights under national laws were examined against the freedoms of the internal market, the exercise of the right of distribution was limited to the first distribution of copies of a work within the Community. On the other hand, the exercise of the right of performance under national laws was not impaired by virtue of the Treaty.²⁰²

Nevertheless, the developments under the CJEU jurisprudence suggest that the strict division between material and immaterial dissemination rights is no longer maintained. First, the exhaustion principle, as inherent to the material dissemination under the *acquis*, has been interpreted as also covering the online distribution of digital copies of software.²⁰³ Second, acts of communication which formally fall under the broad right of communication to the public were exempted from the reach of the right on the basis of criteria alien to traditional copyright doctrine.²⁰⁴

What is more, the absolute majority of the CJEU rulings interpreting the scope of the right of communication to the public under the Directives concern secondary acts relying on either authorised or unauthorised act of initial communication.²⁰⁵ In most cases, the question is whether the right covers secondary acts of dissemination, where right holder has authorised initial communication. From that perspective, the situation at stake resembles the one regulated by the exhaustion principle under the right of distribution. The latter simply exempts any secondary act from the scope of the right if copyright holder has authorised the first distribution. No comparable mechanism exists under the right of communication to the public.

²⁰¹ Article 3(3) of the InfoSoc Directive.

²⁰² Namely, the *Deutsche Grammophon* and *Coditel I* CJEU judgments, see CJEU, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*. (1980) Case C-62/79, Judgment of 18 March 1980; CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*. (1971) Case C-78/70, Judgment of 8 June 1971. Also, see sections 3.2.2. and 5.2.1.1.

²⁰³ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012 and section 4.2.3.3.

²⁰⁴ For instance, the criterion of a new public, for profit nature of activity, etc. See section 5.2.3.2.

²⁰⁵ For instance, they examine retransmission of a signal, linking to an already uploaded work, etc.

Pursuant to secondary EU law, the question of applying exhaustion to the right of communication to the public does not arise. Nonetheless, in practice, the jurisprudence of the Court exempts certain secondary acts either by the extension of the exhaustion principle beyond the realm of distribution of tangible copies or by applying other criteria in the context of the right of communication to the public. Hence, the question is whether the division between material and immaterial dissemination rights is still observed under the *acquis*, and further, what the development means for the scope of control accorded by copyright in general, regardless of the specific right in question.

2.3. Implications of the distinction under the *acquis* on national laws on the example of Scandinavian copyright

This section sets out to illustrate the consequences the EU harmonisation has had for national laws on the example of the Scandinavian countries. As will be explored, apart from being influenced by legal realism thinking and hence, less disposed to dogmatic assumptions, Scandinavian copyright is also characterised by the special place of public interest in copyright law-making. Copyright regulation relying less on the dogmatic assumptions and more on the practical outcome of the adopted rules has also influenced the structure of exclusive rights. Scandinavian copyright provides a broad right of making a work available to the public which covers all the protected acts of dissemination. Further, legislation provides a non-exhaustive list of categories of the right, which are then subjected to different exceptions and limitations.

Faced with the broad harmonised right of communication to the public under the InfoSoc Directive, Sweden and Norway decided to implement the obligations differently under their national laws. Whereas in Sweden a new category of the making available right was introduced, in Norway the act only clarified that such acts already fell under the existing category of public performance. Nevertheless, last year, and nearly twenty years after the adoption of the Directive, Norway also introduced a new category of communication to the public under the making available right. The change was motivated by the extensive developments taking place under CJEU jurisprudence.

Whereas harmonisation under the EU secondary law originally did not seem to subject any non-protected use to the exclusive control of right holder, the subsequent developments under CJEU jurisprudence have had a considerable impact both in terms of the acts falling under the broad right of communication to the public and in terms of freedom to legislate on matters not explicitly harmonised under secondary EU law. Whilst a broad right of making a work available was introduced under Scandinavian copyright with an intention of making it adaptable to the developments of technology, a highly selective approach to harmonisation under the *acquis* interferes with its potential.

The following sections serve to address one of the sub-questions posed at the beginning of this chapter. Namely, what did enshrining the distinction between material and immaterial dissemination under the EU framework mean for national laws and the freedom of MS to legislate? Using Scandinavian copyright with its distinct rationales and approach to law-making as an example, it will be explored how a flexible approach under the national law has been restricted by the harmonisation under the EU *acquis*. Before turning to the structure of exclusive rights themselves, this section will look into the peculiarities of copyright rationale in Scandinavia and how it translates into the scope of protection.

2.3.1. Scandinavian realism and copyright rationale

Scandinavian countries share periods of common history but also of a common law-making.²⁰⁶ Copyright is a prominent example due to the considerable level of harmonisation at the international and regional levels.²⁰⁷ The basis for cooperation lies in common legal tradition, culture, historical ties, and closeness of the languages.²⁰⁸ Although collaboration in the region has decreased in the light of EU harmonisation, the countries strive to implement the obligations under international and EU law in a similar fashion.²⁰⁹

The flexible and less doctrinal approach of Scandinavian law can be attributed, among other things, to the philosophy of the Scandinavian legal realism.²¹⁰ Scandinavian legal thinking represents a realistic view of the purpose and the effect of legislation.²¹¹ Positive law under this view is a deliberate act of the appropriate authority to serve guidance for conduct. The very purpose of the act is to establish the reasons for belief and action, where legal rules are behavioural patterns maintained by force. Thus, legal science cannot provide the conceptual content of the law.²¹²

Legal realism thinking found its way to the copyright field, in particular to explain the aims and structure of copyright protection. Danish scholar Ross, a prominent representative of the movement, criticised justifying the copyright rules on the sole basis of the nature of the legal relationship instead of considering

²⁰⁶ Bernitz (2007), p. 16. Distinctive features of the legislation became a basis for separating of these jurisdictions into a distinct legal family. See Zweigert and Koetz (1998), p. 127; Bernitz (2000), pp. 30–36.

²⁰⁷ Scandinavia here refers to Sweden, Norway, and Denmark. Nordic refers mostly to the Scandinavian countries and the neighboring countries (Finland, Iceland). See the webpage of the Nordic Council (inter-parliamentary cooperation body) <https://www.norden.org/sv/information/fakta-om-de-nordiska-landerna> (Accessed July 14, 2019).

²⁰⁸ Karnell (1987), p. 27; Bernitz (2007), p. 29.

²⁰⁹ Axhamn (2017), p. 11; Bernitz (2007), p. 15.

²¹⁰ On flexibility, see Bernitz (2007), p. 29.

²¹¹ Bernitz (2018), p. 386.

²¹² For further discussion of Scandinavian realism, see Bjarup (2005), pp. 8–9.

the practical implications. The only durable method of evaluating a legal question, he held, is by practical consideration of the pros and cons of the rules, which must be decided in relation to specific interests.²¹³ Accordingly, it is not possible to deduce more from a construction than what was put into it in advance, as it is a description of the law in force and cannot be more than that.

When it comes to the purpose of copyright legislation, there is a good tradition in Scandinavia to take into account society's interest in access to cultural products besides the right holder's interests.²¹⁴ Copyright-protected works are not only products of culture but also its elements, copyright operates in between these considerations.²¹⁵ The interests of right holders and society at large do not point in opposite directions. Broadening the exclusive rights could, to a certain extent, also be explained as furthering society's interest in culture production by supporting right holders' demand for better legal protection.²¹⁶ This also has implications for a view on the limitations. As copyright is expected to balance these two considerations, the idea of limitations being construed narrowly has been rejected.²¹⁷

The aim of protection is described as giving the author a right to decide over the circumstances of making a work public.²¹⁸ In a slightly different light, the aim is defined as providing the right to decide how a work will be enjoyed or perceived by others.²¹⁹ Hence, essentially, the granted protection is described towards the goal of communicating a work. Besides the moral nature of the control over communication, it also serves to increase the potential for obtaining economic remuneration.²²⁰

Apart from determining the circumstances of communication of a work, the right holder is also entitled to a reward for their work.²²¹ Hence, one of the underlying grounds for copyright protection is based on the account that a work should be remunerated and the one having created it should also receive benefits from their creation.²²² The extent of appropriate reward is not clear, especially as to whether copyright is expected to guarantee a living for the creators.²²³ Even

²¹³ Ross (1945), p. 352.

²¹⁴ Rognstad (2005a), p. 385; Bergström (1960), p. 151.

²¹⁵ Knoph (1936), p. 46.

²¹⁶ *Ibid.*, p. 47.

²¹⁷ *Ibid.*, p. 124.

²¹⁸ Nordell (1997), p. 203; Eberstein (1949a), p. 12.

²¹⁹ Ljungman (1956), p. 145.

²²⁰ Rognstad and Lassen (2009), p. 150.

²²¹ Grönberg (1976), p. 106.

²²² Knoph (1936), p. 4.

²²³ Bergström, for instance, noted that copyright in Scandinavia only supports the allocation of results of creative work to right holders but does not guarantee a minimum salary. He criticised the increasing hopes for copyright law to ensure living for creators and supported realising such aims by ways other than through exclusive rights. See Bergström (1960), pp. 145–147. However, see also the recent preparatory work to NCA, stating that the act is the

though the law and preparatory works rely on an unclear concept of remuneration, legislation can have the function of a general stimulus of culture creation.²²⁴

Towards this background, the extent of the granted exclusive rights must be restricted. This is explicitly mentioned under the recently adopted NCA. The first paragraph provides that the purpose of the act is, inter alia, to delineate the rights in order to reach a reasonable balance between the interests of right holders and the interests of users and the public in general, in a way that ensures that a work can be used where it is reasonable in respect to societal considerations.²²⁵

An important distinction which has been drawn in this regard is the control over a work and control over the copies. Knoph contended that copyright serves solely to provide control over a work as such and not the copies. If there is a need for some control over the copies, it should be regulated under a special provision. The possible need to restrict the property right of the owner of a copy at later stages, he argued, is nothing compared to what is missed in technical and practical considerations by abolishing the distinction between a work and the copies and placing the latter under copyright.²²⁶

Similarly, Koktvedgaard reasoned that total control over copies would not serve the interests of copyright holders. Control had to be restricted to avoid protection being excessive and going beyond what is necessary.²²⁷ He argued that broadening the scope of protected works, the length of protection, and the content of the rights to cover any related act was ultimately extending copyright beyond its natural boundaries.²²⁸ Hence, the strong emphasis on the interests of society calls for confining protection to what is necessary. For instance, private use would usually be exempted, as it generally does not harm the interests of the right holder.²²⁹ The protection accorded under copyright does not mean an unlimited and unfounded control over a work.²³⁰ Also, the enjoyment of work would be seen as outside copyright.²³¹

Preparatory work for the current Swedish Copyright Act (SCA) stresses that the rights granted by the act are not based on an exact theory of copyright, but

main instrument to secure copyright holder's revenue and opportunities to make a living out of their work, Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), p. 9.

²²⁴ Ljungman (1976), p. 93,100. See also Koktvedgaard on active culture policy operating with the same instruments as classic copyright law – support in the form of legal protection for certain persons for certain accomplishments, Koktvedgaard (1976), p. 112.

²²⁵ Lov om opphavsrett til åndsverk mv. (åndsverkloven) LOV-2018-06-15-40, para. 1(b). An example is private use or use in the context of the freedom of information and expression.

²²⁶ Knoph (1937), pp. 152–153.

²²⁷ Koktvedgaard (1970), p. 227.

²²⁸ Koktvedgaard (1976), pp. 113–114.

²²⁹ Unless it is a question of business competition, from which the copyright holder can be asked to be protected, see Knoph (1936), p. 87.

²³⁰ Blomqvist (2003), p. 70.

²³¹ Lund (1954), p. 135.

rather are a result of historical development, both domestically and internationally.²³² Similarly, the preparatory work for the recently repealed NCA of 1961 puts the act into the context of international harmonisation and discussion on the copyright purpose.²³³ The purpose of copyright legislation, on the other hand, occupies more space in the discussion. The grant of exclusive rights serves the interests of the general public, and hence, their scope should be aligned accordingly.²³⁴ The right to a work's exploitation of greater economic or practical importance should be granted to the copyright holder as long as there are no strong societal interests speaking against it.²³⁵

The preparatory work to the recently adopted NCA acknowledges that there are many often opposing interests that must be balanced both in the context of separate provisions and the act as a whole. The NCA lists three central objectives.²³⁶ The first is to grant the rights to authors, performers, or investors, providing incentives for cultural production. The second objective is to delineate the rights to ensure the reasonable balance between the interests. The third is to facilitate effortless negotiations on the use of a work.

The nature of copyright protection has been subject to a debate in Scandinavia. The idea that gained the least support is that copyright as a part of IP is a special kind of property that is of the same nature as material property.²³⁷ According to this view, any restrictions on the rights from the perspective of society's interests had to be excluded.²³⁸ The view was rejected and largely seen as a policy program supporting stronger protection.²³⁹ Furthermore, copyright comparability to property right could not form a basis to resolve any unsettled issues by analogy with property.²⁴⁰ Preparatory work for the NCA of 1961 rejected parallels

²³² As stressed by the committee preparing the draft, see SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 84. On the absence of underlying theory see also Nordell (1997), p. 203. The SCA should be understood in the light of international obligations, see Bernitz et al. (2007), p. 13.

²³³ Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, pp. 4–7.

²³⁴ For Sweden, see SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, pp. 85–86. For Norway, see Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, p. 7.

²³⁵ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 248; Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, p. 7. On the other hand, see the Swedish Arts Council stating that any professional or systematic exploitation of work should result in remuneration, Ljungman (1976), p. 102.

²³⁶ Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), pp. 25–26.

²³⁷ Such property was called “spiritual property” or *åndelig eiendomsrett* in Norwegian and was supported by V. Kruse. See more Knoph (1936), p. 13.

²³⁸ *Ibid.*, p. 46.

²³⁹ Rogstad (2016), p. 533; Ross (1945), p. 337; Knoph (1936), p. 46; Bergström (1954), pp. 25–26.

²⁴⁰ It does not preclude an opposite solution, which should be decided based on the practical considerations See Ross (1945), pp. 352–353.

between rights under copyright and considered the rights in tangible property to be of no assistance in legislative work.²⁴¹

Another way to describe the structure of copyright stems from the view that the object of IP is an intangible work, which should be differentiated from copies of a work or other means of expression.²⁴² The intangibility of the object of IP distinguishes it from property law dealing with material things.²⁴³ Under this immaterial rights theory, copyright protects the exploitation of a work as direct exploitation of an intangible creation. Exploitation, in turn, takes place in two main forms: creation of copies in tangible form and communication of a work in its intangible form through a performance.²⁴⁴

The prominent critique of these two theories is found in the contribution of the Danish scholar Ross, a leading Scandinavian realist thinker. Criticising the immaterial rights theory, Ross focused on the close proximity between defining a work as an object of copyright and assimilating it with the property theory of copyright. In his view, a work was just an abstraction because it exists solely as an experience. Accordingly, what is disposed of through exclusive rights is an experience of a work. Likewise, he divided the presentation of a work into two categories: either through the copies of a work that enable the direct experience of a work (e.g. painting) or through the experience of a work as a process (e.g. performance of a work, reading a book).²⁴⁵ From this perspective, Ross described exclusive rights as related to creating the experience of a work and restricting other's freedom to dispose of their property.²⁴⁶

The article by Ross started a long debate on whether the rights under copyright are object or subject related. Eberstein, representing the camp of immaterial rights thinking, agreed with Ross in a later article that a work is just an abstraction, albeit necessary to describe the rights to a creation which can take many different forms.²⁴⁷ Hedfeldt also agreed with the view that a work as an internal experience is just an abstraction. The purpose of the rights is to enable the authorisation of the communication of a work through external experiences. Hence, a work as an internal experience is just an abstraction which you cannot exploit.²⁴⁸ However,

²⁴¹ Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, p. 7.

²⁴² Knoph (1936), p. 8.

²⁴³ Eberstein (1949b), p. 1.

²⁴⁴ Eberstein (1943), pp. 744–748.

²⁴⁵ Ross (1945), pp. 343–354.

²⁴⁶ This led to a statement that, because property rights are exclusive rights and copyright is a special restriction to others' freedom, rights under copyright are negative rights. See Ross (1945), p. 349. The argument was criticised by Hedfeldt, holding that the rights' exclusivity inevitably also results in the negative side. See Hedfeldt (1952), p. 157. Also, it was criticised by Lund, stating that it is the negative rights which matter the most and which are not specific to copyright but to general freedom of action. See Lund (1954), p. 144.

²⁴⁷ Eberstein (1946), pp. 83–84. See also Lund on the purpose of copyright to provide control over the circumstances of a work's communication, Lund (1954), p. 136.

²⁴⁸ Hedfeldt (1952), pp. 155, 161.

he rejected classification of these experiences based on the type of a copy involved, as it would depend on the type of work in question.²⁴⁹

Recently, Rognstad summarised the discussion in Scandinavia and highlighted the dangers of adopting one or another approach. For instance, one middle ground is the one expressed by Karnell: although a work is an abstraction, it is not an obstacle for describing a work as something rights are related to.²⁵⁰ Accordingly, even discarding property theory and immaterial rights theory, which consider copyright as a right to an object, it is important to highlight the main common characteristic of IP and property law as affecting an unlimited circle of persons.²⁵¹ In any case, no substantive conclusions should be drawn whether the rights are described as related to an object or not.²⁵²

Hence, copyright legislation and scholarship in Scandinavia has been influenced by a pragmatic approach to the legislation and the philosophy of Scandinavian legal realism. Copyright is considered to be a tool for achieving a variety of objectives with an emphasis on the interests of society. Accordingly, regulation relies less on the dogmatic assumptions and more on the practical outcome of the adopted rules. This has influenced the structure of exclusive rights, which will be explored later in this chapter.

2.3.2. Broad exploitation right under Scandinavian copyright

Scandinavian copyright acts have almost an identical structure, which is due to the close cooperation preceding the adoption of the acts in the 1960s.²⁵³ Whereas following harmonisation under the InfoSoc Directive the structure of the exclusive exploitation right somehow differed, with the recent adoption of the new NCA close proximity has been brought back. According to the acts, the exploitation rights conferred on the copyright holder consist of the right of making a work available to the public and the right of reproduction. The right of making a work available to the public further contains a non-exhaustive (following the courts' practice) list of categories of acts falling under the right. Distribution, performance, and display traditionally were the main forms of making a work available. A new category of communicating a work to the public was introduced following the harmonisation under the EU *acquis*.

²⁴⁹ For example, reading a book with pictures would comprise two different types of copies: direct (picture) and indirect (text which you have to read). *Ibid.*, p. 158.

²⁵⁰ Rognstad (2016), p. 523.

²⁵¹ *Ibid.*, p. 524.

²⁵² *Ibid.*, p. 535.

²⁵³ Bernitz calls the 1960s the golden age of Nordic legal cooperation, Bernitz (2018), p. 388.

The broad right of making available highlights the communicative function of exploitation rights and the economic significance of control over communication.²⁵⁴ Despite the flexibility such a right introduces, the categories specified under the right are also important. Not least, qualifying the act of exploitation under a particular category of making available can lead to a different outcome based on the exceptions foreseen for a particular way of making a work available.²⁵⁵

The harmonisation under the EU *acquis* has, however, limited the flexibility envisaged by the broad right of making a work available. Importantly, the *acquis* has introduced a rigid distinction between the right of distribution and the right of communication to the public, which has been interpreted restrictively in the context of national proceedings. Moreover, the exhaustive list of exceptions to the right of communication to the public under the InfoSoc Directive is another matter limiting courts' ability to treat dissemination as they deem legitimate in the light of the objectives of national copyright laws.²⁵⁶

Although it cannot be concluded that the harmonisation under the EU *acquis* substantially influenced the application of the distribution right outside the realm of tangible copies, it may have discouraged exploration of the desirability of such a scenario. Generally, the right of distribution under the Scandinavian copyright acts is reserved for acts involving tangible copies, with little further discussion on the matter of tangibility.²⁵⁷ Nonetheless, before the adoption of the InfoSoc Directive, the Norwegian government expressed a view that exhaustion would apply to copies to be produced locally from the information system.²⁵⁸

2.3.2.1. Right of making available under Scandinavian copyright

Due to historical reasons and close cooperation in various fields, the Nordic countries developed copyright legislation which is very similar in many areas. Cooperation between Sweden, Norway, Finland and Denmark started in the 1930s in an attempt to create Nordic copyright law.²⁵⁹ Although due to the collaboration in the Nordics the texts of copyright acts in Norway and Sweden were almost identical at the time of their adoption, court practice and subsequent amendments resulted in certain differences.

²⁵⁴ Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, p. 16.; Prop. 104 L (2016–2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), p. 29. Also, see Ross on the very purpose of exploitation rights to enable control over making a work or a copy public. Ross (1945), pp. 332–333.

²⁵⁵ Wold (2004), p. 541.

²⁵⁶ Rognstad (2005b), p. 369.

²⁵⁷ Lindberg and Westman (2001), pp. 256–257; Olsson and Rosén (2016). Levin (2017), p. 141. On the contrary, see Wagle and Ødegaard (1997), p. 178.

²⁵⁸ Ot. prp. nr. 15 (1994–1995) Om lov om endringer i åndsverkloven m m, p. 455.

²⁵⁹ Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, p. 1.

On a few occasions, countries took slightly different approaches to implementing international obligations. They also became members of different international organisations. Sweden became a member of the EU in 1995 and, subsequently, a party to the WIPO CT in 2009 upon the EU's ratification of the Treaty. Norway is neither a member of the EU nor a party to the WIPO CT, but the Treaty was taken into account when amending copyright legislation in 2004 and adopting a new act in 2018.²⁶⁰ On the other hand, as a member of the European Economic Area (EEA), Norway harmonised certain aspects of copyright law, including under the provisions of the InfoSoc Directive.²⁶¹ As the Directive implements the WIPO CT, it can be said that Norway has as well largely harmonised its legislation with the WIPO CT.

Both acts provide explicitly for exploitation (economic) rights and moral rights. Further, the exclusive right to exploit a work is divided into two main rights, the right to produce copies and the right of making a work available to the public. Only the latter will be addressed here.

The right to exploit a work under the SCA is provided in Section 2§ and reads as follows:

Subject to the limitations prescribed hereinafter, copyright shall include the exclusive right to exploit the work by making copies of it and by making it available to the public, be it in the original or an altered manner, in translation or adaptation, in another literary or artistic form, or in another technical manner.²⁶²

The new NCA from 2018 has slightly changed the wording, Section §3 of the NCA provides that:

Copyright provides exclusive right to dispose of a work by

- a) producing permanent or temporary copies of a work, regardless of the way and form it takes
- b) making a work available to the public.²⁶³

The right of making available to the public as a part of the exploitation right granted to the right holder is further divided into four categories. Before the InfoSoc harmonisation, the SCA and the NCA contained three categories: public display, public distribution, and public performance. They are now supplemented

²⁶⁰ Ot. prp. nr. 46 (2004–2005) Om lov om endringer i åndsverkloven m.m., p. 10.

²⁶¹ In 2004 the EEA committee included the InfoSoc Directive into the Agreement. EØS-komiteens beslutning nr. 110/2004 av 9. juli 2004 om endring av EØS-avtalens vedlegg XVII (Opphavsrett). Available at <http://www.efta.int/sites/default/files/documents/legal-texts/eea/other-legal-documents/adopted-joint-committee-decisions/2004%20-%20Norwegian/110-2004n.pdf>. (Accessed on July 14, 2019).

²⁶² Translation into English by the Swedish Ministry of Justice. Available at <http://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf> (Accessed on July 14, 2019).

²⁶³ Translation into English is author's own, no official translation of the new act is available on the WIPO webpage.

by a fourth category, communication to the public.²⁶⁴ Whereas SCA was amended in 2005 when it was harmonised with the InfoSoc Directive, NCA was amended with a new category in 2018 following, inter alia, the development of the right of communication to the public under the EU copyright *acquis*.²⁶⁵

In the meaning of both acts, a work is made available to the public every time it is published, read out, performed, exhibited, broadcasted, or otherwise made available. Thus, it extends to each and every act.²⁶⁶ In the preparatory works in the 1960s the categories of the right of making available were considered to mark three main groups of acts falling under the right.²⁶⁷ Hence, it was disputed whether acts of making available comprise only acts falling under these categories or if the right is broader than the categories. However, the development suggests that the list is not exhaustive but merely indicative.²⁶⁸

For instance, in Norway some case law was criticised for not making it clear whether the making available right comprised solely acts falling under one of three categories or whether the categories had to be seen in the light of the making available right. It is suggested that the Supreme Court's judgment in *Napster* broadened the scope of the making available right and removed the need to actually put an act within one of the categories to find that it constitutes an act of making available.²⁶⁹ There is a similar tendency in Sweden, where the courts do not always clearly establish the category of making available right before holding that a particular act falls under the exclusive right.²⁷⁰

The term “making available” in the definition of exploitation right was criticised at the time of the adoption of the acts in the 1960s. First, it was suggested that the literal reading of the right would not make it clear that the scope of the right extends beyond the act of first making a work available to the public, i.e. publishing.²⁷¹ The second major concern was that the right comprised exploitation

²⁶⁴ Since Norway has introduced a separate category of the right of making available in 2018, Denmark is the only Scandinavian country where the right still comprises the same three categories introduced in the 1960s.

²⁶⁵ Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), pp. 31–34.

²⁶⁶ For Sweden, see SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 402. For Norway, see Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), p. 30. Also, it was confirmed in the *Napster* case, Rt 2005 41, para. 21.

²⁶⁷ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 97; Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, p. 16.

²⁶⁸ The preparatory work for the new NCA provides that the list of categories under the right of making available is not exhaustive. Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), p. 30.

²⁶⁹ *Napster* case Rt 2005 41. For a comment, see Rognstad (2005b), pp. 345–346.

²⁷⁰ For instance, the Court's of Appeal for Southern Norrland judgement in *DoD*, RH 2006:80.

²⁷¹ The alternative term could have been to spread a work to the public. See Bergström (1954), p. 186.

through distribution, which blurred the relation between the general right concerning a work as such and a category of exploitation concerning separate copies.²⁷² Third, by extending the control to single copies, protection was extended to such an extent that the right covered all the possible aspects and could have been a blanket right instead.²⁷³

2.3.2.2. Distribution and performance as the original categories of the right of making available

The original acts in the 1960s contained three categories of the right of making available: performance, distribution, and display. Distribution is one of the categories of the right, encompassing acts where the copies of a work are offered for sale, rented, lent, or otherwise distributed to the public. Hence, the scope of the acts falling under the concept of distribution is wider than the right of distribution under the EU *acquis*.²⁷⁴ The control over making copies available through distribution had to be restricted. Hence, the right holder cannot object to further dissemination.²⁷⁵

The prevailing view in the legal literature is that the right of distribution concerns solely tangible copies with no further discussion on the matter of tangibility.²⁷⁶ However, some are of the opinion that an upload of a copy on the Internet constitutes distribution, even if it is not exactly the same copy which is being transferred, but rather new copies.²⁷⁷ Inapplicability of the distribution right to acts online is often motivated by the nature of the acts, namely creation of copies as part of the process. For instance, one of the arguments is that the distribution right for copies produced by transmission is not exhaustible because copies are not transferred but created on the recipient's end instead.²⁷⁸

When the acts were adopted in the 1960s, the right of distribution would be exhausted not upon the sale or transfer of ownership, as it is common today and harmonised under the EU *acquis*, but upon a work being published. Now the 19 § of the SCA has the following wording:

Once a copy of a work has been handed over with the copyright holder's consent within the European Economic Area, that copy may be disseminated further.

The provisions of the first paragraph do not confer a right to offer the public:

²⁷² Ibid., p. 81. It was also submitted that exclusive right cannot comprise rights which concern property of others. See Ross (1951), pp. 85–93.

²⁷³ Kruse (1952), pp. 405–423.

²⁷⁴ Rognstad (1999), pp. 116–117.

²⁷⁵ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 246.

²⁷⁶ Lindberg and Westman (2001), pp. 256–257; Olsson and Rosén (2016). Levin (2017), p. 141.

²⁷⁷ Wagle and Ødegaard (1997), p. 178.

²⁷⁸ Lindberg and Westman (2001), p. 258; Olsson (2015), p. 115.

1. copies of works, with the exception of buildings and works of applied art, through rental or equitable legal acts
2. copies of computer programs in machine-readable format or cinematographic works, through lending.²⁷⁹

§ 27 of the NCA, in turn, has a very similar wording:

Once a copy of a work is sold or otherwise handed over with the copyright holder's consent, that copy may be further disseminated to the public. The provisions apply only to the copies handed over within the European Economic Area. If a copy is handed over outside this area, the provisions are without prejudice of a copy being acquired for private use or disseminated further through rental or lending.

The provisions of the first paragraph, with the exception of buildings and works of applied art, do not permit rental. Neither do they permit lending of computer programs in machine-readable format. Organised exchange equals rental.²⁸⁰

The prevailing view under the SCA is that it only applies to tangible copies, which is sometimes justified by the reference to the CJEU ruling in the *Art & Allposters* case.²⁸¹ As to the NCA, there has been a shift in the opinion whether the exhaustion principle under the NCA applies to copies of a work lacking tangible support. In the mid-1990s before the adoption of the WIPO CT and the InfoSoc Directive, it was expected that the provisions would also apply to the copies produced locally from the information system.²⁸² In the preparatory work for the amendments in 2005, on the other hand, it was argued that the question did not arise in the context of online services, even though they might enable acquiring a copy.²⁸³ The latter view is also supported in the Preparatory work for the act adopted in 2018.²⁸⁴

Another category of the making available right is communication of a work to the public, which has been separated from the public performance right. Public performance related mostly to works that could be performed.²⁸⁵ The emergence of the new category of communication to the public under the right of making a work available was motivated by the international and the EU harmonisation.

²⁷⁹ Translation is author's own, adapted from the one by the Swedish Ministry of Justice. Available at <http://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf> (Accessed July 14, 2019).

²⁸⁰ Translation is author's own.

²⁸¹ Olsson and Rosén (2016). For a comment on the *Art & Allposters* case and its non-interference with exhaustion, see section 4.2.3.4.

²⁸² Ot. prp. nr. 15 (1994–1995) Om lov om endringer i åndsverkloven m m, p. 123; Prop. 1994/95:58 Uthyrning och utlåning av opphovsrättsligt skyddade verk, p. 123.

²⁸³ Ot. prp. nr. 46 (2004–2005) Om lov om endringer I åndsverkloven m.m., p. 28.

²⁸⁴ Prop. 104 L (2016–2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), p. 122.

²⁸⁵ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 97.

The line between making a work available through performance or communication to the public and through the dissemination of copies in the Swedish court practice is rather blurred. Analysis of the judgments of the Courts of Appeal and the Supreme Court reveals that qualifying acts under specific category of the making available right is a secondary task. The focus is on determining whether acts generally constitute an act of making available.²⁸⁶ This could also be viewed as expanding the scope of the making available right, as opposed to the idea expressed at the time of the SCA adoption.

The right of distribution was considered by the Swedish courts in the circumstances involving online distribution on a few occasions. For instance, in the *DoD* case, the Sundsvall District Court and the Court of Appeal for Southern Norrland had to examine the upload of copies of software on a leech server and its subsequent download by users of the server.²⁸⁷ The question was whether by uploading and sharing a copy of software a person infringed the right of making a work available to the public by distributing it to the public or contributing to distribution of it to the public.

The District Court ruled that no act of making available to the public in a form of distribution took place, because the public element was absent. The Court based its assessment on the public criteria rather than interpreting the meaning of distribution. The District Court held that users having access to the leech server did not form a public. The Court of Appeal ruled differently though when it comes to the public. It found that users of the leech server formed a public and, thus, a person committed infringement by making software available to the public.

The scope of the right of distribution or its applicability to online transmissions was not discussed by either of the Courts in the grounds of the judgment. In the absence of a separate category of communication to the public at that time, the acts of making available to the public could be qualified under either the distribution, display, or performance categories. What seems to be uncontested is that enabling a download of copies would be an infringement of the right of making a work available if it was directed at the public. Qualifying an act under one of the forms of making a work available was of secondary importance. However, the reference to distribution category of the making available right highlights the parallels that have been drawn between unauthorised distribution of tangible copies and upload of a digital copy for its subsequent transmission.

It was not the only time where the acts of online dissemination through upload and download of copies was considered under the category of distribution as a part of the wider right of making a work available to the public. In the earlier *BBS* case, a person running an online bulletin board for uploading and downloading

²⁸⁶ As can be seen from an example provided below, where the Appeal Court in RH 2006:80 held that an act amounted to making a work available to the public without examining in detail whether an act fell under the specific category of the right.

²⁸⁷ *DoD-målet*, Hovrätten för Nedre Norrland dom 2006-11-22 mål nr B121-05. Although the judgment was rendered in 2006, the case was decided according to the law in place before the harmonisation with the provisions of the InfoSoc Directive.

software was accused of copyright infringement or, alternatively, contributory copyright infringement. The case built, inter alia, on the infringement of the right of making a work available to the public through acts resembling rental or lending.²⁸⁸

The District Court of Helsingborg found that defendant infringed copyright by renting software without the copyright holder's authorisation, whereas the Scania and Blekinge Court of Appeal and the Supreme Court disagreed, ruling that, in order to be held liable for infringement there had to be an active action. Whereas the case is not further commented on here, it is interesting to note that the prosecutor incriminated the operator of the online bulletin board with infringement of the right of rental, which under the SCA is part of the wider category of distribution, primarily associated with tangible copies.²⁸⁹

2.3.3. Harmonising with the EU *acquis*

Harmonisation on the international and EU levels influenced the dissemination-related rights to a considerable extent. Although the right of making a work available to the public proved sustainable in the age of changing technological circumstances of a work's exploitation, the wording of the legislation was amended on a few occasions, especially when it comes to the exhaustion principle. At times, the amendments were introduced in anticipation of the upcoming changes, drawing inspiration from the Directives and the EC's Green Papers and Proposals.

The first impact of harmonisation can be seen as early as in 1989 when the SCA was updated to cover computer programmes as literary works under copyright, and the exhaustion principle was modified. Copies of computer programmes in a machine-readable format would now be, like any other literal works, subject to exhaustion. However, their subsequent rental or lending would still be subject to the right holder's authorisation. This followed the recommendation published by the WIPO in 1982, the EC's Green Paper and the on-going discussions, even though the draft Directive was not yet presented.²⁹⁰

When the Software Directive was adopted in 1991, the discussion in Scandinavia concerned mainly the territoriality of exhaustion, although EEA-wide exhaustion was not implemented until few years after. Both Norwegian and Swedish governments considered the Software Directive unclear on the matter of territoriality of exhaustion.²⁹¹ Also, the Swedish government did not perceive the

²⁸⁸ *BBS-målet*, NJA 1996 s. 79. Högsta domstolen dom 1996-02-22 i mål nr B363-95.

²⁸⁹ See more on the right of rental as a part of the right of distribution in in section 3.1.3.

²⁹⁰ Prop. 1988/89:85 Om upphovsrätt och datorer, pp. 6–9. Same changes were implemented in Norway in 1989, following Ot. prp. nr. 33 (1989–90) Om lov om endringer I åndsverkloven (opphavsrett og edb).

²⁹¹ For Sweden, Prop. 1992/93:48 Om ändringar i de immaterialrättsliga lagarna med anledning av EES-avtalet, p. 124. For Norway, Ot. prp. nr. 84 (1991–1992) Om lov om endringer I lov 12 mai 1961 nr 2 om opphavsrett til åndsverk m.v. og i enkelte andre lover som følge av EØS-avtalen, pp. 19–20.

Directive as requiring full harmonisation, but as allowing to go further than requested.²⁹² Nor did the Rental and Lending Rights Directive harmonising the neighbouring right of distribution and its exhaustion persuade the countries on the EC's approach to the territoriality of exhaustion. EEA-wide exhaustion under SCA and NCA for all types of works was implemented in 2005 at the time of harmonisation with the InfoSoc Directive. Meanwhile, the provision on exhaustion of the right of distribution in regard to computer programmes has been changed multiple times under the SCA, from providing for an EEA-wide one in 1992, reverting to the international one in 1997 and, finally, merging with other types of works in 2005.²⁹³

Nevertheless, the adoption of the Rental and Lending Rights Directive in 1992 resulted in major changes to the copyright frameworks. Both jurisdictions modified the conditions for exhaustion to occur, and now it took place once a work was sold rather than published. Accordingly, the SCA would provide that copies which were transferred could be freely disseminated further, and the NCA provided that copies which were sold could be disseminated further.²⁹⁴ The difference in the wording was mitigated by the additional statement under the NCA which provided that the same applied to copies made public and otherwise transferred with the authorisation of right holder. Furthermore, the already existing provisions, according to which exhaustion did not sanction further rental of distributed copies of musical works, were extended to cover any type of a work, effectively recognising the non-exhaustion of the right of rental.²⁹⁵

As can be seen, the EU harmonisation impacted the exhaustion provisions in Scandinavian countries rather profoundly. First of all, the exhaustion would apply upon a transfer of a copy and not a work being issued, which decreased the scope of the acts which trigger exhaustion from any putting into circulation to the acts amounting solely to a transfer of a copy (or sale, as reflected in the NCA). Secondly, the scope was further delimited to exclude subsequent acts of rental and lending, meaning that even after the initial distribution through sale, rental and lending of distributed copies would still require authorisation. Thirdly, the harmonisation also impacted the territoriality of exhaustion, changing it from an international to the regional (EEA) one.

²⁹² Prop. 1992/93:48 Om ändringar i de immaterialrättsliga lagarna med anledning av EES-avtalet, pp. 110, 122–123.

²⁹³ For more on the motivation behind adopting the EEA-wide exhaustion for computer programmes, see Prop. 1994/95:58 Uthyrning och utlåning av upphovsrättsligt skyddade verk, p. 36.

²⁹⁴ The SCA uses the term “överlåta” to refer to a transfer of a copy, while the NCA uses “solgt”, literally meaning a sold copy.

²⁹⁵ Also, in line with the later CJEU's interpretation of the Directive in the *Laserdisken* case, see CJEU, *Foreningen af danske Videogramdistributører, acting for Egmont Film A/S, Buena Vista Home Entertainment A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S and Warner Home Video Inc. v Laserdisken*. (1998) Case C-61/97, Judgment of 22 September 1998.

Adoption of the InfoSoc Directive also turned out to be an opportunity to revise the acts. When it comes to the right of distribution to the public under the Directive, it was established in both countries that the rights under national law were in conformity with the InfoSoc Directive as they covered all the acts of distribution of copies fixed on a tangible medium.²⁹⁶ Both preparatory works stated that the right of distribution under the copyright acts cover solely tangible copies. While the Norwegian preparatory act does not comment further, the Swedish one refers to the case law of the Swedish Supreme Court, including the *MP3* case, covered later on in this section.²⁹⁷

On the other hand, the right of communication to the public under the InfoSoc Directive was implemented in a different way. The Swedish government considered communication to the public right under the InfoSoc Directive to have a narrower scope than the respective category of public performance under SCA. The former comprised only acts of distance transmission, meaning when communication was taking place by technical means and not by live performance. In addition, the Swedish government concluded that the communication to the public right included certain acts of distance transmission, which under SCA were qualified under the public display right.²⁹⁸

Two ways of implementing the communication to the public right into the SCA were identified. The first option was to clarify the scope of the public performance category to include all the forms of distance transmission irrespective of types of a work. It would mean that the public performance right would also cover pictures and text made available on the Internet or broadcasted on TV. An alternative was to introduce a separate category of communication to the public as the fourth category of the making available to the public right. This would also mean a change in the scope of the public performance and the public display categories to exclude acts falling under the communication to the public right under the Directive.

The second option was preferred, and a new category was included under the making available to the public right. The main argument was a more straightforward implementation of the Directive and linguistic considerations. Also, distance transmission of works were considered significant from the copyright holder's perspective as it could reach a broad audience. Hence, it deserved specific protection as a separate category. Moreover, if the right of public performance would include distance transmission of different types of work, there would be a need to modify the existing exceptions. Finally, it was reasoned that

²⁹⁶ Prop. 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m., p. 81; Ot. prp. nr. 46 (2004–2005) Om lov om endringer I åndsverkloven m.m., p. 27.

²⁹⁷ Prop. 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m., p. 27; Ot. prp. nr. 46 (2004–2005) Om lov om endringer I åndsverkloven m.m., p. 80.

²⁹⁸ Prop. 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m., p. 63.

adopting the chosen solution would approximate the scope of the public performance category under SCA with the public performance right under the BC.²⁹⁹

Similar to the discussion in Sweden, the Norwegian proposal established that communication to the public right under the InfoSoc Directive was narrower than the rights granted to the copyright holder by NCA under the category of performance outside the private circle. Second, the proposal stressed the fact that communication to the public right did not have a uniform meaning under different international instruments, namely the BC and the WIPO CT. Third, it underlined that the making available to the public right was technology-neutral and flexible enough to cover usage of new technologies in an effective manner. Because of these reasons, it was decided that including a new category under the right of making available to the public would not provide desired legal certainty and would be unnecessary, taking into account already existing court practice and agreements concluded based on the act in force.³⁰⁰

Hence, following the harmonisation under the InfoSoc Directive, Sweden and Norway maintained different approaches to dealing with the acts of communication to the public under national law. However, this has recently changed as the NCA was amended to include a new category of communication to the public under the right of making available. The change has been motivated by making it easier to relate the developments under the EU *acquis* to Norwegian law as well as because performance from the language perspective did not seem suitable for dealing with such a variety of situations that have little to do with its original meaning.³⁰¹ The scope of protection was not influenced by the change, but rather the qualification of acts under the categories of the making available right.

Two cases ought to be mentioned here. Both cases concerned hyperlinking as an act of making a work available in the proceedings on contributory infringement. Following the harmonisation of the right of communication to the public under the InfoSoc Directive, the considerations would likely be different if the cases were to be decided now.³⁰² The judgments illustrate the flexibility of a general making available to the public right in dealing with new ways of exploitation. Also, the *MP3* case from Sweden illustrates how the developments under the EU *acquis* have influenced the position of the courts during the proceedings.³⁰³

It is important to note that at the time of the proceedings in the *MP3* case, there was no communication to the public category under the making available to the public right, thus charges were brought on the basis of distribution or performance categories. The appeal proceedings, as well as the proceedings before

²⁹⁹ Ibid., pp. 64–66.

³⁰⁰ Ot. prp. nr. 84 (1991–1992) Om lov om endringer i lov 12 mai 1961 nr 2 om opphavsrett til åndsverk m.v. og i enkelte andre lover som følge av EØS-avtalen, p. 22.

³⁰¹ Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), p. 10.

³⁰² For the developments under the CJEU jurisprudence, see section 5.2.3.2.2.

³⁰³ *MP3-målet*, NJA 2000 s. 292. Högsta domstolen dom 2000-06-15 i mål nr B413-00.

the Supreme Court, seem to have been influenced by the adoption of the WIPO CT and negotiations on the InfoSoc Directive. Skövde District Court, Göta Court of Appeal and the Supreme Court have ruled that there was no copyright infringement, but the qualifications of the act in question differed.

The case concerned hyperlinking, namely whether posting direct (pointing to a downloadable copy of a file) hyperlinks to sound recordings constituted an act of making a work available through distributing it to the public in the meaning of SCA. The District Court held that providing links to the webpages where a copy could be downloaded could not be considered as an act of distribution. Links merely enabled a download of copies without a direct involvement of the person providing a link as files were hosted on the third-party web server.

The Court of Appeal, dealing with the question of contributory infringement of the right of making available to the public, brought the adoption of the WIPO CT and the negotiations on the InfoSoc Directive into the picture. The Court of Appeal stated that the right of distribution concerned physical copies, which applied as soon as a sound recording was fixed on a hard drive.³⁰⁴ Therefore, no direct infringement could have taken place in this case. Merely providing a link did not itself make copies available. Contributory infringement could not be proven either because it was not possible to determine whether the third party which uploaded works did so unlawfully, as copying for private use was not an infringement.

The case was appealed further to the Supreme Court, which had to rule whether linking could constitute a contribution to unauthorised making available of sound recordings. The Supreme Court's secretary was asked for a proposal for a ruling, which differed from the final judgment and deserves special attention. The secretary dismissed the idea that the right of distribution only concerned copies fixed on a tangible medium or that the absence of a transfer of a copy in an act of making a work available would preclude considering it a distribution. Both forms of making available, distribution and performance, could take place at the same time, enabled by technology but not anticipated by law. There were no supporting arguments for holding that one of the forms would exclude the application of the other. On these grounds, it was proposed to rule that providing direct links to copies made available online constituted unlawful distribution to the public and, thus, an act infringing the right of making available to the public.

The Supreme Court ruled a bit differently. It stated that the distribution category under the SCA concerned physical copies. Not placing digital transmissions under the category of distribution under the right of making available to the public was motivated, *inter alia*, by the provisions of the WIPO CT and the draft of the InfoSoc Directive. As the defendant did not himself produce or dispose of copies that could be made using his webpage, the making available that took place could

³⁰⁴ Note that here the original medium did not matter. It did not matter whether music was disseminated on a CD or via the Internet, downloading to a hard drive created a physical copy subject to the right of dissemination. Some are of opinion that "distribution" was not used in the meaning of the SCA, but as a synonym to making available. See Westman (1999), p. 6.

only be qualified as a public performance. However, no infringement of the right of making available to the public took place, as public performance of sound recordings was exempted from the exclusive neighbouring rights of performing artists and phonogram producers.

A similar issue at stake was in the Norwegian *Napster* case, where the question was, inter alia, whether linking to unlawfully uploaded sound recordings constituted an infringement of the right of making available to the public under the category of public performance.³⁰⁵ Unlike in the Swedish *MP3* case, the Sør-Gudbrandsdal District Court found there to be an infringement of the right. The Eidsivating Court of Appeal reversed the judgment on the grounds that linking constituted only a reference to a work which had already been made available. Hence, the Court of Appeal ruled that linking did not constitute making a work available in the meaning of the NCA.³⁰⁶ The Supreme Court concentrated on examining contributory infringement, without focusing on qualifying the act of linking under one of the categories of the right of making a work available. The Court ruled that a person uploading the files infringed the right of making a work available. The defendant contributed to the infringement by providing hyperlinks.³⁰⁷ The reasoning of the Court in reaching the conclusion has been criticised.³⁰⁸

This brief discourse on the structure of copyright acts in Scandinavia illustrates the flexibility of a broadly formulated right of exploitation. Whereas the right of making a work available to the public is divided into categories, these do not form an exhaustive list. Such an approach captures new ways of exploiting a work without a need to recognise new rights. However, such flexibility also requires mechanisms of ensuring a proper balance between the interests of right holders and society. The harmonisation under the EU *acquis* has influenced the flexibility envisaged by the structure of the broad right in two major ways. First, an exhaustive list of permissible limitations under the *acquis* limits the freedom to introduce appropriate exceptions under national law. Second, a rigid distinction between the rights of communication to the public and distribution interferes with determining the scope of protection in accordance with the envisioned objectives rather than on the basis of the dogmatic assumptions.

³⁰⁵ *Napster.no-saken*, Høyesteretts dom den 27 januari 2005, HR-2005-00133-A, sak nr. 2004/822.

³⁰⁶ *Ibid.*, para. 11.

³⁰⁷ *Ibid.*, para. 73.

³⁰⁸ See Rognstad (2005b). For a comparison with the Swedish *MP3* case, see Westman (2012).

2.4. Conclusions and framework for the analysis in the following chapters

This chapter provided a background to the analysis of the rights under the EU copyright *acquis*, which will be undertaken in the following chapters. First, it placed the distinction between material and immaterial dissemination into the wider context of copyright rationales and their significance for determining the scope of exclusive control conferred by the rights. Second, it discussed how technological development influences the circumstances of a work's exploitation and the appropriate scope of protection, emphasising the danger of drawing conclusions on the assumptions of the past. Third, the chapter highlighted the impact of EU harmonisation on the national laws of the Scandinavian countries. Not only do the jurisdictions have distinct copyright rationales which are largely unacknowledged under secondary EU law, the broadly construed right of making available covering all the protected acts of dissemination falls short of its in-built flexibility due to harmonisation under the *acquis*.

The brief discourse on the theories of copyright and the rationales of protection revealed that none of the theories call for an all-encompassing right over a work, as the interests of the creators and right holders cannot always be placed above all other interests. The variety of possible justifications calls for assuming a perspective on the function of protection for the subsequent analysis of development. As has been explored, the distinction between material and immaterial dissemination, which is the main interest of this thesis, is closely related to the economic justifications of copyright and the incentive rationale. The latter justifies protection, *inter alia*, on the basis of eliminating market failure or internalising externalities of cultural goods production. Hence, providing exclusive control is justified to the extent it is necessary to mitigate that particular concern. Once the goal is achieved, other involved interests can be focused on.

An appropriate level of protection and justifications for it are nothing but static. As has been explored, given the intricate link between the scope of copyright protection and the developments of technology, it may not be desirable to rely on the normative constellations outlined at a specific time in the light of constantly changing circumstances of a work's exploitation. Given the increasing impact of the EU harmonisation, it is highly desirable that the MS are left with a framework flexible enough to adapt to the developments and to account for the public interest.

This thesis is concerned with a particular rule enshrined under EU secondary law, which is the distinction between the right of distribution and the right of communication to the public based on the assumption that the former represents material dissemination and the latter covers immaterial dissemination. It is not the characteristic of the rights as such that is questioned but rather the normative conclusions drawn from attributing the rights to one type of dissemination or another. Through both types of dissemination, the right holder attempts to realise the value of a work. The difference lies in the acceptable extent of control con-

ferred by the exclusive rights, given the rationale of protection and other interests involved.

As has been explored, once useful distinction might turn counterproductive when the circumstances change. Whereas striking a balance between the need of protection and the need for drawing its boundaries is all but a straightforward task, constructing frameworks on the basis of contemporary circumstances also bears the danger of becoming quickly obsolete. Neither any online dissemination that does not involve digital copies shall be treated uniformly, nor shall online dissemination that involves copies necessarily be submitted to the rules designed for tangible copies.

The following chapters will analyse the development of the rights of distribution and communication to the public under the *acquis* from the perspective of material and immaterial dissemination as envisioned at the outset of harmonisation. Taking the perspective of the distinction as signifying a normative scope of the rights, it is essential that the scope of enquiry is clearly defined. When addressing the background to the harmonisation of the rights, the analysis will focus on the justifications for aligning the rights with either material or immaterial dissemination and on other developments influencing the need and the form of harmonisation.

Next, the subsequent developments under the *acquis*, particularly CJEU jurisprudence, will be analysed proceeding from the premises that secondary EU law differentiated between the rights pursuant to the distinction between material and immaterial dissemination. This will allow to focus on the developments which counter the original presumption of the nature of the right under secondary EU law. Furthermore, the analysis will commence from the perspective of economic rationale, i.e. focusing on the reasoning of the CJEU concerning the right holder's control over exploitation of a work, the market for a work, remuneration and competition.

Importantly, the analysis will focus on the acts of secondary dissemination that rely on the initially authorised act; it is where the differentiation between material and immaterial dissemination rights plays out. This means that whereas the jurisprudence interpreting the particular rights is analysed, the emphasis is on the CJEU's reasoning in the cases where the right holder has authorised initial dissemination (e.g. distribution of copies, sending a signal, posting a work on the Internet), and where the question is whether particular act relying on such initial act (e.g. resale of a copy, retransmission of a signal, linking to uploaded work, etc.) requires authorisation.

Hence, particular attention will be paid to the reasoning of the CJEU for extending or denying control over subsequent acts of dissemination in relation to the initially authorised act. Rather than focusing on qualifying secondary acts in question under one or another right, it will be shown how the scope of the right of distribution evolved beyond the control over the first dissemination of a work, envisaged by the material dissemination approach. Furthermore, it will be demonstrated how the struggle around the scope of communication to the public

right is caused, *inter alia*, by the assumption that any primary or secondary act ought to be subject to authorisation.

The assessment of the development of the rights towards the distinction between material and immaterial dissemination relies on two key assumptions. First, given the economic underpinning of the exclusive rights, it is presumed that control over every primary act of dissemination potentially offers sufficient incentives to create and exploit a work. Accordingly, it is accepted that the exclusive rights, given their incentive rationale, shall provide control over each and every new act of exploitation.³⁰⁹ However, the question whether each and every secondary act, relying on authorised communication, should be subjected to right holder's exclusive control is not resolved by virtue of the incentive rationale alone.

The second assumption is that the distinction between the primary and secondary acts of dissemination could be a benchmark for evaluating the scope of control accorded by exclusive rights. Hence, in order to derive the justifications behind extending the reach of the rights beyond authorising each new act of dissemination under CJEU jurisprudence, the analysis relies on the differentiation between primary authorised acts and secondary acts relying on such acts. Appropriate control over secondary act could depend on its interference with the incentives to exploit a work, which ought to be safeguarded by the control over the primary act, or on the considerations outside the incentive rationale or even copyright.

³⁰⁹ Such as every upload of a work on a webpage or sale of every new copy of a work.

3. RIGHT OF DISTRIBUTION AS PROVIDING CONTROL OVER MATERIAL DISSEMINATION

The right of distribution is one of the core economic rights granted under copyright, traditionally covering distribution of tangible copies of a work. As has been briefly addressed in Chapter 2, the right of distribution has been associated with the material dissemination of a work. Limiting the scope of the right upon the initial authorisation of the right holder has been justified on the basis of other competing interests, e.g. free circulation of distributed copies. The exhaustion principle, exempting secondary distribution of copies put into circulation from the scope of the exclusive right, is thus also the right's essential characteristic.

Whereas the exhaustion principle is dealt with at a greater length in Chapter 4, the aim of the present chapter is to analyse the development of the right and the justifications for limiting its scope beyond first distribution. In this respect, the exhaustion principle is considered merely a tool to delineate the exclusive control accorded by the right. The objective of the enquiry is hence to illustrate how the development of technology and copyright legislation has shaped the scope of the distribution right under the EU *acquis*, in particular in respect of the secondary (subsequent) distribution. Therefore, particular attention will be paid to the justifications for extending or limiting the reach of the right beyond the first distribution.

Distribution could be discussed in its broad and narrow meanings. The former would comprise different forms of dissemination of a work, typically associated with transfer of copies, e.g. sale, rental, lending. The latter would comprise the forms of more permanent transfers of copies and ownership, such as sale. Whether considered in broad or narrow form, distribution of a work or copies thereof essentially achieves the same result: it conveys the content of a work to the public. However, depending on the specific form, each distribution of a work or copies thereof will have different legal consequences under copyright, as, historically, the rules have been tailored to reflect the need of balancing competing interests in particular type of cases. Whether or not this approach is beneficial given changing circumstances will be discussed in Chapter 6.

Given the overall focus of the thesis on the distinction between material and immaterial dissemination rights as the ground for denying any general limit on the extent of control conferred by the right of communication to the public, this chapter focuses on the right of distribution in its narrow meaning. The right is harmonised in the narrow sense under the InfoSoc Directive, the main instrument under the EU copyright *acquis*. Rental and lending rights, which are so intricately linked to the distribution right will not be analysed separately in this chapter. Rather, the developments of technology, calling for submitting rental and lending to a treatment different from the distribution right are discussed, as well as the precedent of extending the reach of the lending right to digital copies of a work. As the title suggests, the focus will be on the relationship between the right of distribution and the concept of material dissemination. In this context, rental as

the form of a broader distribution, which de facto falls under the immaterial dissemination treatment, falls outside the scope.

This chapter together with chapters 2, 4 and 5 serves to answer the first overall research question, which is *how the development of the rights of distribution and communication to the public under the EU acquis reflects the distinction between material and immaterial dissemination*. More specifically, the present chapter provides a better understanding of the rationale for harmonising the distribution right on the EU level and drawing the boundary of its scope by means of the exhaustion principle. This is achieved by addressing the following sub-questions:

What circumstances have influenced the need and the form of harmonisation of the right of distribution under the EU *acquis*?

How was the distinction between material and immaterial dissemination enshrined under secondary EU law and what were the driving forces?

Does the development of the right of distribution under the EU copyright framework reflect material dissemination and if so, how?

In order to answer these questions, first, the background to harmonising the right of distribution at the international and EU levels is analysed in the light of the overall developments at the time. Second, the circumstances which played a crucial role in determining the form in which the right was harmonised under EU secondary law are explored, with a particular focus on the jurisprudence of the CJEU preceding the adoption of the Directives. Third, the development of the scope of the right of distribution after its harmonisation under the Software and InfoSoc Directives is analysed. Next, the results of the subsequent development of the right are contrasted with the notion of material dissemination in order to conclude whether they have challenged the notion of the distribution right being confined to material dissemination.

The chapter is divided into three parts. Part 3.1. provides the background to the harmonisation of the right of distribution under the EU *acquis* through the prism of copyright development in general and the international developments in particular. Obviously, the right of distribution did not develop in a vacuum and its relation to other rights and the circumstances at the time have impacted its harmonisation. Four important aspects are addressed in this part: significance of recognising a separate distribution right in the light of the reproduction right; acceptance of the broad right covering secondary distribution; distinction between ownership and possession in the context of separating the rental right; and harmonisation of the right at the international level.

Part 3.2. is dedicated to the harmonisation and the development of the right under the EU *acquis*. It starts with the enquiries of the European Commission (EC) into the necessity to harmonise the right of distribution and the aspects harmonised under CJEU jurisprudence prior to the adoption of the Directives. Then this part proceeds to the legislative history of the Software Directive and the InfoSoc Directive, tracing the choices made at the time of enumerating the rights under the *acquis*. Finally, CJEU jurisprudence interpreting the Directives

and subsequently shaping the scope of the right according to the changing circumstances of work's exploitation is explored.

Part 3.3. is set to assess whether and how the right of distribution under the *acquis* reflects the premises of material dissemination envisioned at the time of harmonisation under the Directives. This part focuses on the three aspects of the right: circumstances supporting restricting exclusive control beyond the first distribution, circumstances pointing towards extending exclusive control beyond the first distribution, and the tangibility of object as an (in)dispensable attribute of material dissemination.

3.1. Background to the harmonisation of the right of distribution under the EU *acquis*

Harmonisation and further development of the right of distribution under the EU *acquis* should be examined through the prism of the respective developments and obligations under international law, even more so due to the fact that the developments on the EU level happened in close time proximity or even in parallel with the international negotiations. This section presents the background to harmonising the right of distribution on the EU level, in the light of its scope, wording, and reach beyond the acts of first distribution.

Besides the brief look at the international obligations and the interpretation of them under the EU *acquis*, this section identifies key aspects that influenced the speed of negotiations, the accepted scope of obligations, and the need for harmonisation per se. The first aspect is the significance of the recognition of the right of distribution, in particular in the light of the right of reproduction. The second aspect is the acceptance of right holders' control over any subsequent distribution of copies. The third is the growing support for subjecting rental of copies to copy-right holders' control and the distinction between ownership and possession. The fourth and last aspect is the relation between the right of distribution and digital transmissions.

3.1.1. Significance of explicitly recognising the right of distribution in the light of the right of reproduction

The need for vesting in copyright holders an exclusive right to control any distribution of a work has not always been self-evident. In many cases, at least at the time preceding the Internet, an ability to determine conditions for the distribution of a work was inherent to the creation of a work itself. For instance, when a work exists as a single piece (e.g. a painting), it is ultimately within the control of the author, even without the involvement of copyright law. The property right in the piece would secure the creator's ability to control its fate and ask for compen-

sation in the case of a transfer. The same would be true if there were multiple copies which were produced and distributed by the author.

On the other hand, without the copyright protection, the author would not be able to oppose production of exact or similar copies and their distribution. This concern was mediated by the right of seizure covering counterfeit (i.e. infringing) copies, as recognised by the BC ever since its adoption in 1886. At the time of the Brussels revision in 1948 and the first discussions on the necessity to recognise a right of distribution, Article 16 of the BC provided that competent authorities of signatories may seize pirated works, which included copies imported from the countries where they were not or no longer protected.³¹⁰ Since the Stockholm revision in 1967 the BC mandates even stronger protection by providing that infringing copies are liable to seizure.³¹¹ Copies are deemed infringing if their creation involves infringement of copyright in a work.³¹² Hence, Article 16 of the BC provides a limited control over infringing copies and, in the absence of a recognised right of distribution under the BC, an opportunity to prevent the distribution of copies produced abroad where distribution right may no longer be enforceable.

Coming back to a work or lawfully produced copies thereof, the situation would be different in the case where the author entrusts creation and/or distribution of additional copies to a third party. First, it might well be desirable that the reproduction and distribution are clearly distinguished between and that author's control over the copies of a work is enforceable beyond the contractual obligations. Second, the author may wish to retain control over a work or copies of it beyond their first transfer. As will be shown, whereas the justifiability of vesting the exclusive control over distribution of a work has hardly been disputed, the extension of control to any subsequent disposal of a work or copies has been controversial. Given the overall focus of this thesis on the limits of control over authorised dissemination, this section will focus solely on control over distribution of the copies produced by or with the authorisation of the author.

Although the right of distribution was eventually recognised as a broad right under the WIPO CT, it occurred much later than in respect of other key economic rights, such as the rights of reproduction and performance.³¹³ In particular, it was not before the Brussels revision of the BC in 1948 that the recognition of the right of distribution was discussed internationally. The inclusion of such a right was

³¹⁰ International Convention for the Protection of Literary and Artistic Works Signed at Berne on the 9th September, 1886, Revised at Berlin on the 13th November, 1908, and Revised at Rome on the 2nd June, 1928.

³¹¹ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), Art. 16.

³¹² WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights. WIPO Publication No. 816 (EFS) 1980, p. 133. See also the comments by the German delegation at the Stockholm conference, Records of the Intellectual Property Conference of Stockholm 1967. Vol. 2. WIPO 1971, pp. 854, 907.

³¹³ Ricketson and Ginsburg (2006), p. 13.

opposed on many grounds, including the collision of a broad distribution right with the property rights of a subsequent acquirer and a strong anti-competitive effect on the market.³¹⁴ Moreover, in some countries, the right of reproduction provided the right holders with control over the conditions of distribution of reproduced copies.³¹⁵

A major argument for not providing a separate right of distribution was the view that the right would largely be redundant given the protection already secured by the right of reproduction.³¹⁶ For example, if an author chooses to entrust the making of copies of a work (e.g. a manuscript) to a third party, they would assign to a publisher the right of reproduction, either accompanied or not by an authorisation to distribute these copies. In most cases, it would be very unlikely that a publisher would acquire a right to make copies but lack a right to distribute them.³¹⁷

Considering the right of distribution, a corollary to the right of reproduction was not in itself an obstacle to granting it explicitly under national law.³¹⁸ For instance, the view that the right is a complement to the reproduction right and seldom has a separate meaning is found in Swedish literature and preparatory works for the copyright act, even though it has been recognised as a separate right since 1960.³¹⁹ As it was noted, the right would only become distinctive when copies are disseminated in breach of an agreement, or if copies produced abroad were imported in the absence of it.³²⁰ Hence, a separate right was of a minor practical importance, except for the producers of mass-produced music and films.³²¹

³¹⁴ Ricketson (1987), pp. 402–403.

³¹⁵ Committee of Experts on a possible Protocol to the Berne Convention. First Session. Questions concerning a possible protocol to the Berne Convention Part II. (Draft). Memorandum prepared by the International Bureau. BCP/CE/I/3 1991, p. 20.

³¹⁶ Ricketson and Ginsburg (2006), p. 656.

³¹⁷ See, for instance, the preparatory work to the SCA, SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 95.

³¹⁸ At the time of harmonisation, many countries had already recognised a separate right of distribution (Germany, Italy, Austria, Scandinavian countries), while others derived it from the right of reproduction (France, Belgium), see Ricketson (1987), p. 401; Ohly (2009), pp. 219–220. The SCA and NCA recognise the right of distribution as a separate category of the right of making a work available to the public since 1960 and 1961, respectively.

³¹⁹ Bernitz et al. (2007), p. 68; Olsson (1987), p. 39; Koktvedgaard and Levin (1992), p. 105. It should be noted that the right of distribution under the SCA is a part of the broader right of making a work available, which together with the right of reproduction form the economic rights. See section 2.3.2.1.

³²⁰ In certain cases, the copyright holder could not prevent producing copies outside a country. The right to control distribution provided them with an opportunity to oppose importation and subsequent distribution of such copies. The latter case highlights the overlap between the right of distribution and the right of seizure under the BC. See also SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, pp. 95–97.

³²¹ Koktvedgaard and Levin (1992), p. 105. Also, see section 3.1.5.1.

Similarly, the draft of the Model Law on copyright drafted by the Committee of Experts with the support of the WIPO recognised the right of distribution explicitly despite uncertainty on whether or not the right of reproduction already provided sufficient control.³²² Granting the distribution right was considered justified in certain circumstances, where the author might not have sufficient control over copies by a virtue of contract. This might have been influenced, *inter alia*, by the overall aim of the meetings of the experts to “inspire and influence governments and legislators to improve their intellectual property laws and opt for solutions that will increase the degree of similarity among legislations whenever the special interests of a country do not require different solutions”.³²³ Although the draft of the Model Law was never officially published because another committee started working on PPBC, it serves as a source to understanding the discussions ongoing at that time.

At the level of the international agreements, the right to control distribution has for a long time been considered corollary to the right of reproduction, and its recognition was of a minor practical importance.³²⁴ As noted in the Official Program for Stockholm’s revision of the BC in 1967, the right of distribution is a “natural complement to the right of reproduction”; including the right of distribution into the BC would also require technically complex rules for the sake of exceptions.³²⁵ The right of reproduction at that time was considered fit to provide adequate protection against infringements in most cases.³²⁶ This view prevailed until the end of the 1980s, when the technological development called, if not for a revision, then for a clarification of the existing rights.

As late as in beginning of 1990s, it was not considered worthwhile to separate the right of distribution from the reproduction right under the BC. As the Committee of Experts working on PPBC phrased it, “it would not seem worthwhile trying to use the PPBC to further clarify that age-old relationship between reproduction and (first) distribution of copies of works just for stating immediately (as it would have to be) that, after the first sale of a copy, the right of distribution is exhausted. It seems more appropriate to recognise those aspects of the right of distribution whose maintenance even after the first sale of copies – according to

³²² Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. Memorandum prepared by the International Bureau. III Comments on the draft model provisions for legislation in the field of copyright. CE/MPC/I/2-III 1989, pp. 19–21.

³²³ Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. I Introduction. Memorandum prepared by the International Bureau. CE/MPC/I/2-I 1989, p. 2.

³²⁴ Ginsburg (2002), p. 121. Although the view was widely supported, the right of distribution has acquired a distinctive character, especially when it comes to EU law, as explored further in the chapter.

³²⁵ Hesser (1966), p. 281.

³²⁶ Records of the Intellectual Property Conference of Stockholm 1967. Vol. 2. WIPO 1971, p. 854.

growing agreement at the international level – seems justified; namely the right of rental and public lending in respect of particular categories of works.³²⁷

Following the rejection at the Stockholm conference in 1967, the right was also initially dropped from the agenda of the Committee of Experts working on PPBC in the 1990s as a corollary to the right of reproduction.³²⁸ Moreover, Article 14(1) of the BC providing for a limited right of distribution for cinematographic works was called redundant.³²⁹ Recognition of the right of first distribution was not considered urgent as its absence had not created difficulties in the interpretation of the BC. Nevertheless, a suggestion to sign a protocol stating that the right of first distribution is a corollary inseparable from the right of reproduction under the BC received support from only half of the delegations.³³⁰ The right of distribution was back on the agenda at the later stage of negotiations, which led to the adoption of the WIPO CT.³³¹

Subsequent developments in the field of copyright law changed the perception and the role of the right of distribution. The ample ways of reproducing a work and the broad protection granted under the right of reproduction have challenged the link between the two rights. Notwithstanding the creation of copies, which is subject to the right of reproduction, circumstances of any public distribution of a work are subject to the right of distribution. Furthermore, the subsequent development of the scope of the right and, in particular, its extension to counterfeit or infringing copies under the EU *acquis* has confronted its function as a mere corollary to the reproduction right.

3.1.2. Acceptance of extending control to subsequent distribution

Whereas the right of distribution would increasingly be recognised under national laws and the idea of harmonising it on the international level became gradually accepted, the scope of such right remained a topic for further discussion. One of the most important aspects to address was how far such a right should stretch, i.e. whether it would cover solely the acts of initial distribution (i.e. putting copies into circulation) or any further distribution of copies as well. One of the biggest concerns was a strong anti-competitive effect on the market of any control

³²⁷ Committee of Experts on a possible Protocol to the Berne Convention. First Session. Questions concerning a possible protocol to the Berne Convention Part II. (Draft). Memorandum prepared by the International Bureau. BCP/CE/I/3 1991, p. 22.

³²⁸ *Ibid.*, p. 22.

³²⁹ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 5.

³³⁰ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Report adopted by Committee. BCP/CE/III/3 1993, pp. 10–12, 14.

³³¹ More on the point in section 3.1.5.4.

beyond the initial distribution.³³² As will be shown, the concerns expressed during the various negotiations preceding the harmonisation of the right in the 1990s point towards a conclusion that subjecting all the subsequent acts of distribution to exclusive control was not widely supported at this stage.

The right of distribution rarely existed in an absolute manner under national laws.³³³ Even if some countries introduced the right of distribution before the international harmonisation, most of them also had in place the mechanisms of restricting it to the acts of first putting copies into circulation. Although the distinction between the right of distribution and the right of first distribution has not always been clearly followed, it can be traced in the overall context of the various proposals. The draft of the Model Law, for instance, included the right of distribution as a distinct right. The latter was accompanied by the provision on free resale, hence, pointing towards the right of first putting copies into circulation.³³⁴

Turning to the BC, few delegations at the Stockholm conference advocated for recognising the right of distribution as an independent right under the BC and placing it under the right of reproduction in Article 9(1).³³⁵ Certain countries favoured the proposal in general but expressed the view that the exclusive right of reproduction was enough to secure an author's interests in most cases.³³⁶ A possible need for a separate right was acknowledged; however, it was considered risky to provide copyright holders with the secondary prerogatives of a blanket circulation right beside the reproduction one.³³⁷

In the absence of preparatory works on the subject, it was difficult to find a solution acceptable to all.³³⁸ For this reason, discussions at the Stockholm conference were concluded with postponement of the question to the following meeting. The right of distribution (or circulation) was not completely rejected but considered overreaching and required further studies of the consequences of its introduction.³³⁹ Hence, the right was still not on the agenda and largely considered a corollary to the right of reproduction.³⁴⁰

³³² Ricketson (1987), pp. 402–403.

³³³ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 3.

³³⁴ See also section 4.1.2.

³³⁵ Namely, the Italian delegation, supported by Morocco and Austria. These countries had already recognised the right of distribution as a separate right under their national laws. See Records of the Intellectual Property Conference of Stockholm 1967. Vol. 1. WIPO 1971, p. 623.

³³⁶ For instance, the German Copyright Act provided a separate right of distribution which, to avoid abuses of such an overbroad right, expired upon putting copies into circulation. Records of the Intellectual Property Conference of Stockholm 1967. Vol. 2. WIPO 1971, p. 854.

³³⁷ Comment by the Dutch delegation, see *Ibid.*, p. 854.

³³⁸ *Ibid.*, p. 853.

³³⁹ Ficsor (2002), p. 150.

³⁴⁰ Hesser (1966), p. 281.

Hence, the idea of providing copyright holders with a blanket right to control initial and any subsequent distribution of a work was not accepted even if it was not rejected. However, this does not mean that the BC lacks such right altogether. Limited to a specific type of works, the *droit de suite* right under the Article 14^{ter} of the BC provides authors or successors with an inalienable right to an interest in any subsequent sale of original artwork or manuscript, provided that the country the author belongs to provides for such a right.

Certainly, the *droit de suite* right is rather different from the right of distribution. The latter implies control over the acts of distribution as these must be authorised, whereas the former solely enables receiving further benefit in the form of remuneration. Arguably, by receiving remuneration, the copyright holder is acquiring certain information about the circulation of work, which could be considered as a kind of control, albeit a passive one. On the other hand, one of the primary justifications for granting the right of distribution is to enable right holders to control conditions for distribution and maximise remuneration.

The importance of the distinction between first and subsequent distribution is well illustrated under the negotiations on the PPBC. When the right of distribution was discussed at length at the outset of the third session in 1993, two distinctive definitions were considered: the right of distribution and the right of first distribution. The former (synonymous with the right of circulation) meant the right to authorise acts where one or more copies changed hands. The latter (or the right of putting into circulation) covered acts of distribution of a copy for which right of distribution was not exhausted through the first sale.³⁴¹

In essence, the existence of the two possible definitions or models for recognising the right was due to the ongoing discussions on the recognition of the right of rental, surviving the first distribution.³⁴² It was fairly obvious that the right to resell a copy should not survive the first sale.³⁴³ As indicated in the report of the third session, the broad right received support subject to the condition that the exhaustion of the right through the first sale would apply.³⁴⁴

Similarly, the distinction can also be traced under the negotiations on another important instrument, formally Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, The Agreement on Trade-Related Aspects

³⁴¹ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 3.

³⁴² See more in section 3.1.3.

³⁴³ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 10.

³⁴⁴ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Report adopted by Committee. BCP/CE/III/3 1993, p. 19.

of Intellectual Property Rights (TRIPS).³⁴⁵ The Chairman's text, which served as a draft for the negotiations, contained the right of first distribution and the right of importation, neither of which made it into the final text. According to the draft, the economic rights of the copyright holder should include the right of importation of lawfully produced copies and the right of first distribution by sale, rental or otherwise of original or copies of a work.³⁴⁶ Hence, the distribution right under the TRIPS negotiations concerned solely the acts of initial distribution.

Notwithstanding the lack of consensus on the extent of the right of distribution, the broad wording of the right was also included into the draft of the WIPO CT. This was motivated by the fact that broad right of distribution gained wide international acceptance by that time.³⁴⁷ It is important to note though that the preference for the broad right of distribution extending to subsequent acts is also linked to the developments in terms of recognising the right of rental.³⁴⁸ Following the recognition of rental right as a separate right through restricting the scope of exhaustion of the right of distribution, the scope of the right of distribution has been significantly extended.³⁴⁹

Hence, there was no clear agreement on the question whether subsequent distribution should necessarily fall under the right of distribution in the context of international harmonisation in the light of different positions of the states. For instance, as pointed out in the preparatory work to the SCA, whilst it could be the case that subsequent distribution would come under the exclusive general right of making a work available, it was understandable that a copyright holder should not decide over such acts. Hence, there was a need to explicitly limit the control over such subsequent distribution by means of the exhaustion principle.³⁵⁰

³⁴⁵ Notwithstanding that the agreement did not address the right directly, its wide membership had an impact on the ongoing negotiations in many copyright-related aspects. See Ficsor (2002), pp. 52–53.

³⁴⁶ Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. Chairman's Report to the GNG. MTN.GNG/NG11/W/76 1990, p. 8.

³⁴⁷ Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, p. 34.

³⁴⁸ In many jurisdictions, the right of distribution would also cover forms of rental and lending. Hence, recognising a broad right of distribution extending to any subsequent distribution, while confining exhaustion solely to sale, would be a way to secure the rental rights by exempting them from exhaustion. More on this point in section 4.1.2.

³⁴⁹ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 9. See also the section below.

³⁵⁰ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, pp. 95–96. See also Chapter 2, section 2.3.2.2.

3.1.3. Distinction between ownership and possession as the basis for separation of the rental right

Another discussion that is of a tremendous importance to understanding the development and wording of the right of distribution under the international instruments and the EU *acquis* is its relation to ownership and possession of copies. First, as the main rationale of the right is to provide means to control the dissemination of lawfully produced copies, it has been defined in the relation to work and copies thereof. Second, the primary way of distributing copies is through their sale; hence, reference is often made to the transfer of ownership. Whereas the usage of these terms in the context of international harmonisation might appear self-explanatory, it is important to keep in mind the circumstances in which the harmonisation took place, namely, the emergence of the markets for rental of copies.

International negotiations and harmonisation took place during the time when new technologies created possibilities for new forms of exploitation. Durable mediums such as CDs or DVDs enabled the repeated use of a work through the rental of copies. In certain circumstances, rental undermined the market for distribution of copies, which raised the concerns of copyright holders.³⁵¹ To address this, countries started introducing the right of rental, either as a new right separate from distribution or by exempting it from the reach of the exhaustion principle if national law already provided for the broad right of distribution covering rental.³⁵² On the EU level, early on the CJEU secured the right holder's control over rental of copies imported from a different MS by exempting it from the reach of the Community exhaustion principle of distribution right, which the EC has subsequently harmonised under the Rental and Lending Rights Directive.³⁵³

Under these circumstances, a certain degree of international harmonisation became crucial to secure the right to authorise rental, in particular where the divergent national laws made it possible to import already distributed copies without a separate authorisation of the right holder.³⁵⁴ It was further supported by the fact that many national laws provided a broad right of distribution covering all the types of dissemination of copies, including rental.³⁵⁵ If under such national

³⁵¹ On the example of videocassettes, see Rosenbloum (1995), pp. 564–567.

³⁵² Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 8.

³⁵³ Pursuant to the CJEU judgment in the *Warner Brothers* case (see section 3.2.2.3.), the right of rental could be enforced by the right holder if such right was recognised under national law. The adoption of the Council Directive 92/100/EEC on the rental and lending rights eliminated the disparities under national laws by harmonising an exclusive right of rental.

³⁵⁴ Pursuant to the international exhaustion principle, see section 4.1.4.

³⁵⁵ Committee of Experts on a possible Protocol to the Berne Convention. First Session. Questions concerning a possible protocol to the Berne Convention Part II. (Draft).

laws the exhaustion principle was applied upon any act of initial distribution, the right of rental would also be exhausted upon first putting copies into circulation, unless it was explicitly exempted. Hence, even though it was not universally accepted that the right of distribution ought to be harmonised internationally, new forms of corporeal exploitation made it desirable to regulate at least certain aspects.

The tendency to define distribution using the terms of ownership in conjunction with the recognition for the right of rental is best traced under the negotiations on PPBC. At the very outset of the negotiations, right of rental and lending became a major topic of discussion along with the right of distribution. Even in the absence of an agreement on the latter, it was considered important to harmonise aspects of the distribution right that would justifiably extend beyond the first distribution, namely the right of rental and lending.³⁵⁶

Under the negotiations on PPBC, the first memorandum included a definition of the right of distribution as “a right to authorise any acts where ownership or possession of copies of the work changes hands”.³⁵⁷ Hence, the right was considered in its broad form, including the rental, lending, etc., where only a transfer of possession takes place. Thereafter, rental and lending were defined respectively as transfer of possession of a copy of a work for a limited period of time, for profit- or non-profit-making purposes. In the absence of an indication of a wider acceptance of recognising the broad right of distribution, recognising rental and lending as surviving exhaustion of the right of distribution was considered desirable.³⁵⁸

In such circumstances, the distinction between transfer of ownership and transfer of possession became handy for exempting acts of rental from exhaustion under national law. By providing that exhaustion took place only following a transfer of ownership, one would secure that distribution through rental would not trigger exhaustion of the distribution right, in its broad sense (e.g. also encompassing rental). Ultimately, to make sure that the distribution of a copy through sale would exhaust solely the resale right and not the right to rent a copy, either a separate right of rental or an additional adjustment of the exhaustion principle would be necessary. Scandinavian copyright acts provide a good example: under both SCA and NCA the right of distribution is defined broadly as encompassing rental and lending. To secure the right holder’s control over rental and lending after the exhaustion of the right of distribution, the respective sections of

Memorandum prepared by the International Bureau. BCP/CE/I/3 1991, p. 20. Also, on the rental and lending being a form of distribution see Ohly (2009), p. 220.

³⁵⁶ Committee of Experts on a possible Protocol to the Berne Convention. First Session. Questions concerning a possible protocol to the Berne Convention Part II. (Draft). Memorandum prepared by the International Bureau. BCP/CE/I/3 1991, p. 21.

³⁵⁷ *Ibid.*, p. 20.

³⁵⁸ *Ibid.*, p. 22; Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 9.

the law were updated to clarify that exhaustion did not sanction further rental and lending of copies.³⁵⁹

Understandably, recognising the right of rental as an entirely distinct right would make the adjustments of the exhaustion provisions largely unnecessary. The latter is exactly what took place under the WIPO CT. The right of distribution and the right of rental became separate rights with their distinctive scope.³⁶⁰ This way the Treaty ensured both that any exhaustion of distribution by sale or other transfer of ownership did not affect the right to rent a copy in question. Similarly, it also ensured that renting a copy would not exhaust the right to its further rent or sale.³⁶¹ On the other hand, it still used the ownership-possession dichotomy in the definition of the right of distribution and the provision on the freedom to decide the territoriality of exhaustion.

Whereas the use of ownership in the definition of the distribution right is understandable in the light of the intention to distinguish it from the right of rental, the use of ownership term in the provision on parties' freedom to regulate exhaustion appears less so. Whereas the term ownership was of importance under previous negotiations, it no longer served the same purpose under the WIPO CT, as it would not impact the right of rental. The explicit reference of ownership would be necessary only if the rental right would remain under the broad right of distribution, as in the early definitions under the negotiations on the PPBC.

Hence, there has been a departure from viewing the right of distribution as a broad right encompassing the acts of rental, lending, and even importation, to viewing it narrowly as comprising solely of acts of sale or other transfer of ownership.³⁶² Whereas the shift could be justified for the sake of legal clarity over the scope of the right holder's control in the context of different ways of disseminating (tangible) copies, one should be careful drawing conclusions from the wording of the right under international law. For instance, relying on the absence of a transfer of ownership as a ground for denying the application of the distribution right to digital transfers of a work could be short-sighted if reasoned based on the obligations under international law. Whereas limiting the scope of the right of distribution to tangible objects has its grounds, relying solely on the notion of

³⁵⁹ The change has taken place gradually, starting from exempting rental and lending of certain types of works (notes, computer programmes, movies) to reserving the rental and lending right for all types of works, following the adoption of the Rental and Lending Rights Directive.

³⁶⁰ Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, pp. 34–40.

³⁶¹ As the rental right would not be subject to exhaustion.

³⁶² On the right of importation as corollary to the right of distribution, see Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 4.

transfer of ownership under the international obligations might be of limited relevance.

3.1.4. Right of distribution and digital transmissions

Whereas the right of reproduction evolved to comprise so-called intangible copies or digital copies, the same did not happen with the right of distribution.³⁶³ As the right of distribution (in the countries where it was recognised) was closely linked to the right of reproduction and, hence, dissemination of tangible copies, the question of its applicability to copies lacking tangible support did not arise before the mid-1990s. Qualification was important because of the exhaustion principle as the distribution right's inherent limit. According to the preparatory work for the revision of the NCA in 1995, it was expected that the provision on the exhaustion of distribution right could also apply to the copies produced locally from the information system.³⁶⁴

Development of technology which enabled transmission of digital copies became subject to discussions at the national and international levels at the time of the negotiations on PPBC and the WIPO CT. The fourth session of the Committee of Experts on PPBC was one of the first events where online transmissions as acts related to the dissemination of copyright-protected works were discussed on the international level. The initiative to include the topic into the agenda came from the EC. Notably, from today's standpoint, the issue of digital transmissions was added to the part concerning the harmonisation of the right of distribution.³⁶⁵ The ultimate goal was to ensure the author's control over economically meaningful use of a work necessary to provide the incentives for creative work as well as to promote "distribution and use of works in the "digital age".³⁶⁶

Digital transmissions soon became one of the key priorities for the PPBC, and reaching an agreement was seen as indispensable for the success of ongoing negotiations.³⁶⁷ Including digital transmissions into the discussion on the right of distribution was not a mere coincident. As summarised by the chairman, "... the questions concerning digital transmission of works could be discussed in the context of distribution right, since there were some views according to which, as a result of such transmission, at least in certain cases, distribution of copies might take place."³⁶⁸

³⁶³ On the right of reproduction and digitisation, see Depreeuw (2014), pp. 97–120.

³⁶⁴ Ot. prp. nr. 15 (1994–1995) Om lov om endringer i åndsverkloven m m, p. 123; Prop. 1994/95:58 Uthyrning och utlåning av opphovsrättsligt skyddade verk, p. 123.

³⁶⁵ Committee of Experts on a possible Protocol to the Berne Convention. Fourth Session. Report adopted by Committee. BCP/CE/IV/3 1994, pp. 3–6.

³⁶⁶ Dixon and Hansen (1996), p. 604.

³⁶⁷ Ficsor (1995), p. 122.

³⁶⁸ Committee of Experts on a possible Protocol to the Berne Convention. Fourth Session. Report adopted by Committee. BCP/CE/IV/3 1994, p. 7.

During the discussions, a majority of the delegations were of the opinion that the right of distribution should be reserved to the distribution of tangible copies. However, others expressed the view that making a copy available through digital transmission may substitute distribution in the future. Such acts should then fall within the scope of distribution if the primary purpose is to deliver a copy at the receiving end.³⁶⁹ Hence, there was some support for extending the distribution right to transmission of electronic copies. Such copies were perceived as identical to the ones distributed on a tangible medium, and language of the text was considered to be wide enough to allow for such extension.³⁷⁰ As one of the delegations noted, "... the rules concerning protection as far as possible should be the same regardless of whether that result was obtained through distribution of physical copies or through digital transmission".³⁷¹ Nevertheless, following the discussion, it was established that the right of distribution applied primarily to the tangible copies. Two options were identified for the digital transmissions: either to apply the right of distribution if copies are established at the recipient end or to place them under the right of communication to the public. Creating a new, separate right for digital transmissions received limited support.³⁷²

Starting from the fifth round of negotiations in 1995, the question of digital transmission was separated from that of the introducing the distribution right into the "digital agenda".³⁷³ Despite extensive negotiations, no agreement was reached, and questions were postponed to the next session.³⁷⁴ As the result of the sixth round in 1996, there was an agreement on including a general right of distribution, but no agreement on the type of exhaustion.³⁷⁵ For the digital transmissions an "umbrella solution" was developed. This meant that acts of digital transmission would be covered by an exclusive right in a technology-neutral way, and regardless of the right which applies, such acts would also constitute an act of reproduction.³⁷⁶ Given the advancement of the negotiations, it was decided to prepare for the Diplomatic Conference in December 1996, which resulted in the adoption of the WIPO CT.³⁷⁷

³⁶⁹ *Ibid.*, pp. 3–6.

³⁷⁰ Dixon and Hansen (1996), p. 609.

³⁷¹ Committee of Experts on a possible Protocol to the Berne Convention. Fourth Session. Report adopted by Committee. BCP/CE/IV/3 1994, p. 13.

³⁷² *Ibid.*, p. 14.

³⁷³ Committee of Experts on a possible Protocol to the Berne Convention. Fifth Session. Report adopted by Committee. BCP/CE/V/9-INR/CE/IV/8 1995, p. 59.

³⁷⁴ *Ibid.*, p. 68.

³⁷⁵ Committee of Experts on a possible Protocol to the Berne Convention. Sixth Session. Report adopted by Committee. BCP/CE/VI/16-INR/CE/V/14 1996, p. 23.

³⁷⁶ *Ibid.*, p. 35. See also Geller (1996), pp. 42–43.

³⁷⁷ Committee of Experts on a possible Protocol to the Berne Convention. Sixth Session. Report adopted by Committee. BCP/CE/VI/16-INR/CE/V/14 1996, p. 69.

While the US favoured classifying acts of making works available through digital transmission as acts under the right of distribution, the European Communities supported placing it under the right of communication to the public.³⁷⁸ The umbrella solution, developed under the negotiations for PPBC, was adopted as a compromise.³⁷⁹ It covers all the acts of digital transmissions when a work is made available to the public in such a way that individuals can choose when and where to access the work.³⁸⁰

Upon the proposal of the chairman, a statement was made in relation to the articles corresponding to the right of distribution and the right of communication to the public: “As used in these Articles, the expression ‘copies and originals’ being subject to the right of distribution and the right of rental, refer exclusively to fixed copies that can be put into circulation as tangible objects.”³⁸¹

Similarly to the previous section, I would not find it convincing to rely on the Agreed Statement to hold that the obligations under international law prevent the application of the right of distribution and its exhaustion to digital transmissions of copies. First, the statement is clearly of an explanatory nature, i.e. clarifying that the provisions of the articles provide obligations only insofar as distribution of physical copies is concerned.³⁸² Second, while the text of the WIPO CT places acts of making available under the right of communication to the public, states are free to choose the right under which such acts will fall under the national legislation.³⁸³

3.1.5. Harmonisation of the right of distribution under international law

Against the background to the harmonisation of the right of distribution internationally, this section briefly summarises the obligations under the international instruments. It is important because the harmonisation on the EU level has often

³⁷⁸ Guide to the Copyright and related right Treaties administered by WIPO. Publication No. 891(E) 2004, p. 38.

³⁷⁹ On the origins of the term and the idea, see Ficsor (2002), pp. 204–206; Ficsor (1996), pp. 136–137.

³⁸⁰ Ricketson and Ginsburg (2006), p. 697; Dreier and Hugenholtz (2016), p. 64; Guide to the Copyright and related right Treaties administered by WIPO. Publication No. 891(E) 2004, p. 203.

³⁸¹ Records of the Diplomatic Conference on Certain copyright and neighboring rights questions.1996 Volume II. WIPO Publication No. 348(E) 1999, p. 777.

³⁸² See also sections 3.1.5.4. and 4.1.5.

³⁸³ Guide to the Copyright and related right Treaties administered by WIPO. Publication No. 891(E) 2004, pp. 208–209; Records of the Diplomatic Conference on Certain copyright and neighboring rights questions.1996 Volume II. WIPO Publication No. 348(E) 1999, p. 675. For example, the obligations under the right of making available in the US is implemented under the right of distribution. See *The Making Available Right in the United States*. A Report of the Register of Copyrights, United States Copyright Office, 2016, pp. 15–56.

been motivated by the developments on international level and served as a basis for establishing the appropriate minimum or maximum level of harmonisation under the EU *acquis*. Last but not least, the provisions of the Directives are often interpreted with a reference to international obligations.

As has been argued in the previous sections, harmonisation of the right of distribution on the international level took place in parallel with other important developments, such as increased disparities under national laws as to the extent of the right holder's control over distribution in different forms, such as rental. In many ways, the harmonisation of the distribution right (and especially its exhaustion) has served to mitigate the concerns not directly connected to the mere sale and resale of copies. Whereas some aspects are covered elsewhere, this section will focus on the obligations under the international treaties in terms of the right of distribution and, in particular, the reach of the right beyond the initial distribution of copies.

This section provides a summary of the four instruments: the BC, the WIPO CT, the UCC and the TRIPS. Whereas the obligations under the BC in terms of distribution are rather limited in scope, the WIPO CT is the only international instrument recognising a broad right of distribution applicable to all types of works. The UCC, although not recognising the right explicitly, and of diminishing importance in general, provides an example of deriving control over distribution of lawful copies in the absence of an explicit exclusive right. Although the right of first distribution did not make it into the final text of TRIPS, the significance of its initial draft is briefly addressed. Last but not least, the section concludes with a brief discourse on the interpretation of the obligations under the EU *acquis*.

3.1.5.1. Limited right of first distribution under the Berne Convention

The main international instrument of copyright harmonisation, the BC, does not contain provisions which would oblige the signatories to provide copyright holders with a right of distribution regardless the type of a work.³⁸⁴ Although the right of distribution applicable to all types of works was discussed on a few occasions, the current text provides for such a right only in regard to cinematographic reproductions and adaptations. Thus, the BC does not provide for a general right of distribution like, for example, it does for the right of reproduction.³⁸⁵

³⁸⁴ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979).

³⁸⁵ Ricketson (1987), p. 402. General right in this context means a right which applies to the entire spectrum of works protected under copyright. General right is also used elsewhere to distinguish between a right of distribution applicable to every act of dissemination as opposed to a right covering solely acts of initial dissemination.

The Brussels conference of 1948 marks the beginning of discussions on the necessity to introduce the right of distribution under the BC. Rights of different scope were suggested, from a narrow distribution right covering acts of first putting copies into circulation to a broader one, also covering acts of subsequent distribution.³⁸⁶ While neither proposal succeeded, a limited distribution right was introduced for cinematographic works as well as for cinematographic reproductions and adaptations. This right is, to this day, the only distribution right recognised by the BC.

Distribution right under Article 14(1) of the BC is narrow in two aspects. First, it provides authors of literary, scientific, or artistic works with a right to authorise distribution of cinematographic adaptations and reproductions of works. Thus, the right of distribution is limited to cinematographic reproductions and adaptations of pre-existing works. Second, the right covers only the acts of the first distribution, meaning the initial act of putting into circulation, or the first release.³⁸⁷ Provisions of the Article were considered largely redundant in the subsequent negotiations which led to the adoption of the WIPO CT, as they state the rights which were already recognised, especially with regard to reproduction and adaptation rights.³⁸⁸

Interestingly enough, the proposal to simultaneously also include such a right for musical works was declined as too far-reaching.³⁸⁹ This suggests that there were different market constellations at that time. One of the possible factors could be the development of magnet tape recorders, which enabled sound recording of a high quality, and their commercialisation in the following years. Commercial distribution of cinematographic works outside cinemas was not yet anticipated at that time. This supports the view that the right was of importance for musical works but of little importance to cinematographic reproductions and adaptations and hence accepted only for the latter category.³⁹⁰

³⁸⁶ Ficsor (2002), p. 150. Also, see section 3.1.2.

³⁸⁷ While it does not follow clearly from the English text of the Convention whether only initial or also subsequent distribution is meant, the French text gives a hint by wording the right as “putting into circulation of the works thus adapted or reproduced”. See also Ricketson and Ginsburg (2006), p. 665; Ficsor (2002), p. 147; Dreier and Hugenholtz (2016), p. 64; Karnell (1982), p. 286.

³⁸⁸ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 5.

³⁸⁹ For instance, the British delegation was of the opinion that “any limits on the distribution of copies should be dealt with contractually ... otherwise, the purchaser of a lawfully made copy should have the right to dispose of it as he wished”. See more in Ricketson (1987), p. 405; Ricketson and Ginsburg (2006), p. 663.

³⁹⁰ Ricketson (1987), p. 405.

