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CHRISTOPHE GEIGER* / BERND JUSTIN JÜTTE**

Copyright as an Access Right: Concretizing Positive Obligations for Rightholders to Ensure the Exercise of User Rights

The legal frameworks that govern access to information are essential for safeguarding a sustainable, creative ecosystem. Institutions, such as libraries, research organizations, educational and other cultural heritage institutions, are gateways to diverse collections of scientific production, media and other cultural artefacts. Enabling access to creative works requires careful balancing of the interest of creators, producers of information, publishers and users of that information. While copyright law has traditionally recognized that rightholders enjoy exclusive rights, courts have only recently emphasized that users of works must also enjoy rights, which better reflects that copyright is based on