3.1.5.2. Right of distribution as a part of the translation right under the Universal Copyright Convention

The Universal Copyright Convention, adopted in 1952 and revised in 1971, also does not explicitly provide for the right of distribution.³⁹¹ To a certain extent, it can be attributed to the approach adopted by the drafters of the Convention and its overall aim “not to create a uniform copyright statute, but rather to fuse the diverse domestic copyright systems into a simple workable international agreement”.³⁹²

Instead of providing an extensive list of rights to be granted, the Convention obliges states to provide adequate and effective protection of the rights of authors, corresponding to adequate and effective protection as offered by civilized countries.³⁹³ Although certain delegations supported explicitly listing the exclusive rights, it was argued that their enumeration in the UCC could be read limitatively.³⁹⁴ Inclusion of the right of distribution was specifically discussed by German and Spanish delegations.³⁹⁵ However, it was opposed by others, as it would discourage certain countries from joining the Convention.³⁹⁶

The right of translation is the only right explicitly recognised by the UCC. An author should have an exclusive right to "make, publish, and authorise the making and publication of translations of works".³⁹⁷ Out of these acts only the authorising of publication of translation was said to have a separate meaning and practical importance; other acts would generally not be questioned.³⁹⁸ Publication of translation, in turn, means the "reproduction in tangible form and the general distribution to the public of copies of work from which it can be read or otherwise visually perceived".³⁹⁹ Thus, the scope of the right concerns specifically instances

³⁹¹ For some time, the UCC was considered an alternative to the BC, but its importance has diminished. There are at present 100 contracting parties to the UCC, compared to 174 parties to the Berne Act of 1886. For the up-to-date list of signatories, see: for Berne Convention http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15; for the UCC http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=208&group_id=22. (Accessed on July 14, 2019).

³⁹² Tannenbaum (1955), p. 16.

³⁹³ Bogsch (1958), pp. 4–5.

³⁹⁴ *Ibid.*, p. 224.

³⁹⁵ Analytical report of the observations made in the draft Universal Copyright Convention by governments and inter-governmental organisations. Intergovernmental Copyright Conference, Geneva 1952. UNESCO DA/4, p. 4.

³⁹⁶ Observations Made on the Draft Universal Copyright Convention by Governments and Inter-Governmental Organisations. International Copyright Conference, Geneva. UNESCO/DA/3/ADD.1 1952, p. 18.

³⁹⁷ Universal Copyright Convention as revised on 24 July 1971, Art. 5. For a view that provision of explicit right is due to the controversy of translation, see Bogsch (1958), p. 5.

³⁹⁸ Bogsch (1958), p. 69.

³⁹⁹ Universal Copyright Convention as revised on 24 July 1971, art. 6.

where work is disseminated through providing copies as opposed to live performance of a work.

Even the recognition of translation right caused some debates, as states were generally interested in making foreign works available in their countries at sufficiently early date.⁴⁰⁰ An important limitation in the form of a compulsory license is provided in Article 5(2). States may impose a compulsory license to translate and publish a work if certain conditions are met. First, there has to be no translation within seven years from the date of original publication, or editions of such translation should be out of print. Second, it has to be proved impossible to obtain a license from the right holder themselves. The BC contained very similar provisions – authors were granted an exclusive right to make or authorise translation of their works, which expired 10 years from the publication of the original work.⁴⁰¹ However, since the Berlin Act of 1908, the exclusive right to authorise translation under the BC was extended to last during the general term of protection.⁴⁰²

Accordingly, the right to produce copies of translation and distribute them could likely be deducted from the right of authorising publication of translation recognised by the UCC. However, there are uncertainties as to the exact meaning of distribution. French and Spanish texts of the UCC use “disposing of work” as a substitute for distribution. German text provides for “making translation accessible” and, surprisingly, Portuguese text puts it as “communicating translation to the public”. Given the variety of wordings, it seems that sale could fall within the scope, while the mere offer for sale or rental could be disputed.⁴⁰³

3.1.5.3. Right of first distribution under the initial draft of the TRIPS

At the time of negotiations on the PPBC, subsequently leading to the adoption of the WIPO CT, another important international instrument was adopted. Formally Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also addressed right of distribution, albeit in a very limited manner. The issue of digital technology and transmissions were not addressed by the TRIPS but left to the committee working on the PPBC.⁴⁰⁴ However, due to its wide membership, it had an impact on the ongoing negotiations in many copyright-related aspects.⁴⁰⁵

⁴⁰⁰ Bogsch (1958), pp. 230–231.

⁴⁰¹ Convention Concerning the Creation of An International Union for the Protection of Literary and Artistic Works. Berne 1886, Art. 5.

⁴⁰² Revised Berne Convention for the Protection of Literary and Artistic Works. Berlin Act 1908, Art. 8.

⁴⁰³ Bogsch (1958), p. 91.

⁴⁰⁴ Ficsor (1995), p. 115.

⁴⁰⁵ For the impact of the TRIPS on other agreements, see Ficsor (2002), pp. 52–53.

The Chairman's text, which served as a draft for negotiations, contained right of first distribution and right of importation, both of which did not make it into the final text. According to the draft, economic rights of copyright holder should include the right of importation of lawfully produced copies and "the right to make the first public distribution of the original or each authorized copy of a work by sale, rental, or otherwise except that the first sale of the original or such copy of, at a minimum, a computer programme shall not exhaust the rental or importation right therein".⁴⁰⁶ Hence, the draft of the TRIPS was set to recognise a broad right of first distribution in a sense of also encompassing rental and lending. It was much in line with the developments on the EU level at the time, where the exclusive rental and lending rights have been harmonised under the respective Directive.⁴⁰⁷

Interestingly, the Article on the right of first distribution did not make it into the final text, unlike the rental right recognised under Article 11 and obliging the signatories to provide the rental right at least in respect of computer programmes and cinematographic works. The relation between codifying the right of first distribution and the rental right will be dealt with in the next chapter.⁴⁰⁸ Here, it is appropriate to highlight the proposed wording of the right of distribution which, unlike following international instruments, explicitly refers to the first distribution:

[T]he right to make the first public distribution of the original or each authorized copy of a work by sale, rental, or otherwise except that the first sale of the original or such copy of, at a minimum, a computer program shall not exhaust the rental or importation right therein.⁴⁰⁹

A comment made to the draft of the Article also deserves a special attention, as it has actually been included in the final text:

It is understood that, unless expressly provided to the contrary in this agreement, nothing in this agreement shall limit the freedom of PARTIES to provide that any intellectual property rights conferred in respect of the use, sale, importation and other distribution of goods are exhausted once those goods have been put on the market by or with the consent of the right holder.⁴¹⁰

⁴⁰⁶ Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. Chairman's Report to the GNG. MTN.GNG/NG11/W/76 1990, p. 8.

⁴⁰⁷ 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. 27 November 1992. OJ L 346/61

⁴⁰⁸ The interface between the exhaustion principle and the right of rental is dealt with in section 4.1.2.

⁴⁰⁹ Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. Chairman's Report to the GNG. MTN.GNG/NG11/W/76 1990, p. 8.

⁴¹⁰ *Ibid.*

In the final text, the comment was modified to become Article 6, titled Exhaustion. Instead of leaving the question out of scope, the Article now clarifies that the exhaustion of intellectual property rights is excluded from the dispute settlement mechanism as to avoid different interpretations in the absence of provisions.⁴¹¹ Hence, as can be clearly seen, distribution right in the context of the TRIPS negotiations solely concerned the first distribution, i.e. acts of initial putting copies into circulation. Distribution, in turn, was viewed rather broadly, as also encompassing rental and other ways of distribution. As will follow from the next subchapter, negotiations on the PPBC, which resulted in the adoption of the WIPO CT, developed in a slightly different way.

3.1.5.4. Right of distribution under the WIPO Copyright Treaty

The WIPO CT is the only international instrument addressing the right of distribution for all types of works. The Treaty was adopted following the negotiations on the PPBC and a decision to sign a separate agreement instead. Hence, the draft of the Treaty was prepared by the committee working on the possible protocol and reflected the discussions.

Two alternatives on recognising a general right of distribution were included in the basic proposal on the substantive provisions of the Treaty. Alternative A provided the right to authorise making a work available through sale or other transfer of ownership (distribution right), and the right of importation. Alternative A also stated that contracting parties would be free to provide that the right is exhausted in respect of copies sold in that territory (i.e. national exhaustion). The right of importation, on the other hand, would not be subject to exhaustion, but would not apply to importation for private and non-commercial use. Alternative B provided the right to authorise making a work available through sale or other transfer of ownership (distribution right) and freedom to introduce exhaustion of the right after the first sale or other transfer of ownership (i.e. permitting international exhaustion).⁴¹²

Alternative A was strongly favoured by the US, whereas alternative B was explicitly supported by Australia, Brazil, and Canada. The final text is an amended version of Alternative B, permitting international exhaustion. Article 6(1) of the WIPO CT provides an exclusive right to authorise the making available to the public of the original or copies of their works through sale or other transfer of ownership. The wording of Article 6(2) was slightly modified and now reads as follows: “Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right

⁴¹¹ Gervais (2008), p. 198.

⁴¹² Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, pp. 35–37.

in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.”⁴¹³

Accordingly, the WIPO CT became the first international treaty to treat distribution right at length and the only one to harmonise an exclusive right of distribution extending to all types of copyright-protected works. It is also the first treaty to address exhaustion of the distribution right in some way, besides the TRIPS agreement, that leaves it out of scope. However, interpretation of neither provisions is unambiguous.

First, we will turn to the scope of the obligations under Article 6. What seems to be uncontested is that the Treaty accords the right of authorising the first distribution, i.e. the right of first putting into circulation.⁴¹⁴ However, according to some interpretations, the right of distribution under the Treaty extends beyond the first distribution. Namely, it requires the contracting parties to grant copyright holders a broad right of distribution also covering any subsequent disposal. The broad right of distribution, in turn, might be subjected to exhaustion under certain circumstances, some of which are provided under Article 6(2).⁴¹⁵

The literal reading of Article 6(1) would suggest that it is precisely the broad right of distribution that is meant, i.e. that it extends to all the subsequent acts of disposal. It would seem unreasonable to draft the right in a broad way if the only purpose was to secure the right of first distribution. The latter could be achieved in a much simpler way by recognising a right of first distribution instead of providing the right of distribution seemingly covering subsequent disposal only to subject it to exhaustion. However, one might want to put the final text of the Treaty in the context of the preceding negotiations, not only at the diplomatic conference but also those under the working sessions on the PPBC, briefly outlined in the preceding sections.

The right of distribution covering all the subsequent acts of disposal beyond the first putting into circulation was generally not accepted. A broad right received support subject to the condition that the exhaustion of the right through first sale would take place. Moreover, alternative wordings of the right of first distribution and the right of distribution were discussed simultaneously with the negotiations on the rental right. One of the ways to ensure that rental remained within the copyright holder’s control would be to modify the conditions for the exhaustion of the right of distribution. Hence, initially, harmonising only the aspects that should survive exhaustion received enough support.

One possible indication of an intent to harmonise a broad right of distribution could be the fact that despite making the right of rental a separate right, the right of distribution in its broad wording remained. However, the history of negotiations shows that there was another consideration impacting the presented options. The very existence of the two alternatives of the article on the right of distribution, which only differed in regard to the territoriality of exhaustion, indicate

⁴¹³ WIPO Copyright Treaty, Dec. 20, 1996, WIPO Doc. CRNR/DC/94, art. 6.

⁴¹⁴ Ricketson and Ginsburg (2006), p. 695; Ficsor (2002), p. 486.

⁴¹⁵ As seems to be suggested in Reinbothe and Lewinski (2015), pp. 110–114.

that another possible reason for drafting the right widely was the (unsuccessful) attempt to harmonise the territoriality of exhaustion. This would simply not be possible would the right be drafted as concerning solely the first distribution. Hence, one could question assuming the obligation under Article 6 to provide a broad right to control any subsequent disposal following the first putting of a work into circulation.

Given the different views on the scope of the right of distribution, it is not surprising that there are also divergent perceptions of Article 6(2). If one interprets the WIPO CT as providing the minimum obligation to recognise the right of first distribution, the wording of Article 6(2) has no bearing on the circumstances of exhaustion if it is provided under national law.⁴¹⁶ As the Treaty requires only the right of first distribution to be recognised but does not preclude granting a wider protection, the wording in no way affects the freedom of the parties to legislate.⁴¹⁷

On the other hand, understanding the obligations under the WIPO CT as requiring extending the scope of the right to the subsequent disposals would call for a different understanding of Article 6(2). Namely, that a limitation to this right in the form of exhaustion is only permissible subject to the provisions in the second paragraph.⁴¹⁸ However, even if it would be so, the limitation in the form of exhaustion solely concerns the right of distribution in the meaning of the first paragraph (i.e. distribution through a transfer of ownership). Hence, it achieves nothing more than recognition of the right of first distribution through the transfer of ownership, with a possibility to grant a wider protection. Any other acts (also subsequent disposal) that might fall under the distribution right under national laws would in no way be affected by the provisions of Article 6 of the WIPO CT.⁴¹⁹

⁴¹⁶ With the exception that it must take place with authorisation of the right holder. This would, however, be a relevant consideration only in case copies are not produced with authorisation of the right holder, e.g. under a compulsory license. Otherwise, the exclusive nature of the right of distribution already ensures that any first distribution occurs with the copyright holder's authorisation. The situation arose, for instance, in CJEU, *EMI Electrola GmbH v Patricia Im- und Export and others*. (1989) Case C-341/87, Judgment of 24 January 1989. The case was decided on the grounds other than authorisation, see section 3.2.2.2.

⁴¹⁷ See Ficsor (1997), p. 212. Also, it is supported by the CJEU in CJEU, *Laserdisken ApS v Kulturministeriet*. (2006) Case C-479/04, Judgment of 12 September 2006. See more on the case in section below.

⁴¹⁸ See Reinbothe and Lewinski (2015), pp. 110–114. Alternatively, that exhaustion must be implemented in every case but only some conditions are predetermined by the Treaty. This would, however, be difficult to reconcile with the minimum obligations under international treaties and possibility to provide wider protection, as well as the intention of parties during the negotiations.

⁴¹⁹ The right of distribution under the WIPO CT concerns distribution in a narrow meaning, i.e. excluding such acts as rental and lending, hence the wording “through sale or other transfer of ownership”. See sections 3.1.2. and 3.1.3.

Accordingly, the view that Article 6(2) precludes any exhaustion unless it occurs after the first sale or other transfer of ownership can be contested.⁴²⁰ Moreover, it is only understandable that the second paragraph mentions the first sale or other transfer of ownership, as it corresponds to the definition of the right in the first paragraph and highlights that the minimum obligation solely concerns distribution as making a work available through a transfer of ownership of copies, and that exhaustion of the right is subject to conditions set by the contracting parties.

In this context it is also important to mention that although the right of making available covering digital transmissions was put under the article on the right of communication to the public under the WIPO CT, parties are free to qualify them as falling under the right of distribution.⁴²¹ Therefore, it was important to differentiate between acts considered to always fall within distribution right (dissemination of tangible copies through sale or other transfer of ownership) and acts of making available, which do not necessarily fall within the distribution right.

For the former category, i.e. tangible copies, Article 6 provides that conditions for exhaustion are to be determined by the contracting parties. For the latter category, i.e. copies resulting from the digital transmissions, which may or may not fall under the distribution right, there are no specific obligations in regard to exhaustion upon an authorised first distribution. This is supported, inter alia, by the Agreed Statement, which does not preclude the application of the right of distribution to digital transmissions but merely indicates that provisions of the article are aimed solely at the (conventional) tangible distribution.⁴²² Hence, there is nothing in the WIPO CT to preclude copy-related forms of digital transmissions.⁴²³

3.1.5.5. Interpretation of the international obligations under the EU acquis

The interpretation of the right of distribution under the BC has hardly caused any troubles in the context of EU copyright harmonisation. As Article 19 of the BC does not preclude claiming greater protection if such is afforded by national law, the rights provided in the Convention are minimum rights.⁴²⁴ Moreover, they have to be considered with limitations and exceptions provided in national law to the

⁴²⁰ On Article 6(2) as precluding exhaustion unless it takes place upon first sale of a copy, see Reinbothe and Lewinski (2015), p. 112.

⁴²¹ Geiger and Schönherr (2014b), p. 424.

⁴²² Ficsor (1997), p. 213. Also, section [4.1.5](#).

⁴²³ *Ibid.*, p. 213.

⁴²⁴ von Lewinski (2008), p. 132.

extent permitted by the BC.⁴²⁵ Since the BC obliges states to provide a right of distribution only for cinematographic reproductions and adaptations and for cinematographic works, it is of limited impact, especially following the adoption of the WIPO CT. As follows from the ongoing discussions at the time of the adoption of the BC and also supported by the French text, distribution solely means acts of first putting into circulation and does not extend to the acts of subsequent distribution.⁴²⁶

Distribution right under the WIPO CT, on the other hand, received much more attention, both in the literature and in the CJEU jurisprudence. The WIPO CT was approved by the European Communities in 2000,⁴²⁷ ratified by the EU in 2009 and, subsequently, came into force in 2010.⁴²⁸ Besides, the aim of the Directives adopted in the field of EU copyright law is, inter alia, to harmonise the laws of the MS to bring them into compliance with the obligations on the international level. Consequently, the CJEU occasionally refers to the WIPO CT while interpreting the Directives in the field of copyright.

First, in the *Laserdisken* case, the Court has rightly held that the provisions of the WIPO CT only oblige the right holder's exclusive control to be secured over the acts of making available through the first sale or other transfer of ownership.⁴²⁹ Hence, the CJEU further ruled that Article 6(2) concerning exhaustion of the right of distribution did not impose any obligations in regard to the specific rules governing exhaustion. Therefore, the provisions of the Treaty and of the InfoSoc Directive were complementary for interpreting the scope of the right of distribution and its exhaustion under the EU law.⁴³⁰

Later, in the *Peek & Cloppenburg* case, the CJEU again held that distribution under the WIPO CT is linked exclusively to the transfer of ownership.⁴³¹ However, the Court drew a conclusion which is in conflict with the concept of minimum harmonisation under the WIPO CT. Namely, the Court held that the InfoSoc Directive should have been interpreted as far as possible in the light of the WIPO CT provisions.⁴³² The latter resulted in the CJEU ruling that expression

⁴²⁵ Ibid., p. 138.

⁴²⁶ Ibid., pp. 145–146.

⁴²⁷ Council Decision of 16 March 2000 on approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, 2000/278/EC. OJ L 89/6

⁴²⁸ See http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16 (Accessed on July 14, 2019).

⁴²⁹ CJEU, *Laserdisken ApS v Kulturministeriet*. (2006) Case C-479/04, Judgment of 12 September 2006, para. 42. Also supported in the legal literature, see von Lewinski (2008), p. 451; Rognstad (2014), p. 5.

⁴³⁰ CJEU, *Laserdisken ApS v Kulturministeriet*. (2006) Case C-479/04, Judgment of 12 September 2006, paras 40, 42.

⁴³¹ CJEU, *Peek & Cloppenburg KG v Cassina SpA*. (2008) Case C-456/06, Judgment of 17 April 2008, para. 32.

⁴³² Ibid., paras 29–31.

“distribution by sale or otherwise” under the InfoSoc Directive should be interpreted as meaning solely acts of distribution which entail a transfer of ownership.⁴³³

Whereas the WIPO CT obliges the contracting parties to provide control over distribution of a work through sale or other transfer of ownership, it does not preclude granting wider protection, even by widening the scope of the right of distribution. Hence, reliance of the Court solely on the wording of the respective article of the WIPO CT does not seem satisfactory. Although there may be many reasons to confine the right of distribution under the InfoSoc Directive solely to the acts of transfer of ownership, relying on the WIPO CT should not have been a decisive one.

Similarly, in the *Art & Allposters* case the CJEU supported the reasoning of the EC that the right of distribution applies solely to tangible objects that were put on the market with authorisation of the right holder.⁴³⁴ The Court referred, inter alia, to the WIPO CT and the Agreed Statement to support the reasoning.⁴³⁵ The same was held in regard to the rental right in the *VOB* case, which did not even concern the right of rental. The CJEU differentiated the rental right from lending through establishing that the former applied solely to tangible copies, relying on the WIPO CT and, in particular, on the same Agreed Statement.⁴³⁶

Whereas in some cases the CJEU relied on the WIPO CT to construct the scope of the right of distribution narrowly, in other cases it has done the opposite. For instance, in the *Donner* case the CJEU acknowledged the necessity to give distribution the meaning in accordance with the WIPO CT, simultaneously holding that the content of the notion of distribution must be given an independent interpretation under EU law.⁴³⁷ The Court held that distribution is not an instant act but, instead, consists of series of acts from the conclusion of a sale contract to its performance.⁴³⁸ Hence, by advertising and enabling delivery of copyright-protected works, one carried out distribution to the public within the meaning of the Directive.⁴³⁹ Similar reasoning we also find in the *Syed* case, where the right of distribution was examined in conjunction with Article 6(1) of the WIPO CT.⁴⁴⁰

In a similar case, the *Dimensione Direct Sales* case, the CJEU relied on the finding in the *Donner* case, that the acts preceding conclusion of a sale contract might fall within the distribution right, even when it is a mere offer of a contract

⁴³³ *Ibid.*, paras 33, 35–36.

⁴³⁴ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, paras 37–38.

⁴³⁵ *Ibid.*, paras 39–40.

⁴³⁶ CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. (2016) Case C-174/15, Judgment of 10 November 2016, paras 34, 39.

⁴³⁷ CJEU, *Titus Alexander Jochen Donner*. (2012) Case C-5/11, Judgment of 21 June 2012, para. 25.

⁴³⁸ *Ibid.*, para. 26.

⁴³⁹ *Ibid.*, para. 30.

⁴⁴⁰ CJEU, *Criminal proceedings against Imran Syed*. (2018) Case C-572/17, Judgment of 19 December 2018, paras 20–21.

of sale binding to its author.⁴⁴¹ The CJEU found that offering copyright-protected works for sale may constitute an infringement of the distribution right under Article 4(1) of the InfoSoc Directive irrespective of the fact whether or not an actual sale took place if it invites consumers to purchase it.⁴⁴²

Accordingly, on the one hand, the right of distribution under the InfoSoc Directive has been interpreted narrowly against the background of the WIPO CT, whereas on the other hand, it had been given a broad and independent meaning. Hence, whilst interpreting the Treaty as providing an obligation to recognise the right of first distribution solely through the sale of copies or other transfer of ownership, the Court gave the same meaning to the right of distribution under the InfoSoc Directive. What does not stem directly from the obligations under the WIPO CT is recognising the preparatory steps for distribution of copies as falling under the right of distribution.

3.2. Harmonisation of the right of distribution under the EU *acquis*

Right of distribution as such was not subject to EU harmonisation before the beginning of 1990s. However, its conflict with the internal market objectives was long anticipated. Right of distribution under national laws became subject to a few preliminary rulings by the CJEU on the intersection of exclusive copyright rights and the free movement of goods within the EU. Harmonisation of the general right of distribution was not discussed by the EC before the first Green Paper in 1988, and even then it was considered excessive and unnecessary in the absence of a greater interest in its harmonisation.

The broad general right of distribution appeared for the first time in the draft of the Software Directive, although the underlying Green Paper did not mention it at all. It appeared again shortly after in the Rental and Lending Rights Directive as a neighbouring right, and, finally, in the InfoSoc Directive. Despite the different wording of the right under the Directive from that under the WIPO CT, its scope is often read imitatively as covering solely acts of distribution by sale or its equivalent.

The prevailing view is that the right of distribution under the EU *acquis* applies solely to tangible copies, notwithstanding the *UsedSoft* and *Ranks* judgments concerning the Software Directive and the *VOB* case where the lending right under the Rental and Lending Rights Directive was applied to e-books.⁴⁴³ The alternative view is that the right applies equally to copies lacking tangible

⁴⁴¹ CJEU, *Dimensione Direct Sales Srl, Michele Labianca v Knoll International SpA*. (2015) Case C-516/13, Judgment of 13 May 2015, paras 26–27.

⁴⁴² *Ibid.*, paras 31–32.

⁴⁴³ CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. (2016) Case C-174/15, Judgment of 10 November 2016.

support. The right of distribution acquired a distinctive character under the *acquis*. It is no longer a corollary to the right of reproduction and encompasses various acts (potentially) leading to the transfer of ownership of a copy.

This section examines the development of the right of distribution under the EU *acquis* through the prism of the scope of control accorded by the right beyond the first distribution of a work. Against the background of the previous section, here it is examined how the right was shaped under the CJEU jurisprudence in order to fulfil its function in the changing circumstances of work's exploitation.

3.2.1. Enquiries of the European Commission before the harmonisation

Before the beginning of the 1980s, copyright policy and legislation in the EU MS was, with few exceptions, entirely a matter of national laws. With the development of the internal market and increase in intra-community trade, it became evident that certain aspects of copyright (or IP in general) conflict with the internal market, especially with the free movement of goods. Although the first Directives in the field of copyright were adopted at the beginning of 1990s, they partially built upon case law of the CJEU, which on a few occasions had to rule on the compatibility of certain national laws with the objectives of the EEC Treaty.

The first study on copyright in the context of EU integration was carried out by Dietz on behalf of the EC in 1977. The report provided mainly a comparative review of copyright legislation of then nine MS and sought to address issues arising from technological development.⁴⁴⁴ It was observed that a separate right of distribution was recognised explicitly only in half of the MS, namely in Germany, Denmark, Italy and the Netherlands.⁴⁴⁵ The primary purpose of the distribution right (if recognised) was to provide control over lawfully produced copies. Distribution of unlawfully made copies would be considered an infringement even in the absence of an explicit right of distribution.⁴⁴⁶

Generally, the right was seen as conflicting with the Treaty of Rome, in particular with the provisions on the free movement of goods.⁴⁴⁷ Nonetheless, the report suggested including the express provision of the right of distribution and its exhaustion during the first phase of harmonisation.⁴⁴⁸ The Model Law on copyright which was being developed at that time could serve as a basis.⁴⁴⁹ Also, it was stressed that in order to effectively eliminate the contradiction between the

⁴⁴⁴ Dietz (1978), p. vii.

⁴⁴⁵ Sweden and Norway were part of the EFTA at that time.

⁴⁴⁶ Dietz (1978), pp. 90–91.

⁴⁴⁷ *Ibid.*, p. 89.

⁴⁴⁸ *Ibid.*, p. 247.

⁴⁴⁹ Davies and von Rauscher auf Weeg (1983), p. 176.

free movement of goods and the right of distribution, it would also be necessary to harmonise the preconditions and the term of protection.⁴⁵⁰

Another paper considering the harmonisation of the right of distribution was the Green Paper on Copyright and the Challenge of Technology published by the EC in 1988. It came as a follow-up to the White Paper of 1985 on Completing the Internal Market by 1992.⁴⁵¹ Disparities in IP legislation of the MS impacted intra-community trade to the extent that copyright would become a subject of a separate paper with a specific focus on copyright protection of computer programmes.⁴⁵² The resulting Green Paper on copyright and the challenge of technology addressed issues of privacy, protection and distribution of audio-visual and sound works, and protection of databases and computer programmes.⁴⁵³

A separate part of this Green Paper of 1988 was dedicated to the right of distribution, which varied considerably between the jurisdictions. The right of distribution for the purpose of the report meant authorising making available of copies of a work to the public, providing control over the commercial exploitation of a work within a given jurisdiction.⁴⁵⁴ The possibility to introduce the right of distribution for all or particular types of works was explored. Interestingly, control over all the forms of distribution for the entire duration of copyright protection was considered clearly excessive.⁴⁵⁵

As the EC received no requests from the MS to harmonise the right of distribution and there was relatively strong support only when it came to audio-visual works, the paper concluded that the matter could be effectively dealt with on the national level.⁴⁵⁶ Lending and rental rights, on the other hand, could become an issue, but intervention was not considered justified at that point.⁴⁵⁷ The only urgent matter to address was the copyright protection of computer programmes, and for that reason, a Directive was to be drafted. Distribution right, nevertheless, was not included into the preliminary list of rights to be harmonised.⁴⁵⁸

⁴⁵⁰ Dietz (1978), pp. 97–98.

⁴⁵¹ White Paper on Completing the Internal Market., COM(80) 310 final. 14 June 1985, p. 8.

⁴⁵² *Ibid.*, p. 37.

⁴⁵³ Green Paper on copyright and the challenge of technology – Copyright issues requiring immediate action, COM(88) 172 final. 7 June 1988, p. 16.

⁴⁵⁴ *Ibid.*, p. 146.

⁴⁵⁵ *Ibid.*, p. 147.

⁴⁵⁶ *Ibid.*, p. 154.

⁴⁵⁷ *Ibid.*, pp. 153–154.

⁴⁵⁸ *Ibid.*, p. 201.

3.2.2. CJEU examining the conflict between the right of distribution and the objectives of the internal market

Conflict between the exclusive IP rights and the objectives of the internal market was already anticipated before the start of copyright harmonisation in the late 1980s. Recognition of the right of distribution was particularly problematic, as it distorted the internal market by hindering the free movement of goods. In the absence of harmonisation, few references for a preliminary ruling were made to the CJEU to clarify the relation between copyright protection under national laws and the objectives of the European Economic Community (EEC) Treaty. Half of the requests came from Germany, while the rest from Denmark and the UK.⁴⁵⁹

These are the cases which laid ground for the subsequent harmonisation of the Community exhaustion principle under the secondary law. Returning back to the report prepared by Dietz, which was published after the first major case on the matter, the right of distribution was perceived as an intolerable extension of copyright protection.⁴⁶⁰ The question of Community exhaustion was thus a “question of whether copyright, with its easy accessibility and long duration should adopt the character of a formless and unexamined industrial property right for practically all industrial goods, which must surely lead to a process of copyright self-destruction”.⁴⁶¹

Hence, the brief discourse on the case law below must be seen in the similar light – through weighing the pros of distribution right against the cons of restricting the freedom of movement. Three major aspects were addressed in these cases, which are important for understanding the subsequent harmonisation. First, it is a delineation of the scope of the right of distribution under national laws towards considerations under the free movement of goods. Second, it is a distinction between rental and other types of distribution. Third, it is the significance of consent and exercise of the rights under the national copyright law.

3.2.2.1. Right of distribution in conflict with the free movement of goods

The first aspect, the interface between the national copyright law and the free movement of goods, was considered in four cases, three of which concerned the importation of copies of a work from another MS without obtaining a separate authorisation of the copyright holder. All of the copies in question were lawfully produced and placed on the market in another MS or outside the Community with the right holder’s consent.

⁴⁵⁹ The cases are considered in this section only insofar as they relate to the right of distribution and its scope, as opposed to exhaustion which is dealt with in the following chapter. See section 4.2.1.

⁴⁶⁰ Dietz (1985), p. 391.

⁴⁶¹ *Ibid.*, p. 391.

Deutsche Gramophone is the very first case examined by the CJEU concerning the copyright protection in general, and the right of distribution in particular.⁴⁶² The referring court suspected that the exclusive right of distribution under the German Copyright Act might have been in conflict with Article 85 of the EEC Treaty.⁴⁶³ The German court considered the exhaustion provision under the copyright act to be a possible solution to the problem. However, as the provisions of the national law were not entirely clear, the court was uncertain whether a particular interpretation would be against the EEC Treaty.⁴⁶⁴

Namely, the referring court was not sure whether exhaustion under the national law applied to copies marketed abroad and, if not, whether opposing distribution of such copies would be against the objective of the EEC Treaty.⁴⁶⁵ The referring court thus asked whether it would be contrary to the EEC Treaty to interpret German law as allowing the copyright holder to rely on the right of distribution to prevent marketing of copies of work which were put into circulation with their consent in another MS.

The CJEU established that copyright falls within industrial and commercial property under Article 36 of the EEC; thus certain restrictions on the free movement of goods were justified on the basis of copyright protection.⁴⁶⁶ The Court also held that relying on the right of distribution to prevent marketing of products already distributed by the right holder in a different MS on the sole ground that that distribution did not take place in a present MS would isolate national markets and be against the objectives of the Treaty.⁴⁶⁷ It was thus held that such exercise of the right of distribution was against the free movement of goods if it is invoked solely because initial distribution occurred within another MS.

The second case, *Musik-Vertrieb*, concerned the facts similar to that of *Deutsche Grammophon*.⁴⁶⁸ This time, however, the referring German court asked whether it was compatible with the free movement of goods and, in particular, Article 30 of the EEC, for a copyright holder (through a collective society) to exercise the exclusive right of distribution through claiming a payment for placing already distributed copies imported from another MS, where in that other MS royalty rates are lower.⁴⁶⁹ Accordingly, the lawfulness of import and putting into circulation of these copies was not questioned. Rather, it was questioned

⁴⁶² CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. (1971) Case C-78/70*, Judgment of 8 June 1971.

⁴⁶³ Art. 85 EEC Treaty deals with anticompetitive agreements and is now Art. 101 TFEU.

⁴⁶⁴ CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. (1971) Case C-78/70*, Judgment of 8 June 1971, pp. 494–495.

⁴⁶⁵ Hence, the issue was, in essence, the territoriality of exhaustion.

⁴⁶⁶ Now Art. 36 TFEU.

⁴⁶⁷ CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG. (1971) Case C-78/70*, Judgment of 8 June 1971, para. 12.

⁴⁶⁸ CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA. (1981) Joined cases 55/80 and 57/80*, Judgment of 20 January 1981.

⁴⁶⁹ Now Art. 34 TFEU, concerning prohibition of quantitative restrictions.

whether claiming a payment upon import on the basis of the exclusive distribution right was a measure having an equivalent effect to quantitative restrictions. According to the observations submitted by the EC, the difference in prices between the MS was no ground for isolating the markets, but exactly the reason behind insisting on the free movement of goods. Moreover, it was the objective of the common market to have the market shaped by economic factors rather than artificial measures taken by the governments.⁴⁷⁰

The CJEU established that the territoriality of copyright protection in the absence of harmonisation did not prevail over the single market objective as it lead to partitioning.⁴⁷¹ Examining whether collecting a payment upon import of goods placed on the market in another MS was contrary to the Treaty, the CJEU held that it would amount to a partitioning of the market and thus was precluded.⁴⁷² It was further stressed that the copyright holder, with a view to the common market and the free movement of goods, was free to choose where to place their work on a market in their best interest.⁴⁷³

In the third case referred to the CJEU by the Danish court, *Dansk Supermarked*, the Court examined whether goods lawfully placed on the market in one MS could be prevented from being marketed in a different MS on the basis of copyright, trade mark or marketing legislation.⁴⁷⁴ Although a larger part of the judgment concerns marketing legislation, certain parts deal specifically with copyright and trademarks. For instance, the CJEU re-established that national legislation cannot prevent goods from being marketed in a MS if they were lawfully put on the market with the copyright holder's consent in another MS.⁴⁷⁵

Hence, the Court created a so-called Community exhaustion concept to deal with the conflict between the exclusive rights under copyright and their detrimental effect to the internal market. The exhaustion principle developed under certain national laws proved to be handy for denying control over subsequent distribution of copies when particular conditions were met, namely, when the copies were distributed within the community with the authorisation of the rights holder. Once the right holder exercised the right, they lost not only control over the subsequent distribution but also the ability to claim additional remuneration. Thus, a tool of restricting the scope of distribution right under national law was appropriated by the Court. One should, however, distinguish between exhaustion

⁴⁷⁰ See CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) *Joined cases 55/80 and 57/80*, Judgment of 20 January 1981, p. 158; Opinion of Advocate General in *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. *Joined cases 55/80 and 57/80*. 11 November 1980, p. 177.

⁴⁷¹ CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) *Joined cases 55/80 and 57/80*, Judgment of 20 January 1981, para. 14.

⁴⁷² *Ibid.*, paras 18–19.

⁴⁷³ *Ibid.*, para. 25.

⁴⁷⁴ CJEU, *Dansk Supermarked A/S v A/S Imerco*. (1981) *Case C-58/80*, Judgment of 22 January 1981.

⁴⁷⁵ *Ibid.*, p. 12.

on national level and the Community one, as the latter's function was limited to the conflicts between the free movement of goods between the MS, at least before copyright harmonisation.⁴⁷⁶

Given that the Court de facto held national exhaustion under national laws incompatible with the EEC Treaty, the question that arises is whether it also precluded international exhaustion. Although it was not the case, the next CJEU judgment indicated the tendency of limiting exhaustion to the EEC-wide one. In the *Polydor* case, the CJEU ruled on the justifiability of preventing import of goods lawfully put on the market in non-EEC countries on the basis of the right of distribution.⁴⁷⁷ The Court was ultimately asked whether the principle developed in the previous cases should find its application to the goods that were placed on the market in Portugal. Although not a party to the EEC Treaty at the time, Portugal was a party to a separate Agreement with the EEC on the abolishment of quantitative restrictions on imports. The defendant in the proceedings claimed that the Agreement had the same objectives as the Treaty, hence it was not against the Treaty to import to the United Kingdom copies that were put into circulation in Portugal.

The Court, however, disagreed and held that the agreement in question and the EEC Treaty did not have the same purpose. Preventing import of goods from Portugal could be justified on the ground of protection of industrial property in the United Kingdom.⁴⁷⁸ The case as such did not call for the prohibition on the import of copies put into circulation outside the MS but merely held that in that particular case such restriction was justified. It also very clearly differentiated between the EEC Treaty establishing a single market and the agreements with third countries, even if they also called for the abolishment of quantitative restrictions on imports. Why distinction had to be drawn between the de facto similar treaties providing for abolishment of trade restrictions is nevertheless unclear.⁴⁷⁹

3.2.2.2. Authorisation of first distribution as the essential function of the right

Besides the creation of the Community exhaustion concept, the case law of this time de facto harmonised another two important matters that later were taken into

⁴⁷⁶ Gotzen (1990), pp. 300–302.

⁴⁷⁷ CJEU, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*. (1982) Case C-270/80, Judgment of 9 February 1982.

⁴⁷⁸ *Ibid.*, paras 18–19.

⁴⁷⁹ For instance, Joliet and Delsaux in their comment state that “it is hard to see why the specific subject-matter of industrial property right should vary depending on whether one is in a common market or a free trade area”. Joliet and Delsaux (1986), p. 32. Walter comments that the principle was stated in severe terms for European market but more flexible for the EFTA market, see Walter (1986), p. 57.

account when harmonising copyright under secondary EU law. This section focuses on the aspects related to the exercise of the exclusive right of distribution, which became of utter importance to defining the conditions for limiting the control of right holder over the subsequent distribution. As will be seen in the next chapters, these considerations are not limited to the right of distribution; they are equally important in the cases concerning delineation of the scope of other dissemination-related rights.

A strong argument for limiting the reach of the exclusive right was upheld by the Court in the *Musik-Vertrieb* case. The internal market and the free movement of goods provided the copyright holder with an opportunity to choose where and how to put a work into circulation in their best interest.⁴⁸⁰ Hence, the collecting societies were not allowed to claim additional remuneration upon the importation of copies from another MS based on the difference of the royalty rates between the MS. The significance is prominently illustrated by the next case.

In *EMI Electrola v Patricia* the CJEU, upon a reference from the German court, had to rule whether a manufacturer of sound recordings could rely on the exclusive right of distribution to prevent the import of goods lawfully put on the market in a different MS.⁴⁸¹ This time, however, lawfulness depended not on the consent of the right holder to the original distribution, but on the fact that the copyright protection had already lapsed in that different MS.

In its decision, which is surprisingly concise, the CJEU referred to the previous case *Musik-Vertrieb* where it had ruled that the copyright holder may not rely on the exploitation right to oppose importation of goods put on the market in another MS with their consent.⁴⁸² It then proceeded to distinguish the situation from the proceedings in question on the basis of the absence of consent to the initial act of distribution.⁴⁸³ Nonetheless, instead of developing this line of argumentation further, the Court went on to state that the restrictions on the free movement of goods lied in the differences in the term of protection. The latter was linked to the existence of the right rather than exercise; hence, relying on an exclusive right to prevent distribution was justified.⁴⁸⁴

Notably, the Court decided to focus on the term of protection rather than on the question of restricting the reach of the exclusive rights. This is noteworthy because the case was brought on the ground that initial distribution in another MS did not take place with the consent of the right holder, but only lawfully. This distinction is significant, as during the exhaustion principle development its preconditions changed from concerning lawfully published or those put into

⁴⁸⁰ CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) *Joined cases 55/80 and 57/80*, Judgment of 20 January 1981, para. 25.

⁴⁸¹ CJEU, *EMI Electrola GmbH v Patricia Im- und Export and others*. (1989) *Case C-341/87*, Judgment of 24 January 1989.

⁴⁸² *Ibid.*, para. 9.

⁴⁸³ *Ibid.*, para. 10.

⁴⁸⁴ *Ibid.*, paras 11–12.

circulation to copies to copies distributed with the authorisation of the right holder.⁴⁸⁵

The Court could have also discussed in this case whether the absence of consent as a precondition for exhaustion, as provided under national law, was a justified ground to prevent the import of copies otherwise lawfully produced and put into circulation. Moreover, the lawful copies in question were produced not under a compulsory license or under other similar circumstances where the right holder had not had a possibility to exercise the right. Contrariwise, the situation took place because the term of protection lapsed. Hence, the right holder had actually had an opportunity to exercise their right.

3.2.2.3. Exploitation through rental distinguished from distribution

As examined in the beginning of this chapter, the development of technology enabled new ways of exploitation, potentially opening markets separate to the one for the sale of copies. It is prominent that the CJEU took it into account when dealing with the conflict between exclusive control over the copies of a work and the free movement of goods. In the *Warner Brothers* case, the Court exempted the rental of copies from the Community exhaustion rule.

The facts of the case were similar to the previous cases. Copies were sold with the authorisation of the right holder in the UK and subsequently lawfully imported to Denmark.⁴⁸⁶ However, unlike in the previous cases, the copies were not resold but made available for rental. At that time, the right of rental was recognised in Denmark but not in the UK. Recognising an exclusive right of rental or at least exempting it from falling under exhaustion under national laws was on the agenda of the then-ongoing negotiations on the PPBC and the EU Directives.

The question the CJEU had to address was whether the copyright holder could rely on the exclusive right to authorise rental recognised under the Danish law to prevent rental of copies which were lawfully put into circulation in another MS and then imported into Denmark. The Advocate General (AG) proposed to rule that, similar to the other cases, preventing rental of copies already put on the market was incompatible with the provisions of the Treaty. He relied, inter alia, on the judgment in the *Musik Vertvieb* case, and the statement that the right holder may decide freely over the circumstances of the exploitation of a work but may not take advantage of disparities that exist under national laws.⁴⁸⁷

The Court ruled differently than what the AG proposed. The CJEU started with establishing that such laws as the one at the present proceedings had an effect

⁴⁸⁵ Further explored in section 4.1.3.

⁴⁸⁶ CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86, Judgment of 17 May 1988.

⁴⁸⁷ Opinion of Advocate General in *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86. 26 January 1988.

equivalent to restrictions on imports. Therefore, it was necessary to consider whether the legislation was justified on the grounds of protection of industrial and commercial property.⁴⁸⁸ The CJEU went on to stress that in this case the application of the right was determined by the type of transaction and not the origin of the copies.⁴⁸⁹

Turning to rental itself, the Court reasoned that, as demonstrated by the EC and given the advances of technology, a new market for distributed copies had emerged. However, the right holders would not receive a fair share of the market unless they were able to authorise the rental. Therefore, recognising the right of rental was justified on the grounds of industrial property protection.⁴⁹⁰ Hereafter, the Court upheld the existence of the right and ruled that it was not against the free movement of goods to enforce the right of rental on the copies put into circulation in another MS even if that other MS only protected the initial placing of the copies on the market.⁴⁹¹

3.2.3. Harmonisation of the right of distribution under secondary EU law

The CJEU jurisprudence before the copyright harmonisation under secondary EU law, as examined in the section above, clarified four essential matters. First, that it is contrary to the objectives of the EEC Treaty to prevent importation of goods already lawfully put on the EEC market, invoking the right of distribution on the sole ground of the first putting into circulation taking place outside the MS.⁴⁹² Second, the case law established that the import of the copies lawfully put on the market in third countries could be justified on the grounds of industrial property protection, as was decided in *Polydor*. Third, although importation of copies already put on the market in another MS could not be prevented based on territoriality, their subsequent exploitation in a different form could still be reserved to the right holder if it was necessary to protect their interest in the fair share of the other market. Finally, the right holder could also rely on the right of distribution to prevent importation of copies already lawfully put on the market in a MS where copyright protection had lapsed.

⁴⁸⁸ CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86, Judgment of 17 May 1988, paras 10–11.

⁴⁸⁹ *Ibid.*, p. 12.

⁴⁹⁰ *Ibid.*, paras 15–16.

⁴⁹¹ Hence, effectively denying any comparable “Community exhaustion principle” for the right of rental. See section 4.2.1.3.

⁴⁹² Emphasis on lawfully, as it was not discussed in the case law whether consent to first distribution is an absolutely necessary condition for exhaustion. The answers were formulated in accordance with the questions referred by national courts, which were coming from jurisdictions indeed requiring consent. Although it was discussed by the AG in his Opinion in the *EMI Electrola* case, it was never articulated in any of the CJEU judgments.

The case law of this period thus neither precludes international exhaustion, as it merely states that preventing import from countries outside the Union can be justified. Nor does it prescribe the conditions for exhaustion. Instead, it holds exhaustion compatible with the EEC Treaty if the copies lawfully put on the market in one of the MS are not prevented from entering the market of another MS on the sole ground that it did not occur in the second MS. Finally, it allows right holders to enforce the right of rental irrespective of the exhaustion of distribution right in a different MS. It, however, leaves it unresolved whether the right of rental is necessarily inexhaustible even upon distribution taking place within the same MS.

The late 1980s brought major developments in the field of computing and information technology, promoting discussion on the future of copyright in increasingly changeable circumstances. Furthermore, it became apparent that disparities in copyright laws across the MS often resulted in a distortion of the internal market and free movement of goods. Not least, copyright was considered internationally as an instrument to protect investment into the development of technology products, such as computer programmes.

The Green Papers initiated by the Commission at that time addressed the matters of copyright in the light of these multiple perspectives. Based largely on the results of these papers and the jurisprudence of the CJEU, the first stage of copyright harmonisation commenced with the adoption of the few Directives in the field of copyright in the early 1990s. Whereas the right of distribution is harmonised under multiple Directives, both as the author's right and the neighbouring right, the analysis will focus on two Directives: the Software Directive and the InfoSoc Directive. First, they are of the utmost importance to the harmonisation of the exclusive rights. Second, their respective provisions on the right of distribution became subject for a few preliminary rulings for the interpretation.

3.2.3.1. Right of distribution under the Software Directive

The proposal for a Directive on the protection of computer programmes (Software Directive) was drafted in 1989 as a follow-up to the Green Paper on copyright and the challenge of new technology in 1988. Following the negotiations on the international level, and, even before any harmonisation under the international treaties, the EC proposed to make computer programmes the subject matter protected by copyright.⁴⁹³

⁴⁹³ Whereas the purpose of protecting computer programmes under copyright is outside of the scope of this thesis, it suffices to mention one comment by Reichman. Subjecting computer programmes to all the rights under copyright would transform the latter into providing a “patent-like protection on the softest possible conditions for the longest possible time”. See Reichman (1992), p. 815.

Whereas the preceding Green Paper did not list the right of distribution among the proposed rights, Article 4(c) of the original proposal for a Directive explicitly included the right:

4. Subject to the provisions of Article 5, the exclusive rights referred to in Article 1 shall include the right to do or to authorise:

(c) the distribution of a computer program by means of sale, licensing, lease, rental and the importation for these purposes. The right to control the distribution of a program shall be exhausted in respect of its sale and its importation following the first marketing of the program by the right holder or with his consent.⁴⁹⁴

The explanatory memorandum does not provide many insights into how the right of distribution arrived in the proposal and why it had been worded in that way. Instead, it merely states that the author would usually control directly or indirectly distribution of computer programmes by sale or otherwise. Under the proposal, the right of distribution would be exhausted once a product was placed on the market with consent, and, likewise, the right of importation would be exhausted once a product was imported into the Community with the authorisation of the right holder.⁴⁹⁵

The European Economic and Social Committee did not comment on the inclusion of the right of distribution in its opinion but suggested some minor changes to the language.⁴⁹⁶ Following the comments from the European Parliament, the EC presented an amended proposal, where the wording of Article 4(c) remained the same.⁴⁹⁷ The final text adopted shortly after, however, contained slightly modified wording for the right of distribution under Article 4.⁴⁹⁸ The Directive was codified in 2009, with no changes to Article 4 except the splitting the provision on the exhaustion of the right into a separate paragraph.

Accordingly, the right of distribution under Article 4(1)(c) of the Software Directive now reads as follows:

4.1. Subject to the provisions of Articles 5 and 6, the exclusive rights of the right holder within the meaning of Article 2, shall include the right to do or to authorise:

(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof.⁴⁹⁹

⁴⁹⁴ Proposal for a Council Directive on the legal protection of computer programs. COM (88) 816 final. 17 March 1989.

⁴⁹⁵ *Ibid.*, p. 11.

⁴⁹⁶ Opinion on the proposal for a Council Directive on the legal protection of computer programs. Economic and Social Committee 89/C 329/02.

⁴⁹⁷ Amended proposal for a Council Directive on the legal protection of computer programs. COM(90) 509 final. 18 October 1990.

⁴⁹⁸ Council Directive on the legal protection of computer programs 91/250/EEC. 14 May 1991. OJ L 122/42

⁴⁹⁹ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version). 5.05.2009. OJ L 111/16

Distribution in the Software Directive is thus defined broadly, as encompassing rental as well as sale, and given the initial wording of the Directive, possibly also lease, licensing, etc.⁵⁰⁰ Ultimately, the Directive was adopted at a moment when the right of distribution was defined broadly under many national laws and under the negotiations on the PPBC. Moreover, the right of distribution is the only dissemination-related right recognised under the Directive.⁵⁰¹

The views on whether or not the right of distribution encompasses digital copies or copies produced on the recipient's end through transmission differ, even after the landmark *UsedSoft* judgment.⁵⁰² Some, notwithstanding the case law and the broad language, suggest that distribution encompasses solely acts related to copies fixed on a tangible medium, thus not covering digital transmissions.⁵⁰³ On the other hand, others support the view that the expression “any form of distribution” included digital delivery even before the *UsedSoft* case, explained by the Directive's aim to provide sufficient protection to computer programmes.⁵⁰⁴

3.2.3.2. Right of distribution under the InfoSoc Directive

At the time of the ongoing negotiations on the WIPO CT in 1995 the EC released the Green Paper on Copyright in Information Society. The paper concerned the application of copyright to “the new products and services in the information society, including certain legal and technical aspects which are inseparably linked with the effective exercise of rights.”⁵⁰⁵ The paper was followed by another Green Paper in 1996, which addressed the right of distribution at greater length than the original one.

Whilst by 1995 almost all of the MS recognised the exclusive control of the copyright holder over distribution, there were major differences. Control over distribution could be safeguarded either through an explicit separate right, or due to the fact that it fell within the scope of the broader right of circulation or publication. The latter also influenced the treatment of the exhaustion principle of distribution right, meaning the scope of the control over distribution beyond the first putting into circulation.⁵⁰⁶ At that point, no international treaty recognised a

⁵⁰⁰ Bentley (2006), p. 223.

⁵⁰¹ Right of communication to the public appeared for the first time in the Rental and Lending rights Directive in 1992 as a neighbouring right and it did not encompass the making available right.

⁵⁰² On *UsedSoft*, see sections 4.2.3.3. and 4.2.3.4.

⁵⁰³ See Bentley (2006), p. 223; Bentley and Lee (2016), p. 254; Janssens (2014), p. 116.

⁵⁰⁴ Blocher and Walter (2010), p. 134.

⁵⁰⁵ Green Paper on copyright and the challenge of technology – Copyright issues requiring immediate action, COM(88) 172 final. 7 June 1988, p. 7.

⁵⁰⁶ The follow-up to the Green Paper on copyright and related rights in the Information Society. COM (96) 586 final. 20 November 1996, p. 17.

general right of distribution. The right was recognised under secondary EU law only in regard to computer programmes and, at the time of the Green Paper of 1995, the proposed Database Directive, adopted shortly after in 1996.⁵⁰⁷

Following the second Green Paper of 1996, the EC prepared a draft proposal for a Directive aimed at harmonising certain matters of copyright and covering all the types of a work. The Directive was presented in 1997 under the name of the Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (InfoSoc Directive).⁵⁰⁸ While it implemented initiatives spelled out in the Green Papers, it was also closely linked to the negotiations on the WIPO CT, in which the EC played an important role.⁵⁰⁹ Hence, recital 15 of the InfoSoc Directive provides that the Directive serves, *inter alia*, to implement a number of new international obligations, where the WIPO CT is one of them.

The text of the Directive finally adopted in 2001 does not differ much from the initial wording proposed in 1997. Article 4(1) reads as follows:

Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.⁵¹⁰

The Article is accompanied by recital 28, which seems to clarify that the right of distribution shall cover dissemination in tangible form:⁵¹¹

Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

⁵⁰⁷ Directive 1996/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases. 27 March 1996. OJ L 77/20.

⁵⁰⁸ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final – 97/0359 (COD), 21 January 1998.

⁵⁰⁹ *Ibid.*, p. 3.

⁵¹⁰ 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. 22.6.2001. OJ L 167/10. Art. 4(1).

⁵¹¹ In contrast to the right of communication to the public, see Geiger and Schönherr (2014b), pp. 423–424.

According to the explanatory document, the Proposal did not aim to introduce radical changes to the existing framework of copyright, but rather to address the environment in which works were exploited.⁵¹² As to the right of distribution, it was generally accepted that it concerned physical copies only, as it would be in line with the WIPO CT and also with the *acquis communautaire* to use the concept of a copy or original as exclusively referring to the fixed copies that can be put into circulation as tangible objects.⁵¹³ However, neither the Directive nor the Preparatory documents specify which exact provisions are based on the WIPO CT or explain the difference in the wording of specific rights with the respective provisions under the WIPO CT. For instance, the Economic and Social Committee did not propose any alterations to the parts of the Directive which transpose the obligations of the WIPO CT and did not indicate the provisions in question.⁵¹⁴

Whereas there is little doubt that, at the very least, Article 4's aim is to implement Article 6 of the WIPO CT, the way to achieve it is a bit unclear.⁵¹⁵ First and foremost, the wording of the right of distribution under InfoSoc Directive is different than that under the WIPO CT and at first sight seems broader. First, the right of distribution under the InfoSoc refers to any form of distribution by sale or otherwise, hence, seemingly not limited to the transfer of ownership. The WIPO CT, on the other hand, seems to subject distribution to a broader concept of making a work available. Nevertheless, it covers solely such making available through sale or other transfer of ownership.⁵¹⁶

Whereas some scholars interpret the right of distribution under the InfoSoc Directive broadly as covering any form of distribution, including rental and lending, others perceive that the Article provides only for the right covering distribution through sale or other transfer of ownership.⁵¹⁷ The latter understanding has also been endorsed by the CJEU, as the Court interpreted the Article as mirroring the provisions of the WIPO CT.⁵¹⁸ In the light of the adoption of the

⁵¹² “The proposal does not introduce radical changes to the existing Internal Market regulatory framework in the area of copyright and related rights. It is the environment in which works and other subject matter are being created and exploited which has changed – not the basic copyright concepts.” Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final – 97/0359 (COD), 21 January 1998, p. 8.

⁵¹³ *Ibid.*, p. 27.

⁵¹⁴ Opinion of the Economic and Social Committee on the ‘Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the information society. Economic and Social Committee 98/C 407/06., p. 31.

⁵¹⁵ See Geiger and Schön herr (2014b), p. 423. It has also been confirmed by the CJEU, see section below and section 3.2.4.2.

⁵¹⁶ The WIPO CT defines the right as “the making available to the public of the original and copies of their works through sale or other transfer of ownership”.

⁵¹⁷ For the former view see von Lewinski and Walter (2010), p. 993. For the latter view see Geiger and Schön herr (2014b), p. 426.

⁵¹⁸ See more in section below.

Rental and Lending Rights Directive, which harmonises the rights of rental and lending in a greater detail, the question seems of minor importance.

Another important question is whether the right of distribution under the Directive encompasses digital copies. The majority interprets Article 4 as covering solely tangible copies.⁵¹⁹ Whereas this is an interesting question dealt with elsewhere in this thesis, it is important to note that the legislator aimed to allocate the right of distribution solely to the copies fixed on a tangible medium and to cover all the acts of digital transmissions with the right of communication to the public. Whether the technological changes call for subjecting digital copies to the right of distribution under the InfoSoc Directive, similarly to the conclusion achieved by the CJEU in the context of the Software Directive in *UsedSoft*, is, first and foremost, a question of the desirable implications for the scope of subsequent control.⁵²⁰

Hence, the harmonisation of the right of distribution at the time of the Directive's adoption may not have been such a revolutionary move. Many MS provided control over distribution of lawful copies in some form.⁵²¹ Also, at this time the right has been seen as related to the tangible copies. Nevertheless, the subsequent harmonisation through the jurisprudence of the CJEU has, without a doubt, increased the role of the EU harmonisation in national law-making. As will be shown next, the reach of the right under the Directive was extended beyond lawful copies and beyond the very act of transfer of ownership.

3.2.4. CJEU developing the scope of the right of distribution

Whereas harmonising the right of distribution was meant first and foremost to achieve compliance with the obligations under the WIPO CT and to abolish the adverse impact of national copyright laws on the freedoms of the internal market, the harmonisation went beyond these objectives. This section examines the way the CJEU shaped the scope of the harmonised right in the light of the interpretation of the WIPO CT, with the focus on acceptable control beyond the circumstances of the first marketing of copies of a work.

Four major issues of balancing the need to provide an adequate protection of the right holder's interest in controlling the distribution of a work with the need to maintain the boundaries of exclusive control are identified. First, although very questionably relying on the WIPO CT, the Court denied subjecting the temporary

⁵¹⁹ But see on the right's potential to cover digital copies when they substitute physical distribution, Geiger and Schönherr (2014b), pp. 423, 425.

⁵²⁰ See also section 4.3.2.

⁵²¹ For instance, it was established in Sweden and Norway that their laws were already in conformity with Article 4(1) as they provided the right of distribution covering tangible copies, see Prop. 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m., p. 81; Ot. prp. nr. 46 (2004–2005) Om lov om endringer I åndsverkløven m.m., p. 27.

exhibition of a lawfully acquired piece of furniture to a separate authorisation from the right holder pursuant to the right of distribution. Second, the CJEU extended the concept of distribution to cover acts besides the transfer of ownership if they form a series of acts leading to one. Third, the Court protected the right holder's interest in controlling the lawfully distributed but altered copies opening a new market. Fourth, the Court extended the concept of distribution in its broad sense to Internet transmissions and digital copies, where it found it justified to limit the right holder's control over subsequent dissemination through the mechanisms in place under the Directive.

3.2.4.1. Narrow interpretation of the right as encompassing transfer of ownership

In the *Peek & Cloppenburg* case the CJEU was asked to rule whether the right of distribution under the InfoSoc Directive covered acts of making a work available other than through sale of copies.⁵²² The Court held in this regard that there is little explanation of the concept of distribution of a work under the Directive. It then proceeded to examine the scope of the concept under the WIPO CT, as provisions of the InfoSoc Directive implemented the Treaty and should have been interpreted as far as possible in the light of the WIPO CT provisions.⁵²³ Accordingly, the Court held that the expression “distribution by sale or otherwise” should be interpreted as meaning solely acts of distribution which entail a transfer of ownership.⁵²⁴

Although the language of Article 4 is rather broad, providing for any form of distribution by sale or otherwise, the fact that it implements the WIPO CT and the abovementioned judgment in *Peek & Cloppenburg* contributed to the view that the scope of the right is nonetheless narrow. One view is that the right of distribution under the InfoSoc Directive covers solely acts where a transfer of ownership takes place, leaving such acts as rental and lending for other directives.⁵²⁵ Another view is that just as the Software Directive does, the InfoSoc Directive provides for a broad right, including rental and lending and other forms of distribution. This is so even though in *Peek & Cloppenburg* the CJEU ruled differently. The arguments of the CJEU appear unconvincing as the WIPO CT is considered to provide only minimum rights.⁵²⁶

The very essence of the *Peek & Cloppenburg* case was whether the copyright holder could rely on the right of distribution to prevent a showing of a work

⁵²² CJEU, *Peek & Cloppenburg KG v Cassina SpA*. (2008) Case C-456/06, Judgment of 17 April 2008.

⁵²³ *Ibid.*, paras 29–31.

⁵²⁴ *Ibid.*, paras 33, 35–36.

⁵²⁵ Bechtold (2006), p. 364; Geiger and Schönherr (2014b), p. 424.

⁵²⁶ von Lewinski (2010), pp. 993–994.

(a piece of furniture) at the shop front. The outcome of the ruling seems reasonable, unlike the Court's reliance on the WIPO CT. One opinion is that such a narrow interpretation of the right of distribution in the light of the WIPO CT might have been motivated by balancing the copyright with the freedoms under the Treaty.⁵²⁷ Whereas the Court did not pay any particular attention to the Treaties, the AG did in his opinion, which was followed by the CJEU at least to the outcome.

Inter alia, the AG emphasised that even though the InfoSoc Directive seeks to provide a high level of protection, one should not oversimplify this goal by assuming that any ambiguity must be resolved in favour of the right holder.⁵²⁸ Hence, the AG reasoned that allowing the right holder to rely on a broadly interpreted right of distribution extending to temporary use would be liable to restrict the free movement of goods. Therefore, it would go beyond safeguarding the right of distribution to preclude third persons lawfully acquiring a copy of a work from making it temporary available.⁵²⁹

3.2.4.2. Broad interpretation of the right as encompassing preparatory steps, subsequent distribution, and counterfeit copies

On the other hand, the right of distribution was given a broad scope when it comes to two other important points. First, rather than designating distribution solely to the act of transfer of ownership following the preceding jurisprudence, the CJEU interpreted it as comprising a series of acts which, at the very least, lead to the transfer of ownership. Second, the right was extended to cover counterfeit copies.

In the *Donner* case, the CJEU acknowledged once more the necessity to give the right of distribution the meaning in accordance with the WIPO CT.⁵³⁰ At the same time, the Court held that the content of the notion of distribution must be given an independent interpretation under EU law and not be attached to the legislation applicable to a transaction in question. Therefore, according to the Court's interpretation, distribution is not an instant act but consists instead of the acts leading to the conclusion of sale contract and its performance.⁵³¹ Towards the circumstances of the case in question, the Court held that advertising and enabling delivery of copyright-protected works fell under the right of distribution to the public within the meaning of the InfoSoc Directive.⁵³²

⁵²⁷ Sganga (2018a), pp. 133–134.

⁵²⁸ Opinion of Advocate General in *Peek & Cloppenburg KG v Cassina SpA*. (2008) Case C-456/06. 17 January 2008, para. 33.

⁵²⁹ *Ibid.*, paras 35–36.

⁵³⁰ CJEU, *Titus Alexander Jochen Donner*. (2012) Case C-5/11, Judgment of 21 June 2012.

⁵³¹ *Ibid.*, paras 25–26.

⁵³² *Ibid.*, para. 30.

Somehow in line with the previous judgment, in *Dimension Direct Sales* the CJEU recalled that, according to the case law, acts preceding conclusion of sale contract might be falling within distribution right even when it constitutes a mere offer binding to its author.⁵³³ The CJEU found that offering copyright-protected works for sale may constitute an infringement of the distribution right under Article 4(1) of the InfoSoc Directive irrespective of the fact whether or not an actual sale had taken place.⁵³⁴ Although this is in line with many national laws,⁵³⁵ it extends the reach of the harmonisation under InfoSoc.

In the latest *Syed* judgment, the Court went even further by ruling that the storage of goods bearing a protected work might constitute an infringement of the right of distribution, leaving it for a national Court to determine.⁵³⁶ The Court relied largely on the *Dimension Direct Sales* judgment, stressing that it is not excluded that acts preceding the conclusion of a sale contract fall under the concept of distribution.⁵³⁷ Although sale is not a necessary element, it must be proven that goods indeed are intended to be distributed to the public.⁵³⁸ In the case in question, the Court held that the mere fact that the goods were identical to those offered at the store could not imply that they were meant for distribution.⁵³⁹ Such interpretation would amount to extending the protection beyond the framework established by EU law.⁵⁴⁰ Essentially, the CJEU held that such an act might constitute an infringement but it would be for a national Court to determine.⁵⁴¹ The AG, on the other hand, proposed to rule that an infringement of the right of distribution took place, considering that an offer for sale extended to goods in storage that have a direct link to those on display in a shop.⁵⁴²

What is interesting about the last two cases summarised above is that they relate to counterfeit copies and, thus, seem to extend the application of the right of distribution under the Directive to unlawful copies. Whereas the right of distribution under international law is harmonised to provide the right holder control over lawfully produced copies, under the CJEU jurisprudence the reach of the right can also comprise counterfeit goods. Although the CJEU did not rule on this matter directly, the Court held that an infringement of the right of distribution

⁵³³ CJEU, *Dimensione Direct Sales Srl, Michele Labianca v Knoll International SpA*. (2015) Case C-516/13, Judgment of 13 May 2015, paras 26–27.

⁵³⁴ *Ibid.*, paras 31–32.

⁵³⁵ von Lewinski (2010), p. 996.

⁵³⁶ CJEU, *Criminal proceedings against Imran Syed*. (2018) Case C-572/17, Judgment of 19 December 2018, para. 40.

⁵³⁷ *Ibid.*, para. 23.

⁵³⁸ *Ibid.*, para. 27.

⁵³⁹ *Ibid.*, para. 32.

⁵⁴⁰ *Ibid.*, para. 35.

⁵⁴¹ *Ibid.*, para. 40.

⁵⁴² Opinion of Advocate General in *Riksåklagaren v Imran Syed*. Case C-572/17. 3 October 2018, paras 55–56, 64.

potentially took place, where counterfeit copies were being advertised for sale or stored for the subsequent distribution.

What does not seem to be questioned at all is that the right of distribution under the InfoSoc Directive extends to all the acts of distribution, primary as well as secondary, e.g. further circulation. Whereas the views on whether the right of distribution under the WIPO CT harmonises solely the right of first distribution are divided, it does not seem to be the case under the InfoSoc Directive. Unless exhaustion applies, the right of distribution covers any initial or subsequent distribution of a copy. Moreover, application of exhaustion does not necessarily result in a free subsequent circulation, as will be explained below.

One prominent example of copies that are subject to exhaustion but nonetheless cannot be further distributed without authorisation are copies which have been substantially altered by the first acquirer. In the *Art & Allposters* case the Court had to rule on whether marketing of copies originally distributed by the right holder but subsequently altered by the first acquirer infringed the distribution right of the right holder.⁵⁴³ The referred questions were essentially about the exhaustion principle and the right of reproduction and will be commented on in the next chapter. However, it is interesting how the Court approached the question of the right of distribution. The CJEU stated, inter alia, that “the consent of the copyright holder does not cover the distribution of an object incorporating his work if that object has been altered after its initial marketing in such a way that it constitutes a new reproduction of that work”.⁵⁴⁴ Hence, the subsequent circulation of copies was not exempted from the right holder’s authorisation.

This appears to extend the scope of the distribution right to any subsequent distribution, as even after the first marketing of a copy its acquirer cannot freely dispose of that copy, e.g. by altering it and selling it further. The main argument of the Court was that alteration amounted to a new reproduction, for which there was also a new market, which the right holder was interested in controlling.⁵⁴⁵ Even if the first acquirer would be eligible to resell the acquired copy pursuant to the limitation to the right of distribution in a form of exhaustion principle, they would not be eligible to resell the altered copies without a separate authorisation. The degree to which a copy must be altered in order to require a separate authorisation for its resale is subject to discussion, although it is clear that existence of a new market for such copies would speak against limiting the control of the right holder.

⁵⁴³ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015.

⁵⁴⁴ *Ibid.*, para. 46.

⁵⁴⁵ See more in section 4.2.3.4.

3.2.4.3. *Distribution of digital copies and distribution through transmission*

Whereas the Court has not ruled on the applicability of the right of distribution under the InfoSoc Directive to distribution of digital copies or to distribution through transmission, it had a chance to interpret the right of distribution under the Software Directive and the lending right under the Rental and Lending Rights Directive on similar issues. Although it could be argued that the rights could or ought to have a different scope under the different instruments and, hence, the cases are of limited importance to each other, they will nonetheless be examined towards a broader picture of the justifiability of the exclusive control over dissemination beyond the first communication of a work.

The right of distribution under the EU *acquis* has been considered by the CJEU in the absence of a tangible copy only twice and so far on the basis of Software Directive. A reference on the applicability of the right of distribution under the InfoSoc Directive to the copies of e-books in the *Tom Kabinet* case is now awaiting the CJEU's judgment.⁵⁴⁶ Even in the cases concerning the Software Directive the right of distribution itself was addressed indirectly, as the issue at stake was rather its exhaustion. Hence, the judgments will be covered here only insofar as they concern the right itself and addressed in a greater detail in the next chapter dealing with the exhaustion principle.⁵⁴⁷

Both cases under the Software Directive concerned either the conditions which had to be met for exhaustion of distribution right to apply or consequences of exhaustion. There is very little discussion on the scope of the right of distribution itself or its applicability to dissemination through digital transmission. Yet, the CJEU on some occasions touched upon the substance of the right of distribution. First, the Court suggested that the right of distribution could extend to online transmissions by holding that “online transmission method is the functional equivalent of the supply of a material medium”.⁵⁴⁸ Second, the Court dismissed the EC argument that making a copy of computer programme available on the Internet would fall exclusively under Article 3(1) of the InfoSoc Directive and thus not be subject to exhaustion. The CJEU stated that an act of communication to the public under Article 3 of the InfoSoc Directive changes into an act of distribution under Article 4 of the Software Directive if a transfer of ownership occurs.⁵⁴⁹ The Court relied, inter alia, on the Opinion of AG Bot, who submitted that the wording of the right of distribution under Article 6(1) of the WIPO CT through “making a work available” unequivocally indicates that transfer of

⁵⁴⁶ Request for a preliminary ruling in *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet and others* (2018) Case C-263/18.

⁵⁴⁷ See section 4.2.3.

⁵⁴⁸ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, para. 61.

⁵⁴⁹ *Ibid.*, para. 52.

ownership changes a mere fact of communication to the public into an act of distribution.⁵⁵⁰

The Court did not make it clear whether it is absolutely necessary to classify an act of initial dissemination by the right holder under the distribution right before examining whether conditions for exhaustion are met. To put it in other words, the Court did not provide an indication that the copyright holder disseminating a copy or a work in a way falling within the distribution right is an essential condition to be met to enable exhaustion of the right. The nature of acts of dissemination could perhaps be considered irrelevant as long as it formally resulted in a transfer of ownership.

Following this logic, it could be argued that the right of distribution under the Software Directive is applicable solely to tangible copies, but dissemination of copies lacking tangible support is capable of triggering application of exhaustion of the right of distribution, nevertheless. However, application of exhaustion in this case would only exempt further distribution in the meaning of the Software Directive from the right holder's authorisation, hence, solely the distribution of copies fixed on a tangible carrier.

This, however, would result in an absurd situation. Such reasoning may lead to a conclusion that the copyright holder generally does not have right to control the initial dissemination of copies lacking tangible support, or that only the right to control the distribution of physical copies is harmonised. This may not have been the intention of the legislator aiming to provide strong protection, even considering the absence of any other dissemination-related rights harmonised under the Software Directive. These premises also would not support the very outcome of the *UsedSoft* case, the admissibility of "resale" of digital copies, as it would not cover the acts of distribution of copies not fixed on a tangible medium.

Another landmark case on the application of the distribution right to digital copies is the *VOB* case.⁵⁵¹ The case dealt with the applicability of the lending right to digital copies and the subsequent applicability of exception to that right. Lending has historically been a part of a wider distribution right and was gradually separated from it to avoid the application of the exhaustion principle. The reasoning of the Court in the *VOB* case is, hence, of a great relevance in the context of the distinction between material and immaterial dissemination. Also, whereas in the *UsedSoft* case the Court did not spend much time on the relation between the distribution right and digital copies, it did so in the *VOB* case.

Unlike the very straightforward reasoning of the CJEU in the *UsedSoft* case, the Court addressed at length the justifications of the exclusion of digital copies from the scope of the lending right. The analysis concluded that there were no decisive grounds to preclude intangible copies from falling under the right.⁵⁵²

⁵⁵⁰ Opinion of Advocate General in *UsedSoft GmbH v Oracle International Corp.* Case C-128/11. 24 April 2012, para. 73.

⁵⁵¹ CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht.* (2016) Case C-174/15, Judgment of 10 November 2016.

⁵⁵² *Ibid.*, para. 44.

Next, the Court proceeded to examine whether e-lending activity as described in the circumstances of the case fit the scope of the right. The CJEU held that it was indeed the case as the library allowed one copy to be available to one user at any particular point of time and only for a limited period.⁵⁵³

Coming back to the digital copies, the Court reasoned that there were no decisive grounds for exempting them from falling within the scope of the right of lending. First, the Rental and Lending Rights Directive did not make it clear that such possibility had to be ruled out altogether. Moreover, at the time of the adoption of the Directive, such new forms of exploitation could not have been anticipated.⁵⁵⁴ Second, holding that intangible copies were outside of scope would be contrary to the high level of protection envisaged by the Directive.⁵⁵⁵ The latter is exactly the argument that supports interpreting the *UsedSoft* case as holding that the right of distribution under the Software Directive could also encompass distribution of digital copies.

What is evident from these cases is that the major part of the reasoning of the Court is dedicated to examining the justifiability of covering the digital copies with the rights in question and, in particular, subjecting them to respective limitations. Although in the *UsedSoft* case the Court spends some time justifying qualifying a transaction in question as constituting a transfer of ownership, it is done mainly to rationalise the application of exhaustion and not the application of the right of distribution itself. Hence, the cases point towards a conclusion that there is little doubt that such online acts resemble the dissemination that could easily fit into the wide concept of distribution. Rather, the cases are decided on the basis of whether or not the right holder's further control over dissemination is desirable and whether the application of limitations inherent to the particular form of distribution under the Directive appears appropriate.

3.3. Material dissemination and the right of distribution: tangibility and beyond

As evident from the analysis in this chapter, the relation between the right of distribution and the concept of material dissemination as securing the right holder's control over the first putting of copies into circulation is much more nuanced than suggested under Article 4(2) of the InfoSoc Directive. Whereas in many cases the right holder cannot rely on the right of distribution to control subsequent distribution of copies, there are cases where considerations stretch beyond the mere first exercise of the right.

⁵⁵³ *Ibid.*, paras 49–54.

⁵⁵⁴ *Ibid.*, paras 41–45.

⁵⁵⁵ *Ibid.*, paras 46–48.

This section presents the main findings of the analysis by listing the circumstances that point towards restricting or extending the right holder's control to the subsequent acts of distribution. Because the right of distribution covers, in essence, dissemination of copies, subsequent acts mean first and foremost resale of distributed copies or any other way of putting them into circulation. The results show that the key consideration is the ability of the right holder to exercise the right for the first placement of a work on a market, provided that there is no major interference with this market and the subsequent disposal of such copies does not result in a distinctive market offering a significant potential value.

3.3.1. Circumstances pointing towards restricting the exclusive control beyond the first dissemination

On the basis of the analysis under this chapter, three aspects indicating that the function of the right of distribution was fulfilled are identified. It shall be stressed that these aspects only permit considering whether restricting further control over the copies is justified and not giving any definite answer. The first aspect is the exercise of the right, enabling the copyright holder to obtain remuneration through the initial act of distribution. The second is the objective of restricting the exercise of the right of distribution to what is necessary to safeguard the specific subject matter. The third and final aspect is the considerations of public policy and the objectives of limitations, albeit, so far, specific to the question of extending the right to digital distribution.

3.3.1.1. Exercise of the right as an essential condition

Whether examined against the background of internal market freedoms under the Treaties or harmonisation under secondary EU law, the recurring theme in the CJEU's reasoning behind restricting further control over dissemination is the fact that the right holder through authorising the first distribution of copies was given a chance to exercise control over putting them into circulation and to obtain remuneration.

According to the reasoning of the CJEU, the right holder can choose freely where to put a work into circulation in their best interest.⁵⁵⁶ This is especially so within the Community, which is characterised by the free movement of goods and the freedom to provide services. Hence, the copyright holder is given an opportunity to authorise dissemination but should not expect to have a total control over any subsequent dissemination. The same is true for the distribution of digital copies. The fact that the right holder has exercised their right with an

⁵⁵⁶ CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) *Joined cases 55/80 and 57/80*, Judgment of 20 January 1981, para. 25.

intention to obtain remuneration corresponding to the economic value of a copy points towards the acceptability of restricting further control over such copies.⁵⁵⁷

Whereas there are instances where such control is justified, as will be elaborated in the next section, the control over subsequent dissemination solely on the territorial ground, namely that the copies were first put into circulation in another MS, is not admissible under the EU *acquis*.⁵⁵⁸ Although copies first distributed abroad in some circumstances may be subject to further control upon their importation, the territoriality of the exhaustion of the right of distribution under national law is not a valid ground to interfere with the objectives of the internal market.⁵⁵⁹

The importance of the exercise of the right through authorisation is also evident in cases where further control was allowed in the absence of an opportunity to do so. For instance, the right holder was allowed to rely on the right of distribution to control further marketing of the copies which were lawfully produced in another MS due to the fact that the term of protection had lapsed.⁵⁶⁰ In the light of the above, it may be derived that in such a case the right holder could not exercise their right in that other MS due to the differences in national laws. Hence, the right holder's control over further dissemination of copies in a different MS for which there was no possibility to obtain remuneration was justified.

The prominence of the authorisation could also be attributed to extending the right of distribution to cases clearly concerning counterfeit. In such cases the issue at stake, of course, was primary distribution rather than secondary, as making a work available was not authorised by the right holder in the first place. The right holder was allowed to intervene with marketing of unlawful copies relying on the right of distribution, however, only in cases where such dissemination clearly fell under the meaning of distribution as related to the transfer of ownership.⁵⁶¹

⁵⁵⁷ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, para. 72.

⁵⁵⁸ CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG.* (1971) Case C-78/70, Judgment of 8 June 1971, para. 12.

⁵⁵⁹ See CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG.* (1971) Case C-78/70, Judgment of 8 June 1971., essentially about the compatibility of the national exhaustion with the Treaty.

⁵⁶⁰ CJEU, *EMI Electrola GmbH v Patricia Im- und Export and others.* (1989) Case C-341/87, Judgment of 24 January 1989, paras 10, 12.

⁵⁶¹ For cases, where relying on the right was permitted: CJEU, *Criminal proceedings against Imran Syed.* (2018) Case C-572/17, Judgment of 19 December 2018; CJEU, *Dimensione Direct Sales Srl, Michele Labianca v Knoll International SpA.* (2015) Case C-516/13, Judgment of 13 May 2015; CJEU, *Titus Alexander Jochen Donner.* (2012) Case C-5/11, Judgment of 21 June 2012.

3.3.1.2. Limiting the purpose of authorisation to appropriate remuneration

The second aspect is closely related to the previous one. Because the aim of granting the exclusive right to authorise distribution is the opportunity to ask for remuneration, the question of the extent of such reward is central. Whilst the InfoSoc Directive provides that the aim is to ensure the appropriate reward, there are very few indications of what that might be.⁵⁶² Nonetheless, the CJEU provided some hints to the extent of remuneration accorded to the right holders.

The CJEU's remark on the right holder's ability to exercise the right of distribution according in their best interest already provides an indication.⁵⁶³ Remuneration depends on the author's exercise of the right, whereas the legislation only provides the conditions to enable appropriate reward by allocating the exclusive rights. Accordingly, the right cannot be relied on to claim additional remuneration after the first distribution of a copy. For instance, when the copy which was put on the market with the right holder's consent is then exported to another MS, where the royalties would have been higher.

The same consideration has been held applicable when examining the extension of the limitation of the right of distribution (i.e. in the form of exhaustion) to digital copies. To demand additional remuneration for the subsequent dissemination of copies distributed by download against the payment of remuneration corresponding to the economic value of a copy would go beyond what is necessary to safeguard the subject matter concerned.⁵⁶⁴

It goes without saying that the ability to ask for remuneration is confined solely to the acts covered by the right of distribution. For instance, the Court denied the claim for remuneration for use of a work that did not fall under the distribution right under the InfoSoc Directive.⁵⁶⁵ The high level of protection and the aim of adequate reward did not justify the extension of the right.⁵⁶⁶ Nevertheless, as explored in the next section, the adequacy of remuneration must be examined towards the specific form of exploitation. For instance, the Court held that control over all the subsequent distribution of a copy in the form of rental

⁵⁶² 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. 22.6.2001. OJ L 167/10, recital 10.

⁵⁶³ CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) *Joined cases 55/80 and 57/80*, Judgment of 20 January 1981, para. 25.

⁵⁶⁴ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) *Case C-128/11*, Judgment of 3 July 2012, para. 63.

⁵⁶⁵ CJEU, *Peek & Cloppenburg KG v Cassina SpA*. (2008) *Case C-456/06*, Judgment of 17 April 2008, para. 40.

⁵⁶⁶ *Ibid.*, paras 37–38.

was justified on the basis that the initial remuneration would not properly capture the number of occasions the work is exploited.⁵⁶⁷

3.3.1.3. Public policy behind the limitation as a relevant consideration

The third important consideration is public policy, or the objectives of the specific limitations to the right holder's control over subsequent dissemination of a work. Interestingly, this aspect is prominently present in cases concerning the extension of the right of distribution and related rights and limitations thereof to digital copies. Examining such cases, which are also dealt with later in this chapter, prompted the Court to assess whether subjecting such situations to the treatment envisaged by the Directives from the analogue age is justified from a policy perspective.

For instance, the Court held that the importance of libraries and e-lending leads to the conclusion that e-lending by libraries cannot be ruled out of the framework meant for lending of tangible copies. This also meant that the limitations on the control over subsequent lending could likewise be applicable to e-lending if they had essentially similar characteristics.⁵⁶⁸ Similarly, not subjecting digital copies of computer programmes to the same limitations as in respect of tangible copies (in the form of exhaustion) would undermine the objective of that limitation and go beyond what is necessary to safeguard the specific subject matter.⁵⁶⁹

3.3.2. Circumstances pointing towards admissibility of the exclusive control beyond the first dissemination

This section highlights the circumstances that justify extending the exclusive control of the copyright holder beyond the first distribution of the copies. Three main aspects that call for the exclusive control of the right holder under the CJEU jurisprudence have been identified. First is the absence of consent to the first putting into circulation of copies. The second aspect is the emergence of new markets and potential additional remuneration. Third is the intention to prevent interference with the primary market.

⁵⁶⁷ CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86, Judgment of 17 May 1988, para. 15.

⁵⁶⁸ CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. (2016) Case C-174/15, Judgment of 10 November 2016, para. 51.

⁵⁶⁹ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, paras 62–63.

3.3.2.1. Absence of consent to dissemination

The authorisation of distribution is equally important for finding the grounds for limiting control and for extending control. This aspect has been used by the Court to distinguish between cases where copies were distributed with right holder's authorisation from cases where copies were distributed only lawfully. For instance, one of the cases concerned the right holder's reliance on the right of distribution to prevent the marketing of copies lawfully produced in another MS due to the fact that protection had lapsed.⁵⁷⁰

In this case, notwithstanding the fact that the right holder had a chance to exercise the right in that other MS in the past, the Court held that the right holder could still exercise their right over imported copies. Such disparities in national laws on the term of protection justified the restrictions on the freedoms under the Treaties.⁵⁷¹ Seen from a slightly different angle, the disparities in the term of protection meant that the right holder was deprived of a possibility to authorise the initial distribution of copies in question and, hence, to obtain appropriate reward for them.

Consent thus is an essential indicator of the fulfilment of the function of the right, and its absence points towards endorsing further control over distribution. A similar conclusion was reached by the CJEU in the case concerning the ability to exercise the rental right following the first distribution of copies abroad, where such right was not recognised.⁵⁷² Consent is also an important consideration in cases where the copies are distributed with the right holder's authorisation but undergo a substantial alteration before being put back into circulation. The CJEU held that the right holder's consent does not cover distribution if the copies were altered in substantial way.⁵⁷³ Therefore, the characteristics and the presentation of copies was of importance in determining whether or not the copyright holder might be assumed to have consented to the distribution.

3.3.2.2. New markets for exploitation

A very powerful argument in extending control over further distribution has been the emergence or existence of a new (or existing but distinct) market for exploitation. This could mean a different way to exploit the same distributed copies or

⁵⁷⁰ CJEU, *EMI Electrola GmbH v Patricia Im- und Export and others*. (1989) Case C-341/87, Judgment of 24 January 1989, para. 10.

⁵⁷¹ *Ibid.*, para. 12.

⁵⁷² See the CJEU on the right rendered worthless if the right holder could not authorise, CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86, Judgment of 17 May 1988, para. 18.

⁵⁷³ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, para. 46.

the emergence of a market as the result of the alterations of the copies after their first distribution.

First and foremost, the CJEU jurisprudence distinguished between the two types of corporeal exploitation which are subject to different treatment. The emergence of a distinct market for the tangible copies besides their sale, namely rental, justified control over the copies beyond their first being put into circulation through sale.⁵⁷⁴ Such exploitation offered a great potential source of revenue and, hence, had to be subjected to the right holder's control. Therefore, the repeated exploitation of a work by the right holder was secured.⁵⁷⁵

Another prominent example of the new market consideration is the alteration of copies by their acquirer with intent to distribute them. Whereas, understandably, the deficiencies caused by the mere use of copies would not be of major importance to their subsequent disposal, major alterations that increase the value of the copy would.⁵⁷⁶ The value of these altered copies could present a new opportunity for exploitation.⁵⁷⁷ Hence, extending the right holder's control over subsequent distribution would ensure that that they were not deprived of an appropriate reward for that new exploitation opportunity.

3.3.2.3. Interference with the primary market

The last aspect, although not explicitly discussed by the CJEU in cases concerning distribution, appears to be the interference of secondary dissemination with the primary market. It, however, can be derived from cases where the Court extended the reach of the right of distribution to any act in a chain leading to the distribution of a work and, also, counterfeit copies. The very essence of the right is to secure the right holder's control over marketing of a work, which enables obtaining remuneration.⁵⁷⁸

These developments highlight the necessity to consider not only granting the right of distribution but ensuring that it provides an adequate tool to prevent acts which are not authorised. Accordingly, distribution was given a broad meaning, and the right of distribution would encompass preparatory steps.⁵⁷⁹ Similarly, the

⁵⁷⁴ CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86, Judgment of 17 May 1988, para. 14; CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. (2016) Case C-174/15, Judgment of 10 November 2016, para. 59.

⁵⁷⁵ Schricker (1989), p. 469.

⁵⁷⁶ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, para. 48.

⁵⁷⁷ The point was made by the referring court, the CJEU's reasoning seems to confirm it. See *Ibid.*, para. 19.

⁵⁷⁸ Riis (2013), p. 150.

⁵⁷⁹ CJEU, *Titus Alexander Jochen Donner*. (2012) Case C-5/11, Judgment of 21 June 2012, para. 26.

reach of the right was extended to cover counterfeit copies, which, without a doubt, interfere with the market of lawfully produced and distributed copies.⁵⁸⁰

3.3.3. Tangibility as an indispensable characteristic of material dissemination or an archaic attribute

Whereas the right of distribution, as well as the notion of material dissemination, has primarily been associated with the distribution of tangible copies, the developments under the EU copyright *acquis* have challenged this view. There are two main issues associated with extending the scope of the right beyond the tangible copies. First is the question whether extension of the right is justified in relation to the digital copies. Second is the question whether extension of the right is justified in relation to distribution of such digital copies by transmission.

Whilst the two aspects are, in reality, deeply connected, the distinction between them has the function of representing the extent to which the analogous treatment of “digital” distribution is accepted. This is so because digital copies can be put on a tangible medium, such as a CD. Hence, we could argue that the treatment should be the same for copies downloaded from the Internet and put on a CD (or USB), and for copies originally distributed as tangible copies.

On the other hand, we could also argue that for the application of the limitation to the right of distribution, the copies in question must first be put into circulation in a form covered by the right of distribution, traditionally seen as implying the presence of tangible copies. The question that arises here is whether distribution right then can or ought to encompass ways of dissemination beyond the sale of (digital) copies on a tangible medium, for instance, through transmission of digital copies.

To a certain extent it can be argued that digital copies already come within the scope of the right of distribution. Digital copies here mean copies in digital formats that do not require a separate tangible medium but, in fact, are always fixed on one, be it a hard drive, a server or a CD. An example is a song in .mp3 format, which can be stored on the hard drive of a computer or on a CD. In the latter case, such a copy would be considered tangible, as it would reside on a separate tangible object, and, hence, be subject to the right of distribution. In the former case, the copy would arguably be considered intangible and, traditionally, outside the scope of the right of distribution.

In that regard the CJEU has held that one should not imply that digital copies are not covered by the rights traditionally related to physical copies, such as distribution and lending. Their distribution could not be anticipated at the time of

⁵⁸⁰ CJEU, *Dimensione Direct Sales Srl, Michele Labianca v Knoll International SpA*. (2015) Case C-516/13, Judgment of 13 May 2015; CJEU, *Titus Alexander Jochen Donner*. (2012) Case C-5/11, Judgment of 21 June 2012; CJEU, *Criminal proceedings against Imran Syed*. (2018) Case C-572/17, Judgment of 19 December 2018.

adopting the legislation.⁵⁸¹ Moreover, there is no decisive distinction between the tangible or intangible nature of a copy. Hence, the Court reasoned that denying limitation on exclusive control over subsequent distribution solely because of the absence of a tangible copy would go beyond what is necessary to safeguard the specific subject matter.⁵⁸² Similarly, considering the importance of lending, limiting the permissible derogation from the right on the basis of the absence of a physical copy would not be justified.⁵⁸³

The other part of the question on the possibility of applying the right of distribution outside the realm of sale of physical copies is whether the right could or ought to cover the delivery of copies through transmission. Again, the CJEU found it justified in the particular circumstances of two cases. The very basis of the reasoning was the statement that, from an economic point of view, sale of a tangible copy and download of a digital copy are similar. Hence, the digital transmission is the functional equivalent of distribution on a tangible medium.⁵⁸⁴ Very similarly, the Court found that e-lending is an adapted version of lending. Therefore, if the process of e-lending has essentially similar characteristics to conventional lending, the lending right and its limits could apply.⁵⁸⁵

Although the approach of the Court may seem revolutionary, it is important to keep in mind that the reasoning of the CJEU in these cases is heavily based on their circumstances.⁵⁸⁶ The Court is rather careful when drawing general conclusions and examines the justifications behind extending or not extending the scope of the right in each and every case. Moreover, the absence of justifications behind excluding digital copies from the right of distribution or lending do not automatically also justify the application of limitations.

3.4. Conclusions

This chapter set out to examine the connection between material dissemination rights and the right of distribution and how it has been challenged by the developments under the EU *acquis*. The analysis of the background to the harmonisation of the right under the *acquis* illustrates the common understanding that the distri-

⁵⁸¹ CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. (2016) Case C-174/15, Judgment of 10 November 2016, paras 42, 44.

⁵⁸² CJEU, *UsedSoft GmbH v Oracle International Corp*. (2012) Case C-128/11, Judgment of 3 July 2012, para. 63.

⁵⁸³ CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. (2016) Case C-174/15, Judgment of 10 November 2016, para. 51.

⁵⁸⁴ CJEU, *UsedSoft GmbH v Oracle International Corp*. (2012) Case C-128/11, Judgment of 3 July 2012, para. 61.

⁵⁸⁵ CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*. (2016) Case C-174/15, Judgment of 10 November 2016, paras 45, 51.

⁵⁸⁶ On the Court shifting the paradigm through the interpretation of the distribution right see Riis et al. (2013), p. 477.

bution right ought to be limited to the initial distribution. Relying on the notion of material dissemination, limiting control was justified once the function of the right has been fulfilled through the first exercise. The EU legislator has relied on the notion when harmonising the right of distribution under the *acquis* through recognition of the broad right encompassing primary and secondary acts but subject to the exhaustion principle de facto exempting secondary acts from requiring authorisation.

However, securing the right holders' control over every initial putting into circulation of copies of a work was not the only and, perhaps, not even the main objective of the harmonisation. Two crucial circumstances at the time of harmonisation were the emerging markets for rental of copies and the conflict between the exclusive distribution right with the free movement of goods within the EEC. Divergent national laws did not only distort the free movement of goods but also advanced partition of the markets and market conditions. Whereas the emerging rental market has been (partially) dealt with under the Rental and Lending Rights Directive, harmonising of the right of distribution under the InfoSoc Directive was the key effort to resolve the conflict between the national laws and the freedoms of the internal market.

Accordingly, the picture of the function of the recognising the right under the EU *acquis* is rather complex. Whereas the analysis of the background shed light on the circumstances that have impacted, inter alia, the wording of the right under the Directives, next the analysis turned to the normative scope of the right and in particular the acts of secondary distribution. Laying down the broad right of distribution accompanied by exhaustion under the InfoSoc Directive went beyond merely addressing the conflict between the national laws and copyright territoriality in the context of the free movement of goods within the EU, and it effectively harmonised the scope of the right under the national laws.

Harmonising the scope of the right of distribution under the InfoSoc Directive in the form of a broad right and the exhaustion principle reflects the notion of material dissemination rights. Control over each primary distribution of a work, meaning the putting into circulation of new copies, is subject to authorisation by the right holder. Once the right has been exercised and the copies have been put into circulation, their further distribution is not subject to authorisation. Hence, the right of distribution secures the right holder's opportunity to exploit a work through authorising each distribution and obtaining remuneration for each copy. Once the opportunity to obtain remuneration has been provided, further control is limited for the purpose of attaining other objectives, e.g. the free movement of goods within the Community.

Enumerating the clear-cut rule of exhaustion of the right of distribution under the full harmonisation InfoSoc Directive appears to be rather static, considering the subsequent development under the EU *acquis* reshaping the normative scope of the right of distribution. Without focusing on the principle, which will be examined in a greater detail in Chapter 4, it is observed that the subsequent jurisprudence of the CJEU points towards a more flexible interpretation of the material dissemination approach in the context of the distribution right, not envisaged at

the outset of harmonisation. First, the Court has extended the application of the right of distribution to the cases which were not contemplated by the legislator, such as the cases of digital dissemination. Second, despite the exhaustion principle providing a limit to the right of distribution, no immediate conclusions on the scope of subsequent control can be drawn on the sole basis of authorised distribution.

The main considerations in examining the need to restrict the reach of the right of distribution beyond the first distribution are the exercise of the right in relation to each copy, obtaining appropriate remuneration, and the public policy behind the limitation. On the one hand, they closely relate to the notion of material dissemination. On the other hand, fulfilling these criteria may not necessarily lead to the ultimate answer, as further circumstances are increasingly being taken into account.

Obviously, the absence of consent to the primary distribution would render any secondary distribution of the copies unlawful. However, the consent (or authorisation) requirement has attained new shades. Even though the primary distribution is authorised by the right holder, it may be necessary to take a closer look at what exactly the right holder has consented to. The primary reason seems to be the new ways of exploiting a work, which could not be anticipated at the time of authorising primary distribution. This is in line with the notion of material dissemination, which relies on the right holder's opportunity to estimate the market for a work and ask for appropriate remuneration. The emergence of a not anticipated secondary use could thus justify submitting it to the right holder's authorisation.

The aspect of consent and its scope is also closely linked to two other important considerations: emergence of a new market and interference with a primary market. Both emphasise the economic significance of control over the circumstances of a work's exploitation. Secondary distribution (resale) of tangible copies is generally exempted from authorisation and the right holder is able to take such a resulting secondary market into account. Emergence of a distinct market for distributed copies (e.g. through substantial alteration of copies) would not only likely be unanticipated by the right holder (hence, not taken into account), it would also potentially interfere with the primary market to a much greater extent than the regular secondary market for distributed copies.

In the context of these developments, the all-or-nothing approach of the exhaustion principle appears outdated. Evaluation of the degree of control accorded to the right holder under the right of distribution no longer relies solely on the notion of the primary or secondary distribution, as suggested by Article 4 of the InfoSoc Directive, but on an overall assessment of the circumstances of a work's exploitation. Hence, even seemingly more straightforward cases of distribution of tangible copies require an increasingly tailored assessment, which would be even more true in respect of digital distribution.

Therefore, the CJEU's judgment in *UsedSoft*, extending the right of distribution or at least the exhaustion principle to copies of software distributed digitally, is prominent. Whereas in economic terms digital distribution may closely

resemble the physical distribution envisioned at the time of harmonisation of the right, there are by all means more aspects to be taken into account. Given the variety of works and forms of digital distribution, the assessment of possible substantial interference with a primary or new market would require a much more nuanced analysis than the fact of initial authorisation.

The findings of this chapter will be taken as a basis for the analysis of the development of the exhaustion principle under Chapter 4 and the right of communication to the public under Chapter 5. Development of the exhaustion principle as an instrument of limiting control over subsequent dissemination will be assessed in the light of the increasing need for a flexible approach to assessing the overall circumstances. The findings of this chapter will also inform the analysis of the development of the communication to the public right, which, *inter alia*, will focus on identifying the tendencies pointing towards the convergence of approaches to material and immaterial dissemination under the right.

4. EXHAUSTION PRINCIPLE AS AN INSTRUMENT TO LIMIT CONTROL OVER SUBSEQUENT DISTRIBUTION

The exhaustion principle is a general limit to the right of distribution, which is nearly as wide-spread as the recognition of the exclusive right of distribution itself.⁵⁸⁷ Whereas the principle is found across all the fields of IP, this chapter focuses solely on the exhaustion principle in the field of copyright. Despite the similarities in some of the justifications for exhaustion, the principle under copyright has a distinctive character.⁵⁸⁸ Under copyright, the principle is associated with the right of distribution and constitutes its most significant limitation.⁵⁸⁹ In basic terms, it could be summarised as providing that the right holder loses control over subsequent distribution of a work or copies thereof upon the first instance of authorised putting on the market. Although there are a few theories explaining the principle, in the context of this thesis exhaustion is viewed primarily from the perspective of remuneration theory, suggesting that the author could have had an opportunity to receive an appropriate reward upon the first alienation of a copy.⁵⁹⁰

Being an inherent limit to the right of distribution, the rationale of exhaustion is in direct connection to the notion of material dissemination, as it is an instrument of delineating exclusive control over every exploitation of a work through distributing copies. Not necessarily the only form of limiting exclusive control, the exhaustion principle is a particular construct which reflects the idea of limiting the reach of the exclusive right once its function has been fulfilled. It is through this prism the principle will be analysed in this chapter: as fulfilling the function of the material dissemination approach by systematically restricting the scope of subsequent control over distribution once an opportunity to obtain appropriate remuneration has been provided.

The development of technology has challenged the scope of the exhaustion principle. Historically, the principle has been associated with the dissemination of tangible copies of a work through sale, which is the core of the distribution right. Technological development, however, prompted the discussion of the pos-

⁵⁸⁷ See the WIPO on exhaustion being a general limit of the right and as not falling under Article 9(2) of the BC, *Interface between Exhaustion of Intellectual Property Rights and Competition Law*. WIPO CDIP/4/4 REV/STUDY/INF/2. June 1, 2011, p. 8.

⁵⁸⁸ On the exhaustion as a commonly accepted principle according to which the lawful buyer of a tangible object on which a work is fixed has a right to resell it, see Riis et al. (2013), p. 460; Schovsbo (2012). On the differences between exhaustion under different IP rights, see Rognstad (2003), pp. 450–451; Joos (1991), pp. 43–51.

⁵⁸⁹ On exhaustion as the Achilles' heel of the right of distribution, see Ohly (2009), p. 219.

⁵⁹⁰ Blocher and Walter (2010), p. 134. Further on the theories of exhaustion, see Hugenholtz (1996), pp. 96–97; Joos (1991), pp. 51–67. Also, see Lucas holding that the principle is backed by different types of considerations but lacking clear boundaries, Lucas (2010), p. 306.

sibility and the desirability of extending the reach of the principle to dissemination taking place outside the realm of tangible copies. Furthermore, even in respect of tangible copies, the exhaustion principle alone might not effectively delineate the scope of exclusive control, taking into account the competing interests arising from new and not previously anticipated ways to exploit already distributed copies.

As copyright grants a variety of independent rights, application of the exhaustion principle is not the only and equally not always the concluding step of limiting the exclusive control over distribution, as discussed in Chapter 3.⁵⁹¹ Although it is by all means a powerful and straightforward tool, it is important to emphasise that the principle does not entail the complete loss of control over further exploitation. As will be explored, the principle exempts only certain secondary acts which rely on the initially authorised dissemination and does not sanction any separate act of exploitation, e.g. creation and distribution of new copies.

Towards the overall focus of this thesis, the present chapter explores the exhaustion principle as an instrument of limiting control over subsequent distribution, reflecting the material dissemination notion. Together with chapters 2, 3, and 5, it serves to address the first overall research question, namely *how the development of the rights of distribution and communication to the public under the EU acquis reflects the distinction between material and immaterial dissemination*. More specifically, it assesses the strengths and shortcomings of the exhaustion principle in delineating the scope of the exclusive right according to the developments of technology and the *acquis*. The following sub-questions are set to be answered:

What circumstances have influenced the need and the form of harmonisation of the exhaustion principle under the EU *acquis*?

What role has the exhaustion principle played in limiting the scope of the exclusive distribution right pursuant to material dissemination under secondary EU law?

How does the exhaustion principle perform its function of limiting the right of material dissemination given the subsequent development of technology and the *acquis*?

Exhaustion being an inherent boundary of the right of distribution, the analysis in this chapter is closely connected and builds upon the findings of Chapter 3 on the development of the right. In order to answer the questions, first, the background to harmonising the exhaustion principle on the EU level and the relevant circumstances on both national and international levels are analysed.

Second, the harmonisation of the principle under secondary EU law and the varying objectives behind it are explored. In particular, the development of the exhaustion principle from dealing with the territoriality aspect of copyright (under the Community exhaustion principle) into an instrument of placing a

⁵⁹¹ See section 3.3.2.

general limit on the normative scope of the right of distribution under the *acquis* is emphasised.

Third, the CJEU's interpretation of the principle is examined against the background of material dissemination. Next, it is discussed how the principle performs its function given the developments of technology, markets, and new ways of disseminating copies of a work, relying on the previously identified circumstances pointing towards admissibility of exclusive control beyond first dissemination.⁵⁹²

The chapter is divided into three parts. Part 4.1. provides the background to the harmonisation of the principle. Besides the developments at the international level, three crucial aspects influencing the need, as well as the form of harmonisation, are discussed: the emergence of the rental market for copies of a work, the territoriality of exhaustion as a policy tool, and the significance of the conditions leading to exhaustion of the distribution right. These aspects are also discussed in the context of Scandinavian copyright acts and the amendments that took place following the harmonisation under the EU *acquis*.

Part 4.2. deals with the harmonisation of the principle under the EU *acquis*. It starts with the jurisprudence of the CJEU preceding harmonisation under the Directives and establishing the Community exhaustion principle. Next, it proceeds with the analysis of the legislative history of the exhaustion principle under the Software, the Rental and Lending, and the InfoSoc Directives. Part 4.3. deals with role of exhaustion in restricting the scope of the distribution right pursuant to material dissemination. Against the background of the developments under the *acquis*, it is discussed whether the principle fulfils its function given the emerging markets for distributed copies and the changing circumstances of work's exploitation. Particular attention is paid to the ability to adapt in the situations where further control is justified and where the distribution of a work takes place outside the realm of tangible copies.

4.1. Background to the harmonisation of the exhaustion principle under the EU *acquis*

Although exhaustion was discussed in conjunction with the right of distribution ever since the first negotiations on copyright harmonisation, the only binding international instrument explicitly referring to it is the WIPO CT, which also recognised a right of distribution. The rationales behind the harmonisation as well as the wording of the principle are not incidental but build upon the preceding discussions on the necessity to introduce a boundary of the right of distribution would it to be recognised internationally.

⁵⁹² Namely, part 0. on the relation between the right of distribution and material dissemination following the developments under the *acquis*.

This section identifies four aspects explaining the significance of harmonisation of the exhaustion principle on the international level. The first aspect is the recognition of the exclusive right to control the first distribution of a work necessitating the introduction of exhaustion. The second aspect is the need to secure the right holder's control over rental of the copies in the circumstances where the right of distribution is recognised in its broad form under national law. The third aspect is the significance of the conditions leading to exhaustion of the right. The last aspect it is the territoriality of exhaustion as a matter of international trade policy.

4.1.1. Recognition of the right of first distribution under international law

Exhaustion is of major importance to recognising the right of first putting copies into circulation as opposed to the right of distribution covering every subsequent act of putting into circulation. Whereas the idea that the extent of exclusive control granted by IP rights in respect of each copy shall be limited is of a universal nature, the term "exhaustion" was first coined in the German scholarship in the field of patents and later extended to other fields of IP.⁵⁹³

As explored in Chapter 3, during negotiations on the harmonisation of copyright on the international level, the right of distribution was supported only provided that it is accompanied by a general limit.⁵⁹⁴ Hence, the exhaustion principle was employed under the negotiations to designate such limit. For instance, during the negotiations on the Model Law in the field of copyright, exhaustion was discussed as a one-sided solution to the detriment of the copyright holder to solve the property right in a copy problem.⁵⁹⁵ Furthermore, exhaustion was discussed simultaneously with the right of distribution and not in a separate section dedicated to exceptions to exclusive rights.

Similarly, under the negotiations on the PPBC, the right of distribution, originally appearing on the agenda, was dropped for a few sessions because it was not widely supported in its broad form. For instance, it was evident that the

⁵⁹³ Puig (2013), p. 162.; Joos (1991), pp. 23–36.

⁵⁹⁴ See the proposal for the SCA, where it was stressed that the right to control the dissemination of copies should systematically be restricted so that it cannot be relied on in subsequent dissemination of copies. SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 246. Subsequent transfers of issued copies were not subject to the copyright holder's consent, meaning that the right of dissemination to the public was exhausted by authorising the first transfer. *Ibid.*, p. 96.

⁵⁹⁵ Committee of Experts on Model provisions for legislation in the field of copyright. Third Session. Draft model provisions for legislation in the field of copyright. Memorandum prepared by the International Bureau. CE/MPC/III/2 1990, p. 44.

right to resale should not survive the first distribution.⁵⁹⁶ Accordingly, the exhaustion principle was considered for the purpose of achieving the "termination of the right of distribution".⁵⁹⁷ Where the broad right of distribution was to be recognised rather than the right of first distribution, it would have to be accompanied by the exhaustion principle.

4.1.2. Securing control over exploitation through rental

Due to the different rationales behind exhaustion and the absence of a consensus on its scope or the appropriate scope of the right of distribution, the early negotiations on international harmonisation failed. However, in the era of expansion of the exclusive rights, it soon became evident that the disparities in national laws on the matter of exhaustion had much broader consequences. The right of distribution under national law in this period frequently covered all acts of dissemination that concerned a tangible copy of a work, be it a transaction equalling sale, rental, lending, etc.⁵⁹⁸ Consequently, if a country did recognise a broad right of distribution exhausted upon the first distribution, it might as well provided that right to control subsequent dissemination in the form of rental and lending was exhausted.

The first extensive negotiations on copyright exhaustion took place in the context of the negotiations on the Model Law on copyright. The right of distribution and its exhaustion were not considered the key issue, as there were doubts as to whether it was at all necessary to harmonise them. The alternative could be recognising the right of rental instead – a solution which seemed much more acceptable in different countries.⁵⁹⁹ The draft of the Model Law did not provide for a separate right of rental but instead secured it by adjusting the wording of the exhaustion principle, as demonstrated below.

The scope of the general right of distribution under the Model Law is broad and covers distribution by "sale or other transfer of ownership or by rental, lease or lending".⁶⁰⁰ Section 19, in turn, under the heading "Free Resale [and Lending]" defines its boundaries:

⁵⁹⁶ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, pp. 9–10.

⁵⁹⁷ *Ibid.*, p. 3.

⁵⁹⁸ This is, for instance, the case in the Scandinavian countries, where the right of distribution is construed broadly.

⁵⁹⁹ Committee of Experts on Model provisions for legislation in the field of copyright. Third Session. Draft model provisions for legislation in the field of copyright. Memorandum prepared by the International Bureau. CE/MPC/III/2 1990, pp. 48–49.

⁶⁰⁰ Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. Memorandum prepared by the International Bureau. II Draft provisions. CE/MPC/I/2-II 1989, p. 7.

Notwithstanding the provisions of Section 8, it shall be permitted, without the author's authorisation and – except in the case referred to in Section 9 – without payment of remuneration, to

Resell, or otherwise, transfer the ownership of a copy of a work after the first sale or other transfer of the ownership of the copy [...] [;].

[(ii) lend to the public a copy of a work expressed in writing – other than a computer program – by a library or archive whose activities do not serve direct or indirect commercial gain.]⁶⁰¹

Accordingly, acts amounting to rental, lease or lending were clearly differentiated from sale or transfer of ownership. The right holder's exclusive control over rental and lending was secured even after the first distribution of copies, as only subsequent resale or other transfer of ownership would be permitted. The exhaustion principle under the Model Law made subsequent rental and (optional) lending of copies of a work subject to the right holder's authorisation. The purpose was achieved by providing that the right of rental survives exhaustion rather than by providing a separate exclusive and inexhaustible right of rental.

This particular wording of the exhaustion principle is interesting, as, unlike the subsequent international harmonisation of exhaustion, the principle is worded positively. Rather than stating that the copyright holder retains full control over distribution unless certain conditions are met, it provides that an acquirer of a copy is permitted to dispose of a work through transfer of ownership or lending. This approach is more open than the negative wording of the WIPO CT and the EU Directives.⁶⁰²

The importance of recognition of the right of distribution and its exhaustion materialised at a time when rental and lending became a significant form of exploitation of copies. Thus, it became necessary to modify exhaustion in countries where it was already regulated.⁶⁰³ During the subsequent negotiations for the PPBC, which led to the adoption of the WIPO CT, it was explicitly proposed that only the rights that shall survive exhaustion, namely the rental and lending rights, be regulated.⁶⁰⁴ One of the main driving forces behind the recognition of the right of rental was the existence of the exhaustion principle under national laws.⁶⁰⁵

⁶⁰¹ Ibid., p. 11.

⁶⁰² See, sections 4.1.5. and 4.2.2., respectively.

⁶⁰³ For the discussion, see Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. Memorandum prepared by the International Bureau. III Comments on the draft model provisions for legislation in the field of copyright. CE/MPC/I/2-III 1989, p. 20.

⁶⁰⁴ Committee of Experts on a Possible Protocol to the Berne Convention. Fourth Session. Questions concerning a possible protocol to the Berne Convention. Memorandum prepared by the International Bureau. BCP/CE/IV/2 1994, p. 13.

⁶⁰⁵ In the absence of it, a separate right would not be a necessity as rental generally constitutes one of the forms of distribution. See Longdin and Lim (2013), p. 544. For the EU law perspective, see Gotzen (1990), p. 299.

The negotiations on the PPBC partially followed the Model Law and defined the right of distribution broadly as including rental and lending. Exhaustion of the right of distribution was defined in the following way:

The "exhaustion of the right of distribution" is the termination of the right of distribution in respect of any copy of the work where ownership has been transferred for the first time by means of an implicit or explicit authorisation of the author of, or other original owner of the copyright in, the work. The "first sale doctrine" is the doctrine on which such exhaustion of the right is based.⁶⁰⁶

The wording must be viewed in conjunction with the wording of the right of distribution itself, which was defined broadly as covering both the change of ownership and possession.⁶⁰⁷ By providing that exhaustion occurred upon a transfer of ownership, the drafters limited the scope of exhaustion to exclude mere transfer of possession, as would be the case with rental.⁶⁰⁸ Such wording was supported by the fact that exhaustion in many countries applied only to the change of ownership in order to secure the rental right.⁶⁰⁹

Accordingly, the main justification for the distinction between ownership and possession for the purpose of exhaustion appears to be securing the rental right. By the time the negotiations on the WIPO CT started, it was generally accepted that the right of distribution would mostly refer to the transfer of ownership, as the rights of rental and lending were made a separate part of the agenda. With the latter being generally recognised and harmonised as a separate right, the question that arises is whether the distinction between ownership and possession in the solely exhaustion context still carries any significance.

4.1.3. Significance of the conditions of exhaustion

Another consideration that goes hand in hand with the section above is the significance of the conditions prompting for the exhaustion of the right and the scope of the latter. Whereas the most commonly accepted trigger today is the first distribution of copies, it has not been the only way to introduce the limitation to the right of distribution. Moreover, the conditions could also differ between the types of works.⁶¹⁰

⁶⁰⁶ Committee of Experts on a possible Protocol to the Berne Convention. Third Session. Questions concerning a possible protocol to the Berne Convention Part III. New Items. Memorandum prepared by the International Bureau. BCP/CE/III/2-III 1993, p. 3.

⁶⁰⁷ On the right of distribution covering change of ownership and possession, see section 3.1.3.

⁶⁰⁸ On rental being affected by the exhaustion principle, see Quintais and Poort (2018), p. 45.

⁶⁰⁹ Committee of Experts on a possible Protocol to the Berne Convention. First Session. Questions concerning a possible protocol to the Berne Convention Part II. (Draft). Memorandum prepared by the International Bureau. BCP/CE/I/3 1991, p. 20.

⁶¹⁰ Copyright acts in Scandinavian countries, for instance, originally contained two separate provisions on exhaustion of the right of distribution depending on a type of a work. Exhaustion

The copyright acts in the Scandinavian countries, for instance, for quite some time did not define the sale of copies as a precondition to exhaustion. The SCA provided that when a literary, musical, or artistic work was published, the copies could be disseminated further and be publicly displayed.⁶¹¹ The NCA provided for exhaustion in respect of artistic, literary, musical, and scientific works. The copies could be freely disseminated to the public when a work was published, with the exception of copies of musical works, which could not be rented without the copyright holder's consent.⁶¹²

Hence, originally, the right of distribution under the Scandinavian copyright acts would be exhausted not upon the sale or transfer of ownership but upon a work being published.⁶¹³ The definition of a published work was also of importance for a number of other provisions and, thus, was defined in a separate provision.⁶¹⁴ According to the SCA, a work was published when copies of a work were lawfully put on the market or otherwise disseminated, with "lawfully made available" referring primarily to acts authorised by a right holder.⁶¹⁵ According to the NCA, a work was published when a reasonable number of copies was put on the market with the copyright holder's consent.⁶¹⁶

Whereas the sale of copies would be an inevitable consequence of publishing and putting copies into circulation, publishing as a condition is ultimately broader than a mere sale. Not least in the context of extending the principle to dissemination other than through sale of copies on a tangible medium.⁶¹⁷ Whereas further discussion on the conditions of exhaustion is outside the scope of this chapter, it is important to keep in mind that sale is not the only acceptable precondition to

(*konsumtion*) became regulated under a single provision of the SCA in 1992 in accordance with Prop. 1993/94:49 Ändring i övergångsbestämmelserna till lagen (1993:1007) om ändring i upphovsrättslagen.

⁶¹¹ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 246. Article 23 dealt with literarily and musical works, whereas Article 25 dealt with artistic works.

⁶¹² Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, p. 11. The SCA, in turn, provided for the right of rental not subject to exhaustion in respect musical notes. The provision was modified to encompass copies of musical works in 1982 in accordance with the Prop. 1982/83:40 Om ändring i lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk.

⁶¹³ The SCA uses term "utgivet", and the NCA uses the term "utgitt".

⁶¹⁴ For instance, it was important for dealing with exceptions to the exclusive rights, such as private copying, public display, etc.

⁶¹⁵ SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk: lagförslag, p. 167.

⁶¹⁶ Ot. prp. nr. 26 (1959–1960) Om lov om opphavsrett til åndsverk, p. 8. The requirement of a reasonable number of copies implemented Article 4(4) of the BC (Brussels revision of 1948) and meant to differentiate between the types of works in order to determine the reasonable number. *Ibid.*, p. 19.

⁶¹⁷ Whilst appropriating the principle of exhaustion understood through the sale or transfer of ownership presents difficulties not only from the perspective of copyright, appropriating the concept as referring to putting copies on a market with the right holder's consent may appear slightly less troublesome.

exempt the subsequent dissemination from exclusive control of the copyright holder. Hence, any international harmonisation relying on the term of transfer of ownership in this respect could also be seen as harmonising solely the resale of distributed copies.⁶¹⁸

4.1.4. Territoriality of exhaustion as a policy tool

Copyright protection is territorial and so are the rights granted to the copyright holder. With a different scope of exclusive rights and conditions of exhaustion, the question that arises is what territoriality means in the context of cross-border trade. Should it matter for the purpose of applying exhaustion whether or not the copies in question were distributed for the first time in a given jurisdiction or abroad? Shall the right of distribution be enforced in respect of all the copies put into circulation for the first time in a given jurisdiction, even if they were already distributed abroad? These are ultimately the questions which depend on a variety of considerations outside copyright.

The two widely recognised types of exhaustion principle under the national copyright laws are national and international exhaustion. The former means that the right of distribution is only exhausted when a copy in question is put into circulation in the territory of that particular country. The latter, in turn, means that putting the copies into circulation in any country exhausts the right of distribution, even in a given jurisdiction.⁶¹⁹ Yet another category, regional exhaustion, restricts applicability of exhaustion to copies distributed in a particular region or territory (e.g. EEA-wide exhaustion).

Territoriality of exhaustion makes a difference in the context of cross-border trade as well as the copyright policy. Depending on the regime, the cross-border movement of goods and services can be severely distorted.⁶²⁰ The harmonisation of the right of distribution subject to exhaustion would not be complete unless the territoriality aspect was settled. So far, there is no agreement on the international level as to the mode of exhaustion, although some international or supra-national organisations such as the EU maintain their own regimes. In the EU, the regional exhaustion is practiced, which is closer to national exhaustion. It precludes unauthorised import of copies unless they were put into circulation for the first time with the authorisation of the right holder in one of the MS.⁶²¹

During the early international negotiations on the Model Law, the question of territoriality of exhaustion was not widely discussed, although some comments

⁶¹⁸ See Hilty for a similar point: exhaustion provision might be read as referring solely to the resale of tangible copies. Hence, prohibiting exhaustion of other rights is outside the scope of the provision unless the resale of tangible copies is involved. Hilty (2018), p. 867.

⁶¹⁹ See Schovsbo (2012).

⁶²⁰ Yusuf and von Hase (1992), p. 116; Slotboom (2005), pp. 421–440.

⁶²¹ Further on exhaustion under the EU law, see section 4.2.

on the necessity to reach an agreement were made.⁶²² In the course of the subsequent negotiations on the PPBC, territoriality was discussed at length. It was not clear what relationship existed between the territoriality of copyright protection and the territoriality of exhaustion, and the separate right of importation was seen as a way to deal with the latter. If such right was recognised, exhaustion would inevitably become national.⁶²³

Under the negotiations on the PPBC, international exhaustion was seen as favourable to international trade. However, although it would reduce copyright's influence on international trade and stimulate import and competition, it would also diminish the copyright's territoriality, which could result in a single source of supply and loss of control over exploitation. Hence, the TRIPS Agreement was considered to be an appropriate instrument to deal with the matter. The latter, however, provided common standards of IP protection without also spelling out the limitations to the rights.⁶²⁴

Although territoriality of exhaustion is also outside of the scope of the WIPO CT, there was some discussion on the appropriate solution. As addressed in Chapter 3, the first alternative was to recognise the right of distribution, accompanied by the national exhaustion and the right of importation.⁶²⁵ The recognition of the right of importation would be of a minor importance, as national exhaustion would already secure the copyright holder's right to oppose putting into circulation of copies distributed abroad. The second alternative would provide the right of distribution accompanied by the exhaustion provision not connected to any particular territory. As the result of negotiations, the Treaty leaves it for the parties to regulate the circumstances of exhaustion, hence, enabling international exhaustion. Although the WIPO CT did not adopt international exhaustion, it was expected that it would become generally acceptable to the parties once every country had the same level of protection, i.e. if distribution right is recognised.⁶²⁶

4.1.5. Exhaustion principle under international law

The BC developed from recognising rights rather narrow in scope to granting a couple of broad general rights accompanied by a possibility to introduce exceptions and limitations to such rights in order to secure the interests of parties other

⁶²² Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. Report prepared by the Committee. CE/MPC/I/3 1989, p. 25.

⁶²³ Committee of Experts on a Possible Protocol to the Berne Convention. Fourth Session. Questions concerning a possible protocol to the Berne Convention. Memorandum prepared by the International Bureau. BCP/CE/IV/2 1994, pp. 13, 24.

⁶²⁴ Yusuf and von Hase (1992), p. 130.

⁶²⁵ See section 3.1.5.3.

⁶²⁶ Yusuf and von Hase (1992), p. 130.

than copyright holders.⁶²⁷ This was motivated by a *de minimis* approach to provide a basic necessary level of copyright protection for right holders around the globe at the specific time. Although up to now most of the rights under the BC are limited in scope (e.g. to the subject matter), none of them is "exhausted" or ceases to exist upon a certain act by the right holder.

The closest example to exhaustion would perhaps be the expiration of the right of translation ten years following the date of a publication of a work, present in the BC before the Berlin Act of 1908.⁶²⁸ Although there is no provision on the exhaustion of the distribution right in the absence of the recognition of a broad distribution right itself, it was understood that the potential recognition of a broad right of distribution would necessarily have to be accompanied by the limits to the right.⁶²⁹

Whereas the right of distribution was discussed but not adopted under the TRIPS negotiations, the statement which relates to the exhaustion principle became the draft of Article 6 of the Agreement:

It is understood that, unless expressly provided to the contrary in this agreement, nothing in this agreement shall limit the freedom of PARTIES to provide that any intellectual property rights conferred in respect of the use, sale, importation and other distribution of goods are exhausted once those goods have been put on the market by or with the consent of the right holder.⁶³⁰

The final version of Article 6 dealing with exhaustion, instead of leaving the question out of scope, clarifies that exhaustion is excluded from the dispute settlement mechanism in order to avoid different interpretations in the absence of provisions.⁶³¹ Hence, there are no obligations arising from the TRIPS in regard to the scope and the applicability of exhaustion.⁶³²

⁶²⁷ In the context of recognition of the right of reproduction, see Proposals for Revising the Substantive Copyright Provisions (Articles 1 to 20). Document S/1. Prepared by the Government of Sweden with the Assistance of BIRPI. 1967, p. 43.

⁶²⁸ It is arguable though whether expiration of the right was attributed to an action by the right holder or to the limits of the right as such. See Convention Concerning the Creation of An International Union for the Protection of Literary and Artistic Works. Berne 1886, Art. 5. The time limitation on the right of translation was removed from the BC but is still present under the UCC, see previous chapter, section 3.1.5.2.

⁶²⁹ The BC grants the right of first distribution for cinematographic works, which does not cover subsequent distribution. Hence, the question of exhaustion does not arise. See section 3.1.5.1. and the Records of the Intellectual Property Conference of Stockholm 1967. Vol. 2. WIPO 1971, p. 853.

⁶³⁰ Negotiating Group on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods. Chairman's Report to the GNG. MTN.GNG/NG11/W/76 1990, p. 8.

⁶³¹ Gervais (2008), p. 198.

⁶³² Frankel (2016), p. 217.

The WIPO CT, on the other hand, is less straightforward on the matter in the light of harmonising the right of distribution and the right of rental. Exhaustion was discussed extensively during the negotiations only insofar as its territoriality was at stake. The wording itself was developed during the negotiations on the PPBC and reflects the efforts of harmonising the exclusive rights. Article 6(2) of the WIPO CT reads as follows:

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorisation of the author.

The wording of the provision is ambiguous and became subject to a couple of statements by certain delegations, which were to be reflected in the records.⁶³³ The uncertainties about the interpretation of the obligations (if any) in regard to the exhaustion principle should also be viewed in conjunction with the harmonisation of the right of distribution itself.⁶³⁴

Article 6(2) of the WIPO CT is interpreted either as not influencing the freedom of parties to introduce exhaustion or any conditions thereof, or as not going beyond the condition(s) mentioned in the article. If one interprets the WIPO CT as according the minimum obligation to recognise the right of first distribution, the wording of Article 6(2) has no bearing on the circumstances of exhaustion if any is provided under national law.⁶³⁵ However, some understand the Article as providing that limitation to the right of distribution in the form of exhaustion is only permissible subject to the provisions in the second paragraph, it being the first sale or other transfer of ownership.⁶³⁶

Another statement which relates to exhaustion is the one offered by the Chairman during the negotiations and by subsequent voting included in the final text:

⁶³³ Brazil, for instance, understood the Article as meaning that the Treaty in no way influences conditions national laws might impose on exhaustion of the right of distribution, with the scope of the latter being the one harmonised under the Treaty. See the Records of the Diplomatic Conference on Certain copyright and neighboring rights questions.1996 Volume II. WIPO Publication No. 348(E) 1999, p. 782.

⁶³⁴ See section 3.1.5.3.

⁶³⁵ However, consider the condition that distribution must take place with authorisation of the right holder. This would, however, be a relevant consideration only in case copies are not produced with authorisation of the right holder, e.g. under a compulsory license. Otherwise, the exclusive nature of the right of distribution already ensures that any first distribution occurs with the copyright holder's authorisation. The situation arose, for instance, in CJEU, *EMI Electrola GmbH v Patricia Im- und Export and others*. (1989) Case C-341/87, Judgment of 24 January 1989. The case was decided on grounds other than authorisation.

⁶³⁶ Reinbothe and Lewinski (2015), p. 112. I tend to disagree with the latter view given the negotiations on the PPBC and the WIPO CT, the scope of the right of distribution, and intention of the parties. See also section 3.1.5.3.

As used in these Articles, the expression 'copies and originals' being subject to the right of distribution and the right of rental, refer exclusively to fixed copies that can be put into circulation as tangible objects.⁶³⁷

The meaning of the statement can be misunderstood without taking a closer look at the history of the negotiations on the WIPO CT and the adopted umbrella solution for covering the acts of online dissemination. As was touched upon in Chapter 3, the statement served to differentiate between the obligations related to the right of distribution and the obligations under the umbrella solution, according to which the right to control digital transmissions could also be implemented by means of the right of distribution.⁶³⁸ Hence, Article 6 refers solely to distribution on a tangible medium, providing for a right of first distribution either through the explicit right of first distribution or through a broad right which could also be subject to exhaustion once exercised by the right holder. Digital transmissions, which could fall under the right of distribution, are not subject to any other requirements than that they should be covered by an exclusive right. Hence, they are not subject to Article 6(2).

The statement merely indicates a minimum obligation, which means that right of distribution is to be granted at least in respect of the tangible copies.⁶³⁹ Accordingly, it shall not be interpreted as precluding application of the right of distribution beyond the marketing of tangible copies. Nevertheless, the statement is often used as an argument for not extending the scope of the right of distribution to the acts of online dissemination⁶⁴⁰ or confining the scope of the right of distribution under the EU secondary law to solely tangible copies.⁶⁴¹

Article 6(2) of the WIPO CT has attracted the attention of the CJEU on only a few occasions. For instance, the Court considered it in the *Laserdisken II* case,

⁶³⁷ Records of the Diplomatic Conference on Certain copyright and neighboring rights. Draft Agreed Statements concerning Treaty NO. 1 submitted by Main Committee I to the Conference, meeting in Plenary. CRNR/DC/92 Corr. 1996, p. 2. Also Records of the Diplomatic Conference on Certain copyright and neighboring rights questions.1996 Volume II. WIPO Publication No. 348(E) 1999, p. 777.

⁶³⁸ More on the point, see section 3.1.4. Also, section 5.1.6.

⁶³⁹ Ficsor (2002), p. 486; Karapapa (2014), p. 311; Ficsor (1997), p. 213.

⁶⁴⁰ For instance, see Savič (2015). Karapapa (2014), Reinbothe and Lewinski (2015), p. 113. However, see Rognstad on Article 6(2) of the WIPO CT as not precluding the application of exhaustion to copies created through online service, Rognstad (2014), p. 10.

⁶⁴¹ The EC relied on the international obligations under the WIPO CT and the Agreed Statement concerning Article 6 of the WIPO CT when claiming that the right of distribution applies solely to tangible copies in the *Art & Allposters* case. The CJEU agreed with the EC, stating that exhaustion applies to tangible object incorporating a work that has been placed on the market with the right holder's consent. See CJEU, *Art & Allposters International BV v Stichting Pictoright. (2015) Case C-419/13*, Judgment of 22 January 2015, para. 40. Similarly, in the *VOB* case, the Court ruled that the right of rental can only be interpreted as referring to tangible copies, referring to the same Agreed Statement under the WIPO CT, see CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht. (2016) Case C-174/15*, Judgment of 10 November 2016, paras 32–35.

where the defendant in the proceedings challenged the validity of exhaustion provision under Article 4(2) of the InfoSoc Directive. The CJEU has rightly held that there are no obligations on Community as a contracting party stemming from the WIPO CT to provide for a specific rule on exhaustion in Community law.⁶⁴² In the *Peek & Cloppenburg* case, the Court held that interpreting Article 4(2) of the InfoSoc Directive on the exhaustion of the right of distribution should be done in the light of Article 6 of the WIPO CT as a whole.⁶⁴³

4.2. Harmonisation of the exhaustion principle under the EU *acquis*

The exhaustion principle in copyright has, to certain extent, been harmonised under the EU *acquis*. First, through the case law of the CJEU, precluding exercise of the right of distribution to prevent importation of copies put into circulation in a different MS (i.e. essentially forbidding exercising national exhaustion in respect of such copies). At this stage, the CJEU was not concerned with copyright as such, but rather with ensuring that the divergent national copyright laws would not interfere with the objectives of the internal market, in particular with the free movement of goods.

Second, on the basis of the CJEU's jurisprudence and the international harmonisation of exclusive rights, the EC undertook the task of harmonising certain matters of copyright law. Among other issues, the exhaustion of the right of distribution became subject to regulation under the Directives. Hence, exhaustion is of dual meaning under the EU *acquis*: as a rule solving the conflict between the national copyright law and the Treaties, and as a rule within the statutory copyright law under the *acquis*.⁶⁴⁴

This part addressed the development of the principle under the EU *acquis*, from the CJEU establishing the principle of Community exhaustion to the CJEU shaping the scope of exhaustion under secondary EU law. This section explores how harmonisation of the principle under the Directives was guided, inter alia, by international developments and how it went beyond mere codification of preceding CJEU case law.

⁶⁴² CJEU, *Laserdisken ApS v Kulturministeriet*. (2006) Case C-479/04, Judgment of 12 September 2006, para. 40.

⁶⁴³ CJEU, *Peek & Cloppenburg KG v Cassina SpA*. (2008) Case C-456/06, Judgment of 17 April 2008, para. 34.

⁶⁴⁴ Westkamp (2017), p. 43.

4.2.1. Exhaustion principle as an instrument to solve the conflict between copyright and the objectives of the Treaties

As explored in Chapter 3, the exhaustion principle under national laws became an instrument of the CJEU in dealing with conflicts between exclusive rights under copyright and the objectives of the Treaties. By deciding whether preventing import between the MS in each particular case was justified on the grounds of IP protection, the CJEU also shaped the permissible boundaries of exhaustion under national laws. This section examines the main outcomes of the cases preceding the adoption of the Directives for exhaustion on the MS level. First is the incompatibility of national exhaustion with the free movement of goods if exercised solely on the basis of territoriality of the principle under national law. Second is the relation between exhaustion and the new form of exploitation of copies in the form of rental.

4.2.1.1. Incompatibility of national exhaustion with the EEC Treaty

As indicated above and explored in Chapter 3, the exhaustion principle under national law proved to be a useful instrument for the CJEU for dealing with cases where exclusive rights under national copyright laws interfered with freedoms under the Treaties. Moreover, the territoriality of exhaustion could serve not only internal market freedoms but also trade policy as such. Whereas national exhaustion would harm the free movement of goods within the internal market, maintaining international exhaustion per se does not distort the free movement of goods.

In the first cases on the right of distribution under national laws the CJEU had to decide whether exercise of an exclusive right of distribution ran contrary to the objectives of the EEC Treaty if it aimed to prevent marketing of copies lawfully distributed and imported from another MS. It just so happened that all the three cases came from jurisdictions which had already recognised a broad right of distribution and its exhaustion (Germany and Denmark). Hence, the CJEU could use the principle of exhaustion as an instrument to resolve the conflict.

In the famous *Deutsche Grammophon* case, the CJEU ruled that it would be against the free movement of goods to exercise the right of distribution granted to phonogram producers under the German law if the copyright-protected goods were already lawfully placed with the right holder's consent on the market in one of the MS.⁶⁴⁵ In other words, MS were precluded from allowing copyright holders to prohibit import of goods on the sole ground that their distribution first occurred in another MS. This meant, for instance, that national exhaustion could not be invoked in relation to such copies.

In the similar circumstances of the *Musik-Vertrieb* case, the Court decided that it was also against the free movement of goods to invoke the right of distribution

⁶⁴⁵ CJEU, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG.* (1971) Case C-78/70, Judgment of 8 June 1971, paras 12–13.

to claim royalties for the import of copies which were already lawfully put into circulation with the right holder's consent in another MS.⁶⁴⁶ In the third case, *Dansk Supermarked*, the CJEU established that it was equally against the free movement of goods to invoke the right of distribution to prohibit marketing of goods which were already lawfully put into circulation with right holder's consent in another MS.⁶⁴⁷

Hence, what the CJEU established in these cases is that it was against the objectives of the EEC Treaty to prevent importation of goods already lawfully put on the EEC market by invoking the right of distribution. There could be different grounds for preventing importation of such goods, potentially in line with the Treaty, but exercising the right of distribution and national exhaustion in such circumstances was not permissible. This is essentially the Community exhaustion principle derived from the CJEU's jurisprudence before harmonisation under the Directives. As will be seen in this chapter, in the course of EU copyright harmonisation, the Community exhaustion principle has been interpreted outside of its initial boundaries, extending, inter alia, to prohibiting international exhaustion.

4.2.1.2. Significance of consent for the application of the Community exhaustion principle

Although the significance of consent was not examined in the preceding case law, the application of the Community exhaustion principle in later cases was limited to instances where the first putting into circulation of the copies took place not only lawfully but also with the authorisation of the right holder.

In *EMI Electrola v Patricia* the CJEU held that the EEC Treaty did not preclude right holders from relying on the rights of reproduction and distribution to prevent importation of copies that were already lawfully put on the market in another MS, where the copyright protection had already expired.⁶⁴⁸ Accordingly, the copies in question were initially put into circulation lawfully, but without the consent of the right holder. In his Opinion, the AG relied heavily on the previous case law in other fields of IP, namely patent law, where consent was an essential condition for exhaustion to occur.⁶⁴⁹

The CJEU partially followed the reasoning of the AG, although without referring to the case law from the patent law cases. The Court contrasted the circumstances of the proceedings with those considered before in the *Deutsche*

⁶⁴⁶ CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) *Joined cases 55/80 and 57/80*, Judgment of 20 January 1981.

⁶⁴⁷ CJEU, *Dansk Supermarked A/S v A/S Imerco*. (1981) *Case C-58/80*, Judgment of 22 January 1981.

⁶⁴⁸ CJEU, *EMI Electrola GmbH v Patricia Im- und Export and others*. (1989) *Case C-341/87*, Judgment of 24 January 1989.

⁶⁴⁹ Opinion of Advocate General in *EMI Electrola GmbH v Patricia Im- und Export and others*. (1988) *Case C-341/87*. 29 November 1988., paras 16–20.

Grammophon and *Musik-Vertrieb* cases, where importation of the copies lawfully placed on the market by the owner or with their consent could not be prevented. The CJEU reasoned that it was different from the situation where the copies were distributed lawfully but in the absence of consent. Moreover, the Court held that the problem did arise from the difference in the term of protection.⁶⁵⁰ The length of protection was linked to the very existence of the right and, hence, the restrictions on the import could be justified.

In the absence of harmonisation of the term of protection, the outcome seems reasonable in that the EEC Treaty did not interfere with industrial property protection, namely with its length. On the other hand, the judgment could be criticised as not spending much time on clarifying the significance of the right holder's consent for the application of the exhaustion principle. Now that the term of protection is harmonised under the *acquis*, similar situations are unlikely to arise. Moreover, the subsequent Directives harmonised the conditions for exhaustion, and it is equally unlikely that there would be large disparities in national laws as to whether or not the right holder's consent is necessary for exhaustion to apply. Nonetheless, the outcome of the cases emphasises the importance of authorisation for determining the consequences of the first distribution, i.e. whether the copyright holder has had a chance to exploit a work through the exercise of an exclusive right.⁶⁵¹

4.2.1.3. Denying the Community exhaustion principle for exploitation through rental

Besides precluding exercising national exhaustion of the right of distribution in relation to the resale of the copies lawfully placed on the market in another MS, the CJEU also had a chance to rule on admissibility of preventing further rental of such copies. For instance, whilst it was clear that resale within the Community could not be prohibited, would the same apply to further rental of such already distributed copies? It should be recalled that before the harmonisation of the rental right under secondary EU law, national laws differed. Whereas some countries recognised the rental right, it was often a part of a broader distribution right and potentially also subject to exhaustion.

In the *Warner Brothers* case the Court had to rule whether the right of rental recognised in some MS could be invoked against the rental of copies already distributed in different MS. Import of such copies could not be prevented on the basis of the right of distribution pursuant to the Community exhaustion principle, but rental was a grey area. The question was answered in the affirmative. It allowed the copyright holders to invoke the right of rental (if recognised in a

⁶⁵⁰ CJEU, *EMI Electrola GmbH v Patricia Im- und Export and others*. (1989) Case C-341/87, Judgment of 24 January 1989, para. 10.

⁶⁵¹ See also section 3.2.2.3.

particular jurisdiction) to prevent rental of copies which were already put into circulation within the Community.⁶⁵²

The right of rental thus was exempted from the Community exhaustion principle as formulated for the distribution right. Right holders could rely on their right of rental if such was recognised under national law to enforce control over copies already distributed abroad. The judgment merely provided that further distribution through rental could be prevented by the virtue of the rental right under national law but did not oblige the MS to recognise such a right. On the other hand, the judgment has also emphasised the importance of exercising the exclusive right, as the rental right would be rendered worthless if the right holder could not authorise exploitation.⁶⁵³

Hence, the *Warner Brothers* judgment clarified that the Community exhaustion principle in respect of the distribution right did not prejudice the exercise of the rental right over distributed copies if such right was recognised under national law. A few years later, the exclusive right of rental was recognised under secondary EU law under the Rental and Lending Rights Directive, effectively differentiating rental from distribution and mitigating the discrepancies between national laws. However, yet another question arose: how does the (now separate) rental right interact with the Treaty provisions? For instance, could the right holder exercise the rental right to prohibit rental of copies in a MS, where the copies have been imported from another MS where their rental was authorised?⁶⁵⁴

This is exactly the issue the Court was facing in the *Laserdisken* case, referred to after the adoption of the Rental and Lending Rights Directive.⁶⁵⁵ The CJEU was asked to rule on whether it would be contrary to the Treaty to rely on the right of rental to prohibit copies from being rented in a MS if their rental was authorised in another MS.⁶⁵⁶ Hence, the question was identical to the one asked in *Deutsche Grammophon*, albeit in the present case in relation to the rental right. Unlike in the *Deutsche Grammophon* case, in *Laserdisken* the question was answered in the negative. Hence, it was not contrary to Articles 30 and 36 of the EEC Treaty to prohibit rental of copies even if their rental was previously authorised in another MS.

The CJEU based its reasoning on differentiating rental from distribution, largely relying on the *Warner Brothers* case, where the Court distinguished between distribution and rental and held that the exhaustion of the distribution

⁶⁵² CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86, Judgment of 17 May 1988.

⁶⁵³ *Ibid.*, para. 18.

⁶⁵⁴ See Rosenbloum on the gradual harmonisation of rental aspects. Rosenbloum (1995), pp. 584–585.

⁶⁵⁵ CJEU, *Foreningen af danske Videogramdistributører, acting for Egmont Film A/S, Buena Vista Home Entertainment A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S and Warner Home Video Inc. v Laserdisken*. (1998) Case C-61/97, Judgment of 22 September 1998.

⁶⁵⁶ *Ibid.*, para. 8.

right in regard to a specific copy does not exempt rental of that copy from the right holder's authorisation. Whereas in *Laserdisken* the CJEU had to reason solely in the context of the rental right on whether first authorisation of rental exhausted the right to authorise rental of the same copy in another MS, it again resorted to distinguishing rental from distribution. The Court has held that "the same reasoning must be followed as regards the effects produced by the offer for rental."⁶⁵⁷

Referring to the AG opinion, the CJEU further stipulated that: "... the exclusive right to hire out various copies of the work contained in a video film can, by its very nature, be exploited by repeated and potentially unlimited transactions, each of which involves the right to remuneration. The specific right to authorise or prohibit rental would be rendered meaningless if it were held to be exhausted as soon as the object was first offered for rental."⁶⁵⁸

Hence, the question of extending the application of the Community exhaustion principle formulated for the right of distribution to the rental right was resolved by virtue of distinguishing between the rights. The ultimate outcome of non-application of the Community exhaustion principle is that the right of rental can be exercised in each MS separately even though rental of the same copy may have been already authorised in a different MS. Whereas the previous case law has established rental as an independent form of exploitation not influenced by the exhaustion of the right of distribution, in the *Laserdisken* case the Court confirmed the right holder's ability to partition the rental market within the Community.

In this respect, the reference to the *Warner Brothers* case in the context of Article 3(3) of the InfoSoc Directive on non-exhaustion of the right of communication to the public is remarkable. The EC referred to the judgment alongside the *Coditel I* judgment suggesting that Article 3(3) is only a clarification of the established fact that the provision of services does not give rise to exhaustion.⁶⁵⁹ This is fascinating because the *Warner Brothers* case does not deal with the question of exhaustion of the rental right but rather the consequences of exhaustion of the distribution right and separation of rental from other types of distribution. At the time of the publication of the proposal for the InfoSoc Directive in 1997, the Court had not yet ruled in the *Laserdisken* case. However, the *Laserdisken* case also concerned the right holder's ability to partition the rental market within the Community rather than dealing with the question of whether the exercise of the right can be restricted outside cross-border situations.

⁶⁵⁷ Ibid., para. 18.

⁶⁵⁸ Ibid., para. 18.

⁶⁵⁹ Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 10 December 1997, p. 27. See also section 5.2.2.3.

4.2.2. Harmonisation of the exhaustion principle under secondary EU law

Following the first stage of harmonisation through the Community exhaustion rule developed under CJEU jurisprudence, the second stage of copyright harmonisation further unified the conditions of exhaustion with a view of harmonising the right of distribution under the EU *acquis*. The provisions on exhaustion under the *acquis* serve two primary objectives: first and foremost, as follows from the preceding case law of the CJEU and the objectives of the Treaty, to eliminate adverse effect of the national copyright law on the internal market; second, along with the introduction of the general right of distribution, to provide limits for such a broad right. Another important function of harmonising the exhaustion, recognition of the rental right, had already been achieved at the time through the adoption of the Rental and Lending Rights Directive.

Exhaustion is harmonised under the four Directives: the Software Directive of 1991 (as codified in 2009), the Database Directive of 1996, the Rental and Lending Rights Directive of 1992 (as codified in 2006), and the InfoSoc Directive of 2001. Three of these Directives are examined in this section, but the Database Directive is not examined in detail for several reasons. First, it concerns the databases solely, and the wording of exhaustion is nearly identical to that under the Software Directive.⁶⁶⁰ Second, unlike the latter Directive and the InfoSoc Directives, exhaustion provisions have not been subject to any preliminary rulings from the CJEU. Exhaustion under the Rental and Lending Rights Directive was also not subject to interpretation. However, its legislative history is important for understanding the negotiations on the text of the InfoSoc Directive.

4.2.2.1. Exhaustion principle under the Software Directive

The exhaustion principle was first substantially harmonised under the EU copyright *acquis* under the Software Directive adopted in 1991. Article 4 of the initial draft from 1988 provided that:

Subject to the provisions of Article 5, the exclusive rights referred to in Article 1 shall include the right to do or to authorise:

(c) the distribution of a computer program by means of sale, licensing, lease, rental and the importation for these purposes. The right to control the distribution of a

⁶⁶⁰ See second part of Article 5(c), which is only slightly different from Article 4(2) of the Software Directive. Namely, it establishes that the first sale of a copy exhausts the right to control resale rather than the right of distribution, as is the case under the Software Directive.

program shall be exhausted in respect of its sale and its importation following the first marketing of the program by the right holder or with his consent.⁶⁶¹

The preparatory work did not provide much explanation for the offered wording, especially considering the absence of the intent to harmonise the right of distribution at all in the preceding Green Paper.⁶⁶² The wording has only been backed by the statement that it is common to have the right of distribution exhausted upon the first sale with the right holder's consent and that an exclusive right to control rental and lending of the copies shall survive the first distribution.⁶⁶³

In its opinion, the European Economic and Social Committee supported the draft for not dealing with territoriality of exhaustion but proposed a slightly modified version, which would clarify the subject matter (copies):

4 (c) the distribution of copies of a computer program by means of licensing, sale, lease, rental and the importation for these purposes. The right to control the distribution of a copy of a program shall be exhausted in respect of the sale or importation of that copy following the first sale of that copy to any person by the rightholder or with his consent.⁶⁶⁴

The final wording of the Directive, which remained unchanged in the subsequent codification, is a very similar one, despite restricting exhaustion territorially to the Community:

4 (c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.⁶⁶⁵

The exact wording of the exhaustion principle after the adoption of the Directive was mainly discussed in the light of its territoriality. The EC's view was that the Directive precludes international exhaustion as it only mentions exhaustion for the copies put into circulation within the Community.⁶⁶⁶ The position is difficult

⁶⁶¹ Proposal for a Council Directive on the legal protection of computer programs. COM (88) 816 final. 17 March 1989.

⁶⁶² See section 3.2.3.1.

⁶⁶³ Proposal for a Council Directive on the legal protection of computer programs. COM (88) 816 final. 17 March 1989, p. 11.

⁶⁶⁴ Opinion on the proposal for a Council Directive on the legal protection of computer programs. Economic and Social Committee 89/C 329/02.

⁶⁶⁵ For the latest wording, see Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version). 5.5.2009. OJ L 111/116.

⁶⁶⁶ Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs. COM (2000) 199 final. 10 April 2000. p. 11.

to question in the absence of further explanations. While it is understandable that the legislator would aim to prevent national exhaustion, as it would conflict with the existing CJEU case law (even if the cases were not mentioned in the preparatory works), it does not necessarily mean that international exhaustion had to be ruled out too.⁶⁶⁷

Some countries were reluctant to adopt Community-wide exhaustion instead of international exhaustion following the adoption of the Directive.⁶⁶⁸ Even though Sweden and Norway harmonised certain aspects falling under the Software Directive before it was adopted, territoriality was not settled even after the Directive was adopted.⁶⁶⁹ Both governments considered the Directive to be unclear on the matter of territoriality of exhaustion.⁶⁷⁰ Moreover, the Directive was also viewed as not requiring full harmonisation.⁶⁷¹

The wording of the exhaustion principle relying on the concept of sale is in line with the international developments at the time. Namely, the Directive was initiated when harmonising the exhaustion principle was considered for safeguarding the right of rental under international treaties. It can be argued that it is also the case under the Software Directive. As Gotzen wittily described it, an exception to an exception to an exclusive right was, *de facto*, a proposal for introducing a right of rental for computer programmes.⁶⁷²

If that would be the only justification for spelling out the exhaustion principle under the Software Directive, it would appear to lose its meaning in the light of the Rental and Lending Rights Directive adopted shortly after. Nevertheless, it is surprising that, when the Directive was codified in 2009, the legislator still relied on the concept of sale, disregarding the developments.⁶⁷³ Hence, although the

⁶⁶⁷ On the opposite view, namely that international exhaustion would interfere with the internal market, see von Lewinski (2005), p. 233.

⁶⁶⁸ Namely, Sweden and Norway, both the EFTA states at the time. Sweden became an EU MS shortly after in 1995, while Norway is an EEA MS.

⁶⁶⁹ Countries followed the recommendation published by the WIPO in 1982, the EC's Green Paper and the on-going discussions on protecting software under the copyright. See Prop. 1988/89:85 Om upphovsrätt och datorer, pp. 6–8. Same changes were implemented in Norway in 1989, following the Ot. prp. nr. 33 (1989–90) Om lov om endringer I åndsverkloven (opphavsrett og edb).

⁶⁷⁰ For Sweden, see Prop. 1992/93:48 Om ändringar i de immaterialrättsliga lagarna med anledning av EES-avtalet, p. 124. For Norway, see Ot. prp. nr. 84 (1991–1992) Om lov om endringer I lov 12 mai 1961 nr 2 om opphavsrett til åndsverk m.v. og i enkelte andre lover som følge av EØS-avtalen, pp. 19–20.

⁶⁷¹ Prop. 1992/93:48 Om ändringar i de immaterialrättsliga lagarna med anledning av EES-avtalet, pp. 110, 122–123.

⁶⁷² Gotzen (1990), p. 299.

⁶⁷³ Hilty (2018), p. 867.

wording of the right and possibly exhaustion is flexible enough to encompass distribution of digital copies, uncertainty exists whether it is the case.⁶⁷⁴

The provision is interpreted in a way that exhaustion of the broad right of distribution takes place only through one type of distribution, i.e. through sale. Hence, following the first sale, the right of distribution is exhausted with an exception of rental.⁶⁷⁵ The traditional understanding is that the exhaustion of the right applies only to tangible copies of a computer programme, i.e. fixed on a tangible medium.⁶⁷⁶ However, when a function of delivery by transmission achieves making available a copy without infinitely repeating its performance, such use might come within the scope of the right.⁶⁷⁷

4.2.2.2. Exhaustion of the neighbouring right of distribution under the Rental and Lending Rights Directive

In the middle of the 1980s the question of whether the rental and lending rights recognised under some national laws shall be exhausted together with the right of distribution following the first sale was unresolved.⁶⁷⁸ The CJEU ruled in *Warner Brothers* that the EEC Treaty did not preclude the MS from prohibiting the import of copies lawfully sold in a different MS if import was for the purpose of subsequent rental, subject to the author's consent in that MS. Following the judgment and international negotiations on the recognition of the right of rental as surviving exhaustion, the exclusive rights of rental and lending made it into the EC's agenda on copyright harmonisation.

While initially rental and lending rights were discussed only in regard to sound recordings and videograms, they soon gained support for all types of works.⁶⁷⁹ Rental and lending rights are nevertheless not as such covered in this part. Besides providing the copyright holder with an exclusive right of rental and lending, the Rental and Lending Rights Directive also harmonised neighbouring rights. One

⁶⁷⁴ On the flexibility of wording, see Blocher and Walter (2010), p. 136. Also, the CJEU ruled that the distribution of digital copies through download fell under the right of distribution and its exhaustion under the Software Directive, see sections 3.2.4.3. and 4.2.3.4.

⁶⁷⁵ Janssens (2014), p. 118.

⁶⁷⁶ *Ibid.*, p. 119.

⁶⁷⁷ Blocher and Walter (2010), p. 137. However, video-on-demand can make a difference. If it is less costly than a physical copy, then copyright holder might want to claim remuneration per each and every view. See *Ibid.*, p. 138.

⁶⁷⁸ Dietz in his commentary stated that the CJEU would probably hold that the non-exhaustion of the right of rental is contrary to the EEC law, would such case be referred. However, the CJEU ruled otherwise. See Dietz (1986), pp. 49–50.

⁶⁷⁹ For the initial idea, see the Green Paper on copyright and the challenge of technology – Copyright issues requiring immediate action, COM(88) 172 final. 7 June 1988, pp. 155–166.; on the introduction of the general right of rental, see the follow-up to the Green Paper on copyright and related rights in the Information Society. COM (96) 586 final. 20 November 1996, p. 15.

of the neighbouring rights under the Directive is the right of distribution, which is, similar to the author's right of distribution, subject to exhaustion.

The development of the wording of the provision is especially of interest, as it was later copied into the draft of the InfoSoc Directive. According to the Proposal presented in 1990, a neighbouring right of distribution would be exhausted upon the following conditions, which is, essentially, a summary of the case law preceding harmonisation:⁶⁸⁰

7(2). If a subject matter referred to in paragraph 1 has been put into circulation within the Community by the right owner or with his consent, then its import into another Member State may not be prohibited by virtue of the right referred to in paragraph 1.⁶⁸¹

Accordingly, exhaustion in such wording would rule out the possibility to distort the import of the copies put into circulation in another MS but only by virtue of the right of distribution. Hence, the wording focuses not on the exhaustion principle as such, but on the consequences of first distribution of copies within the Community. It is indeed in line with the previous CJEU jurisprudence, which did not prescribe the exact conditions for exhaustion, but merely precluded some which interfered with the internal market by distorting free movement of goods between the MS. Thus, the exhaustion principle could have had different wording under the national laws of the MS, as long as it did not prevent imports from the other MS on the basis of copyright and right of distribution.

The final text of the provision, surprisingly, had very little in common with the original and resembled the wording of the later-adopted InfoSoc Directive.⁶⁸² It is worded in the negative and instead of referring solely to the permissibility of import of already distributed copies, focuses on stating that the right is not subject to exhaustion unless certain conditions are met. The conditions, in turn, were changed too, from putting copies into circulation to the first sale within the Community:

9(2). The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.⁶⁸³

⁶⁸⁰ See the Opinion of the Economic and Social Committee: "7(2) is no more than a codification of judgements of the European Court (see, for example, case 158/86) and could be deleted". Opinion on the proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright. 91/C 269/17. OJ C 269(34), 1991.

⁶⁸¹ Proposal for a Council Directive on rental right, lending right, and on certain rights related to copyright. COM (90) 586 final. 28 February 1991, p. 37.

⁶⁸² For the indication that the wording was changed as a result of a proposal by one MS to bring it closer to the Software Directive, see von Lewinski (2010), p. 331.

⁶⁸³ 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. 27 November 1992. OJ L 346/61

Although the exhaustion principle as provided for the neighbouring right of distribution has never been subject to the CJEU ruling or, as it seems, to extensive research, the history of its adoption sheds little light on the reasons driving subsequent development, namely the drafting history of the InfoSoc Directive. The latter adopted the wording of exhaustion as provided under the Rental and Lending Rights Directive without any discussion whatsoever.

The wording was considered to follow from CJEU case law, which was true only in respect of the first version of the provision. First, the subsequent version of the provision turned a limitation to the exercise of the exclusive right of distribution in the name of the free movement of goods into the only limitation permissible to the neighbouring right of distribution. Second, the application of exhaustion was limited from putting copies into circulation to sale of an object. Considering the significance of the adopted wording for the later developments, the absence of an explanation for modifying the wording is highly unfortunate.

For instance, the adoption of the Directive resulted in major changes to the copyright legislation of Scandinavian countries. First and foremost, both Sweden and Norway modified the conditions upon which exhaustion occurred. Whereas previously the right of distribution would be exhausted upon a work being published, now it took place once a work was sold.⁶⁸⁴ Hence, the scope of the acts which trigger exhaustion was decreased from any putting into circulation to acts amounting solely to a transfer of a copy or sale. Second, the Directive seemed to some extent clarify the EC's approach to the territoriality of the exhaustion. The SCA was changed to provide for EEA-wide exhaustion of the right of distribution, albeit reversed later.⁶⁸⁵ The Norwegian government, on the other hand, did not consider the matter resolved and the Norwegian Act was amended to provide for EEA-wide exhaustion as late as 2005, following the adoption of the InfoSoc Directive.⁶⁸⁶

4.2.2.3. Exhaustion principle under the InfoSoc Directive

The adoption of the InfoSoc Directive continued the full-scale harmonisation initiated under the Rental and Lending Rights Directive. It was full-scale in a sense that it would harmonise a number of exclusive rights, namely the very core of exploitation rights, and stretch over all subject matters. Exhaustion became

⁶⁸⁴ The SCA would now provide that copies which were transferred could be freely disseminated further, and the NCA would provide that copies which were sold could be disseminated further. The difference in the wording was mitigated by an additional statement in the NCA which provided that the same applied to copies made public and otherwise transferred with authorisation of the right holder. For the changes into the SCAe see Prop. 1994/95:58 Uthyrning och utlåning av upphovsrättsligt skyddade verk. For the NCA, see Ot. prp. nr. 15 (1994–1995) Om lov om endringer i åndsverkloven m m.

⁶⁸⁵ Prop. 1994/95:58 Uthyrning och utlåning av upphovsrättsligt skyddade verk, pp. 36–37.

⁶⁸⁶ Ot. prp. nr. 15 (1994–1995) Om lov om endringer i åndsverkloven m m, p. 81.

one of the subjects included in the draft, and, whereas it was said that Article 4(2) only codified the preceding case law, harmonisation has clearly gone beyond.

The Green Paper of 1988, which preceded negotiations on the InfoSoc Directive, stipulates that initially the exhaustion principle related solely to the MS within which the right of distribution arose, but later it was adapted to the needs of regional and international markets.⁶⁸⁷ As it has further been confirmed, the CJEU through its case law already ensured that the common market would not be distorted by national copyright law. Outstanding issues were minor and better dealt with at the national level, unlike the right of rental and lending.⁶⁸⁸

In the next Green Paper of 1995, the exhaustion principle was already named a central one in Community law, providing the CJEU with the means of reconciling free movement of goods with the territoriality of IP rights.⁶⁸⁹ The wording of the then-in-force Software Directive and the Rental and Lending Right Directive was seen as reflecting the previous case law of the CJEU and preventing MS from distorting the internal market by maintaining international exhaustion.⁶⁹⁰ To fill the gaps in copyright harmonisation, the wording of the exhaustion principle for the neighbouring right of distribution under the Rental and Lending Right Directive was set as a point of departure in the Follow-up Green paper.⁶⁹¹

The very aim of harmonising the exhaustion principle under InfoSoc was to prevent the distortion of the internal market.⁶⁹² The initial draft of Article 4(2) reads as follows:

The distribution right shall not be exhausted within the Community in respect of the original of their works or of copies thereof, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.⁶⁹³

As can be seen, the initial wording is identical to that under the Rental and Lending Rights Directive for the exhaustion of the neighbouring right of distribution. The Economic and Social Committee supported the position of the EC.

⁶⁸⁷ Green Paper on copyright and the challenge of technology – Copyright issues requiring immediate action, COM(88) 172 final. 7 June 1988, p. 148.

⁶⁸⁸ *Ibid.*, pp. 152–153.

⁶⁸⁹ Green Paper on Copyright in Information Society. COM(95) 382 final. 19 July 1995, p. 44.

⁶⁹⁰ *Ibid.*, p. 47.

⁶⁹¹ The follow-up to the Green Paper on copyright and related rights in the Information Society. COM (96) 586 final. 20 November 1996, p. 18.

⁶⁹² Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 10 December 1997, p. 27.

⁶⁹³ Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 12 December 1997, p. 45.

The exhaustion principle had to be confined to the Community in line with the preceding case law.⁶⁹⁴

The adopted text of Article 4(2) is almost the same as the initial one except for small changes:

The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.⁶⁹⁵

Whereas the preceding Directives provide for exhaustion solely upon sale, the InfoSoc Directive words it in a way resembling the wording of the WIPO CT, i.e. concerning sale or other transfer of ownership.

Generally, the provision of Article 4(2) is considered to provide for full harmonisation of the exhaustion principle.⁶⁹⁶ Even though, as positioned during the negotiations, the wording is based on the text of the WIPO CT and also relies on the codification of the CJEU jurisprudence, some contest these premises. I subscribe to the view that harmonisation under the InfoSoc Directive went further than necessary for accession to the WIPO Treaties or codification of previous case law.⁶⁹⁷ In the light of the background preceding harmonisation, it is rather surprising that there was nearly no discussion on the appropriate wording of the provision. Of course, codifying the outcomes of the previous judgments under the Directive could be a logical step in harmonising certain matters of copyright. However, it went clearly beyond the case law without sound preparatory work on the matter. Copying wording from a previous Directive serving different objectives does not seem appropriate.

The provision went far beyond then-existing case law in terms of territoriality of exhaustion by prohibiting international exhaustion.⁶⁹⁸ The validity of the provision has even been challenged due to the prescribed territoriality.⁶⁹⁹ The concern expressed by the EC was that MS maintaining national exhaustion could prevent importation of copies from the MS which maintained international exhaustion, in the absence of authorised placement on the EEC market. To my mind, this concern must be put into the context of harmonising consent as a prerequisite for Community exhaustion. Although this section will not extend into

⁶⁹⁴ Opinion on the proposal for a Council Directive on the legal protection of computer programs. Economic and Social Committee 89/C 329/02.

⁶⁹⁵ 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. 22.6.2001. OJ L 167/10

⁶⁹⁶ von Lewinski (2005), pp. 234–235. On the CJEU interpreting the Directive proceeding from the assumption of it as a full harmonisation directive, see Sganga (2018a), p. 126.

⁶⁹⁷ See also Cohen Jehoram (2001), p. 539; Karapapa (2014), p. 324.

⁶⁹⁸ Cook (2010), p. 360. For a different view, see von Lewinski (2005), p. 233.

⁶⁹⁹ In the case CJEU, *Laserdisken ApS v Kulturministeriet*. (2006) Case C-479/04, Judgment of 12 September 2006. See more in the following section.

the subject of consent, it will briefly illustrate how to avoid the problem in a different way than prohibiting international exhaustion altogether.

If, for instance, the consent requirement for exhaustion was not harmonised on the EU level, MS would not be able to rely on national exhaustion to prevent importation of copies that were lawfully (not necessarily with the consent of the copyright holder) imported from another MS. This way distortion could be avoided, i.e. the copies which lawfully entered the EEA territory (for example, due to international exhaustion of the distribution right in one of the MS) could not become subject to import prohibition in any other MS. However, consent as a prerequisite of exhaustion under, inter alia, the InfoSoc Directive, eliminates this scenario.⁷⁰⁰

The question whether the exhaustion of the distribution right under the Directive encompasses the copies not fixed on a tangible medium is closely connected to the question whether the right itself covers dissemination by transmission.⁷⁰¹ The Directive seem to imply, rather ambiguously, that only tangible copies are subject to exhaustion. Recital 29 provides the following:

The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

The recital seems to have been motivated by preceding case law, although it is by far an overreaching conclusion.⁷⁰² It has been rightly criticised, inter alia, on the grounds of making it seem like under the EU copyright *acquis* the service v goods dichotomy corresponds to tangible v intangible object dichotomy.⁷⁰³ Going beyond the tangible or intangible nature of a copy, it is also unclear why online delivery is associated exclusively with online services.⁷⁰⁴ Still, in *UsedSoft*, alt-

⁷⁰⁰ In this regard see also CJEU, *EMI Electrola GmbH v Patricia Im- und Export and others*. (1989) Case C-341/87, Judgment of 24 January 1989. The CJEU ruled that MS could prevent importation of copies lawfully put on the market in a different MS but in the absence of the right holder's authorisation.

⁷⁰¹ For the discussion, see 0.

⁷⁰² On the case law that seem to have prompted the inclusion of the recital, see Geiger and Schönherr (2014b), p. 417. On the case law not supporting the rigid demarcation, see Tjong Tjin Tai (2003), p. 208. See also section 5.2.2.3.

⁷⁰³ For instance, it excludes material copies made by a user of a service. See Spedicato (2015), pp. 46–47.

⁷⁰⁴ Tjong Tjin Tai (2003), p. 208.

though in the context of the Software Directive, the CJEU seems to have advanced an argument that exhaustion can apply to copies produced from a service.⁷⁰⁵

4.2.3. CJEU developing the exhaustion principle

The scope of the exhaustion principle under the Software and the InfoSoc Directives was referred to the CJEU for interpretation on a few occasions. Although the amount of case law on the matter is considerably smaller than the cases dealing with exclusive rights, most of the cases on the right of distribution concern its boundaries as articulated by the exhaustion principle. While in the years following the adoption of the InfoSoc Directive the cases concerned mainly the conditions of exhaustion, in recent years the focus shifted to the applicability of exhaustion to online dissemination.

The following key elements of the CJEU jurisprudence characterise exhaustion as the limit to exclusive right following first putting copies into circulation. First, the jurisprudence limits exhaustion to an EEA-wide scope, which provides right holders with even more control over the market. Second, sale or other transfer of ownership as a trigger of exhaustion under the jurisprudence generally narrows down the cases falling under exhaustion provision. Third, the jurisprudence extends the reach of the principle to digital copies and delivery by download, ensuring that the boundaries of control are kept even in the absence of tangible mediums. Last, the jurisprudence at times defined the consequences of exhaustion, which not necessarily can be resolved by the exhaustion principle.

4.2.3.1. Territoriality of exhaustion and further control over distribution

Despite every attempt from the EC to ensure that the InfoSoc Directive would be interpreted as precluding the MS from maintaining not only national but also international exhaustion, the MS had their doubts. Accordingly, InfoSoc, similarly to the older Directives, was referred to the CJEU on the question of territoriality of exhaustion. In the *Lasersiken II* case the party challenged non-applicability of exhaustion to copies initially distributed outside the EEA area and the validity of the provisions of the Directive as a whole.⁷⁰⁶ The CJEU held that the Directive was valid and the provisions were to be interpreted as precluding national law to provide for exhaustion of the right of distribution for copies marketed outside the EEA.

⁷⁰⁵ Rognstad (2014), p. 14.

⁷⁰⁶ CJEU, *Laserdisken ApS v Kulturministeriet*. (2006) Case C-479/04, Judgment of 12 September 2006. Interestingly, the case was referred to the CJEU by the Danish court. Scandinavian countries maintained international exhaustion before harmonisation under the EU *acquis*.

Despite a judgment of the average length, the Court deals with the interpretation of Article 4(2) with impressive efficiency. In eleven paragraphs, it explains the questions and the arguments put forward by the parties and answers them. The Court derives two conditions from the wording which must be fulfilled for the right to be exhausted: a copy must be put into circulation with the right holder's consent, and first distribution must take place within the Community.⁷⁰⁷ Moreover, the Court establishes that the Article read in conjunction with recital 28 and the preamble provide for full harmonisation and does not leave the MS open to provide international exhaustion.⁷⁰⁸

Proceeding to the objectives of the Directive, the CJEU holds that prohibition of international exhaustion is the only entirely consistent interpretation of the provision in the light of the internal market. International exhaustion, if maintained by the particular MS, would “inevitably give rise to barriers to the free movement of goods and the freedom to provide services”.⁷⁰⁹ Given that the previous case law only found national exhaustion to be interfering with the internal market, this point could clearly have been elaborated further. Even though in the *Polydor* case the CJEU allowed the exercise of the right of distribution in relation to copies coming from outside the EEA, it decided the case on the grounds that it was justified in particular circumstances and not that it would otherwise distort the internal market.

Hence, the CJEU extended the right holder's control over dissemination of copies beyond first distribution if copies were first put into circulation outside of the Community. The position of the right holder in the Community market was strengthened, as they de facto were granted total control over first circulation of copies within the Community. The right holder was given an opportunity to rely on the right of distribution to separate Community market from the other markets. Territoriality of copyright protection became the primary instrument to support partitioning of the market.

4.2.3.2. Sale or transfer of ownership as a condition of exhaustion

In line with the Community exhaustion principle developed under the CJEU jurisprudence, the exhaustion under the Directives was interpreted as essentially requiring right holder's consent to distribution and sale of copy or other transfer of ownership. As will be seen, the sale or other transfer of ownership has been interpreted both narrowly and broadly, depending on the case.

In the *Laserdisken II* case concerning mainly the territoriality of exhaustion, the CJEU derived two conditions that must be fulfilled for the right to be

⁷⁰⁷ Ibid., para. 21.

⁷⁰⁸ Ibid., para. 24., also confirmed in CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, para. 30.

⁷⁰⁹ CJEU, *Laserdisken ApS v Kulturministeriet*. (2006) Case C-479/04, Judgment of 12 September 2006, para. 26.

exhausted: a copy must be put into circulation with the right holder's consent, and first distribution must take place within the Community.⁷¹⁰ The WIPO CT was interpreted as not requiring any particular conditions for applying exhaustion after first sale.⁷¹¹ It is, however, unclear whether the Court interpreted the WIPO CT as requiring first sale as a precondition to exhaustion.⁷¹²

In *UsedSoft* in the context of the Software Directive, the CJEU considered the meaning of sale in the case concerning copies produced on the recipient's end following an authorised download of a copy. The key question for establishing whether such copies would be subject to exhaustion was whether the transaction in question could be regarded as a first sale of a copy of a program.⁷¹³ As the Directive did not make any reference to national law for interpreting the term of sale, it must have been given a uniform interpretation through the Union and designated an autonomous concept of EU law.⁷¹⁴

The Court found that a download of a copy and the conclusion of a user license agreement formed an indivisible whole and since the user license agreement made a copy usable for an unlimited period in return for payment, it must have been regarded as a transfer of ownership. Thus, a download of a copy of a computer programme for disposal unlimited in time in return for a fee constituted a transfer of ownership.⁷¹⁵ The Court also held that it made no difference whether a copy was offered on a tangible medium such as a CD or via download, as it remained inseparable from a user license agreement from the point of view of the acquirer.⁷¹⁶

Hence, the sale or transfer of ownership was interpreted not solely on the conditions of the license agreement in question but rather according to the overall outcome of a transaction. An important element of regarding the transaction a sale within the meaning of the exhaustion provision was the consideration that through making available of copies of software the vendor was able to obtain remuneration corresponding to the economic value of a copy. Hence, it supports the purpose of the right of distribution as enabling obtaining remuneration through the exercise of the right. Once the right has been exercised and the remuneration obtained, further control can be restricted unless the circumstances call for the opposite.⁷¹⁷

It is, however, unclear whether the same reasoning could be applied under the InfoSoc Directive. In *UsedSoft* the Court relied on the Software Directive being

⁷¹⁰ *Ibid.*, para. 21.

⁷¹¹ *Ibid.*, para. 42.

⁷¹² For further discussion, see section 3.1.5.3.

⁷¹³ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, para. 38.

⁷¹⁴ *Ibid.*, para. 40.

⁷¹⁵ *Ibid.*, paras 44–46.

⁷¹⁶ *Ibid.*, p. 47.

⁷¹⁷ See section 3.3.2.

lex specialis to counter the arguments posed under the InfoSoc Directive.⁷¹⁸ To my mind, the statement on *lex specialis* character shall not be imperative for interpreting similar cases under the InfoSoc Directive. Neither should it indicate that the same reasoning cannot be applied under the InfoSoc Directive nor should it designate the interpretation beforehand. Whereas there is no reason to treat functionally similar situations differently and striving for coherent interpretation is generally upheld, a consistent result can be achieved through other means.⁷¹⁹

4.2.3.3. Distribution through transmission and digital copies

Although the application of the right of distribution to dissemination by transmission partially answers the question of the applicability of the right to copies lacking tangible support, this section summarises the CJEU's approach to countering the arguments denying application of the exhaustion principle to digital copies based on the absence of a tangible medium.

Whereas it is commonly accepted that the exhaustion principle applies to copies of a work put into circulation and seems unambiguous at first glance, CJEU jurisprudence shows that there is confusion about what the exhaustion principle relates. For instance, in the *Art & Allposters* case the CJEU, with a view to the WIPO CT, held that the "exhaustion of the distribution right applies to the tangible object into which a work or its copy is incorporated if it has been placed on the market with the copyright holder's consent".⁷²⁰

This is clearly misleading as exhaustion concerns a work or a copy of a work and not its medium. The right of distribution is not as such controlling the disposal of a tangible medium, but rather a copy that happens to be fixed on a tangible medium. The Court reached a correct conclusion in the later *Ranks* case, where it stated the opposite – exhaustion concerns a copy of a programme and not the material medium on which it is placed.⁷²¹

When it comes to the applicability of exhaustion to digital copies without a tangible medium, so far guidance has been provided solely under the Software Directive. In the *UsedSoft* case the Court was asked to rule whether exhaustion applied when an acquirer obtained a digital copy with the right holder's consent by downloading it from the Internet. Interestingly enough, the Court did not start with examining whether the initial dissemination of copies fell under the right of distribution but proceeded directly to the conditions for exhaustion to occur.⁷²²

⁷¹⁸ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, paras 51, 56.

⁷¹⁹ More on this in section 6.2.2.2.

⁷²⁰ CJEU, *Art & Allposters International BV v Stichting Pictoright.* (2015) Case C-419/13, Judgment of 22 January 2015, para. 40.

⁷²¹ CJEU, *Aleksandrs Ranks, Jurijs Vasiļevičs v Microsoft Corp.* (2016) Case C-166/15, Judgment of 12 October 2016, para. 34.

⁷²² See more in section 3.2.4.3.

The main argument of the CJEU was that exhaustion applied because the transaction in question was interpreted as a sale. However, the Court also countered two major arguments advanced by the EC and the vendor.

One of the arguments was that exhaustion under the Directive related only to tangible copies and not to copies downloaded from the Internet.⁷²³ In this regard, the Court held that the language of Article 4(2) of the Software Directive does not make any distinction between copies with or without a tangible support. Limiting the exhaustion principle to tangible copies would provide right holders with excessive control over intangible copies, which would go undoubtedly beyond what is necessary to achieve the objectives of copyright protection.⁷²⁴

Although there is, so far, no ruling on the applicability of exhaustion to digital copies under the InfoSoc Directive, the CJEU was asked to rule on it in the context of lending of e-books in the *VOB* case.⁷²⁵ One of the aspects the Court addressed was whether it was permitted under the EU *acquis* to make application of an exception to lending right subject to the condition that the right of distribution is exhausted in accordance with Article 4(2) of the InfoSoc Directive. The Court held that the lending right under the Rental and Lending Rights Directive also covered lending of e-books and that national law could make the application of an exception to the right of lending depending on the exhaustion of the right of distribution under the InfoSoc Directive.⁷²⁶

Hence, the Court did not rule on the applicability of exhaustion to copies of e-books but rather on the circumstances of the application of an exception to the lending right. However, as the lending right was held applicable to intangible copies (e-books), it seems logical that the same would be the case for applying exhaustion under Article 4(2) of InfoSoc to intangible copies. If that is not the case, i.e. exhaustion under InfoSoc applies solely to tangible copies, it essentially renders the lending right applicability to intangible copies useless. By making application of an exception to the lending right dependant on exhaustion which is not applicable to intangible copies, MS would de facto block the application of exception as such. Although the judgment does not permit direct conclusion that exhaustion extends to all types of works, it shows a tendency to do so.⁷²⁷

Accordingly, when interpreting the provisions on the exhaustion principle and its extension to digital copies, the Court, in line with the reasoning on the right of distribution itself, relied mostly on the discussion about whether treating functionally equivalent situations differently was justified on the sole basis that the acts concerned copies without a tangible medium. Hence, there was little doubt

⁷²³ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, para. 53.

⁷²⁴ *Ibid.*, pp. 53–64.

⁷²⁵ CJEU, *Vereniging Openbare Bibliotheken v Stichting Leenrecht.* (2016) Case C-174/15, Judgment of 10 November 2016.

⁷²⁶ *Ibid.*, paras 55–65.

⁷²⁷ Determann and Specht (2018), p. 733.

that the acts in question could fall within the scope of the right and exhaustion; the question was whether the treatment should be equivalent.

4.2.3.4. Consequences of exhaustion for subsequent control

Whereas according to the exhaustion principle under the EU *acquis* the right holder loses further control over distributed copies, it is in no way absolute and could even be rather limited, as will be shown in this section. First, the scope of the right that is exhausted is confined to a specific type of distribution and is without prejudice to other forms of distribution or other exclusive rights. Second, emergence of a separate market for distributed copies will prompt subjecting their marketing to a separate authorisation. Third, the ways in which the copies might be disposed of are limited.

Turning to the first aspect, it is inevitable that the interpretation of the scope of the right of distribution under the Directive also influences the consequences of exhaustion. In the *Peek & Cloppenburg* case the CJEU did not rule on exhaustion, but on the scope of the right of distribution, which is of importance for understanding the scope of the right that is exhausted following initial distribution.⁷²⁸ The CJEU ruled that the right of distribution under the Directive covers solely acts of sale and acts amounting to a transfer of ownership.⁷²⁹ Hence, the exhaustion of the right of distribution would lead to loss of control over subsequent distribution solely through sale or other acts of transfer of ownership.

Notwithstanding the loss of control over subsequent sale of copies, exhaustion of the right of distribution does not sanction free disposal of such copies in the event they were substantially altered. In the *Art & Allposters* case, the CJEU had to decide whether the exhaustion principle applied to copies that were sold with the authorisation of the right holder but with subsequent alteration of the original medium.⁷³⁰ The Court stated that the consent of the right holder did not cover distribution of such new object incorporating a work and the resale should have been authorised. Also, the CJEU noted that the right of distribution would be exhausted only upon the first sale of that new object.⁷³¹

Hence, the right holder's control over subsequent distribution can be extended. As the Court rightly pointed out, exhaustion did not cover the alteration of an existing object even if it was sold with the consent of the right holder in case this alteration, taken as a whole, had resulted in a new object.⁷³² However,

⁷²⁸ CJEU, *Peek & Cloppenburg KG v Cassina SpA*. (2008) Case C-456/06, Judgment of 17 April 2008.

⁷²⁹ See section 3.2.4.1. on the CJEU relying on the WIPO CT wording. Also, von Lewinski and Walter (2010), p. 994.

⁷³⁰ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015.

⁷³¹ *Ibid.*, para. 46.

⁷³² Headdon (2018), p. 305.

in my view, the outcome must be interpreted as linked not to a tangible medium as such but rather to the alteration of the way a work is presented.⁷³³ Such modifications might potentially increase the value of copies and open new exploitation opportunities that conflict with the right holder's interests.⁷³⁴

Furthermore, it is important to note that further non-commercial transfer of such altered objects would most certainly not fall under the distribution right and be outside control of the right holder. Notwithstanding moral rights, the acquirer of a copy of a work is generally free to modify an acquired copy in any desirable way. Nonetheless, they cannot do so on a large-scale commercial basis interfering with the new or potential market for a work. Hence, the ruling shall not be read as holding that the act of distribution of new objects rendered inapplicable the exhaustion of the right of distribution in regard to the original copies. The exhaustion for the original copies shall still be valid but it only allows disposal of those original copies of a work and not their alteration and subsequent distribution.

The acceptable ways to further dispose of a copy following the exhaustion of the right of distribution are further limited to the acquired copy as opposed, for example, to a backup copy. For instance, the *Ranks* case examined by the CJEU did not concern the applicability of exhaustion as such, but instead whether a subsequent acquirer of a computer programme could rely on exhaustion of the right of distribution to resell their backup copy in the absence of the original copy.⁷³⁵ The Court has ruled that a backup copy could not be passed on without obtaining the authorisation of the right holder.

The case received somewhat limited attention, even in the legal scholarship, as its application at first glance seems to be rather narrow and based mainly on the findings in the landmark *UsedSoft* judgment.⁷³⁶ Nevertheless, the significance of the judgment is in establishing that although an acquirer is not allowed to sell a backup copy of a computer programme if the original copy is damaged, destroyed or lost, they are not deprived of the ability to resell it all together.⁷³⁷ Even though the case did not give any guidance as to how it might be achieved, it suggests that the vendor shall allow download of a copy through its webpage.⁷³⁸ In my view, this is a very reasonable outcome for the case, where the interests of an acquirer of a computer programme are balanced with the interests of a copy-

⁷³³ On the same point, see Griffiths (2016).

⁷³⁴ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, paras 19, 48.

⁷³⁵ CJEU, *Aleksandrs Ranks, Jurijs Vasiļevičs v Microsoft Corp.* (2016) Case C-166/15, Judgment of 12 October 2016.

⁷³⁶ See, for example, Colby (2017), Wolk (2017), Geiregat (2017).

⁷³⁷ This is at odds with the view that back-up copies could be passed to the next acquirer together with the original one. See Blocher and Walter (2010), p. 139.

⁷³⁸ Subsequent acquirer shall be able to download a copy from a vendor's webpage, see CJEU, *Aleksandrs Ranks, Jurijs Vasiļevičs v Microsoft Corp.* (2016) Case C-166/15, Judgment of 12 October 2016, para. 54.

right holder in controlling the market for a work.⁷³⁹ Whereas, as a general rule, the acquirer of software can resell their license, the exclusive control over further distribution of a backup copy is reserved to the right holder.

Turning to the outcome of *UsedSoft*, once the right of distribution is exhausted upon the first sale of a copy, that copy can be further resold and used by the next acquirer. Nevertheless, copy is a loosely formulated notion in this regard as there was no passing on a copy in this case but only sale of a license key combined with an opportunity to download the software in question from the vendor's webpage. In a sense, the outcome of exhaustion of the right was that the acquirer of a copy could resell the license key and that the next acquirer became a lawful acquirer which enabled them to avoid the concern of breaching the right of reproduction.⁷⁴⁰

At least in regard to computer programmes, resale of a license entails the resale of a copy in the meaning of the Software Directive.⁷⁴¹ This is also supported in the *Ranks* case, where the Court held that one cannot be deprived of the possibility to resell their own copy even though the original copy has been destroyed, damaged or lost.⁷⁴² The possible solution would be to let the next acquirer download a copy from the vendor's webpage.⁷⁴³ Hence, to satisfy the conditions of exhaustion, it suffices that the right holder provides copies for unlimited use against payment of a fee corresponding to economic value.

4.3. Exhaustion principle in relation to material dissemination: strengths and shortcomings

Restricting control over material dissemination ought to ensure that the right holder's control does not extend further than necessary to enable obtaining appropriate remuneration in order to avoid unnecessarily obstructing further dissemination. The aim of the exhaustion principle under the EU copyright *acquis*, as articulated in the *UsedSoft* case, points into the same direction. The objective of the exhaustion principle is to restrict control over distribution of a work to what is necessary to safeguard the subject matter.⁷⁴⁴

This part will put the exhaustion principle as developed under the EU *acquis* into the context of material dissemination. The scope of the principle will be

⁷³⁹ For a more detailed comment on the outcome of the *Ranks* judgment, see Oprysk (2019b).

⁷⁴⁰ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, para. 88.

⁷⁴¹ *Ibid.*, para. 84.

⁷⁴² CJEU, *Aleksandrs Ranks, Jurijs Vasiļevičs v Microsoft Corp.* (2016) Case C-166/15, Judgment of 12 October 2016, para. 53.

⁷⁴³ *Ibid.*, para. 54.

⁷⁴⁴ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, para. 62.

examined towards the relevant considerations for either limiting or safeguarding control of the right holder over subsequent distribution, identified in Chapter 3.⁷⁴⁵ Hence, the strengths and the deficiencies of exhaustion in contemplating all the relevant aspects will be assessed.

As will be shown, whereas the exhaustion principle proved to be an effective tool for achieving restriction of exclusive control to what is necessary in specific cases, it is much less flexible in others. The latter is well illustrated by CJEU jurisprudence on the right of distribution, in particular in relation to the digital environment. Also, the rather predetermined approach to the harmonisation of the rights and permissible boundaries has forced the CJEU to look for policy arguments in extending the logic behind the principle to other rights.

4.3.1. Role of exhaustion in limiting exclusive control to first distribution

As has been explored in the previous chapter, based on the developments under the EU *acquis*, there are three major circumstances pointing towards the justifiability of restricting control over further distribution. First is the fact that right holder has exercised their exclusive right. Second is the fact that right holder had a chance to obtain appropriate remuneration. Third are considerations of public policy behind the recognised limitations, where the subsequent use in question does not clearly come within the scope of the right and exception.

When it comes to the first consideration, being restricting of control over further distribution upon the exercise of the right, the exhaustion principle under the EU *acquis* seems to achieve just that, at least in regard to distribution through sale. Confining the application of the exhaustion principle solely to cases where copies were sold or ownership over them was otherwise transferred with the authorisation of the right holder ensures that the loss of subsequent control happens solely upon the actual exercise of the right.

Hence, the exhaustion principle under the EU copyright *acquis* reflects the objective of material dissemination in a sense that it ensures that the right holder has control over each and every act of exploitation through distribution unless the conditions provided by exhaustion are met. This goes hand in hand with the second aspect, the ability to obtain remuneration. In the particular circumstances of the sale of (tangible) copies, the right holder is in a position to ask for appropriate remuneration for each copy. Accordingly, exhaustion of the right upon sale or other transfer of ownership safeguards the author's ability to ask for appropriate remuneration.⁷⁴⁶

⁷⁴⁵ See section 3.3.

⁷⁴⁶ Another aspect of appropriate remuneration, it being not guaranteeing the highest possible remuneration, is only implicitly covered by the provision. It appears to rather be a matter of competition or consumer protection law.

The third major consideration is the resort to public policy. In the course of the development of the exhaustion principle this aspect became prominent in the cases dealing with the necessity to consider limiting control over subsequent acts in cases not clearly coming within the scope of established mechanisms. For instance, that would be the case of extending the reach of exhaustion under the *UsedSoft* case. The exhaustion principle is least flexible in relation to this aspect. Whereas the Court found it useful for dealing with cases closely resembling situations the legislator had in mind when drafting the provisions, the extent to which the concept in its narrow sense can be adapted is limited.⁷⁴⁷ However, the exhaustion principle can also be considered in its broad sense, as expressing the idea that exclusive control shall not go beyond what is necessary to enable obtaining appropriate remuneration.

Whereas the exhaustion principle under the EU *acquis* achieves limiting the control of the right holder to the first exercise of the right of distribution and obtaining appropriate remuneration in the case of distribution of tangible copies, the legislative choices make the principle of very limited practical importance in potential cases not concerning mere sale. Unless, of course, the principle is interpreted in a broader fashion, as was done by the CJEU in the context of the distribution of digital copies.⁷⁴⁸

The wording of the principle interferes with the ability to adapt the notion to the changing circumstances of a work's exploitation. For instance, exempting further resale from exclusive control could have been achieved in a different and much less restrictive way. One example could be the wording of exhaustion under the first draft of the Rental and Lending Rights Directive, merely exempting further importation of distributed copies from the reach of the right of distribution.⁷⁴⁹ However, turning the provision under the InfoSoc Directive into the only admissible condition upon which the right of distribution may be restricted substantially limited the flexibility of assessing a situation at stake.

4.3.2. Ability to adapt when securing further control is justifiable

Besides indications pointing towards restricting further control over dissemination, the analysis of the development of the EU copyright *acquis* reveals three considerations upholding extending control beyond first distribution. In the particular context of the exhaustion principle, it would mean the flexibility of the latter to account for the circumstances of dissemination influencing the permissible scope of control following the first exercise of the right. The three considerations identified in Chapter 3 are the absence of consent to the dissemination,

⁷⁴⁷ Exhaustion in the narrow sense means primarily the exhaustion principle as harmonised under the Directives, i.e. relating solely to a particular situation of dissemination of tangible copies.

⁷⁴⁸ See sections 4.2.3.3. and 4.2.3.2.

⁷⁴⁹ See section 4.2.2.2.

the emergence of new markets for the distributed copies, and the interference with the primary market.⁷⁵⁰

At first sight, the exhaustion principle safeguards consent as it is a precondition to even considering restricting exclusive control. The principle would simply not apply at all in the absence of an unauthorised initial distribution. However, due to the nature of the exhaustion principle, it does not permit drawing any further conclusions beyond the fact that the right holder has authorised sale of the copies. Consider, for instance, the *Art & Allposters* case, where the CJEU examined whether marketing of the altered copies could be prevented on the basis of the right of distribution. The Dutch Court asked whether the distribution right and its exhaustion under the InfoSoc Directive governed the answer to the question. Furthermore, if it did, the Court was also asked to rule whether it was permissible to rely on the notion developed under national law, according to which there was no longer any question of exhaustion if the acquirer substantially altered the copies and disseminated them to the public.⁷⁵¹

Rather than holding, as it would have to, that the exhaustion principle under the InfoSoc Directive had no bearing on the answer to the question, the Court proceeded to examine whether in such case the right holder has consented to dissemination of altered copies. The CJEU found that through the alteration process in question new copies were created and the right to distribute them was not exhausted. Essentially, the Court reached a conclusion comparable to the one the Dutch courts reached under national law. However, it overlooked the fact that exhaustion under the Directive only clarifies the permissibility of further resale of copies, which would be evident if exhaustion was worded in a way merely confirming this.

Flexibility for taking into consideration new markets as the second relevant aspect is also not something that the exhaustion principle is generally concerned with. Whereas in the course of the development the principle has been adapted to exclude forms of distribution forming a distinct market such as rental, other potential markets for the distributed copies would now have to be contemplated by the recognition of new or an extension of existing exclusive rights.⁷⁵² Hence, whenever a new market for copies is unlocked by technology, the exhaustion principle would not be a suitable tool to secure such uses.

Interestingly, exempting new uses from the reach of exhaustion turned what was once a small exception from exhaustion into a rule.⁷⁵³ Certain acts were exempted from exhaustion through the recognition of distinct exclusive rights such as rental. They, in turn, were hardly subject to a wider discussion on the

⁷⁵⁰ See section 3.3.2.

⁷⁵¹ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, para. 21.

⁷⁵² CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86, Judgment of 17 May 1988, para. 14. Also, subsequent adoption of the Directive harmonising the right of rental not subject to exhaustion.

⁷⁵³ Torremans (2010), p. 302.

necessity of introducing exhaustion-like provisions, or in more general terms, a wider discussion on maintaining mechanisms to systematically restrict the scope of the right to what is necessary.

The third aspect relevant to the assessment of desirability of extending the control of the copyright holder beyond initial dissemination is interference with the primary market. This is similarly not accounted for by the exhaustion principle. The only way in which the principle ensures that the market is not interfered with is that it only exempts copies already put into circulation and the acts which are confined to a specific territory. Hence, exhaustion does not sanction production and distribution of new copies by the third parties.

Although the CJEU's jurisprudence has occasionally reshaped the right of distribution and at times adapted exhaustion to take into consideration the relevant aspects outlined here, the provisions themselves come up short. As has been explored in this chapter, the wording of exhaustion under copyright harmonisation served many functions, including differentiating rental and lending from other forms of distribution. Hence, its wording should not be interpreted as the only conceivable expression of an approach to material dissemination. It could, of course, be the case that the legislator intended authorised sale to be the one and only possible precondition for exhaustion of the right. However, the jurisprudence of the Court seems to indicate otherwise.⁷⁵⁴

Whereas defining the right of distribution and its exhaustion through the transfer of ownership can be explained and possibly justified by the circumstances of harmonisation, the developments might require a slight modification. This does not mean that exhaustion should necessarily be amended to be triggered by circumstances other than transfer of ownership. Necessary result could also be achieved by considering the logic behind the exhaustion principle in the broader context.

4.3.3. Potential of exhaustion as a limit to exclusive control over material dissemination in the online environment

Whereas the possible extension of the right of distribution to the acts of online dissemination encountered some resistance, this is even more so in case of the application of the exhaustion principle. The CJEU's jurisprudence provides precedents for applying the principle to copies distributed by download, although they are rather limited to specific circumstances. The latter is perhaps understandable in the light of the nature of the exhaustion principle and its inflexibility,

⁷⁵⁴ For instance, the emergence of a new market enabled by modification of a work may justify exempting a work in question from exhaustion. See CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, para. 48.

as described above. On the other hand, jurisprudence also indicates the development of similar principles in the context of other exclusive rights.⁷⁵⁵

The main argument against the application of the principle in cases of online transmissions is that both the right of distribution and exhaustion should oversee solely tangible copies, leaving digital copies and online transmissions to other rights. As fair as this seems to be, this line of reasoning often results in a denial of (any) limits to control over dissemination in the online context; restricting further control, arguably, would be justified solely for acts of material distribution. It is necessary to clearly demarcate whether one argues against the application of exhaustion online because it is not a perfect construct, against the application of exhaustion to acts only remotely resembling material dissemination, or against the application of any limits, including in the form of exhaustion, to control over acts of online dissemination.

Whereas I find the first two arguments to a certain extent justifiable, the very last one seems highly unreasonable. Even more so if it is justified on the grounds that dissemination taking place online is of a solely immaterial nature. In this regard, I tend to support the view that, although it is obvious that the exhaustion principle originates under rather different circumstances and is closely tied to physical copies, the absence of such tangible copies as such cannot mean that the limitation on the scope of legal protection intended by the exhaustion principle is not appropriate in other cases.⁷⁵⁶

The recent jurisprudence of the CJEU relying on the material dissemination construct in the online setting to uphold the application of certain exceptions originally designed for tangible copies illustrates the importance of assessing the broader picture. It includes not only the infamous *UsedSoft* case but also the *VOB* case, where the CJEU at length discussed justifications beyond extending the reach of the lending right and its limitation to e-books. The Court considered it important to preserve the limitations formulated in the analogue era despite slightly different but largely equivalent circumstances.⁷⁵⁷ Moreover, the Court took a very cautious approach, as the absence of justifications to exclude digital copies from the right of distribution or lending did not automatically also justify the application of limitations to these rights.

Indeed, the Court acknowledged the exhaustion principle in its broader sense. In *UsedSoft* the Court stressed that to read the exhaustion principle narrowly would allow the right holder to circumvent the provision, thus its effectiveness would be undermined.⁷⁵⁸ Similarly, in the *Ranks* case the CJEU held that an acquirer of a computer programme cannot be deprived of the possibility to resell

⁷⁵⁵ For instance, the thinking resembling the exhaustion principle in its broad sense is evident in the cases on secondary communication of a work. See section 5.3.2.

⁷⁵⁶ Hilty (2018), p. 865.

⁷⁵⁷ See section 4.2.3.3.

⁷⁵⁸ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, para. 49.

that copy only because it was lost, damaged or stolen, as it would undermine the effectiveness of the exhaustion principle.⁷⁵⁹

Nonetheless, it is also evident that an attempt to apply the material dissemination approach online runs into the inflexibility of the exhaustion principle as laid down under secondary EU law. However, this pitfall can be avoided if the exhaustion principle is not considered in its narrow sense as the one and only solution for implementing limits on exclusive control following the material dissemination approach, but in its broader meaning. The exhaustion principle shall not be disregarded or overlooked in the context of online dissemination, rather its role and development shall be discussed.

Rognstad, for example, argues that the CJEU in *UsedSoft* should have respected the decision of the legislator to limit the right of distribution to tangible copies and recalled that the right of communication to the public is not subject to exhaustion. Next, if the Court deemed that restricting the resale of such copies did go beyond what is necessary to safeguard the specific subject matter, it could have proclaimed such national rules contrary to the Treaty on the Functioning of the European Union (TFEU).⁷⁶⁰ Riis et al., in turn, state that although it is indeed problematic that the Court stepped over its mandate and went beyond the wording of the legislation, it has nevertheless pointed copyright in the right direction, as the flexibility exercised in the case lies at the very heart of copyright.⁷⁶¹

The *UsedSoft* judgment also seems to have advanced a kind of user right, previously unknown under (EU) copyright. For instance, Hilty comments that the Court essentially dealt with a right to use, because the copy in question was not the one created by the first acquirer. The issue was the use of copies created by the third parties, which was lawful due to the non-use by the first acquirer.⁷⁶² Hilty holds that the question of access as such is more of a contractual nature, i.e. whether the right holder accepts that the initial acquirer will be substituted by a third party.⁷⁶³ However, overruling contractual freedom in the case could have been motivated by protecting the position of the first acquirer, who paid full price and wants to realise its residual value through the secondary market.⁷⁶⁴

Accordingly, the association of the exhaustion principle with material dissemination is both the strength and the weakness of the latter. It is especially evident in cases concerning the distribution-like dissemination in the online environment. On the one hand, the exhaustion principle provides a clear boundary to the right holder's control over dissemination in the form of distribution, enabling subsequent dissemination and disposal of copies. Against the background of the online environment, however, such a clear-cut solution may not be

⁷⁵⁹ CJEU, *Aleksandrs Ranks, Jurijs Vasiļevičs v Microsoft Corp.* (2016) Case C-166/15, Judgment of 12 October 2016, para. 53.

⁷⁶⁰ Rognstad (2014), p. 15.

⁷⁶¹ Riis et al. (2013), p. 478.

⁷⁶² Hilty (2018), p. 869.

⁷⁶³ *Ibid.*, p. 872.

⁷⁶⁴ *Ibid.*, p. 874.

highly appropriate in circumstances where the actual conditions differ considerably.

On the other hand, the development of the exhaustion principle under the EU *acquis* as associated solely with distribution of tangible copies has led to scepticism over the possibility of considering the principle in its broader sense in the online context, or, put differently, the extension of the approach to material dissemination in the online context. First, the arguments against the application of the principle often stem from the very wording of the provision. Second, it is easy to circumvent the principle by disseminating copies in a way that does not fall within the provided definition, with a view to potentially unlimited possibilities offered by digital technologies. Hence, successfully arguing that exhaustion does not apply in a particular case secures the right holder potentially unlimited control over any aspect of work's exploitation.

4.4. Conclusions

This chapter set out to examine the place of the exhaustion principle in limiting the scope of the right of distribution pursuant to the notion of material dissemination. Namely, it assessed the role and the potential of the principle in restricting the scope of the right in the context of the changing circumstances of a work's exploitation and increasingly flexible approach to the defining permissible scope of right holder's control under the EU *acquis*. For the purpose of the analysis, exhaustion was understood in its narrow meaning as a particular construct limiting the scope of the right of distribution once an opportunity to receive remuneration has been provided. Hence, the analysis relied predominantly on the remuneration theory of exhaustion and built on the findings of the Chapter 3.

The analysis of the background to harmonising the principle on the international and the EU levels revealed that its harmonisation served objectives far beyond mere restriction of control over secondary distribution. First, confining the wording of the principle to transfer of ownership of a copy has served to secure the right holder's exclusive control over subsequent rental of already distributed copies. Second, determining the principle's territorial application was of importance to international trade due to the territorial nature of copyright. Whereas the attempts to harmonise the principle on the international level have failed largely due to disagreement on the territorial reach of exhaustion, the extensive harmonisation has taken place under the EU *acquis*.

The chapter has traced the process of harmonising the exhaustion principle under the EU *acquis* from tackling the territoriality of the exclusive rights in the context of the internal market to drawing the boundary of the right of distribution. The harmonisation of the exhaustion principle under the EU *acquis* served two separate yet ultimately interconnected objectives: to eliminate the adverse effect of the territorial nature of copyright on the free movement of goods within the internal market, and to delimit the scope of the (fully) harmonised right of distribution under the EU secondary law.

First, the development of the Community exhaustion principle under the CJEU jurisprudence has been assessed. The principle precludes the exercise of the right of distribution under the national laws if it prevents the import of copies already put into circulation within the EEA with the right holder's authorisation. Second, the chapter has analysed the exhaustion principle as harmonised under secondary EU law. It has been emphasised that, whereas tackling the territoriality of exhaustion was crucial to the functioning of the internal market, full harmonisation of the permissible limit of the right of distribution might have been premature, given the lack of discussion on the purpose and wording of the provision in the preparatory documents to the Directives.

Subsequent developments under CJEU jurisprudence have had two major implications for the role of the exhaustion principle as delimiting control over distribution pursuant to the material dissemination notion. First, the all-or-nothing approach of exhaustion in its narrow sense as stipulated under the InfoSoc Directive has clearly been challenged. Emerging circumstances which could not be taken into account by the right holder at the time of authorising primary communication might call for submitting secondary communication to the exclusive control of the right holder despite the de facto application of the exhaustion principle. This does not only raise the question of the scope of the acts exempted from authorisation by virtue of the exhaustion principle but also suggests the principle is no longer capable of providing a more or less clear picture of the legitimate right holder's expectations.

Second, the development of the right of distribution and the right of communication to the public indicates that harmonisation of the exhaustion principle in its narrow meaning under the InfoSoc Directive has implicated the development of a more consistent and systematic approach to the question of admissible control over the acts of secondary dissemination. The all-or-nothing approach of Article 4(2) of InfoSoc made the extension of the principle beyond the right of distribution undesirable in the light of changing circumstances of a work's exploitation. Even within the realm of the conventional sale of tangible copies of a work, the principle falls short of providing a satisfactory instrument, accounting for the factual circumstances and emerging markets for distributed copies.

Some of the contemporary challenges the exhaustion principle faces could be dealt with by proclaiming the rule as dealing solely with the resale of tangible copies if they have not been substantially altered. However, on the EU level, given the full harmonisation under the InfoSoc Directive and the CJEU's unwillingness to leave any matters to the MS, it could be to further detriment to legal certainty. Whereas the exhaustion principle indeed emerged to simply exempt the secondary distribution of copies from the right holder's control, under the EU *acquis* it has been turned into the only possible limit to the right of distribution and, furthermore, strongly contrasted to other dissemination-related rights, in particular, the right of communication to the public.

Hence, confining the meaning of exhaustion to its original connotation is supported, provided that exhaustion is then considered in its broader meaning, as (partially) restricting exclusive control over dissemination following the initial

authorisation enabling the right holder to obtain appropriate remuneration. As will be discussed in Chapter 5 on the right of communication to the public, the developments under the *acquis* indicate that the strong contrast between the rights on the basis of ambiguous denial of the application of the exhaustion principle in its narrow sense has implicated the development of the consistent approach to examining the need to restrict or extend the exclusive control over secondary dissemination in the changing circumstances of work's exploitation.

Whereas the CJEU has redefined the approach to material dissemination to take into account the circumstances of exploitation beyond mere authorisation, as discussed in Chapter 3, the exhaustion principle as harmonised under the Directives no longer provides a clear picture of the relevant considerations. Although it played the decisive role in shaping the scope of control accorded under the right of distribution at the time of harmonisation under the Directives, the subsequent development has downplayed its role.

Furthermore, although the CJEU has extended the principle to seemingly functionally equivalent acts of digital distribution, it is arguable whether this development hit the right note rather than obscured the reality and confused legal certainty. Whereas the very outcome in the form of exempting secondary distribution from authorisation of the right holder might be reasonable, the means of attaining it are much less so. Given the blurred meaning of the exhaustion principle under the EU *acquis*, employment of the all-or-nothing approach does little to adapt the copyright framework to the needs of today.

Even though employing the exhaustion principle in its narrow sense as harmonised under the InfoSoc Directive to achieve the objectives of the material dissemination approach is questioned in the light of the developments and the need for flexibility, considering the exhaustion principle in its broader meaning is certainly endorsed. Chapter 5 will examine the detriment to legal certainty caused by the denial of a possibility to recognise a comparable limit to exclusive control in the context of the right of communication to the public.

5. RIGHT OF COMMUNICATION TO THE PUBLIC BETWEEN MATERIAL AND IMMATERIAL DISSEMINATION OF A WORK

The right of communication to the public is one of the core economic rights, whose importance has been on a steady rise ever since the transition to the online environment as the primary channel of disseminating a work. During the last century, its significance evolved from securing control over communicating a performance of a work to the audience beyond the immediate reach of performance in space and time to sanctioning broad control over nearly any aspect of a work's dissemination through communicating its content in either a direct or indirect way.⁷⁶⁵

Just as it is important to distinguish between the broad right of distribution encompassing any act of disposing of copies of a work and the narrow right of distribution through sale of copies, it is also crucial to differentiate between the right of communication to the public and the rights of communication to the public. Whereas the latter refers broadly to the different rights encompassing the dissemination of a work other than through distributing copies, the former is one of those rights with its distinctive scope. Whereas the background to the harmonisation of the right under the EU *acquis* will be analysed from a broader perspective of communication rights, the analysis under the EU copyright *acquis* will focus primarily on the right of communication to the public as harmonised under the InfoSoc Directive.

Rights of communication to the public are traditionally viewed as protecting immaterial exploitation of a work.⁷⁶⁶ Hence, unlike with the material dissemination rights such as distribution, no overall limit on the extent of the control that should be accorded to the copyright holder beyond the first communication of a work is generally recognised. The right holder, in general, has a right to authorise or prohibit each and every act of communication falling within the scope of the right. Nonetheless, the developments under the *acquis* suggest that any limits on the extent of control are not ruled out from the outset. As will be seen on the example of the EU copyright *acquis* and, in particular, the CJEU jurisprudence, some boundaries to the exclusive control are desirable to avoid granting more control than necessary to the detriment of other objectives.

Given the breadth of the scope of the right of communication to the public as harmonised under the EU *acquis* and the variety of acts it covers, this chapter does not have an ambition to provide an all-encompassing picture of the right.⁷⁶⁷

⁷⁶⁵ For instance, the right of communication to the public under the EU *acquis* covers direct communication of content of a work such as through broadcast of performance or streaming of a song. It also encompasses indirect communication such as through making a digital copy of a work available for (un)limited access or disposal.

⁷⁶⁶ Depreeuw (2014), p. 245.

⁷⁶⁷ For further analysis of the right, see *Ibid.*, p. 340.

The purpose of the discussion in this chapter is to assess how the development of the scope of the right of communication to the public has contested the confinement of the right to the solely immaterial dissemination notion. Furthermore, relying on the analysis in chapters 2, 3 and 4, this chapter is set to highlight how the reasoning of the CJEU in defining the scope of the right essentially blurs the boundaries between material and immaterial dissemination. As will be demonstrated, the approach is greatly inconsistent as the variety of uses fall under the single broad right of communication, with very little room for appreciating the differences in the specific circumstances of a work's exploitation.

Therefore, the enquiry will focus on the aspects central to the material dissemination approach. These are, as outlined in chapters 3 and 4, the circumstances pointing towards permissibility of limiting exclusive control over dissemination and the circumstances supporting exclusive control beyond the initial act of communication. Hence, it will also be of utmost importance to differentiate between the primary and secondary acts of communication. This is so because the application of the material dissemination concept does not render inapplicable any control over works' dissemination but only exempts dissemination of already distributed copies from exclusive control.

To put it differently, it does not sanction production and dissemination of new copies without authorisation securing appropriate remuneration for the right holder. Equally, the limit to the right of communication to the public in regard to subsequent control over each authorised act of communication would not sanction any independent communication. Hence, for the purpose of the analysis, the initial acts, which are always subject to authorisation, will be distinguished from the secondary acts, control over which is justified to a different extent in varying circumstances. This also implies that the analysis focuses predominantly on the secondary acts in relation to primary communication authorised by the right holder.

This chapter together with chapters 2, 3 and 4 serves to answer the first overall research question, which is *how the development of the rights of distribution and communication to the public under the EU acquis reflects the distinction between material and immaterial dissemination*. More specifically, the present chapter provides an understanding of the rationales for harmonising the right of communication to the public, including placing it in stark contrast to the right of distribution. Next, it illustrates how the rigid distinction between the rights has been challenged by subsequent developments. This is achieved by addressing the following sub-questions:

What circumstances have influenced the need and the form of harmonisation of the right of communication to the public under the EU *acquis*?

How was the distinction between material and immaterial dissemination enshrined under secondary EU law and what were the driving forces?

Does the development of the right of communication to the public under the EU copyright framework reflect immaterial dissemination and, if so, how?

In order to answer these questions, first, the background to harmonising the right of communication to the public at the EU level and the developments influencing its scope are analysed. Besides a short enquiry into the concept of communication and the evolution of the technology enabling it, the harmonisation of the right at the international level, especially in the context of the digital agenda, is analysed. Second, the developments at the EU level besides the adoption of the InfoSoc Directive are addressed, such as CJEU jurisprudence on the conflict of the right with the freedoms of the internal market and the adoption of the Satellite and Cable Directive regulating retransmissions.

Third, the harmonisation of the right of communication to the public under the InfoSoc Directive and the subsequent jurisprudence of the CJEU are analysed from the perspective of primary and secondary communication. The findings of the analysis are contrasted with the notion of immaterial communication to conclude to what extent the development of the right of communication to the public continues to reflect the immaterial dissemination notion.

The chapter is divided into three parts. Part 5.1. provides the background to the harmonisation of the right under the EU copyright *acquis*. It addresses the development of communication rights from the performance right to the broad notion of the communication right under the WIPO CT. Part 5.2. focuses on the harmonisation of the right of communication to the public under EU secondary law and the CJEU shaping the boundaries of the right. Whereas the focus is on the right as harmonised under the InfoSoc Directive, this part also addresses certain other developments important from the perspective of secondary communication, such as the retransmissions under the Satellite and Cable Directive.

Part 5.3. is set to assess how the development of the scope of the right of communication to the public under the *acquis* has shifted its place in the material-immaterial dissemination equation. This part focuses on three major aspects: significance of conferring control over any subsequent communication by default, circumstances pointing towards limiting the extent of control beyond the initial communication, and the place of secondary acts relying on infringing communication.

5.1. Background to the harmonisation of the right of communication to the public under the EU *acquis*

Leaving aside the breadth of the expression “communication” in the definition of communication rights and turning to the premises of the immaterial dissemination notion,⁷⁶⁸ there are numerous ways of communicating a work’s content to the public without producing and distributing tangible copies. Going back to the time when the need to distinguish between the ways of disseminating a work

⁷⁶⁸ As outlined in section 2.2.1.

arose, the main way of exploiting a work in the absence of copies was through its performance to a present public.⁷⁶⁹

Technological development, such as the emergence of broadcasting, enhanced communication of a work through broadening the reach of performance beyond the immediately present public. Not only did it enable further (simultaneous or time-shifted, altered or unaltered) communication of a live performance to a broader public, broadcasting entered the ranks of primary channels, as works could also be communicated directly without relying on the prior live performance.

Next, cable networks, including the Internet, added another layer to communication channels. Similarly, they provided a channel for extending the reach of a live performance or broadcast thereof. Furthermore, they also facilitated independent communication not relying on the acts of live performance or broadcast. With the emergence of the Internet, the reach of communication of a work became virtually unlimited. In many cases, the development de facto eliminated the initial constraints of immaterial dissemination in extracting the appropriate value of a work because of the inability to precisely estimate demand and the limits on an audience confined to space and time.

Hence, technology developed in layers and enhanced communication targeting a wider audience. At the same time, the characteristics of these ways of dissemination differed from the initial form of public performance, allowing much greater control over communication and the receiving public. The fact that all these uses except live performance were harmonised under a single right of communication to the public under the EU *acquis* is capable of giving an impression how inherently complex it must be to define any common criteria for limiting, where necessary, exclusive control over secondary communication.⁷⁷⁰

This section outlines the background of harmonisation of the right of communication to the public under the EU *acquis*. First, it contextualises the right within the broader concept of communication rights to highlight which uses were primarily targeted by the obligations under international law. Second, it outlines the driving forces behind recognition of the broad right of communication and its extension to online dissemination. Third, it summarises the relevant obligations under the international treaties.

Throughout this thesis, the terms material and immaterial dissemination are primarily used to designate the approaches to regulating exclusive rights based on their ability to secure appropriate remuneration through the authorisation of each primary act.⁷⁷¹ However, this chapter must distinguish between two meanings of immaterial in the context of the rights of communication to the public. Under international negotiations “immaterial” is primarily used to describe the

⁷⁶⁹ Or recitation, which is a more suitable term for literary works and is also used in the BC.

⁷⁷⁰ See Lund on the problems caused by the usage of broad concepts that are given a very specific content. Nevertheless, they are necessary for dealing with all the different ways to exploit a work, Lund (2001), p. 620.

⁷⁷¹ As outlined in section 2.2.1.

set of rights of communication of a work other than through distributing physical copies. Hence, the term “immaterial” is used not as suggesting no limits to exclusive control granted by the right.

On the other hand, this is what took place under the EU *acquis*, where the harmonised right of communication to the public has been associated with the notion of immaterial dissemination as justifying placing no general limits on the right holder’s control. Therefore, in order to avoid misunderstandings, this chapter will use the term intangible instead of immaterial where it refers to communication other than through tangible copies without implying any particular stand on the scope of the right.

5.1.1. Communication rights and the notion of communication

Whereas the right of distribution is the central right for so-called copy-related rights, communication to the public builds on a variety of more specific rights grouped by the absence of a tangible medium. Collectively, these rights are referred to as the rights of communication to the public.⁷⁷² Hence, it is important to differentiate between the notion of communication to the public as a broader concept covering divergent ways to present a work, and the right of communication to the public covering a specific type of exploitation. As will be evident, the scope of the latter differs depending on the instrument of international or EU harmonisation or on national law.

For instance, the WIPO Glossary from 1980 defines communication to the public as:

Making a work, performance, phonogram or broadcast perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group. This notion is broader than publication and also covers, among others, forms of uses such as public performance, broadcasting, communication to the public by wire, or direct communication to the public of the reception of a broadcast.⁷⁷³

Accordingly, the notion is a broad one and comprises the variety of acts of making a work perceptible to the public. Similarly, under negotiations on the Model Law the following definition was used for the joint concept of communication to the public:

⁷⁷² Ricketson and Ginsburg (2006), pp. 580–582.

⁷⁷³ WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights. WIPO Publication No. 816 (EFS) 1980, p. 42. The CJEU has at times referred to the Glossary in conjunction with the WIPO CT. For instance, see CJEU, *Phonographic Performance (Ireland) Limited v Ireland and Attorney General*. (2012) Case C-162/10, Judgment of 15 March 2012, para. 34.

“Communication” of a work to the public (including the display, performance or broadcast thereof) “to the public” is the making of the work available to the public through means other than distributing copies. The whole process which is needed for, and leads to, the making available of the work to the public is “communication”, and the work shall be considered “communicated” even if no member of the public to which it was thus made available actually receives, watches or listens to the work.⁷⁷⁴

Under this definition the concept of communication to the public would cover any way of making a work available except through the distribution of copies, even if no member of the public actually perceives it in any way.

On the other hand, under the negotiations on the PPBC, notion of communication was defined as following:

“Communication to the public” is the transmission by electronic, electric or similar means (either by wire or without wire) of the image or sound or both of a work or the sound of recording (including the display of a work and the performance or broadcast of a work or a sound recording) in a way that the said image or sound can be perceived by any person on the same conditions at a place or places whose distance from the place where the transmission is started is such that without the electronic, electric or similar means the images or sound would not be perceivable at the said place or places.⁷⁷⁵

Whereas it is similar to the definition under the Model Law, instead of relying on the term of making available to define the acts, it uses transmission by electronic, electric or similar means. This is explained by the Protocol aiming first and foremost at harmonising the right of communication through transmission, including digital transmissions, as will be shown below.⁷⁷⁶

Accordingly, there are various understandings of the notion of communication to the public. Two main ones ought to be highlighted. A broad concept of communication comprises any act of making a work available for perception by others outside a private circle. A narrow concept of communication is connected to transmissions that make a work perceptible to the distant public. The latter corresponds more to the communication to the public right as recognised under the WIPO CT and harmonised under the EU *acquis*.⁷⁷⁷ Hence, any act that makes a work perceptible to the public appears to fall under the communication of a

⁷⁷⁴ Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. I Introduction. Memorandum prepared by the International Bureau. CE/MPC/I/2-II 1989, p. 2.

⁷⁷⁵ Committee of Experts on a possible Protocol to the Berne Convention. First Session. Questions concerning a possible protocol to the Berne Convention Part II. (Draft). Memorandum prepared by the International Bureau. BCP/CE/I/3 1991, p. 29.

⁷⁷⁶ At the beginning of the negotiations, communication to the public was discussed mainly in conjunction with other rights, and only insofar it concerned the term public.

⁷⁷⁷ Importantly, the WIPO Glossary includes direct communication of a reception of a broadcast into the scope of communicating a work to the public.

work. Only the distribution of copies is generally exempted. Nevertheless, such broad language could theoretically encompass distribution of copies, as it is also in the end making a work perceptible.

Rights of communication to the public, aimed to secure the right holder's control over exploitation of a work, comprise different rights covering the acts of communication of an immaterial nature in a sense of the absence of material mediums.⁷⁷⁸ Hence, the key feature is making a work perceptible to the public. Notably, the rights of communication to the public protect exploitation of a work, thus communications within the restricted group of people that do not affect exploitation of a work should not be subject to control.⁷⁷⁹

Rights of communication to the public have been gradually recognised on the international and national levels for all types of works, which has not always been the case. For instance, the BC does not grant a general right of communication to the public, but instead few rights covering different types of communication for various types of works.⁷⁸⁰ These fragmented provisions on the different types of communication rights are often redundant or self-contradictory.⁷⁸¹

At the time of the adoption and the subsequent revisions of the BC, ways of communicating a work were typically associated with a particular type of a work. For instance, the BC maintains the distinction between performance and recitation rights as they cover musical and literary works, respectively. The development of technology and the emergence of the online environment in particular blurred the disparities and the types of communication are no longer confined to a single type of work.⁷⁸² The differences, however, have not disappeared altogether. Ultimately, sound recording is more comparable to a performance or broadcast than a painting, for which the right of display (not harmonised under international law) would be much closer.

5.1.2. Performance as the initial form of communication

Historically, the right of public performance was among the first widely recognised rights under copyright and the first when it comes to intangible dissemination.⁷⁸³ Whereas it was primarily associated with live performances to a present public, later development of technology overcame the time and distance challenges of communicating a performance to a distant public, but not in the same

⁷⁷⁸ Depreeuw (2014), p. 245. For the grounds for using the term “intangible” rather than “immaterial” in this context, see section above.

⁷⁷⁹ *Ibid.*, p. 340.

⁷⁸⁰ Dreier and Hugenholtz (2006), p. 49.

⁷⁸¹ Ginsburg (2004), p. 2.

⁷⁸² Ricketson and Ginsburg (2006), p. 703; Depreeuw (2014), p. 341. Also, Ricketson (1987), p. 424.

⁷⁸³ More on the brief history of public performance right, see Quintais and Poort (2018), pp. 14–24.

way for all works.⁷⁸⁴ The BC maintains a distinction between public performance and other types of communication to the public, using the criteria of public to which the communication is directed.⁷⁸⁵ The right of public performance under the BC covers acts (whether assisted or not by technical devices) directed at the present audience as opposed to acts of transmission to the public not present at a place.⁷⁸⁶

The right of public performance was recognised for the first time under the Brussels Act. Article 11 of the BC then introduced it for dramatic and musical works, which at that time were the primary subject matters for performance. Another right of performance is recognised under Article 14(1)(ii) for cinematographically adapted or reproduced literary or artistic works.⁷⁸⁷ Yet another article (Article 11ter) provides for the right of recitation for literary works. Essentially, both performance and recitation rights cover very similar acts, albeit in relation to different subject matters.⁷⁸⁸ Nonetheless, attempts to reconcile these two rights did not succeed.⁷⁸⁹

Although at the time of the Brussels Conference in 1948 most countries already provided the public performance right, its adoption was not straightforward. This was mainly due to various exceptions existing under national laws. Not least, it was feared that the recognition of a general right of performance would provide right holders with excessive exclusive control that might influence other fields of law, such as competition law.⁷⁹⁰

The right of public performance under the BC covers solely acts of communication to a present public. While the performance itself can be a direct (live) or a recorded one, the public must be present at the premises where performance

⁷⁸⁴ Performance was a primary way to communicate and exploit a work before the development of technologies for recoding, time-shifting, etc. See also Depreeuw (2014), p. 341.

⁷⁸⁵ See more in the Committee of Experts on a possible Protocol to the Berne Convention. First Session. Questions concerning a possible protocol to the Berne Convention Part II. (Draft). Memorandum prepared by the International Bureau. BCP/CE/I/3 1991, p. 28.

⁷⁸⁶ Ricketson and Ginsburg (2006), p. 703.

⁷⁸⁷ Brussels text included the right of performance and presentation, the latter is covered by the term “performance” under the Stockholm Act. See Sterner et al. (1968), pp. 19–20.

⁷⁸⁸ On Article 11ter amplifying Article 11, see Ricketson (1987), p. 111. Also, Stewart and Sandison (1989), pp. 123–124; Nordemann et al. (1990), p. 118. It is also further supported by the fact that under the negotiations on the PPBC the definition of public performance included public recitation. See the Committee of Experts on a possible Protocol to the Berne Convention. First Session. Questions concerning a possible protocol to the Berne Convention Part II. (Draft). Memorandum prepared by the International Bureau. BCP/CE/I/3 1991, p. 28. On the absence of clarity behind the differentiation see also Ricketson and Ginsburg (2006), pp. 714–716. On the other hand, Nordemann explains it by the fact that earlier only a performance required the copyright holder’s consent, but not a recitation. See Nordemann et al. (1990), p. 118.

⁷⁸⁹ Nordemann et al. (1990), p. 119.

⁷⁹⁰ On the point see Ricketson and Ginsburg (2006), p. 712; Stewart and Sandison (1989), p. 65.

occurs.⁷⁹¹ The phrase “by any means or process” was included into Article 11 at the Stockholm conference to reconcile the right with the provision under Article 13, which provided for a right of recording of musical works and subsequently performing them from such a recording using technical means.⁷⁹² Thus, Article 11 of BC covers performance of dramatic and musical works which is either live or recorded and either assisted or not by technical means, but to a present public.

While it may seem that the right covers solely so-called push communication, where a work is communicated without a request from the audience, it might as well cover pull communication or communication on demand. Namely, the WIPO in its Guide to the BC from 1976 stated that there was no difference between a live performance and a discotheque where customers choose their music by using coins.⁷⁹³ Thus, it suggested that the scope of public performance is much broader than push communication. In the light of the subsequent developments and the harmonisation of a broad communication to the public right under the WIPO CT, along with the making available right aimed specifically at on-demand transmission, it could perhaps be contested whether such cases fall under the performance right under the BC.

5.1.3. Broadcasting as broadening the reach of performance to a remote public

With the development of technology, the new ways of dissemination emerged, allowing transmission of signals carrying copyright-protected content to a much broader public than that potentially reached by a public performance to a present audience. Broadcasting of a performance became one of the ways to reach a public not present at the premises. Besides the broadcasting of a performance, technology also enabled broadcasting of a work itself, even if it would generally not be subject to performance but of recitation or even display.⁷⁹⁴

Hence, the emergence of broadcasting resulted in the two main advances. First, it allowed a live performance to be communicated to a much wider public not present at the premises.⁷⁹⁵ Second, it provided a primary channel of dissemination not dependent on the performance, i.e. through broadcasting a film or

⁷⁹¹ Ricketson and Ginsburg (2006), pp. 704, 715.

⁷⁹² Sterner et al. (1968), p. 27.

⁷⁹³ Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). WIPO Publication No. 615(E) 1978, p. 64.

⁷⁹⁴ On broadcasting being a communication of a work see also Opinion of Advocate General in Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08). 3 February 2011, para. 117.

⁷⁹⁵ See Gordon on artistic performance becoming a public good with the development of technology and ability to reach audience beyond a concert hall. Gordon (2003), p. xv.

sending images accompanied by music.⁷⁹⁶ In the first case, the recognition of an exclusive right of broadcasting would secure the right holder's ability to control any subsequent use of performance and the new market for its consumption. In the second case, the right would ensure that the broadcasting as a separate way of exploiting a work is subject to right holder's authorisation and, hence, secure remuneration.

Faced with new channels of communication, such as through broadcasting, copyright holders and various intermediaries sought to protect their interests in potential commercial exploitation of works. Essentially, broadcasting enabled the same performance of a work, whether transmitting a live or a recorded one.⁷⁹⁷ Whereas the relation between copyright and broadcasting is a complex one, the current section will briefly touch upon broadcasting as a subject to the exclusive author's right.⁷⁹⁸

It would perhaps seem logical to cover broadcasting with the recognised right of public performance, as the only difference was the presence of the public at the receiving end and technical means involved.⁷⁹⁹ Rightly so, the option was discussed at the negotiations on the BC revision but was not adopted.⁸⁰⁰ Instead, Article 11bis(1)(i) was introduced to the BC in order to provide a right of authorising broadcasting limited to literary and artistic works. Whereas there is no definition of broadcasting in the text of the BC, some derive it from the wording of the Article to mean the wireless diffusion of signs, sounds, or images.⁸⁰¹ Others refer to the Rome Convention, which provides that it is a communication of works to the public by radio diffusion.⁸⁰²

The right of authorising broadcasting under the BC is understood to include only wireless communication, which is also reflected in the heading of the Article. Communication by wire is instead covered by the right of communication to the public by wire under Article 11bis(1)(ii). On the other hand, the right of

⁷⁹⁶ The two-fold nature of broadcasting in respect of communication of a work is also highlighted in the draft of the Model Law on copyright. The author is granted a right of broadcasting, which is the right to communicate a work (including the display, performance, or broadcast of a work) to the public by broadcasting. See Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. I Introduction. Memorandum prepared by the International Bureau. CE/MPC/I/2-II 1989, p. 7.

⁷⁹⁷ On the history of broadcasting and the relation to copyright law, see Quintais (2017), pp. 56–61.

⁷⁹⁸ Broadcasting is also subject to neighbouring rights. For an extensive summary of regulation, see Guibault and Melzer (2004).

⁷⁹⁹ This is if broadcasting is seen as receiving a signal on a TV set which is placed in a public space. If broadcasting is instead considered as sending a signal carrying a work or its performance, other arguments arise.

⁸⁰⁰ Ricketson and Ginsburg (2006), p. 722.

⁸⁰¹ See Nordemann et al. (1990), p. 124.

⁸⁰² Ricketson (1987), p. 439. Radio-diffusion, in turn, is understood to include both radio and television. See Stewart and Sandison (1989), p. 124.

communication to the public of the performance of dramatic and musical works covers both communication by wire and wireless communication.⁸⁰³ Similarly, the right of communication to the public of the recitation of literary works under Article 11ter(1)(ii) covers both types of communication.

Whereas it is unclear whether the right of broadcasting covers rebroadcasting from the wording of Article 11bis(1)(i) alone, it is somehow clarified in the next paragraph. According to Article 11bis(1)(ii), rebroadcasting or any communication to the public of broadcast by wire is subject to an exclusive right when it is performed by an organisation other than the original one. However, it is not very clear why each act of retransmission is subjected to authorisation or how to differentiate between the primary broadcast and any retransmissions.⁸⁰⁴

Accordingly, Article 11bis(1)(ii) seems to exempt the acts of retransmission either through rebroadcasting or communication by wire when it is made by the same organisation having initial authorisation. It is, however, questionable on what conditions these acts are exempted. Namely, whether retransmission can reach new territories, take place at a different date, etc. On the one hand, where no new organisation is involved and retransmission is a simultaneous one, it seems not to constitute communication requiring authorisation under Article 11bis of the BC, even if it takes place in a different territory.⁸⁰⁵ On the other hand, the wording also suggests that, in principle, any act of retransmission is a relevant act, even if directed at the same public.⁸⁰⁶

Hence, the outcome seems to be that every act of broadcasting, whether a primary or a secondary one, is an act of exploitation requiring the right holder's authorisation.⁸⁰⁷ Whereas the right to authorise primary broadcasting is covered under the first paragraph of Article 11bis(1), secondary acts of retransmission are within the scope of the right pursuant to Article 11bis(1)(ii). Nevertheless, acts of retransmission are exempted if they are carried out by the same organisation as the initial broadcast. Given that the only condition for secondary acts of broadcasting to fall within the exclusive right is that these acts are carried out by an organisation other than the original one, this condition deserves special attention.

Whereas the text of Article 11bis(1)(ii) refers to an organisation other than the original one, it was by far not the only option discussed during negotiations on Article 11bis. The question whether and when retransmission of a broadcast

⁸⁰³ Nordemann et al. (1990), p. 124.

⁸⁰⁴ Depreeuw (2014), p. 280.

⁸⁰⁵ On simultaneous transmissions, see Ricketson and Ginsburg (2006), p. 737. Also, under the negotiations on the Model Law, simultaneous rebroadcast by the same organization was exempted from the exclusive right. See Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. I Introduction. Memorandum prepared by the International Bureau. CE/MPC/I/2-II 1989, p. 21.

⁸⁰⁶ Depreeuw (2014), p. 290.

⁸⁰⁷ On the secondary act of broadcasting, see Depreeuw (2014), pp. 290–291; Quintais (2017), p. 61.

would require consent became subject to extensive debate.⁸⁰⁸ Notably, another criterion discussed was the reach of the public. The alternative solution would be that no separate authorisation was necessary for simple retransmission that did not extend the reach of a primary broadcast and merely improved the quality of reception.⁸⁰⁹

The concept of a new public as a prerequisite for qualifying retransmission as requiring a separate authorisation was dismissed as too vague, *inter alia*, on the ground that it could be argued that every transmission by different technical means would reach a new public and become subject to another authorisation.⁸¹⁰ The latter had to be avoided in order to ensure that the broadcasting organisation with authorisation would be able to send the signal through its stations irrespective of the way of doing so and without the need to obtain additional authorisation.⁸¹¹

In the context of Article 11*bis*(1)(ii), the reference to a different organisation appears no less vague. Indeed, the concept provides very little guidance on why acts of retransmission should be subject to the exclusive right at all. Also, the reference does not clarify why retransmissions by the original broadcaster should always be exempted from the authorisation requirement, including when they result in a foregone profit for the copyright holder. The negotiations on the Model Law suggest that the relevant factor is not only a new organisation, but also whether the retransmission is simultaneous and unaltered.⁸¹²

Some interpret the history of the BC as not implying that unaltered simultaneous retransmission to the same coverage area would be subject to authorisation.⁸¹³ This is supported by the fact that retransmission of a broadcast by cable by a third party was not a reality back at the time of the Brussels conference and, hence, not contemplated by the provisions. Essentially, what the provision meant to achieve was that retransmission outside the transmission area of first broadcast required authorisation, which falls back on the notion of a new public.⁸¹⁴

Although the new public criterion has been rejected, in my opinion, it is relevant consideration even if put in conjunction with a new organisation requirement.

⁸⁰⁸ For instance, the UK delegation suggested to include three conditions for rebroadcasting to fall under the exclusive right: if it takes place in a country of the Union other than the original broadcast; if it is done by a body other than the original broadcaster; and if it is broadcasted to audience not contemplated by the original body. See Records of the Intellectual Property Conference of Stockholm 1967. Vol. 1. WIPO 1971, p. 671.

⁸⁰⁹ Depreeuw (2014), p. 285.

⁸¹⁰ *Ibid.*, p. 286.

⁸¹¹ Ricketson and Ginsburg (2006), p. 733.

⁸¹² Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. Memorandum prepared by the International Bureau. III Comments on the draft model provisions for legislation in the field of copyright. CE/MPC/I/2-III 1989, p. 28.

⁸¹³ Peukert (2017), p. 891.

⁸¹⁴ *Ibid.*, p. 891.

Essentially, the reason for granting the exclusive right to authorise an act is to secure the exploitation of a work. Hence, subjecting acts of retransmission to exclusive control must intend to provide an opportunity for the right holder to obtain remuneration. However, whether such retransmission has a potential of generating additional value will depend on aspects far beyond the identity of the organisation. For instance, it will depend on whether a new public is reached, i.e. the potential audience is willing to pay for it, presumably not having access to the work before. Whether or not this public is reached by a different organisation should be of minor importance.⁸¹⁵

Hence, it is not utterly convincing to differentiate between the original broadcaster and different organisation for this purpose.⁸¹⁶ Although it could be argued that the right holder is in a better position to negotiate the remuneration with an original broadcaster than with a different organisation, it would also raise the question of competition. For instance, it is not justified from an economic point of view to subject simultaneous transmissions to additional remuneration, which the right holder must have claimed from a single broadcaster.⁸¹⁷ All this suggests that the new public may still be relevant for examining the reach of the broadcasting right in regard to retransmissions. Importantly, the new public would have to be assessed in such cases, not in the territorial sense but in the economic sense.⁸¹⁸ Because what is essential for the authors is the remuneration corresponding to the territory in which the broadcast can be received.⁸¹⁹

Yet another aspect that is relevant to the subsequent development of the right of communication to the public on the EU level is viewing the public receipt of a broadcasting signal as an act of communication to the public.⁸²⁰ On the one hand, copyright protection and the rights of communication to the public shall leave enough space for enjoyment of the work and its reception.⁸²¹ On the other hand, the advancement of reception technology required a delimitation between mere reception and communication of a work as an act relevant to exploitation.⁸²²

Although the question of public reception of communication as an act of communication to the public is not resolved, qualifying it as an act of communication requiring authorisation received some support.⁸²³ One argument is that, even if it

⁸¹⁵ See also CJEU, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*. (2006) Case C-306/05, Judgment of 7 December 2006, paras 40–41. And the Opinion of Advocate General in *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*. (2006) Case C-306/05. 13 July 2006, para. 50.

⁸¹⁶ See Reimer calling for the revision of Article 11*bis* on the grounds that the Article is not clear on the matter of retransmissions. Reimer (1979b), p. 564.

⁸¹⁷ Peukert (2017), p. 893.

⁸¹⁸ Depreeuw (2014), p. 344.

⁸¹⁹ Ulmer (1986), p. 713.

⁸²⁰ For instance, by placing a TV receiver in a pub or other public place.

⁸²¹ Depreeuw (2014), p. 344.

⁸²² *Ibid.*, p. 317.

⁸²³ *Ibid.*, p. 265.

is not a substitute for existing form of exploitation, the right holder shall be able to participate where the use of a work generates income by attracting the public.⁸²⁴ Furthermore, it should not matter whether an entity receiving a signal publicly is making any profit, as long as it affects the right holder's right to exploit a work.⁸²⁵ The mere reception and distribution of a signal by a collective antenna, on the other hand, would not constitute communication to the public.⁸²⁶

In a sense, the broadcasting right is a highly technical one, which covers a specific form of exploitation extending to a wider public. Hence, there are concerns about the breadth of the right and possibilities to restrict it, not least in relation to retransmissions.⁸²⁷ Hence, Article 11*bis*(2) provides the parties with a possibility to establish the conditions under which the right may be exercised, provided that they do not prejudice the right to obtain equitable remuneration.⁸²⁸ This presents a possibility of compulsory licenses that would turn the right into a remuneration right.⁸²⁹

Article 11*bis*(2), which provides an option for states to introduce a compulsory license for the retransmission of a broadcast, is the only Article under the BC in relation to communication rights which provides a possibility to limit control over subsequent communication. In the late 1970s BIRPI (United International Bureaux for the Protection of Intellectual Property, the predecessor of the WIPO) discussed the need to update the Convention with a possibility to restrict the rights.⁸³⁰ The rights under consideration were first and foremost the right of translation and the broadcasting right.⁸³¹ The discussion resulted in negotiations with developing countries and the adoption of the Paris Act, which provided them with a possibility to define exceptions to translation and reproduction rights.⁸³²

⁸²⁴ Ibid., p. 338.

⁸²⁵ Ibid., p. 338. On the matter addressed by the CJEU, see section [5.2.3.2.1.3](#).

⁸²⁶ Ibid., p. 285.

⁸²⁷ Ibid., p. 299.

⁸²⁸ On compulsory licensing under Article 11*bis*(2), see Quintais (2017), pp. 61–70.

⁸²⁹ See Schovsbo on compulsory licensing, emphasising the significance of anticompetitive effects created by copyright. Schovsbo (2011), p. 325.

⁸³⁰ One of the options under the consideration was to provide a general possibility to restrict the rights. Another option was to provide an exception for educational purposes, either for all the parties or solely for the developing countries.

⁸³¹ Study of the Entire Situation of International Relations in the Field of Copyright. The BIRPI Memorandum. BIRPI/SGC-I/7 1969., pp. 8–9.

⁸³² Under the Paris Act, Article II (9) of the Appendix to the Berne Convention. Broadcasting right was not among the rights, but it is generally covered under Article 11*bis* of the Stockholm Act. See Ulmer (1971), p. 363.

5.1.4. Communication to the public from an act of secondary to an act of primary communication

Besides the right of performance and the right of broadcasting, the third type of rights covering intangible dissemination under the BC is the right of communication to the public. The right is granted not in respect of a work itself but its performance (or recitation in the case of literary works) or broadcast.⁸³³ One example would be communication to the public of a broadcast by its public receipt, touched upon in the previous section. The right of communication to the public under the BC was quite separate from performance and broadcasting rights.⁸³⁴ The main function of the right is to subject acts of subsequent communication to the exclusive control of the right holder.

No blanket right of communication to the public is provided under the BC. Instead, the scope of the right is derived from several provisions.⁸³⁵ First, the BC grants the right of communication to the public of performance of musical and dramatic works under Article 11(1)(ii).⁸³⁶ Similarly, it provides for the right of communication to the public by wire or analogue instruments of broadcast of literary and artistic works under Article 11bis(1)(ii) and 11bis(1)(iii) of the BC. Second, the BC grants the right of communication to the public of the recitation of literary works under Article 11ter(1)(ii). Third, the BC also recognises the right of communication to the public of adapted literary or artistic works under the Article 14(1)(ii).

Whereas at the time of the BC adoption and revision the communication to the public right was of secondary importance and covered, in essence, secondary acts of communication relying on the initial acts (such as performance, broadcast, etc.), its significance increased with the emergence of the online environment. At the outset of online dissemination and negotiations on the WIPO CT, the question that arose was whether the reach of the fragmented right of communication to the public under the BC extended to online dissemination. Views differed.⁸³⁷

Under the negotiations on the Model Law in the early 1990s the definition of the scope of the right of communication relied on the provisions of the BC.⁸³⁸

⁸³³ Ricketson and Ginsburg (2006), p. 741.

⁸³⁴ Committee of Experts on a possible Protocol to the Berne Convention. Sixth Session. Report adopted by Committee. BCP/CE/VI/16-INR/CE/V/14 1996, p. 29.

⁸³⁵ Ricketson and Ginsburg (2006), pp. 730–731. Also, Ricketson (1987), p. 432.

⁸³⁶ Before the Stockholm Act of 1967 the wording of the provision was slightly different, using the term distribution: “11(1) The authors of dramatic, dramatico-musical or musical works shall enjoy the exclusive right of authorizing: (ii) the public distribution by any means of the presentation and performance of their works”.

⁸³⁷ Ricketson and Ginsburg (2006), pp. 742–743. Also, see Ginsburg on the application of the BC, Ginsburg (2004), p. 8.

⁸³⁸ Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. Memorandum prepared by the International Bureau. III Comments on the draft model provisions for legislation in the field of copyright. CE/MPC/I/2-III 1989, p. 22.

Nonetheless, under the Model Law the rights of communication were systematised. Besides the rights of performance and broadcast, the draft included the right to authorise communication of a work (including the display, performance or broadcast of a work) by cable or any other means.⁸³⁹ Communication to the public as a concept was also discussed under the negotiations on the PPBC, but mainly in respect to the definition of public. However, it was back into the programme under the discussion on digital transmissions in 1995. The question was how to deal with digital transmissions and delivery in the absence of certainty as to whether rights under the BC already covered such uses. Besides the proposal to recognise a new right of transmission, the application of reproduction and distribution rights was discussed.⁸⁴⁰

The question of possible extension of the right of communication to the public to the acts of online transmission was equally on the agenda. Unlike the other rights under consideration, the right of communication to the public was not widely harmonised on the international level and applied in different scope to different works (or rather their performances, recitations, and broadcasts). Hence, the introduction of a broad right of communication to the public was also discussed. Following the negotiations, the question of extending the scope of the right of communication to the public to all types of work was combined with the question of digital transmissions.⁸⁴¹ Hence, one of the main driving forces (if not the chief one) behind the recognition of the broad right of communication to the public was the intent to extend it to digital transmissions.⁸⁴²

From then on, the right of communication to the public was discussed as concerning a work rather than its performance or broadcast. More precisely, discussion on digital transmissions dealt explicitly with situations where a work was initially communicated through online transmission, without relying on previous acts such as performance or broadcasting. Such communication would mean making a work perceptible (equivalent to performance) and not merely a transmission of a signal that extended the reach of the previous communication of a work. Whereas it is a reasonable development, today the right must be viewed beyond the transmission realm, as every transmission might not be per se equal to exploitation.⁸⁴³

⁸³⁹ Committee of Experts on Model provisions for legislation in the field of copyright. First Session. Draft model provisions for legislation in the field of copyright. I Introduction. Memorandum prepared by the International Bureau. CE/MPC/I/2-II 1989, p. 7.

⁸⁴⁰ Committee of Experts on a possible Protocol to the Berne Convention. Fifth Session. Report adopted by Committee. BCP/CE/V/9-INR/CE/IV/8 1995, p. 59. Some delegations supported also the application of the right of display, see *Ibid.*, p. 68.

⁸⁴¹ Committee of Experts on a possible Protocol to the Berne Convention. Sixth Session. Report adopted by Committee. BCP/CE/VI/16-INR/CE/V/14 1996, p. 24.

⁸⁴² Ficsor (2002), pp. 494–495.

⁸⁴³ Hence, the right should not be aligned solely with it. See Depreeuw (2014), p. 343.

5.1.5. Broad right of communication to the public and the digital agenda

The late 1980s marks a shift in the approach to exclusive rights under international law. Perhaps the first glimpse of it, although not in the negotiations on a binding legal instrument, can be traced under the discussions on the Model Law, which served as a draft for the subsequent discussion on the PPBC. The tendency to talk about separate categories of works and respective rights gradually disappeared. This can be traced clearly in the two outcomes of the negotiations on the Model Law. First, the right of recitation was assimilated with the right of performance, and the latter was still discussed separately from other forms of intangible dissemination. Second, a blanket right of communication to the public covering all types of works was included in the draft. Therefore, the right would be broader than the communication to the public right under the BC, where it covered communication of performance, recitation or broadcast rather than a work.⁸⁴⁴

The tendency to broaden the scope of the right continued under the negotiations on the PPBC. Out of the communication rights, only the right of broadcasting was addressed in greater detail at the outset of the negotiations. Nevertheless, the right of communication came under the spotlight in conjunction with its possible application to digital transmissions. There was more or less a consensus on a need to recognise a right to authorise the transmission of a work that would apply in a digital environment, but there was no agreement on which right shall be applied.⁸⁴⁵ The notion of the right of digital transmission inevitably overlapped with the rights recognised under the BC, namely the right of broadcasting and, partially, the right of communication to the public.⁸⁴⁶ The extension of the right of communication to the public was considered a possible option, that would, however, also result in some traditional forms of exploitation falling within its scope.

The main proponent of assigning the right of communication to the public to digital transmissions was the EC. The EC made a Proposal which was later copied into the WIPO CT (with the only difference that under the WIPO CT the provision would refer to Article 11 as a whole):

⁸⁴⁴ See the previous section on the initially secondary character of the right of communication to the public relying on a primary communication through performance, broadcast, etc. On the other hand, the right under the Model Law covered solely communication by wire.

⁸⁴⁵ Some suggest that the whole purpose behind the right to authorise digital transmissions was to secure control over all digital performances and distribution regardless whether in the public or private sphere. See McManis (1996), p. 272.

⁸⁴⁶ See the statement by the delegation of Japan, Committee of Experts on a possible Protocol to the Berne Convention. Sixth Session. Report adopted by Committee. BCP/CE/VI/16-INR/CE/V/14 1996, pp. 24–25.

Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.⁸⁴⁷

The EC proposal introduced a making available right as a sub-right of the right of communication to the public. Although it was the first time making available would be used as a designation of a right, the concept was not unknown under the BC. Besides the first being present in the earlier definition of publication under the Convention, it is also used for calculating the term of protection under Article 7 of the BC. A work being made available was a precondition to a lawful quotation exception under Article 10. The expression “making available” relates to every form of publication of a work and is not restricted to copies but extends to radio diffusion and merely provision of access.⁸⁴⁸

Furthermore, the term making available is also defined in the WIPO Glossary. To make a work available to the public means “to offer a work to the public in such a way as to make it accessible according to its characteristics, through exhibition, publication, performance, broadcasting, or other forms of communication to the public.”⁸⁴⁹ Hence, the making available concept covered both copy-related and non-copy related presentation of a work to public. In the absence of a consensus on a suitable right for digital transmission, the term making available was endorsed as a basis of the umbrella solution.⁸⁵⁰ Whilst it meant that the right of making available covering digital transmissions is placed under the right of communication to the public under the WIPO CT, the contracting parties are free to implement it under other rights, including the right of distribution.⁸⁵¹

During the discussion few concerns were raised as to the extension of the right of communication to the public to online transmissions. The delegation of Japan has rightly pointed out that one shall be careful with expanding the right of communication to the public, as it may in the end cover not only new forms of electronic communication but subject matters already covered by other rights not harmonised by the BC, such as public display, as well.⁸⁵² The UNESCO delegation developed the argument a bit further, stating that a difference shall be

⁸⁴⁷ Committee of Experts on a possible Protocol to the Berne Convention. Seventh Session. Proposals of the European Community and its Member States. BCP/CE/VII/1-INR/CE/VI/1 1995, p. 3.

⁸⁴⁸ Ficsor (2002), pp. 168–169.

⁸⁴⁹ WIPO Glossary of Terms of the Law of Copyright and Neighboring Rights. WIPO Publication No. 816 (EFS) 1980, p. 153.

⁸⁵⁰ Ficsor (2002), p. 169.

⁸⁵¹ See more on the provision in sections 3.1.5.4. and 5.1.6.2.

⁸⁵² Committee of Experts on a possible Protocol to the Berne Convention. Sixth Session. Report adopted by Committee. BCP/CE/VI/16-INR/CE/V/14 1996, p. 25. This is indeed so if we consider the adopted right of making a work available to the public.

maintained between the acts of transmission and acts of communication to the public. Covering the former with the right of communication to the public was advantageous for authors.⁸⁵³

Similarly to UNESCO, the Business Software Alliance (BSA) presented a view that the nature of an act shall play a role in, for instance, whether a copy is created only in memory or on a hard drive, or a work can be accessed online. The right of distribution was the preferred option for covering certain types of acts.⁸⁵⁴ The American National Music Publisher Association rightly underlined that digital transmission could, at the same time, involve other rights such as public performance, communication and distribution.⁸⁵⁵ The Electronic Industries Alliance stressed the importance of ensuring that distributed digital copies could be further disposed of by end users, like in the tangible world, to maintain a balance between end users and right holders.⁸⁵⁶

UNESCO supported the proposal of the EC in general, i.e. to use the communication to the public right for dealing with digital transmissions, but was sceptical about the part on the making available right in the light of the absence of any proposed exceptions to the right. Also, it was feared that in relation to analogue communication that was covered by certain provisions of the BC, the proposal could extend the coverage of acts of performance, broadcasting, and communication outside of normal exploitation of a work.⁸⁵⁷

Harmonising the right of making available to the public encompassing online dissemination under the broader right of communication to the public influenced the nature of the latter right. Whereas under the BC the right would deal with the acts of secondary transmission, now through the making available right its scope would extend to the acts of primary communication. Hence, acts with different characteristics and subject to different regulation in analogue circumstances would become subject to a single broad right in the digital environment.

Such as shift from different rights in analogue circumstances to a single right in the online context implicates drawing the appropriate boundaries of the scope of granted protection, where exclusive control over any subsequent (secondary) acts undermines the access to a work and competition. Therefore, by placing the right of making available under the right of communication to the public, the very different ways of communicating a work would be put together. Namely, direct communication of a work's content, secondary communication of a work extending the reach of primary communication and making a work available for access.⁸⁵⁸ The right of making available would fundamentally differ from the traditional communication rights such as performance or broadcast, as it would

⁸⁵³ *Ibid.*, p. 29.

⁸⁵⁴ *Ibid.*, p. 31.

⁸⁵⁵ *Ibid.*, p. 30.

⁸⁵⁶ *Ibid.*, p. 34.

⁸⁵⁷ Committee of Experts on a possible Protocol to the Berne Convention. Seventh Session. Report adopted by Committee. BCP/CE/VII/4-INR/CE/VI/4, p. 21.

⁸⁵⁸ Dixon and Hansen (1996), p. 610.

focus not on transmission but rather making a work available for access. Thus, even though in the analogue world the concept merely brought together the different forms of dissemination, its scope in the context of the online environment would be rather different.

5.1.6. Harmonisation of the right of communication to the public under international law

As was outlined in the section above, harmonisation of the right of communication to the public under the BC is rather fragmented. It relates to acts of transmission which are secondary to a work's communication such as through performance or broadcast. The importance of recognition of the broad right materialised with the emergence of the digital environment and the possible extension of the right from covering secondary acts to encompassing the primary acts of communication of a work.

The WIPO CT harmonised a broad right of communication to the public and, hence, addressed the lacunae of protection granted under the BC. This section focuses specifically on the provisions under the WIPO CT, as its adoption became the main driving force behind the harmonisation of the right of communication to the public on the EU level, and the European legislator relied on the wording on the Treaty when drafting the InfoSoc Directive.

5.1.6.1. Broad right of communication to the public under the WIPO Copyright Treaty

The Diplomatic Conference adopting the WIPO CT followed the negotiations on the PPBC and built upon the results of the submissions from the delegations. The aim of harmonising the right of communication to the public under the Treaty was to expand the limited scope of the right recognised under the BC, filling in the blank spots.⁸⁵⁹ Furthermore, the adoption of the right also implemented initiatives under the digital agenda concerning digital transmissions. The “side effect” of the process was creation of a broad right covering communication from a live performance to online delivery.⁸⁶⁰

The draft proposal by the Chairman of the text of the Treaty under Article 10 (Article 8 in the final text) was almost verbatim a copy of the Proposal made by the EC:

Without prejudice to the rights provided for in Articles 11, 11*bis*, 11*ter*, 14 and 14*bis* of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works,

⁸⁵⁹ Ginsburg (2004), p. 12. Also, Ginsburg and Budiardjo (2018), p. 156.

⁸⁶⁰ Ginsburg (2002), p. 120.

including the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them.⁸⁶¹

The only difference was the wording of the first sentence, namely that Article 11bis was included as a whole, unlike the PPBC. This would essentially mean that the Treaty was without prejudice to the BC provisions on the communication to the public or broadcasting or rebroadcasting of the literary and artistic works and communication to the public by loudspeaker. Even more importantly, the provisions of Article 11bis(2) would not be affected, and, thus, the ability of states to opt for implementing non-voluntary licenses for retransmission of broadcast.⁸⁶²

The adopted text of the WIPO CT, however, differs to the effect that only Article 11bis(1)(iii) could be affected by the WIPO CT, probably because of the application of the right of communication to the public under the WIPO CT to wireless transmissions as well. Article 8 is hence modelled after the general right of reproduction,⁸⁶³ and reads as follows:

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

The Article is accompanied by the Agreed Statement, which confirms that the Treaty is without prejudice to the option of introducing compulsory licenses under Article 11bis(2) of the BC:

Agreed statement concerning Article 8: It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).

The first part of the Article extended the right of communication to the public by wire or by wireless means to all types of works. The proposal stressed that communication to the public covers acts of making available by means or processes other than distributing copies. Further, communication implied transmission to

⁸⁶¹ Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, p. 42.

⁸⁶² Ibid., p. 44.

⁸⁶³ Depreeuw (2014), p. 346.

the public not present where it originates.⁸⁶⁴ Hence, it would cover all the communication of a work besides distributing copies and communicating a work to a present public. It can be concluded that private performance would fall outside the scope of the right, whereas broadcasting would come within the scope.⁸⁶⁵

Although initially a separate right of transmission was discussed for dealing with communication to a remote public, it was argued that opting for the right of communication to the public to cover such acts made the wording consistent with the BC.⁸⁶⁶ Article 8's reference to communication by wire or by wireless means might appear confusing in the context of online dissemination. The distinction between communication by wire and wireless communication was developed under the BC with regard to then existing technologies, i.e. to differentiate between broadcasting and other ways of transmitting a signal carrying a work. In the context of the online environment, it would be of no relevance whether a user or a person communicating a work or making it available accesses the network through wi-fi, cable network or mobile network. Essentially, the connection always passes through cables (the Internet's backbone) or satellites (for mobile networks).

Unlike the right of distribution under the Treaty, the right of communication to the public under the WIPO CT is commonly understood as encompassing acts of initial and subsequent transmissions of a work.⁸⁶⁷ It is also understood that the right does not cease to exist upon any circumstances, although certain limitations and exceptions may be applied in accordance with the principle of minor reservations.⁸⁶⁸ Receipt of the transmission is not an essential condition, meaning that the public need not to actually perceive a work. The only condition is that persons to whom access is offered form a public.⁸⁶⁹

Against the background of the previous section and the obligations under the BC, the right of communication to the public essentially harmonises both acts of primary and secondary communication by extending the concept originally used to characterise secondary communication. It covers any communication of a work to a distant public, be it an act relying on performance to the present public or

⁸⁶⁴ Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, p. 44.

⁸⁶⁵ Hugenholtz and van Velze (2016), p. 800.

⁸⁶⁶ Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, p. 46.

⁸⁶⁷ Ginsburg and Budiardjo (2018), p. 156; Reinbothe and Lewinski (2015), pp. 132–133.

⁸⁶⁸ Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, pp. 46–48.

⁸⁶⁹ Ginsburg and Budiardjo (2018), p. 157.

not, including any further communication. Given the selectivity of coverage of secondary acts of communication by exclusive rights under the BC, it is interesting that such an extension did not raise objections or further debate at the time of adoption of the Treaty.

The right of communication to the public under the WIPO CT has been called a “safety net” for right holders, as it covers all forms of communication not recognised under the BC.⁸⁷⁰ Nonetheless, this does not mean that any exception to the right are ruled out from the outset. For instance, the WIPO CT does not preclude the contracting parties from exempting rebroadcasting from the reach of the right of communication to the public.⁸⁷¹

5.1.6.2. Right of making available to the public under the WIPO Copyright Treaty

The second part of Article 8 provides for the right of making available to the public, which was negotiated during preceding discussions on the PPBC. Although the BC could be interpreted as already covering acts of digital transmission, spelling the right out explicitly in the text of the Treaty would ensure that was the case.⁸⁷² Hence, one could view the right of making available as “neither a reaffirmation nor a novelty” but simply as resolving an ambiguity as to whether the communication to the public right under the BC covered pull technologies.⁸⁷³ Furthermore, it could be seen as clarifying whether the protection of communication of a work extends also to a public separated in time.⁸⁷⁴

Considered in isolation from the other rights under the BC, the right of communication to the public under the Convention covered only secondary acts. Indeed, the right would probably be wide enough to cover retransmission of a broadcast or a performance on the Internet. However, it may not cover transmission of performance or of a work originating on the Internet. For this, the extension of the right of broadcast or performance would be necessary. However, as the right of communication to the public under the WIPO CT covers any act

⁸⁷⁰ Efroni (2011), p. 274.

⁸⁷¹ Article 8 of the WIPO CT is without prejudice to Article 11*bis*(2) of the BC. Also, the right was discussed insofar it related to online transmissions. See Peukert (2017), p. 891.

⁸⁷² Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, p. 44. Also, Records of the Diplomatic Conference on Certain copyright and neighboring rights questions.1996 Volume II. WIPO Publication No. 348(E) 1999, p. 675. The wording of the right of making available clarified that the BC provisions applied also to communication to the public separated in time.

⁸⁷³ Ginsburg (2004), p. 12.

⁸⁷⁴ Records of the Diplomatic Conference on Certain copyright and neighboring rights questions.1996 Volume II. WIPO Publication No. 348(E) 1999, p. 746.

of communication, this was achieved under the right of communication to the public, but without considering the limitations associated with the respective rights.

Turning back to the making available right under the WIPO CT, although it is often discussed separately, in practice it falls under the wider scope of communication to the public. The making available right is the result of the umbrella solution developed during the negotiations on the PPBC in the absence of a consensus on what right should cover on-demand digital transmissions.⁸⁷⁵ According to the solution, acts of digital transmission could be covered by any right.⁸⁷⁶

The Proposal prepared by the Chairman explained that “the relevant act is the making available of the work by providing access to it. What counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals. It is irrelevant whether copies are available for the user or whether the work is simply made perceptible to, and thus usable by, the user”.⁸⁷⁷ Hence, the right would cover both transmissions resulting in a creation of digital copies on a recipient’s end and those communicating it by making it perceptible, functionally equivalent to a performance or broadcast.

Interestingly enough, the proposal stressed the initial acts of making available, which indeed supports the thesis that, first and foremost, recognition of the right to communicate a work through online transmission as a primary channel was at stake. According to the wording, only on-demand acts of communication fall within the scope. This is not too clear, as also noted during the Diplomatic Conference. Replying to a comment from the delegation of Singapore on this matter, the EC delegation confirmed that the provision intended to cover only truly on-demand services.⁸⁷⁸ Near-interactive services (such as through subscription) would not be covered in the view of the EC. Others contend that push-technologies are included, i.e. where a work is sent as an e-mail attachment, meaning that access is on-demand rather than the transmissions itself.⁸⁷⁹

Placing the right of making available to the public into the same article as the right of communication to the public was criticised. The Australian delegation suggested keeping the rights of communication to the public and making

⁸⁷⁵ See the statement by the US delegation, *Ibid.*, p. 675.

⁸⁷⁶ *Ibid.*, p. 747. Also, Ficsor (1997), pp. 206–212. The most discussed issues were the right of distribution and the right of communication to the public. See also sections 3.1.4. and 4.1.5.

⁸⁷⁷ Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, p. 44. Also, Records of the Diplomatic Conference on Certain copyright and neighboring rights questions. 1996 Volume II. WIPO Publication No. 348(E) 1999, p. 675.

⁸⁷⁸ Records of the Diplomatic Conference on Certain copyright and neighboring rights questions. 1996 Volume II. WIPO Publication No. 348(E) 1999, p. 667.

⁸⁷⁹ Reinbothe and Lewinski (2015), p. 140.

available separate by at least moving the second part of the article to a new paragraph and including making available in the heading.⁸⁸⁰ Indeed, placing the right of communication and the right of making available under the same article seem to have resulted in confusion.⁸⁸¹

The right of making available to the public under the WIPO CT thus covers acts of making a work available by wire or by wireless means for the public to access it at the place and time chosen by them. The phrase “from a place and at a time individually chosen by the members of the public” was supposed to clarify both the public concept and that the on-demand use would come within the scope.⁸⁸² This is possibly the broadest possible definition of the right to control dissemination. This is supported, *inter alia*, by the broad understanding of the making available concept and the usage of the making available expression in the definition of the right of distribution. Equally, it is difficult to come up with any conceivable boundaries of the right deriving from its wording as it seems to cover nearly everything.

However, as it was introduced to primarily cover digital transmissions, it would most probably not extend to making a work available through displaying a tangible object incorporating a work. Equally, the on-demand nature of the acts intended to fall under the right implies that broadcasting would also be out of the scope due to the lack of individual choice.⁸⁸³ Furthermore, individual point-to-point communication would likely also be excluded.⁸⁸⁴

Although the wording puts it in a way that the public can decide when and where to access a work, it is fundamentally a very distinct characteristic of the online environment. The latter enables on-demand consumption without the need to subscribe to broadcasting. As accurately indicated by Ginsburg, the making available right is essentially access right, even though it creates the impression of control being put into the end user’s hands.⁸⁸⁵ Combined with the clarification that it does not matter whether or not a copy is provided to a user, it is an over-broad right covering *de facto* any possible act that (remotely) has to do with a work online.

⁸⁸⁰ Records of the Diplomatic Conference on Certain copyright and neighboring rights questions. 1996 Volume II. WIPO Publication No. 348(E) 1999, p. 667.

⁸⁸¹ Especially because the EU harmonisation with the WIPO CT relied heavily on the wording of the Treaty. See more in section 5.2.2. Also, it is at odds with the wording of the WIPO Performances and Phonograms Treaty, under which the right of making available is a separate right. See Weatherall (1999), p. 343.

⁸⁸² Committee of Experts on a possible Protocol to the Berne Convention. Seventh Session. Report adopted by Committee. BCP/CE/VII/4-INR/CE/VI/4, pp. 4–5.

⁸⁸³ Basic Proposal for the Substantive provisions of the Treaty on certain questions concerning the protection of literary and artistic works to be considered by Diplomatic Conference. Diplomatic Conference on Certain Copyright and Neighboring rights questions. WIPO CRNR/DC/4 1996, p. 44.

⁸⁸⁴ Ginsburg (2004), p. 12.

⁸⁸⁵ “At the time and place chosen by them” most probably must be interpreted as meaning the place of the user, see Ginsburg (2002), p. 122.

5.2. Harmonisation of the right of communication to the public and making available under the EU *acquis*

As outlined in the section above, the background to the harmonisation of the right of communication to the public is rather complex. Whereas the notion of the communication rights comprises several rights covering the different ways of making a work perceptible, the right of communication to the public under the EU *acquis* grew, with a very few exceptions, into a general right covering all the possible ways to exploit a work not associated with the distribution of copies on a tangible medium.⁸⁸⁶ However, if we consider that the communication of a work to the public from a tangible copy such as a recoding on a CD would also fall under the right, the copy-related rights such as distribution are, in essence, just a preparatory step.

The harmonisation of the right under the EU *acquis* relies largely on the Directives, in particular the InfoSoc Directive. Unlike the right of distribution, the rights of communication to the public under national laws prior to the Directives were subject to CJEU jurisprudence in very few cases. The analysis of this part focuses predominantly on the InfoSoc Directive and the CJEU jurisprudence on it. Whereas the Satellite and Cable Directive is briefly examined in this part, the recently adopted Digital Single Market (DSM) Directive is left out of the scope of the enquiry as not addressing the scope of the right of communication to the public.⁸⁸⁷

5.2.1. Developments besides the adoption of the InfoSoc Directive

Before proceeding to the analysis of the right of communication to the public under the InfoSoc Directive, it is appropriate to briefly address a few other developments. Four important matters will be addressed in the present section. The first aspect is the Court's jurisprudence examining the conflict between the

⁸⁸⁶ If we consider that the communication of a work to the public from a tangible copy such as a recoding on a CD would be falling under the right as well, the copy-related rights such as distribution cover, in essence, a preparatory step to the actual communication of a work.

⁸⁸⁷ Although Article 17 of the DSM Directive provides that “an online content-sharing service provider performs an act of communication to the public or an act of making available to the public ... when it gives the public access to copyright-protected works ... uploaded by the user”, it is solely for the purpose of this Directive. Furthermore, recital 64 clarifies that the provision does not affect the concept of the rights elsewhere, and recital 66 refers to the provision as a specific liability mechanism for the purposes of the Directive. See 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. 17.5.2019. OJ L 130/92.

exclusive rights of communication and the freedom to provide services under the Treaty. The second aspect is the jurisprudence of the Court drawing a line between the rights of material and immaterial dissemination in relation to the same tangible copy. The third is the enquiries of the EC on the necessity to harmonise the right of communication to the public and the interpretation of the preceding case law. The fourth and final is the limited regulation of retransmissions under the Satellite and Cable Directive.

5.2.1.1. Conflict between the exclusive rights of communication to the public and the freedom to provide services under the CJEU jurisprudence

Before the harmonisation of the right of communication to the public under the InfoSoc Directive, other rights of communication were examined under the CJEU jurisprudence. Given the development of the right of communication to the public as encompassing all the uses traditionally covered by separate rights, the judgments considering these rights are of direct relevance.⁸⁸⁸ The cases considered in this section examine ways a work can be exploited, which are now covered under the right of communication to the public under the *acquis*.

Rights of material dissemination such as the right of distribution under national copyright laws manifestly interfered with the free movement of goods objective of the Treaty.⁸⁸⁹ The conflict between the rights of intangible dissemination and the objectives of the Treaty was less obvious.⁸⁹⁰ Not only would the exclusive rights of communication be closely interconnected and subject to complex licensing schemes, they would interfere with the freedom to provide services rather than free movement of goods.

The cases outlined below illustrate how the issues at stake and the Court's reasoning in examining the compatibility of the rights of intangible dissemination with the TFEU Treaty were less straightforward than in cases concerning material dissemination and the free movement of goods. The variety of licenses involved in the provision of services complicated weighing the objectives of the internal market with that of copyright and contract law. The latter is supported, *inter alia*, by the fact that the defendants in both *Coditel* cases built their defence largely on the infringing nature of territorial license relied on by plaintiff either in the light of freedom to provide services or on competition grounds.

Three cases exploring the relation between the exclusive rights of an intangible nature and the Treaties will be examined here. Whereas all the cases became landmark ones, the first two also became the ground for a specific regulation

⁸⁸⁸ Not least because their outcomes became a ground for harmonising particular aspects of the right of communication to the public.

⁸⁸⁹ See sections 3.2.2. and 4.2.1.1.

⁸⁹⁰ Dietz (1985), p. 379.

under the InfoSoc Directive, differentiating the right of communication to the public from the right of distribution.⁸⁹¹ The third landmark case was decided after the adoption of the InfoSoc Directive but ought to be addressed here to illustrate the changing considerations at stake.

The *Coditel I* case is the first of two cases with the same factual background examining the possible conflict of the exclusive right of intangible dissemination under national copyright law with the TFEU Treaty. In this landmark case the CJEU was asked to rule whether it would be against the freedom to provide services under Article 59 of the Treaty (now Article 56 TFEU) to rely on the exclusive right of performance under national copyright law to prohibit unauthorised cable retransmission of a signal originally authorised in a different MS.

As was elaborated at the beginning of this chapter, the right of public performance is traditionally the first widely recognised right of communicating a work in “immaterial” (in the meaning of intangible) form. At the time preceding the harmonisation of the right at the EU level, it was recognised in all the nine MS. However, there were substantial differences when it came to modern mass communication technology such as broadcasting and cable retransmissions, which was the issue at stake in the *Coditel* cases. Treatment of such technology differed, especially in the light of international harmonisation under the BC which allowed compulsory licensing.⁸⁹²

The questions about the interpretation of the Treaty arose in the proceedings where an assignee of an exclusive license to distribute a film in Belgium (*Cine Vog*) claimed compensation from an assignee of the right in a different MS (*Coditel*). The reason was that the latter picked up a signal containing a film in Germany and subsequently retransmitted it by cable in the former’s exclusive territory without authorisation. The defendant (*Coditel*) argued that prohibition of transmission on the basis of an exclusive license confined to a single MS would be in breach of Article 59 of the Treaty safeguarding the freedom to provide services. The Court was asked, in essence, whether an assignee of the right of performance could rely on its exclusive license to claim compensation for an unauthorised transmission of a signal that was authorised in a different MS in the light of the TFEU and the freedom to provide services.

The EC in this case argued that the case law on the right of distribution and the free movement of goods would not be applicable. In relation to the application of the Community exhaustion to the present case, the EC argued that “that principle may not be applied to copyrights where there is no material medium. These are essentially performing rights. If there is no material medium the criterion of marketing cannot be used to determine the extent of the exclusivity of the right”.⁸⁹³ Hence, the EC aimed to distinguish between tangible and intangible dissemination to deny the application of the Community exhaustion principle to the latter.

⁸⁹¹ Namely, Article 3(3) of the InfoSoc Directive. See also section 5.2.2.3.

⁸⁹² Dietz (1979), p. 408.

⁸⁹³ CJEU, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*. (1980) Case C-62/79, Judgment of 18 March 1980, p. 894.

The Court distinguished the situation at the proceedings from the one that arises in the context of works, the disposal of which is inseparable from the circulation of a material medium (such as books and recordings). In the present case the right holder had, according to the Court, a legitimate interest to calculate fees based on an actual or probable number of performances. Hence, requiring a fee for every showing of a work constituted an essential function of copyright for this particular type of work.⁸⁹⁴

When it comes to the freedom to provide services, the CJEU recalled that Article 59 does not preclude exercise of IP rights unless such exercise constitutes arbitrary discrimination or restriction on trade between the MS, i.e. when it results in creation of artificial barriers.⁸⁹⁵ However, assignment of right of performance confined to a territory of a MS did not, in principle, constitute an obstacle, as it would be impractical to divide licenses differently when the television broadcasting was relying upon legal broadcasting monopolies. Hence, the assignee could rely on their right in the proceedings against a company retransmitting into the assignee's exclusive territory the signal lawfully originating in a different MS.⁸⁹⁶

The outcome of the case could be justified considering that it solely concerned retransmission of a signal originating abroad. It is important to keep in mind that the judgment did not clarify if the assignee could also prohibit retransmission of their initial transmission originating within the same territory.⁸⁹⁷ However, the reasoning of the Court could have been less ambiguous. The distinction between the different types of works served little besides a slightly inaccurate generalisation that non-exhaustion for particular acts of intangible dissemination necessarily translates into no limit to the control over any act of dissemination concerning a digital copy of a work.⁸⁹⁸

Whereas subjecting retransmission to exclusive control could be justified in this case on the basis that such communication, inter alia, reached far beyond the intended territory and interfered with the envisioned form of exploitation, it cannot be assumed that the same justifications would surface in all the cases of retransmission. Indeed, a general rule of non-exhaustion for any of the ways of communicating a work in intangible form cannot be derived from this case.⁸⁹⁹ Exhaustion was neither the subject of the case nor examined by the Court. What the Court did was to hold that in the circumstances of the case with a view to a specific type of a work and the way it was exploited, enabling obtaining

⁸⁹⁴ Ibid., paras 12–14.

⁸⁹⁵ Ibid., para. 15.

⁸⁹⁶ Ibid., paras 16–17.

⁸⁹⁷ Later seems to have been answered in negative, CJEU, *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH (2017) Case C-138/16*, Judgment of 16 March 2017. See 0.

⁸⁹⁸ On this point, see Spedicato (2015), p. 48.

⁸⁹⁹ See also Cistaro (2016), p. 145; Tjong Tjin Tai (2003), p. 208; Ruffler (2011), pp. 378–379; Spedicato (2015), p. 48; Hugenholtz et al. (2006), p. 24; Guibault et al. (2007), p. 26.

remuneration for each showing was an essential function of copyright. Certainly, it precluded retransmission of a signal originating abroad; however, it did not preclude retransmission of a signal within the same territory.⁹⁰⁰

Still, the case is often interpreted as precluding the exhaustion of the rights covering intangible dissemination, including the right of communication to the public.⁹⁰¹ However, what some scholars call the “doctrine of securing repeated exploitation of a work” developed in *Coditel I* can also amount to a slight exaggeration.⁹⁰² Every dissemination-related right granted to the right holder protects repeated acts of exploitation in the meaning of authorising every separate act of communication. Exhaustion of the right in the context of the right of distribution only limits the extent to which each act of exploitation can be subject to further control. However, in no way does it restrict the right holder’s freedom to authorise any new and independent act of exploitation. Accordingly, this and the following cases must be analysed very carefully to avoid overinterpreting their outcome beyond the specific circumstances of the proceedings.

The distinction drawn between the types of works and their relation to material and immaterial dissemination is largely arbitral at this point. The film industry no longer relies solely on broadcast, and, just like other types of copyright-protected works, films can be distributed as tangible or digital copies to individual users or streamed on-demand rather than broadcasted to a wider public at a specific time. Dissemination of films through distribution of tangible copies was hardly contemplated at the time, as it took off only in the late 1980s when the technological development enabled dissemination through copies at a reasonable price. Comparing remuneration for films and for books at that moment also seems a very ambiguous task.⁹⁰³

In the continuation of the case the defendant argued against the exercise of the exclusive performance right on competition grounds.⁹⁰⁴ In the *Coditel II* case the Court had to rule on the same facts but in a different context. *Coditel* argued this time that Article 85 of the Treaty (now Article 101 of the TFEU) precluded agreements which assigned the exclusive license confined to a particular MS for a specified amount of time. The CJEU ruled that, taking into consideration the characteristics of the cinematographic industry and its market, limiting the assigned rights geographically as such did not amount to distortion of competition under the Treaty even though the area could coincide with national

⁹⁰⁰ Later confirmed in CJEU, *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH (2017) Case C-138/16*, Judgment of 16 March 2017. See 0.

⁹⁰¹ See, for instance, von Lewinski and Walter (2010), p. 986. On the judgment as precluding exhaustion of the right of communication to the public, see Karapapa (2014), p. 310.

⁹⁰² Schricker (1989), p. 469.

⁹⁰³ The cost of production of a film would be much higher than of a book, and its performance would be the only way to recoup investment.

⁹⁰⁴ This is not surprising because comparable cases from the domain of the free movement of goods concerned also competition under the TFEU.

borders.⁹⁰⁵ Nevertheless, the exercise of such assigned right could amount to distortion, which would have to be ascertained on a case-by-case basis.⁹⁰⁶

Accordingly, the outcome of these two cases is next. First, relying on the exclusive performance right to object to retransmission of an authorised signal originating in a different MS into one's exclusive license territory could not be prohibited on the basis of the freedom to provide services under TFEU. Second, notwithstanding the above, invoking the right could be precluded under Article 101 of the TFEU if the exercise of the right, given the circumstances of the market, was to distort the particular market.

Hence, in the cases of unauthorised retransmission into territories not intended by the original transmission and in breach of an exclusive territorial license, relying on the exclusive right of performance was justified even though it distorted the freedom to provide services. Nonetheless, it could come into conflict with the objectives of competition within the internal market. The cases could also be seen as essentially examining the exercise of the exclusive rights assigned on the territorial basis in respect of secondary communication against anticompetitive practices and the abuse of rights.

After the adoption of the InfoSoc Directive, the CJEU had a chance to examine the exclusive rights associated with intangible dissemination and their conformity with Article 56 of the TFEU on the freedom to provide services only on few occasions. The Article has been invoked, *inter alia*, in the cases of CMO, which will not be examined here.⁹⁰⁷ However, the right of communication through broadcast was also indirectly examined in the *FAPL* case, where the question was, *inter alia*, whether national law prohibiting import and sale of decoding devices intended to receive a broadcast were incompatible with the freedom to provide services under Article 56 TFEU.⁹⁰⁸

The Court examined the national legislation in the light of the freedom to provide services rather than the free movement of goods, as the sale of a device was a secondary aspect of such legislation.⁹⁰⁹ The CJEU found that the legislation in place prevented the persons from enjoying the services originating in a different MS, and, hence, the latter constituted a restriction on the freedom to provide services unless objectively justified.⁹¹⁰ Although football matches were not protected as IP under the EU law, it did not preclude national laws from

⁹⁰⁵ CJEU, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*. (1980) Case C-62/79, Judgment of 18 March 1980, paras 15–16.

⁹⁰⁶ *Ibid.*, p. 17.

⁹⁰⁷ For instance, see CJEU, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* (2014) Case C-351/12, Judgment of 27 February 2014.

⁹⁰⁸ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) (2011), Judgment of 4 October 2011, para. 54.

⁹⁰⁹ *Ibid.*, paras 80–83.

⁹¹⁰ *Ibid.*, paras 87–89.

conferring such protection, which, in turn, could justify the restrictions on the freedom to provide services.⁹¹¹

The Court, recalling the *Musik-Vertrieb* case, started with stating that the specific subject matter of IP is “to ensure for the right holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject-matter, by the grant of licences in return for payment of remuneration”.⁹¹² However, as the Court continued, it does not guarantee the highest possible remuneration but only appropriate remuneration for each use of IP, reasonable to actual or potential number of persons enjoying or wishing to enjoy the service.⁹¹³ In relation to broadcast, it must be reasonable in respect of its parameters, such as actual and potential audience, language version, etc.⁹¹⁴

The claimant in this joint case claimed that the use of a decoder acquired abroad undermined the exclusive broadcast rights and should have been prohibited on the basis of national legislation. The Court disagreed, holding that nothing precluded the right holder from asking for appropriate remuneration when broadcasting was agreed on.⁹¹⁵ The aim of placing restrictions on the sale and the use of decoding devices aimed to enable additional remuneration based on territorial exclusivity. This went beyond what was necessary to ensure appropriate remuneration for the right holder in question.⁹¹⁶ The circumstances were contrasted with the *Coditel I* case, where the cable retransmission took place without obtaining authorisation in the MS of the origin of communication and without paying an appropriate remuneration to the right holder.⁹¹⁷

The case cannot either be directly compared to the judgments on the free movement of goods concerning the right of distribution.⁹¹⁸ First, the *FAPL* case concerned the primary act of broadcast with the authorisation of the right holder, notwithstanding the fact that their reception did not match the intended territory or the type of license. In the *Deutsche Grammophon* and *Musik-Vertrieb* cases, on the other hand, the issue was secondary acts of distribution. Hence, the question in the *FAPL* case can be summarised as essentially inquiring whether it is permissible to prohibit the sale of decoding cards where they enable receipt of authorised broadcast but are not intended for use in a specific MS on the basis of their price. In the *Coditel I* case, in turn, the question was about an unauthorised retransmission of an authorised signal into a different territory, where this retrans-

⁹¹¹ *Ibid.*, paras 99–104.

⁹¹² *Ibid.*, para. 107.

⁹¹³ *Ibid.*, paras 108–109.

⁹¹⁴ *Ibid.*, para. 110.

⁹¹⁵ *Ibid.*, para. 112.

⁹¹⁶ *Ibid.*, paras 115–116.

⁹¹⁷ *Ibid.*, para. 119. Essentially, without paying appropriate remuneration for reaching unintended public.

⁹¹⁸ Although some have called the issue at stake in the *FAPL* case a parallel import of broadcasting services. See Kaburakis et al. (2012), p. 322.

mission also interfered with the exploitation of a work based on the delay between the showing of a movie in the cinema and its broadcast.⁹¹⁹

What is interesting is that the answer to the question in the *FAPL* case was not influenced by the fact that the decoding devices that were used by the owners of commercial establishments were meant for private use only.⁹²⁰ The Court reasoned that the danger of users acquiring a private license instead of a commercial one also existed in purely national situations; hence, the prohibition of importation on this ground was not admissible.⁹²¹ However, one has to also acknowledge that the conclusion is without prejudice to the assessment of the use of broadcast for commercial purposes following its reception. Indeed, in the latter part of the judgment the Court established that public receipt of a broadcast on a TV set at a commercial establishment such as a pub constituted a communication to the public of works broadcasted.⁹²²

Accordingly, although the broadcaster could not prohibit the sale of decoding devices in other MS, they could obtain additional remuneration for the public receipt of a broadcast, at least when the latter included works where copyright belonged to the broadcaster.⁹²³ Consequently, the remuneration for the communication to the public through screening of broadcasts at commercial establishments would be another premium paid to the broadcasters, at least in the cases such as at the proceedings.⁹²⁴

The relation between these cases has been lively debated. One view is that the *FAPL* case rewrote the accepted legal position by holding that the subject matter of copyright entitled the right holder to appropriate remuneration but not to deriving an exclusivity premium.⁹²⁵ Another view is that the status quo was preserved but made more complicated.⁹²⁶ What is evident is that the cases arose at very different times and diverse circumstances within a complex system of licensing arrangements. Whereas they do not allow for an all-encompassing generalisation of their outcomes, they provide valuable guidance on the con-

⁹¹⁹ Opinion of Advocate General in *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)*, 3 February 2011, para. 196.

⁹²⁰ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011, para. 132.

⁹²¹ *Ibid.*, paras 130–131.

⁹²² See more in section 5.2.3.2.1.3. Also, CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011, paras 183–207.

⁹²³ This is because the Court only examined the public receipt of a broadcast in the light of Article 3(1) of the InfoSoc Directive.

⁹²⁴ An interesting question is whether broadcaster or any other copyright holder of works contained in a broadcast could claim additional remuneration for its public screening when the establishment in question was in fact in possession of a commercial license.

⁹²⁵ Batchelor and Montani (2015), p. 597.

⁹²⁶ Marušić (2011), p. 275.

siderations relevant to examining permissible or desirable control over authorised communication.⁹²⁷

5.2.1.2. Distinction between the rights of distribution and communication to the public in relation to a tangible copy

Generally, cases concerning intangible dissemination began to reach the CJEU slightly later than cases on matters of dissemination of tangible copies. The reason is likely two-fold. First, the material dissemination dominated the channels of a work's exploitation before technology enabled exploitation without the involvement of tangible mediums. Second, the free movement of goods was a somewhat clearer concept under the Treaty, and the intra-EU trade in goods was one of the biggest interests behind establishing the internal market.

Certainly, provision of services within the EU touched upon slightly different matters than that of intra-EU trade in goods. While it is understandable that these differences could call for a slightly different treatment in the context of the Treaties, which the Court was essentially interpreting, the same might not be true in a purely copyright context. Setting aside the questionable generalisation drawn between immaterial and material dissemination rights under the *acquis* on the basis of the Court's reasoning in the *Coditel* cases, the CJEU has also emphasised the need to consider dissemination as a whole.

Whereas distribution of a tangible object could relate both to the free movement of goods and the freedom to provide services, towards the specific circumstances of the case the CJEU would consider only one of the aspects if the second was a secondary one.⁹²⁸ This section will thus briefly illustrate through the Court's jurisprudence how the circumstances of a work's exploitation influenced the freedom towards which the exercise of the exclusive right was examined.

In the *Tournier* case, the owner of a discotheque brought proceedings against the director of CMO on the grounds that the latter charged unreasonably excessive and abusive royalties for performance of musical works and refused to license only a part of their collection. The referring Court asked the CJEU to examine a couple of questions in the light of Articles 30, 59, 85 and 86 of the EEC Treaty. By its fifth question, the Court asked whether it would be against Articles 30 and 59 to claim royalties for the performance of a work using a sound recording purchased in a different MS and in respect of which the right of distribution was exhausted.

⁹²⁷ See Batchelor and Montani questioning whether the judgment is relevant in cases other than satellite communication, like communication satellite to internet or beyond. Batchelor and Montani (2015), p. 598.

⁹²⁸ For instance, CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011, paras 78–84.

First, the CJEU recalled the *Coditel I* case and drew an analogy between the films that were the subject matter in the former case and music, the subject matter in the present proceedings. Musical works, the Court held, had to be distinguished from other works, dissemination of which was inseparable from the circulation of a tangible medium.⁹²⁹ The CJEU proceeded to establish in a sense a two-fold nature of musical works. The Court stipulated that, despite the fact that Article 30 of the EEC Treaty on the free movement of goods exempted import of already distributed copies of sound recordings from the right holder's authorisation, such imported copies could also be used for exploitation through public performance.

Accordingly, the considerations under the free movement of goods and the freedom to provide services had to be reconciled in the present case. The copy-right holder could invoke the right of performance to claim royalties for the public performance of a sound recording even though the right holder could not claim any royalties for further marketing of a sound recording already put on the market within the Community.⁹³⁰ The outcome of the case was that Articles 30 and 59 did not preclude the right holder from relying on their right of public performance in a situation such as one in the proceedings.

A very similar reasoning was adopted by the Court in the *Laserdisken* case, where the CJEU made it even more obvious that the exhaustion of one right does not render all other rights inapplicable: "the release into circulation of a picture and sound recording cannot therefore, by definition, render lawful other acts of exploitation of the protected work, such as rental, which are of a different nature from sale or any other lawful act of distribution."⁹³¹ One of the reasons to clearly differentiate between the rights was, of course, to avoid the application of the developed Community exhaustion principle to acts other than mere resale of copies.⁹³²

Hence, these decisions illustrate the systematic approach to the interface between the exclusive rights under copyright and the objectives of the Treaty. The relevant considerations depend not so much on the presence of a tangible copy but rather on the nature of the exploitation in question. Indeed, the presence of a tangible copy can point to the direction of limiting exclusive control under the copyright on the basis of the Treaties, using the developed Community exhaustion principle. However, the circumstances of subsequent dissemination must be examined. Moreover, the outlined jurisprudence also emphasises the

⁹²⁹ CJEU, *Ministère public v Jean-Louis Tournier*. (1989) Case C-395/87., Judgment of 13 July 1989, para. 12.

⁹³⁰ *Ibid.*, para. 13.

⁹³¹ CJEU, *Foreningen af danske Videogramdistributører, acting for Egmont Film A/S, Buena Vista Home Entertainment A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S and Warner Home Video Inc. v Laserdisken*. (1998) Case C-61/97, Judgment of 22 September 1998, para. 17. Also in CJEU, *Metronome Musik GmbH v Music Point Hokamp GmbH*. (1998) Case C-200/96, Judgment of 28 April 1998, para. 18.

⁹³² See also section 4.2.1.3.

proper understanding of the exhaustion principle, i.e. as related to a particular act of exploitation whose reach does not extend to other forms of subsequent exploitation.

5.2.1.3. Enquiries of the European Commission

Against the background revealed above, it is appropriate to turn next to the enquiries of the EC into the necessity to harmonise the right of communication to the public under the *acquis*. Whereas the harmonisation was prompted, inter alia, by international harmonisation, cases on the intersection of communication rights with the objectives of the Treaty influenced a number of legislative choices. Given that the jurisprudence was unjustifiably generalised on a few occasions, this section will provide an overview of the Commissions' reasoning on the need to harmonise the right, relying, inter alia, on the preceding case law.

The efforts towards the harmonisation of the rights covering intangible dissemination at the EU level started with the EC issuing a couple of Green Papers and studies.⁹³³ The first Green Paper was presented in 1988 with the broad title "Copyright and the challenge of technology – Copyright issues requiring immediate action". The paper was of a predominantly economic character, setting the stage by highlighting the issues of copyright being raised to Community level:

[T]he growing economic importance of the industries needing copyright protection against ready misappropriation of their products, particularly by copying, has naturally produced pressure for the modernization of existing copyright protection systems at both national and Community level.⁹³⁴

Although no comprehensive copyright harmonisation was expected to take place at the EU level at the time, the paper was followed by another one and, shortly after, by a few Directives.⁹³⁵ The next Green Paper on Copyright in Information Society was presented in 1995 and became the most important one in the light of the subsequent wide harmonisation under the InfoSoc Directive. The paper defined a number of policy choices that had to be made in the light of the emergence of the information society and the ongoing attempts of harmonisation at the international level.⁹³⁶ The major aspect of the discussion on the information

⁹³³ At first, papers were prepared by the section responsible for cultural affairs and, a few years later, by the Directorate on the Internal Market. It has been argued that the EC adopted a predominantly economic approach to identified issues, almost hostile to copyright and authors, putting the internal market as a primary focus. See Schricker (1989), pp. 472–474. Also, Cohen Jehoram (1992), p. 627.

⁹³⁴ Green Paper on copyright and the challenge of technology – Copyright issues requiring immediate action, COM(88) 172 final. 7 June 1988, p. 3.

⁹³⁵ For the scepticism, see Schricker (1989), pp. 483–484.

⁹³⁶ Green Paper on Copyright in Information Society. COM(95) 382 final. 19 July 1995, p. 6.

society was the issue of piracy, to which roughly one third of the paper is devoted.⁹³⁷

The jurisprudence of the CJEU became a source of inspiration for the EC. The Commission often relied on the preceding jurisprudence to justify the intervention into the copyright law at the national level.⁹³⁸ Indeed, on multiple occasions the outcome of the rulings was generalised to a greater extent than would seem appropriate. A couple of examples will be shown below.

When it came to the question of harmonising the rights of intangible dissemination, the *Coditel I* and *Warner Brothers* cases were recalled. Whereas rental right concerned tangible copies and, in many jurisdictions, formed a part of the broader right of distribution, it was in a sense assimilated with the right of performance, as it was exempted from the Community exhaustion principle. According to the EC, it was in the copyright holder's interest to benefit from each act of exploitation, either through rental or through performance.

The Green Paper of 1988 stated that, pursuant to the *Coditel I* case, if a work is exploited by successive performances, the first performance does not exhaust the right to authorise the next one.⁹³⁹ The paper, regrettably, disregarded the fact that, essentially, according to the case, a retransmission of a signal from abroad was not permitted, which would not necessarily be the case for any retransmission. Furthermore, the metaphor of exhaustion in this case appears very deceptive, as the judgment suggests that if exhaustion would apply in this case, then the next performance would not be subject to the right holder's authorisation. The latter is not in line with the objective of the principle of exhaustion as articulated under the Community exhaustion principle.⁹⁴⁰

Also, surprisingly, the views of the EC were rather different from the EC's position in the course of the *Coditel I* proceedings. There the Commission argued that the CJEU may find that the simultaneous and unaltered retransmission to another MS should not require a separate authorisation on the basis that the author receives fair remuneration from the company retransmitting a signal.⁹⁴¹ Hence, in the EC's view, a separate authorisation would not have been necessary for such a retransmission, although national law may still require remuneration to be paid to the right holder. In a sense, the approach resembles the outcome in the cases concerning import of distributed copies under the right of distribution. The difference is that import did not give rise to claim additional remuneration, whereas retransmission, as argued by the EC in *Coditel I*, may do so.⁹⁴²

⁹³⁷ Schricker (1989), p. 476.

⁹³⁸ For which it was rightly warned. See, inter alia, Dietz (1985), p. 402.

⁹³⁹ Green Paper on copyright and the challenge of technology – Copyright issues requiring immediate action, COM(88) 172 final. 7 June 1988, p. 163.

⁹⁴⁰ Elaborated in the preceding sections 5.2.1.1. and 5.2.1.2.

⁹⁴¹ CJEU, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*. (1980) Case C-62/79, Judgment of 18 March 1980, p. 898.

⁹⁴² See, inter alia, the *Deutsche Grammophon* and *Musik-Vertrieb* cases, section 3.2.2.

The case law of the CJEU on intangible dissemination was mentioned under the EC papers only in part and predominantly in connection to parallel imports. This time the EC accurately summarised the outcome of the *Coditel* cases: “the fact that a rightholder authorizes one broadcast of a film in one section of the Community territory does not exhaust his rights over later broadcasts or broadcasts in other parts of the Community”.⁹⁴³ Although interpreted by some scholars as denying any limit to the broadcasting right, it merely recalls that each act of broadcasting shall be authorised by the right holder and the Treaty does not preclude the exercise of the right, for instance, on grounds of the freedom to provide services. Furthermore, the EC refers explicitly to later broadcasts or broadcasts in other parts of the Community and, hence, does not touch upon simultaneous retransmissions. If the EC indeed meant that simultaneous retransmissions within the same territory should always fall under the exclusive right of broadcast, it would be a step well beyond the *Coditel I* decision.

Turning back to the right of communication to the public itself, this topic was discussed under two sections of the Green Paper of 1995. First, in regard to the definition of public, which was defined neither under international law nor under the EU copyright *acquis*.⁹⁴⁴ Second, in line with the discussions on the PPBC, in relation to the acts of digital transmission, which required protection. The need to recognise a new right was motivated by the uncertainty as to whether such acts were covered by national laws. According to the EC, such acts challenged the established understanding of intangible dissemination, which was necessarily a point-to-multipoint one. Adopting a common approach to covering acts of digital transmissions was also viewed as a necessary step to remove obstacles to the freedom to provide services in the internal market.⁹⁴⁵

The Green Paper did not propose one clear-cut solution but presented few possible options. The first would cover acts of digital dissemination or transmission with a new right, either with a broad scope to include any type of digital dissemination (including digital broadcasting) or with a narrower scope confined to point-to-point transmissions.⁹⁴⁶ The second option would be to cover such acts by extension of already widely recognised rights. Interestingly, an option to cover digital transmission with the right of rental was strongly supported by the EC for acts of transmission in the course of commercial activities. This is slightly surprising in the light of the EC initiative to cover acts of making available with the communication to the public right under the WIPO CT negotiations.

⁹⁴³ Green Paper on Copyright in Information Society. COM(95) 382 final. 19 July 1995, p. 46.

⁹⁴⁴ The importance of uniform interpretation of public criteria was viewed in the light of clarifying the scope of private use. The discussion followed the one under the negotiations on the PPBC; further negotiations on harmonising the concept under the EU *acquis* were postponed. Green Paper on Copyright in Information Society. COM(95) 382 final. 19 July 1995, pp. 53–54.

⁹⁴⁵ *Ibid.*, p. 56.

⁹⁴⁶ *Ibid.*, p. 56.

The likely reasons for considering the right of rental were, on the one hand, the expectation that digital distribution would replace tangible distribution and, on the other hand, the fact that the rental right has already been harmonised under the EU *acquis*.⁹⁴⁷ Nevertheless, the option required the examination of “how the characteristics of certain commercial operations could be taken into account as regards the application of this right”.⁹⁴⁸ Furthermore, extending the right of rental to digital dissemination also called for maintaining a balance between the interests of public libraries and right holders.⁹⁴⁹

Following the Green Paper of 1995, scholarly debate on the appropriate rights to be applied to acts of digital transmission intensified. Some advocated for a broad right of communication to the public covering broadcasting and on-demand making available whilst preserving essential exceptions.⁹⁵⁰ Others also supported an option to cover on-demand making available acts with the right of distribution in order to avoid difficulties caused by the on-demand nature of transmission and the separation of acts leading to distribution.⁹⁵¹

The Follow-up Green Paper was presented shortly after in 1996 to reflect on the issues raised in 1995 and the public response. Unlike its predecessor, the follow-up paper highlighted the uncertainty about dealing with digital transmissions in the absence of clarity on the scope of the right of communication to the public under the BC and national laws.⁹⁵² The right of rental was no longer considered a viable option. According to the paper, the right of communication to the public, with a few exceptions, was the most widely supported solution to cover digital dissemination. The result of the paper was thus a proposal to harmonise the digital “on-demand” transmissions on the basis of a further harmonised right of communication to the public. For the scope of the proposed rights the paper referred to the submission made by the Community and the MS under the negotiation on the WIPO CT.⁹⁵³

5.2.1.4. Simultaneous retransmissions under the Satellite and Cable Directive

As the analysis under this chapter focuses on the question of the extent of exclusive control over dissemination of a work beyond the authorisation of every separate communication, the issue of regulating retransmissions is of particular

⁹⁴⁷ Dreier (1998), p. 632.

⁹⁴⁸ Green Paper on Copyright in Information Society. COM(95) 382 final. 19 July 1995, p. 59.

⁹⁴⁹ *Ibid.*, p. 59.

⁹⁵⁰ Hugenholtz (1996), pp. 101–102. Also, Dreier (1998).

⁹⁵¹ Loewenheim (1996), p. 49.

⁹⁵² The follow-up to the Green Paper on copyright and related rights in the Information Society. COM (96) 586 final. 20 November 1996, p. 13.

⁹⁵³ *Ibid.*, p. 14.

interest. Hence, this section briefly outlines the significance of the Satellite and Cable Directive, which was adopted in the aftermath of the *Coditel I* decision.⁹⁵⁴ The Directive deals with harmonising certain aspects of copyright law across the MS in order to facilitate the broadcasting market within the Community. Namely, the major achievement of the Directive is the country-of-origin rule that requires broadcasting organisations to obtain a single authorisation from the right holder in the country where the communication originates.⁹⁵⁵

What is of special interest is the retransmission provision under Article 8(1) of the Directive. The Article provides that a MS shall ensure that, in the event of a retransmission from another MS, copyright rules are observed, and such retransmission takes place on the basis of an individual or collective contractual agreement. Hence, on the one hand, the Directive strengthens the protection in comparison to the BC, as it precludes statutory licenses.⁹⁵⁶ On the other hand, it introduces collective licensing of retransmissions, provided that such retransmissions are not altered and take place simultaneously.⁹⁵⁷

Essentially, the Directive addresses solely retransmissions between the MS, leaving retransmissions within the same MS subject to national law.⁹⁵⁸ Whereas it confirms that retransmissions are to be authorised by the right holders (without spelling it out in the wording of a right), it also ensures that the necessary arrangements become simpler. In a sense, it strengthens the argument that retransmission to a different MS has a potential economic value for rights holders. Likewise, altered or delayed retransmissions are outside the scope of the Directive, hence, potentially subject to the exclusive right.

The limited scope of the application of the rule supports the three main circumstances pointing towards submitting such secondary acts of communication to the right holders' exclusive right: communication which is delayed in time, altered communication, and communication reaching new (national) territories. The latter is not least supported by the statement in the preceding Green Paper on Television Without Frontiers. Namely, one solution to intra-community retransmissions considered by the EC was to remove any restrictions following the legal primary transmission.⁹⁵⁹

For instance, retransmission would be permitted throughout the common market following the right holder's authorisation for broadcast of a work in one MS. Nonetheless, the paper recalled that the CJEU did not follow this line in the *Coditel I* case, as the Court held that right holder was entitled to remuneration for

⁹⁵⁴ 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. 6.10.1993. OJ L 248/15

⁹⁵⁵ Dreier (2010b), pp. 410–415.

⁹⁵⁶ Hugenholtz (2016b), p. 327.

⁹⁵⁷ Rosén (2014), p. 320; Hugenholtz (2016b), p. 313; Dreier (2010b), pp. 420–421.

⁹⁵⁸ Also, in line with the *Coditel I* judgment, see section 5.2.1.1.

⁹⁵⁹ Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable. COM(84) 300 final. 14 June 1984, pp. 314–315.

every showing of a work.⁹⁶⁰ Although the Court did not expressly state so in the judgment, the Commission stated that if retransmissions outside the original area would not be subject to authorisation, the right holder would lose the chance to obtain a fee covering such a new audience.⁹⁶¹ Hence, ultimately, the new public argument was advanced. The relevance of the targeted audience and the audience reached by retransmission is further supported by few preliminary rulings on the interpretation of the Directive.

For example, in the *Egeda* case, the Court was asked to rule, inter alia, whether public reception of a broadcast through the installation of TV sets in hotel rooms fell within the scope of communication to the public or public retransmission under the Satellite and Cable Directive. The CJEU highlighted the limited scope of the application of the Directive. The rules on communication to the public and retransmission covered solely retransmission to a different MS and its primary aim was to avoid application of different rules to a single transaction.⁹⁶² Further, the Court recalled the proposal for the InfoSoc Directive, which would be an instrument actually dealing with the scope of the rights.⁹⁶³

In another case, the Court had to rule whether relying on a different organisation for communicating a broadcast in a specific area constituted a separate act of broadcast requiring authorisation. Whereas the CJEU held that the acts formed a single act of communication, this did not mean per se that the intervention of a third party did not require separate authorisation.⁹⁶⁴ The new audience was brought into the picture, because the third party, besides mere retransmission, also provided services on its own to the public outside the intended recipient circle. Such intervention with initial communication by making a broadcast accessible to a new public was not covered by the initial authorisation.⁹⁶⁵ Moreover, the fact that the third party also obtained fees from these non-intended recipients for a separate service supported finding such transmission a distinct communication.⁹⁶⁶

These cases are also significant to examining the development of the right of communication to the public under the InfoSoc Directive. Unlike the latter, the cases highlight the significance of distinguishing between the primary and

⁹⁶⁰ See Schricker on the EC pushing to remove obstacles to cross-border broadcasting. Schricker (1989), pp. 470–472.

⁹⁶¹ Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable. COM(84) 300 final. 14 June 1984, p. 315.

⁹⁶² CJEU, *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)*. (2000) C-293/98, Judgment of 3 February 2000, paras. 21, 24.

⁹⁶³ *Ibid.*, paras 26–28.

⁹⁶⁴ CJEU, *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) (C-431/09) and Airfield NV v Agicoa Belgium BVBA (C-432/09)*, Judgment of 13 October 2011, para. 70.

⁹⁶⁵ *Ibid.*, paras 76, 79, 82.

⁹⁶⁶ *Ibid.*, para. 80.

secondary acts, i.e. between the act of communication and the act of retransmission. The *Canal Digital* judgment illustrates how the fact that an act comes within the wording of the provision exempting it from separate authorisation is not sufficient in itself to support the findings. Rather, consideration should also be given to whether such acts interfere with communication or unduly deprive the right holder of the market, in particular, when it is done with an intent of making a profit.

Whether retransmission taking place online would be covered is disputed, as this factor was not anticipated at the time of the adoption of the Directive.⁹⁶⁷ However, the recently adopted Directive on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes has addressed the question.⁹⁶⁸ Article 4 provides that right holders other than broadcasting organisations shall authorise through CMO the simultaneous, unaltered and unabridged retransmission, including retransmissions online. Furthermore, Article 7 recognises that MS may provide the same rules in respect of retransmissions both under this Directive and the Satellite and Cable Directive, where both initial transmission and the retransmission take place within a same MS.

Hence, the new Directive extends the regulation of cable retransmission through entrusting CMO to manage them for other types of retransmission, such as online. At the same time, pursuant to Article 2(2), the Directive does not concern the retransmission of transmission originating online. Finally, the rules apply solely to cross-border transmissions, as is also the case with the Satellite and Cable Directive. Nevertheless, the recently adopted Directive allows MS to apply the same rules to purely national retransmissions.

Would the Directive make the provision of Article 4 mandatory for retransmissions within the same MS, it would effectively designate a rule for secondary communication, which is relying on the initially authorised one. Whereas it would not be comparable to the Community exhaustion principle under the right of distribution, which exempts the acts from authorisation only in cross-border setting, through entrusting CMO with managing the rights, such a rule would recognise the need to eliminate the adverse impact of the complex clearance of the rights even within a single MS.

⁹⁶⁷ Hugenholtz (2016b), p. 321.

⁹⁶⁸ 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 organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC. 17.5.2019. OJ L 130/82

5.2.2. Harmonisation of the right of communication to the public under the InfoSoc Directive

Shortly after the Green Paper of 1995 and the follow-up paper of 1996, a Proposal for a Directive on the harmonisation of certain aspects of copyright in the information society was presented. The Directive, negotiations on the adoption of which stretched over four years, became the main instrument of copyright harmonisation in the EU. Notwithstanding what the name suggests, the scope of harmonisation stretched well beyond the copyright matters of a purely digital nature.

The explanatory note to the Proposal stated that it did not radically change the existing internal market regulatory framework. Rather than being a change in basic copyright concepts, it was essentially the environment were works were created and exploited that changed.⁹⁶⁹ From the perspective of subsequent development, it is highly debatable if the Directive was such a small step as was presented at its outset. Not least, the Directive spelled out rigid rules at a rather dynamic time.⁹⁷⁰

The priority items of the Proposal followed from the obligations under the recently adopted WIPO CT. It was established that implementing the necessary changes into national laws would be better achieved at the Community level.⁹⁷¹ The Explanatory Memorandum recalled that Article 8 of the WIPO CT extended the traditional right of the copyright holder to authorise or prohibit the non-interactive communication of a work to all categories of work. Furthermore, that, upon a proposal from the EC, the right also covered interactive transmissions.⁹⁷²

Despite what could be expected in the light of the preceding Green Papers, the part of the Explanatory Memorandum dealing with the right of communication to the public jumps immediately to the topic of technological development and interactive on-demand transmissions as a new form of exploitation of a work. Rather than starting with the notion of communication and its scope outside of the digital environment, it proceeds immediately to holding that the right would cover interactive (on-demand) transmissions.

The on-demand transmissions were characterised as storing works in a digital form and interactively making them available in a way that enables users to access and request transmission at any time.⁹⁷³ Such transmissions were considered to form a new economic form of exploitation of a work, which should

⁹⁶⁹ Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 Final. 10 December 1997, p. 9.

⁹⁷⁰ Hugenholtz (2000b), p. 501.

⁹⁷¹ Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 Final. 10 December 1997, p. 11.

⁹⁷² *Ibid.*, p. 19.

⁹⁷³ *Ibid.*, p. 16.

have been subjected to copyright protection though granting an exclusive right to authorise them. The latter meant that the right of communication to the public (not fully harmonised under the BC) had to be harmonised as a whole under the Directive to mitigate the legal uncertainty in the Community, which was caused by divergent treatment, as well as to provide adequate and coherent protection of the right holder on the market.⁹⁷⁴

Whereas harmonisation did not seem as revolutionary for national laws, subsequent development has contested the conclusion.⁹⁷⁵ This section outlines the three main issues relevant to the assessment of the development of the right of communication to the public in relation to control over subsequent communication. First is the recognition of the broad right of communication to the public. Second is the recognition of the right of making available under the right of communication to the public. Third is the non-exhaustion of the rights as stipulated in the Directive.

5.2.2.1. Broad right of communication to the public

Article 3 of the InfoSoc Directive under the heading “Right of communication to the public, including the right of making available works or other subject matter” harmonises three essential matters. First, it harmonises the right of communication to the public as extended to any communication to a public not present at the place where it originates. Second, it introduces a new right of making available to the public to cover on-demand digital transmissions. Third, it introduces a similar neighbouring right of making available.

Article 3(1) of the InfoSoc Directive provides that:

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

The text of the Article was not substantially altered during the negotiations following the proposal for a Directive. The only difference is that the phrase “originals and copies of their works” in the Proposal was substituted with simply “their works”.⁹⁷⁶ The change was adopted on the initiative of the Council and

⁹⁷⁴ *Ibid.*, p. 19.

⁹⁷⁵ On the InfoSoc Directive and the WIPO CT as not being revolutionary in protecting every act of communicating a work in the context of Norwegian copyright law, see Lund (2001), p.618.

⁹⁷⁶ See Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 12 December 1997, p. 44.

motivated by the equivalent alteration in the wording of Article 2(a) on the right of reproduction for a work.⁹⁷⁷

Whereas it might not seem as a substantial modification, the difference between this wording and the wording of the right of distribution is occasionally used to draw a line between the rights of material dissemination and immaterial dissemination to deny any limit to the latter right. Whilst the expression “work” in the wording of the rights emphasises the communicative function of the right, the expression “originals and copies” also indicates the two-fold nature of the copies, for instance, that a copy distributed with the authorisation of the right holder may not be used for public performance or broadcasting without obtaining a separate authorisation.⁹⁷⁸

Recital 23 of the Directive further provides that:

This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

Hence, the right of communication under the InfoSoc Directive requires the MS to recognise an exclusive right of communication to the public in its broadest sense.⁹⁷⁹ First, the right extends from the acts of retransmission of a performance or a broadcast to the primary acts such as broadcast. Second, it is granted in respect of all types of works. Third, being a full harmonisation Directive, the Directive exhaustively harmonises any permissible exceptions to the right.⁹⁸⁰ Fourth, recital 23 suggests that any act of retransmission also falls within the scope of the exclusive right.

The latter is quite a departure from the approach taken under the BC or the WIPO CT, where retransmission did not necessarily require authorisation in all the cases. Given the considerable extension of the right of communication, it is questionable whether such a strict rule going well beyond international obligations is justified. Moreover, following the jurisprudence of the CJEU, the significance of the recital is blurred, not least because of the ambiguous scope of

⁹⁷⁷ Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of ... on the harmonisation of certain aspects of copyright and related rights in the information society. 2000/C 344/1, p. 15.

⁹⁷⁸ See section 5.2.1.2.

⁹⁷⁹ On the cons of such a general and abstract right, see also Depreeuw (2014), pp. 456–457.

⁹⁸⁰ The CJEU has also established that the notion of communication to the public cannot be given a wider scope under national law than that under the Directive, as doing so would undermine the objective of the Directive and distort the internal market. See CJEU, *Nils Svensson and Others v Retriever Sverige AB*. (2014) Case C-466/12, Judgment of 13 February 2014, paras 34–37.

retransmission, which could include either or both simultaneous and later retransmission.

For instance, in the *TVCatchup* case the Court held that, although simultaneous retransmission constituted an act of communication, the criterion of a new public had still to be examined in order to qualify such retransmission as falling under the right of communication to the public, unless new technical means were used.⁹⁸¹ In yet another case, the CJEU held that simultaneous retransmission amounted to an act of communication but not an act of communication to the public, as it did not reach a new public despite the new technical means.⁹⁸² While it is obvious that a later retransmission (say, from a recording of the original one) would fall under the right of communication to the public, exempting simultaneous ones could be justified when certain criteria are satisfied.

Furthermore, it should also be noted that, according to the proposal, “an act of communication to the public can involve a series of acts of transmissions”.⁹⁸³ The importance of this statement is two-fold. First, as will be shown below, the scope of the right under the CJEU jurisprudence is clearly broader than the acts of transmission, which were the primary target of the right under the BC and the WIPO CT. Second, a single act of communication can be comprised of a series of acts of transmission, which means that whether or not there is an act of communication to the public will necessarily depend on objective or subjective criteria.⁹⁸⁴

The aim of the Article, first and foremost, is to implement the obligations under the WIPO CT by extending the scope of the communication right to all types of works and, also, according to the umbrella solution, to cover on-demand digital transmission.⁹⁸⁵ However, as apparent, *inter alia*, from recital 23, the Directive went further by providing a broad right of communication covering all the types of communication to the public not present at the place where it originates, including broadcasting.⁹⁸⁶ This made it the core economic right under the EU *acquis* covering acts ranging from broadcasting to peer-to-peer file sharing.⁹⁸⁷

⁹⁸¹ CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd.* (2013) Case C-607/11, Judgment of 7 March 2013, paras 23–39.

⁹⁸² CJEU, *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* (2017) Case C-138/16, Judgment of 16 March 2017, paras 26–30.

⁹⁸³ Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 10 December 1997, p. 25.

⁹⁸⁴ This presents a difficulty in establishing criteria determining when an act of transmission corresponds to an act of dissemination. Furthermore, the jurisprudence of the CJEU shows that the significance of transmission for the right of communication to the public diminishes, see Depreeuw (2014), pp. 286–288.

⁹⁸⁵ Geiger and Schönherr (2014b), p. 419.

⁹⁸⁶ On the right being broader than under the BC or the WIPO CT see Dreier and Hugenholtz (2006), p. 50; Guibault (1998), p. 13.

⁹⁸⁷ Hugenholtz and van Velze (2016), pp. 797–798.

Whether or not the making available right shall be considered separately or in conjunction with the right of communication to the public is not entirely clear. On the one hand, the Explanatory Memorandum provides that the Directive grants the right holder a general right of communicating a work to the public for all types of works for any communication outside the interactive environment.⁹⁸⁸ On the other hand, the same Memorandum provides that the right of communication to the public extends to the acts of making available for individual access from different places and at a different time.⁹⁸⁹ Further, it specifies that the term of communication covers any means or processes of communication other than by distributing copies, either by wire or wireless means.⁹⁹⁰ The case law of the CJEU shows a tendency to consider the right of making available a part of a broader right of communication to the public.⁹⁹¹

5.2.2.2. Right of making available to the public

The second part of Article 3(1) presents, if not the core, then a very important part of the Directive, namely recognising, in line with the WIPO CT, the exclusive right of making a work available to the public. As the Explanatory Memorandum provides, the scope of the right covers solely interactive on-demand acts of digital transmission.⁹⁹² Hence, broadcast, pay-per-view services or any services offering a pre-defined programme or near-on-demand-video shall fall outside of the scope.⁹⁹³

Whereas transmissions appear to still play a role in the context of the right of communication to the public, the Explanatory Memorandum stipulates that the critical act for making available is the one preceding the actual on-demand transmission.⁹⁹⁴ Hence, some line could be drawn between the communication to the public and making available rights. The former would include an act (or series of

⁹⁸⁸ Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 10 December 1997, p. 25.

⁹⁸⁹ *Ibid.*, p. 5.

⁹⁹⁰ *Ibid.*, p. 25.

⁹⁹¹ See, inter alia, CJEU, *C More Entertainment AB v Linus Sandberg*. (2015) Case C-279/13, Judgment of 26 March 2015, para. 24; CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, para. 13. In the latter case, the CJEU reformulated the question from concerning the right of making available to the right of communication to the public.

⁹⁹² Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 10 December 1997, p. 26.

⁹⁹³ See also von Lewinski (1999), p. 773.

⁹⁹⁴ Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 10 December 1997, p. 27.

acts) of transmission, whereas the latter finds its application even before any transmission takes place. This very much resembles the characteristic of the rights of communication to the public under international law. An act falls under the exclusive right even if there is no audience receiving the communication.

In the absence of a clearly defined act that is targeted by the making available right and with a view to the breadth of the language of the provision, it is no surprise that neither the right's relation to transmissions is clear nor the right's delineation against acts falling under the right of communication to the public. The opinion of the AG, holding that the making available right is the digital equivalent of analogue communication to the public right, only further complicates the matter.⁹⁹⁵ The reference to interactivity of communication achieves little to assist in interpreting the scope of the right.⁹⁹⁶

5.2.2.3. Non-exhaustion of the right of communication to the public

As highlighted in the sections above, unlike under the BC, the InfoSoc Directive does not maintain any distinction between the primary and secondary acts of communication or clarifies the significance of relying on previous acts of exploitations.⁹⁹⁷ Instead, Article 3(3) of the Directive stipulates that:

The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public of a work and other subject matter as set out in paragraph 2, including their being made available to the public.

According to the Explanatory Memorandum, Article 3(3) clarifies that an act of communication to the public or of making available of a work can be repeated an unlimited number of times and every such act must be authorised by the right holder, relying on the *Coditel I* and *Warner Brother* judgments.⁹⁹⁸ The explanation thus suggests that every act falling under the scope of the right of communication to the public and making available is subject to authorisation. However, as has been stressed before, this is indeed the case for any exclusive right, including the right of distribution. Henceforth, the Article ought to suggest that every secondary act of communication is inevitably subject to authorisation, referring to the exhaustion principle and case law.⁹⁹⁹

⁹⁹⁵ Opinion of Advocate General in *Land Nordrhein-Westfalen v Dirk Renckhoff*. Case C-161/17. 25 April 2018, para. 4.

⁹⁹⁶ Guibault et al. (2007), p. 28.

⁹⁹⁷ Depreeuw (2014), pp. 458–459.

⁹⁹⁸ Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. COM (97) 628 final. 10 December 1997, p. 27. For a comment on the little relevance of the *Warner Brothers* judgment see section 4.2.1.3.

⁹⁹⁹ Also, notwithstanding the fact that Article 3(1) itself suggests that at least cable retransmissions fall within the broad right of communication to the public. See Rosén (2014), p. 232.

Whereas, at first glance, it would seem like the provision merely codifies the jurisprudence subjecting any secondary acts of communication to exclusive rights, this connotation will be contested here. First, while some consider the inclusion of the statement as a necessary but also an obvious clarification, others hold that careful reading of the cases does not lead to the conclusion that exhaustion is precluded.¹⁰⁰⁰ Similarly, others hold that the statement is highly contradictory and founded on specific historical circumstances of the preceding case law.¹⁰⁰¹ I strongly concur with the latter interpretations. As has been explained, the *Coditel I* case, on which the EC was relying, did not decide whether the acts of retransmission within the same territory should be precluded but merely that such retransmission outside of the coverage area (or territory of MS) could be prohibited.¹⁰⁰²

Second, as indicated above, Article 3(3) read in conjunction with recital 29 illustrates the misinterpretation of the exhaustion principle. These provisions are supposed to clarify that each act of communication is subject to authorisation by the right holder. However, the same statement would also be true in regard to the rights that can be exhausted, such as the right of distribution. Exhaustion of such right does not mean that right holder cannot authorise new acts of distribution of the copies other than those already distributed. It merely means that the acts of secondary distribution cannot be controlled, specifically in regard to already distributed copies. Hence, the legislator in this context is stating the obvious, i.e. that the right covers each and every act of communication of a work. However, by using the term exhaustion, it attempts to subject all the acts of secondary communication to the exclusive right, which is not in line with then- or now-existing case law.¹⁰⁰³

This finding is supported by the few references to Article under CJEU jurisprudence. We find the Court mentioning the Article while interpreting the scope of the right of communication to the public under the InfoSoc Directive only twice. First, in the *Renckhoff* case, concerning an act of a new upload of a work and, hence, a new independent communication of a work.¹⁰⁰⁴ Second, in the *TVCatchup* case on retransmission of a broadcast on the Internet, where the Court

¹⁰⁰⁰ On the necessity of the statement, see Cohen Jehoram (1999), p. 498; von Lewinski (1999), p. 774.; On *Coditel I* not precluding exhaustion see Guibault et al. (2007), p. 26; Hugenholtz et al. (2006), p. 24.

¹⁰⁰¹ Mysoor (2018), p. 680; Jütte (2017), p. 189; Tjong Tjin Tai (2003), p. 208; Spedicato (2015), pp. 42, 46.

¹⁰⁰² For more, see section 5.2.1.1. Also, Dreier (2006), p. 218.

¹⁰⁰³ This seems to have been confirmed by the CJEU in the *TVCatchup* case. First, the Court states that under Article 3(3) authorisation to communicate a work does not exhaust the right to authorise other communication. Second, the Court draws the conclusion that the legislator intended to make any transmission of retransmission (using separate technical means) subject to the right holder's authorisation. CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd*. (2013) Case C-607/11, Judgment of 7 March 2013, paras 23–24.

¹⁰⁰⁴ See section 5.2.3.1.2.

found it to be a new use of a work.¹⁰⁰⁵ Accordingly, the reference to exhaustion seems to be made solely within the meaning of subjecting any independent act or a new use to right holder's authorisation.

Before proceeding to the third point, it is necessary to mention recital 29 of the Directive, which further provides that the question of exhaustion does not arise in the context of the on-line services:

The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

The recital uses the shaky ground of the *Coditel I* and *Warner Brothers* cases once more to argue that services cannot lead to exhaustion, including into the notion of service not only traditionally intangible dissemination through communication but also rental and lending. The recital unnecessarily mixes up the issues from different domains, namely a) the necessity of obtaining authorisation for an act of secondary intangible communication (corresponds to the question of application of exhaustion in the context of material dissemination), b) a definition of services and unconvincingly binding them to intangible dissemination, c) misusing the term of exhaustion only to confirm that every act of communication must be authorised.

The legislator overlooks the scenario when online delivery is equivalent to tangible distribution.¹⁰⁰⁶ Such would be the case, for instance, where a constant connection to an online service is not necessary for consumption of a work.¹⁰⁰⁷ Recital 29 seems to be motivated by the view that exhaustion in online dissemination would be incompatible with the aim of encouraging online services.¹⁰⁰⁸ However, such a rigid distinction may be difficult to reconcile with consumer expectations and economic considerations, or may even support contesting its binding nature.¹⁰⁰⁹

¹⁰⁰⁵ In the context of the right of distribution, a new use metaphor can be compared to the right of rental surviving exhaustion of the right of distribution, as it enables new exploitation. See also section 3.2.2.3.

¹⁰⁰⁶ Dreier (2006), p. 218; Guibault et al. (2007), p. 26.

¹⁰⁰⁷ For an overview of arguments for and against, see Wiebe (2009), pp. 116–117. Also, Spedicato holds that for the purposes of distinguishing goods from services one should rely on the distinction between exploitation entailing transfer of ownership and not entailing it. Spedicato (2015), p. 49.

¹⁰⁰⁸ Westkamp (2017), p. 45.

¹⁰⁰⁹ On consumer expectations and economic considerations, see Hugenholtz et al. (2006), pp. 27–28. See also Hilty contesting the binding nature of the recital, Hilty (2016), pp. 69–70.

Rather surprisingly, the only judgment where the CJEU mentions recital 29 is the *UsedSoft* case on exhaustion under the Software Directive. First, the AG described the recital as ambiguous and proceeded to interpret it as not precluding the application of exhaustion under the Software Directive to the acts of disseminating digital copies of software.¹⁰¹⁰ The Court, in turn, refrained from interpreting recital 29 and merely acknowledged the position of the EC. The CJEU has, in essence, avoided interpretation of the recital by holding that the Software Directive constitutes a *lex specialis* to the InfoSoc Directive.¹⁰¹¹ It remains to be seen how the Court will address the questions referred in Dutch proceedings on the resale of e-books.¹⁰¹² Even though the referring court is asking the CJEU to rule on whether dissemination of e-books falls under the right of distribution under InfoSoc and, hence, potentially satisfy the conditions of the exhaustion principle, the CJEU will likely have to also interpret Article 3(3).

Even notwithstanding the absence of the conclusive grounds for denying exhaustion in the meaning of exempting subsequent acts of communication from authorisation, the very decision to do so seems extremely hasty from today's perspective.¹⁰¹³ The developments following the proposal and the adoption of the Directive could not have been anticipated at the outset of copyright harmonisation. Instead, Article 3(3) unnecessarily complicates the discussion on online exhaustion.¹⁰¹⁴

5.2.3. CJEU developing the scope of the right of communication to the public

Given the all-encompassing nature of the right of communication to the public, its definition is essential for determining the scope of exclusive rights.¹⁰¹⁵ Whereas the right is spelled out in rather broad language under the InfoSoc Directive, the case law on the right of communication to the public is, in the very least,

¹⁰¹⁰ Opinion of Advocate General in *UsedSoft GmbH v Oracle International Corp.* Case C-128/11. 24 April 2012, para. 76.

¹⁰¹¹ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, paras 54–56.

¹⁰¹² Request for a preliminary ruling in *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet and others* (2018) Case C-263/18.

¹⁰¹³ See Hilty (2018), p. 867.

¹⁰¹⁴ Ohly (2009), p. 237. An interesting approach of dealing with the legacy of the provision is offered by Hilty. First, Article 3(3) should be interpreted as referring to exhaustion solely in its literal meaning in the analogue environment, i.e. as exempting further resale of copies fixed on a tangible medium. Subsequently, Article 3(3) will carry little weight when dealing with cases of contemporary dissemination lacking tangible mediums but enabling passing access. See Hilty (2018), p. 867.

¹⁰¹⁵ Guibault and Quintais (2014), p. 21.

confusing.¹⁰¹⁶ Interpretation of the right as harmonised under the InfoSoc Directive became the most controversial aspect of EU copyright law.¹⁰¹⁷ AG Sánchez-Bordona has recently described the body of case law with a quote from Ansel Adams: “There is nothing worse than a sharp image of a fuzzy concept”.¹⁰¹⁸

An interesting observation is that all but two cases under the jurisprudence on the right concern secondary rather than primary communication, in a sense that such communication relies and often depends on a previous act. For instance, such acts comprise retransmission, which relies on the original broadcast or hyperlinking, which in turn relies on a third person uploading a work. Also, in a majority of these cases, initial communication has been authorised by the right holders. With very few exceptions, jurisprudence examines acts of secondary communication. This suggests that it is here where the grey area lies.

The CJEU has developed a commercial communication right by operating with notions of real harm, a new public and profit-making nature as elements of the right and extending exhaustion to downloads.¹⁰¹⁹ As will be shown, despite the restrictive wording of the right and Article 3(3) of the InfoSoc Directive, the Court has sometimes exercised a remarkable flexibility when dealing with the boundaries of the right.¹⁰²⁰ Whereas the approach of the Court is often somewhat unpredictable, the developments have also been praised. In particular, downgrading the exclusivity of the right holder’s control was supported, as it may lead to competition instead of foreclosing any market for subsequent exploiters of a work.¹⁰²¹

Whereas the rich jurisprudence of the Court could be analysed from many different angles, for the purpose of this analysis, the focus is on the justifications for limiting or extending the right holder’s control over dissemination beyond the first communication of a work. Hence, the cases interpreting the right of communication to the public are divided into two groups, corresponding to sections 5.2.3.1. and 5.2.3.2. of this chapter. The first group is rather scarce and encompasses two cases concerning entirely separate acts of communication. The second group covers the cases concerning secondary acts of communication, relying on initial communication in one way or another.

Furthermore, the second group is divided into two major categories. The first category comprises cases related to performance or broadcast, and the second category covers cases of communication happening entirely within the online

¹⁰¹⁶ See Hugenholtz and van Velze (2016), p. 798.

¹⁰¹⁷ Quintais (2018), p. 2.

¹⁰¹⁸ Opinion of Advocate General in *Land Nordrhein-Westfalen v Dirk Renckhoff*. Case C-161/17. 25 April 2018, para. 5.

¹⁰¹⁹ Westkamp (2017), p. 23. See also on the economic approach of the Court, Guibault and Quintais (2014), p. 14.

¹⁰²⁰ See empirical study by Rendas (2018). Also, on the Court being motivated to reach a reasonable result at the expenses of traditional copyright concepts, providing flexibility by considering fair competition and market effect, see Riis (2013), pp. 139–140.

¹⁰²¹ Westkamp (2017), p. 39.

environment. The main purpose of grouping these cases into categories is to illustrate how, depending on the circumstances of the cases, the Court relies on the developed notion to a various extent. As shall be seen, the Court demonstrates the importance of flexibility when examining the right of such ultimately broad scope. Furthermore, the Court also employs arguments which are quite similar to those identified under the analysis of the right of distribution.

5.2.3.1. Primary acts of communication

Despite the fact that the number of the cases on the interpretation of the right of communication to the public under the InfoSoc Directive is rather high, only two of them can be categorised as concerning an unauthorised act of primary communication, i.e. originating from a person other than the right holder and without the authorisation of the latter. Perhaps it could be attributed to the absence of greater doubts whether such cases fall under the scope of the right. Nonetheless, the only case concerning a new act of communication which was deemed to fall under the scope of the right of communication to the public, was, in fact, decided very recently.

5.2.3.1.1. Communication through a live performance outside the scope of the right

Although it was more or less clearly explained at the preparatory stage of the adoption of the InfoSoc Directive that the right of communication to the public would not extend to acts of performance to a present public, a case on the matter reached the CJEU as late as in 2010. However, it is also understandable in the light of the overreaching character of the right and the blurred boundaries of a present and non-present public under the preceding case law.¹⁰²²

Ultimately, there is a thin line between the live performance of music to a present public and providing access to a live performance by installing a TV set in a common space. Essentially, the public is “present” in both cases. The only difference is that in the latter case an act of transmission is involved. The Court has previously interpreted such transmission as originating not where a TV set is installed but, essentially, where the broadcast of the performance originates.¹⁰²³

¹⁰²² See earlier case law interpreting the right and relying on the notion of present public, section 5.2.3.2.1.3.

¹⁰²³ This is a bit puzzling if considered from the perspective of primary and secondary communication. Ultimately, transmission originates from a broadcaster. However, it could be argued that communication taking place through public receipt of a broadcast as an act of making a work perceptible originates where a TV set is installed.

The understanding of a present public has also been rather different under national laws, for instance, in the Nordic countries.¹⁰²⁴

The reason why the definition of a present public matters is because the right of performance and the right of communication to the public are exploited differently and the conditions of their exercise could vary. For instance, in the *Circul Globus* case the dispute in the main proceedings concerned the performance of music during circus and cabaret performances. The owner did not obtain a license for such performance from the CMO entrusted by Romanian law with managing the rights of communication to the public. He argued that the license had already been obtained directly from the right holders and to require him to obtain one via the CMO was against the provisions of the InfoSoc Directive.

The referring Court essentially asked whether such public performances fell under Article 3(1) of InfoSoc. Furthermore, if they were to fall under this Article, whether the Directive precluded national law from entrusting the CMO with managing the right. Not too surprisingly, the CJEU ruled that the communication to the public right under the Directive does not cover live performance. The Court noted that it was not intended under Article 3(1) to cover direct representation or performance to a public present at a place where such communication originates.¹⁰²⁵ Accordingly, the CMO in the proceedings could not claim royalties for the public performance.

What is important in this case is that authorisation from the right holders was already obtained, hence they had received a remuneration. Therefore, the CMO request for remuneration on the basis of communication to the public right essentially was a claim for additional remuneration on the basis that the act fell under the right of communication to the public. The reason the Court dismissed the claim was the explicit intent of the legislator to exclude public performances to a present public from the scope of the harmonised right. As a matter of fact, only slightly different cases were considered to fall within the right, in the absence of an explicit intent of the legislator to leave them outside of the scope of the right.

5.2.3.1.2. Upload of a work to a webpage as an act of communication

Another case on the act of primary communication has been decided by the CJEU very recently. Setting aside the fact that the alleged act of communication took place in the educational context, be it not the preceding jurisprudence of the CJEU, the answer would be a straightforward one.¹⁰²⁶ The outcome would most

¹⁰²⁴ For an overview, see Axhamn (2014), Rosenmeier (2016), Rosenmeier and Blomqvist (2018).

¹⁰²⁵ CJEU, *Circul Globus București (Circ & Variete Globus București) v Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor (UCMR - ADA)*. (2011) Case C-283/10, Judgment of 24 November 2011, paras 37–40.

¹⁰²⁶ Ohly (2018b), pp. 1003–1004.

certainly be the same one (if it would even make it all the way to the CJEU) if the case had been decided in the early 2000s. However, the reasoning would likely be much more streamlined.

The question in the *Renckhoff* case was whether upload of a copy of a work which was already freely available on another webpage with the right holder's authorisation would amount to an act of making a work available to the public.¹⁰²⁷ The Court, in its own fashion, reformulated the question as essentially asking whether such upload would be covered by the right of communication to the public.¹⁰²⁸ Whereas, at first sight, it would appear as if the circumstances are comparable to the earlier *Svensson* case, where the Court did not find an act of communication to the public, this case had to be distinguished.¹⁰²⁹ Whereas the former case concerned a hyperlink which would only provide access to the original webpage and a work without altering the way of presenting it and for as long as it was still available, in the present case it was a separate act not in any way dependant on the original upload besides the copying of a file.

At the very outset of his opinion, the AG found that upload of a work without authorisation constituted, in general, an act of making available.¹⁰³⁰ Nonetheless, he immediately proceeded to examine the role of the user uploading a work without authorisation and the consent of the author to the original making available of a work. The AG was of opinion that, when a work was already freely available without attribution to the author, a regular user could assume that the author had no objections to the usage of a work for educational purposes.¹⁰³¹ To hold every such user accountable for infringement of the right would undermine the freedom of expression and the right to education under the CFR (Articles 11 and 14(1)).¹⁰³²

The CJEU, nonetheless, took a different path. The Court recalled the two cumulative criteria of communication to the public developed in the case law (an act of communication and a presence of public) and held that the posting of a work on a website indeed amounted to the communication as it essentially made a work available.¹⁰³³ The decisive criteria to qualify an act of upload as infringing the right of communication to the public in this case became the existence of a new public. The claimant, the intervening governments, and the EC rightly disagreed on this point.¹⁰³⁴

¹⁰²⁷ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, para. 12.

¹⁰²⁸ *Ibid.*, para. 13.

¹⁰²⁹ See the *Svensson* case, section 5.2.3.2.2.

¹⁰³⁰ Opinion of Advocate General in *Land Nordrhein-Westfalen v Dirk Renckhoff*. Case C-161/17. 25 April 2018, paras 61–62.

¹⁰³¹ *Ibid.*, paras 62–68.

¹⁰³² *Ibid.*, para. 79.

¹⁰³³ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, para. 21.

¹⁰³⁴ *Ibid.*, para. 28.

The Court held that the upload of a work on a webpage in this case was such as to present a work to a new public, which was based on two grounds. First, on the grounds that the right would be undermined if the right holder could not object or put to an end exploitation of a work on a third-party webpage.¹⁰³⁵ Second, based on, as it appears, a clear misinterpretation of non-exhaustion provision under Article 3(3) of InfoSoc. The Court reasoned that to hold that this new upload did not constitute an act of making available would amount to the exhaustion of the right of communication to the public.¹⁰³⁶

Relying on these considerations, the Court proceeded to state that the purpose of IP as to enable right holders to commercially exploit their work and, accordingly, that “In such circumstances, the public taken into account by the copyright holder when he consented to the communication of his work on the website on which it was originally published is composed solely of users of that site and not of users of the website on which the work was subsequently published without the consent of the rightholder, or other internet users”.¹⁰³⁷

This is, to say the least, surprising. While it remains to be seen whether the case will be upheld in the future, it introduces some unexpected criteria in the absence of a need to do so. The case could have been decided solely on the fact that an upload of a work on a publicly accessible website is a separate act of making available and, thus, a new act of communication to the public.¹⁰³⁸ No other criteria are necessary in this case, especially not those developed in the context of hyperlinking, where the acts in question did not concern the primary communication of a work at all.

Rightly so, the case law on hyperlinks was held inapplicable to the present case. However, the reasoning of the Court is subject to criticism. The CJEU held that jurisprudence on hyperlinking is not applicable because of three reasons. First, the case law specifically concerned hyperlinks, and thus circumstances do not call for the same balance between the right holders and the users’ interests. Second, unlike in the case of hyperlinks, where the original poster controls availability of a work, in the present case the preventive nature of the right could not be secured. Third, unlike in the case of hyperlinks, there was no lack of involvement when a work was actively uploaded.¹⁰³⁹

Overall, the outcome of the case is, of course, justified, keeping in mind that the Court left it to the referring Court to consider the application of the limitation to the right for educational purposes. However, it would suffice for the Court to step back and simply hold that an act of upload constitutes a separate act of

¹⁰³⁵ Ibid., paras 29–31.

¹⁰³⁶ Ibid., paras 32–33. The reference to the exhaustion principle in this context appears misleading, see section 5.2.2.3.

¹⁰³⁷ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, paras 34–35.

¹⁰³⁸ The Court has actually even stated that by holding that an upload constituted a new and independent communication. See Ibid., para. 44.

¹⁰³⁹ Ibid., paras 39–45.

communication to the public requiring the authorisation of right holder, especially that the Court explicitly provides that posting on a webpage “gives rise to a new communication, independent of communication initially authorised”.¹⁰⁴⁰ This would also be in line with the economic perspective on linking versus a new upload.¹⁰⁴¹

What is more, the Court brought into the picture the way a work has been initially posted on a webpage with the right holder’s authorisation. Despite the absence of a discussion on this point (except mentioning it in the facts of the case), the operative part of the judgment holds that unauthorised posting of a photograph falls under the communication to the public right when it has been “previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website”. Consequently, it opens the doors for arguing that the case might be different if initial posting only allows consumption of a work and not its download. Such interpretation of the right would clearly not be in line with the objectives of the Directive or obligations under international law.

The decision is, without a doubt, welcomed in the light of the confusion caused by the new public criterion, which often happens to conceal the relevant normative considerations.¹⁰⁴² However, it is slightly problematic in its reasoning. First, whereas stating at the outset that any upload constitutes an act of communication, subsequent discussion underplays the significance of the separate act of communication as contrasted with the acts relying on an initial act of communication. Second, by bringing back the public criteria into the assessment concerning a clearly distinct act of communication, the Court causes further uncertainty as to the scope of the right of communication to the public. Third, the Court unnecessary brings into the picture the concept of exhaustion, which ought to be of no relevance to separate acts of dissemination but only with the acts of subsequent exploitation.

It must be mentioned that the recently adopted DSM Directive aims to facilitate, *inter alia*, the legitimate use of works in the context of teaching activities. Article 5 of the Directive provides for a mandatory exception to the rights of reproduction and communication to the public under the InfoSoc Directive for digital use of works for non-commercial teaching purposes, provided that the teaching takes place through a secure electronic environment accessible only to the students accompanied by the indication of the source.¹⁰⁴³ Hence, the provision aims to ensure that use for educational purposes is exempted from authorisation by the right holder. However, this provision would not cover situations such as

¹⁰⁴⁰ *Ibid.*, para. 44.

¹⁰⁴¹ Poort (2018), p. 328. Also, Ohly (2018b), p. 999.

¹⁰⁴² Ohly (2018b), p. 1000.

¹⁰⁴³ 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. 17.5.2019. OJ L 130/92.

in the *Renckhoff* case, as a presentation using the copyright-protected work was made freely available on the Internet.

Accordingly, this case is a great illustration of the need to distinguish between primary and secondary acts of communication. As will be addressed in Chapter 6, it would be beneficial to reconcile the approaches to material and immaterial dissemination rights, in particular with respect to the variety of cases falling under the right of communication to the public. Whereas, it shall by no means imply constructing pre-defined limits by default, at least it would help to systematise the jurisprudence and achieve some level of coherence.

5.2.3.2. Secondary communication relying on the initial act

The largest and perhaps the most significant part of the CJEU jurisprudence examines whether acts that can be classified as secondary communication relying on acts of initial communication fall under acts requiring an authorisation pursuant to the right of communication to the public under the EU *acquis*. The cases presented here are very diverse in their circumstances and concern a great variety of analogue and digital communication channels.

The cases have been grouped into two major categories: acts in relation to performance and broadcasting and other acts, which are mostly related to communication in the digital environment. The reason is two-fold. First, the right of communication to the public harmonises the pre-existing rights related to broadcasting and retransmission. The question of control over subsequent acts (such as retransmission) has been discussed and partially harmonised at the international level. The need to exempt certain secondary acts from exclusive control had already been acknowledged before the EU harmonisation.

Second, the harmonisation of the right of making available or the acts of online communication, both primary and secondary, was completed in the absence of such underlying discussion. Hence, in such cases, the Court, in principle, does not have any other grounds to proceed from rather than a broadly worded right and the ambiguous statement on its non-exhaustion, as has been explored.¹⁰⁴⁴ Given the absence of a clear distinction between the right of making available to the public and the right of communication to the public under the InfoSoc Directive, no clear distinction is maintained either under the CJEU jurisprudence.

5.2.3.2.1. Secondary communication in relation to a performance or a broadcast

This section analyses the cases examined by the CJEU in connection to performance or broadcast. They can, in turn, be grouped in cases concerning (re)transmission and cases concerning the public receipt of a transmission (broadcast). As

¹⁰⁴⁴ See section 5.2.2.3.

has been illustrated in the section examining the background of the harmonisation, at the international level such acts appear as secondary exploitation, whose status is not clearly resolved. Hence, this section outlines the aspects which are relevant for consideration whether the acts of secondary communication constitute a form of secondary exploitation and whether such exploitation should be subjected to the exclusive control.

5.2.3.2.1.1. Transmission of a broadcast as a part of the initial authorised communication

The *SBS* case is the only case examining whether there is an act of communication to the public when an entity actively transmits a signal carrying a work without it being receivable by the general public. In this case the broadcasting organisation transmitted a work-carrying signal to point-to-point distributors, which then broadcasted it to the public. The organisation representing the right holders claimed that the initial transmission by the broadcasting organisation of a signal without the authorisation of the right holder constituted a breach of Article 3(1) of the InfoSoc Directive. The question was thus whether the right holder is entitled to authorise every act of transmission of a signal in a series leading to the broadcast of a work under Article 3(1) of InfoSoc.

The referring Court asked the CJEU to rule on whether the transmission of a signal carrying a work without making this work accessible to the public, but which will subsequently be made accessible to the public by signal distributors, constitutes an act of communication to the public under Article 3 of InfoSoc.¹⁰⁴⁵ The CJEU decided the case on the basis of the absence of the public, as the signal could not be accessed by viewers.¹⁰⁴⁶ However, the Court also established that situation would be different if the transmission of a signal from the distributors to the viewers was solely of technical character, in which case the transmission in the main proceedings would constitute communication to the public.¹⁰⁴⁷

Consequently, the CJEU did not rule out the possibility that the broadcasting organisation was performing an act of communication to the public altogether. The reason behind it seems to have been an intent to ensure that one of the entities in the chain of communicating a work is deemed to perform an act of communication to the public rather than letting the separate processes escape authorisation altogether. This is in line with the view expressed under the negotiations on the InfoSoc Directive. Namely, that an act of communication can consist of

¹⁰⁴⁵ Or, more precisely, as reformulated by the CJEU. See CJEU, *SBS Belgium NV v Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM)*. (2015) Case C-325/14, Judgment of 19 November 2015, paras 12–13.

¹⁰⁴⁶ *Ibid.*, paras 21–22.

¹⁰⁴⁷ *Ibid.*, paras 30–32.

few acts of transmission which must be considered together.¹⁰⁴⁸ In the present circumstances, the act of transmission constituted a part of the same act of communication to the public. The entity which actually made the signal available to the public (in this case the last in the chain), would be performing an act of communication to the public.

The CJEU employing the new public concept is not very convincing here, although it may have been motivated by its usage in a similar case under the Satellite and Cable Directive. In the *Canal Digitaal* case the Court referred to the new public because the transmission in question made a signal available to the public.¹⁰⁴⁹ Hence, the Court considered the intended audience and found that a transmission in question, in fact, constituted a separate act of communication as it was targeting a separate audience. The right of communication to the public was used to require an authorisation and, thus, remuneration for an act of transmission, for which authorisation must have been obtained prior the transmission of the broadcast. Hence, the ultimate question was also whether the organisation representing the right holders could claim remuneration not only from an organisation receiving a signal for subsequent transmission to the receiving public, but also from an organisation merely supplying the signal.

5.2.3.2.1.2. *Retransmission to the same coverage area or the circle of intended recipients*

Next, the jurisprudence of the Court addressed the issues of the retransmission of the original signal without obtaining a separate authorisation of the right holder but reaching, essentially, the same intended public. Although the two cases considered below concern similar situations, the Court reached the opposite conclusion. It is important to provide the background for the cases, namely which entity was relying on the right of communication to the public and what the ultimate goal was.

In the first of the two cases (*TV Catchup*), the broadcasting organisation itself was also the owner of the author's rights in the works that were broadcasted.¹⁰⁵⁰ Hence, the broadcasting organisation invoked the right of communication to the public to subject the retransmission of its signal, essentially reaching the same public, to authorisation. Basically, subjecting retransmission to authorisation would either eliminate the competition or subject such retransmissions to remuneration. The second case (*AKM*) was brought by the CMO against the

¹⁰⁴⁸ It resembles the reasoning of the Court in cases concerning the right of distribution, where the right encompassed preparatory steps. See section 3.2.4.2.

¹⁰⁴⁹ CJEU, *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) and *Airfield NV v Agicoa Belgium BVBA* (C-432/09), Judgment of 13 October 2011.

¹⁰⁵⁰ It is of importance in the context of the Satellite and Cable Directive that permits collective licensing for simultaneous retransmissions. See Guibault and Quintais (2014), p. 20.

operator of a cable network for distribution of a broadcasting signal to its subscribers. The organisation claimed a payment of remuneration for the retransmission of original broadcast.

What is also important to note is that retransmission in these cases did not concern a specific work but rather the broadcast as a whole. This, essentially, goes back to the discussions on the need to exempt the simultaneous unaltered retransmissions from a separate authorisation. However, retransmissions seem to have been substantially harmonised under the right of communication to the public under the InfoSoc Directive.¹⁰⁵¹ The question that arises in the context of these cases is whether the copyright holder shall benefit from each and every act of exploitation even after remuneration was obtained, in particular if it reaches the same authorised audience. As will be shown, the answer is anything but a black or white and will depend on a variety of considerations.

5.2.3.2.1.2.1. Retransmission of a broadcast via the Internet

The proceedings in the *TVCatchup* case concerned an online service that allowed identified users to stream a live broadcast of the channels which these users were entitled to under their analogue license. The affected broadcasters owning the copyright in the broadcasted programmes maintained that such service infringed their right of communication to the public of such programmes. The referring court thus asked the CJEU, inter alia, whether the right of communication to the public extended to cases where the third party provided a service by which users, who could lawfully receive the broadcast on their TV sets, could receive the content of the broadcast online upon authentication.¹⁰⁵²

The CJEU, however, reformulated the question to whether the communication to the public right under Article 3(1) covers a retransmission of the works included in a terrestrial television broadcast by a third party by means of an Internet stream available to subscribers entitled to a terrestrial broadcast. Accordingly, the Court shifted the focus from retransmission of a signal to retransmission of a work. The important peculiarity of the case was that the service only let the users who were indeed in the possession of a terrestrial license to authenticate and receive a transmission by determining their location.¹⁰⁵³ The Court thus examined the case on the assumption that all the users were entitled to receive the broadcast lawfully through other means than using the online service in question.¹⁰⁵⁴

The defendant in the proceedings (the provider of the online service) argued that online retransmission of the broadcast constituted merely a technical means to ensure or improve reception of the broadcast in the intended area. The CJEU

¹⁰⁵¹ Quintais and Poort (2018), p. 42.

¹⁰⁵² CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd.* (2013) Case C-607/11, Judgment of 7 March 2013, para. 18.

¹⁰⁵³ *Ibid.*, para. 10.

¹⁰⁵⁴ *Ibid.*, para. 19.

disagreed with the merely technical function of such retransmission and held that it constituted a separate transmission subject to the right holder's authorisation.¹⁰⁵⁵ The Court argued that the circumstances of the case had to be distinguished from the earlier cases concerning broadcasting, as in the present case retransmission was carried out using a different method.¹⁰⁵⁶

Significantly, the Court recalled Article 3(3) of the InfoSoc Directive, providing for non-exhaustion of the right of communication to the public. The CJEU held that authorising inclusion of a work in communication to the public did not exhaust the right to authorise or prohibit other communications. The EU legislature regulated the situations in which a work is put to multiple uses. Hence, as the Court suggested here, retransmission through different means constitutes such a new use of a work.¹⁰⁵⁷ Accordingly, the CJEU established that, when different means were used to retransmit a work (as in the present case), such retransmission constituted a separate act of communication to the public. Hence, there was no need to examine whether there had been a new public.¹⁰⁵⁸

The referring court also asked if the two aspects played any role in establishing the existence of an act of communication to the public: the profit-making nature of the online service and the fact that the service provider acted in competition with the right holder. The CJEU held that the profit-making nature was neither an essential nor a decisive condition for there to be an act of communication to the public.¹⁰⁵⁹ The competitive nature of the service in relation to the right holder's one, on the other hand, was not relevant for the purpose of categorising a transmission.¹⁰⁶⁰ It is regrettable that the Court dismissed these circumstances, especially in the light of the subsequent cases on similar grounds where the Court reached a different result.

The Court's reasoning could have been more considerate. First, nowhere did the Court discuss whether such simultaneous transmission of a broadcast online constituted a separate act of communication to the public of a specific work under the InfoSoc Directive. The Court relied on the provisions of the Satellite and Cable Directive to find that this is the case. However, if the same public was reached by the retransmission at the very same time, remuneration from the receiving public had already been obtained through terrestrial licenses.

Considering that the right holder in question is actually the broadcasting organisation, another question that arises is whether the copyright holder should be entitled to additional remuneration for the very same act of communication. Moreover, also from the perspective of the user in possession of a terrestrial license, it does not seem fair to be deprived of the possibility to obtain (potentially

¹⁰⁵⁵ *Ibid.*, paras 27–30.

¹⁰⁵⁶ *Ibid.*, para. 26.

¹⁰⁵⁷ *Ibid.*, paras 23–24.

¹⁰⁵⁸ *Ibid.*, paras 38–39.

¹⁰⁵⁹ *Ibid.*, paras 43–44.

¹⁰⁶⁰ *Ibid.*, para. 46.

more user-friendly) access despite the fact that they had already remunerated the right holder. Whereas such a service might be considered as interfering with the market for a work and, hence, subject to the exclusive right, the CJEU could have done a better job at exploring the implications.

Furthermore, the significance of the “different technical means” criterion appears rather blurry. First, in the latter case of cable retransmission, the Court, very surprisingly, did not refer to the *TVCatchup* case at all. Second, it would also be highly questionable whether a slight change of technology in a multi-stage communication would necessarily constitute a different method.¹⁰⁶¹ Third, it did not clarify the significance of reaching a new public. Overall, the Court seems to suggest that a new way of exploiting a communication, even if simultaneous and unaltered, is subject to a separate authorisation.¹⁰⁶² Accordingly, the Court seems to rely solely on such retransmission being a new use of a work. Although the Court denied the relevance of competition and obtaining a profit, they seem valid criteria to consider and will be discussed in Chapter 6.

5.2.3.2.1.2.2. Retransmission of a broadcast via a cable network

The reasoning of the Court in the *TVCatchup* case could be seen as partially reversed in the later *AKM* case, which so far received limited attention in copyright scholarship and succeeding CJEU judgments.¹⁰⁶³ In the *AKM* case on simultaneous retransmission, the question referred to the CJEU was whether transmission of a broadcast through cable network installations constituted a separate act of communication to the public under Article 3(1) of InfoSoc. More precisely, the question was whether national law exempting such cable installations if they comprised of fewer than 500 subscribers was in breach of the Directive. Retransmission of the original broadcast took place simultaneously through the cable and without altering its content.

Answering the questions, the Court first examined whether there was an act of communication to the public requiring authorisation. Surprisingly, the CJEU did not refer to the *TVCatchup* case on the similar matter and did not, generally, speak of the transmission in question as a retransmission.¹⁰⁶⁴ Although finding that the transmission was done by means other than the original (via cable network and not a broadcast), the Court merely stated that the facts permitted qualifying such transmission as an act of communication to the public.¹⁰⁶⁵

¹⁰⁶¹ For that reason, Peukert called these criteria isolated. See Peukert (2017), p. 889.

¹⁰⁶² Geiger and Schönherr (2014b), p. 417.

¹⁰⁶³ For instance, scholars often rely on the *TV Catchup* ruling without mentioning the *AKM* case. See Ginsburg and Budiardjo (2018), p. 169. On the other hand, see Peukert (2017).

¹⁰⁶⁴ Which it essentially was, in a sense that it relied on initial transmission to communicate a broadcast to the subscribers.

¹⁰⁶⁵ CJEU, *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* (2017) Case C-138/16, Judgment of 16 March 2017, para. 26.

Next, likewise at odds with the *TVCatchup* judgment, the Court proceeded to the second criterion of communication to the public. Namely, the CJEU examined whether there was a new public.¹⁰⁶⁶ The Court found that the right holder's authorisation for a national broadcast clearly also covered the persons that could receive the signal retransmitted by the defendant. Accordingly, no new public was reached through the transmission in question.¹⁰⁶⁷ Nevertheless, an act of communication to the public could have taken place if such secondary transmission would also include broadcasts by different broadcasters from another MS.¹⁰⁶⁸

The operative part of the judgment further specifies the conditions under which Article 3(1) of the InfoSoc Directive and Article 11*bis* of the BC do not preclude national legislation that does not cover an act of simultaneous and unaltered transmission of a broadcast with the communication to the public right. Namely, the Court states that the criterion are satisfied if (re)transmission takes place on national territory and "provided that it is merely a technical means of communication and was taken into account by the author of the work when the latter authorised the original communication, this being a matter for the national court to ascertain".

Hence, in this case, although establishing that the retransmission in question was done using different technical means, the Court found it necessary to examine the criteria of the public. Essentially, by restricting the scope of the right of communication to the public in the present case the Court avoided double compensation to the right holder.¹⁰⁶⁹ The question that arises is whether there are any "levels" of different technical means, according to which the new public ought to be taken into consideration. Whereas the subsequent communication of a work using a new way of exploitation (e.g. streaming) may indeed justify requiring the consent of the right holder, not every slight change may be of the comparable level of significance.¹⁰⁷⁰

While it is difficult to draw a clear picture of when a simultaneous retransmission of a broadcast constitutes a separate act of communication to the public, combining some arguments from both cases could perhaps help to define a better working criterion for the necessity to obtain authorisation for the retransmission of a broadcast. Namely, if a retransmission is simultaneous, unaltered, and aimed at the same public, it would not, as a rule, require authorisation (in line with the *AKM* case). However, if such retransmission substantially interferes with the interests of copyright holder, it can be deemed a new communication to the public and require authorisation (in line with the *TVCatchup* case).

¹⁰⁶⁶ Ibid., paras 27–28. On new public criteria, see, inter alia, section 5.2.3.2.1.3.2.

¹⁰⁶⁷ Ibid., para. 29.

¹⁰⁶⁸ Ibid., para. 33.

¹⁰⁶⁹ Peukert (2017), p. 892.

¹⁰⁷⁰ See section 6.2.3. Also Ibid., p. 889.

“New technical means” is not a very technology-neutral criterion, although it may seem like one. Given the constantly evolving technological possibilities, it is desirable to define a criterion that is based on a clearer rationale. Perhaps, such criteria as interference with exploitation or competition with the right holder could be used. Whereas the “new technical means” criterion points towards sanctioning the right holders with obtaining remuneration for each (direct or indirect, in competition or not) exploitation, the new public criterion in the *AKM* case points towards limiting the reach of the right where interference is insignificant, and no new potential audience is reached.

5.2.3.2.1.3. Public receipt of a broadcast as a secondary communication

The question whether public receipt of a broadcast always falls under the exclusive right of communication to the public is not resolved. Whereas in certain cases the CJEU deemed it to fall within the scope of the right, in others it did not. Public receipt here means the installation of a TV or radio set outside the private sphere. In the cases considered by the CJEU, the sets were installed at commercial establishments, either in common spaces such as pubs or in more private ones such as hotel rooms. The question was essentially whether making a transmission available in a public place rather than in person constitutes a retransmission requiring authorisation.¹⁰⁷¹

The cases of public receipt of a broadcast represent analogue communication rather than that enabled by the digital environment. A public not present at the place where the communication originates appears slightly inadequate in given circumstances. According to CJEU jurisprudence, installing TV sets constitutes a separate act of communication. Hence, the communication in this case would actually originate at the place of TV set and, ultimately, at the place of the public.¹⁰⁷² Nevertheless, the Court has treated such a public as not present at the place where communication originates, clearly having in mind the origin of a broadcasting signal instead.

If put into context, the cases of public receipt of a signal essentially concern the question whether different right holders are entitled to remuneration on top of that received for a broadcast of a work. Hence, by qualifying an act of public receipt under the communication to the public right, the Court accords the right holders a claim for additional remuneration when an authorised broadcasting signal is received at commercial establishments. It is also important to note that the right of communication to the public is harmonised not only as the author’s right but also as a neighbouring right for performers, producers, broadcasters, etc.

¹⁰⁷¹ Opinion of Advocate General in *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)*. 3 February 2011, para. 117.

¹⁰⁷² A bit different but similar point was made by the AG, see *Ibid.*, paras 144–146. Under Swedish law, see *Axhamn (2007)*, p. 155.

Accordingly, qualifying an act as falling under the communication to the public right under Article 3 has far-reaching consequences, allowing a vast variety of right holders to ask for remuneration.

Whereas this thesis is concerned solely with the right of communication to the public as a right granted to authors under the InfoSoc Directive, this section will include references to the cases from the domain of the neighbouring rights. On the one hand, the Court ruled that the neighbouring right of communication to the public under Article 8(2) of the Rental and Lending Rights Directive requires an individual interpretation based on the compensatory nature of the right.¹⁰⁷³ On the other hand, the CJEU held later that communication to the public ought to have the same meaning for the right under the InfoSoc Directive and the neighbouring rights under the Rental and Lending Rights Directive.¹⁰⁷⁴ The Court actively refers to case law under both Directives when examining the scope of the communication to the public right under the InfoSoc Directive.¹⁰⁷⁵

The subject of Article 8(2) of the Rental and Lending Directive is a single equitable remuneration paid by the user for the use of a phonogram for any communication to the public:

Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers, lay down the conditions as to the sharing of this remuneration between them.

The latter is thus a remuneration right as opposed to the right under Article 3(1) of the InfoSoc Directive. Hence, it is of importance to qualify the act under the appropriate Article and Directive as the Court has done in the *Del Corso* case.¹⁰⁷⁶ Notwithstanding that, the ultimate goal of both exclusive rights is to secure remuneration through a work's exploitation, and hence it supports the same considerations for both types of rights.

¹⁰⁷³ CJEU, *Società Consortile Fonografici (SCF) v Marco Del Corso*. (2012) Case C-135/10, Judgment of 15 March 2012, paras 74–77.

¹⁰⁷⁴ CJEU, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*. (2016) Case C-117/15, Judgment of 31 May 2016, paras 32–34.

¹⁰⁷⁵ For instance, CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, paras 28–36; CJEU, *Stichting Brein v Jack Frederik Wullems*. (2016) Case C-527/15, Judgment of 26 April 2017, para. 30.

¹⁰⁷⁶ The case was referred on the basis of Article 3(1) of the InfoSoc Directive, but the Court reformulated the questions to interpret the neighbouring right under Article 8(2) of the Rental and Lending Rights Directive. See CJEU, *Società Consortile Fonografici (SCF) v Marco Del Corso*. (2012) Case C-135/10, Judgment of 15 March 2012, para. 64.

5.2.3.2.1.3.1. Receipt of a broadcast as an act of communication

The *Rafael Hoteles* case was the very first case referred to the CJEU on the interpretation of Article 3(1) and the right of communication to the public. The proceedings were brought against a hotel that installed TV sets in rooms, enabling customers to watch broadcasts of channels subscribed to. SGAE (the body responsible for managing IP rights in Spain) claimed that by providing TV sets the hotel was communicating to the public in the meaning of Article 3(1) of the InfoSoc Directive musical works which SGAE managed. With a view that the hotel had not obtained prior authorisation for such communication, SGAE demanded compensation.¹⁰⁷⁷

The referring court thus asked whether installation of TV sets in hotel rooms amounted to the communication of musical works included into a broadcast and if the hotel guests constituted a public. First, the CJEU noted that the installation of TV sets as such did not constitute communication of a work. However, if by the means of these sets distribution of a programme-carrying signal took place, it constituted an act of communication to the public performed by the hotel owner.¹⁰⁷⁸ Transmission of a broadcast through TV sets was a deliberate action to provide access to a broadcast rather than a mere technical arrangement.¹⁰⁷⁹

Perhaps slightly counterintuitively, it was established that installation of the TV sets amounted to distribution of a signal and, hence, communication of a work.¹⁰⁸⁰ This can be found counterintuitive because mere reception of a signal was considered its distribution, amounting to communication of a work. The act of installing TV sets does not include any active transmission or retransmission on its own. Speaking of which, the Court also found that the acts in question fell under Article 11*bis*(1)(ii) of the BC as they constituted communication by an organisation other than the original one.¹⁰⁸¹

The notion of receipt of a broadcast as an act of communication to the public has since then been upheld in the case law of the Court, both under InfoSoc and under the Rental and Lending Rights Directive.¹⁰⁸² The subsequent case law focused on the various criteria such as intervention in full knowledge, a new public, and a receptive public, rather than on the act of communication as such. The situations, in which the Court found an act of communication taking place through public receipt of a broadcast are summarised below.

¹⁰⁷⁷ CJEU, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*. (2006) Case C-306/05, Judgment of 7 December 2006, para. 21.

¹⁰⁷⁸ *Ibid.*, para. 46.

¹⁰⁷⁹ *Ibid.*, para. 42.

¹⁰⁸⁰ *Ibid.*, para. 47.

¹⁰⁸¹ *Ibid.*, para. 40.

¹⁰⁸² Under the SCA before the EU harmonisation, the receipt of a signal at the hotel through TV sets was considered to fall under the category of performance, where the hotel made musical works available to the public against the payment of a fee. See *Mornington-målet*, NJA 1980 s 123. For comment, see Axhamn (2007), p. 153.

The joined *FAPL/Murphy* case concerned circumstances similar to those in *Rafael Hoteles* in a sense that one of the defendants (the owner of a pub) through a TV set screened broadcasts of football matches. The only difference in the facts concerning communication was that screening was made using a decoding device and that it took place in another type of establishment than a hotel. Many questions were referred to the CJEU, including on obtaining and use of a decoding device intended for use in a different market. In this section the case is considered only insofar as it interprets the right of communication to the public under the InfoSoc Directive.¹⁰⁸³

The referring court asked the CJEU to rule, *inter alia*, whether a work is communicated to the public where a satellite broadcasting signal is received at commercial premises and shown via a single television screen and loudspeakers to the members of the public present at the place.¹⁰⁸⁴ Not surprisingly, the CJEU held that the circumstances of the case were comparable to those in *Rafael Hoteles*.¹⁰⁸⁵ Following essentially the same line of reasoning as in the preceding case, the CJEU ruled that such screening constituted an act of communication of a work to the public.¹⁰⁸⁶

The concept of communication to the public has also been examined in disputes concerning national laws exempting certain establishments from paying remuneration, for instance, in the *Phonographic Performance Ireland (PPI)* case, which concerned the Irish law exempting hotels from paying levies for broadcasting of sound recordings. The claimant in the proceedings, the CMO, contested that law on the grounds of the breach of obligations under the EU Directives, namely Article 8(2) of the Rental and Lending Rights Directive.

The issue at stake was comparable to earlier cases, the question was namely whether neighbouring right holders were entitled to additional remuneration when radio or TV sets were installed at commercial establishments such as hotels. Once more, the CJEU held that installing TV sets constituted an act of communication to the public as it communicated a work to the public that would otherwise not receive a broadcast.¹⁰⁸⁷ The result of the case was, essentially, that the exemption under the Irish law was against the Directive.

Slightly surprisingly in the light of the preceding case law, the Court did not find there to be an act of communication to the public in the *Del Corso* case, where TV sets receiving broadcast of phonograms were installed in a private dental practice. Although by installing TV sets the owner of the practice communicated the work to the public, the list of persons was limited and comprised

¹⁰⁸³ For the comment in relation to the freedom to provide services, see section 5.2.1.1.

¹⁰⁸⁴ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011, para. 54, question 6.

¹⁰⁸⁵ *Ibid.*, para. 195.

¹⁰⁸⁶ *Ibid.*, paras 198–199.

¹⁰⁸⁷ CJEU, *Phonographic Performance (Ireland) Limited v Ireland and Attorney General*. (2012) *Case C-162/10*, Judgment of 15 March 2012, paras 44–47.

solely clients that were present there subsequently and not at the same time.¹⁰⁸⁸ Furthermore, the Court has stressed on the fact that it could not be presumed that the usual customers of a dentist were receptive to the broadcast.¹⁰⁸⁹ Hence, the Court relied on the criterion of a public rather than communication through a receipt, as covered in the section below. This case has understandably received quite some attention, and different establishments tried to rely on it in the aftermath.¹⁰⁹⁰

Nearly the same circumstances arose in the *OSA* case, where a spa establishment had TV sets on the premises and received a broadcasting signal. The CMO brought a claim for compensation for unauthorised communication to the public of works. The spa establishment maintained that their activity was covered by the provision of the Czech Copyright Act exempting health institutions from payment of license fees.¹⁰⁹¹

Examining whether installing TV sets to receive a broadcasting signal constituted an act of communication to the public, the CJEU relied on previous judgments, namely on *Rafael Hoteles*. The spa establishment argued that the nature of the public at their facilities was different from hotels and resembled the dental practice, in line with the *Del Corso* judgment.¹⁰⁹² The Court disagreed and held that distribution of a signal to TV sets on their premises constituted an act of communication to the public.¹⁰⁹³ Furthermore, the CJEU held that exceptions under Article 5 of InfoSoc did not influence the interpretation.¹⁰⁹⁴

In yet another case, where the CJEU answered the questions by means of a reasoned order, the issue at stake was whether owners of a café acted in breach

¹⁰⁸⁸ CJEU, *Società Consortile Fonografici (SCF) v Marco Del Corso*. (2012) Case C-135/10, Judgment of 15 March 2012, paras 96–97.

¹⁰⁸⁹ *Ibid.*, para. 98. This resembles the CJEU decision in the *BSA* case, where the Court reasoned that television broadcast of a graphic user interface of computer programme did not fall under the right of communication to the public because it was not communicated in such a way that the public had access to its essential element, it being interaction with a user. See CJEU, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* (2010) Case C-393/09, Judgment of 22 December 2010, para. 57.

¹⁰⁹⁰ See CJEU, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*. (2016) Case C-117/15, Judgment of 31 May 2016.; CJEU, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* (2014) Case C-351/12, Judgment of 27 February 2014.

¹⁰⁹¹ CJEU, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* (2014) Case C-351/12, Judgment of 27 February 2014, paras 11–13.

¹⁰⁹² Where there was no public found by the Court, see above.

¹⁰⁹³ CJEU, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* Case C-351/12. 27 February 2014. Para. 30–34.

¹⁰⁹⁴ The cited provisions were Articles 5(2)(e), (3)(b) and (5) of the InfoSoc Directive, but the Court held that it only concerned the right of reproduction. CJEU, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* Case C-351/12. 27 February 2014. Para. 39–41.

of the right of communication to the public under Article 3(1) of InfoSoc by transmitting at their premises radio broadcast through radio set and speakers.¹⁰⁹⁵ The CJEU relied on its previous case law, in essence on the *FAPL/Murphy* case, to arrive at the conclusion that the act indeed constituted communication to the public. What is interesting though is that the referring Court was asking the CJEU whether the fact of owners using speakers or amplifiers had any effect on the answer to the question.¹⁰⁹⁶

Similar circumstances were considered in the *RehaTraining* case, where the CJEU was asked to rule whether installing TV sets to receive a broadcast in a rehabilitation centre amounted to the communication of works to the public. The rehabilitation centre relied on the argument that the visitors formed a narrow circle of accident victims. The Court disagreed and indicated that the receipt of the broadcast at the establishment was fully comparable to situations considered in café-restaurants, hotels, and spa establishments.¹⁰⁹⁷ Hence, the Court considers public receipt of a broadcast at commercial establishments to constitute an act of communication to the public. Even in the case where no communication to the public was deemed to take place, the Court reasoned on the basis of the audience not forming a public rather than the very act falling outside of the right. The section below will summarise these cases in relation to the public as a criterion of communication to the public right.

5.2.3.2.1.3.2. Receiving public as a new public

Against the background of the previous section, here the cases are dealt with inasmuch they qualified the public receiving a broadcast through TV sets as a new public. Given that any receipt of a broadcast was considered to be an act of communication, the public became the decisive criterion to qualify an act as falling under the right of communication to the public. Although the Court does not always differentiate between the criteria of communication and the public, some relevant considerations for the assessment can be observed.

First and foremost, the Court seems to derive the new public criterion as relevant factor for finding an act of communication to the public from Article 11*bis*(1)(ii) of the BC. As the Court stipulated, “a communication made in circumstances such as those in the main proceedings constitutes, according to Article 11*bis*(1)(ii) of the BC, a communication made by a broadcasting organisation other than the original one. Thus, such a transmission is made to a public

¹⁰⁹⁵ CJEU, *Sociedade Portuguesa de Autores CRL v Ministério Público and Others* (2015) Case C-151/15, Judgment of 14 July 2015.

¹⁰⁹⁶ For an overview of the case, see Malaquias (2016), p. 2010. Essentially, the case could also be viewed as concerning communication by the loudspeakers.

¹⁰⁹⁷ CJEU, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*. (2016) Case C-117/15, Judgment of 31 May 2016, paras 55–56.

different from the public at which the original act of communication of the work is directed, that is, to a new public.”¹⁰⁹⁸

Hence, the CJEU suggests that the mere fact that the communication is made by a different organisation indicates that such communication reaches a new public. This is further supported by the criterion of intervention, according to which the customers physically within the area would not be able to enjoy the broadcast in the absence of an intervention.¹⁰⁹⁹ Rather than examining the audience in the context of the intent of the copyright holder authorising the broadcast, the CJEU suggests that the public shall be defined in isolation from the intended public. Meaning that even though these persons were within the reach of the original broadcast, the establishment providing the means of receiving a signal communicated this broadcast to a new public, which is limited to a specific circle of persons, i.e. customers.

The latter is also evident in the Court’s reasoning in the *FAPL* case, where the CJEU held that right holder authorising a broadcast considers only the owners of the TV sets as the potential public.¹¹⁰⁰ Hence, any public receipt of a broadcast would qualify as a communication to the public, as it would include persons other than owners of a TV set. The opinion of AG in the *FAPL* case is interesting because it suggests that there is no act of communication to the public. According to the AG, the public in this case is present where the communication originates (from a TV screen placed in the pub).¹¹⁰¹ This is said to be different than in the *Rafael Hoteles* case where there were different TV sets receiving a signal and distributing it to different facilities, so that communication was not technically to a present public.

Despite such a broad understanding of the public, the Court employed further criteria or, perhaps more precisely, arguments for examining the matter. For instance, the CJEU held that installing TV sets at public establishments constitutes an act of communication to the public because it is directed to the public that would otherwise not receive the broadcast.¹¹⁰² Similarly, that circle of patients of a rehabilitation centre was not too small or insignificant, particularly since they may enjoy works in several places at the establishment.¹¹⁰³

¹⁰⁹⁸ CJEU, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* (2006) Case C-306/05, Judgment of 7 December 2006, para. 40.

¹⁰⁹⁹ *Ibid.*, para. 42.

¹¹⁰⁰ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) (2011), Judgment of 4 October 2011, para. 198.

¹¹⁰¹ Opinion of Advocate General in *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08). 3 February 2011, para. 144.

¹¹⁰² CJEU, *Phonographic Performance (Ireland) Limited v Ireland and Attorney General* (2012) Case C-162/10, Judgment of 15 March 2012, paras 44–47.

¹¹⁰³ CJEU, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* (2016) Case C-117/15, Judgment of 31 May 2016, para. 58.

Ultimately, the understanding of public in the CJEU jurisprudence on the public receipt of a broadcast is a broad one. The only case that stands out is the *Del Corso* case. The CJEU did not find there an act of communication to the public on the grounds that the list of persons visiting the dental practice was limited at all times.¹¹⁰⁴ Furthermore, the customers were characterised as not particularly receptive to the works.¹¹⁰⁵ The judgment, however, interpreted Article 8(2) of the Rental and Lending Rights Directive; hence, it remains to be seen if similar justifications could be applied in the cases under Article 3(1) of InfoSoc.

5.2.3.2.1.3.3. Profit-making nature of communication as an indication of an intervention

At the very outset of the harmonisation of the right of communication to the public under the CJEU jurisprudence, the Court established that the intent of establishment and profit-making nature of the installation were the relevant criteria. Despite them not being a precondition for finding an act of communication to the public, both criteria were relevant to the assessment under the *Rafael Hoteles* case.¹¹⁰⁶

Similarly, despite recalling that profit was not a decisive factor, the Court reasoned that transmission in the *FAPL* case was carried out to obtain additional benefit and attract customers.¹¹⁰⁷ Likewise, receipt of a broadcast at a rehabilitation centre, in the Court's view, constituted an additional service without a medical benefit, thus giving the establishment a competitive advantage.¹¹⁰⁸ However, whereas in the *Rafael Hoteles* case the CJEU held that it cannot be seriously disputed that TV sets influenced the price of the rooms, TV installation at a dental practice did not have the same impact.¹¹⁰⁹

The Court has also denied the argument from the broadcasting organisation that TV installation at a hotel gave rise to a claim for additional compensation

¹¹⁰⁴ CJEU, *Società Consortile Fonografici (SCF) v Marco Del Corso*. (2012) Case C-135/10, Judgment of 15 March 2012, paras 96–97.

¹¹⁰⁵ *Ibid.*, paras 98–99.

¹¹⁰⁶ CJEU, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*. (2006) Case C-306/05, Judgment of 7 December 2006, para. 44; CJEU, *Phonographic Performance (Ireland) Limited v Ireland and Attorney General*. (2012) Case C-162/10, Judgment of 15 March 2012, paras 44–47.

¹¹⁰⁷ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011, paras 204–205.

¹¹⁰⁸ CJEU, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)*. (2016) Case C-117/15, Judgment of 31 May 2016, para. 63.

¹¹⁰⁹ CJEU, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*. (2006) Case C-306/05, Judgment of 7 December 2006, para. 44; CJEU, *Società Consortile Fonografici (SCF) v Marco Del Corso*. (2012) Case C-135/10, Judgment of 15 March 2012, paras 98–99.

under Article 8(3) of the Rental and Lending Rights Directive. The question in the *Hotel Edelweiss* case was whether wireless communication to the public of a broadcast in hotel rooms constituted an act falling under the neighbouring right of communication granted to the broadcaster for a rebroadcast of their works to the public against the payment of an entrance fee. The CJEU ruled that the entrance fee meant solely a fee requested in return for communicating a work to the public.¹¹¹⁰ The price of the room could not constitute such a fee in the Court's view; it considered such communication an additional service.

Although this service influenced the hotel price, it was not an act of communication to the public in the meaning of Article 8(3).¹¹¹¹ This is exactly the case that illustrates the complexity of the jurisprudence on the right of communication to the public. Whereas the broadcaster could not claim compensation in this case on the basis of neighbouring right, it could well do so under Article 3(1) of the InfoSoc Directive pursuant to the case law outlined above if the broadcasting organisation itself was the copyright holder.¹¹¹²

5.2.3.2.1.3.4. Practical significance of public receipt constituting an act of secondary communication

The practical outcome of these cases is that they entitle the CMO administering communication to the public right to collect royalties for such communication through the public receipt of a broadcast.¹¹¹³ Essentially, Article 3(1) accords to the right holders of the broadcasted works an additional claim for compensation for each and every receipt of a broadcast in a (relatively) public space. Likewise, Articles 8(1) and 8(2) of the Rental and Lending Rights Directive accord the same claim to neighbouring right holders.

On the other hand, Article 8(3) of the latter Directive does not give rise to a claim for additional compensation for broadcasting organisations, as it is designed to only do so when the communication is directed to the public and against payment of an entrance fee. The latter is, of course, without prejudice to other provisions granting the right of communication to the public to authors and neighbouring right holders. For instance, the same broadcasting organisation can claim a payment for public receipt of a broadcast if it owns a copyright for works that are broadcasted.

The overall outcome of these cases is generally supported on the grounds that enabling reception of a broadcast for hotel guests is an economically significant act that shall be separately authorised.¹¹¹⁴ While the latter view could be

¹¹¹⁰ CJEU, *Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH*, (2017) Case C-641/15, Judgment of 16 February 2017, para. 23.

¹¹¹¹ *Ibid.*, paras 25–26.

¹¹¹² As an example of a broadcaster being the right holder, see the *TVCatchup* case, section 5.2.3.2.1.2.1.

¹¹¹³ Leistner (2009), p. 859.

¹¹¹⁴ Ohly (2009), p. 228.

supported, the question that arises is whether such an act shall necessarily be considered a separate act of communication in the absence of active interference with the signal. Even more significant is the question of whether considering public receipt as an act of communication to the public ought to be confined solely to the acts in context of TV/radio broadcasting or similar (like online streaming) since it could be argued that in such cases the right holder has a legitimate interest to obtain remuneration for public viewing of communication which is otherwise meant for private consumption.

5.2.3.2.2. Secondary communication through hyperlinking and related activities

Another part of the case law concerns different acts in connection with communication of a work on the Internet and in one way or another are connected to linking. Most significantly, the cases examine whether linking as such constitutes a separate act of communication to the public. The most important characteristic of linking in the light of this thesis is that a person providing a link is not necessarily the same as the one actually uploading a work. Accordingly, similar to the cases of retransmission or public receipt of communication, such communication relies on an initial act. The present section outlines the findings of the CJEU on linking constituting communication and the relevant considerations for restricting or extending the reach of the exclusive right to such secondary acts.

5.2.3.2.2.1. *Hyperlinking as an act of communication*

The *Svensson* case was the first of the so-called “linking” cases and, without a doubt, the landmark one for the EU copyright *acquis*. Although in this case the CJEU did not find an infringement of the right of communication to the public, the Court’s reasoning set an important precedent which laid the ground for the future proceedings. The case was brought by the right holders claiming an infringement of the right of communication to the public by an operator of a webpage providing hyperlinks to their articles, which, as a matter of fact, were already freely available on the Internet.

The referring Swedish court approached the issue at stake very systematically. First, it asked the CJEU to rule whether provision of a clickable link constituted an act of communication to the public. Second, it asked whether the assessment was influenced by the fact that the works in question were already freely available on the Internet or that the link was framing the content. Third, it enquired whether MS could provide wider protection under the right of communication to the public than the one envisaged under Article 3(1) of the InfoSoc Directive.¹¹¹⁵

¹¹¹⁵ CJEU, *Nils Svensson and Others v Retriever Sverige AB*. (2014) Case C-466/12, Judgment of 13 February 2014, para. 13.

The CJEU, however, reformulated all but the last question to a single one: whether provision of a clickable link to works freely available on a different website constituted an act of communication to the public under Article 3(1). The Court recalled the two cumulative criteria of communication to the public right: an act of communicating a work and it being directed to the public.¹¹¹⁶ The CJEU found it rather straightforward that hyperlinking constituted an act of communication. First, the Court recalled that the latter must be construed broadly to ensure a high level of protection for right holders. Second, the Court found that provision of a link enabling access to a work de facto made it available. Third, as the webpage was available to the general public, such communication constituted an act of communication.¹¹¹⁷

It is striking that the Court does not spend more time on analysing whether linking constitutes an act of communication.¹¹¹⁸ Equally, that the CJEU did not find it necessary to ask for an opinion of the AG. By extending the reach of the right to hyperlinking, the scope of the right of communication to the public was substantially widened.¹¹¹⁹ The case has understandably provoked a lot of attention.¹¹²⁰ Although the practical outcome of the *Svensson* case does not subject hyperlinks to freely available authorised content to the authorisation of the right holder, the way the Court arrived at the conclusion could be less troublesome. To give one example – the CJEU seems to suggest that links to freely available works could turn infringing if the consent for original posting of a work was recalled.¹¹²¹ This raises the question whether a person posting a hyperlink is obliged to monitor the lawfulness and availability of content to which the link points, as such situation is clearly outside of the control of a person providing a link.¹¹²²

The Court relied on the *Svensson* case in the later *GS Media* case, concerning hyperlinks to works made available without the copyright holder's authorisation. Rather than holding that any linking, either to lawfully or unlawfully posted work, constitutes an act of communication, the Court distinguished the circumstances of the case from *Svensson*.¹¹²³ The Court held that it could not be inferred from the *Svensson* or later *BestWater* case that lawfulness of the initial making available of a work did not influence the assessment. In other words, it could not

¹¹¹⁶ Ibid., para. 16.

¹¹¹⁷ Ibid., paras 19–22.

¹¹¹⁸ See also Arezzo (2014), p. 539.

¹¹¹⁹ In *Svensson* it was widened because it covered now secondary acts of making available. See Hugenholtz and van Velze (2016), pp. 798, 806.

¹¹²⁰ Notably, as the first in the series of missteps by the CJEU, see Koo (2018), p. 543.

¹¹²¹ CJEU, *Nils Svensson and Others v Retriever Sverige AB*. (2014) Case C-466/12, Judgment of 13 February 2014, para. 31. See also later confirmed in the *Filmspeler* case CJEU, *Stichting Brein v Jack Frederik Wullems*. (2016) Case C-527/15, Judgment of 26 April 2017, para. 48.

¹¹²² Arezzo (2014), p. 546.

¹¹²³ CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, para. 41.

be inferred that posting a link to an unauthorised on-line copy would fall outside of the communication to the public right.¹¹²⁴

The Court acknowledged the argument of the MS and the EC that to consider all the links pointing to unauthorised content as an act of communication to the public requiring consent of the right holder would have restrictive consequences for freedom of expression and information as safeguarded by the CFR and constitute a burden for individuals.¹¹²⁵ Hence, the CJEU reasoned that for the existence of an act of communication to the public where a person linked to infringing content without pursuing profit to be individually assessed, it was necessary to take into account the fact whether a person could not reasonably know about the infringing nature of the content.¹¹²⁶ Whereas in the *Svensson* case, the CJEU ruled at the outset that posting a link, in principle, constituted an act of communication, it refrained from proceeding from the same assumption in the *GS Media* case. The Court was careful with qualifying any act of linking as an act of communication, in line with the concerns expressed by some MS and the EC. Moreover, in subsequent cases the Court did not refer to the *Svensson* or *GS Media* cases as providing that any act of linking in general is an act of communication.¹¹²⁷

Given the background described above, the new public criteria developed under the retransmission case law of the CJEU has found its application to hyperlinking under special circumstances. Setting aside the possible critique of qualifying hyperlinking as communication, the Court has rightly considered the new public only in the *Svensson* case. There the original communication was authorised by the right holder; hence, the question was the control accorded to the copyright holder beyond authorising the initial communication.¹¹²⁸ Indeed, the new public seems of little to no relevance in the cases of unauthorised communication. Any public in this case is not contemplated by the right holder, and, thus, new.

Hence, in the *Svensson* case the Court held that even though linking constituted an act of communication to the public, in those circumstances it did not

¹¹²⁴ Ibid., para. 43.

¹¹²⁵ Ibid., paras 44–46.

¹¹²⁶ Ibid., para. 47.

¹¹²⁷ Instead, the Court argued that circumstances of the cases are comparable to hyperlinking as they likewise make a work available. See CJEU, *Stichting Brein v Jack Frederik Wullems*. (2016) Case C-527/15, Judgment of 26 April 2017, paras 37–38. Also see the *Ziggo* case, where the Court infers from the case law that “as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29.” CJEU, *Stichting Brein v Ziggo BV and XS4All Internet BV*. (2017) Case C-610/15, Judgment of 26 April 2017, para. 34.

¹¹²⁸ In the *GS Media* case, the Court explicitly referred to a new public criterion in the cases where the initial communication was authorised by the right holder. CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, para. 52.

require the authorisation of the right holder as no new public was reached.¹¹²⁹ The works in question (articles) have been originally published on the Internet and freely accessible to all users. Therefore, no new public was reached by linking to the works.¹¹³⁰

What can then be inferred from these judgments? In the case of *Svensson*, the issue was the extent of control over initial authorised communication, comparable to cases of simultaneous retransmission relying on an initial authorised broadcast. In this case, following the line of reasoning in former retransmission cases, a new public became an important factor to establish an act of communication to the public. In the case of hyperlinking to infringing content, the issue at stake is not so much further control over communication but a complementary act to infringing initial communication. To find this complementary act to always fall under the act of communication to the public as a primary offence would be too far-reaching; hence, additional considerations shall be taken into account.

Interestingly, the recently adopted Directive on copyright and related rights in the Digital Single Market explicitly excludes hyperlinking from the protection granted to the press publishers in the form of the neighbouring right of making available to the public.¹¹³¹ This is provided in conjunction with the clarification that the neighbouring right for press publishers does not apply to private or non-commercial use of press publications by individual users. Hence, whereas hyperlinks can fall within the scope of the making available right under Article 3(1) of the InfoSoc Directive, they are explicitly excluded from the scope of the neighbouring right of making available for press publishers.

5.2.3.2.2. *Interference with the initial authorised communication*

This section will briefly outline the relevance of interference with initial communication as examined by the CJEU in the cases of hyperlinking. Namely, two such cases are examined – communicating a work beyond the intended circle of recipients and interfering with primary communication through altering its circumstances. Whereas in the first case the CJEU regards the criteria of interference as a primary one for establishing an infringement of the right of communication to the public, in the latter case it does not seem to accord it any special attention.

For instance, in the *Svensson* case the Court held that if a link would circumvent restriction on the access to a work and make it available for the public that was not intended, these new users would constitute a new public. Hence, such linking, even though pointing to the lawfully communicated work, would be

¹¹²⁹ CJEU, *Nils Svensson and Others v Retriever Sverige AB*. (2014) Case C-466/12, Judgment of 13 February 2014, para. 30. See Rognstad calling the result a conceptual collapse, Rognstad (2018), pp. 119–120.

¹¹³⁰ *Ibid.*, paras 27–28.

¹¹³¹ 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. 17.5.2019. OJ L 130/92. Art. 15.

infringing unless separately authorised by the right holder.¹¹³² Accordingly, as long as a link is provided to authorised content and not in any way interferes with the original availability, it is deemed as not requiring authorisation.

On the other hand, the Court did not consider the type of a hyperlink to be of any relevance as long as it does not alter the initial accessibility in terms of the public. Namely, the Court stated that the finding that linking to the lawful source did not require an authorisation could not be called into question on the basis of the way a work appeared on a screen for a person following the link.¹¹³³ Later, the same approach was confirmed in the *BestWater* case decided by a reasoned order.¹¹³⁴ The CJEU held that embedding of a work itself did not constitute communication to the public as long as the work was in any way altered or communicated to a new public.¹¹³⁵

Whereas the Court has probably been guided by the considerations of technological neutrality in its reasoning, the statement could be too rigid. In some circumstances linking through embedding could interfere with an initial communication, be it for the purpose of monetising the webpage views or for the consideration of purely moral nature.¹¹³⁶ Whilst it may very well be a policy choice not to distinguish between the different cases for the sake of consistency, the impact of such general treatment inevitably conflicts with a degree to which the right holder is interested in non-interference with the initial act of communication.¹¹³⁷

5.2.3.2.2.3. *Broad understanding of communication in relation to the infringing primary communication*

Whereas this thesis is primarily concerned with the constraints on further control accorded to the right holder over authorised and, hence, lawful communication,

¹¹³² Ibid., para. 31. See also in the *GS Media* case the CJEU on the intervention with communication through circumventing access restrictions. CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, para. 50.

¹¹³³ CJEU, *Nils Svensson and Others v Retriever Sverige AB*. (2014) Case C-466/12, Judgment of 13 February 2014, paras 29–30.

¹¹³⁴ The question referred to the CJEU was whether embedding of a video constituted an act of communication to the public under Article 3(1) of the InfoSoc with a view that there were neither new technical means nor a new public involved.

¹¹³⁵ CJEU, *BestWater International GmbH v Michael Mebes and Stefan Potsch*. Order of the Court (2014) Case C-348/13, Judgment of 21 October 2014. Although it is not clear whether it matters that the originally posted video is available without a permission from the right holder. See <http://ipkitten.blogspot.com/2014/10/that-bestwater-order-its-up-to.html> (Accessed on July 14, 2019).

¹¹³⁶ Such as the right holder's right to decide how a work is to be presented. On the observation that the CJEU's assessment of the right of communication to the public overlaps with the right of divulgation as a moral right, see Marušić (2019).

¹¹³⁷ See more in section 6.2.1.3.

this section briefly explores the case law concerning the acts related to initial unlawful communication. Namely, the cases concern, in a sense, secondary acts in relation to unauthorised communication by posting a work on the Internet. Given the rather loose connection between the initial infringing act of making available through upload of a work and the secondary acts in question, the Court found it necessary to examine a variety of criteria before arriving at the conclusion whether the acts fell under the right of communication to the public.

Unlike the previously outlined cases, the circumstances of the proceedings addressed here were both enabled and motivated by the nature of online dissemination. First, the Internet has enabled communication of a work to a virtually unlimited number of persons. Second, it is not always easy to establish whether or not certain communication is taking place in the absence of authorisation pursuant to the copyright law. Hence, to qualify any act on the Internet in indirect connection of a work as an infringement of the right of communication to the public, whether intentional or not, would be clearly excessive.¹¹³⁸ Without going into the discussion on the Court essentially harmonising the matters of secondary liability, this section summarises three cases where the Court held that through hyperlinking or related acts in relation to unlawful content a person committed an infringement of the right of communication to the public by intervening with a work's exploitation. These cases are the *GS Media*, *Filmspeler*, and *Ziggo* cases.

First of all, these cases have substantially widened the scope of the right of communication to the public. For instance, a sale of a multimedia player containing links to infringing works was assimilated with hyperlinking on the grounds that it also made a work directly available.¹¹³⁹ Furthermore, the Court derived from the case law that, as a rule, "any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an 'act of communication' for the purposes of Article 3(1) of Directive 2001/29".¹¹⁴⁰ Hence, making available and operating an online sharing platform was also found to constitute an act of communication.¹¹⁴¹

However, finding a specific act to constitute an act of communication was only the first step. Next, the Court held that it is necessary to assess whether it is an act directed to a public and falls within the right of communication to the

¹¹³⁸ See, for instance, *GS Media*, where the Court reasoned that to consider all the links pointing to unauthorised content as an act of communication to the public requiring consent of the right holder would have restrictive consequences for the freedom of expression and information as safeguarded by the CFR and constitute a burden for individuals. CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, paras 44–46.

¹¹³⁹ CJEU, *Stichting Brein v Jack Frederik Wullems*. (2016) Case C-527/15, Judgment of 26 April 2017, paras 37–38.

¹¹⁴⁰ CJEU, *Stichting Brein v Ziggo BV and XS4All Internet BV*. (2017) Case C-610/15, Judgment of 26 April 2017, para. 34.

¹¹⁴¹ *Ibid.*, para. 39.

public, requiring an individual assessment.¹¹⁴² A set of further relevant considerations was established by the CJEU in the *GS Media* case, which was subsequently used in the following cases. These criteria, besides the intervention and communication of a work, include the profit-making nature of intervention and the knowledge of the infringing nature of the content.¹¹⁴³

The *GS Media* case concerned the proceedings against an operator of a popular website that contained links to works hosted on the Internet without the authorisation of the right holder. Despite several requests from the right holder to remove such links, they continued to be available on the website. The national court referred to the CJEU several questions in order to clarify whether linking to works freely available online in the absence of right holder's authorisation constituted communication to the public under Article 3(1) of InfoSoc. Moreover, the court also asked whether knowledge or awareness of the infringing nature of content was of relevance in the case, or what the relevant circumstances would be.¹¹⁴⁴

The CJEU held that for an individual assessment of whether linking in non-profit making purposes constitutes an act of communication to the public, it is necessary to consider whether a person does not know or cannot reasonably know that the original communication is not authorised by the right holder.¹¹⁴⁵ Hence, if a person knows about the infringing nature or ought to have known that a work is posted illegally, their action should be considered to constitute an act of communication to the public.¹¹⁴⁶ On the other hand, if such activity is carried out for profit, it can be presumed that a person acts in full knowledge. Consequently, if the presumption is not rebutted, an act of linking constitutes an act of communication to the public.¹¹⁴⁷

Accordingly, the first step of assessment is the profit-making nature of linking. If profit is involved, then the knowledge of the infringing nature is assumed.¹¹⁴⁸ If there is no profit involved, it is necessary to consider whether a person does not know and cannot reasonably know about the infringing nature of the content, or indeed knows or ought to have known. In the former case, as a general rule, the person does not intervene in full knowledge and may not be carrying out an act of communication to the public.¹¹⁴⁹ On these grounds, the Court found there

¹¹⁴² CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, para. 47.

¹¹⁴³ *Ibid.*, para. 47.

¹¹⁴⁴ *Ibid.*, para. 24.

¹¹⁴⁵ *Ibid.*, para. 47.

¹¹⁴⁶ *Ibid.*, para. 49.

¹¹⁴⁷ *Ibid.*, para. 51. For AG opinion, see Opinion of Advocate General in *Stichting Brein v Jack Frederik Wullems*. Case C-527/15. 8 December 2016, para. 42.

¹¹⁴⁸ Also confirmed in the *Filmspeler* case, CJEU, *Stichting Brein v Jack Frederik Wullems*. (2016) Case C-527/15, Judgment of 26 April 2017, para. 49.

¹¹⁴⁹ CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, paras 47–48.

to be a communication to the public both were a defendant operated a platform aggregating the hyperlinks to the infringing material, and where a defendant sold a multimedia player with pre-installed add-ons with the links to such material. In both cases, the Court stressed equally the importance of the profit-making nature of the activity and the actual knowledge.

The *Stichting Brein* case concerned a multimedia player that contained add-ons with the links to the works available on the Internet either with or without authorisation by right holders. The multimedia player was marketed, among other things, as providing links to the material by circumventing the right holder's authorisation. The organisation representing the right holders claimed that the sale of the multimedia player infringed copyright under Article 3(1) of the InfoSoc Directive. The referring court hence asked the CJEU to rule whether communication to the public right covers the sale of the multimedia player with pre-installed add-ons containing hyperlinks to infringing material.

Perhaps unsurprisingly considering the previous case law of the Court, CJEU found that sale of such a multimedia player indeed constituted an act of communication to the public under Article 3(1) of the InfoSoc Directive.¹¹⁵⁰ Pre-installing the add-ons that enabled users to access materials which otherwise would be difficult to identify and reach, while acting in full knowledge, amounted to an act of communication rather than a mere provision of physical facilities.¹¹⁵¹ Sale of a player for profit in full knowledge of infringing content and marketing it as providing access to such content constituted an act of communication to the public.¹¹⁵²

Interestingly, this is contrary to what the EC argued during the proceedings, according to the AG.¹¹⁵³ The Commission resided with the defendant, arguing

¹¹⁵⁰ It is important to note that the case does not quote the *AKM* case on the necessity to examine the new public criterion even if different technical measures are used. The case is also not mentioned in the AG Opinion, which only quotes the *TVCatchup* case. Opinion of Advocate General in *Stichting Brein v Jack Frederik Wullems*. Case C-527/15. 8 December 2016, para. 43.

¹¹⁵¹ CJEU, *Stichting Brein v Jack Frederik Wullems*. (2016) Case C-527/15, Judgment of 26 April 2017, para. 41.

¹¹⁵² *Ibid.*, paras 50–52. The outcome resembles the developments under the US copyright law, where the Courts held that providing a dual use device is not an infringement per se, but it might be if the function is actively advertised, see <http://cyberlaw.stanford.edu/blog/2017/04/copyright-liability-streaming-box-distributors-comparative-eu-us-perspective> (Accessed on July 14, 2019). Also, a parallel could be drawn with the cases concerning private levies paid on a blank media for possible unauthorised private copying under the EU *acquis*. As the CJEU held in the *Copydan* case, the application of levy does not depend on the multi-purposeness of a device, ability to make copies is sufficient. However, it may affect the amount of fair compensation which is due. CJEU, *Copydan Båndkopi v Nokia Danmark A/S*. (2015) Case C-463/12, Judgment of 5 March 2015, para. 25–27.

¹¹⁵³ Opinion of Advocate General in *Stichting Brein v Jack Frederik Wullems*. Case C-527/15. 8 December 2016, para. 33.

that a sale of a multiplayer and provision of links cannot be assimilated.¹¹⁵⁴ The EC feared that such excessively broad interpretation of the right of communication to the public would alter the balance between the rights of all the parties.¹¹⁵⁵ The Court, however, followed the AG's opinion: posting hyperlinks on the webpage was essentially the same as including them in a multimedia player.¹¹⁵⁶

The *Ziggo* case is the latest ruling on liability associated with the hyperlinks to the infringing content under the communication to the public right. In the main proceedings the organisation representing copyright holders ordered Internet providers to block the domain names of The Pirate Bay (TPB) website. TPB is a well-known online platform containing links to torrent files enabling download of files from others' computers, including copyright-protected material made available without the right holder's authorisation.

Although in the national proceedings it was established that the TPB indeed made works available to the public, there were doubts whether the platform communicated them to the public within the meaning of Article 3(1) of the InfoSoc Directive. The referring court thus asked the CJEU whether communication to the public right under the Directive also covers management of a platform which by indexation of metadata and providing a search function allows users to locate infringing works and share them on a peer-to-peer network.

The CJEU answered the question in the affirmative, relying primarily on the previous case law on linking and the preceding *Stichting Brein* case. Operators of the TPB intervened in full knowledge by providing a system that facilitated access to the works and thus communicated them to the public.¹¹⁵⁷ As the works were essentially made available to all the users of the platform, they constituted a rather large public and amounted to communication to the public.¹¹⁵⁸ Turning to the *GS Media* criteria, the CJEU stressed that the operators of TPB deliberately encouraged users to make use of such works and knew that infringing material was shared.¹¹⁵⁹ Second, the Court held that it was done so for profit.¹¹⁶⁰

There are many aspects to this judgment that seem troubling and problematic. First is the Court's statement that without the operators of such webpages, sharing of infringing content would be problematic.¹¹⁶¹ Second is the result of the cases

¹¹⁵⁴ Ibid., paras 46–47.

¹¹⁵⁵ Ibid., para. 34.

¹¹⁵⁶ Ibid., para. 51.

¹¹⁵⁷ CJEU, *Stichting Brein v Ziggo BV and XS4All Internet BV*. (2017) Case C-610/15, Judgment of 26 April 2017, paras 35–39.

¹¹⁵⁸ Ibid., paras 40–43.

¹¹⁵⁹ Ibid., para. 45.

¹¹⁶⁰ Ibid., para. 46.

¹¹⁶¹ Ibid., para. 36. Also, Opinion of Advocate General in *Stichting Brein v Ziggo BV and XS4All Internet BV*. Case C-610/15. 8 February 2017, para. 51.

effectively regulating secondary liability.¹¹⁶² Third is the statement that any act that provides some kind of access to a work in full knowledge made the application of the right stretch to virtually any act where knowledge can be assumed or inferred.¹¹⁶³

5.3. Extent of control under the right of communication to the public: between immaterial and material dissemination

As is apparent from the discourse above, the adoption of the EU Directives was only a very early step of the harmonisation of the right of communication to the public. The most important developments have taken place under the CJEU jurisprudence.¹¹⁶⁴ The growing importance of the harmonisation of the right at the EU level is supported by the fact that almost two decades after the adoption of the InfoSoc Directive, some countries choose to recognise the right as a separate category to make compliance with CJEU jurisprudence easier. For instance, Norway implemented the right as a separate category of the right of making a work available only recently, which was motivated by CJEU jurisprudence.¹¹⁶⁵

What is evident from the analysis is that the variety of the rulings on the interpretation of Article 3(1) of the InfoSoc Directive concern secondary acts of communication, in one way or another relying on previous acts. The Court, nonetheless, generally does not distinguish between primary and secondary acts, only occasionally using such terms as retransmission. Although under the rather ambiguous language of Article 3(3) of the InfoSoc Directive the EU legislator seems to imply that any act, whether primary or secondary, is subject to separate authorisation by the right holder, the jurisprudence challenges that understanding.

¹¹⁶² Whereas the EC opposed qualifying the act as communication to the public and suggested leaving the secondary liability for MS to regulate, the AG supported addressing it under the EU jurisprudence. Opinion of Advocate General in *Stichting Brein v Ziggo BV and XS4All Internet BV*. Case C-610/15. 8 February 2017, para. 3. On secondary liability in this context, see Husovec and Van Dongen (2017), p. 15.

¹¹⁶³ Koo (2018), p. 543.

¹¹⁶⁴ Nevertheless, one must keep in mind that due to the nature of the CJEU case law, the cases where the Court had to interpret the scope of the right under the EU copyright *acquis* are limited. The proceedings before the Court are predominantly initiated by the national courts, in the cases where they deem the interpretation of the national law in question to be dependent on the instrument of the EU harmonisation. Hence, the references to the Court are made solely at national courts' discretion.

¹¹⁶⁵ See Prop. 104 L (2016 – 2017) Proposisjon til Stortinget (forslag til lovvedtak) Lov om opphavsrett til åndsverk mv. (åndsverkloven), pp. 31–34. Sweden, on the other hand, recognised the right of communication to the public as a category of a general right of making available in 2005, pursuant to Prop. 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m., pp. 64–66.

In the majority of the cases the Court did find there to be an act of communication to the public falling under exclusive control of the copyright holder. However, the reasoning in these cases as well as in cases where the Court finds the communication non-infringing often resembles the arguments associated with material dissemination. This is not surprising, considering that, as has been shown in the previous chapters, the material dissemination approach in the context of the right of distribution is less than consistent towards the initially envisioned limits of control. Any act of authorised distribution does not necessarily result in a complete loss of control over subsequent dissemination.

On the other hand, as was shown in this chapter, the right of communication to the public as supposedly reflecting immaterial dissemination does not necessarily mean that any possible communication falls under the right and, hence, requires authorisation. In a sense, the CJEU shall be praised for not referring to Article 3(3) of the InfoSoc Directive in all the cases, which would most likely prompt ending the assessment there. Notably, the Court referred to Article 3(3) only on two occasions, in relation to a separate act of communication and in relation to retransmission of an analogue broadcast on the Internet, which was deemed to be an act of new use. Hence, it seems that the Court's interpretation of the article is very cautious.¹¹⁶⁶

Against this background, in this section cases where the Court reasoned in a fashion resembling the objectives of the right of distribution and the material dissemination will be highlighted. It will be shown how the arguments are essentially based on the notions of authorisation, new markets, and appropriate remuneration as well as how some criteria worked out by the Court cannot be clearly connected to material or immaterial dissemination. Instead, they may indicate an attempt to provide national courts with flexibility in assessing the cases, however, at the cost of legal certainty in such a tightly overseen field as copyright.

5.3.1. Control over any subsequent communication by default

Unlike the right of distribution, which is characterised by its limited scope in relation to secondary distribution if the primary act fulfils the criteria of exhaustion, no such general limit exists for the right of communication to the public under the EU *acquis*. The absence of authorisation of any act of communication, whether primary or secondary, generally ought to result in the infringing nature of such communication. It is equally so in the context of any secondary communication reaching beyond the borders of the MS of original communication.¹¹⁶⁷

In cases where new uses of a work are at stake, authorisation of the new use even if it is essentially a secondary communication appears to be of utmost importance under the *acquis*. Consider, on the one hand, the case of substantial

¹¹⁶⁶ See also section 5.2.2.3.

¹¹⁶⁷ Pursuant to the *Coditel I* case and the non-application of the Community exhaustion principle. See section 5.2.1.1.

alteration and resale of physical copies by a third party following their lawful marketing by the right holder.¹¹⁶⁸ On the other hand, the case of simultaneous retransmission of a broadcast on the Internet reaching the same intended public can be considered.¹¹⁶⁹ Both cases concern a potential new market of a work, be it due to a new form of presenting a work on a material medium or a new way of providing access to authorised communication. Notwithstanding the moral rights of the author in the first case, it is essentially the economic aspect of a work's exploitation as a whole which is affected. In neither case would the communication reach the originally unintended recipients. However, it would undermine the right holder's market, either the primary one or one enabled by the alteration, or both.

Whereas in these cases the Court reached essentially the same outcome, the nature of the examined rights played a role in the Court's reasoning. In the former case of altering copies otherwise falling under the exhaustion principle and, hence, exempted from exclusive control, the CJEU had to justify submitting them to further control. In the case of resale of altered copies, the Court had to deal with the predetermined stance under Article 4(2) of the InfoSoc Directive and argue for the justifiability of further control. This led the Court to examine whether the right holder consented to such subsequent marketing through the first putting of copies into circulation. In the latter case of retransmission, the Court proceeded from the statement that any new use of a work must be authorised by the right holder and retransmission using different means was indeed a new use. Although in the case of retransmission the act did not fall under any exception to the right of communication to the public, the Court found it necessary to stress the secondary act being a new use.

Whilst under the right of distribution the acceptance of control over the subsequent distribution in new geographical markets depends largely on the state policy on the territoriality of exhaustion, under the right of communication to the public reaching any new territory would inevitably amount to new communication. Accordingly, the lack of authorisation for communication in a particular territory is of utmost importance. Consider, for instance, the *Coditel I* case, where the retransmission into a territory not envisaged by the exclusive license from the right holder was considered a breach of the right of performance.¹¹⁷⁰

Essentially, reach of the new audience not envisaged by the authorisation of primary communication interfered with the right holder's exploitation of a work. Whether or not such interference with the exploitation of a work could be opposed on the basis of the exclusive communication right in the case depended essentially on two elements. First and foremost, whether copyright protects the right holder from any interference with the work's exploitation. The underlying reason for this retransmission being an interference with the exploitation was the

¹¹⁶⁸ Essentially, the circumstances of the *Art & Allposters* case, see sections 3.2.4.2. and 4.2.3.4.

¹¹⁶⁹ Essentially, the circumstances of the *TVCatchup* case, see section 5.2.3.2.1.2.1.

¹¹⁷⁰ CJEU, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*. (1980) Case C-62/79, Judgment of 18 March 1980, para. 6.

exclusive territorial licensing by the right holder, which secured control over separate territories and ensured that the broadcasting windows would be kept in place. Henceforth, the second aspect was the question whether relying on the exclusive territorial licensing was contrary to the provisions of the Treaty.

The first aspect remained unexamined. Rather, the Court focused on the second aspect, holding that to assign the rights otherwise than on a territorial basis would be impracticable for exploiting the works in question.¹¹⁷¹ Hence, the Court did not answer the question to what extent the right holder can rely on the exclusive right to prohibit any (also insignificant) interference with the work's exploitation. Instead, given the circumstances of the case, the Court established that in this case the Treaty did not interfere with the exclusive right under copyright.

Whereas the consideration of interference with a work's exploitation is most prominent in cases of secondary acts of communication such as retransmission, it can also be derived from cases of unauthorised primary and secondary communication. Namely, the infringing nature of unauthorised communication in an economic sense relies precisely on the foregone profit or an opportunity to exploit a work commercially. For instance, the *Renckhoff* case submitting an act of upload to authorisation could be viewed not only as confirming the exclusive nature of the right of communication to the public in relation to any new acts of communication, but also as securing the right holder's potential market for a work.¹¹⁷²

Likewise, extending the reach of the right to acts contributing to initially infringing communication could also be understood as indirectly contributing to eliminating the interference with the right holder's market.¹¹⁷³ Obviously, such stretching of the scope of the right of communication to the public requires some very careful considerations. This is also confirmed by the jurisprudence of the CJEU, where the Court takes into account fundamental rights such as freedom of expression and information.¹¹⁷⁴ Furthermore, it is confirmed by the Court developing criteria under which such extension might take place rather than submitting at the outset that any (in)direct act must be deemed infringing.

5.3.2. Limiting control beyond authorising initial dissemination

Whereas the number of cases where the Court found conduct to infringe the right of communication to the public outweighs the cases where there was no infringement of the right, few arguments can be derived for limiting the reach of the right beyond the initial communication. Both the cases denying and allowing

¹¹⁷¹ *Ibid.*, para. 16.

¹¹⁷² CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, paras 30–31.

¹¹⁷³ For similar considerations in the context of the right of distribution, see section 3.3.2.

¹¹⁷⁴ CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, paras 45–47.

further control are relevant, as they highlight the considerations which under certain circumstances call for exempting the acts from exclusive control.

However, it is important to note that distinction between the primary and secondary acts of dissemination is less easy to draw under the right of communication to the public, especially in the online setting, where the digital environment accumulates all the different types of communication. For instance, if a work is posted online, then a link to a work would generally be a secondary act and an upload of a copy a primary one. If a retransmission of analogue signal is made online, this could also be seen a separate act, although it relies on the primary one. Consequently, drawing any distinction relies not only on whether or not there is a primary act but also whether communication can be considered sufficiently distinctive.

As was explored above, every exclusive right provides the right holders with control over every act of dissemination in a sense of disseminating new copies or authorising a new broadcast or uploading a work on another webpage. Whereas the fact that every act of dissemination is subject to the right holder's authorisation is not disputed, the extent of control over any particular act beyond the authorisation can be questioned. Whereas for the right of communication to the public no general limitation exists, it does not mean that no limits can be imposed. Below the two main considerations for justifying limiting subsequent control under the EU copyright *acquis*, which stem from the material dissemination approach, are outlined.

5.3.2.1. Exercise of the right and non-interference with the market

The essential element of examining the scope of control in cases concerning the right of communication to the public is the exercise of the right in the first place, with emphasis on determining the circumstances of the work's initial making available. This is supported, *inter alia*, by the Court stipulating that the specific subject matter of IP is to exploit a work commercially, by marketing or making a work available, including through granting licenses.¹¹⁷⁵

Therefore, the important consideration is whether the original act on which the subsequent communication relies on was authorised by the right holder. For instance, in the *FAPL* case, where control over importation of decoding devices was denied, the Court stressed the fact that the primary broadcast in question was authorised by the right holders.¹¹⁷⁶ On the other hand, in the *Coditel I* case, where subsequent control was upheld, the entity retransmitting a signal did not have authorisation in the MS of the origin of the broadcast.¹¹⁷⁷

¹¹⁷⁵ See CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011, para. 107.

¹¹⁷⁶ *Ibid.*, para. 120.

¹¹⁷⁷ *Ibid.*, para. 119.

Whereas the exercise of the right is important for the material dissemination approach, the Court seems to accord it even more attention in cases on the right of communication to the public. This is particularly so in the cases concerning online dissemination, where the Court has repeatedly stressed the preventive nature of the rights and the right holder's consent to particular communication.¹¹⁷⁸ In one of the latest cases, the CJEU holds at the outset that, subject to exceptions and limitations, any use of a work (communication to the public in the specific case) without the prior consent of the right holder infringes copyright.¹¹⁷⁹

Significance of consent and what can be implied from it is particularly prominent in cases where the Court assesses the new public criterion. For instance, in the landmark *Svensson* case, the Court devotes very little attention to authorisation itself. Rather, the CJEU relied on the fact that the right holder contemplated access by the users in question through authorising the initial communication.¹¹⁸⁰ Hence, this points towards a conclusion that it could be inferred from the initial communication that it intended to make a work available to all the potential users.

Further, this assumption is used to restrict the reach of the exclusive right if no new public is reached by such subsequent communication relying on the initial act. Likewise, the Court relies on the consenting to the initial communication targeting the same circle of persons in the *AKM* case.¹¹⁸¹ Hence, these cases thus point towards the conclusion that one might have to accept some limits on the exercise of the right once communication is authorised. They are, of course, not absolute, but depend on a variety of indications, the most important of which seems to be the reach of a new public as a new target audience.

The new public seems to be essentially an economic consideration, although it also has a moral rights aspect. If taken in the context of distribution of copies as the main example of material dissemination, partitioning of the market is rather straightforward and confined largely to the territory of states or a group of states (as, for example, the EU). Intangible dissemination, and in particular one taking place online, enables much more precise delineation of the markets and, hence, taking advantage of a monopolistic position. If the subsequent acts of dissemination represent the same way of exploitation, it is important to consider whether a new public is reached, meaning whether the authorisation of initial communication contemplated offering the work to this particular public.

¹¹⁷⁸ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, para. 44. Also CJEU, *Stichting Brein v Jack Frederik Wullems*. (2016) Case C-527/15, Judgment of 26 April 2017, para. 25.

¹¹⁷⁹ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, para. 16.

¹¹⁸⁰ CJEU, *Nils Svensson and Others v Retriever Sverige AB*. (2014) Case C-466/12, Judgment of 13 February 2014, paras 26–27.

¹¹⁸¹ CJEU, *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH* (2017) Case C-138/16, Judgment of 16 March 2017, paras 28–29.

On the other hand, if the subsequent dissemination represents a new form of exploitation, it targets the potentially not envisioned public for that particular mode of exploitation. The jurisprudence seems to imply that any change in the way of exploitation renders the secondary act of dissemination infringing, even if the public covered by such secondary act is already covered by the right holder through the same way of exploitation.¹¹⁸² Whereas it could be questionable on the basis of solely economic considerations, it might be accepted on the grounds of the complexity of the assessment of a case would these circumstances have to be taken into account.

Hence, it appears that the essential reasoning behind the new public criteria is very much related to the idea that every use of a work shall be remunerated. Therefore, if one offers a work through secondary dissemination to the public not contemplated by the initial communication, whether or not against any fee, they inevitably interfere with the exercise of the right to exploit and obtain remuneration for each use of a work.

5.3.2.2. *Appropriate remuneration*

Just as for material dissemination, the cases on the right of communication to the public show that the important consideration, besides the authorisation of the right holder, is obtaining the remuneration. Principally, the specific subject matter of IP is its commercial exploitation.¹¹⁸³ In the *Coditel I* case the Court seems to suggest the exploitation and the relevant considerations depend on the type of a work in question.¹¹⁸⁴ The development of technology and the online environment has evened out the type of works when it comes to the initial and subsequent making them available on the Internet.¹¹⁸⁵ However, the differences may, to some extent, persist when it comes to such specific forms of exploitation as, for instance, broadcasting.

Similarly to the cases on the right of distribution, the Court has held in the context of the right of communication to the public that, although the aim of exclusive rights is to enable obtaining remuneration, it does not guarantee the

¹¹⁸² Essentially, the circumstances of the *TVCatchup* case. See section 5.2.3.2.1.2.1.

¹¹⁸³ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011, para. 107.

¹¹⁸⁴ For films it would be every showing of a work, also with the view of broadcasting of a film. See CJEU, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others. (1980) Case C-62/79*, Judgment of 18 March 1980, para. 14.

¹¹⁸⁵ Development of technology might have blurred the distinction between the types of a work, see section 5.2.1.1.

highest possible remuneration, but only an appropriate one.¹¹⁸⁶ Furthermore, the remuneration must be reasonable in relation to the service provided, i.e. to the expected public and the parameters of communication.¹¹⁸⁷ Interestingly, the position of the right holder in negotiating the remuneration upon first communication is emphasised. Namely, the right holder is free to negotiate the remuneration corresponding to the potential audience at the time of negotiating authorisation.¹¹⁸⁸

However, although it could be expected that through the first authorisation the right holder has obtained the appropriate remuneration, the assumption cannot be absolute. For instance, if the secondary communication relying on the initial act is deemed to be a new use of a work, it may require separate authorisation even though it is directed to the same circle of persons. New use would mean a new way of exploiting a work; hence, the interests of the right holder in taking advantage of new opportunities must be safeguarded.¹¹⁸⁹

On the other hand, requesting additional remuneration for subsequent uses neither being a new use nor targeting a new audience could be denied. For instance, the Court found that paying a premium based on territoriality went beyond what was necessary to safeguard the subject matter. Hence, the Treaty could intervene with the exercise of the exclusive right on the basis of the freedom to provide services.¹¹⁹⁰ Similarly, in the *AKM* case, the request for additional remuneration for cable retransmission to the same audience was denied on the basis that the right holder authorised broadcasting in this territory.¹¹⁹¹

¹¹⁸⁶ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) (2011)*, Judgment of 4 October 2011, paras 107–108.

¹¹⁸⁷ *Ibid.*, paras 109–110.

¹¹⁸⁸ *Ibid.*, para. 112.

¹¹⁸⁹ On new use as requiring authorisation, see CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd. (2013) Case C-607/11*, Judgment of 7 March 2013, paras 23–24.

¹¹⁹⁰ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) (2011)*, Judgment of 4 October 2011, paras 115–116.

¹¹⁹¹ CJEU, *Staatlich genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger registrierte Genossenschaft mbH (AKM) v Zürs.net Betriebs GmbH (2017) Case C-138/16*, Judgment of 16 March 2017, paras 28–29.

5.3.3. Secondary acts in relation to infringing communication

What stands out in the analysis of the jurisprudence on the right of communication to the public right is its extension to acts in (in)direct connection to infringing communication of a work. This is not unknown in the context of exclusive dissemination rights. The right of distribution, for instance, has also been applied in the cases concerning the infringing copies of a work.¹¹⁹² However, unlike the straightforward application of the right of distribution, the Court has been much more careful with the same results under the right of communication to the public. It is highly debatable whether it is desirable to cover such acts of (at most) contributory liability with the right of communication to the public, and even more so considering the distinction between the right of communication and the right of making available is not maintained, whereas it otherwise would call for a different assessment of the circumstances of a work's exploitation.

The main innovation of this body of case law are the subjective criteria developed to deal with the question of whether an act infringes the right of communication to the public. The basis for establishing whether or not a certain intervention is liable to breach the right of communication to the public is, first, the profit-making nature of the activity and, second, the knowledge of the infringing nature of primary communication. Whereas the profit-making nature of a third-party's conduct is not an unknown element of constructing the scope of control accorded to the copyright holder under the exclusive right of communication to the public, the knowledge criterion is indeed an innovation.¹¹⁹³

Finding an infringement of the right of communication of a work to the public on the basis of knowledge of the infringing nature of primary communication is rather ambiguous.¹¹⁹⁴ This approach must also be contrasted with the cases of primary infringing communication. For instance, compare the knowledge criterion with the *Renckhoff* case, where the issue concerned a primary infringing communication through an upload. The Court found it immaterial whether the uploader knew that such act is infringing. Hence, any new communication would be liable to infringe the right of communication to the public unless an exception applied.¹¹⁹⁵ On the other hand, left with no exceptions in the *GS Media* case the Court opted for this complicated system of conditions to avoid the conclusion that all secondary acts relying on infringing primary communication infringed the right.

¹¹⁹² See section 3.2.4.2.

¹¹⁹³ Quintais (2018), p. 18.

¹¹⁹⁴ See Rognstad calling it a conceptual collapse when an action constitutes an act of communication to the public but does not require an authorisation. Rognstad (2018), pp. 199–121.

¹¹⁹⁵ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, paras 42–43.

This is supported by the fact that the Court resorted to the importance of hyperlinks for the freedom of expression and information, and exchange of information, to justify individual assessment of the situation at stake.¹¹⁹⁶ To my mind, the situation is symptomatic of overbroad language of the right combined with the overbroad scope that encompasses uses which have been previously regulated separately. Hence, there is a danger of applying this line of reasoning to all the cases currently falling under the right of communication to the public rather than confining these criteria to the acts in connection to an infringing communication.

5.4. Conclusions

This chapter set out to examine the development of the right of communication to the public under the EU *acquis* in the light of the distinction drawn at the outset of the harmonisation between the material and immaterial dissemination rights. Whereas the right of communication to the public as known at present is the result of the layers of technological development and legislators' legitimate intent to secure the right holder's control over exploitation of a work, the recognition of a broad right covering a great variety of acts of both analogue and digital dissemination has clearly implicated the task of balancing the need of providing exclusive control with other rationales of copyright protection.

The background to the harmonisation of the right of communication to the public under secondary EU law revealed that the objectives stretched beyond the mere implementation of the international obligations under the WIPO CT. An important, if not the main, rationale behind harmonising the right under the InfoSoc Directive was the recognition of the making available right encompassing acts of emerging digital transmissions. Through placing the right of making available under the broader right of communication harmonising nearly any form of a work's communication not involving tangible copies, characteristically different acts were subjected *de facto* to the same treatment. Given the full harmonisation of the right under the InfoSoc Directive and no mechanism for taking into consideration the circumstances at stake in individual cases, a less-than-coherent framework emerged.

A broad right can indeed be advantageous as it can be easily adapted to the need to secure an emerging exploitation of a work. Nonetheless, suitable mechanisms for delimiting its scope according to specific circumstances must follow if it is to avoid a one-sided serving of the involved interests. The analysis of the adoption of Article 3(3) of the InfoSoc Directive, seemingly precluding any general limit to the right of communication to the public on the basis of it being of an immaterial nature, reveals the vague foundation of the provision. Considered from today's perspective, the issue has been settled prematurely, complicating the adaptation of the copyright framework to the digital age.

¹¹⁹⁶ CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, paras 45–47.

As the analysis of the growing CJEU jurisprudence interpreting the right of communication to the public under the InfoSoc Directive shows, most jurisprudence concerns secondary communication in some way relying on the initially authorised one. Furthermore, the reasoning of the Court is essentially based on economic considerations, ranging from the exercise of the right and appropriate remuneration to interference with a market and the relevance of the profit-making nature of secondary communication. Whilst the development has been endorsed for contemplating the interests at stake instead of subjecting any related act to the exclusive right, it has also attracted substantial critique for going against the legislative intent and, essentially, impairing legal certainty.

The analysis under the chapter indicates a shift from denying any limits to subsequent control over dissemination falling under the right of communication to the public to allowing imposing restrictions in particular cases. Although the right was legislated on the assumption of immaterial dissemination and denying any limits to control over secondary dissemination, it has proven inadequate for explaining why certain uses ought to be subjected or exempted from exclusive control. For a right encompassing a wide variety of uses, both well-known and not at all anticipated, the enshrined inflexibility of approaching secondary communication proved to be counterproductive.

Three main findings shall be emphasised. First, despite the rigid (but also ambiguous) wording of Article 3(3) of the InfoSoc Directive, the jurisprudence of the CJEU allows exempting certain acts of secondary communication from the exclusive control. Remarkably, Article 3(3) has only been mentioned in cases involving either unauthorised primary communication or acts that, although relying on initial communication, constitute a distinct way of exploitation.

Second, whereas no distinction between primary and secondary communication is drawn or can be implied from the wording of Article 3(1) of the Directive, jurisprudence appears to move into the direction of creating one. Almost all of the cases interpreting the right of communication to the public concern acts of secondary communication. Although the CJEU does not distinguish them from cases concerning primary unauthorised communication, the Court applies slightly different reasoning when examining them. Such a development might well be welcomed considering the broad scope of the right and the need to systematise the approach.

Third, the justifications of the Court for capturing the acts of secondary dissemination with the right of communication to the public are essentially economic. Emphasis on a new public, new technological measures, and distinct exploitation can be interpreted through the objective of securing the market of a work and preventing interference with its exploitation. Leaving aside the contradiction between Article 3(3) and jurisprudence, the Court adopts a flexible approach to examining whether preventing particular interference is admissible on the basis of the right of communication to the public. Nevertheless, the way of approaching the cases lacks the transparency of the underlying objectives and normative guidance beyond the set of loosely formulated criteria that inevitably weight differently in diverse types of communication.

Accordingly, the analysis reveals that the underlying premises of the Court's assessment in the cases concerning the right of communication to the public resemble the considerations employed in the cases on the material dissemination rights. Namely, these are the interference of the acts of secondary communication with the exploitation of a work by interfering with the primary market or a potential market. This raises the question of whether the EU copyright framework as a whole would benefit from reconciling the approaches to both types of rights given the developments. The findings of this chapter will be integrated with chapters 3 and 4 in order to outline a framework for defining the extent of exclusive control beyond first communication, combining the approaches of material and immaterial dissemination rather than relying on Article 3(3) of the InfoSoc Directive.

6. DEFINING THE SCOPE OF THE EXCLUSIVE CONTROL OVER SECONDARY DISSEMINATION IN THE LIGHT OF THE DEVELOPMENTS UNDER THE EU COPYRIGHT ACQUIS

Copyright, including under the EU *acquis*, generally does not distinguish between acts of primary and secondary dissemination. The exclusive rights ought to provide the right holder with control over exploitation of a work. Hence, they extend to any act falling within their scope, whether primary or secondary. Nonetheless, the broad exploitation rights do have their boundaries, sometimes coinciding with secondary dissemination. For instance, it has long been recognised that the scope of the right of distribution covering, first and foremost, distribution of tangible copies, ought to be limited to avoid interference with other interests such as circulation of goods. The exhaustion principle is an instrument of delineating the scope of the right of distribution de facto exempting secondary distribution from the right holder's control.

It is by no means excluded that similar circumstances, calling for limiting the reach of the exclusive right holder's control in the light of other interests, arise in the context of dissemination falling within the scope of other rights. Nevertheless, historically, the idea of limiting the right holder's exclusive control over communication of a work to the primary authorisation was largely opposed. One of the grounds has been the distinction between material and immaterial dissemination rights, where only the former category provided the right holder with an opportunity to obtain appropriate remuneration through the first authorisation. The distinction is based on the economic underpinning of the rights and, essentially, relies on the right holder's ability to exercise the exclusive right in their best interest.

Whereas the assumption has been enshrined under secondary EU law in the field of copyright, the subsequent developments, not least under the CJEU jurisprudence, have challenged it. As has been explored in chapters 2 to 5 of this thesis, neither envisaged loss of control over secondary distribution nor the outlawed limits on the exclusive control over secondary communication under the InfoSoc Directive provide a reliable picture of what the scope of control is in practice. The preceding chapters examined in detail the development of the rights under the *acquis* and explored the justifications behind extending or restricting exclusive control over secondary dissemination. The present chapter sets to summarise the conclusions and offer a framework for reconciling the material and immaterial dissemination rights under the *acquis* through defining a common set of criteria for assessing the justifiability of subjecting secondary dissemination to the exclusive right holder's control.¹¹⁹⁷

¹¹⁹⁷ As was explained in Chapter 1, dissemination as a term was preferred to communication or distribution when referring to any way of communicating a work's content to the public in

This chapter, relying on the analysis in chapters 2 to 5 of this thesis, presents the answers to the two overall research questions. The first overall research question is *how does the development of the rights of distribution and communication to the public under the EU acquis reflect the distinction between material and immaterial dissemination rights?* The second overall research question is *how could the approaches to material and immaterial dissemination be reconciled to define the scope of exclusive rights beyond authorising every communication of a work?*

Whereas the main aim of the chapter is to outline the normative framework for answering the second overall question on the basis of reconciling the approaches to material and immaterial dissemination, it also sets to provide the background by summarising the findings of the analysis under chapters 3 to 5. Hence, before answering the first overall research question and turning to the normative framework itself, the indications of the convergence of the approaches to material and immaterial dissemination rights under the *acquis* are examined.

Next, in order to outline the normative framework for assessing the justifiability of subjecting secondary dissemination to the right holder's control given the developments under the *acquis*, common criteria which can be used to systematise the approach to the extent of control over secondary communication are explored. The outlined criteria are contrasted with the incentive rationale of copyright and the objectives of the exclusive rights envisioned under secondary EU law to group them into primary and ancillary considerations. Last, the chapter puts the developed normative framework into the context of secondary EU law in force to examine the shortcomings of the present regulatory framework in accommodating the developed criteria.

Hence, besides answering the two overall research questions of this thesis, this chapter addresses the following sub-questions to support the conclusions:

What are the indications of the convergence of the approaches to material and immaterial dissemination rights under the EU *acquis*?

What common criteria can be used to systematise the extent of control over secondary communication, relying on initially authorised communication, under the EU *acquis*? How do these criteria relate to the incentive rationale and the objectives of copyright under the *acquis*?

What are the main shortcomings of the current EU copyright framework in accommodating the developed criteria?

In order to answer these questions, first, the significance of the distinction between material and immaterial dissemination in the context of the development under the EU copyright *acquis* is summarised. Relying on the findings of chapters

the chapters dealing with the analysis of rights, in order to avoid confusion with the scope of the respective exclusive right. Since this chapter is focusing on the outlook for reconciling the approaches rather than on placing the acts under a specific right, the term communication will be used throughout this chapter as a synonym to dissemination and as communicating a work's content to exploit it economically.

2 to 5 of the thesis, it is explored what developments under the two main dissemination-related rights point towards the convergence of approaches and could form a basis for reconciling the approaches. Furthermore, the complications of relying on the distinction for determining the appropriate scope of control over secondary dissemination are emphasised. The analysis leads to the conclusions on the first overall research question, which also provide the background for the normative framework.

Second, the normative framework building upon the identified developments is constructed. The framework aims to provide common criteria that could be used to systematise the extent of the right holder's control over secondary dissemination. Given the underlying premises of the analysis of the development of the rights, the elements are contrasted with the economic rationale and the objectives of exclusive rights under the *acquis*. On this basis, the elements of the framework are divided into primary and ancillary ones. The former category constitutes the core of the assessment, capable of indicating whether exclusive control over subsequent secondary dissemination shall be upheld. The latter group comprises the elements that can assist the assessment but ought to be accompanied by clarification of the rationales of protection under the *acquis* to avoid unduly prioritising the interests of the right holders at cost of other considerations. Finally, outlining the normative framework is complemented by exploring the main shortcomings of the present EU copyright framework in accommodating the developed criteria.

The chapter is divided into two parts. Part 6.1. provides the background to the developed normative framework by summarising the developments under the *acquis* pointing towards the convergence of approaches and concluding on the first overall research question. Part 6.2. outlines the normative framework for assessing the justifiability of subjecting secondary communication to the exclusive control of the right holder under the *acquis*. This part outlines a set of primary and ancillary criteria for the assessment and the shortcomings of the present copyright framework in accommodating them, before concluding on the second overall research question.

6.1. The material and immaterial dissemination distinction in the context of the development of *acquis*

In the context of technological progress in the 20th century, the emergence of the Internet as a new dissemination channel is, without a doubt, the key development. Not least because of the challenges it posed to the traditional way of regulating the exclusive rights on the basis of the material and immaterial dissemination distinction. The emergence of a new channel prompted legislators to confer on the right holder broad control over any act of communication taking place online.¹¹⁹⁸

¹¹⁹⁸ Both internationally and at the EU level. See sections 5.1.6. and 5.2.2.

Appropriate protection was necessary for the development of business models.¹¹⁹⁹ Nevertheless, nearly two decades after the harmonisation under secondary EU law, the adequacy of the framework is increasingly questioned.¹²⁰⁰ Whereas the extensive protection enabled the development of various business models, other objectives of copyright received less attention. Among other aspects, the position of users and the role of copyright in fostering innovation and competition are often discussed.¹²⁰¹

This part summarises the findings of the analysis conducted in chapters 2 to 5 of this thesis to contextualise the framework for reconciling the approaches to material and immaterial dissemination rights in the second part of this chapter. First, the developments indicating the convergence of approaches will be highlighted. Second, the complications of commencing the assessment of secondary dissemination relying on the distinction enshrined under the InfoSoc Directive will be discussed. Third, conclusions on the first overall research questions will be provided and will serve as a background for the second part of the chapter.

6.1.1. Developments indicating a convergence of material and immaterial dissemination approaches

At the very outset of the EU copyright harmonisation, a strict line between the rights of material and immaterial dissemination was drawn under secondary EU law.¹²⁰² The right of distribution would be systematically restricted by the application of the exhaustion principle, whereas the right of communication to the public would not be subject to exhaustion. However, the subsequent development under CJEU jurisprudence illustrates that neither the general boundary of the right of distribution nor the outlawed limits on the right of communication to the public under secondary EU law tell us much anymore about the scope of exclusive control in practice.

Technological advancements and emerging markets have required a flexible assessment of the interests at stake that would consider the circumstances of exploitation of a work. The recent tendency to examine the relation between the copyright legislation and the fundamental rights harmonised under the CFR points towards dealing with the undesirable consequences of the broad exclusive

¹¹⁹⁹ Guibault and Quintais (2014), p. 7.

¹²⁰⁰ Sganga et al. (2017). See also *Opinion of the European Copyright Society concerning the scope of the economic rights in light of case C-161/17, Land Nordrhein Westfalen v. Dirk Renckhoff* ('Córdoba case'), 2018, emphasising the current copyright system's inability to adapt to the digital environment and suggesting a *de minimis* rule, which would deal with the use of a work that has minimal impact on the interests of right holders.

¹²⁰¹ On the position of a user, see Mazziotti (2008), Synodinou (2010). On competition, see Schovsbo (2011).

¹²⁰² Under the InfoSoc Directive, see section 5.2.2.3.

control granted under copyright by the mechanisms outside copyright.¹²⁰³ This thesis, leaving fundamental rights outside the scope, operates within the boundaries of the copyright framework and from the perspective of economic justifications for copyright.

The absence of any designated material medium in online communication of a work implicates drawing definite conclusions based on the assumptions developed in the realm of analogue dissemination. The emergence of new markets and the potential for secondary exploitation of a work have prompted the CJEU to retreat from the predetermined positions enshrined under secondary law. Whereas the increasing flexibility in constructing the scope of the exclusive rights under the *acquis* is welcomed, the development comes at the cost of legal certainty.¹²⁰⁴ Whilst the underpinning arguments of the CJEU are of a predominantly economic nature, the underlying objectives are seldom explicitly revealed.

The next sections integrate the findings of the analysis of the rights under the *acquis* and illustrate the convergence of the approaches to material and immaterial dissemination. By contextualising in part 6.2.3. of this chapter the answer to the first research question on how the development of the rights reflects the distinction, the present part also provides a background to the normative framework for assessing the scope of control accorded by the rights. First, the tendency to broaden the scope of subsequent control conferred by the right of distribution is assessed towards the traditionally material nature of the right. Second, the flexible approach to assessing secondary dissemination under the right of communication to the public is contrasted with the traditionally immaterial nature of the right. Third, the complications of commencing the assessment of the cases from the distinction under the secondary law are outlined.

6.1.1.1. Scope of the right of distribution beyond the first marketing of a tangible copy

The concept of material dissemination laid the ground to confining the right of distribution under secondary EU law solely to the copies fixed on a tangible medium. The preparatory works to the InfoSoc Directive indicate the legislator's intent to harmonise the right of distribution under Article 4 of the Directive as covering solely distribution of tangible copies of a work.¹²⁰⁵ However, the notion of material dissemination as related solely to tangible copies has been contested. First, the CJEU extended the application of the right of distribution and its boundaries to apparently functionally equivalent acts of online dissemination.¹²⁰⁶

¹²⁰³ On the topic, see Hugenoltz (2001), Geiger (2006), Geiger (2004), Jütte (2016), Hugenoltz (2016a), Griffiths (2018), Helfer (2018).

¹²⁰⁴ See also Rendas concluding that CJEU exercises great flexibility but at the cost of legal certainty, Rendas (2018), pp. 169–182.

¹²⁰⁵ See section 3.2.3.2.

¹²⁰⁶ The ruling in the *UsedSoft* case, see section 3.3.3.

Second, the economic arguments which are typically attributed to material dissemination have been used for delineating the scope of the rights of seemingly immaterial nature.¹²⁰⁷

This section draws attention to three main observations which point towards the convergence of approaches to material and immaterial dissemination and provide a ground for outlining the normative framework in the next part of the present chapter. The first observation is an explicit delineation between the primary and secondary acts of distribution. The second aspect is the emphasis on the right holder's chance to exercise the right. The third and final aspect is flexibility to extend the scope of control to secondary distribution despite the application of the exhaustion principle as a seeming boundary of the right.

Despite the broad wording of the right of distribution under secondary EU law, at the time of harmonisation at the international and EU levels, there was little support for recognising a right that would extend to any subsequent distribution of the same copies.¹²⁰⁸ Recognising the right of first distribution was an alternative to a broad right. The latter, in turn, would necessarily have to be accompanied by the exhaustion principle. Opting for the broad right was a less obvious way of harmonising the right of first distribution. The right of distribution under the InfoSoc Directive covers any primary or secondary act of distribution with the exception of secondary acts following exhaustion of the right.¹²⁰⁹

Spelling out the exhaustion principle under secondary EU law meant that the acts of primary and secondary (subsequent) distribution must be distinguished. Every primary act of distribution is, in any case, subject to the right holder's authorisation, whereas secondary acts of distribution (in the meaning of distribution under Article 4(1) of the InfoSoc Directive) are exempted from authorisation on the basis of the exhaustion principle under Article 4(2). This distinction is also significant in two other aspects. First, the wording of the principle rules out its application to acts not falling under the right of distribution under Article 4(1).¹²¹⁰ Second, the distinction was also employed by the CJEU through the Community exhaustion principle to solve the conflict between the exclusive right and the free movement of goods within the internal market.¹²¹¹

The exhaustion principle, in theory, exempts acts of secondary distribution from the right holder's authorisation. However, the wording of the principle is too finely tuned to the specific circumstances of distribution of "unalterable" tangible copies to effectively delineate control granted by the right in slightly different circumstances.¹²¹² Although the wording of the principle suggests that

¹²⁰⁷ For the criterion of appropriate remuneration, see section 5.3.2.

¹²⁰⁸ See section 3.1.2.

¹²⁰⁹ Also, spelling out the exhaustion principle allows to regulate its territoriality, see section 3.2.3.2.

¹²¹⁰ First and foremost, in respect of rental. See section 4.1.2.

¹²¹¹ See section 3.2.2.1.

¹²¹² In general, see section 4.3.1. Also, in the context of online distribution, see Oprysk et al. (2017). "Unalterable" is meant to signify that it could more or less be assumed at the time of

the first putting a copy on the market entails a complete loss of control over subsequent distribution, it is far from providing a due account. The application of exhaustion neither prejudices other rights nor denies any control over subsequent dissemination.¹²¹³ The CJEU jurisprudence provides some examples where further control is justified even though the conditions of exhaustion are met.¹²¹⁴

The key condition for the application of the exhaustion principle under the *acquis* is the exercise of the right by the right holder. In economic terms, by granting control over the placement of tangible copies of a work on the market, the Directives provide an opportunity to obtain appropriate remuneration for each copy.¹²¹⁵ Hence, the right of distribution under the *acquis* suggests that appropriate reward is ensured by providing the right to authorise any primary act of distribution, as secondary distribution is effectively exempted. Nevertheless, the CJEU on a few occasions considered it necessary to look beyond the remuneration due for initial distribution.¹²¹⁶

Hence, there has been a departure from the right of distribution securing control over the first marketing of copies to the right of distribution securing control over the distributed copies on any market. It is no longer the case that the right of distribution primarily covers first distribution. Rather, the right provides control over every distribution, exempting secondary distribution only if there is no separate market for the copies and if secondary distribution does not significantly interfere with the primary market.

Whereas it could be argued that new markets for exploitation of distributed copies undermine the primary market for original copies or unduly deprive the right holder of additional profit, the overall development must be assessed towards the objectives of the right. It is highly debatable whether the copyright holder should be granted control extending beyond obtaining remuneration through the initial distribution of copies.¹²¹⁷ Furthermore, it can be seriously disputed whether the incentive rationale of protection necessitates providing control over the placement of a work on any primary and secondary market, regardless the fact whether any (however slight) potential for obtaining additional remuneration for already distributed copies exists.

elaborating the principle that a secondary market (if any) would be comprised of copies that were not substantially altered besides a regular “wear and tear.” However, as technology evolves, it becomes possible to modify copies in ways creating additional value, which raises the question of whether the right holder’s claim of further control shall be upheld. See also section 4.2.3.4. on the *Art & Allposters* ruling.

¹²¹³ For instance, see on the different rights in relation to the same tangible copy section 5.2.1.2.

¹²¹⁴ See section 4.2.3.4.

¹²¹⁵ In line with recital 10 of the InfoSoc Directive. See also section 3.3.1.2.

¹²¹⁶ For instance, when a new market is emerging for copies already distributed, e.g. through rental or their substantial modification.

¹²¹⁷ See, for instance, Poort on the irrelevancy of surplus created in the downstream market for the scope of copyright protection as long as market failure is not reintroduced. Poort (2018), p. 294. Also, Rognstad and Poort (2018), pp. 140–141.

Given the increasing demand for flexibility in constructing the boundaries of the control accorded by copyright, the role of the exhaustion principle under Article 4(2) of the InfoSoc Directive in delineating the scope of the harmonised right of distribution is diminishing. Rightly so, the CJEU has considered the exhaustion principle as limiting the control to the first authorisation in its broader economic and practical sense and beyond the sale and resale of tangible copies.¹²¹⁸ Unlike the exhaustion principle in its narrow meaning under the Directives, such broader perspective can be replicated in the cases not necessarily encompassing dissemination of tangible copies. This is not to suggest that the exhaustion principle per se should be extended to digital copies. On the contrary, the principle in its narrow meaning under Article 4(2) shall rather be confined to its traditional tangible context.¹²¹⁹

The implications of the development of the right of distribution and its inherent boundary in the form of the exhaustion principle are two-fold. First, the control accorded by the right under the EU *acquis* extends beyond the first distribution of copies despite the exhaustion principle. The all-or-nothing approach of the principle does not fit well in the recently much more flexible approach to defining the boundaries of permissible control. Although the increasing flexibility of the CJEU's reasoning could be praised, jurisprudence fails to provide a clear rationale for extending control accorded by the right beyond the first distribution.¹²²⁰

Second, the development does not provide any decisive grounds for extending the material dissemination approach to the assessment under other exclusive rights. Inevitably, extending the exhaustion principle in its broader sense to situations outside the realm of tangible copies is a matter of policy. However, it is of utmost importance that the question whether the material dissemination thinking accompanied by the exhaustion principle in its broader sense shall be extended to uses beyond the sale of tangible copies is not confined to the application of the exhaustion principle in its narrow sense under Article 4(2) of the InfoSoc Directive.

6.1.1.2. Search for flexibility under the right of communication to the public

The right of distribution stands in contrast with the right of communication to the public under the *acquis*. The latter, in theory, knows no boundaries when it comes to primary versus secondary acts of communication falling under the right, pursuant to Article 3(3) of the InfoSoc Directive.¹²²¹ The justifications for such

¹²¹⁸ For instance, in the context of the *UsedSoft* case, where the Court held that limiting exhaustion would go beyond what is necessary to achieve objectives of copyright. See section 4.2.3.3.

¹²¹⁹ As will be elaborated in section 6.2.2.2.

¹²²⁰ See section 3.3.2.

¹²²¹ See section 5.2.2.3.

unequivocal contrast rely, inter alia, on the distinction between material and immaterial dissemination rights. However, the development of the right of communication to the public indicates that what secondary EU law seems to imply no longer reflects the state of the things. The tendency is to move beyond the assumption of no general limit to the right of communication to the public. Furthermore, the CJEU operates with considerations which are typically associated with material dissemination and the right of distribution.

The present section outlines three main aspects of the development, which support reconciling the approaches to the exclusive rights on the basis of integrating the material and immaterial dissemination approaches. The first aspect is an indication that the function of the right can be fulfilled through authorising each act of initial communication. The second aspect is the growing emphasis on the exercise of the right as the essential objective of protection. The third aspect is the diminishing significance of Article 3(3) of the InfoSoc Directive precluding exhaustion of the right of communication to the public.

A significant departure from the traditional view of immaterial dissemination is acknowledging the possibility of limiting the exercise of the right of communication to the public once its function has been fulfilled. In turn, it relies on the assumption that the function of the right can be fulfilled through the first exercise of the right. The CJEU has held that, in particular circumstances, control over acts that would formally fall under the exclusive right of communication to the public could be limited, given the fact that initial communication has been authorised.¹²²² The Court reasoned, inter alia, that the rights guarantee only appropriate remuneration, which the right holder could have negotiated when giving the initial authorisation.

Similarly, the absence of the public which has not already been taken into account by authorising the initial communication as an argument for restricting control over secondary communication through hyperlinking essentially points into the same direction.¹²²³ What is emphasised is that the right holder is free to exploit a work in their best interest by virtue of the right to authorise any separate act of dissemination. However, they cannot expect to retain control over any secondary communication or any act in a remote connection to a work.

If the possibility to confine the right holder's control to authorising primary communication is admitted, then it prompts a discussion on the circumstances which sanction placing the limits on subsequent control. Perhaps the most prominent criterion developed by the Court in this respect is a new public, which is essentially of economic character. The assessment of the intended audience of the initial communication and the audience reached by a secondary act establishes

¹²²² See sections 5.2.1.1. and 5.2.3.1. In essence, the *FAPL* case has a lot to do with the fact that public receipt of a broadcast is considered to fall under the right of communication to the public. The reasoning of the CJEU on the relation between sale of decoding devices and the freedom to provide services relates to receipt of a signal rather than to a more active interference such as retransmission of a signal.

¹²²³ See sections 5.2.3.2.2. and 5.3.2.1.

whether the subsequent act interferes with primary communication by targeting an audience that was not foreseen. Hence, a new public potentially reached by secondary communication corresponds to the public from which potential remuneration was not obtained.¹²²⁴

The criterion further emphasises the importance of exercise of the right and the right holder's prerogative to exploit a work in the form of targeting any individual (or a group of individuals) with a communication of a work. It could therefore also be understood as assessing the presence of a foregone potentially paying public. Nevertheless, as will be argued, the criterion should only be examined in conjunction with the circumstances at stake. In some instances, the supposedly new public would not be interested in accessing a work at all; hence, no potential remuneration could be obtained.¹²²⁵ In other circumstances, although no additional circle of persons would be reached, an act could still substantially interfere with a work's communication or exploitation.¹²²⁶ Therefore, it is vital that the new public criterion is considered when assessing other circumstances of an act in question.¹²²⁷

These considerations run contrary to what EU secondary law seems to imply under Article 3(3) of the InfoSoc Directive. Fundamentally, the paragraph attempts to distinguish the right of communication to the public from the right of distribution on the basis of the assumption that any primary or secondary act falling under the former right would have to be authorised in order to secure appropriate remuneration to the right holder.¹²²⁸ Hence, whereas there are, of course, specific limitations such as exceptions for educational or scientific purposes, no general limits such as the exhaustion principle were deemed permissible. Whether or not one interprets Article 3(3) as precluding any general limit on the right of communication to the public, the wording unnecessarily encourages assuming a predetermined stance on the extent of accorded control.¹²²⁹

Prominently, the Court at times has adopted a flexible approach to the scope of the right of communication to the public beyond authorising primary commu-

¹²²⁴ On the new public as intended audience, see also Peukert (2017), p. 897.

¹²²⁵ Consider, for instance, installation of TV sets in public spaces such as hotel lobbies. It is questionable whether customers already having a terrestrial license and those who are not in possession of one would actually be interested in accessing a broadcast in a public space. Even if they were, another question that arises is whether it is justified to pass the extra costs on consumers already paying for a license and double compensate the right holder. See the CJEU applying the unconvincing criterion of the perceptiveness of the public, section 5.2.3.2.1.3.2.

¹²²⁶ For instance, framing could represent such a case. See Poort distinguishing embedding from linking and placing it closer to a work's exploitation by downgrading the right holder's exclusivity. Poort (2018), pp. 317–321.

¹²²⁷ On the importance of these considerations, see also Depreeuw (2014), p. 343.

¹²²⁸ The views on the exact meaning of the Article differ, see section 5.2.2.3.

¹²²⁹ As will be explored in the following section, any assessment of acts falling under the right of communication to the public starts from assuming the right holder's control over any (in)direct act in connection with a work.

nication, much in line with the material dissemination thinking.¹²³⁰ In the absence of any limit under the right of communication to the public, which is comparable to exhaustion under the right of distribution, the CJEU jurisprudence has confused legal certainty. Namely, the Court's understanding of Article 3(3) of the InfoSoc Directive appears rather narrow, as opposed to the indications given by its wording. Rather than considering the provision in the circumstances of secondary communication, the CJEU examined its significance only in the cases which entail the existence of independent exploitation through unauthorised communication or correspond to secondary communication which is distinct to an extent it could be considered a separate one.¹²³¹

Prominently, the Court has referred to the exhaustion principle to justify its conclusion that an upload of a work already freely available online constitutes an act of communication to the public.¹²³² Whereas the conclusion itself is supported, provided that the MS are then free to examine whether the act in question falls under any exception, the reference to exhaustion in this context is clearly erring. The Court has also referred to the provision in the case where secondary communication, although not altering most circumstances of the original one, was so distinct that it could be considered a separate exploitation.¹²³³ It would be much more convincing if the Court would recall Article 3(3) of the InfoSoc in the cases concerning neither clearly primary communication nor secondary communication potentially amounting to distinct exploitation. Instead, examining the meaning of Article 3(3) would be much more insightful in such cases as retransmission through nearly the same means to the same public, public receipt of a broadcast or linking to freely available authorised content.

Accordingly, the right of communication to the public as representing immaterial dissemination has undergone substantial adjustments. The distinction the legislator enshrined into secondary EU law proved to be a restrictive factor in shaping the appropriate scope of control accorded by the exclusive right. Nevertheless, even though the CJEU jurisprudence does not explicitly nullify the provision under Article 3(3) of the InfoSoc Directive, it demonstrates a flexible approach to subsequent control based on the circumstances of the case. In this context, the CJEU's sporadic reference to Article 3(3) serves as additional argument for employing the distinction between primary and secondary dissemination as equally useful under the right of communication to the public.

¹²³⁰ For instance, the same economic considerations of a work's exploitation were used in the context of the right of communication to the public. Consider the exercise of the right through determining circumstances of initial dissemination and obtained remuneration, outlined above.

¹²³¹ See section 5.2.3.1.2. Also, the Article was mentioned in the case of secondary act amounting to a new exploitation, see section 5.2.3.2.1.2.1.

¹²³² See the *Renckhoff* case, section 5.2.3.1.2.

¹²³³ See the *ITV Catchup* case, section 5.2.3.2.1.2.1. On the economic significance of retransmission, see also Poort (2018), pp. 324–328.

6.1.2. Complications of relying on the distinction for determining the appropriate scope of the rights

Given the developments of the rights under the EU *acquis*, the main obstacle to constructing a framework that would be flexible and yet preserve the legal certainty is the strict division between the rights and the enumerated closed list of permitted limitations.¹²³⁴ As the tendency has been, the CJEU jurisprudence gained increasing importance when it comes to providing any guidance on what the possible limits of control might be.¹²³⁵ However, such development has also resulted in the shortcomings due to the selective nature of cases referred to the Court and the CJEU confining its reasoning to very specific circumstances.

The structure of the InfoSoc Directive prevented a broader debate on the limits of the rights and complicated conceptualising the balancing factors and policy aims.¹²³⁶ The first obstacle is seemingly precluding exhaustion of (i.e. exempting any acts of secondary communication from) the right of communication to the public. The second obstacle is harmonising the exhaustion principle under the full-harmonisation Directive. In the first case, the provision has been used to practically deny any general limit on the exercise of the right of communication to the public. In the second case, by spelling out the exhaustion principle in a narrow way, adapting it to the changing circumstances of a work's exploitation was essentially discouraged.

This is not to suggest that the distinction between the right of distribution and the communications right in its broad sense is deprived of any substance.¹²³⁷ Instead, the circumstances of exploitation change as technology evolves, and they call for a flexible assessment on a case-by-case basis. Every live performance of a work as a traditional form of immaterial exploitation requires a separate authorisation from the right holder, just as every distribution of copies of a work does. In that sense, both acts are treated equally as they are subject to authorisation under the respective exclusive right.

However, the considerations change when performance can be communicated beyond the reach of the present public, e.g. through broadcasting. Such further communication reaches an additional audience, for which the right holder might not be compensated if the right of performance does not extend to subsequent communication. Ultimately, circumstances of subsequent communication of a performance are different from resale of tangible copies, where the right holder has been compensated for each copy. Such secondary communication opens a

¹²³⁴ Griffiths (2010), Dreier (2010a), Geiger and Schön herr (2014a), Guibault (2010), Hugenholtz (2016a).

¹²³⁵ Rosati (2019).

¹²³⁶ Westkamp (2017), p. 25.

¹²³⁷ On communications rights versus the right of communication, see section 5.1.1. Distribution of tangible copies is still the way of dissemination where profit from each copy is obtained mostly through the first sale. Broadcast is still different as its retransmission can result in substantial additional profit and interference with the right holder's business model.

potentially much bigger market than a live performance, which can explain why exploitation through a performance does not entail the automatic application of the exhaustion principle. Once again, application of the exhaustion principle in this context could only mean exempting transmission (or broadcast) of a performance to a (new) public but not the loss of the ability to authorise any new performance.¹²³⁸

Consider, on the other hand, online dissemination, which opens a potentially world-wide market for communicating a work. Delivery of electronic copies to individual users through online transmission essentially resembles physical distribution. Should resale of these copies be prohibited on the sole ground that dissemination is seemingly immaterial? Likewise, would the first authorisation of communication of a work enable obtaining appropriate reward, if access to such communication is strictly controlled and offered worldwide? Whereas it might be the case, the peculiarities of online dissemination might as well call for refraining from drawing any conclusions on the sole basis of dissemination being “digital” or “immaterial”.

The main message is that the variety of ways to exploit a work through communication does not allow supporting an all-or-nothing approach to the extent of appropriate exclusive control. Whereas the strict distinction between the rights could be justified at the outset of digital environment in order to let the businesses grow on the basis of the broad exclusive right, the question is whether the solution is still justified today. In a sense, the distinction between material and immaterial dissemination rights indicates nothing more than the reluctance to apply the all-or-nothing approach of the exhaustion principle as formulated under the Directives to the variety of acts falling under the right of communication to the public. However, it cannot justify placing no limits at all on the scope of the right of communication to the public.

It could also be argued that the sharp distinction between the rights has encouraged the CJEU and the academic community to explore the possibility of extending the right of distribution to online dissemination.¹²³⁹ Would more flexibility be entailed under the other rights, the limits of control could also have been addressed under the broad right of communication to the public. As has been explored in the previous chapters, denying the application of the right of distribution to dissemination other than through circulation of tangible copies is often associated with precluding the application of the exhaustion principle. However, as was also illustrated in the previous chapters, the exhaustion principle might no longer entail a total loss of control over subsequent communication.¹²⁴⁰ Therefore, considering exhaustion in its broader meaning is certainly endorsed.

¹²³⁸ To consider exhaustion as a loss of an ability to authorise next performance would amount to holding that exhaustion of the right of distribution implies that anybody is allowed to produce and distribute new copies of a work.

¹²³⁹ See section 4.3.3. Also, Sganga (2018b).

¹²⁴⁰ For instance, the Court has shown flexibility in assessing the circumstances of the cases even if they de facto prompted for application of exhaustion. See section 4.2.3.4.

It has already been emphasised that no conclusions on the appropriate scope of the rights can be drawn from the presence of a tangible medium alone. A copy fixed on a physical medium can be used both for distribution and for communication of a work through a performance or a broadcast. Hence, interference of secondary communication by a third party does not depend on a copy itself but rather on the use that is made of it.¹²⁴¹ The perception of dissemination as material or immaterial changes over time as technology evolves. Once a new distinct use for distributed copies or primary communication emerges, primary dissemination might call for treatment originally reserved to immaterial dissemination rather than material.¹²⁴²

The on-demand nature of online dissemination as a distinctive characteristic calling for an approach different from the rights of material dissemination must be contested.¹²⁴³ Dissemination of works is generally evolving towards communicating a work upon a request from a user. Actually, on-demand consumption of a work would essentially be closer to the consumption enabled by distribution of individual copies, compared with the consumption of a live performance or a broadcast. Whereas the latter presupposes that the circumstances of a work's consumption are outside of the control of a user, the former actually enables such control.

The inflexibility of the current framework leads to the situation where the businesses can adapt their models to fit the necessary category of the exclusive rights and enforce excessive control to the likely detriment of the market and consumers.¹²⁴⁴ One example is witnessed in the *VOB* case, where libraries were allowed to lend e-books on the condition that their e-lending closely resembled the analogue lending process.¹²⁴⁵ Could it be the case that, be it not for the absence of a comparable exemption from the right of communication to the public, the e-lending system could be built in a different way not mirroring lending of tangible copies? For instance, libraries could potentially embrace the possibilities of technology and provide simultaneous access to more users at the same time and remunerate the right holders accordingly.

Rather than trying to force the new ways of exploitation into the existing boxes, as was advised against at the outset of harmonisation,¹²⁴⁶ it is appropriate

¹²⁴¹ For instance, providing tangible or digital copies of works for use in hotel rooms was considered to fall under the right of communication to the public despite the involvement of tangible copies. CJEU, *Phonographic Performance (Ireland) Limited v Ireland and Attorney General*. (2012) Case C-162/10, Judgment of 15 March 2012, paras 62–69. See also section 5.2.1.2.

¹²⁴² Consider, for instance, rental of tangible copies, which was exempted from exhaustion following the rise of commercial rental, section 4.1.2.

¹²⁴³ See section 5.2.2.2.

¹²⁴⁴ For instance, this is evident in the aftermath of the *UsedSoft* case, where the vendors could easily adapt to the reasoning of the Court by providing time-limited access.

¹²⁴⁵ See section 3.2.4.3.

¹²⁴⁶ See section 2.2.2.

to account for the underlying practical-economic implications of exploitation and policy considerations.¹²⁴⁷ Ultimately, the complexity of copyright grows when economic interests are balanced in individual cases. However, it would provide more flexibility to account for differences in specific circumstances.¹²⁴⁸ From this perspective, and in particular in the context of online dissemination, relying on the notion of communication of a work under the right of communication to the public as of an inherently immaterial nature and not be subject to any general limit is somewhat archaic.¹²⁴⁹ There is nothing to suggest that online dissemination at all times is incapable of generating appropriate remuneration through the first act of dissemination. Therefore, the justifications behind submitting any subsequent dissemination to the right holder's control must be considered carefully.

Next, maintaining the strict distinction between the rights also does not allow the effect of the rights on the market to be appreciated. For instance, in the context of tangible copies, the primary market for a work is affected by the second-hand market for distributed copies. Denying the application of exhaustion to intangible copies thus ensures that no comparable interference takes place in regard to the market for digital copies. The situation could be viewed as conferring preferential treatment on the specific form of exploitation based on the technical circumstances of communication of a work. Whereas other objectives might justify such outcome, it is highly debatable whether creating a different status quo is supported by the mere absence of a tangible medium, if considered towards the rationale of providing incentives to create.

Reconciling the approaches to material and immaterial dissemination under the exclusive rights would uphold the distinction between the primary and secondary acts of dissemination, which is traditionally associated with the material dissemination. The distinction would be helpful to avoid the confusion around the meaning of the exhaustion principle both in its narrow and broad senses. The exhaustion principle sanctions placing a limit on the secondary acts relying on the initially authorised communication and in no way interferes with the ability to authorise each new independent act. Only when it has been established that the right holder has exercised their right can the justifications for limiting further control over the particular act be considered.

Taking these considerations into account, it should be concluded that reconciling the approaches to material and immaterial dissemination would be a particularly appropriate development under the EU copyright *acquis*. First, it

¹²⁴⁷ In the context of exhaustion, see Rogstad (2003), p. 463. In the broader context of the proposed alternative model for defining the exclusive rights through reasonable exploitation, see Rogstad and Poort (2018), p. 132. Also, see Ohly emphasising current formalistic approach to the exclusive rights and the need to consider economic consequences, Ohly (2018a), pp. 97–99.

¹²⁴⁸ Riis (2013), p. 151.

¹²⁴⁹ Jenner calls the discussion whether it is a download or a stream, under what section of the act does it fall and where and who owns it an arcane Medieval teleological discussion, Jenner (2011), pp. 60–61.

would systematise the developments under CJEU jurisprudence. Second, it would provide a framework for evaluating the cases on the basis of the practical implications rather than the dogmatic assumptions. Third, the reconciled framework ought to be better suited to deal with emerging technologies and any future need to adjust the right holder's control over circumstances of dissemination. Finally, all these aspects would contribute to restoring legal certainty, which has recently been substantially weakened.

6.1.3. Conclusions on the first overall research question

The first overall research question of this thesis is *how does the development of the rights of distribution and communication to the public under the EU acquis reflect the distinction between material and immaterial dissemination rights?* The objective of the research was to determine the impact of the distinction between material and immaterial dissemination on the harmonisation of the rights and establish to what extent the *acquis* continues to reflect the assumptions made at the outset of harmonisation.

As has been explored in Chapter 2, the distinction between material and immaterial dissemination is not a clear-cut notion but rather a way to systematise the rights. It has been employed to explain why the scope of certain rights could generally be limited to first exercise in relation to each separate act of dissemination (e.g. the right of distribution) and others (communication rights) ought not to. The distinction is in close relation to the economic rationale of protection and the idea that the function of the right can be fulfilled by the right holder exercising control over exploitation through authorisation of each separate dissemination.

Traditionally, the right of distribution would be differentiated from the right of performance on the basis that the right holder would have a possibility to obtain appropriate remuneration through the first putting of copies into circulation, whereas authorising a performance may not provide appropriate remuneration with a view of the potential downstream market reached by communicating performance to a wider public. Accordingly, national laws have limited the right of distribution to authorising every initial distribution of copies by spelling out the exhaustion principle as an inherent boundary of the right. Rights of communication to the public covering dissemination not connected to any tangible copies traditionally know no such (or comparable) limit.

The approach to regulating dissemination-related rights on the basis of distinction has early on been enshrined under secondary EU law harmonising the exclusive rights under copyright. Whereas the right of distribution is accompanied by the exhaustion principle under Article 4(2) of the InfoSoc Directive, Article 3(3) explicitly precludes application of exhaustion, and hence, supposedly, any limits on control over secondary dissemination, to the right of communication to the public under

As explored in chapters 3 to 5, the legislative choices under the Directive depended on a variety of considerations besides the mere scope of control over

secondary dissemination conferred by each right. Harmonisation under the Directives relied, *inter alia*, on the preceding case law of the CJEU examining the conflict of national copyright with the free movement of goods, calling for harmonising certain aspects of exhaustion in order to prevent distortion of the internal market. Furthermore, given the broad scope of the right of distribution under certain national laws, it had to be ensured that the exhaustion principle as harmonised under secondary EU law would not interfere with the right holder's control over such forms of distribution as rental. Given the fact that the wording of the provisions serves multiple objectives, it is crucial to unravel any assumptions on the envisioned scope of the exclusive right from the exact wording of the rights under the secondary EU law.

Whereas it might not have seemed like such a big step to harmonise the two widely recognised rights in the 1990s on the basis of the commonly accepted distinction, it appears to be one from today's perspective. As explored in Chapter 2, copyright is closely linked to the development of technology and has been heavily challenged by the emergence of a great variety of dissemination channels, in particular the Internet. The developments have, without a doubt, impacted the distinction between material and immaterial dissemination. Whereas dissemination is increasingly moving online and ought to be of immaterial form, it can hardly be argued that none of the ways of dissemination is able to secure appropriate remuneration, given, *inter alia*, the availability of technological measures enabling wide control over access and consumption of a work.

As has been discussed, the recently enabled new ways of exploiting already distributed tangible copies is another reason to question the justifiability of denying further control on the basis of the exhaustion principle. The overreaching scope of the communication to the public right seemingly covering any thinkable act of communication of a work online at times appears excessive in the absence of proper mechanisms of delineating control accorded by the right. This has had implications on matters outside copyright but closely related to the scope and the exercise of exclusive rights, such as consumer protection and competition.

Whereas copyright law-making ought to be accustomed to the constant process of adaptation, it is nonetheless dependent on the flexibility of the framework and the ability to account for the ever-changing circumstances of a work's exploitation. As discussed in Chapter 2, the harmonisation of the rights under secondary EU law has negatively impacted the freedom of the MS to legislate. Whereas the aim of harmonisation has been, besides providing adequate protection to the right holders, to advance the internal market and competition within it, the objectives might not have been effectively achieved due to the diminutive margin for appreciation of the changing circumstances of a work's exploitation.

The impact of enumerating the rights under the EU copyright framework on the basis of the distinction has been discussed using the Scandinavian countries as an example. These countries share a common history of copyright law-making and are characterised by a less dogmatic approach to the legislation and the particular weight of public interest in copyright rationales. It was explored in Chapter 2 how Scandinavian copyright has been influenced by Scandinavian legal realism

and how the important public interest rationale appears otherwise hardly accounted for under the EU *acquis*. The broad right of making available under Scandinavian copyright was designed to withstand the challenges of law-making in the course of technological development but the obligations under the *acquis* had led to further categorisation of the right.

Despite the strict distinction between the right of distribution and the right of communication to the public under the InfoSoc Directive, the developments under the CJEU jurisprudence have substantially blurred the picture of the two rights. Whereas the harmonisation through the CJEU jurisprudence has touched many aspects of copyright, the right of communication to the public has received a fair share of attention. The significance of the development can be seen not least in Norwegian copyright, where, after nearly three decades of harmonisation, a separate category of communication to the public within the broad right of making available has been introduced to ease compliance with the *acquis*.

The analysis of the development of the rights under the *acquis* under chapters 3 to 5 from the perspective of the distinction drawn at the outset of harmonisation revealed that the distinction has not been strictly followed in practice. CJEU jurisprudence demonstrates a much more nuanced picture of the extent of control accorded by the rights than the mere wording of the provisions would suggest. The tendency has been to consider a wider picture rather than to rely on the respective Article of the InfoSoc Directive. Whereas it has upset legal certainty as to the scope of obligations under the *acquis*, it has also endorsed a flexible approach to the appropriate scope of control pursuant to the circumstances of a work's exploitation.

Besides resorting to the notion of appropriate remuneration in the context of the right of communication to the public, the Court has further advanced the idea that the exercise of the right might come with consequences for the right holder. This idea has traditionally been confined to distributed tangible copies, where control over such copies is limited after their first authorised distribution. Although, as suggested by the InfoSoc Directive, any act of communication, whether primary or secondary, requires the authorisation of the right holder, certain acts might be exempted. This appears to depend essentially on the degree to which secondary acts potentially interfere with the work's exploitation and on the necessity to acknowledge other involved interests, such as fundamental rights.

Despite the developments under jurisprudence, seemingly advancing flexibility, the distinction spelled out under the InfoSoc Directive has caused inconsistencies. The Court still must commence the assessment from the wording of the Directive, which has made Article 3(3) of the InfoSoc Directive rather ambiguous. It is even more so considering that the Article is hardly ever mentioned in jurisprudence. Given the complications of relying on the distinction for the assessment of the appropriate scope of control discussed in this chapter, it has been concluded that it is important for legal certainty that the distinction is reconsidered and the material and immaterial dissemination rights are reconciled under the *acquis*. Acknowledging the fact that the approaches in fact already merge, it would be appropriate to review the choices made three decades ago.

As the second part of the chapter attempts to consolidate the findings on the development of the rights and outline a possible normative framework for evaluating the justifiability of extending or limiting control over secondary communication, the present part has also summarised the developments indicating the convergence of the approaches to material and immaterial dissemination under the *acquis*. Four main observations have been emphasised. First is the increasing emphasis on the exercise of the exclusive right as the essential function of the right. The second observation is the indication that the function of the right can be fulfilled through authorising each act of initial (primary) dissemination.

The third observation is the (in)explicit delineation between the primary and secondary acts of dissemination. Whereas the delineation is explicit under the right of distribution, given that its scope in most cases is confined to the first distribution of a copy, it is much less clear under the communication rights. The distinction is observed, first and foremost, through the differences in the reasoning of the Court in cases concerning secondary dissemination and cases of either primary or secondary unauthorised communication. The fourth and the final observation is the flexibility exercised by the CJEU despite the envisaged application of the exhaustion principle or the absence of limits on the control over communication pursuant to Article 3(3) of the InfoSoc Directive.

On the basis of the findings on the first research question and the observations on the converging approaches to material and immaterial dissemination rights, the next part of this chapter proceeds with outlining a possible normative framework for evaluating the justifiability of extending exclusive right holders' control over secondary communication. As has been explored in Chapter 2, the analysis in this thesis relied on assumptions which also must be taken into account when outlining a framework. Whereas the economic underpinning of the exclusive rights and their boundaries is not the only aspect to consider in copyright law-making, it is an appropriate point of departure if the objectives of protection are to acknowledge the wider public interest.

6.2. Framework for reconciling the approaches to material and immaterial dissemination

As has been elaborated in the first part of this chapter, the development of the rights of distribution and communication to the public points towards the convergence of material and immaterial dissemination rights contrasted under secondary EU law at the outset of harmonisation. It has been concluded in answering the first overall research question that, in the light of the technology development and the increasing demand for legal certainty under the *acquis*, reconciling the approaches to material and immaterial dissemination would be a logical and necessary development. Consequently, the present part outlines a normative framework as the means to that end.

Understandably, it would be too far-reaching to attempt to construct the appropriate scope of the exclusive economic rights on the sole basis of reconciling these approaches. Nevertheless, integrating approaches can serve as a basis for assessing the necessity to extend or restrict the reach of the rights over each secondary dissemination (communication), in the light of the potential fulfilment of the economic function of the right through the authorisation of each initial act of communication. Accordingly, the normative framework outlined below builds on the analysis in the preceding chapters and the underlying premises of the distinction between material and immaterial dissemination rights.

More precisely, the framework is meant for assessing secondary communication by third parties, i.e. acts which rely on the initially authorised communication. As elaborated in Chapter 2, the distinction which is reconciled here concerns essentially the scope of the exclusive rights in relation to secondary dissemination. This is to say that it only comes into play when the right holder has exploited a work through authorising its dissemination in one way or another and where the question is to what extent they might control any secondary use of such dissemination. Whereas, pursuant to the distinction enshrined under secondary EU law, further control is either permitted or denied, reconciling the approaches shall offer a considerably more nuanced approach.

The framework outlined below is only designed to examine the acts of secondary dissemination relying on the initially authorised communication. This is its most important limitation because the framework is not intended to offer all-encompassing guidance on what the appropriate scope of copyright protection as a whole ought to be and what acts of a work's dissemination shall be reserved for the right holder. The tendency has been to reserve for the right holder any making of a work available which entails some degree of control over the circumstances of dissemination. Whereas the studies have been conducted on the appropriate scope of the economic rights as a whole, the focus of the present enquiry is narrower.¹²⁵⁰

Focusing on control over secondary communication relying on the initially authorised communication, the framework proceeds from the assumption that the right holder has authorised the initial act of communication of a work. Furthermore, it must be assumed that this initial dissemination falls under exclusive rights, which would mean that the right holder has exercised their right. The framework then aims to assess the justifiability of submitting an act of secondary dissemination by a third party to the right holder's exclusive control, with a view of the circumstances of the act and its possible interference with a work's exploitation.

The convergence of the approaches to material and immaterial dissemination under the *acquis* has amplified the importance of distinguishing between primary and secondary acts of dissemination. This is so because the relevant considerations are not identical. An upload of a work and making it accessible on the Internet is clearly an independent act of communication, entailing control over

¹²⁵⁰ For instance, the suggestions in Hugenholtz et. al. (2018).

the availability and access to a work, and, generally, ought to be reserved for the right holder's authorisation, unless there is strong public interest in the opposite. A mere link to an already legally available work leads to less straightforward conclusions. Assessing both cases using the same standards leads to inconsistent conclusions and upsets legal certainty.¹²⁵¹

Distinguishing between the primary and secondary acts of dissemination may not be easy at all times. Furthermore, whereas in the past secondary dissemination would be confined to redistribution of tangible copies or retransmission of a broadcast, technological development has enabled secondary communication capable of altering the envisioned circumstances of primary communication to a far greater extent. Indeed, in certain cases, secondary dissemination is of such a distinct and interfering nature that it ought to be considered as a primary exploitation. The outlined framework ought to enable capturing these aspects, as the developed criteria allow appreciating the broader circumstances of a work's exploitation.

For the purpose of the framework, secondary dissemination shall mean any act which relies or is dependent on the initial dissemination authorised by the right holder. Whereas every initial act presupposes exercise of control over particular circumstances of dissemination such as place, duration, availability, acts of secondary dissemination generally do not entail the same degree of control. A few examples of secondary acts which rely on initially authorised dissemination are:

- linking to a work that has been uploaded on the Internet with the authorisation of the right holder;
- retransmission of (a performance of) a work;
- passing on a (digital) copy of a work, where the copy was obtained on an individual basis against the payment of a one-time fee;
- transfer of access to a copy of a work associated with one user account to a different user account.

These examples are rather broad; they are broad on purpose. Linking to a work that has been made freely available on the Internet is different from linking that circumvents protection measures confining the initial availability of a work to a particular circle of recipients. Furthermore, it could make a difference whether linking is taking place through a simple hyperlink pointing to another webpage or, for instance, through framing the content from a different webpage. The criteria under the outlined framework are designed to capture the circumstances of such secondary communication rather than to decide on the admissibility of the acts on the all-or-nothing basis suggested under the current secondary EU law in the field of copyright.

Drawing normative conclusions on the permissibility of such acts in the absence of the right holder's authorisation shall not be a matter of qualifying an act under one of the rights and the type of dissemination it ought to represent

¹²⁵¹ As, for instance, in the *Reckhoff* case. See section 5.2.3.1.2.

(either material or immaterial). Rather, it shall be a matter of assessing the broader context of such acts and their impact on a work's exploitation. Any insignificant use of a work which does not unduly prejudice the interests of right holders shall not be made subject to the right holder's exclusive control at the cost of competing objectives, such as public access to a work or competition.

Copyright does not operate in a vacuum but in the context of complex legal relationships. Not least, in the digital environment the access to a work is usually accompanied by lengthy terms of use. Even though the framework below might point towards admissibility of a certain secondary act, it may run contrary to the contractual obligations under such terms. Likewise, even if such secondary acts were to breach the contractual obligations, the consumer protection law may step in and preclude enforcement of particular terms. Accordingly, it is by no means the objective of the framework to provide a definite answer to the admissibility of each act in every specific case. Rather, the objective is to outline the criteria indicating that the function of the exclusive right in relation to specific act of dissemination might be considered fulfilled, opening the floor for taking other involved interests into consideration.

The framework outlined in this part is based on the analysis conducted in chapters 2 to 5 and, essentially, the economic approach to the exclusive rights. Given that the criteria have been derived by analysing the justifications for extending or limiting control over secondary communication against the background of the distinction between material and immaterial dissemination, they build largely on the economic considerations. Although they might not necessarily be the decisive ones in the light of the diverse rationales of copyright, they play the key role in the harmonisation under the *acquis* and in the CJEU's interpretation of it.

Whereas the purpose of the framework is to primarily reconcile the approaches to examining two main dissemination-related rights (distribution and communication to the public), the considerations outlined below are equally useful for other economic rights related to a work's dissemination, such as, for example, rental. Nonetheless, further discussion on the other rights would require a thorough assessment of their development and is outside the scope of this thesis. Here, the suggestion is made only insofar it concerns rebutting the presumption enshrined under the InfoSoc Directive and reconciling the approaches to material and immaterial dissemination using the example of the two rights.

The framework is by no means limited to the premises of present technological development and currently known (primary or secondary) ways of exploiting a work. Circumstances of a work's exploitation constantly change. What is static is the need to define and constantly adapt the scope of control accorded by copyright considering different (and changing) rationales for protection and the competing interests involved. The objective of the thesis is not to balance these interests but to contribute with a framework offering guidance on when the function of the exclusive right might be considered fulfilled.

Some matters identified under the analysis of the development of the rights are not directly envisaged by the economic underpinning of the rights or by the

rationales of the *acquis*. Hence, the criteria under the normative framework have been divided into two groups on the basis of the primary assumption made for the purpose of the analysis in this thesis, that control over every primary act of dissemination potentially offers sufficient incentives to create and exploit a work.¹²⁵² Therefore, the primary elements of the framework examine the exercise of the exclusive right by the right holder and the potential interference of secondary dissemination with a work's exploitation. Primary elements are complemented by ancillary ones. The ancillary elements could potentially influence the assessment, but considering them requires a clarification of the underlying rationales to avoid unjustifiably prioritising the interests of the right holders.

Part 6.2.1. of this chapter outlines the primary elements for evaluating the justifiability of subjecting acts of secondary dissemination to the exclusive control of the right holder. These criteria are of primary importance for securing the right holder's control over every act of communication. Therefore, where the right holder exercises their right in the circumstances where such control has been warranted, it would point towards the conclusion that the function of the right has been fulfilled and further control over this specific instance of dissemination could be limited, unless circumstances call for additional assessment. The primary elements of the framework are exercise of the right through authorising initial communication of a work, relevance of obtained remuneration, and interference with a work's exploitation.

The second group of criteria, elaborated in part 6.2.2., consists of ancillary considerations that potentially form a basis for such additional assessment. In the light of the assumption that the function of the right might be fulfilled through authorising initial communication, the criteria embody considerations extending beyond providing control over initial communication and must be examined carefully. These considerations might unduly prioritise the interests of the right holders where there are indications that the function of the right has been fulfilled. As the rationales for introducing these ancillary elements into the assessment are not explicitly articulated under the EU *acquis*, it is equally desirable that the objectives are elaborated by the legislator. The ancillary considerations are reaching a potentially new public within the originally authorised area, competition, in particular on the primary market, and revenue generated by a third party.

6.2.1. Primary and ancillary elements of the framework

As elaborated above, the following sections will outline the primary and ancillary elements of the normative framework for reconciling the approaches to material and immaterial dissemination rights under the *acquis* on the basis of the analysis undertaken in chapters 2 to 5 of the thesis and the conclusions on the first overall research question. Whereas, in reality, the identified criteria are intricately linked to each other, this part will attempt to address each one in isolation, demonstrating

¹²⁵² For more background, see section 2.4.

how they are, to a different extent, influenced by the various objectives of the EU *acquis*.

6.2.1.1. Primary elements for assessing the justifiability of control beyond every initial authorisation

This section outlines three primary elements for evaluating the justifiability of subjecting acts of secondary dissemination to the exclusive control of the right holder. The criteria build upon the research on the development of the exclusive rights in chapters 2 to 5 and the indications of the convergence of the approaches to material and immaterial dissemination, summarised in part 6.1. of this chapter. The primary criteria consist of three elements. The first criterion is the exercise of the right through authorising the circumstances of primary communication as a basis for any limit to exclusive control over secondary communication. The second consideration is the relevance of remuneration obtained through authorising the primary act of dissemination. The third element is the substantial interference of a secondary act of communication with exploitation of a work. Whereas the normative framework as a whole aims to reconcile the approaches to material and immaterial dissemination, at first sight the primary elements mirror several aspects of the material dissemination approach. However, as shall be explained, the criteria shall not be examined in a yes-or-no fashion but rather entail a broader assessment.

The first two criteria examine whether the exercise of the right through the first communication of a work points towards the conclusion that the function of the right has been fulfilled, focusing on the circumstances of the initial communication. However, these criteria do not take into account the circumstances of the particular situation and ought to be complemented by a third criterion. The latter brings flexibility into the assessment by considering the role of the secondary act relying on the initially authorised communication. In particular, it must be assessed to what degree such secondary act interferes with a work's exploitation. The latter inevitably depends also on the characteristics of communication envisioned by the initial authorisation. Hence, it is not only the fact of authorisation that shall be established under the first two criteria but also the envisaged audience, means, duration, which are relevant for examining the third criterion.

6.2.1.1.1. Exercise of the right through authorising primary communication

The rights granted under copyright are essentially preventive in nature; warranting authorisation of the right holder is their primary function.¹²⁵³ Safeguarding the

¹²⁵³ See on the preventive nature of the economic rights under the EU *acquis*, Rosati (2019), pp. 60–61.

right holders' authorisation of each exploitation of a work is the crucial objective of the exclusive rights. Through authorising every dissemination of a work to the public the right holder is given an opportunity to exploit a work commercially and to obtain remuneration. The distinction between material and immaterial dissemination, which is at the centre of this thesis, has been drawn on the basis of the assumption that the right holder may obtain appropriate remuneration through the first authorisation of particular dissemination.¹²⁵⁴ Hence, the fact of the right holder's authorisation plays a role in determining the scope of exclusive control over secondary dissemination.

Explicit exemption of secondary acts of communication from the right holder's exclusive control has traditionally been associated with the rights of material dissemination, such as the right of distribution. For instance, the exhaustion principle as a boundary of the right of distribution exempts further resale of distributed copies from authorisation. The exhaustion principle in its narrow sense is a rather one-sided solution to the need to limit the extent of control over secondary market. Whereas such a clear-cut rule has been accepted at the time of the intense international and the EU harmonisation, the development of technology challenges the established solution.¹²⁵⁵

It must be kept in mind that authorising distribution has no bearing on the right holder's prerogative to exercise the right again through authorising distribution of additional copies. Hence, authorisation of initial distribution might only influence the ability to further control already distributed copies, but in no way influences the right holder's entitlement to exclusive control over any new ones. Accordingly, exercise of the right as a primary element of the outlined normative framework shall be assessed insofar it relates to an act of secondary communication relying on such initial authorised act. Authorisation of a particular dissemination act shall be of no relevance to the right holder's control over each and every separate communication, as emphasised in the section above.

As has been illustrated in the background to the harmonisation of the right of distribution, the authorisation of the right holder has not always been a precondition to limiting control over subsequent distribution.¹²⁵⁶ However, it has gained importance under the EU *acquis*, both under secondary EU law and under CJEU jurisprudence. For instance, authorisation has been used for establishing the Community exhaustion principle, where the intervention with the exercise of exclusive rights under national copyright laws was justified on the basis of the Treaties once the right holder has authorised distribution of copies in question.¹²⁵⁷

The analysis of CJEU jurisprudence suggests that very little if anything could be inferred from the fact of authorisation. At the very least, authorisation indicates that the right holder agreed to communicating a work to the public and such

¹²⁵⁴ Section 2.4.

¹²⁵⁵ Section 4.3.3.

¹²⁵⁶ For instance, limiting further control could be triggered by other circumstances such as publication of a work, see section 4.1.3.

¹²⁵⁷ See section 3.2.1.

communication is normally confined to a specific area. It is, hence, irrelevant whether such authorised communication takes a form of distributing physical copies within a particular MS, broadcasting a work within the particular geographical area, or uploading a work on a publicly accessible webpage. Any of those acts essentially intend to make a work available to the public, whether or not the public takes a chance.

Whereas the EU *acquis* and the jurisprudence of the CJEU deal with the authorisation predominantly through the economic prism of exploiting a work, there is also an inherent moral element to it. By exercising the rights through authorising dissemination, the authors not only exploit a work economically but also exercise their moral right to determine the circumstances of presentation of a work.¹²⁵⁸ Interference with the circumstances of the authorised communication and, essentially, presentation of a work, can, in turn, also impede exploitation in the economic sense.¹²⁵⁹

It is precisely the economic aspect of authorisation which is important to the outlook presented in this chapter. Authorisation of any dissemination effectively safeguards the right holder's opportunity to exploit a work by prohibiting others from doing so. Hence, in the absence of authorisation, any act of dissemination will be infringing, essentially interfering with exploitation opportunities. The economic aspect of authorisation has been stressed by the CJEU holding that through exercising the right to authorise primary distribution the right holder can freely choose where and how to exploit a work on a market.¹²⁶⁰ In different terms, the Court has also held that the right of exploitation would be worthless if it was not possible to authorise or prohibit the acts falling under it, or if the right holder could not put an end to unauthorised communication of a work.¹²⁶¹

Hence, the exercise of the right through authorisation of dissemination is an important indication of the right holder's intent to make a work public and to exploit it commercially. If a third party could communicate a work without obtaining authorisation, it would interfere with the right holder's opportunities to exploit a work. Therefore, if the objective of the exploitation right is to secure the non-interference of third parties with the market for a work, any limitation to the right holder's control over subsequent dissemination ought to be based on the fact that the right holder has entered the market.

¹²⁵⁸ On the observation that the CJEU's assessment of the communication to the public right overlaps with the right of divulgation as a moral right, see Marušić (2019).

¹²⁵⁹ See section 6.2.1.1.3.

¹²⁶⁰ CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) *Joined cases 55/80 and 57/80*, Judgment of 20 January 1981, para. 25.

¹²⁶¹ In the context of the right of rental, see CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) *Case C-158/86*, Judgment of 17 May 1988, para. 18. Also, in the context of the right of communication to the public, see CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) *Case C-161/17*, Judgment of 7 August 2018, paras 29–31.

As is evident from the analysis of the rights, accepting the limits on further control arising from the mere fact that a work was lawfully communicated would undermine the objective of securing the primary market of a work. This would be the case, for instance, if the primary communication took place pursuant to a compulsory license or a remuneration right. It cannot be ruled out at the outset that such lawful dissemination of a work could trigger comparable consequences for the extent of further control. However, under the EU *acquis*, the conditions for limiting further control have been narrowed down to the initial acts authorised by the right holder.

On the other hand, subjecting every act of primary dissemination to the right holder's control could serve the economic rationale of copyright, for instance, by resolving market failure. If the right holder is able to obtain appropriate remuneration through the authorisation of each dissemination, the question that arises is to which extent shall secondary dissemination not constituting a separate exploitation be subject to exclusive control. With the welfare economics perspective and market failure in mind, the question is how justifiable it is to confer exclusive control once the underlying market failure has been mitigated. It is obvious that no universal answer can be provided as considerations will depend on the type of a work and the circumstances of the case.

Therefore, rather than taking the form of a mere yes-or-no fact (as with the exhaustion principle in its narrow sense), the criterion of exercise of the right through authorisation shall necessarily be a broader one, accommodating the assessment of the envisioned circumstances of communication. Here, a parallel could be drawn with the idea of implied consent, holding that the right holder's consent to certain secondary use of a work can be implied from authorising the original communication.¹²⁶² Whereas the implied consent theory could be of help in the context of the assessment, the purpose of the authorisation criterion is clearly broader.

Rather than establishing what could be implied from initial authorisation, the assessment of this element is indispensably linked with examining the other two primary elements. The purpose is to look at a broader picture of whether and how secondary communication potentially interferes with primary dissemination. This would move the assessment closer to the one CJEU performed in the *Coditel I* case, where the peculiarities of a particular exploitation model were taken into account.¹²⁶³ However, such assessment cannot and should not be generalised, as it is to be performed on a case-by-case basis.

Inevitably, the significance of authorisation of primary communication for the outcome of the assessment would differ, depending on the nature of the secondary act. For instance, when technological development enables a new distinctive use of already authorised communication, amounting to new exploitation, the relevance of authorisation decreases. The very purpose of requiring consent for a

¹²⁶² See the analysis of the exhaustion principle in the context of implied consent theory, Mysoor (2018). On a new public as an implied license, see Rosati (2019), p. 101.

¹²⁶³ See section 5.2.1.1.

particular act is to inform the right holder about the future exploitation of a work and the means of prohibiting it. Hence, without contemplating a possible distinct use, the right holder cannot adopt a position in advance.¹²⁶⁴ Conversely, where secondary dissemination closely resembles the primary dissemination, the criterion shall carry more weight.

Certain concepts developed under the CJEU jurisprudence relate, in essence, to the consequences of authorisation. The new public criterion, for instance, assesses permissibility of further control over communication on the basis of the right holder's intent and the legitimate expectations.¹²⁶⁵ The criterion is closely connected to authorisation as a primary element of assessing the justifiability of the exclusive control reaching beyond each initial communication. However, it bears the danger of being too blunt if examined in isolation and not confined to the assessment of secondary communication. Whereas it is by all means important to acknowledge the intended audience and any new audience reached by secondary communication, it must be done in the overall context of the exercise of the right and the work's exploitation.

Accordingly, the exercise of the right through authorising the underlying primary dissemination shall form a key element of the assessment of justifiability of subjecting secondary communication to exclusive control of the right holder. Whereas there might be public policy arguments for exempting certain secondary uses even in the absence of authorisation of primary communication,¹²⁶⁶ the framework proceeds with outlining other criteria on the assumption that the underlying initial dissemination has been authorised. Furthermore, the circumstances of initial communication and the scope of authorisation shall be assessed in conjunction with the other developed criteria, taking into account the characteristics of the secondary act.

6.2.1.1.2. Relevance of obtained remuneration

The criterion outlined in this section is closely related to the exercise of the right to exploit a work through authorisation of dissemination. Obviously, not every exploitation of a work entails obtaining direct remuneration. However, obtained remuneration proved to be a compelling argument in the context of limiting the reach of both material and immaterial dissemination rights. The very fact that through first authorisation the right holder has obtained or has had a chance to

¹²⁶⁴ CJEU, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* (2016) Case C-301/15, Judgment of 16 November 2016, paras 37–40. Also see Rosati (2019), p. 77.

¹²⁶⁵ Westkamp (2017), p. 34. Also, section 5.3.2.1.

¹²⁶⁶ See, for instance, the opinion of the ECS in the *Renckhoff* case. In particular, the proposal of introducing a *de minimis* rule to deal with uses that have minimal impact on the interests of right holders. See Opinion of the European Copyright Society concerning the scope of the economic rights in light of case C-161/17, *Land Nordrhein Westfalen v. Dirk Renckhoff* ('Córdoba case'), p. 4.

obtain remuneration can point towards a possibility to restrict exclusive control beyond primary dissemination.

According to the CJEU, the specific subject matter of copyright is to ensure “protection of the right to exploit commercially the marketing or the making available of the protected subject-matter, by the grant of licences in return for payment of remuneration”.¹²⁶⁷ Hence, warranting an opportunity to obtain remuneration is an important objective of the EU copyright framework.¹²⁶⁸ However, the highest possible remuneration is not guaranteed. Recital 10 of the InfoSoc Directive provides that the protection seeks to guarantee an opportunity to obtain an appropriate reward, which is reasonable in relation to economic value and also takes into account the actual or potential number of persons who enjoy or wish to enjoy the service.¹²⁶⁹

The fact that protection does not aim to guarantee appropriate remuneration but only to provide an opportunity to obtain it through exploitation of a work shall be emphasised. For instance, the CJEU has stressed that there is nothing that prevents the right holder from claiming a reasonable amount for the initial authorisation in relation to the potential audience of the communication in question.¹²⁷⁰ Asking for a fee which is intended to obtain remuneration corresponding to the economic value of a copy points towards the conclusion that the function of the right has been fulfilled.¹²⁷¹ The very pragmatic approach of the CJEU is further supported by Court’s reasoning outside the realm of secondary dissemination, where the CJEU has held that the royalties paid by CMO must be analysed “with respect to the value of that use in trade”.¹²⁷²

The relevance of remuneration and what could be considered appropriate remuneration, naturally, differ. Even though the criterion is relevant for the assessment, it ought not be decisive for the outcome. Even if appropriate remuneration is obtained, further dissemination could be legitimately opposed, for instance, as would be the case where secondary communication is likely to create a new distinct market for already authorised dissemination and interfere with primary or subsequent markets of a work. For example, it has been held that resale

¹²⁶⁷ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) (2011), Judgment of 4 October 2011, para. 107.

¹²⁶⁸ See also section 2.1.2.

¹²⁶⁹ CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) (2011), Judgment of 4 October 2011, paras 108–109.

¹²⁷⁰ *Ibid.*, para. 112.

¹²⁷¹ CJEU, *UsedSoft GmbH v Oracle International Corp.* (2012) Case C-128/11, Judgment of 3 July 2012, para. 45.

¹²⁷² CJEU, *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* (2008) C-52/07, Judgment of 11 December 2008. para. 36

of substantially altered lawfully distributed tangible copies shall not escape the right holder's authorisation if such copies form a distinct market.¹²⁷³

Remuneration as an argument is most prominent in the cases where the right holder has authorised communication to a specific public by offering access to a work against the payment of an individual fee. A subsequent act of dissemination, relying on such initial act, if operating within the boundaries of the same targeted public and the same way of the work's exploitation, could be exempted from the right holder's authorisation. Resale of copies distributed with the right holder's authorisation or simultaneous retransmission of a broadcasting signal would be core examples.¹²⁷⁴

Generally, a claim for additional remuneration beyond that which is due for initial dissemination would be denied if no interfering circumstances are present. Consider, for instance, the CJEU rejecting the claim for payment of additional remuneration upon the importation of copies lawfully distributed in a different MS.¹²⁷⁵ Similarly, consider the CJEU invalidating the national law which prohibits the import of decoding devices providing access to a broadcast solely on the basis of territoriality.¹²⁷⁶ Additional payment based on the territorial exclusivity was considered to go beyond what is necessary to safeguard the specific subject matter of protection.¹²⁷⁷

However, remuneration obtained through the primary act of dissemination is not automatically appropriate. In theory, the right holder can always ask for an appropriate amount of remuneration in the absence of competition from third parties. Hence, the right holder could be assumed to have acted in their best interest when authorising initial dissemination. Nevertheless, certain circumstances might interfere with such a conclusion. For instance, the relevance of obtained remuneration diminishes if the particular secondary use could not have been anticipated at the time of authorising primary communication, such as communication resulting in a new good or service.

On the other hand, the absence of remuneration which is explicitly due for primary communication cannot alone indicate that no limits on further control over communication would be justified. It would, for instance, be the case of hyperlinking to the content freely available on the Internet. In the absence of additional circumstances, prohibiting hyperlinking by virtue of the exclusive

¹²⁷³ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, also, section 3.3.2.2.

¹²⁷⁴ See sections 3.3.1.2. and 5.2.3.2.1.2.2.

¹²⁷⁵ In line with the *Musik-Vertrieb case*, CJEU, *Musik-Vertrieb membran GmbH and K-tel International v GEMA*. (1981) Joined cases 55/80 and 57/80, Judgment of 20 January 1981.

¹²⁷⁶ In line with the *FAPL case*, CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) (2011)*, Judgment of 4 October 2011.

¹²⁷⁷ *Ibid.*, para. 116. Also, Opinion of Advocate General in *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*. 3 February 2011, para. 192.

right has been denied, even though the right holder might not have received any specific remuneration through authorising the initial upload. By making a work freely available online, the right holder has exercised the right in their best interest and would have to accept certain consequences of their action.¹²⁷⁸

In this respect, the notion of a “payment corresponding to an economic value of a copy” used by the CJEU in the *UsedSoft* case is noteworthy. It seems to support the idea that remuneration asked for the initial act of dissemination would often amount to appropriate reward. It could perhaps even be assumed, given the present technological circumstances and control over access to a work, that the price set by the right holder corresponds to the actual value of the access to communication. Unless, of course, the subsequent use changes the envisaged parameters of such communication.¹²⁷⁹

This argument is particularly appealing in the context of online dissemination. Digital technologies have made access to a work much more excludable.¹²⁸⁰ DRM protection, supported by secondary EU law, inevitably subjects any copy to the right holder’s extensive exclusive control.¹²⁸¹ Furthermore, where a work is offered on the basis of conditional access or can only be downloaded from the Internet, it is much easier for the right holder to achieve market delimitation.¹²⁸² In combination, these circumstances enable perfect price discrimination through access control, hence making a market failure, which is supposed to be mitigated by the grant of the exclusive rights, less of a concern.¹²⁸³ The circumstances empower the right holders to ask for a price they deem appropriate.

Coming back to the incentive rationale of copyright protection and the economic underpinning of the rights, obtaining appropriate remuneration could be an indication that the objective of providing incentives has been achieved. Clearly, defining appropriate remuneration is not a straightforward task. Nevertheless, it could be argued that, in a situation where the right holder is granted an exclusive right to enter the market and is familiar with the boundaries of the granted protection, the remuneration they ask for the initial act should be considered appropriate, as they have been given an opportunity to act accordingly.

On the other hand, this conclusion would be undermined by the absence of legal certainty on the scope of exclusive control or interference of secondary

¹²⁷⁸ CJEU, *Nils Svensson and Others v Retriever Sverige AB*. (2014) Case C-466/12, Judgment of 13 February 2014, paras 27–28.

¹²⁷⁹ Consider alteration of a medium in the *Art & Allposters* case. CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015. Or subsequent communication using different technological means, CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd*. (2013) Case C-607/11, Judgment of 7 March 2013.

¹²⁸⁰ Kreiken and Koepsell (2013), p. 8.

¹²⁸¹ Elkin-Koren and Salzberger (2012), p. 79.

¹²⁸² Opinion of Advocate General in *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08). 3 February 2011, para. 187.

¹²⁸³ Ginsburg (2002), p. 125. Also, Poort (2018), pp. 290–292.

dissemination which could not have been contemplated. Hence, sorting out the scope of the exclusive rights in relation to secondary dissemination, as suggested here, would advance the argument that the function of the right can be fulfilled through its exercise in relation to each separate act of dissemination. Nevertheless, the results of the assessment of this criterion shall be complemented also by the ancillary elements of the framework upon clarifying the objectives of the exclusive rights.

6.2.1.1.3. Interference with exploitation of a work

Whereas the first two primary criteria of the framework focus on the right holder's prerogative in exploiting a work and the significance of authorisation for determining the extent of control over any potential secondary communication, the last primary criterion shifts the focus to the act of secondary dissemination in question. Whilst authorisation and remuneration are often discussed by the CJEU in cases on the scope of exclusive rights, interference with a work's exploitation has not explicitly been a part of the assessment.

Nevertheless, the analysis of the development of the rights under the *acquis* illustrates that many considerations taken into account by the Court essentially boil down to the presence of substantial interference. Assessing the act of secondary dissemination in question ought to complement the more formal criteria of prior authorisation and obtained remuneration and serve to avoid predetermined results, such as on the basis of the exhaustion principle. If a secondary act relying on initially authorised dissemination does not clearly interfere with a work's exploitation, the chances are that such act could be exempted from authorisation. Conversely, if an act would substantially interfere with a work's exploitation, such activity would most probably be subjected to further control.

Interference with a work's exploitation can be divided into three main categories. The first is the interference of secondary communication with a work's exploitation through altering the circumstances of initial communication (presentation) of a work. The second category is the interference of the secondary act with the different market for a work, e.g. when the subsequent dissemination constitutes a distinct form of exploitation. The third category is when the subsequent act directly interferes with the primary market for a work.

For the purpose of the assessment of this criterion, the market is considered in a broad sense as an opportunity to obtain compensation in exchange for providing access to a work. A distinct market for a work can be facilitated by the change in technology communicating the content of a work, change in the intended audience of dissemination or change in territorial coverage. The distinction between the primary market and a different market is drawn for illustrative purpose only to signify the various (in)direct forms in which an act can potentially interfere with a work's exploitation. Obviously, the types of interference in no way exclude each other. On the contrary, they often arise simultaneously. For instance, the interference with the primary market for a work would typically not

take place unless the subsequent act in some way alters the circumstances of initial communication. Further, in such a case, the secondary act might trigger not only interference with communication in general but also an interference with a different market for a work.

Not every insignificant interference with a work's communication should trigger the application of the exclusive right and subject secondary communication to authorisation.¹²⁸⁴ However, a change of the circumstances, even in no way altering the presentation of a work, might, in particular cases, be considered as interfering with a work's exploitation. Linking to content which is already lawfully and freely available on the Internet in the form of framing could be one example.¹²⁸⁵ Whereas, on the one hand, such linking would not interfere with the intended audience or in any way alter the original content, such secondary communication could nevertheless interfere with the right holder's intentions. Notwithstanding the moral aspect of the presentation of a work, framing could obstruct obtaining remuneration in connection to consumption of a work on the webpage that was initially intended.¹²⁸⁶

Continuing with hyperlinking, placing a link to a work which through the primary authorised act has been made accessible only to certain target audience will constitute an interference if it were to reach the public which was not intended. Not only will such secondary act interfere with the intended circumstances of original communication, but it will also interfere with the (new) market formed by the recipients of the link not envisioned under the primary communication. The same holds true for any secondary act, which, by its virtue, offers access to a work to the audience, which was not contemplated by the first communication.¹²⁸⁷

A prominent example of a case where secondary dissemination is likely to fall under the exclusive control of the right holder is where it directly exploits a new market. For instance, this would be the case of rental of the copies distributed with the authorisation of the right holder. Although the right holder has obtained remuneration through the first distribution of each copy, further rental of such copies would deprive them of remuneration that could have been extracted from each copy if it were rented instead of being offered for sale. Moreover, such

¹²⁸⁴ See also *Opinion of the European Copyright Society concerning the scope of the economic rights in light of case C-161/17, Land Nordrhein Westfalen v. Dirk Renckhoff* ('Córdoba case'), 2018, suggesting a *de minimis* rule to deal with uses of a work that have minimal impact on the interests of right holders.

¹²⁸⁵ On the types of links, see Guibault and Quintais (2014), p. 15. Also, Poort (2018), pp. 314–324.

¹²⁸⁶ For example, where the exploitation of a work is taking place through monetising on website's visits or advertisements placed on a webpage. See also Rognstad and Poort (2018), pp. 142–144. On framing as being possibly captured under the unfair competition laws of some countries, see Guibault and Quintais (2014), p. 19.

¹²⁸⁷ On constructing the limits of the rights through the notion of consuming control as illustrated by the new public criterion, see Westkamp (2017), p. 46.

secondary dissemination could possibly also undermine demand for copies distributed by the right holder on the primary market.¹²⁸⁸

Another way a secondary act could interfere with the primary market is through substantial alteration of the initial communication.¹²⁸⁹ A prominent example is the resale of significantly modified copies. First, such an act would affect the right holder's intent to disseminate a work in a particular form. Second, it could interfere with a new market enabled by the alteration of copies. Likewise, such modified copies might as well decrease the demand for the original copies, resulting in an interference with the primary market.

Sometimes the interference with the exploitation of a work also depends on the specific characteristics of the business model. For instance, one example is the situation at stake in the *Coditel I* case. Leaving aside the fact that the secondary act communicated a work to the public which was not intended by the initial authorisation, such secondary communication also interfered with the specific circumstances of a film's exploitation through a windowing system.¹²⁹⁰ The question of whether copyright should de facto protect business models in such cases is highly debatable. Nonetheless, taking into account the circumstances of a work's exploitation might be necessary for striking an appropriate balance.

Occasionally, a change of technology used for secondary communication can also constitute interference with the new market for a work. For instance, simultaneous retransmission of a broadcast of a work through a different channel such as the Internet might amount to an interference with a new market, even though the secondary act may not be reaching any new audience.¹²⁹¹ No definite conclusion should be drawn in such case. Retransmission on the Internet may not provide an alternative access to broadcast but merely deliver an additional convenience for users paying the right holder to watch the broadcast. Hence, it may well be the case that the retransmission does not deprive the right holder of any paying customers. Furthermore, if the right holder does not provide any comparable service for accessing a broadcast online, the consequences of prohibiting such secondary act by virtue of exclusive rights appear even more disadvantageous to the users.

Hence, it is of utmost importance that the criterion of interference is not used in an absolute manner. Whereas, as outlined above, secondary dissemination often appears to interfere with one or another aspect of a work's exploitation, it

¹²⁸⁸ See the *WarnerBrothers* case, CJEU, *Warner Brothers Inc. and Metronome Video ApS v Erik Viuff Christiansen*. (1988) Case C-158/86, Judgment of 17 May 1988. Also, section 3.3.2.

¹²⁸⁹ As examined by the CJEU in the *Art & Allposters* case, see section 4.2.3.4. Also, see Lund in that it is only natural that you cannot sell further a copy that was changed or where the author's name was removed. Lund (1954), p. 142.

¹²⁹⁰ The windowing system is used by the film industry to increase the revenue from a film's exploitation through first making it public at cinemas and later through broadcasting.

¹²⁹¹ Section 5.2.3.2.1.2.1. Also, see Westkamp holding that actively interfering with an act of communication employing different technology could further be seen to fulfil the new public criterion and constitute an entirely separate act of communication. Westkamp (2017), p. 34.

does not necessarily mean that any such interference justifies subjecting secondary dissemination to exclusive rights. Rather, including interference with a work's exploitation into a normative framework ought to emphasise the need for flexibility in assessing the justifiability of the right holder's control over secondary dissemination.

It would go beyond the objective of this thesis to define any threshold of interference which would point towards extending or restricting the reach of exclusive rights. What should be emphasised though is the fact that establishing any level of interference shall necessarily be accompanied by the clarification of rationales of the *acquis* and the ancillary elements of the framework, outlined in the part below. The significance of the interference might depend on the fact whether it occurs on a market where the right holder is not active or, on the contrary, whether it results in competition. Furthermore, it could also be influenced by the fact whether the right holder is deprived of any potential income.

Examining these circumstances, however, requires further guidance on the rationales of protection. Considering the possible interference of secondary dissemination clearly goes beyond a traditional distinction between material and immaterial dissemination and the incentive rationale of copyright. Although interference with a work's exploitation calls for clarifying the objectives of protection as do the ancillary elements outlined below, it shall nevertheless form a basis for the primary assessment. Examining the impact of the secondary dissemination in question shall be indispensable for the assessment of the justifiability of subjecting it to exclusive control if a flexible yet predictable approach to the appropriate scope of the exclusive rights is to be taken.

6.2.1.2. Ancillary considerations

In the part above, the primary elements of the normative framework for reconciling the approaches to material and immaterial dissemination have been outlined. These elements shall form a basis for an assessment of the justifiability of extending right holder's exclusive control to an act of secondary dissemination. They relate directly to the assumption that appropriate remuneration can be received through authorising initial communication. The primary criteria focus on the exercise of control by the right holder and the potential interference of secondary dissemination with an ability to obtain appropriate remuneration through a work's exploitation.

Ancillary considerations outlined in the present part relate to the act of secondary dissemination itself and form a basis for additional assessment, provided that the rationales of the copyright *acquis* are clarified to avoid unjustified prioritisation of the right holder's interests. In most cases, these aspects are closely connected with the assessment of the primary elements. Nonetheless, separating these elements into a different group ought to highlight the arguable premises for introducing these aspects into the assessment. It is argued that the criteria outlined below go beyond merely safeguarding the right holder's first-

mover advantage on a market and point into the direction of eliminating any competition with the right holder.

Similar to the interference with a work's exploitation as the primary criterion, these criteria have not been explicitly employed by the CJEU in the cases concerning secondary dissemination. However, the analysis of the development of the rights has shown that they might better explain subjecting certain acts to exclusive control than the Court's mechanical approach to what constitutes an act of communication. Three such ancillary elements have been identified. The first element is the assessment of whether a secondary act reaches a potentially new public within the audience originally envisioned by the right holder. The second consideration is whether the secondary act of communication leads to competition with the right holder. The third element is the relevance of revenue potentially generated by the third party through secondary communication. In combination, these conditions might point towards extending the right holder's control to the specific act of secondary communication.

6.2.1.2.1. Reaching a potentially new public within the originally authorised area

The analysis of the development of the EU copyright *acquis* points towards an important observation. Secondary acts, which essentially targeted the same intended public, have been subjected to the exclusive right and, hence, required the right holder's authorisation or compensation. The new public criterion justifying submitting secondary communication to the exclusive control was typically used in cases where dissemination was directed at a distinct geographical area or where the dissemination itself constituted a distinct form of exploitation. However, the CJEU has also submitted situations where neither condition was met to the exclusive right and, hence, for a claim for additional compensation.

The most prominent example is the public receipt of a broadcast at a commercial establishment such as a hotel. Notwithstanding the question of whether such public receipt constitutes an act of secondary communication, the Court has repeatedly held that such actions required authorisation under the exclusive right of communication to the public.¹²⁹² For instance, in *Rafael Hoteles* the Court reasoned on the basis of the new public criterion, holding that a new public was reached as there was a communication by an organisation other than the right holder.¹²⁹³ Intervention of the hotel provided access to works to customers which would not otherwise access the works even though they were physically within the intended coverage area of a broadcast.¹²⁹⁴

¹²⁹² The Court has nicely summarised the issue at stake under one of the headings of the *FAPL* judgment as “*B – Rules relating to the use of the broadcasts once they are received*”.

¹²⁹³ CJEU, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*. (2006) Case C-306/05, Judgment of 7 December 2006, para. 40.

¹²⁹⁴ *Ibid.*, para. 42.

The CJEU appears to narrow down the notion of the intended audience beyond the one within the catchment area of a broadcast and confine it to the circle of recipients of a broadcast in possession of a license. A hotel making a broadcast accessible to the customers within the catchment area was considered to interfere with the initial broadcast through communicating it to the new public potentially not captured by a TV license. Whether such a narrow understanding of the intended audience and such a broad understanding of the new public could be endorsed in the cases beyond the public receipt of a broadcast is highly disputable.

In this respect, the Court's reasoning in the *Renckhoff* case is worrying as the CJEU relied on the same notion of the new public in the context of a work freely available on the Internet with the authorisation of the right holder. The Court reasoned that the public taken into account by the right holder comprised solely the users of a particular website and not users of the other websites or even all the Internet users.¹²⁹⁵ Whereas this would be a reasonable argument were access to the original webpage in any way protected, the statement is odd when a freely publicly accessible webpage is in question.

As was explored, any separate act of making a work available entailing full control over dissemination (such as upload of a work) would generally fall under the exclusive right without the need to examine the public that has been reached. Whereas exceptions may exempt such secondary use from obtaining authorisation, the exhaustion principle as a limit to control over subsequent dissemination would in no way influence the findings. The fact that the Court did not stress in *Renckhoff* that the issue concerned a new upload and, thus, a separate exploitation, is problematic.¹²⁹⁶ It would be rather unfortunate and highly misleading to draw a conclusion that the authorised posting of a work on a freely accessible webpage implies solely consent to communicate a work to the visitors of that specific webpage. Following such reasoning, any linking could be held as an act of communication and require authorisation.

Consider, for instance, the cases where the initial making a work available is not authorised by the right holder. A secondary act such as hyperlinking to unauthorised content might well target the same public as the original unauthorised communication.¹²⁹⁷ However, the primary act and any secondary act would inevitably be directed to the new public as this public was not contemplated by the right holder. Accordingly, what is essential is the authorisation of the right holder in respect of offering a work to a particular public. In the absence of

¹²⁹⁵ CJEU, *Land Nordrhein-Westfalen v Dirk Renckhoff*. (2018) Case C-161/17, Judgment of 7 August 2018, para. 35.

¹²⁹⁶ See also Ohly (2018b).

¹²⁹⁷ CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, paras 42–43; CJEU, *Stichting Brein v Jack Frederik Wullems*. (2016) Case C-527/15, Judgment of 26 April 2017, paras 48–50; CJEU, *Stichting Brein v Ziggo BV and XS4All Internet BV*. (2017) Case C-610/15, Judgment of 26 April 2017, para. 45.

authorisation, any act, whether primary or secondary, is infringing as it is, in fact, directed to a new public.¹²⁹⁸

However, not every case of public receipt of a broadcast has been subjected to the exclusive right. For instance, in the *DelCorso* case, public receipt of a broadcast did not require a payment of a fee on the basis of a neighbouring right of communication to the public because the circle of persons having access to it was limited. Furthermore, the visitors were not particularly receptive to the broadcast at a dentist's office.¹²⁹⁹ Such a receipt at a commercial establishment also did not generate a value on its own, as will be examined in the following sections.

The CJEU jurisprudence is rather inconsistent on submitting the public receipt of a broadcast to the exclusive right; the rationales of extending the exclusive control to such acts are blurry. There are grounds to confine the assessment of the potential new public within an originally authorised area to the cases of public receipt of a broadcast. What is also important to take into account in these cases is the intent and the outcome of claiming the acts to fall under the broad right of communication to the public, which is essentially obtaining additional compensation. Whereas it might be argued that it is difficult to calculate the number of persons that would be willing to pay for a broadcast at the time of authorisation, it is highly disputable whether similar claims should be endorsed in the context of dissemination other than through a broadcast, and, especially, in the online setting.

It could be equally argued that, just as it does not matter whether the public to which communication is directed has actually enjoyed a work, it also should not matter whether a part of this originally authorised public is reached by secondary communication provided that all the other parameters of communication remain the same. What is important is the exercise of the exclusive right by the right holder which enables them to exploit a work in their best interest. If seen from this perspective, it is highly disputable whether the right holder should be additionally compensated on the mere ground that the intended public is confined to a more specific group.

Hence, it is argued that reaching a potentially new public within the initially intended area is an ancillary consideration which should be examined very carefully in each case. First, it can easily amount to a double payment to the right holder, where the consumers are passed on the cost of a separate license for public receipt of a signal. Second, if considered in the cases outside the realm of public receipt of a broadcast, the reasoning by analogy could lead to situations where any secondary act would require authorisation even though it cannot possibly deprive the right holder of any (potential) customers. The latter would, in turn, further advance a dominant position of the right holder.

¹²⁹⁸ Also, Rosati (2019), pp. 102–103.

¹²⁹⁹ CJEU, *Società Consortile Fonografici (SCF) v Marco Del Corso*. (2012) Case C-135/10, Judgment of 15 March 2012, paras 96–98.

6.2.1.2.2. Competition, in particular on a primary market

Whereas the CJEU denied the relevance of competition when examining secondary communication, it can be genuinely disputed whether that is actually the case. Different outcomes in rather similar cases could be explained in the light of competition, which is closely linked with the interference with a work's exploitation as a primary element of the framework. Nonetheless, competition has been placed under the heading of ancillary considerations because of two main reasons. First, copyright protection generally does not engage with regulating competition. Second, the aspect is not explicitly addressed under the CJEU jurisprudence and lacks a clear stand within the objectives of copyright *acquis*.

For instance, in the case of retransmission of an analogue broadcast on the Internet, the Court held that whether a third party acts in competition with the right holder is not a relevant consideration.¹³⁰⁰ Instead, the Court found there to be an act falling under the exclusive right of communication to the public relying on the argument that retransmission of a broadcast was carried out using new technical means. The latter is a somewhat inflexible indicator because there could be cases where the same technical means are used in a very innovative way.¹³⁰¹ Essentially, the case could have been seen in the light of the interference with the communication or precisely in the context of competition with the right holder.

If considered in conjunction with the outcome in the *AKM* case, where a retransmission through cable network installations was not considered to fall under the right of communication to the public, competition seems indeed a very relevant criterion. Whereas in the *AKM* case the third party did not interfere with the intended public and did not in any way alter the way of accessing a broadcast, the third party in the *TVCatchup* case arguably did, providing access to a broadcast via Internet. Nonetheless, the practical or economic significance of such alternative way of accessing a broadcast was still limited. Using *TVCatchup* service still required a possession of a terrestrial license. Hence, in theory, the right holder was already remunerated for the access to a broadcast by the persons using the third-party service to access a broadcast.

In these circumstances, it seems that the primary concern of the right holder in the *TVCatchup* case, who also happened to be the broadcaster, was the competition from a third party. It is also suggested by one of the questions that the referring court was asking the CJEU, namely, whether it was of any importance to the assessment of the scope of the right whether or not a third party acted in competition.¹³⁰² In this case, the third party could probably not be considered in direct competition with the right holder, as the possession of an original broadcaster's license was required to access the service. However, would the

¹³⁰⁰ CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd.* (2013) Case C-607/11, Judgment of 7 March 2013, para. 46. Also, section 5.2.3.2.1.2.1.

¹³⁰¹ Guibault and Quintais (2014), p. 14.

¹³⁰² CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd.* (2013) Case C-607/11, Judgment of 7 March 2013, para. 18.

broadcaster offer the same extra service, namely access to their broadcast online, the third party de facto would be in direct competition. The fact that the broadcaster was also the right holder of the broadcasted works is an essential factor here.

Whereas the CJEU might have attempted to avoid the criterion such as competition, favouring a seemingly more objective one such as different technical means, it is greatly disputable whether such approach conveys any advantages. The use of the new technical means argument is somewhat inconsistent in the light of the subsequent case law, in particular, the *AKM* case.¹³⁰³ On the other hand, competition is intricately linked with the exclusivity of the rights under copyright and safeguarding right holder's prerogative in exploiting a work. Consider, for instance, the *Art & Allposters* case, where the fact of a new exploitation opportunity through alteration of the lawfully acquired copies was emphasised.¹³⁰⁴ Essentially, what was important, was the interference of the third party's conduct with a new market for a work, possibly in competition with the right holder, similar to the circumstances in *TVCatchup*.

Competition as a criterion could potentially become more prominent and even supplement the primary elements of constructing the scope of exclusive control. Indeed, it could also become a part of the assessment of possible interference with a work's exploitation, which is the primary element of the framework.¹³⁰⁵ Not least, competition would help to differentiate between the subsequent acts of dissemination of a private and commercial nature. For instance, it cannot be disputed that the alteration of an acquired copy for private use is generally permissible, whereas the subsequent commercial resale of such copies might not be.¹³⁰⁶

On the other hand, considering competition as a relevant criterion requires a more than careful assessment. The analysis of the development of the rights has shown that there appears to be a considerable emphasis on protecting the right holder from competition under the CJEU jurisprudence. Not only is it questionable from the perspective of the incentive rationale of protection, competition also falls outside the equation of the distinction between material and immaterial dissemination rights, which this thesis attempts to reconcile. If the rationales of copyright under the *acquis* are predominantly incentive based and competition in

¹³⁰³ See section 5.2.3.2.1.2.2.

¹³⁰⁴ CJEU, *Art & Allposters International BV v Stichting Pictoright*. (2015) Case C-419/13, Judgment of 22 January 2015, paras 19, 48.

¹³⁰⁵ Section 6.2.1.1.3.

¹³⁰⁶ See also Senftleben in that time-shifting for private use can hardly be said to damage interests of the right holders. Similarly, it would have to be demonstrated that rebroadcasts typically constitute a significant source of revenue. See Senftleben (2004), p. 203. Interestingly, the recently adopted DSM Directive explicitly exempts private or non-commercial uses of press publications by individual users from protection under the neighbouring right of making available to the public which it grants to press publishers. See 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. 17.5.2019. OJ L 130/92, Art. 15.

the internal market is to be promoted,¹³⁰⁷ then considering competition in conjunction with the possible interference of secondary communication with a work's exploitation ought to be based on the clear objective of the exclusive rights. Should the rights secure an opportunity to exploit a work or, in addition, eliminate (any) competition?

Subjecting any subsequent dissemination to exclusive control appears detrimental to consumers and innovation. Whereas copyright may not be the appropriate field of law to regulate competition, persistently subjecting all the acts of secondary dissemination to authorisation of the right holder would be an unfortunate development when the situations at stake are rather diverse. Thus, it would be more appropriate for copyright to encourage the right holders to optimise their business models rather than to maximise control. Whereas downright free-riding on the investment in direct competition with the right holder ought to weight considerably in the assessment of extending the reach of exclusive control (already at the level of primary criteria), an additional service which does not unduly impair the right holder's interests might be exempted from authorisation where appropriate remuneration has been obtained through initial authorisation.

6.2.1.2.3. Foregone profit and revenue generated by a third party

The foregone profit of the right holder is occasionally inexplicitly taken into account by the CJEU in the context of secondary communication resulting in a new market or targeting a new public which was not envisaged by primary communication of a work. On the other hand, revenue generated by a third party in connection with secondary dissemination has explicitly made it into jurisprudence on a few occasions. Although the distinction between material and immaterial dissemination itself does not entail that the third-party revenue is of any relevance to the assessment, it appears to have become a part of the equation under CJEU jurisprudence. Essentially, under the material dissemination approach (as well as the justification for copyright on the basis of mitigating market failure), any revenue generated by a third party is irrelevant as long as the right holder has exercised their right and obtained remuneration.¹³⁰⁸

Turning back to the *TVCatchup* case, the Court held that the revenue generated by the third party is not conclusive for finding there to be an infringement of the right of communication to the public. Hence, the presence of the revenue was not a determining factor in the case of a broadcast retransmitted on the Internet.¹³⁰⁹ On the other hand, in the *Rafael Hoteles* case concerning the public receipt of a broadcast, the profit-making nature of the activity was a relevant but not a necessary condition for finding there to be an act of communication to the

¹³⁰⁷ On the rationales under the *acquis*, see section 2.1.2.

¹³⁰⁸ See sections 2.1.2.2. and 2.2.2. Also, Poort (2018), pp. 298–232.

¹³⁰⁹ CJEU, *ITV Broadcasting Ltd and Others v TVCatchUp Ltd.* (2013) Case C-607/11, Judgment of 7 March 2013, paras 43–44.

public.¹³¹⁰ Conversely, in the context of the receipt of a broadcast at a dental practice, the Court considered the absence of the revenue generated by a public receipt as one of the main arguments for holding that such act did not fall under the neighbouring right of communication to the public.¹³¹¹ Accordingly, it is not clear why in some instances this aspect plays a more significant role than in others. Furthermore, it is not evident how third-party revenue relates to the economic underpinning of the rights and appropriate remuneration which ought to be secured under the *acquis*.

One way to interpret the cases would be to consider the revenue generated by the third party as evidence of foregone profit for the right holder. For instance, if the dentist did not receive any economic benefit from a public receipt of a broadcast, then the right holder was not deprived of any either.¹³¹² However, it goes without saying that one should be careful assuming that the right holder has foregone any profit where a third party made a profit. This is especially so in the circumstances where the party relies on the initial authorised act and does not interfere significantly with the primary market.¹³¹³

Lately, the Court has also employed the profit criterion for dealing with the cases of secondary communication relying on primary infringing communication. In these cases, the Court has used the profit-making nature of the activity of the third party as a basis for a rebuttable presumption of knowledge of the infringing nature of the primary communication.¹³¹⁴ Whereas it is outside of the scope of this thesis to deal with the secondary acts relying on the initially unlawful communication, such approach must not be extended to the cases where the third party is relying on authorised communication, examined here. First, knowledge presumption becomes void when the initial communication is lawful. Second, the interference with the right holder's interest shall not be presumed on the sole ground that a profit is made in (in)direct connection to a work.

It could also be asked whether the profit-making criterion ought to be slightly relaxed in the online environment. On the one hand, the Internet as a dissemination channel is characterised by a higher degree of control over circumstances of initial communication of a work. On the other hand, it also often provides more opportunities to make a profit through secondary communication in a way which may not necessarily substantially harm the position of the right holder.¹³¹⁵ Hence,

¹³¹⁰ CJEU, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*. (2006) Case C-306/05, Judgment of 7 December 2006, para. 44.

¹³¹¹ CJEU, *Società Consortile Fonografici (SCF) v Marco Del Corso*. (2012) Case C-135/10, Judgment of 15 March 2012, para. 99.

¹³¹² Riis (2013), p. 150.

¹³¹³ See also section 6.2.1.1.3. on the interference with work's exploitation and section above on competition.

¹³¹⁴ CJEU, *GS Media BV v Sanoma Media Netherlands BV and Others*. (2016) Case C-160/15, Judgment of 8 September 2016, paras 47–48.

¹³¹⁵ Consider, for instance, Tom Kabinet webpage offering a platform for reselling e-books from particular vendors against the payment of a commission to CMOs upon each transfer of

the question that arises is whether the development of additional services, relying on the initially authorised communication, should be precluded on the sole basis that they might generate some income. Also, the question is whether the developments under the *acquis* point towards supplementing the incentive rationale of the *acquis* with the objective of attributing any possible value generated in (in)direct connection to a work to the right holder. Considering the recently adopted DSM Directive targeting the value gap in the context of online intermediaries, the development seems to point precisely in this direction.¹³¹⁶

Whereas the foregone profit of the right holder might play a role in the assessment of the primary criteria of the framework, namely, the interference of secondary communication with the work's exploitation, it shall be examined separately from any profit made by a third party. By no means should it be concluded at the outset that the revenue generated by a third party is always irrelevant for the assessment unless foregone profit can be proven. In a sense, there might always be foregone profit if we accept that subjecting secondary dissemination to exclusive control would effectively enable obtaining additional remuneration. Equally to the competition aspect outlined above, the relevance of profit made by the third party shall be examined with great care and towards the clarified objectives of protection.

6.2.1.3. Consequences of reconciling the approaches under the *acquis*

The set of primary and ancillary criteria outlined above highlights the essentially economic underpinnings of the exclusive rights and the developments under the *acquis*. Whereas each element in one way or another contributes to securing a market for a work as envisaged by the economic rationale of copyright protection, some elements, if taken to the extreme, also support retaining control over the market beyond the initial authorisation of a work's communication. Therefore, the rationales behind the scope and the reach of the exclusive rights under the *acquis* require elaboration if they are not to unduly advance the interests of the right holders at the expense of other involved interests.

The present section briefly outlines the consequences of employing the identified criteria as a common approach to examining the justifiability of submitting

an e-book. Tom Kabinet is the party in the proceedings before the CJEU, Request for a preliminary ruling in *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet and others* (2018) Case C-263/18. The platform voluntarily pays a fee to the authors for each transfer of an e-book between users of the platform, which goes beyond the obligations under copyright *acquis* and enables obtaining additional remuneration from a single copy, which would not be possible in the analogue scenario.

¹³¹⁶ 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. 17.5.2019. OJ L 130/92, Art. 17. For an overview, see also Rosati (2019), pp. 200–202. On the value gap generally, see Quintais and Poort (2018).

secondary dissemination to the exclusive control of the right holder. First of all, a common set of criteria would avoid the confusion caused by Article 3(3) of the InfoSoc Directive, which so far has rarely been invoked by the CJEU. At the moment, the Article clarifies little beyond the fact that every separate act of secondary dissemination has to be authorised by the right holder. Whereas the criteria developed by the Court under the right of communication to the public might seem to introduce some flexibility into the assessment if compared with the wording of Article 3(3) of the InfoSoc Directive, it is still limited to the economic aspects of exploitation of a work from the perspective of the right holder. Very rarely does the Court reach the conclusion that the secondary act does not prejudice the interests of the right holder. In turn, the right holder is seldom a creating author themselves.

Second, the common approach might help to avoid creating concepts detached from the real world. In very few cases, notably in the context of digital dissemination, the Court discusses the justifiability of excluding acts closely resembling the analogue communication from the respective rights and exceptions to them. In most of the cases, the Court proceeds from the assumption of the high level of protection as necessarily translating into the right holder's interest in the highest possible degree of control over any dissemination. In essence, the jurisprudence ignores such aspects as who the parties to the proceedings are, who relies on the exclusive right and whether they seek to prohibit an act or merely to obtain additional remuneration.

The reference in the *Tom Kabinet* case appears symptomatic of the development under the jurisprudence and of the lack of flexibility sanctioned under the EU *acquis*.¹³¹⁷ The CJEU will have to decide whether the all-or-nothing approach of the exhaustion principle should be extended to digital dissemination of e-books, similarly to the situation in the *UsedSoft* case. One might wonder if the situation would have been different in the absence of Article 3(3) of the InfoSoc. Could more flexible criteria have been developed, diminishing the need to rely on the outdated all-or-nothing approach of the exhaustion principle? Anyhow, the questions referred for a preliminary ruling do not allow the broader picture to be examined.¹³¹⁸

Reconciling the approaches to material and immaterial dissemination rights would help to systematise the developments under the *acquis* on the basis of

¹³¹⁷ The case concerns the application of the exhaustion principle to online distribution of e-books. Namely, the referring court asks, inter alia, whether the right of distribution is exhausted once the right holder provides a copy of an e-book for download. See Request for a preliminary ruling in *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet and others* (2018) Case C-263/18.

¹³¹⁸ For instance, other rights under the *acquis*, such as the right of communication to the public, are not subject to interpretation, as well as the possible DRM protection of e-books. *Tom Kabinet* only facilitates resale of DRM-free books. On the reference in the context of the DSM, see Oprysk (2019a).

whether a primary or a secondary act of communication is concerned.¹³¹⁹ As this chapter outlines the elements for assessing secondary dissemination relying on the initially authorised communication, it is self-explanatory that no automatic replication of the elements ought to take place in the cases of primary or secondary unauthorised communication. Nevertheless, the criteria developed here can also inform the discussion on the scope of the exclusive rights more generally.

As has been demonstrated, no definite conclusion should be drawn from the mere fact that an act of secondary dissemination relies on initially authorised communication. Nevertheless, the distinction between secondary dissemination and unauthorised primary communication is useful to maintain. Not least, it ought to avoid the confusion caused by the inconsistent application of criteria developed in the context of secondary dissemination in the cases of primary dissemination. The right holder's control over any separate acts of dissemination shall be safeguarded unless very specific objectives justify otherwise, which is not the focus of this thesis. Secondary dissemination relying on such authorised communication might, on the other hand, be exempted from control if it does not unduly influence the incentives to create and work's exploitation. The criteria outlined above precisely aim to support the assessment of whether any substantial interference takes place.

Clarifying the objectives of copyright harmonisation combined with provided flexibility to take into account the changing circumstances of a work's exploitation would be the most appropriate development of the EU copyright *acquis*. As it has been explored on the example of Scandinavian copyright, national laws might be better equipped to the agile circumstances surrounding copyright policy.¹³²⁰ There are two ways to achieve a more or less coherent approach to the exclusive rights across the MS given these dynamic conditions. The first is to complete a full-scale harmonisation taking all the aspects into account, e.g. by introducing European copyright title.¹³²¹ The second is to provide sufficient guidance on the objectives of the *acquis* and the relevant considerations while leaving enough room for the MS to develop national laws capable of adapting accordingly.

Last but not least, reconciling the approaches would contribute to restoring legal certainty. Removing the distinction between material and immaterial dissemination, which is largely arbitral at this point, would provide right holders with more a intuitive understanding of the scope of control envisaged under the

¹³¹⁹ Consider, for instance, the *FAPL* case, which was differentiated from the earlier *Coditel I* case because in the latter a rebroadcast took place without authorisation and appropriate remuneration being paid to the right holder. CJEU, *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08)* and *Karen Murphy v Media Protection Services Ltd (C-429/08)* (2011), Judgment of 4 October 2011, para. 119.

¹³²⁰ See section 2.3.

¹³²¹ See Ricolfi (2016), Strowel (2014), van Eechoud et al. (2009), pp. 316–325. Recently, on creeping unification of the EU copyright and the time for unification, see Hugenholtz (2019).

copyright framework. A better understanding of the scope of protection than the misleading all-or-nothing rule suggested under secondary EU law could also mean a more thoughtful exercise of the exclusive rights. This, in turn, would advance the argument for exempting certain acts of secondary dissemination from exclusive control following the exercise of the right by the right holder who is fully aware of the eventual boundaries of protection.

6.2.2. Shortcomings of implementing the framework under the current system of secondary EU law in the field of copyright

The sections above have outlined the normative framework that could be used for assessing the justifiability of submitting secondary dissemination to the exclusive control of the right holder under the EU copyright *acquis*. Given that the elements of the framework rely, inter alia, on the developments under CJEU jurisprudence, the question that arises is to what extent the EU copyright framework already accommodates the assessment pursuant to the criteria. The present part aims to highlight the shortcomings of the current system of secondary law for employing the framework in concrete cases.

Copyright rules do not operate in a vacuum but within a system of other fields of law, such as consumer protection, contract law, unfair commercial practices, competition law, etc. However, it is often the objectives of copyright protection that take precedence over all other considerations. A discourse on the limits of control accorded by the exclusive right under copyright would perhaps be of less importance if there were other effective mechanisms to ensure that control does not stretch beyond what is necessary.¹³²²

Without a clear rationale behind the extent of control accorded by copyright, balancing copyright objectives with those of other fields of law is a tall order. The scope of the undertaken analysis does not allow a conclusion to be drawn on how reconciling the approaches to material and immaterial dissemination could or ought to best be implemented in practice. However, this part will highlight the two most significant deficiencies of the current regulatory framework under the EU copyright *acquis*, which complicate accommodating a flexible approach to determining admissible control over dissemination beyond first authorisation. The first aspect is the broad scope of the right of communication to the public in the light of legal certainty. The second aspect is the potential role of the exhaustion principle in reconciling the approaches to material and immaterial dissemination in the context of distribution of digital copies, especially in the light of the upcoming ruling in the *Tom Kabinet* case.

¹³²² Hilty (2018), p. 880.

6.2.2.1. Borderless right of communication to the public and legal certainty

As evident from the analysis in this thesis and, in particular, Chapter 5, the right of communication to the public under the EU *acquis* has a broad scope and covers a fair share of the ways to disseminate a work today. The right covers any secondary communication of a live performance extending its reach beyond the physically present public, such as through broadcasting. The right also encompasses any primary or secondary act of communicating a work, regardless the fact whether any audience actually enjoys a work or whether any new audience is reached.¹³²³

A broadly formulated right is not detrimental to the copyright framework *per se*. The broad language of the right might better capture the emerging ways of exploiting a work than the already recognised technology-specific rights. This aspect has been explored, for instance, on the example of a broad right of making available under Scandinavian copyright.¹³²⁴ However, such broad right is somewhat at odds with the traditional structure of copyright as a collection of rights with distinctive scope, boundaries, and exceptions. A broad right of communication to the public, encompassing all the different types of uses, also requires in-built flexibility to deal with cases where restraints on the accorded control are necessary.

The right of communication to the public *de facto* provides a general right to control access to a work.¹³²⁵ As control of access to a work is generally not a right protected by copyright, complications arise.¹³²⁶ Whereas the technological development raises the need for a flexible framework, the exhaustive list of permitted limitations under Article 5 of the InfoSoc Directive runs contrary to that objective.¹³²⁷ Given the overall focus of this thesis on the distinction between immaterial and material dissemination, it is Article 3(3) of the InfoSoc Directive which deserves special attention as it seemingly precludes a more general delineation of the boundaries of the communication to the public right.

Combining any known and unanticipated future ways of exploitation under a single right also calls for a flexible approach to defining its boundaries, which extends beyond the specific cases known at present. The lack of such mechanism under the EU *acquis* might have prompted the businesses and public institutions alike to act in a particular manner. Namely, it encouraged their activity to be organised in ways which are not optimal from the perspective of technological

¹³²³ On the broad scope, see section 5.2.2.

¹³²⁴ Consider the right of making a work available as an umbrella right under the Scandinavian copyright law, section 2.3.2.1.

¹³²⁵ Westkamp (2006), p. 268.

¹³²⁶ On access to a work being outside the scope of copyright regulation, see Guibault and Helberger (2005), p. 19.

¹³²⁷ van Eechoud et al. (2009), pp. 102–104.

possibilities or the public interest but which support fitting their activity into a necessary box for the particular right and the associated exception to apply.

It is worth recalling one such prominent example. In the *VOB* case, the issue at stake was whether lending of e-books fell under the regulatory framework of the lending right and, further, under the library exception to the right.¹³²⁸ The question concerned a process organised in a way closely resembling tangible lending in order to fall under the exception to the lending right. One electronic copy was accessible to one user at any particular time and only for a limited amount of time. The CJEU ruled that such e-lending would fall under the exception and, hence, not be subject to authorisation but to compensation, pursuant to that exception.

What if lending of e-books could be organised in a way that a few users could access an item at the very same time and the right holder would be compensated accordingly? Whereas it does not present a challenge for technology, it would result in an uncertain situation under copyright. Could such lending still come under the scope of the lending right and the exception to it, or would it automatically fall under the right of communication to the public? Whereas the ruling in *VOB* is helpful for libraries if their system is built reflecting the legacy of tangible lending, it fails to provide any guidance on how such services could be developed and offered in the future.

A comparable situation was also at stake in *UsedSoft*, where the circumstances of a work's dissemination without tangible support were similar to the ones usually falling under the right of distribution. The ruling, although a landmark one, proved to be of limited impact, both when it comes to the application to the different subject matters of copyright and to slightly different circumstances of online dissemination. A similar outcome is likely to take place in the *Tom Kabinet* case as the circumstances are comparable to the ones in *UsedSoft*. However, another layer of uncertainty, which is unlikely to be resolved, is added to the equation. It is the DRM protection of e-books, which is not an issue in the *Tom Kabinet* case but is protected under the copyright *acquis* and is capable of creating obstacles to practical implementation of the ruling if it were to extend the principle of exhaustion to all the subject matters.¹³²⁹

Submitting new uses to the rules designed to balance the objectives of protection in particular analogue circumstances might not be the perfect fit for online dissemination. Whilst the CJEU should be endorsed for devoting attention to the justifications behind extending the scope of the limitation in the *VOB* case, the Court only briefly mentioned them in the *UsedSoft* case, applying the exhaustion principle to the digital distribution of computer programmes.¹³³⁰ On the other hand, if the Court were to refuse to treat these cases on the basis of traditionally

¹³²⁸ See section 3.2.4.3.

¹³²⁹ On the different roles TPMs play, see Rognstad and Poort (2018), pp. 146–147. Under their model right of reasonable exploitation, TPMs are not treated as a separate layer of protection but within the exclusive right.

¹³³⁰ Section 3.2.4.3.

copy-related rights, any comparable boundaries on exclusive control may not be recognised at the EU level until a new case makes it to the CJEU on the basis of a different right, in particular the right of communication to the public. The broad scope of the right of communication to the public and its interpretation, combined with Article 3(3) of the InfoSoc Directive, give an impression that the control does not have any visible boundaries. This, in turn, might discourage national courts from submitting questions for interpreting the appropriate scope of control accorded to the right holder.

However, as has been illustrated through the development of the exclusive rights, this assumption is no longer unchallenged in the light of CJEU jurisprudence. The fact that the CJEU assumed the role of the legislator has, understandably, been criticised.¹³³¹ At the same time, the developments under jurisprudence also offered more flexibility for dealing with the divergent objectives of copyright protection. Legal certainty is of tremendous importance when the need to clear the rights, especially in the online setting, is constantly rising.¹³³² It is vital to services relying on the copyright-protected content and to users as both may be reluctant to engage in activities that are not so clearly legal.¹³³³

In the light of the analysis in this thesis, it shall be concluded that the assumption of no admissible boundary to the scope of control under the right of communication to the public based on its inherently immaterial nature ought to be abolished in the light of the benefits that reconciling the approaches to material and immaterial dissemination rights offers. Whereas abolishing the distinction would not itself ensure legal certainty, it would be a step towards a broader discussion on the rationales behind the extent of the exclusive rights. The outlined primary and ancillary criteria could, in turn, provide guidance on the relevant considerations in the light of the practical situations the CJEU had to deal with and the constantly evolving circumstances of a work's exploitation.

The ability of the right holder to exercise the exclusive rights granted under copyright in their best interests is one of the major considerations under the CJEU jurisprudence. The exercise of the right, in turn, in certain cases can justify limiting further control over communication on the assumption that an opportunity to obtain appropriate remuneration was provided. However, at present, secondary EU law appears to imply borderless control over dissemination under the right of communication to the public, whereas CJEU jurisprudence does not fully support it.

In order to avoid a vicious circle of legal uncertainty, where extending exclusive control is being justified on the basis of right holders not contemplating the secondary use of communication, it is desirable to at least acknowledge the possibility to limit the reach of the right of communication to the public. The under-

¹³³¹ Determining the scope of protection at the judiciary level, even if the regulation is confusing, is liable to harm legal certainty, see Batchelor and Montani (2015), p. 600.

¹³³² Jenner (2011), p. 58.

¹³³³ van Gompel (2011), p. 7. Further on the importance of the legal certainty to internet platforms, see Belleflamme (2016), p. 10.

standing of at least the lower threshold of the accorded exclusive control should allow the right holder to exercise the right in their best interest. In these circumstances, the differentiation between the primary acts always falling under the scope of the exclusive right and the secondary acts not necessarily subject to authorisation would be advantageous. Similarly, clear rationales behind extending or limiting control over secondary communication would further enhance the understanding of protection which can be relied on.

6.2.2.2. Potential of the exhaustion principle under Article 4(2) of the InfoSoc Directive

The reference in *Tom Kabinet* calls for considering the extension of the exhaustion principle in its narrow sense to digital copies of all the subject matters protected by copyright.¹³³⁴ Whereas much of the debate on the matter focuses on the wording of exhaustion under Article 4(2) as being able to accommodate digital uses, it is essential that the question is approached from the two ways of looking at the principle. Throughout this thesis, the exhaustion principle was addressed in two main senses. First, exhaustion has been considered in its broad understanding as limiting the reach of the exclusive right to authorisation of initial dissemination. Second, the principle has also been addressed in its narrow meaning as a label for a specific solution to the need of delimiting the right of distribution, as harmonised under Article 4(2) of the InfoSoc Directive.

Ultimately, the exhaustion principle in its narrow meaning under Article 4(2) is not the only conceivable way to implement the rationale of exhaustion in its broader understanding but only a particular instrument to deal with the balancing it entails.¹³³⁵ Towards the background of the undertaken analysis, the principle as enshrined under the InfoSoc Directive could be seen as too rigid for today's realities, as it entails the all-or-nothing approach to such a delicate task of balancing interests.¹³³⁶ This is not to suggest that what the principle achieves in the realm of physical distribution should not be also endorsed in the context of other rights or circumstances. Instead, the undesired effects of copyright, which were tackled to some extent by the exhaustion principle in its narrow sense, might need to be considered in a broader context.¹³³⁷

In the age of expanding rights and the overall reach of copyright protection, it is no wonder that the exhaustion principle is under attack.¹³³⁸ Whereas the

¹³³⁴ Request for a preliminary ruling in *Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet and others* (2018) Case C-263/18.

¹³³⁵ Batchelor and Montani (2015), p. 600. See also section 4.3.

¹³³⁶ Framed as stemming from the need to eliminate the interference of exclusive rights with the internal market, the principle under Article 4(2) perhaps overachieves in term of envisaged harmonisation. See analysis under section 4.2.

¹³³⁷ Hilty (2018), p. 880.

¹³³⁸ Hugenholtz (1997), p. 7.

principle in its narrow sense could be seen as a phase-out model in the digital world, nothing precludes the discussion on the need to formulate a comparable technology-neutral rule that would better reflect the rationale of exhaustion in its broad sense.¹³³⁹ The application of Article 4(2) outside the realm of physical copies is opposed mainly on the grounds that the principle is only associated with the material dissemination and distribution of tangible copies. As it has also been explored, such claims are rather unfounded considering both the development of technology and the development of dissemination-related rights under the EU *acquis*.¹³⁴⁰ Not only do some ways of online dissemination closely resemble the tangible distribution in every major aspect, but the CJEU also found it necessary to interpret the provisions of the EU secondary law in a flexible manner. Specific technical circumstances of the work's dissemination should play an increasingly minor role.¹³⁴¹ Instead, the right holder's authorisation of dissemination shall be taken as a point of departure for establishing the reasonable limits to the exclusive rights once a work is exploited.

On the other hand, the exhaustion principle under Article 4(2) of the InfoSoc is a rather specific solution, to the point of being of limited use. Especially so in the context of online dissemination which is characterised by the extensive possibilities to control access and consumption of a work. The application of the exhaustion principle online is vulnerable to the changes in business models and can actually have the opposite effect.¹³⁴² Hence, there might be a need to find other ways to achieve the desired result of not allocating the right holder more control than what is reasonable.¹³⁴³

Regardless of the outcome in the *Tom Kabinet* case, nothing precludes a broader discussion on the need to reconsider the approaches to dissemination-related rights. Torremans, for example, asks whether it is time to reconsider the outcome of the *Coditel I* case and the justifications behind exempting communication rights from exhaustion with reference to the *FAPL* judgment.¹³⁴⁴ Rognstad, on the other hand, submits that the situation at stake in *UsedSoft* should have been addressed from the perspective of the Treaties rather than forcing the analogue right of distribution.¹³⁴⁵ Addressing the need to delineate the rights

¹³³⁹ See Wiebe on exhaustion as a phase-out model, Wiebe (2010), p. 327. On the other hand, see Hilty holding that the fact that exhaustion is worded as related to some physical objects does not mean that limitations intended by it may not be equally appropriate in the absence of a physical object. Hilty (2018), p. 865.

¹³⁴⁰ See section 4.3.3.

¹³⁴¹ The fact that copies are not transferred but created on the recipient end is immaterial to the assessment of the extent of exclusive control that should be accorded. On the contrary, see Lindberg and Westman (2001), p. 258; Olsson (2015), p. 115.

¹³⁴² Riis et al. (2013), p. 479.

¹³⁴³ *Ibid.*, p. 479.

¹³⁴⁴ Torremans (2010), pp. 302–303.

¹³⁴⁵ Rognstad (2014), p. 15.

should not necessarily entail the use of the exhaustion metaphor.¹³⁴⁶ It is also conceivable to create a balancing mechanism through applying the economic arguments similar to that in the *UsedSoft* case in the context of other rights, as the CJEU has done examining the cases on the communication to the public right.¹³⁴⁷ Essentially, the discussion is not about the type of arrangement but about explaining why certain uses do not constitute an infringement of copyright.¹³⁴⁸

Finally, the function of the exhaustion in its broad sense could also be divided into two main categories. First and foremost, it draws the boundaries of exclusive control, ensuring that the rights do not unduly interfere with secondary use relying on initial authorised communication.¹³⁴⁹ The second function is to delimit control of the right holder over circumstances of a work's consumption by individual users. Whereas the exhaustion principle in its narrow sense under Article 4(2) served both functions, it is unlikely that they can be easily addressed under a single instrument in the context of online dissemination.¹³⁵⁰

Ultimately, the question of the optimal way of reconciling the approaches to material and immaterial dissemination requires further research. However, what can be submitted is that the all-or-nothing approach of exhaustion in its narrow sense might be too rigid in the present development and especially in the context of online dissemination. Furthermore, the distinction between the necessity to provide boundaries of control in general and the need to enable users to dispose of their copies in particular should be explored further. It does not seem viable to address both aspects with a single rule by extending the exhaustion principle under Article 4(2) of the InfoSoc. Whereas the first aspect could potentially be tackled under the copyright framework, the second might need an intervention of other fields of law such as consumer protection.¹³⁵¹

The above considerations bring us to a final point. Either outcome in the *Tom Kabinet* case could be seen in a positive light as long as the CJEU bases the decision on elaborating the underlying rationales of the *acquis* rather than relying on the dogmatic assumptions. Neither precluding the extension of the principle nor endorsing it would result in a final stance on the matter of delineating the

¹³⁴⁶ Rognstad (2003), p. 464.

¹³⁴⁷ Riis et al. (2013), p. 479.

¹³⁴⁸ Hilty (2018), p. 867.

¹³⁴⁹ Consider exhaustion in its narrow sense as enabling trade in copies but only the original ones. On the limited market effect of exhaustion, see Heide (2004), p. 98.

¹³⁵⁰ Given that a user is often in a weaker position, some scholars submit that, given that the InfoSoc Directive in general favours the right holders at the expense of users, the absence of digital exhaustion strengthens position of the former even more. See Cohen Jehoram (2001), p. 542; Targosz (2010), pp. 337–353.

¹³⁵¹ In particular with a view of the recent adoption of the Digital Content Directive, which provides consumers with a claim for remedies when use of digital content is prevented or limited as a result of restrictions imposed by a third party, including on the basis of IP rights. See Article 10 of the Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services. 22 May 2019. OJ L 136/1.

control accorded by the exclusive rights.¹³⁵² Making the exhaustion “digital” through the extension of the principle to digital copies might not bring the envisioned result, but it would certainly become sort of manifestation of the impact of digitisation on exclusive rights.¹³⁵³

6.2.3. Conclusions on the second overall research question

The second overall question of this thesis is *how could the approaches to material and immaterial dissemination be reconciled to define the scope of exclusive rights beyond authorising every communication of a work?* The question has been answered in the second part of this chapter by outlining a normative framework for reconciling the approaches to material and immaterial dissemination rights. The objective is to offer a list of criteria for assessing the justifiability of extending the right holder’s exclusive control over secondary communication relying on the initially authorised dissemination, pursuant to the developments under the *acquis* analysed in chapters 2 to 5.

This part proceeded with sketching the normative framework on the basis of the observation that the development of the rights of distribution and communication to the public reveals a much more nuanced relationship between the rights than the traditional distinction between the material and immaterial dissemination rights under secondary EU law would suggest. Whereas secondary law appears to subject any secondary act of communication to exclusive control and exempt any secondary distribution from control, CJEU jurisprudence is less than coherent on the matter. As it has been concluded in the answer to the first overall research question, given the changing circumstances of a work’s exploitation and the importance of legal certainty on the extent of control conferred by the exclusive rights, reconciling the approaches to material and immaterial dissemination rights would be a logical and welcomed development.

The normative framework described here shares the underlying premises with the distinction between material and immaterial dissemination rights. Namely, it proceeds from differentiating secondary acts of dissemination from primary acts. Whereas the latter always fall under the exclusive right and require the authorisation of the right holder, exempting the former from the exclusive control may be justified if the right holder has exercised the exclusive right in their best interest. The distinction under secondary EU law exempts secondary distribution from authorisation on the sole ground of authorisation of initial dissemination in some cases and blankly denies any limit in other cases. The outlined framework offers a more nuanced approach.

The elements of the framework are intended to capture the circumstances of secondary communication and its potential interference with a work’s exploi-

¹³⁵² See also Oprysk (2019a).

¹³⁵³ Targosz (2010), p. 351. Also, for the exhaustion principle not leading to the equitable result in an online environment, Oprysk et al. (2017), pp. 132–134.

tation, unlike the all-or-nothing approach to the scope of the exclusive rights pursuant to the exhaustion principle. Acts of secondary communication, the justifiability of subjecting which to the exclusive control of the right holder ought to be examined under the framework, encompass acts which rely or depend on the initial dissemination authorised by the right holder.

The framework consists of six elements derived on the basis of the analysis of the developments under the *acquis* and grouped into primary and ancillary criteria. Primary elements are essential to secure the right holder's control over each exploitation of a work. They rely on the assumption that through the first authorisation of dissemination the right holder has been given an opportunity to obtain appropriate remuneration. Ancillary considerations, on the other hand, appear to go beyond the incentive rationale of protection. They should be taken into account provided that the objectives of the exclusive rights under the *acquis* are clarified.

Three primary elements for the assessment of secondary dissemination have been identified. These criteria are of primary importance to the assessment of the justifiability of subjecting acts of secondary dissemination to the exclusive control of the right holder as they ought to ensure the right holder's control over every initial communication. These three elements are exercise of the right through authorising initial communication of a work, relevance of obtained remuneration thereof, and interference of secondary act with a work's exploitation.

Exercise of the right through the right holder authorising initial dissemination is the key requirement of the framework and the basis for examining all the other criteria. Whereas exercise of the right has traditionally been employed to exempt any secondary distribution from the right holder's authorisation pursuant to the exhaustion principle and the material nature of such dissemination, the scope of the criterion is broader under the framework. Besides establishing the fact of authorisation of a work's exploitation, the assessment of the element ought to take into account the envisaged circumstances of initial dissemination. They, in turn, ought to also be examined in the light of possible interference of secondary communication with work's exploitation under the third element of the framework.

The second of the primary elements is the relevance of obtained remuneration through the initial authorisation of dissemination. Whereas not every exploitation entails direct remuneration that can be easily examined, the fact of obtaining remuneration ought to play a role in the assessment relying on the incentive rationale of copyright and the economic underpinning of the rights. In the light of the envisioned objective of the *acquis* to provide an opportunity to obtain appropriate remuneration, it has been discussed under what circumstances it could be assumed that the chance to obtain remuneration has been provided through control over each primary communication.

The third primary criterion is the broadest and ought to examine the possible interference of the secondary communication with exploitation of a work. It shifts the focus from considering the circumstances of primary communication and the interests of the right holder to examining the characteristics of the act of secondary communication and the extent to which it interferes with a work's exploitation.

The criterion allows the practical implications of subjecting or exempting secondary communication from the exclusive control to be appreciated. However, it is obvious that not every insignificant interference calls for reserving the act for the right holder. The fine line of permissible interference ought to be explored in conjunction with clarifying the rationales of the EU *acquis*, similarly to the ancillary criteria.

The ancillary group of criteria also consists of three elements, which ought to complement the primary ones. Considering that these criteria do not stem from the assumption that the function of the right can be fulfilled though its first exercise, employing them for the assessment of justifiability of submitting secondary dissemination to the exclusive control of the right holder shall be accompanied by the clarified objectives of the exclusive rights under the *acquis*. These three ancillary considerations are reaching a potentially new public within the originally authorised area; competition, in particular on the primary market; foregone profit; and the revenue generated by a third party.

The first ancillary element is a potentially new public within the originally authorised area, which has been derived from the CJEU's tendency to give the new public a broad meaning while interpreting the intended public narrowly. Whereas secondary communication can substantially interfere with exploitation of a work even though it, in essence, targets the same public, it is argued that the public shall not be employed as a separate argument without considering other circumstances of exploitation as well as the objective behind exercising the right in respect of secondary communication. It is arguable whether communication directed at the part of the intended public which, de facto, does not deprive the right holder of paying customers shall necessarily require authorisation. Hence, the relevance of reaching some public within the authorised area shall be considered in the light of the clarified objectives of the exclusive rights.

The second ancillary element is the relevance of competition, especially on the primary market. It has been argued that, despite the CJEU denying it as a relevant criterion, competition could provide a ground for further fine-tuning the assessment of the justifiability of submitting secondary dissemination to the exclusive control of the right holder. The tendency seems to be to eliminate any competition through submitting secondary communication to the exclusive right. Whereas submitting any act that is in (in)direct competition with the right holder to the exclusive control of the latter would be clearly excessive, competition could be taken into account to a certain degree, provided that the assessment is based on the clarified objectives of the exclusive rights.

The third and the last ancillary element is the relation between the foregone profit of the right holder and the revenue generated by a third party. Whereas neither the foregone profit nor the revenue generated by a third party is of relevance for the distinction between material and immaterial dissemination rights, both considerations are prominent under the CJEU jurisprudence. This criterion is closely connected to competition and presents one extra element for examining the possible interference with a work's exploitation. However, it has been warned that the foregone profit shall not be assumed where there is any

profit generated by a third party, it would also be excessive to submit any additional service not unduly interfering with the right holder's interests to the exclusive right on the sole basis that it generates some value. Therefore, equally to other ancillary criteria, this element should be examined in conjunction with clarifying the objectives of the exclusive rights under the *acquis*.

Whereas outlining a normative framework for reconciling the approaches to material and immaterial dissemination rights under the *acquis* did not address the question of how the framework ought to be applied in practice, the two main shortcomings of the present system of secondary EU law in accommodating the outlined criteria have been emphasised. The first shortcoming is the broad scope of the right of communication to the public absent mechanisms for restricting its scope where necessary or enough leeway for the MS to do so. The broad right in conjunction with the ambiguous statement of Article 3(3) of the InfoSoc Directive only upsets legal certainty suggesting the scope of the right that is not followed in practice under the jurisprudence. The second shortcoming of the current framework is the exhaustion principle harmonised in its narrow meaning under Article 4(2) of the InfoSoc Directive. Whereas it appears to be an outdated provision, as it also is rather inflexible for accounting for new uses of already distributed copies, it needlessly suggests that it is the only admissible case of limiting the reach of the exclusive rights over secondary communication.

Accordingly, the second overall question has been answered by outlining the criteria for examining justifiability of subjecting secondary communication to the exclusive control of the right holder. The criteria are based on the indications pointing towards the conclusion that the function of the exclusive right can be fulfilled through authorising every exploitation, which opens the floor for taking into account other involved interests. For this reason, it is crucial that such assessment considers not only the mere authorisation of initial communication but also the possible interference of secondary communication with a work's exploitation. Overall, the developed criteria aim to offer an alternative approach to examining the appropriate scope of exclusive control conferred by the rights through reconciling the material and immaterial dissemination rights in the light of the developments under the EU *acquis*.

CONCLUSIONS

Summary

Copyright is so intricately linked to the development of technology that it could not possibly withstand the enormous advances taking place in the last three decades and the numerous exploitation opportunities facilitated by the emergence of the Internet. Early on after the rise of online environment, the right holder's control over digital dissemination was safeguarded at the international, national, and EU levels.

From today's perspective, introducing the broad right of communication to the public encompassing the acts of the on-demand making available of a work marks one of the most significant developments in copyright history. Sending digital copies of music over the Internet or streaming movies was not yet a reality in the early 1990s. Still, relatively little attention was paid to the probable future need to restrict the reach of the broad right. Essentially, the right of communication to the public encompasses a wide variety of uses previously subject to different exclusive rights of distinct scope and the limitations thereof.

As the analysis of the development of the main dissemination-related rights under the EU copyright *acquis* has shown, the combination of the broad right of communication to the public and the exhaustive list of exceptions under secondary EU law led to little flexibility for appreciating the circumstances of dissemination at hand. In the light of the increasingly all-encompassing harmonisation under the EU *acquis*, the development has impaired the freedom of the MS to devise their own solutions and serve copyright rationales besides incentivising creative labour.

This thesis focused on the significance of the distinction between material and immaterial dissemination rights drawn at the outset of the online environment in justifying placing no general limits on the scope of the right of communication to the public under the EU *acquis*. The thesis set out to examine how the assumption on the basis of the distinction influenced the harmonisation of the main dissemination-related rights under secondary EU law and whether the developments under the *acquis* still support the distinction.

Two overall research questions were asked. The first question is *how does the development of the rights of distribution and communication to the public under the EU acquis reflect the distinction between material and immaterial dissemination rights?* The second overall research question is *how could the approaches to material and immaterial dissemination be reconciled to define the scope of exclusive rights beyond authorising every communication of a work?* To answer these questions, the development of the exclusive rights under the *acquis* was examined from the perspective of the distinction. The analysis relied on the incentive rationale of copyright and the economic underpinning of the exclusive rights which underly the distinction between material and immaterial dissemination rights.

Chapter 2 has provided the background to the analysis of the rights under the EU copyright *acquis* by placing the distinction between material and immaterial dissemination into the wider context of copyright rationales and their significance for determining the scope of exclusive control conferred by the rights. Furthermore, the chapter explored how technological development influences the circumstances of work's exploitation and the appropriate scope of protection, resulting in a danger of drawing inadequate conclusions on the assumptions made in the past.

As the overall focus of this thesis has been the EU *acquis*, Chapter 2 also addressed the impact of the EU copyright harmonisation on the national laws of the MS. The significance of enshrining the distinction between material and immaterial dissemination through harmonising the exclusive rights under the *acquis* has been illustrated using the Scandinavian countries as an example. Not only does Scandinavian copyright place great emphasis on serving public interest in copyright law-making, which is largely unacknowledged under the EU copyright *acquis*, the broadly construed right of making available covering any protected act of dissemination falls short of its in-built flexibility due to harmonisation under the *acquis*.

Chapter 2 equipped the research undertaken in chapters 3 to 6 with the understanding of how the distinction between material and immaterial dissemination relates to the copyright rationales and, in particular, to the economic underpinning of the rights, and how the analysis is influenced by the assumed rationales of protection. Two main assumptions for the analysis of the exclusive rights were defined. First, given the economic underpinning of the exclusive rights, it was presumed that control over every primary act of dissemination potentially offers sufficient incentives to create and exploit a work, which warrants placing limits on exclusive control over secondary dissemination. The second assumption was that the distinction between the primary and secondary acts of dissemination could be a benchmark for evaluating the appropriate scope of control accorded by copyright.

For the purpose of the analysis, secondary acts comprised any act that relies or is dependent on the initial dissemination authorised by the right holder. Whereas every initial (primary) act of communication presupposes the exercise of control over particular circumstances of dissemination such as place, duration, availability, acts of secondary dissemination generally (but not always) would not entail the same degree of control over the circumstances. Such examples of secondary acts would be linking to a work that has been uploaded on the Internet with the authorisation of the right holder, retransmission of (a performance of) a work, and passing on a (digital) copy of a work obtained on an individual basis against the payment of a one-time fee.

It has been emphasised that the distinction between primary and secondary communication (dissemination) is not a straightforward task. Furthermore, the distinction is liable to become even more blurred when technology enables secondary communication that, in fact, amounts to distinct exploitation. Hence, reconsidering the rules developed on the basis of the distinction between material and immaterial dissemination is important because they rely solely on the fact of

authorised primary dissemination (the case of the exhaustion principle), without leaving room for appreciating the circumstances and the practical impact of such secondary act on a work's exploitation.

Taking as a basis the economic approach to copyright and the outlined assumptions, in chapters 3 to 5 the development of the two main dissemination-related rights under the EU copyright framework has been analysed against the background of the distinction between material and immaterial dissemination. Chapter 3 devoted attention to the development of the right of distribution, and Chapter 4 concentrated on the development of the exhaustion principle as an instrument to limit control over secondary distribution. Chapter 5 focused on the development of the right of communication to the public. Whereas the focus of the analysis of the rights has been on the InfoSoc Directive and CJEU jurisprudence, other instruments of secondary EU law were addressed where necessary for providing a background, as were the developments under international and national laws.

Chapter 3 examined the development of the right of distribution under the *acquis* as providing control over material dissemination. The main matters the chapter addressed were the circumstances influencing the need and the form of harmonising the right under the *acquis*, the driving forces behind confining its scope to material dissemination, and the discussion of whether and how the subsequent development of the right reflects the premises of material dissemination. The analysis under this chapter has revealed that the need to harmonise the right under international law and the *acquis* was heavily influenced by the needs of international trade, especially given the disparities in the scope of control under national laws pursuant to the exhaustion principle. Subsequent developments of technology, in turn, have challenged the clear-cut rule under Article 4(2) of the InfoSoc Directive exempting secondary distribution from the scope of the right of distribution.

As the analysis has revealed, the assessment of the acts potentially falling under the right of distribution no longer relies solely on the notion of primary or secondary distribution but on the overall assessment of the circumstances of a work's exploitation. Furthermore, this development concerns not only the dissemination of digital copies, which the right of distribution was not designed to cover, but also the traditional distribution of tangible copies. The findings of Chapter 3 suggest that the changing circumstances of a work's exploitation call for a more nuanced analysis than the fact of the right holder's authorisation of initial distribution. This, in turn, enables reconciliation of the approaches to material and immaterial dissemination rights by developing a common normative framework for assessing the justifiability of subjecting secondary dissemination to the exclusive right holder's control.

Chapter 4 examined the development of the exhaustion principle as an instrument of limiting control over subsequent distribution under the *acquis*. The exhaustion principle was analysed through the prism of it constituting an inherent boundary to the right of distribution fulfilling the function of the material dissemination approach. The chapter addressed the circumstances influencing the

need and the form of harmonising the principle under the *acquis* and the role it played in limiting the scope of the right of distribution pursuant to material dissemination, and discussed whether the principle continues to perform its function given the development of the right of distribution. The analysis revealed the objectives of harmonising the principle under secondary EU law that reach well beyond establishing the mere boundary of the right of distribution.

Chapter 4 concluded that enshrining the principle under EU secondary law in its narrow sense of limiting the exclusive control over distributed tangible copies has implicated the development of a more flexible and systematic approach to the scope of admissible control over secondary dissemination. Whereas, as explored in Chapter 3, the circumstances of exercising the right of distribution and determining its appropriate scope changed, these developments could not be easily accommodated under the exhaustion principle. This has also resulted in the uncertainty as to the exact meaning of Article 4(2) of the InfoSoc Directive. Given the increasingly all-encompassing harmonisation under the *acquis* and the full harmonisation character of the InfoSoc Directive, it is important to refrain from interpreting the provision as the only possible general limit on the reach of exclusive rights. Confining the exhaustion principle in its narrow meaning to tangible copies shall not prejudice considering the broader notion of exhaustion outside the realm of tangible mediums.

Chapter 5 examined how the right of communication to the public under the EU *acquis* developed from being of an inherently immaterial nature envisaged under secondary EU law to accommodating certain premises of the material dissemination approach. Unlike the right of distribution with the more or less identical scope under national, international, and EU law, scope of the right of communication to the public differs between the instruments of international harmonisation, national laws, and the EU *acquis*. For this reason, a general background to the wider concept of communication rights was provided, whereas the focus of the analysis has been on the right of communication to the public as harmonised under the InfoSoc Directive.

The main matters addressed in Chapter 5 were the circumstances influencing the need and the form of harmonising the right under the *acquis*, the driving forces behind confining its scope to immaterial dissemination, and the discussion of whether and how the subsequent development continues to reflect the premises of immaterial dissemination. As the analysis of the development of the right of communication to the public revealed, the right's harmonisation under the *acquis* was driven by then ongoing developments under international law, namely, the adoption of the WIPO CT. Whereas the introduction of a broad right of communication potentially made it future-proof by incorporating nearly any conceivable way of communicating a work to the public, the subsequent developments under the *acquis* indicate that another aspect of the exclusive right, namely, the limits of its scope, received disproportionately little attention.

The analysis in Chapter 5 revealed a shift from denying any general limit to the right holder's control over secondary communication pursuant to Article 3(3) of the InfoSoc Directive to adopting a more nuanced approach to examining

secondary communication under the CJEU jurisprudence. It was concluded that the rule developed under Article 3(3) was ambiguous from the outset and cannot adequately explain why certain secondary communication ought to be subjected to exclusive control whereas other secondary communication shall not. Furthermore, although no delineation between primary and secondary communication was envisaged under the Directives, the line appears to intuitively yet not explicitly be drawn under CJEU jurisprudence.

The justifications behind extending or restricting the reach of the exclusive right of communication to the public to secondary communication are essentially of economic nature and resemble considerations typically associated with material dissemination. Although CJEU jurisprudence demonstrates great flexibility in assessing the scope of the right in the light of Article 3(3) of the InfoSoc Directive, the reasoning lacks the clear underlying objectives and the guidance beyond a set of loosely formulated criteria that weigh differently for diverse types of communication. Given the overall development of the right pointing towards differentiating between primary and secondary communication, the chapter concluded that reconciling the approaches to material and immaterial dissemination rights would be an appropriate development under the *acquis*.

On the basis of the analysis in chapters 2 to 5 of this thesis, Chapter 6 summarised the findings and offered a normative framework for reconciling the approaches to material and immaterial dissemination rights under the *acquis* pursuant to the developments. First, it has been explored what are the indications of the convergence of the approaches to material and immaterial dissemination rights under the *acquis*. Second, the common criteria that could systematise the extent of control over secondary dissemination were defined and contrasted with the incentive rationale of copyright and the objectives of protection under the *acquis*. Third, the main shortcomings of implementing the outlined normative framework under the current system of EU copyright were addressed.

Pursuant to the analysis addressing the first overall research question, Chapter 6 concluded that the development of the rights under the *acquis* reveals a much more nuanced picture of the scope of permissible exclusive control in relation to secondary dissemination than suggested by secondary EU law. Such development was attributed to the changing circumstances of a work's exploitation and the need for a flexible assessment of the situation at stake rather than relying on all-or-nothing rules. Four main observations pointing towards the convergence of the approaches under the CJEU jurisprudence and laying the ground for developing a common normative framework for the assessment of secondary dissemination were emphasised.

These observations were the increasing emphasis on the exercise of the exclusive right as the essential function of the right, the indication that the function of the right can be fulfilled through authorising each act of initial (primary) dissemination, the (in)explicit delineation between the primary and secondary acts of dissemination, and the flexibility exercised by the CJEU despite the envisaged application of the exhaustion principle or the absence of limits on the control over communication pursuant to Article 3(3) of the InfoSoc Directive. These obser-

vations also led to the conclusion that commencing the assessment from the distinction enshrined under secondary EU law in these circumstances results in an inconsistent approach to the scope of exclusive rights, which is to the detriment to legal certainty. Against this background, reconciling the approaches would be a timely development aiding the task of defining the appropriate scope of control over secondary dissemination accorded by exclusive rights.

Proposed normative framework

Chapter 6 addressed the second overall research question, namely a way to reconcile the approaches to material and immaterial dissemination rights pursuant to the developments under the *acquis*, by outlining a normative framework for assessing the justifiability of subjecting secondary dissemination to the right holder's exclusive control. The normative framework builds upon the analysis of the development of the rights and has as an objective to provide an instrument for assessing whether extending the reach of the right is justified in a particular case of secondary dissemination. It is meant as an alternative to the all-or-nothing approach envisaged by the exhaustion principle enshrined under the Directives, which has been challenged, not least under CJEU jurisprudence.

The framework relies on the assumption inherent to the distinction between material and immaterial dissemination rights, which is the notion that the function of the exclusive right can be fulfilled by the right holder authorising every primary communication of a work. Hence, submitting or exempting secondary communication from the reach of the exclusive right must be justified. Contrasting the criteria of the outlined framework with the predominantly incentive-based rationale of copyright under the *acquis* led to dividing them into primary and ancillary elements. The primary criteria of the framework relate directly to the economic underpinning of the exclusive rights and the possibility of limiting their scope once their function has been fulfilled through the first authorisation of dissemination. Ancillary criteria reach beyond securing the right holder's first-mover advantage on a market and shall be carefully examined towards the clarified objectives of the exclusive rights under the *acquis*.

Primary criteria under the normative framework consist of three elements that are of primary importance to the assessment of the justifiability of subjecting acts of secondary dissemination to the exclusive control of the right holder as they ought to ensure the right holder's control over every primary communication of a work. Exercise of the right through authorising initial dissemination is the first element and the basis for examining all the other criteria. Besides establishing the fact of authorisation of a work's exploitation, the assessment of the element ought to take a notice of the envisaged circumstances of initial dissemination. It, in turn, shall also be taken into account when examining a possible interference of secondary dissemination with a work's exploitation pursuant to the third primary criteria.

Second primary element is the relevance of remuneration obtained through the initial authorisation of dissemination, supported by the incentive rationale and the economic underpinning of the rights. It should neither be assumed that the absence of direct remuneration obtained through authorising initial communication justifies subjecting any secondary communication to exclusive rights, nor should it be accepted that obtaining remuneration for the initial authorisation justifies exempting any secondary communication from the reach of the exclusive rights.

The last primary element is introduced to accommodate the assessment of the act of secondary communication itself. The third criterion is the interference of secondary communication with a work's exploitation. It is obvious that subjecting any act that remotely interferes with exploitation of a work would shift the balance to serving a right holder's interests, possibly at the expense of the broad public interest. Hence, the fine line of tolerable interference ought to be explored in conjunction with clarifying the rationales of the EU copyright *acquis*.

Ancillary elements also consist of three criteria and could complement the primary ones, provided that the objectives of the exclusive rights under the *acquis* are clarified. The first ancillary element is reaching a potentially new public within the originally authorised area, arising from the CJEU's tendency to give a new public a broad meaning while interpreting the intended public rather narrowly. Examining the relevance of reaching such a "new" public shall take into account the objectives behind exercising the right and the presence of other circumstances pointing towards the interference of secondary communication with exploitation of a work. The second ancillary element is the relevance of the fact that secondary communication might result in competition, especially on a primary market. The criterion could provide a ground for further fine-tuning of the assessment. However, the boundaries of permitted competition should be further explored, as the tendency has been to extend exclusive control to an extent eliminating any competition, which may be excessive.

The third and last ancillary element is the relation between the foregone profit of the right holder and the revenue generated by a third party, which is closely connected to competition as an ancillary criterion. Whereas this element could play a role in assessing the possible interference with a work's exploitation, it has been warned against assuming foregone profit where any revenue is made by a third party. Otherwise, it would advance the idea that any potential profit in (in)direct connection to a work ought to be attributed to the right holder. Equally to other ancillary elements, the relevance of foregone profit and generated value shall be examined in conjunction with clarifying the objectives of the exclusive rights under the *acquis*.

Finally, Chapter 6 also discussed the main shortcomings of employing the criteria defined under the framework under the current system of EU secondary law. It has been concluded that the main obstacle is the broad scope of the right of communication to the public absent the mechanisms for restricting its reach where it might be necessary. Article 3(3) of the InfoSoc Directive upsets legal certainty in the light of CJEU jurisprudence and limits the leeway for the MS to

employ a more flexible and consistent approach to exclusive rights. The second shortcoming is the seemingly outdated exhaustion principle under Article 4(2) of the InfoSoc Directive, which is not flexible enough to account for the new realities of a work's exploitation. Article 4(2) in conjunction with Article 3(3) unwarrentedly suggest that exempting secondary distribution of tangible copies is the only permissible limitation to exclusive control over secondary dissemination under the *acquis*.

Concluding remarks

The analysis in this thesis has led to three main conclusions. First, given the variety of acts falling under the broad right of communication to the public, it is crucial to distinguish between primary and secondary acts of communication. Whereas the primary acts ought to fall under the exclusive right and require an authorisation (unless intentionally exempted pursuant to an exception or a limitation), the scope of control accorded over secondary communication ought to vary depending on the circumstances of the case and the interests involved. In order to take into account interests other than the right holder's, it is important to separate cases where there could be more room for examining the broad public interest, such as where the right holder has been given an opportunity to exercise the exclusive right in their best interest.

The second conclusion is that the approaches to material and immaterial dissemination rights ought to be reconciled under the *acquis*, preferably on the legislative level as well as under CJEU jurisprudence. The distinction drawn at the outset of harmonisation appears to no longer serve any practical aim and obscures reality by suggesting the predetermined stance on the extent of appropriate exclusive control on the basis of once handy distinction. The importance of reconciling the approaches to material and immaterial dissemination rights is further supported by the intricate role of EU harmonisation in the MS's ability to construct a flexible yet predicible framework under national law.

The third conclusion takes the form of a list of proposed primary and ancillary criteria for examining the justifiability of subjecting secondary communication to the exclusive control of the right holder, pursuant to the developments and the conclusions above. Whereas these criteria stem, inter alia, from the observations under CJEU jurisprudence, application of the ancillary criteria should be accompanied by clarification of the objectives of the EU copyright *acquis*. Ancillary criteria might unduly favour the interests of the right holders at the cost of the public interest where the right holder exercised control over primary communication in their best interest.

The findings of this thesis should be of interest to law and policy makers in the field of copyright. In particular, the results of the analysis provide arguments for considering introduction of limits to the reach of the exclusive rights in respect of secondary dissemination and aligning their scope to what is necessary to incentivise creation and exploitation of works. The normative framework outlined

in this thesis lists the circumstances which indicate that the incentive function of the right has been fulfilled. Hence, it could be useful for accommodating the conflicting interests involved in secondary dissemination of a work, such as consumer protection or competition. On the basis of the outlined primary criteria, the incentive function of exclusive rights could be deemed fulfilled, making room for pursuit of other objectives.

As the conclusions in thesis are drawn with a view of reconciling the approaches to different rights through a common set of economically underpinned criteria, they ought to remain equally relevant in the constantly changing circumstances of a work's exploitation. The need for a flexible approach to the exclusive control conferred by the rights, especially in respect of secondary communication, will only increase with new technologies offering more sophisticated control over the circumstances of a work's communication and consumption. Also, the possible negative consequences of the broad exclusive rights will accentuate the need to strike a balance between the need for copyright protection and serving public interest.

Further research is encouraged, in particular with respect to the ancillary elements of the outlined normative framework. These elements call for further analysis, as they lie outside the core incentive rationale of the *acquis*, on which the analysis in this thesis relied. In particular, the consequences of allocating exclusive control over secondary dissemination require an assessment towards the background of competition and consumer protection. Furthermore, the analysis of the appropriate scope of dissemination rights would also benefit from being complemented by studies on the appropriate limits of other rights such as the right of reproduction.

In an attempt to systematise the developments under the *acquis*, this thesis demonstrated that there is little new about the considerations the CJEU operates with besides the very fact that contemplating them is not explicitly envisaged under secondary EU law. Given the vast developments which could hardly have been anticipated at the time of drafting the Directives, it is understandable that the Court strives for flexibility. However, now that the developments are evident, the time is ripe to reconsider the choices made at the outset of harmonisation and restore legal certainty, serving the rationales of protection without unduly favouring any of the involved interests.

SUMMARY IN ESTONIAN

Ühtne lähenemisviis materiaalse ja immateriaalse levitamise õigustele Euroopa Liidu autoriõiguse arengu valguses

Autoriõiguste kaitse peaks teenima avalikku huvi loometöö soodustamise ja teoste levitamise võimaldamise teel. Ainuõiguste kui autoriõiguste kaitse saavutamise vahendi puuduseks on piiratum avalik juurdepääs kaitstud teostele ja konkurentsi moonutamine. Seepärast ei ole ainuõigustega antav kontroll absoluutne, vaid peab piirduma sellega, mis on vajalik selleks, et teenida autoriõiguse eesmärke.

Tehnoloogia areng on seadnud kahtluse alla väljakujunenud lähenemisviisid, mida kasutatakse ainuõiguse kaitseulatuse määratlemiseks. Digitaalse keskkonna kui uue levitamiskanali esile kerkimine on seadnud kahtluse alla Euroopa Liidu teiseses õiguses loetletud materiaalse ja immateriaalse levitamise õiguste eristamise autoriõiguste vallas. Kuigi teine õigus esmapilgul ei võimalda kehtestada üldpiirangut õiguste omaja kontrollile immateriaalse levitamise esmaste või teiseste toimingute üle, viitab Euroopa Liidu Kohtu värske praktika sellele, et erinevate teoste kasutamise eripära nõuab paindlikumat lähenemisviisi.

Väitekirjas uuritakse võtmetähtsusega varaliste õiguste arengut Euroopa Liidu autoriõiguses tehnoloogia arengu taustal ning materiaalse ja immateriaalse levitamise õiguste eristamist Euroopa Liidu teiseses õiguses. Väitekirjas leitakse, et Euroopa Liidu autoriõiguse põhimõtted, millest lähtuvalt autoriõigusi ühtlustama asuti, on praeguseks aegunud ja tehakse ettepanek ühtlustada levitamisega seotud õiguste reguleerimise lähenemisviisid, võttes arvesse õigustiku arengut ja muutusi teoste kasutamisel.

Sissejuhatus

Digitaalne keskkond võimaldab pakkuda palju erinevaid teenuseid ja nõudmisel juurdepääsu (*on-demand access*) autoriõigusega kaitstud teostele on tegelikkuses kujunenud uueks standardiks.¹³⁵⁴ Lisaks uuele levitamiskanalile võimaldab tehnoloogia teoste üle seninägematut kontrolli, sh nii veebipõhise juurdepääsu kui ka digitaalsete koopiade edastamise kontekstis.¹³⁵⁵ Uue levitamiskanali pakutavad võimalused tõid kaasa autoriõiguse kaitseulatuse laienemise.¹³⁵⁶ Rahvusvahelise autoriõiguse raamistiku olulised täiendused räägiti läbi 1990. aastatel,

¹³⁵⁴ Õiguste omajate ja tarbijate saadava kasu kohta vt Waldfogel (2017), lk 208–210; Longhini (2016), lk 106.

¹³⁵⁵ Näiteks kohaldatavad tehnoloogilised kaitsemeetmed mitte üksnes ei jõusta litsentsilepingute sätteid, vaid faktiliselt ka laiendavad kontrolli teose ja koopiade üle. Vt Poort (2018), lk 291.

¹³⁵⁶ Selle kohta, kuidas autoriõigused lähevad vastuollu uue tehnoloogiaga ja kuidas järkjärgult laiendatakse õiguste ulatust vt Synodinou (2014), lk 81. Autoriõiguste kui laienevate ainuõiguste kohta vt Ohly (2009), lk 238.

kui veebikeskkond hakkas kujunema teoste kasutamise kanaliks.¹³⁵⁷ Ühest küljest võimaldas selline õiguslik režiim koostoides tehniliste lahendustega erinevaid ärimudeleid, mis pakkusid juurdepääsu seadusega kooskõlas olevale autoriõigusega kaitstud sisule. Teisalt on see sisuliselt välistanud teoste teisese kasutamise kolmandate isikute või lõppkasutaja poolt või seda pärssinud, minnes seejuures vastuollu lõppkasutajate ootustega, mis on kujunenud välja analoogmaailma oludes.¹³⁵⁸

Ainuõigustega antava kontrolli laienemine ilmneb ka Euroopa Liidu (EL) tasandil, kus autoriõiguse ühtlustamine lähtub kõrgetasemelise kaitse eesmärgist.¹³⁵⁹ Ainuõiguse piirangute ulatust mõjutanud kõrgetasemelise kaitse eesmärki, teadlased laialdaselt kritiseerinud.¹³⁶⁰ Laiad, kõikehõlmavad õigused koostoides kitsalt määratletud ammendavalt loetelud piirangutega toovad kaasa ebakõla autoriõiguse kaitse tasakaalustamisel ja riivavad liikmesriikide vabadust oma lahenduste väljatöötamisel.¹³⁶¹

Üks põhjuseid, miks digitaalset kasutust, mis näib olevat funktsionaalselt samaväärne tavalise füüsilise levitamisega, koheldakse erinevalt, seisneb selles, et ELi autoriõiguse ei tõmba sõnaselgelt piiri õiguste omaja ainukontrollile levitamise üle, kui tegu ei ole füüsiliste koopiaga. Kuigi levitamiseõiguse raames tunnustatud õiguste ammendumise põhimõte¹³⁶² viitab sellele, et ainuõigusest tulenev kontroll füüsiliste koopiate üle lõpeb pärast seda kui õiguse omaja on eksemplari võõrandanud, ei ole sellist õigust digitaalsete eksemplaride ega muude veebipõhiste levitamisvormide puhul. Sellist erinevat kohtlemist on selgitatud muu hulgas teose materiaalse ja immateriaalse levitamise erinevusega, mille puhul vaid esimene liik õigustab üldpiirangu seadmist ainuõiguse ulatusele.

¹³⁵⁷ Eelkõige Maailma Intellektuaalse Omandi Organisatsiooni (WIPO) autoriõiguse lepingu sõlmimine Genfis 1996. aasta 20. detsembril (WIPO autoriõiguse leping) and 1994. aasta 15. aprillil sõlmitud intellektuaalomandi õiguste kaubandusaspektide leping (TRIPS-leping).

¹³⁵⁸ Vt Guibault (2008).

¹³⁵⁹ Euroopa Liidu autoriõiguse õigustik tähendab Euroopa Liidu liikmesriikide ühiste kohustuste kogumit autoriõiguse valdkonnas. Euroopa Liidu teisene õigus viitab õigustiku osale, mis koosneb direktiividest ja määrustest autoriõiguse valdkonnas. Kohtupraktika viitab Euroopa Liidu Kohtu praktikale õigustiku tõlgendamisel.

¹³⁶⁰ Vajaduse kohta võtta autorikeskse lähenemisviisi asemel omaks võrdsed mängureeglid vt Ohly (2009), lk 239–240. Kõrgetasemelise kaitse eesmärgi kahtluse alla seadmise kohta põhjusel, et see ilmtingimata ei soodusta loomingulisest ega innovatsiooni vt ka van Gompel (2017), lk 307.

¹³⁶¹ Vt Ohly (2009), lk 236; van Eechoud jt. (2009), lk 94–118; Hugenholtz (2019), Rosenmeier jt. (2019), lk 17–24.

¹³⁶² Eesti intellektuaalse omandi teoorias kasutatakse levitamiseõiguse lõppemise tähistamiseks õiguste ammendumise (*exhaustion of rights*) mõistet. Eesti autoriõiguse seadus räägib õiguse teost levitada lõppemise õiguse ammendumise põhimõtet otseselt nimetamata (§ 13). Eesti patendiseadus kasutab aga otsesõnu õiguste ammendumise mõistet (§ 17¹). Õiguste ammendumise mõiste on kasutuses ka teaduskirjanduses. Seetõttu lähtutakse sellest mõistest ka käesolevas töös. – Autoriõiguse seadus. – RT I 1992, 49, 615 ... RT I, 19.03.2019, 55; Patendiseadus. – RT I 1994, 25, 406 ... RT I, 19.03.2019, 59.

See erinevus on mõjutanud 1990. aastatel tehtud seadusandlikke valikuid. Materiaalset levitamist seostatakse füüsiliste eksemplaride levitamisega, mis võimaldab õiguste omajal saada hüvitist algse levitamistoimingu kaudu. Immateriaalne levitamine hõlmab aga teose edastamist ilma füüsilist eksemplari andmata, seega esituse, ülekande jms teel. Eristamise loogika peitub sisuliselt ainuõiguste majanduslikus õigustuses. Koopiate müümise teel saab õiguste omaja tasu iga koopia eest. Seevastu ei pruugi teose väärtus realiseeruda esitamise vormis esmakasutuse teel.

Erinevust on kasutatud selleks, et eristada autoriõigustest tulenevaid ainuõigusi ja õigustada nende vastavaid piire. Euroopa Liidus on ühtlustatud peamised levitamisega seotud õigused, s.o levitamisõigus ja õigus teost üldsusele edastada. Levitamisõigust on piiratud tuginedes õiguste ammendumisele esmase levitamisega, ent üldsusele edastamise õigus, mida seostatakse immateriaalse levitamisega, hõlmab nii teose üldsusele edastamise esmast toimingut kui ka hilisemaid toiminguid.

Seega ehkki veebikeskkond võimaldab erinevaid teose edastamise viise, mis sarnanevad nii füüsilisele levitamisele kui ka esitamisele, käsitletakse veebipõhist levitamist ELi õiguse raames eelkõige mittefüüsilise levitamisenä. See on toonud kaasa muu hulgas olukorra, kus teose üldsusele edastamisele puuduvad levitamisõiguse ammendumise (lõppemise) põhimõttega võrreldavad üldpiirangud. Laialt määratletud teose üldsusele edastamise õigus, millega kaasneb ELi õigustikus lubatavate erandite kitsalt tõlgendatud ulatus, on toonud kaasa õiguste omajale antud kontrolli drastilise laienemise.¹³⁶³

Autoriõiguse valdkonnas Euroopa Liidu teisest õigust tõlgendav Euroopa Liidu Kohtu hiljutine praktika on seadnud kahtluse alla väljakujunenud arusaama veebipõhise levitamise homogeensuse olemusest. Muu hulgas on kohus lubanud veebipõhiselt levitatud tarkvara edasimüüki, laiendades füüsilistele koopiatele kohaldatavat õiguste ammendumise põhimõtet ka veebipõhisele levitamisele.¹³⁶⁴ Lisaks on kohus mõningatel juhtudel leidnud, et üldsusele edastamise õigus ei ulatu esmaedastuse lubamisest kaugemale, kasutades seejuures lõppemisele sarnaseid argumente.¹³⁶⁵

Üldise arengu tähtsus on kolmetine. Esiteks õõnestas see õiguskindlust seoses õigustikust tulenevate ainuõiguste pakutava kaitse ulatusega. Funktsionaalselt sarnaseid toiminguid võidakse kohelda erinevalt, sõltuvalt sellest, kas levitamine toimub veebikeskkonnas ja levitatava teose liigist. Tehnoloogiapõhine lähene mine õiguste määratlemisele Euroopa Liidu teiseses õiguses ja pidevalt täienev Euroopa Liidu Kohtu praktika teevad õiguste piiramise võimalikkuse hindamise eripärade mõistmise keeruliseks. Üldsusele edastamise õiguse lai sõnastus aval-

¹³⁶³ Digitaalsete kasutusviiside lühikese loetelu kohta vt Hilty (2004), lk 766.

¹³⁶⁴ Palju kõlapinda tekitanud kohtuasi *UsedSoft*. Vt Euroopa Liidu Kohus, *UsedSoft GmbH vs Oracle International Corp.* (2012) Kohtuasi C-128/11, 2012. aasta 3. juuli otsus. Otsuse mõju piirdub senini vaid tarkvaraga, sest autoriõiguse muid esemeid reguleerib teine instrument.

¹³⁶⁵ Sganga (2018b), lk 213, 227–228.

dab pärssivat mõju teose võimalikele teistele kasutusviisidele, sest ei näi pakkuvat kasutajale lisaväärtust, kuigi õiguste omaja on saanud tasu esmase levitamise teel. Lõpetuseks teeb õiguskindluse puudumine keerukaks loa saamise teose kasutamiseks ja selliste lubade haldamise kollektiivse esindamise organisatsioonide poolt. Viimatinimetatud on püüdnud saada lisahüvitist üldsusele edastamise õiguse suurele ulatusele tuginedes.¹³⁶⁶

Hiljutised sündmused on põhjustanud arvukaid üleskutseid kaaluda ainuõiguste reguleerimise lähenemisviisi ja ulatuse muutmist ELi autoriõiguse õigusliku raames, eriti seoses nende ulatuse piiritlemisega veebikeskkonnas.¹³⁶⁷ Peamine mure seisneb selles, et ELi autoriõiguse raamistik ei ole kuigi paindlik nende erinevate viiside mõistmisel, mil teost veebis levitada saab. See on iseäranis probleemne, arvestades ELi teisest õigusest tulenevate varaliste õiguste ulatuslikku ühtlustatust.¹³⁶⁸ Lisaks peab Euroopa Liidu Kohus navigeerima veebikeskkonnas tekkivate probleemide vahel tuginedes põhimõtetele, mis on sätestatud direktiivides juba ammu enne selliste kasutusviiside esilekerkimist.

Teose kasutamise olude areng võib nõuda uusi lähenemisviise kaitsemeetmete ulatuse reguleerimisel.¹³⁶⁹ Traditsiooniliste paradigmatel külge klammerdumine uute tehniliste võimaluste ajastul ei pruugi olla põhjendatud.¹³⁷⁰ Ulatuses, milles teose tarbimist ja teisest kasutamist on võimalik veebikeskkonnas kontrollida, ületab selle, mis on võimalik või lubatud analoogmaailmas, ent ei ole autoriõiguste kaitse aluseid silmas pidades ilmtingimata põhjendatud.¹³⁷¹ Euroopa Liidu õigustiku arengut silmas pidades analüüsitakse väitekirjas eeldusi, millest lähtuti ELi õiguse ühtlustamisel, samuti näidata, kuidas need eeldused on seatud kahtluse alla vajaduse poolt olla ainuõiguste piiride suhtes paindlik, ning selgitada, kuidas lähenemisviise materiaalse ja immateriaalse levitamise õigustele saaks paremini ühildada.

¹³⁶⁶ Näiteks ülekande avaliku vastuvõtu eest.

¹³⁶⁷ Põhiargumentide kokkuvõttega tutvumiseks vt Rendas (2018), lk 155–160. Veebikeskkonna kontekstist vt Hugenholtz jt. (2018), Ginsburg (2002), Rognstad (2015), Geiger (2017), Westkamp (2017), Depreuw (2014).

¹³⁶⁸ Rognstad (2009), lk 532, 536. Vt ka Hiltyt, kes leiab, et liikmesriikidelt manööverdamisruumi äravõtmisega sekkuvad Euroopa Liidu õigusaktid ka võimesse reageerida uutele vajadustele huvisid tasakaalustada. Hilty (2004), lk 766.

¹³⁶⁹ Vt Jennerit, kes nimetab arutelu sellest, kas tegu on allalaadimise või voogedastusega, mis paragrahvi alla see kuulub ning kus ja kes on omanik „mõistatuslikuks keskaegseks teleoloogiliseks aruteluks“. Jenner (2011), lk 59.

¹³⁷⁰ Autoriõiguse kui seadusandja leiutise kohta, mille piirjooni saab kujundada selliseks nagu meil vaja, vt Heide (2004), lk 102.

¹³⁷¹ Näiteks turutõrke leevendamisele tuginevad autoriõiguste kaitse majanduslikud alused ei toeta ainuõiguste laiendamist toimingutele, millega turutõrget ei kaasne, nt individuaalsete koopiade kasutamine nende levitamisel ja järelturg. Vt Poort (2018), lk 331.

Väitekirja ulatus

Väitekirjas uuritakse materiaalse ja immateriaalse levitamise erinevust levitamisega seotud õiguste kujundamisel ELi autoriõiguses. Analüüs keskendub nende õiguste pakutava ainukontrolli ulatusele, mis ulatuvad kaugemale iga algse levitamistoimingu lubamisest. Selleks uuritakse ELi õigustiku raames kahe peamise teose levitamisega seotud õiguse – levitamisoiguse ja üldsusele edastamise õiguse – arengut.

Kontrolli ulatus ja piirid sõltuvad eeskätt autoriõiguste kaitse alustest ja eesmärkidest.¹³⁷² Analüüsi aluseks on eeldus, et mitte ükski autoriõiguse aluseks olev teooria ei nõua kõikehõlmava kontrolli andmist teose üle. Euroopa Liidu õiguse arengu tulemusi hinnatakse materiaalse ja immateriaalse levitamise eristamisel valguses autoriõiguse kaitse soodustavatest alustest, rõhutades õiguste majanduslikku alust ja õiguste piire.

Väitekirjal on kaks peamist eesmärki. Esiteks näidata, kuidas teose kasutamise olude muutus on suunanud materiaalse ja immateriaalse levitamise õiguste ulatuse määramise lähenemisviiside koondumist ELi õigustikus. Teiseks pakkuda viisi, kuidas õigustiku arengut silmas pidades lähenemisviise ühtlustada, töötades välja normatiivse raamistiku, millest lähtuvalt hinnata, kas teose teisese levitamise allutamine õiguste omaja kontrollile on õigustatud.

Uuringu ülesehitus

Väitekirjas analüüsitakse kriitiliselt praeguses ELi teiseses õiguses sätestatud autoriõigusliku kaitse eeldusi, pidades silmas õiguse arengut ja muutusi teoste kasutamise. Lisaks teiseses õiguses sätestatud õiguste ja nende ulatuse ühtlustamise uurimisele analüüsitakse väitekirjas seda, kas materiaalseid ja immateriaalseid õigusi eristatakse ka Euroopa Liidu Kohtu praktikas. Seejärel selgitatakse, kuidas materiaalse ja immateriaalse levitamise õiguste lähenemisviise saaks ühtlustada hindamaks, kas teose teisese levitamise allutamine õiguste omaja kontrollile on põhjendatud.

Väitekirjas esitatakse kaks üldist uurimisküsimust:

1. Kuidas kajastab levitamisoiguse ja üldsusele edastamise õiguse areng Euroopa Liidu õigustikus materiaalse ja immateriaalse levitamise õiguste erinevust?
2. Kuidas saaks lähenemisviise teose materiaalsele ja immateriaalsele levitamisele ühtlustades määratleda õiguste omaja ainuõiguse ulatus selliselt, et puudub vajadus saada luba teose igakordseks edastamiseks?

¹³⁷² Ainuõiguste kui poliitilistest valikutest sõltuva nähtuse piiritlemise kohta vt Rognstad (2018), lk 123.

Kahele üldküsimusele vastamist toetavad täpsustavad küsimused. Esimesele üldküsimusele vastamisel tuginetakse alltoodud lisaküsimustele:

- Kuidas ja millisel eesmärgil eristatakse materiaalselt ja immateriaalselt levitamist autoriõiguste kontekstis? Kuidas on eristamine seotud autoriõiguste alustega ja kui võrd tehnoloogia areng on selle kahtluse alla seadnud?
- Mida tähendab materiaalse ja immateriaalse levitamise eristamine ELi õigustiku raames liikmesriikide õigusele ja õigusloomevabadusele?
- Milline oli materiaalse ja immateriaalse levitamise eristamine ELi teiseses õiguses ja mis olid seda suunavad jõud?
- Mis asjaolud on mõjutanud levitamise õiguse, üldsusele edastamise õiguse ja õiguste ammendumise põhimõtte ühtlustamise vajadust ja vormi ELi õigustiku raames?
- Millist rolli on õiguste ammendumise põhimõtte mänginud levitamise ainuõiguse ulatuse piiramisel materiaalse levitamise raames ELi teiseses õiguses?
- Kas ja kuidas kajastab levitamise õiguse areng ELi autoriõiguste raamistikus materiaalselt levitamist? Kas ja kuidas kajastab üldsusele edastamise õiguse areng immateriaalselt levitamist?
- Kuidas täidab õiguste ammendumise põhimõtte materiaalse levitamise õiguse piiramise funktsiooni, arvestades tehnoloogia ja õigustiku edasist arengut?

Teisele üldküsimusele vastamist toetavad esimese üldküsimuse analüüsi järeldused ja vastused alltoodud lisaküsimustele:

- Mis viitab materiaalse ja immateriaalse levitamise õiguste lähenemisviiside ühtlustamisele ELi õigustiku raames?
- Milliseid üldkriteeriume saab ELi õigustiku alusel kasutada selleks, et süstematiseerida kontrolli teisele edastamise üle, tuginedes algsele edastamisloale? Kuidas on need kriteeriumid seotud soodustavate alustega ja kaitse-eesmärkidega õigustiku raames?
- Millised on peamised puudujäägid ELi kehtivas autoriõiguste raamistikus väljatöötatud kriteeriumite omaksvõtul?

Väitekiri viitab teose levitamisele üldiselt, s.o kui mis tahes viisile edastada teose sisu üldsusele näiteks koopiade levitamise, esituse, peast esitamise, ülekande, voogedastuse vms teel. Teose „edastamine” võib keelelisest perspektiivist olla pisut sobivam termin ja seda kasutatakse vaheldumisi „levitamisega,” iseäranis väitekirja viimases, s.o 6. peatükis. Segaduse vältimiseks edastamine kui laias mõttes teose levitamise vahel ja üldsusele edastamise mõttes edastamise vahel eelistatakse väitekirjas ainuõiguste ulatuse analüüsi kontekstis terminit „levitamine”.

Esimese üldküsimusega püütakse teha kindlaks, mis rolli on materiaalse ja immateriaalse levitamise õiguste eristamine mänginud ELi autoriõiguste ühtlustamisel? Arvestades ELi õigusraamistikku, on vajalik kontrollida kaht aspekti, et esimesele küsimusele vastata. Esimene aspekt on see, kuidas materiaalse ja immateriaalse levitamise eristamine on mõjutanud ühtlustamist ELi teiseses

õiguse alusel? Teine aspekt on see, kas edasine Euroopa Liidu Kohtu praktika areng toetab ELi teiseses õiguses tehtud eristust?

Teine üldküsimus püüab pakkuda lahendust, kuidas ühtlustada lähenemisviisid materiaalse ja immateriaalse levitamise õigustele ELi õigustiku arengu põhjal. Teisele küsimusele vastamiseks tuleb kontrollida kaht aspekti. Esimene aspekt on see, milliseid ühiseid kriteeriume saab iga algse edastuse lubamisele järgnevate õiguste ulatuse kohta tuletada õiguste arengust õigustiku raames. Teine aspekt on, kuidas neid kriteeriume võiks ühtlustada ühtse hindamisraamistiku piires ja kooskõlas ELi autoriõiguse õigustiku alustega.

Analüüsis kasutatakse uurimisküsimustele vastamiseks nii kirjeldavaid kui ka normatiivseid meetodeid. Esimene küsimus, mis on olemuselt normatiivne, nõuab ka kehtiva õigusraamistiku kirjeldavat analüüsi. Selleks, et õigustiku raames õiguste arengut analüüsida, uuritakse materiaalse ja immateriaalse levitamise erinevust autoriõiguste kaitse aluseid silmas pidades. Euroopa Liidu autoriõigusest tuleneva erisuse kasutamise tähtsust liikmesriikide õigusele vaadeldakse Skandinaavia riikide näitel.¹³⁷³ Lisaks analüütilisele meetodile kasutatakse ka võrdlevat meetodit, et hinnata liikmesriikide õiguses kasutatud erinevaid lähenemisviise õigustikust tulenevate kohustuste täitmise suhtes.

Järgmiseks pöördub analüüs ELi autoriõiguste õigustikus sätestatud ainuõiguste poole, mis kajastavad erinevust materiaalse ja immateriaalse levitamise õiguse vahel. Uurimine algab edastamise ja levitamise ainuõiguste rahvusvahelisel ja ELi tasandil ühtlustamise tausta ajaloolise analüüsiga. Sel foonil käsitletakse ELi teisest õigusest tulenevate õiguste ulatust grammatilise, kontekstilise ja teleoloogilise tõlgendamise meetodi abil. Seejärel analüüsitakse ainuõiguste arengut Euroopa Liidu Kohtu praktikas läbi materiaalse ja immateriaalse levitamise õiguste erisuse, mis kätkeb endas õiguse piiramist või laiendamist pärast iga levitamise esmast lubamist.

Esimese üldküsümuse analüüsi ja järelduste pinnalt tuletatakse normatiivse raamistiku üldkriteeriumid hindamaks seda, kas teisese levitamise toimingute allutamine ainuõiguse omaja kontrollile on põhjendatud. Neid kriteeriume hinnatakse autoriõiguse edendamist ja ELi õigustikust tulenevate õiguste majanduslikke aluseid silmas pidades. Põhielemendid on hindamise aluseks, samas kui kõrvalelemendid täiendavad neid eeldusel, et õigustikust tulenevate ainuõiguste eesmärke täpsustatakse. Lõpetuseks rõhutatakse ELi teiseses õiguses loodud autoriõiguse raamistiku peamisi puudujääke pakutud kriteeriumite lisamisel hindamiskriteeriumitesse.

Analüüsi toetavad erinevad allikad, sh õigusaktid, õigusakte ettevalmistavad aktid, kohtupraktika ja õigusteadlaste arvamused. Euroopa Liidu autoriõiguse õigustiku puhul, millele väitekirjas keskendustakse, analüüsitakse ELi esmase ja

¹³⁷³ Nagu 2. peatükis selgitatud, iseloomustab Skandinaavia autoriõigust avaliku huvi kaal autoriõiguse kujundamisel ja ulatuslik teose kättesaadavaks tegemise õigus, mis on mõeldud tulema toime tehnoloogia arengust tingitud seadusloomeliste raskustega. Euroopa Liidu õigustikust tulenev ühtlustamine on piiranud võimalust teenida avalikku huvi ja kohandada raamistikku tehnoloogia arengule vastavalt.

teisese õiguse allikaid ja Euroopa Liidu Kohtu praktikat.¹³⁷⁴ Kuigi levitamise-õiguse ja edastamisõiguse arengu ajalooline analüüs käsitleb erinevaid autoriõiguse valdkonna direktiive, keskendutakse analüüsis eeskätt infoühiskonna direktiivile, mis on varaliste õiguste ühtlustamise põhiinstrument.¹³⁷⁵ Euroopa Liidu Kohtu praktika on õigustikust tulenevate õiguste arengu hindamisel samuti olulisel kohal, sest kohus mängib üha suuremat rolli ELi autoriõiguse ühtlustamisel hoolimata siduvate pretsedentide süsteemi puudumisest.¹³⁷⁶ Lisaks õigusallikatele ja kohtupraktikale analüüsitakse õigusakte ettevalmistavaid akte.

Kuigi rahvusvaheliste instrumentide analüüsi eesmärk ei ole anda kõikehõlmav ülevaade rahvusvahelisest õigusest tulenevatest kohustustest, vaid paigutada muudatused autoriõiguse kujunemise laiemasse konteksti, võetakse arvesse mitmeid allikaid. Peamist huvi pakuvad Berni konventsiooni, WIPO autoriõiguse leping ja TRIPS-leping.¹³⁷⁷ Lisaks nendele instrumentidele ja neid ettevalmistavatele aktidele hõlmab analüüs ka ülemaailmse autoriõiguse konventsiooni sätteid ja 1990. aastatel aset leidnud läbirääkimisi autoriõiguse valdkonna õigusaktide mudelsätete ja võimaliku Berni konventsiooni lisaprotokolliga kohta. Ehkki mudelseaduse ja võimaliku lisaprotokolliga üle peetud läbirääkimised ei päädinud siduvate instrumentide vastuvõtmisega, olid need aluseks hilisemale WIPO autoriõiguse lepingule ja aitasid mõista õiguste ühtlustamisele viinud asjaolusid.

Analüüs Euroopa Liidu ühtlustatud õiguse mõjust liikmesriikide õigusele tugineb Skandinaavia, eeskätt Rootsi ja Norra autoriõiguse analüüsile. Uuritakse Rootsi ja Norra 1960. aastate autoriõiguse seaduste vastuvõtmisele eelnenud arutelu ja seaduse vastuvõtmise järel toimunud muutusi (sh Norra 2018. aasta autoriõiguse seadust). Lisaks autoriõiguse seadustele analüüsitakse ka nende ettevalmistusakte ja muudatusi, sest tegu on Skandinaavia autoriõiguse seisukohast oluliste tõlgendusallikatega.

¹³⁷⁴ Euroopa Liidu esmane õigus koosneb ELi aluslepingutest, samas kui teine õigus selle väitekirja kontekstis koosneb autoriõiguse valdkonna direktiividest ja määrustest. Euroopa Liidu autoriõiguse õigustiku all peetakse väitekirjas läbivalt silmas ELi esmast ja teisest õigust, mida täiendab Euroopa Liidu Kohtu praktika, mis nii otseselt kui ka kaudselt määratlevad autoriõiguse ühtlustamise ulatuse ja sisu.

¹³⁷⁵ Euroopa Parlamendi ja nõukogu direktiiv 2001/29/EÜ, 22. mail 2001, autoriõiguse ja sellega kaasnevate õiguste teatavate aspektide ühtlustamise kohta infoühiskonnas. 22.6.2001. ELT L 167/10.

¹³⁷⁶ Selle kohta, et puudub formaalne pretsedentide süsteem ja et Euroopa Liidu Kohtu eelotsustel on oluline roll vt Rosati (2019), lk 73–85. Kohtupraktika rolli kohta ELi õigusloomes vt Hartley (2014), lk 71–72; eelotsuse taotluse menetluse ja õigusteadlaste osaluse kohta vt van Echoud (2012).

¹³⁷⁷ Berni kirjandus- ja kunstiteoste kaitse konventsioon (muudetud 28.9.1979), WIPO autoriõiguse leping (sõlmitud Genfis 20.12.1996); 1994. intellektuaalomandi õiguste kaubandus-aspektide leping (allkirjastatud 15.4.1994).

Väitekirja ülesehitus

Väitekirja jaguneb kolmeks põhiosaks. Esimeses osas paigutatakse analüüs konteksti, tuues esile raamistiku, millest lähtuvalt hinnatakse õiguste arengut ELi õigustiku alusel hilisemates peatükkides. Teises osas keskendutakse levitamise seotud õiguste arengule õigustiku raames, tuginedes esimeses osas esile toodud raamistikule. Kolmas ja ühtlasi ka viimane osa väitekirjast käsitleb analüüsi tulemusel tehtud tähelepanekuid ja vastatakse kahele üldisele uurimisküsimusele.

Teises peatükis esitatakse analüüsi alused, paigutades materiaalse ja immateriaalse levitamise erinevuse autoriõiguse aluste laiemasse konteksti, iseäranis autoriõiguste kaitse majanduslike aluste konteksti. Arvestades, et väitekirja põhirõhk on ELi autoriõiguse raamistikul, juhib peatükk tähelepanu ka tähtsusele, mis erisuse ELi teiseses õiguses sätestamisel on liikmesriikide õiguse seisukohast. Seejärel käsitletakse materiaalse ja immateriaalse levitamise õiguste vahelist erinevust selle taustal, et tehnoloogia areng muudab pidevalt teose kasutamise olusid ja sobiva kaitse ulatust ja rõhutatakse, et mineviku eeldustele tuginevate normatiivsete järelduste tegemine on ohtlik.

Peatükkides 3–5 esitatakse levitamiseõiguse ja üldsusele edastamise õiguse arengu analüüs, lähtudes tehtud tähelepanekutest ja 2. peatükis välja toodud raamistikust. Õiguste ammendumise põhimõtte kui levitamiseõiguse olemuslik piir eraldatakse nimetatud õiguse analüüsist ja seda käsitletakse pikemalt 4. peatükis. Peatükid 3–5 algavad õiguste ELi tasandil ühtlustamise tausta, sh rahvusvahelisest õigusest tulenevate asjaomast kohustuste tuvastamisega. Seejärel suundub analüüs õiguste arengu hindamise juurde materiaalse ja immateriaalse levitamise erisust silmas pidades. Viimases osas võrreldakse analüüsi käigus tehtud tähelepanekuid materiaalse ja immateriaalse levitamise omadustega, et illustreerida lähenemisviiside lähenemist.

Kuuendas peatükis käsitletakse analüüsi tulemusel tehtud tähelepanekuid ja vastuseid kahele üldisele uurimisküsimusele. Peatüki esimeses osas tehakse kokkuvõtte tuvastatud muudatustest, mis viitavad materiaalse ja immateriaalse levitamise õiguse lähenemisviiside lähenemisele õigustiku raames ja moodustavad aluse lähenemisviiside ühtlustamiseks ühtse raamistiku kaudu. Selles osas esitatakse esimese üldise uurimisküsimuse kohta tehtud järeldused koos välja-vaadetega teises osas esitatud normatiivse raamistiku kohta.

Kuuenda peatüki teises osas esitatakse normatiivne raamistik, mis pakub kriteeriume teisele levitamise õiguste omaja kontrollile allutamise põhjendatuse hindamiseks tuginedes materiaalse ja immateriaalse levitamise lähenemisviiside ühtlustamisele vastavalt õigustiku arengule. Selles osas tuuakse esile normatiivse raamistiku põhi- ja kõrvalelemendid ja rõhutatakse ELi kehtiva teisele õiguse süsteemile tugineva raamistiku peamisi puuduseid. Kuues peatükk lõppeb teise üldküsimuse vastuse kokku võtmisega.

2. Materiaalse ja immateriaalse levitamise erinevus autoriõiguse aluste ja autoriõigusloome kontekstis

Teises peatükis esitatakse taustateave Euroopa Liidu *õigustikust* tulenevate õiguste analüüsiks, mis järgnevates peatükkides ette võetakse. Esiteks paigutatakse selles materiaalse ja immateriaalse levitamise erinevus autoriõiguse aluste laiemasse konteksti ja foonile, milles autoriõiguse alused suunavad nende õigustega antud ainukontrolli ulatuse määramist. Teiseks käsitletakse selles seda, kuidas tehnoloogia areng mõjutab teose kasutamise olusid ja sobiva kaitse ulatust, rõhutades mineviku eeldustele tuginevate järelduste – näiteks materiaalse või immateriaalse levitamise kontsepti – tegemise ohtlikkust. Kolmandaks rõhutatakse peatükis ELi õiguse ühtlustamise mõju liikmesriikide õigustele Skandinaavia riikide näitel. Neis õiguskordades tunnustatakse teistsuguseid autoriõiguse aluseid, mis ei ole ELi õiguses valdavalt tunnustamist leidnud. Üldiselt formuleeritud õigus teha teos kättesaadavaks, mis hõlmab kõiki kaitstud levitamistoiminguid, ei ole sisemise paindlikkuse jaoks piisav *õigustikust* tulenevast ühtlustamisest lähtuva toimingute liigituse tõttu.

Enne kui vastata väitekirjas püsitatud kahele üldküsimusele, on vaja tuletada meelde autoriõiguse alused ja nende mõju ainuõiguste ulatusele. Sõltuvalt vaatenurgast annab arengu analüüs erinevaid tulemusi. Tutvustamata materiaalse ja immateriaalse levitamise erisust sellisena nagu seda mõisteti 1990. aastatel toimunud ühtlustamise ajal ja seda, kuidas see on seotud kaitse alustega, poleks taust täielik. Teises peatükis aidatakse vastata esimesele uurimisküsimusele, käsitledes alltoodud lisaküsimusi:

Kuidas ja milleks eristatakse materiaalselt ja immateriaalselt levitamist autoriõiguste kontekstis? Kuidas on erinevus seotud autoriõiguse alustega ja kuidas on tehnoloogia areng selle kahtluse alla seadnud?

Mida tähendab materiaalse ja immateriaalse levitamise eristamine ELi õigustiku raames liikmesriikide õigusele ja õigusloomevabadusele?

Peatükk on jagatud neljaks osaks. Osas 2.1 esitatakse taust, käsitledes autoriõiguse aluseid, eelkõige autori ainuõiguste majanduslikke põhjendusi. Seejärel liigutakse edasi autoriõiguse aluste juurde ELi *õigustikus*, pannes suuremat rõhku infoühiskonna direktiivile. Osa 2.2 on pühendatud mõjule, mida uute levitamiskanalite teke avaldab autoriõigusloomele ning erinevusele materiaalse ja immateriaalse levitamise vahel kui ainuõiguste eristamise alusele. Osas 2.3 uuritakse, kuidas *õigustiku* raames toimunud ühtlustamine on mõjutanud liikmesriikide paindlikkust kaitse sobivate piiride seadmisel ainuõiguste ulatuse määramise kaudu. Keskenduses Rootsile ja Norrale, uuritakse selles osas õigusrealistlikku mõtlemist, mis mõjutab Skandinaavia autoriõiguse aluseid, varaliste õiguste struktuuri ja muudatusi, mis järgnesid ELi autoriõiguse *õigustiku* ühtlustamisele. Osas 2.4 võetakse kokku peatükis tehtud tähelepanekud ja kirjeldatakse peatükkides 3–5 kasutatud analüüsiprismat.

Lühike peatus autoriõiguse teooriatel ja kaitse alustel näitab, et mitte ükski teooria ei nõua kõikehõlmavat kontrolli teose üle, sest autorite ja õiguste omajate

huve ei saa seada alati kõrgemale kõigi teiste omadest. Nagu ilmnes, on erinevus materiaalse ja immateriaalse levitamise vahel tihedalt seotud autoriõiguse majanduslike põhjendustega ja õigustab kaitset, mille aluseks on turutõrke kõrvaldamine või kultuuriväärtuste tootmise väliste aspektide muutmise sisemisteks aspektideks. Seetõttu on ainukontrolli andmine õigustatud ulatuses, milles see on vajalik konkreetse mure leevendamiseks. Kui tulemus on saavutatud, ei ole sekkumiseks rohkem õigustusi – see võib omakorda võimaldada keskenduda konkurentsiaspektile või muudele seotud huvidele üldiselt.

Sobiv kaitsetase ja autoriõiguste õigustused on staatilised nähtused. Arvestades keerulist seost autoriõiguste kaitse ulatuse ja tehnoloogia arengu vahel, ei pruugi olla soovitatav tugineda konkreetsetel ajahetkel määratletud normidele, sest kasutusolud muutuvad väga kiiresti. Võttes arvesse ELi õiguse ühtlustamise üha kasvavat mõju, tuleks liikmesriikidele anda raamistik, mis on piisavalt paindlik selleks, et kohaneda vajadustega ja arvestada avaliku huviga. Arvestades ELi *õigustiku* hiljutist arengut, seisneb küsimus selles, kas laialt määratletud õigus oleks Skandinaavia autoriõiguses kasulik eeldusel, et seda täiendatakse vastava piiritlemismehhanismiga, mis arvestab oludega.

Algselt kasulik eristus võib osutada vastunäidustatuks, kui olud muutuvad. Kui kaitsevajaduse ja piiride tõmbamise vajaduse vahel tasakaalu leidmine on kõike muud kui lihtne ülesanne, siis ka kaasaegsete asjaolude põhjal konstrueeritud raamistikud võivad kiiresti ajale jalgu jääda. Ka veebipõhist levitamist, mis ei hõlma koopiaid, ei saa automaatselt samamoodi kohelda. Veebipõhist levitamist, mis hõlmab digitaalseid koopiaid, ei saa ilmingimata kohelda viisil, mis on mõeldud selliste toimingute füüsilisele väljendusele.

Teises peatükis esitatud analüüsile tuginedes analüüsitakse järgnevates peatükkides levitamise- ja üldsusele edastamise õiguse arengut *õigustiku* raames materiaalse ja immateriaalse levitamise vaatenurgast, mis määratleti ühtlustamise alustamisel. Iga õiguse harmoniseerimise tausta analüüs keskendub nende kooskõlla viimisele materiaalse või immateriaalse levitamise põhjendustega. *Õigustiku* edasist arengut eelkõige Euroopa Liidu Kohtu praktika valguses analüüsitakse lähtuvalt eeldusest, et ELi õigus eristab neid õigusi vastavalt materiaalse ja immateriaalse levitamise eristamisele. Analüüs algab majanduslike aluste vaatenurgast, s.o keskendudes Euroopa Liidu Kohtu põhjendustele, mis puudutavad õiguste omaja kontrolli teose kasutamise, teose turu, tasu ja konkurentsi üle.

Oluline on, et analüüs keskendub teisese levitamise toimingutele, mis tuginevad algselt lubatud toimingule, sest seal ilmnebki erinevus materiaalse ja immateriaalse levitamise vahel. See tähendab, et kuigi analüüsitakse õiguse tõlgendamise kohtupraktikat, on rõhk Euroopa Liidu Kohtu mõttekäigul kohtuasjades, kus õiguse omaja on lubanud esmase levitamise (nt koopiate levitamine, ülekandesignaali edastamine, teoste internetti postitamine) ja kus küsimus seisneb selles, kas konkreetne toiming, mis tugineb sellisele algele toimingule (nt koopia edasimüük, signaali ümbersuunamine, üleslaaditud teosele hüperlinkimine jne) nõuab samuti autori luba.

Õiguse eristamise suunas arenemise hindamise aluseks on kaks põhieeldust. Esiteks, arvestades ainuõiguste majanduslikke aluseid eeldatakse, et kontroll iga

esmase levitamistoimingu üle pakub piisavat motivatsiooni teose loomiseks ja kasutamiseks. Samuti aktsepteeritakse, et ainuõigused – arvestades nende soodustavaid aluseid – annavad kontrolli iga uue kasutustoimingu üle. Ent küsimust sellest, kas iga teisene toiming, mis tugineb edastamise lubamisele, tuleks allutada ainukontrollile, ei saa lahendada pelgalt soodustuse loogikale tuginedes. Teine eeldus on, et esmaste ja teiseste levitamistoimingute erinevus võib olla etaloniks, mille põhjal hinnata ainuõigustega antava kontrolli ulatust. Seega selleks, et tuletada Euroopa Liidu Kohtu praktikast põhjendused õiguste ulatuse laiendamiseks kaugemale igast uuest levitamistoimingust, tugineb analüüs esmaste lubatud toiminute ja teiseste toimingute eristamisele. Sobiv kontroll teiseste toimingute üle võib sõltuda sellest, mil määral need riiavad teose kasutamise motivatsiooni, mida tuleks kaitsta esmase toimingu üle teostatava kontrolli vormis või soodustuste alustest või koguni autoriõigusest väljapoole jäävatest kaalutlustest.

3. Levitamisõigus, mis annab kontrolli materiaalse levitamise üle

Kolmas peatükk uurib esmalevitamisele järgneva levitamise õiguse arengut ja levitamisoiguse ulatuse piiramise põhjendusi ning illustreerib seda, kuidas tehnoloogia areng on kujundanud seda ulatust ELi õigustiku raames. Arvestades, et väitekirjas keskendutakse üldjoontes materiaalse ja immateriaalne levitamise erinevusele kui alusele, millele tuginedes keelduda üldpiirangu seadmisest üldsusele edastamise õigusega antava kontrolli ulatusele, keskendutakse selles peatükis levitamisoigusele selle kitsas tähenduses, mis hõlmab eksemplaride ja omandi püsivama võõrandamise vorme, näiteks müüki. Kitsas tähenduses on see õigus ühtlustatud infoühiskonna direktiivi raames, mis on peamine instrument ELi autoriõiguse õigustiku raames. Vaatluse all on levitamisoiguse ja materiaalse levitamise kontsepti vaheline suhe.

Koos 2., 4. ja 5. peatükiga püütakse selles peatükis vastata esimesele üldisele uurimisküsimusele, s.o *kuidas kajastab levitamisoiguse ja üldsusele edastamise õiguse areng Euroopa Liidu õiguses materiaalse ja immateriaalse levitamise erinevust*. Täpsemalt esitatakse selles peatükis alused õiguste ammendumise põhimõtte kui levitamisoiguse piiri ühtlustamiseks, käsitledes alltoodud lisaküsimusi:

Mis asjaolud on mõjutanud levitamisoiguse ühtlustamise vajadust ja vormi ELi õigustiku raames?

Milline oli materiaalse ja immateriaalse levitamise eristamine ELi teiseses õiguses ja mis olid seda suunavad jõud?

Kas ja kuidas kajastab levitamisoiguse areng ELi autoriõiguse raamistikus materiaalselt levitamist?

Peatükk on jagatud kolmeks osaks. Osas 3.1 esitatakse levitamisoiguse ühtlustamise taust ELi õigustiku raames nii läbi autoriõiguse üldise arengu prisma kui ka autoriõiguse rahvusvahelise arengu prisma. Selles osas käsitletakse nelja olulist

aspekti: eraldi levitamisoiguse tunnustamise olulisus reprodutseerimisõigust silmas pidades; teisele levitamisele ulatava laia õiguse aktsepteerimine; erinevus omandi ja valduse vahel laenuõiguse eristamise kontekstis; õiguse ühtlustamine rahvusvahelisel tasandil. Osa 3.2 on pühendatud õiguse ühtlustamisele ja arendamisele ELi õigustiku raames. See algab levitamisoiguse ühtlustamise vajaduse uurimisega Euroopa Komisjoni poolt ja enne direktiivide vastuvõtmist Euroopa Liidu Kohtu praktikas ühtlustatud aspektidega. Seejärel liigitakse tarkvaradirektiivi ja infoühiskonna direktiivi ajaloo juurde, kaardistades õiguste sätestamise ajal õigustikus tehtud valikud. Lõpetuseks uuritakse Euroopa Liidu Kohtu praktikat direktiivide tõlgendamisel ja õiguse ulatuse kujundamisel vastavalt teose kasutamise olude muutumisele. Osas 3.3 hinnatakse seda, kas ja kuidas õigustikus sisalduv levitamisoigus kajastab direktiivide ühtlustamise ajal sõnastatud materiaalse levitamise eeldusi. Selles osas keskendutakse õiguse kolmele aspektile: esmasele levitamisele järgneva ainukontrolli piiramist õigustavatele asjaoludele, esmasele levitamisele järgneva ainukontrolli laiendamisele viitavatele asjaoludele ja eseme kehalisusele kui materiaalse levitamise vältimatule/välditavale omadusele.

Õiguse ühtlustamise tausta analüüs õigustiku raames illustreerib ühist arusaama, et levitamisoigus peaks piirduma esmase levitamisega. Euroopa Liidu seadusandja on levitamisoiguse ühtlustamisel õigustiku raames tuginenud materiaalse levitamise kontseptile, tunnustades laia õigust, mis hõlmab esmaseid ja teiseid toiminguid, ent allutanud selle lõppemisprintsipi, mis faktiliselt vabastab teised aktid loa andmisest. Õiguste omajatele kontrolli andmine teose koopiade iga esmase ringlusse laskmise üle ei olnud ühtlustamise ainus eesmärk. Kaks kriitilise tähtsusega asjaolu olid ühtlustamise ajal koopiade laenutusturu esile kerkimine ning turgu lõhestanud konflikt levitamise ainuõiguse ja kaupade vaba liikumise vahel Euroopa Majandusühenduses (EMÜ).

Lai levitamisoiguse kehtestamine koostoimes levitamisoiguse lõppemisega läks infoühiskonna direktiivi raames aga kaugemale pelgalt riigisisese õiguse ja autoriõiguste territoriaalsuse konflikti lahendamisest kaupade vaba liikumise kontekstis ELis – see sisuliselt ühtlustas levitamisoiguse ulatuse riigisiseses õiguses. Ühtlustamise vorm laia õiguse kaudu, millega kaasneb õiguste ammen-dumise põhimõte, kajastab materiaalse levitamise õiguste kontsepti, mille puhul kontroll teose iga esmase levitamise üle (s.o uute koopiade ringlusse laskmine) nõuab õiguste omaja luba ja järgnev levitamine luba ei nõua. Kui õiguste omaja kasutab teost nii, et annab igaks levitamiseks eraldi loa ja saab tasu iga koopia eest, piirdub tema kontroll muude eesmärkide saavutamise, s.o kaupade vaba liikumisega EMÜs.

Levitamisõiguse lõppemise reegli selgepiiriline sätestamine täielikku ühtlustamist nõudva infoühiskonna direktiivi alusel näib olevat üsna staatiline, arvestades ELi õigustiku arengut, mis õiguse normatiivse ulatuse ümber kujundab. Euroopa Liidu Kohtu järgnev praktika viitab materiaalse levitamise paindlikumale tõlgendamisele levitamisoiguse kontekstis võrreldes sellega, mida ühtlustamise alustamisel ette kujutati. Esiteks laiendas kohus levitamisoiguse kohaldamist juhtudele, mida seadusandja ette ei näinud, näiteks digitaalse levitamise

juhtudele. Teiseks, hoolimata sellest, et õiguste ammendumise põhimõtte e nägi ette levitamisoiguse piiri, ei saa pelgalt lubatud levitamisele tuginedes teha rutakaid järeldusi järgneva kontrolli ulatuse kohta.

Analüüsitud arengu kontekstis tundub õiguste ammendumise põhimõtte kõik-või-mitte-midagi lähenemisviis olevat ajale jalgu jäänud. Õiguste omajale levitamisoiguse raames antud kontrolli ulatuse hindamine ei tugine enam pelgalt esmase või teisele levitamise kontseptile, millest räägitakse infoühiskonna direktiivi artiklis 4, vaid üldisele hinnangule teose kasutamise olude kohta. Seega isegi näiliselt lihtsad juhtumid, mis hõlmavad füüsiliste koopiade levitamist, nõuavad üha individuaalsemalt hindamist. Seetõttu saab esile tõsta Euroopa Liidu Kohtu otsust kohtuasjas *UsedSoft*, kus kohus laiendas levitamisoigust või vähemasti õiguste ammendumise põhimõtet digitaalselt levitatud tarkvara koopiatele. Kui majanduslikus plaanis võib digitaalne levitamine olla väga sarnane füüsilise levitamisega nii nagu seda mõisteti õiguse ühtlustamise ajal, on ilmne, et vaja on arvestada enamate aspektidega. Arvestades kaitstud teoste ja digitaalse levitamise vormide mitmekesisust, nõuab peamisele turule või mis tahes uuele turule võimaliku sisulise sekkumise hindamine märksa nüansirikkamat analüüsi kui pelgalt algse loa andmise fakti tuvastamist.

4. Õiguste ammendumise põhimõtte kui vahend, mille abil piirata kontrolli edasise levitamise üle

Neljandas peatükis uuritakse õiguste ammendumise põhimõtte positsiooni levitamisoiguse ulatuse piiramisel lähtudes füüsilise koopia levitamisest. Selles käsitletakse põhimõtte rolli ja potentsiaali kõnealuse õiguse piiramisel teose kasutamise olude muutuse kontekstis ja üha paindlikumat lähenemist õiguste omaja kontrolli ulatuse lubatavuse määratlemisele ELi õigustiku raames. Analüüsimisel lähtutakse lõppemise tasuteooriat ja varasemates peatükkides tehtud tähelepanekuid silmas pidades lõppemise kitsast tähendusest, mis on levitamisoiguse ulatust piirav erikonstruktsioon, mis tugineb tasu saamise võimaluse olemasolule.

Koos 2., 3. ja 5. peatükiga püütakse selles peatükis vastata esimesele üldisele uurimisküsimusele, s.o *kuidas kajastab levitamisoiguse ja üldsusele edastamise õiguse areng Euroopa Liidu õiguses materiaalse ja immateriaalse levitamise erinevust*. Täpsemalt hindab see õiguste ammendumise põhimõtte tugevusi ja nõrkusi ainuõiguse ulatuse piiritlemisel tehnoloogia ja õigustiku arengut silmas pidades. Uuritakse alltoodud lisaküsimusi:

Mis asjaolud on mõjutanud õiguste ammendumise põhimõtte ühtlustamise vajadust ja vormi ELi õiguses?

Millist rolli on õiguste ammendumise põhimõtte mänginud levitamise ainuõiguse ulatuse piiramisel materiaalse levitamise raames ELi teiseses õiguses?

Kuidas täidab õiguste ammendumise põhimõtte materiaalse levitamise õiguse piiramise funktsiooni, arvestades tehnoloogia ja õiguse edasist arengut?

Peatükk on jagatud kolmeks osaks. Osas 4.1 kirjeldatakse põhimõtte ühtlustamise tausta. Lisaks rahvusvahelisel tasandil tehtud muudatustele käsitletakse kolme olulist aspekti, mis mõjutavad ühtlustamise vajadust ja ka vormi: teose koopiade laenutusturu teke, lõppemise kui poliitikavahendi territoriaalsus ning levitamise õiguse lõppemiseni viivate tingimuste tähtsus. Osas 4.2 käsitletakse põhimõtte ühtlustamist ELi õigustiku raames, alustades direktiivide abil ühtlustamisele eelnevast Euroopa Liidu Kohtu praktikast, eelkõige ühenduse õiguste ammendumise põhimõtte kehtestamisest. Sellele järgneb õiguste ammendumise põhimõtte kujunemislöö analüüs tarkvaradirektiivi, laenutusdirektiivi ja infoühiskonnadirektiivi põhjal. Osas 4.3 käsitletakse õiguste ammendumise põhimõtte rolli levitamise õiguse ulatuse piiramisel ja küsimust, kas põhimõtte täidab oma ülesannet, arvestades koopiade levitamisele keskenduvate turgude esile kerkimisega ja teiste kasutamise olude muutumisega.

Põhimõtte rahvusvahelisel ja ELi tasandil ühtlustamise tausta analüüs näitab, et ühtlustamine teenis eesmärgi, mis ulatusid märksa kaugemale pelgast kontrolli piiramisest teisele levitamise üle. Esiteks aitas põhimõtte sõnastuse piiritlemine koopia omandi üleandmisega kindlustada õiguse omaja ainukontrolli juba levitatud koopiade edasise laenutamise üle. Teiseks oli põhimõtte territoriaalne määratlemine oluline rahvusvahelise kaubanduse jaoks autoriõiguse territoriaalse iseloomu tõttu. Kuigi katsed ühtlustada põhimõtet rahvusvahelisel tasandil on läbi kukkunud peamiselt lõppemise territoriaalset ulatust puudutavate erimeelsuste tõttu, toimus ELi õigustiku raames siiski ulatuslik ühtlustamine. Õiguste ammendumise põhimõtte e ühtlustamine ELi õigustikus teenis kaht erinevat ent siiski omavahel seotud eesmärki: kõrvaldada autoriõiguste territoriaalse olemuse negatiivne mõju kaupade vabale liikumisele siseturul ja piirata (täiesti) ühtlustatud levitamise õiguse ulatust ELi teiseses õiguses.

Euroopa Liidu Kohtu praktika edasisel arengul oli kaks olulist tagajärge õiguste ammendumise põhimõtte funktsioonile, milleks oli piirata kontrolli levitamise üle materiaalse levitamise kontsepti raames. Esiteks on kitsas tähenduses lõppemise (sätestatud infoühiskonna direktiivis) kõik-või-mitte-midagi lähenemisviis ilmselgelt kahtluse alla seatud. See tõstatab küsimuse õiguste ammendumise põhimõttele tuginevalt loa olemasolu nõudest vabastatud toimingute ulatusest, ent annab ka mõista, et põhimõtte ei anna enam selget pilti õiguste omaja õigustatud ootustest. Teiseks näitavad levitamise õiguse ja üldsusele edastamise õiguse areng, et kitsas tähenduses õiguste ammendumise põhimõtte sätestamine infoühiskonna direktiivis tingis järjepidevama ja süsteemsema lähenemisviisi teisest levitamistoimingute üle lubatava kontrolli suhtes. Infoühiskonna direktiivi artikli 4 lõike 2 kõik-või-mitte-midagi lähenemisviis muutis põhimõtte laiendamise levitamise õigusest kaugemale ebasoovitavaks teose kasutamise olude muutumise valguses.

Mõned kaasaja raskused, millega õiguste ammendumise põhimõtte silmitsi seisab, saaks ületada kuulutades, et norm puudutab vaid füüsiliste koopiade edasimüüki tingimusel, et koopiaid pole oluliselt muudetud. Ent ELi tasandil, arvestades infoühiskonna direktiiviga ette nähtud täielikku ühtlustamist ja Euroopa Liidu Kohtu soovimatust asju liikmesriikide otsustada jätta, võib see veelgi

kahjustada õiguskindlust. Kuigi õiguste ammendumise põhimõte tekkis tööpoolest selleks, et vabastada koopiote teisene levitamine õiguste omaja kontrolli alt, on see ELi õigustikus muudetud levitamise õiguse ainsaks võimalikuks piiranguks ja lisaks on see teravas vastuolus muude levitamisega seotud õigustega, eeskätt üldsusele edastamise õigusega.

Lõppemise tähenduse taandamist selle algsele kõrvaltähendusele toetatakse tingimusel, et lõppemist käsitletakse seejärel ka selle laiemas tähenduses, mille kohaselt see (osaliselt) piirab ainukontrolli levitamise üle pärast esmase loa andmist, mis võimaldab õiguse omajal saada sobivat tasu. Nagu üldsusele edastamise õigust käsitlevas 5. peatükis öeldud, viitab õigustiku areng sellele, et suur erinevus õiguste vahel, mis lähtub kitsas tähenduses õiguste ammendumise põhimõtte kohaldamise ebaselgest keelamisest, on mõjutanud järjepideva lähenemisviisi kujunemist vajaduse suhtes piirata või laiendada ainukontrolli teisele levitamise üle teose kasutamise olude muutumise tingimustes.

Kuigi Euroopa Liidu Kohus on uuesti määratlenud lähenemisviisi materiaalsele levitamisele, võttes lisaks loa olemasolule arvesse ka kasutamise asjaolusid nagu 3. peatükist nähtub, ei anna direktiivides ühtlustatud 1 õiguste ammendumise põhimõtte enam selgelt pilti asjaomastest kaalutlustest. Ehkki see mängis otsustavat rolli levitamise õigusega antava kontrolli ulatuse kujundamisel direktiivide raames ühtlustamise ajal, on hilisem asjade käik selle rolli pisendanud. Ehkki Euroopa Liidu Kohus on laiendanud põhimõtet mõnedele näiliselt funktsionaalselt samaväärsetele digitaalse levitamise toimingutele, on vaieldav, kas tegu on arenguga õiges suunas või hoopis tegelikkuse moonutamisega ja õiguskindluse vähendamisega. Kuigi tulemus, milleks on teisele levitamise vabastamine õiguste omaja loast, võib olla mõistlik, siis selle saavutamise meetmed kaugeltki nii mõistlikud pole. Arvestades ELi õigusest tuleneva õiguste ammendumise põhimõtte tähenduse hägustumist, siis kõik-või-mitte-midagi lähenemisviisi kasutamine ei aita just kuigipalju kaasa autoriõiguse raamistiku kohendamisele nii, et see vastaks tänapäevastele vajadustele.

5. Üldsusele edastamise õigus teose materiaalse ja immateriaalse levitamise vahel

Viiendas peatükis uuritakse üldsusele edastamise õiguse arengut ELi õigustikus materiaalse ja immateriaalse levitamise õiguste ühtlustamise alustamisel lähtunud erisuste valguses. Kui üldsusele edastamise õigus, nii nagu seda praegusel ajal tuntakse, on mõjutatud nii tehnoloogia arengust kui ka seadusandja legitiimsest soovist tagada õiguste omaja kontroll teose kasutamise üle, siis laiapõhjalise ja tervet rida erinevaid analoog- ja digitaalse levitamise toiminguid hõlmava õiguse tunnustamine on ilmselgelt muutnud ainukontrolli andmise vajaduse tasakaalustamise autoriõiguste kaitse muude alustega liiga raskeks.

Koos 2., 3. ja 4. peatükiga püütakse selles peatükis vastata esimesele üldisele uurimisküsimusele selle kohta, *kuidas kajastab levitamise õiguse ja üldsusele edastamise õiguse areng Euroopa Liidu õigustikus materiaalse ja immateriaalse*

levitamise erinevust. Täpsemalt antakse peatüks edasi arusaam üldsusele edastamise õiguse ühtlustamise alustest, sh selle teravast vastandamisest levitamise õigusega. Järgmiseks illustreeritakse, kuidas on nende õiguste vahelist jäika eristust seatud kahtluse alla hilisema arengu käigus, käsitledes alltoodud lisaküsimusi:

Mis asjaolud on mõjutanud üldsusele edastamise õiguse ühtlustamise vajadust ja vormi ELi õigustiku raames?

Milline oli materiaalse ja immateriaalse levitamise eristamine ELi teiseses õiguses ja mis olid seda suunavad jõud?

Kas ja kuidas kajastab üldsusele edastamise õiguse areng ELi autoriõiguse raamistikus immateriaalset levitamist?

Peatükk on jagatud kolmeks osaks. Osas 5.1 kirjeldatakse üldsusele edastamise õiguse ühtlustamise tausta ELi autoriõiguse õigustiku raames. Selles käsitletakse edastusõiguste arengut esitamiseõigusest kuni WIPO autoriõiguse lepingu raames ühtlustatud edastamisõiguse laia kontseptini. Osas 5.2 keskendutakse üldsusele edastamise õiguse ühtlustamisele ELi teiseses õiguses ja sellele, kuidas Euroopa Liidu Kohus on õiguse piire kujundanud. Kuigi rõhk on infoühiskonna direktiivis ühtlustatud õigusel, käsitletakse selles osas ka teatud muid muutusi, mis on teise suhtluse seisukohast olulised, nt satelliit- ja kaabellevi direktiiviga reguleeritud taasedastamist. Osas 5.3 hinnatakse üldsusele edastamise õiguse ulatuse arengut õigustiku raames ja seda, kuidas selle koht on muutunud materiaalse-immateriaalse levitamise võrrandis. Selles osas keskendutakse kolmele peamisele aspektile: vaikumise kontrolli andmine igasuguse hilisema edastamise üle; asjaolud, mis viitavad kontrolli ulatuse piiramisele pärast esmaedastamist; õigusvastasele edastamisele tuginevate teiste toimingute positsioon.

Üldsusele edastamise õiguse ühtlustamise taustast nähtub ELi teiseses õiguses, et ühtlustamise eesmärgid ulatusid kaugemale pelgalt WIPO autoriõiguse lepingust tulenevate kohustuste rakendamisest. Oluline, et mitte öelda peamine põhjus, miks kõnealune õigus sätestati infoühiskonna direktiivis, seisnes arusaamas, et kättesaadavaks tegemise õigus peaks sisaldama kujunemisjärgus digitaalsete ülekandelahenduste abil tehtavaid toiminguid. Asetades kättesaadavaks tegemise õiguse laima edastamise õiguse kohaldamisalasse, milles ühtlustatakse peaaegu kõik teose edastamise vormid, mis ei hõlma füüsilisi koopiaid, allutati faktiliselt samale kohtlemisele olemuslikult sootuks erinevad toimingud. Arvestades üldsusele edastamise õiguse täielikku ühtlustamist infoühiskonna direktiivi raames ja seda, et puudub mehhanism üksikjuhtumitel kaalul olevate asjaolude arvesse võtmiseks, kujunes välja kõike muud kui järjekindel raamistik.

Laia õiguse eelis võib seisneda selles, et seda on lihtne kohandada vajadusele kaitsta teoste uusi kasutusviise. Siiski peavad sellega kaasnema mehhanismid, mis sobivad selle ulatuse piiritlemiseks vastavalt konkreetsetele asjaoludele, et vältida asjaomaste huvide ühekülget teenimist. Infoühiskonna direktiivi artikli 3 lõige 3 näiliselt välistab üldpiiri seadmise üldsusele edastamise õigusele, sest see õigus on olemuslikult immateriaalne. Kõnealuse sätte analüüs näitab, et selle alu-

sed on väga ebamäärased. Kaasaegsest vaatenurgast on küsimus lahendatud ennatlikult ja see on teinud autoriõiguse raamistiku kohendamise digiajastule keeruliseks. Euroopa Liidu Kohtu praktika üldsusele edastamise õiguse tõlgendamise vallas infoühiskonna direktiivi raames üha kasvab ja lõviosa sellest puudutab teisest edastamist, mis mingil viisil tugineb algselt lubatud edastamisele. Lisaks tugineb kohtu mõttekäik peamiselt majanduslikele kaalutlustele, ulatudes õiguse teostamisest ja sobivast tasust kuni turule sekkumiseni ja teisese edastuse tulundusliku olemuse asjakohasusele. Kuigi vaekausil olevate huvide kaalumist on eelistatud iga asjaomase toiminguga allutamisele ainuõigusele, on seda ka palju kritiseeritud seadusandja tahtega vastuollu mineku ja sisuliselt õiguskindluse pärssimise tõttu.

Peatükis sisalduv analüüs näitab, et on toimunud nihe üldsusele edastamise õiguse alla paigutuva levitamise edasisele kontrollile piiride seadmiselt piirangute lubamisele teatud juhtudel. Ehkki õigus sätestati tuginedes immateriaalsuse eeldusele, mis ei võimaldanud piirata kontrolli teisese levitamise üle, on see osutunud ebasobivaks selgitamisel, miks teatud kasutusviisid tuleks ainukontrollile allutada või sellest vabastada. Paljusid erinevaid, sh nii tuntud kui ka sootuks ootamatuid kasutusviise sisaldava õiguse puhul osutus kehtestatud jäikus teisese levitamise käsitlemisel vastunäidustatuks.

Rõhutatakse kolme peamist tähelepanekut. Esiteks – hoolimata infoühiskonna direktiivi artikli 3 lõike 3 järgast ent samas ka mitmetimõistetavast sõnastusest – võimaldab Euroopa Liidu Kohtu praktika vabastada ainukontrollist individuaalseid teisese levitamise toiminguid. On märkimisväärne, et artikli 3 lõiget 3 on mainitud vaid kohtuasjades, mis puudutavad loata esmast edastamist või toiminguid, mis küll tuginesid lubatud edastamisele, ent kujutasid endast erilist kasutusviisi. Teiseks, kuna direktiivi artikli 3 lõike 1 sõnastusest ei saa tuletada esmase ja teisese edastamise erinevust, näib kohtupraktika liikuvat selle tekitamise suunas. Kolmandaks on kohtu põhjendused teisese levitamise toimingute paigutamisele üldsusele edastamise õiguse alla eelkõige majanduslikud. Jättes kõrvale vastuolu artikli 3 lõike 3 ja kohtupraktika vahel, läheneb kohus paindlikult sellele, kas konkreetse sekkumise ennetamine on üldsusele edastamise õiguse alusel lubatav. Sellest hoolimata on aluseesmärgid jäänud juhtumite käsitlemisel läbipaistmatuks ja normatiivsed suunised piirduvad ebamääraselt sõnastatud kriteeriumitega – sellel on paratamatult erinev mõju eri liiki edastamisele.

Seetõttu näitab analüüs, et kohtu hinnangu alused kohtuasjades, mis puudutasid üldsusele edastamise õigust sarnanevad kaalutlustega, mida kasutati materiaalse levitamise õigusi puudutavates kohtuasjades. Nendeks on teose kasutamisse sekkumine teisese levitamise toimingute puhul põhiturule või potentsiaalsele turule sekkumise teel. See tõstatab küsimuse, kas ELi autoriõiguse raamistik tervikuna saaks mingit kasu nende õiguste suhtes võetud lähenemisviiside ühtlustamisest kõnealust asjade käiku silmas pidades. Peatüki järeldused haakuvad 3. ja 4. peatükiga, et tuua välja esmasele edastamisele järgneva ainukontrolli ulatuse määratlemise raamistik, mis ühendab lähenemisviisid materiaalsele ja immateriaalsele levitamisele, selle asemel, et tugineda infoühiskonna direktiivi artikli 3 lõikele 3.

6. Ainukontrolli ulatuse määratlemine teisele levitamise üle Euroopa Liidu autoriõiguse õigustiku arengu valguses

Kuendas peatükis, mis tugineb 2.–5. peatükis tehtud tähelepanekutele, antakse vastus kahele üldisele uurimisküsimusele. Kuigi peatüki põhieesmärk on tuua välja normatiivne raamistik teisele üldküsimusele vastamiseks materiaalse ja immateriaalse levitamise suhtes võetud lähenemisviiside ühtlustamise alusel, esitatakse selles ka taustateavet, tehes kokkuvõtteid 3.–5. peatükis sisalduva analüüsi käigus tehtud tähelepanekutest. Seega enne esimesele üldküsimusele vastamist ja normatiivse raamistiku poole pöördumist uuritakse, mis on materiaalse ja immateriaalse levitamise õiguste lähenemisviiside ühtlustamise näidustused õigustiku raames?

Seejärel – selleks, et tuua välja normatiivne raamistik hindamaks, kas teisele levitamise allutamine õiguste omaja kontrollile on õigustiku arengut silmas pidades põhjendatud – uuritakse, mis üldtingimusi saab kasutada süstematiseerimaks lähenemisviisi teisele edastamise üle teostatava kontrolli ulatusele. Loetletud kriteeriume vastandatakse autoriõiguse soodustavatele alustele ja ELi õiguses sisalduvatele ainuõiguste eesmärkidele, et rühmitada need põhi- ja kõrvalkaalutlusteks. Lõpetuseks asetab peatükk väljatöötatud normatiivse raamistiku ELi teisele õiguse konteksti, et uurida praeguse regulatiivse raamistiku puudujääke teisele levitamise hindamiseks väljatöötatud kriteeriumite kohaldamisel.

Lisaks väitekirja kahele üldküsimusele vastamisel käsitletakse 6. peatükis lõppjäreldusi toetavaid lisaküsimusi:

Mis on materiaalse ja immateriaalse levitamise õiguste lähenemisviiside ühtlustamise näidustused ELi õigustiku raames?

Milliseid üldkriteeriume saab ELi õigustiku alusel kasutada selleks, et süstematiseerida kontrolli teisele edastamise üle, tuginedes algele edastamisloale? Kuidas on need kriteeriumid seotud soodustavate alustega ja kaitse-eesmärkidega õigustiku raames?

Millised on peamised puudujäägid ELi kehtivas autoriõiguste raamistikus väljatöötatud kriteeriumite omaksvõtul?

Peatükk jaguneb kaheks osaks. Osas 6.1 esitatakse väljatöötatud normatiivse raamistiku taust. Selleks tehakse kokkuvõtte õigustiku arengust, mis viitab lähenemisviiside ühtlustumisele ja esitatakse järeldused seoses esimese üldise uurimisküsimusega. Osas 6.2 antakse ülevaade õigustiku raames teisele edastamise õiguste omaja ainukontrollile allutamise põhjenduste hindamise normatiivsest raamistikust. Selles osas tuuakse välja peamised ja täiendavad hindamiskriteeriumid ja autoriõiguse olemasoleva raamistiku puudus nende kohaldamisel ning esitatakse lõppjäreldused teise üldise uurimisküsimuse kohta.

Väitekirja esimene üldine uurimisküsimus on järgmine: *kuidas kajastab levitamise õiguse ja üldsusele edastamise õiguse areng Euroopa Liidu õigustikus materiaalse ja immateriaalse levitamise õiguste erinevust?* Nagu 2. peatükis leiti, ei ole materiaalne ja immateriaalne levitamise selgepiirilised erinevad mõisted,

vaid pigem õiguste süstematiseerimise viis, mida on kasutatud selgitamaks, miks saab teatud laadi levitamise (nt levitamisõigus) puhul üldiselt piirata õiguste ulatust esimese kasutamisega, samas kui teist laadi levitamise (nt edastusõigused) seda teha ei saa. Peatükkidest 3–5 ilmneb, et direktiivides tehtud seadusandlikud valikud sõltuvad paljudest erinevatest kaalutlustest, mitte pelgalt sellest, kui ulatusliku kontrolli iga erinev õigus teisele levitamise üle annab. Ühtlustamine tugines direktiivides muu hulgas Euroopa Liidu Kohtu eelnevale praktikale, milles uuriti riigisisese autoriõiguse vastuolu kaupade vaba liikumisega, mis nõudis lõppemise teatud aspektide ühtlustamist, et vältida siseturu moonutamist. Arvestades levitamisõiguste suurt ulatust teatud liikmesriikide õiguses, tuli hoolitseda selle eest, et ELi teiseses õiguses ühtlustatud õiguste ammendumise põhimõte ei läheks vastuollu õiguste omaja kontrolliga selliste levitamismuudatuste üle nagu laenuvõtte. Arvestades asjaolu, et sätete sõnastus teenib korraga mitut eesmärki, on tähtis sõneluda teiseses õiguse sätestatud õiguste täpsest sõnastusest välja eeldused, millest lähtuti ainuõiguse ulatuse kavandamisel.

Kui 1990. aastatel ei pruukinud kahe laialdaselt tunnustatud õiguse ühtlustamine ühiselt aktsepteeritud eristusele tuginedes tunduda suure sammuna, siis tänases vaatepunktis näib see küll selline. Nagu 2. peatükis märgitud, on autoriõigus tihedalt seotud tehnoloogia arenguga ja hulga erinevate levitamiskanalite teke iseäranis seoses interneti kasutuselevõtuga on autoriõigusele probleeme valmistanud. See on mõjutanud materiaalse ja immateriaalse levitamise eristamist. Olukorras, kus levitamine kolib üha enam veebikeskkonda ja peaks toimuma immateriaalses vormis, ei saa väita, et mitte ükski levitamismudel ei suuda tagada piisavat tasu, arvestades muu hulgas tehnoloogilisi meetmeid, mis annavad laialdase kontrolli juurdepääsu ja teose tarbimise üle.

Hoolimata levitamisõiguse ja üldsusele edastamise õiguse rangest eristamisest infoühiskonna direktiivis, on Euroopa Liidu Kohtu praktika nende kahe õiguse piirjooni tublisti hägustanud. Euroopa Liidu Kohtu praktikas on ühtlustatud palju autoriõiguse aspekte ja üldsusele edastamise õigus on pälvinud üsna suurt tähelepanu. Selle olulisest annab tunnistust näiteks Norra autoriõigus, kus pärast ligikaudu kolmekümne aasta pikkust ühtlustamist võeti laia kättesaadavaks tegemise õiguse raames kasutusele eraldi üldsusele edastamise kategooria, et tagada sujuvam kooskõla ELi õigustikuga.

Õiguste arengut ELi õigustiku raames analüüsiti peatükkides 3–5 selle eristamise vaatenurgast, mis tehti ühtlustamise alustamisel ning analüüsi tulemusel selgus, et praktikas seda eristust rangelt ei järgitud. Euroopa Liidu Kohtu praktika näitab palju nüansirohkemat pilti õigustest tuleneva kontrolli ulatusest, kui sätete sõnastuse põhjal võiks eeldada. Euroopa Liidu Kohus on kaldunud kaaluma laiemat pilti, mitte pelgalt keskendunud infoühiskonna direktiivi konkreetsele artiklile. Kuigi kohus on vähendanud õiguskindlust õigustikus sisalduvate kohustuste ulatust silmas pidades, on kohus toetanud paindlikku lähenemist sobiva kontrolli ulatusele lähtuvalt teose kasutamise asjaoludest.

Hoolimata kohtupraktikast, mis näiliselt suurendas paindlikkust, põhjustas infoühiskonna direktiivis sätestatud eristus ebakõlasid. Kohus peab ikkagi alus-
tama hindamist tuginedes direktiivi sõnastusele, kus artikli 3 lõige 3 on iseäranis

mitmetähenduslik. Lisaks seda artiklit kohtupraktikas peaaegu ei mainitagi. Arvestades raskusi, mis tekivad kontrolli sobiva ulatuse hindamise erisusele, mida selles peatükis käsitletakse, jõutakse järeldusele, et õiguskindluse seisukohast on väga tähtis erisus ümber mõtestada ja lähenemisviisid direktiivi raames ühtlustada. Arvestades, et lähenemisviise juba ühendatakse, oleks kohane käsitleda kolmkümmend aastat tagasi tehtud valikuid.

Väitekirja teine üldküsimus on järgmine: *kuidas saaks lähenemisviise materiaalsele ja immateriaalsele levitamisele ühtlustada nii, et määratleda ainuõiguse ulatus selliselt, et puudub vajadus saada luba igaks teose üldsusele edastamiseks?*

Küsimusele vastatakse 6. peatüki teises osas, kus tuuakse välja materiaalse ja immateriaalse levitamise lähenemisviiside ühtlustamise raamistik. Eesmärk on pakkuda välja kriteeriumite loetelu, mille põhjal hinnata, kas ainuõiguse omaja kontrolli laiendamine teisele edastamisele on algselt lubatud levitamisele tuginedes põhjendatud, arvestades õigustiku arengut, mida analüüsitakse peatükkides 2–5.

Seejärel visandatakse 6. peatükis raamistik, mis tugineb tähelepanekule, et levitamiseõiguse ja üldsusele edastamise õiguse areng kajastab palju nüansirohkemat suhet kui väljakujunenud eristus materiaalse ja immateriaalse levitamise õiguste vahel, kui seda võiks ELi teisele õiguse põhjal eeldada. Kui teisene õigus näib allutavat teisesed edastustoimingud ainukontrollile ja vabastab teisesed levitamistoimingud kontrollist, siis Euroopa Liidu Kohtu praktika ei ole selles küsimuses kaugeltki mitte järjekindel. Nagu järeldati vastuses esimesele üldisele uurimisküsimusele, siis – võttes arvesse teose kasutamise olude muutmist ja õiguskindluse tähtsust ainuõigustega antava kontrolli ulatusele – oleks materiaalse ja immateriaalse levitamise suhtes võetud lähenemisviiside ühtlustamine loogiline ja tervitatav samm.

Pakutud normatiivne raamistik tugineb materiaalse ja immateriaalse levitamise õiguste erisusele. Teisisõnu on selle lähtepunktiks teiseste levitamistoimingute eristamine esmastest toimingutest. Kui viimased paigutuvad alati ainuõiguse alla ja nõuavad õiguste omaja luba, siis esimesed vabastamine ainukontrollist võib olla põhjendatud olukorras, kus õiguste omaja on kasutanud ainuõigust oma parimates huvides. Erinevalt teisesele ELi õigusest, mis mõningatel juhtudel vabastab teisesele toimingud loa olemasolu nõudest pelgalt selle põhjal, et esmaseks levitamiseks oli luba olemas ja teistel juhtudel lihtsalt ei võimalda piirangut, kätkeb välja pakutud raamistik endas nüansirohkemat lähenemisviisi.

Raamistik koosneb kuuest elemendist, mis on tuletatud õigustiku arengu analüüsist ja jagatud põhi- ja lisakriteeriumiteks. Põhielemendid on vajalikud selleks, et tagada õiguste omaja kontroll teose iga kasutamise üle ja rajanevad eeldusel, et levitamise esimese lubamise kaudu on õiguste omajale antud võimalus tasu saada. Lisakaalutlused aga näivad minevat kaugemale kaitse soodustavatest alustest ja neid tuleks võtta arvesse tingimusel, et ainuõiguste eesmärgid õigustiku alusel on selged.

Teisele levitamise hindamiseks on tuvastatud kolm põhielementi. Need kriteeriumid on esmatahtsad selleks, et hinnata, kas teisele levitamise toimingute

allutamine õiguste omaja ainukontrollile on põhjendatud, sest need peaksid tagama õiguste omaja kontrolli iga esmase edastamise üle. Need kolm elementi on õiguse kasutamine teose esmase edastamise teel, selle eest saadud tasu asjakohasus ja teise toiminguga mõju teose kasutamisele.

Lisakriteeriumid koosnevad samuti kolmest elemendist, mis täiendavad esmasid kriteeriume. Kuna need kriteeriumid ei lähtu eeldusest, et õiguse funktsiooni on võimalik täita selle esimese kasutamise teel, tuleb kriteeriumite kasutamisel selleks, et hinnata, kas teise levitamise toimingute allutamine õiguste omaja ainukontrollile on põhjendatud, esitada ka ainuõiguste täpsustatud eesmärgid õigustiku raames. Need kolm lisakaalutlust on: uue võimaliku auditooriumini jõudmine algselt lubatud piirkonnas; konkurents, iseäranis esmaturul; saamata jäänud tulu ja kolmanda isiku tekitatud tulu.

Kuigi normatiivse raamistiku esile toomine selleks, et ühtlustada lähenemisviisid materiaalse ja immateriaalse levitamise õigustele õigustiku raames, ei käsitle küsimust, kuidas peaks raamistikku praktikas rakendama, rõhutatakse ELi teise õiguse olemasoleva süsteemi puuduseid esile toodud kriteeriumite määratlemisel. Esimene puudus seisneb üldsusele edastamise õiguse suures ulatuses, milles puuduvad mehhanismid vajadusel ulatuse piiramiseks või liikmesriikidele selleks piisava manööverdamisruumi jätmiseks. Lai õigus koostoimes infoühiskonna direktiivi artikli 3 lõikega 3 mitmetimõistetava sõnastusega pärsib õiguskindlust, viidates õiguse ulatusele, mida Euroopa Liidu Kohtu praktikas ei järgita.

Kehtiva raamistiku teine puudus väljendub õiguste ammendumise põhimõttes, mis on kitsas tähenduses sätestatud infoühiskonna direktiivi artikli 4 lõikes 2. Tegu näib olevat aegunud sättega, sest see on üsna jäik juba levitatud koopiade uute kasutusviiside suhtes. See annab tarbetult mõista, et tegu on ainsa juhtumiga, mille puhul ainuõiguste ulatuse piiramine teise edastuse üle on lubatud. Füüsiliste koopiade maailmas suutis säte tulla toime nii õiguse ulatuse piiramise funktsiooniga kui ka teose lõppkasutaja-poolse tarbimise üle teostatava kontrolli piiramise funktsiooniga, kuid digitaalses maailmas on need kaks eraldi ülesannet.

Seega teisele üldküsimusele vastamiseks loetletakse kriteeriumid, millest lähtuvalt kontrollitakse seda, kas teise edastamise toimingute allutamine õiguste omaja ainukontrollile on põhjendatud. Nende kriteeriumite aluseks on näidustused, mis viitavad järeldusele, et ainuõiguse funktsiooni saab täita iga kasutuse lubamise teel, mis teeb võimalikuks muude asjaomaste huvide arvesse võtmise. Sel põhjusel on tähtis, et hindamisel arvestatakse mitte üksnes algse edastamise lubamist, vaid ka teise edastamise võimalikku mõju teose kasutamisele. Kokkuvõttes on väljatõetatud kriteeriumite eesmärgiks pakkuda alternatiivset lähenemisviisi kontrollimaks, kas õigustega antava ainukontrolli ulatus on sobiv, kui ühtlustada materiaalse ja immateriaalse levitamise õigused ELi õigustiku arengut silmas pidades.

Kokkuvõte

Autoriõigus ei suuda kuidagi pidada sammu viimase kolme kümnendi jooksul toimunud tehnoloogia arenguga, eelkõige arvukate kasutusvõimalustega, mida

pakub internet. Alguses, pärast veebikeskkonna esiletõusu, kaitsti õiguste omaja kontrolli digitaalse levitamise üle rahvusvahelisel, riiklikul ja ELi tasandil. Täna kujutab üldsusele edastamise lai õigus, mis hõlmab teose tellimuspõhiseid kättesaadavaks tegemise toiminguid, üht kõige olulisemat muutust autoriõiguse ajaloos. Muusika digitaalsete koopiade edastamine interneti teel või filmide voogedastus ei olnud 1990. aastate alguses veel võimalik. Sellest hoolimata pöörati vähe tähelepanu võimalikele vajadustele tulevikus kärpida laia õiguse ulatust. Sisuliselt hõlmab üldsusele edastamise õigus arvukalt erinevaid (samaväärseid) kasutusviise, millele varem kohaldati erinevaid ainuõigusi, millel oli erinev ulatus ja millele kehtisid erinevad piirangud.

Nagu ELi autoriõiguse õigustikus sisalduvate peamiste levitamisega seotud õiguste arengu analüüs on näidanud, põhjustas edastamise lai õigus koostoiimes ELi teises õiguses sisalduva erandite loeteluga olukorra, kus kaasaegsete levitamisolude hindamiseks pole kuigipalju paindlikkust. Arvestades üha kõikehõlmavamast ühtlustamist ELi õigustiku raames, on asjade käik piiranud liikmesriikide vabadust oma lahendused ise välja töötada ja loometöö soodustamise kõrval ise autoriõiguse eesmärkide saavutamisele kaasa aidata.

Väitekirjades keskendub sellele, kui oluline oli materiaalse ja immateriaalse levitamise eristamine veebikeskkonna algusajal, et õigustada üldiste piiride seadmata jätmist üldsusele edastamise õiguse ulatusele ELi õigustikus. Väitekirjas uuriti, kuidas eristamise aluse eeldus mõjutas peamiste levitamisega seotud õiguste ühtlustamist ELi teisesse õiguse raames ja kas õigustiku areng ikka veel toetab seda eristamist.

Analüüsi põhjal saab teha kolm põhijäreldust. Esiteks, arvestades erinevaid toiminguid, mis kuuluvad üldsusele edastamise laia õiguse alla, on tähtis eristada esmaseid ja teiseseid edastamistoiminguid. Kui esmased toimingud on hõlmatud ainuõigusega ja nõuavad luba (v.a juhul, kui need on vabastatud erandi või piirangu alusel), peaks teisese edastamise suhtes kohaldatava kontrolli ulatus sõltuma juhtumi asjaoludest ja asjaomastest huvidest. Selleks, et võtta arvesse muude isikute huve kui õiguse omaja huvid, on oluline eristada juhtumeid, kus ülekaaluka avaliku huvi kontrollimiseks on rohkem ruumi, arvestades asjaolu, et õiguse omajale anti võimalus kasutada ainuõigust oma parimates huvides.

Teine järeldus on, et lähenemisviisid materiaalse ja immateriaalse levitamise õigustele tuleks õigustikus ühtlustada, soovitatavalt nii õigusloome kui ka kohtupraktika tasandil. Ühtlustamise alguses aluseks võetud eristus ei teeni enam ühtki praktilist eesmärki ja hägustab tegelikkust seeläbi, et pakub välja ettemääratud positsiooni sobiva kontrolli ulatuse suhtes varasemalt käepärase eristuse põhjal. Materiaalse ja immateriaalse levitamise õiguste suhtes võetud lähenemisviiside ühtlustamise tähtsust kinnitab ka ELi ühtlustamise keeruline roll, arvestades liikmesriikide võimet luua paindlik ja samas etteaimatav raamistik riigisisises õiguses.

Kolmas järeldus väljendub pakutud põhi- ja lisakriteeriumite nimekirja näol, mis on mõeldud kontrollimaks, kas teisese edastamise toimingute allutamine õiguste omaja ainukontrollile on põhjendatud, pidades silmas toimunud arengut ja ülaltoodud järeldusi. Kriteeriumid tulenevad muu hulgas Euroopa Liidu Kohtu

praktikas tehtud tähelepanekutest, ent lisakriteeriumite kohaldamisega peab kaasnema ELi autoriõiguse õigustiku eesmärkide täpsustamine, sest need võivad põhjendamatult eelistada õiguste omajate huve avaliku huvi arvel, olgugi, et õiguste omaja teostas kontrolli esmase suhtluse üle enda parimates huvides.

Väitekirjas tehtud tähelepanekud võiksid pakkuda huvi autoriõiguse valdkonna seadusandjatele ja poliitikakujundajatele. Analüüsi tulemused esitavad argumente kaalumaks piiride kehtestamist ainuõiguste ulatusele ja nende joondamist vastavalt sellele, mis on vajalik loovuse ja tööde kasutamise soodustamiseks. Väitekirjas välja toodud normatiivne raamistik loetleb asjaolud, mis näitavad, et õiguse soodustav funktsioon on täidetud. Seega võib raamistik olla kasulik selleks, et mahutada ära vastandlikud huvid, mida teose teisene levitamine hõlmab (nt tarbijakaitse või konkurents). Esile toodud põhikriteeriumite puhul võib ainuõiguste soodustava funktsiooni lugeda täidetuks, mistõttu muude eesmärkide poole püüdlemiseks on rohkem ruumi.

Väitekirjas tehakse järeldusi sooviga ühtlustada erinevate õiguste suhtes võetud lähenemisviisid ühtse majanduslikult põhjendatud kriteeriumite abil, mis peaksid jääma sama asjakohaseks ka teose kasutamise olude muutumise korral. Vajadus ainuõiguste ulatuse suhtes paindliku lähenemisviisi järele, iseäranis seoses teisese edastamisega, üha suureneb, sest uued tehnoloogiad pakuvad detailsemat kontrolli teose edastamise olude ja tarbimise üle. Lisaks rõhutavad laia ainuõiguse võimalikud negatiivsed tagajärjed vajadust leida tasakaal autoriõiguste kaitse vajaduse ja avalike huvide teenimise vahel.

Täiendavad uuringud on soovitatavad, eelkõige seoses välja toodud normatiivse raamistiku kõrvalelementidega. Need elemendid nõuavad täiendavat analüüsi, sest need paiknevad väljaspool autoriõiguse edendamise motivaatoreid, millele väitekirja analüüs tugineb. Eelkõige teisese levitamise üle ainukontrolli andmise tagajärg nõuab hinnangut, mis peab silmas konkurentsi ja tarbijakaitset. Lisaks oleks levitamisõiguste sobiva ulatuse analüüsil abi toest, mida saavad pakkuda teiste õiguste (nt reprodutseerimise õiguse) kohaste piiride kohta tehtud uurimused.

Püüdes süstematiseerida õigustiku arengut, näitas väitekirja, et Euroopa Liidu Kohtu kasutatavates kaalutlustes on vähe uut peale asjaolu, et nende kasutamine ei ole ELi teiseses õiguses sõnaselgelt ette nähtud. Kohtu püüd paindlikkuse poole on mõistetav, arvestades tohutuid muutusi, mida direktiivide väljatöötamise ajal oli võimatu ette näha. Ent nüüd, kus need on ilmsed, on aeg küps ühtlustamise algusajal tehtud valikute revideerimiseks ja õiguskindluse taastamiseks nii, et see teeniks õiguste kaitse huve, seejuures asjaomaseid huve põhjendamatult soosimata.

Kokkuvõtte tõlge eesti keelde: Taivo Liivak

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List of publications

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English	Highly proficient
Swedish	Highly proficient
Norwegian	Good understanding
Russian	Good command
Estonian	Elementary

Projects in progress

PRG124 “Protection of consumer rights in the Digital Single Market – contractual aspects (1.01.2018–31.12.2021)”, Karin Sein, University of Tartu, Faculty of Social Sciences, School of Law.

ELULOOKIRJELDUS

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Hariduskäik

2016–2020 Tartu Ülikool, õigusteaduskond, infotehnoloogiaõigus, doktoriõpe
2014–2016 Tallinna Tehnikaülikool, tehnoloogiaõigus, magistriõpe
2012–2013 Lvovi Ivan Franko nimeline Ülikool, rahvusvaheline õigus, magistriõpe
2010–2011 Axevalla folkhögskola, Euroopa õpingud, vahetusüliõpilane
2008–2012 Lvovi Ivan Franko nimeline Ülikool, rahvusvaheline õigus, bakalaureuseõpe

Teadustegevus väljaspool Eestit

03.01.2019–29.03.2019 Külalistedur, Max-Planck-Institut für Innovation und Wettbewerb, Saksamaa
08.10.2018–09.11.2018 Külalistedur, Oslo Ülikool, Norra
01.11.2017–31.05.2018 Külalistedur, Max-Planck-Institut für Innovation und Wettbewerb, Saksamaa
01.06.2017–31.07.2017 Külalistedur, Stockholmi Ülikool, Rootsi
01.02.2017–30.04.2017 Külalistedur, Infoõiguse Instituut (IViR), Madalmaade Kuningriik

Töökogemus

01.09.2017–31.08.2019 Infotehnoloogiaõiguse nooremteadur, Tartu Ülikool
01.03.2014–31.08.2014 Itera ASA, lepinguspetsialist
2012–2014 Vahejuhtumite, probleemide ja muudatuste haldur, EVERY AB
2011–2012 IT-toe insener, EVERY AB

Teadusvaldkonnad

Intellektuaalomandiõigus, autoriõigus

Publikatsioonid

1. Oprysk, L. (2019). “Digital” Exhaustion and the EU (Digital) Single Market. In Synodinou T., Jougoux Ph., Markou Ch., Prastitou Th. (toim) *EU Internet Law in The Digital Era*. Springer.

2. Oprysk, L. (2019). The CJEU Judgment in Ranks and Vasilevics: You Can Buy a Used License, but Will a Copy Follow? In Holm C. (toim) *Secure Digitalisation. Nordic Yearbook of Law and Informatics 2016–2018* (lk 77–82). Poseidon Förlag AB.
3. Oprysk, L., Matulevičius, R., Kelli, A. (2017). Development of a Secondary Market for E-books: the Case of Amazon. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 8(2), 128–138.
4. Oprysk, L. (2016). The Forthcoming General Data Protection Regulation in the EU: Higher Compliance Costs Might Slow Down Small and Medium-sized Enterprises' Adoption of Infrastructure as a Service. *Juridica International*, 24, 23–31.

Keelteoskus

Ukraina keel	emakeel
Inglise keel	väga hea
Rootsi keel	väga hea
Norra keel	rahuldav
Vene keel	hea
Eesti keel	algtase

Käimasolevad projektid

PRG124 “Tarbijate õiguste kaitse digitaalses ühistus – lepinguõiguslikud aspektid (1.01.2018–31.12.2021)”, Karin Sein, Tartu Ülikool, Sotsiaalteaduste valdkond, õigusteaduskond.

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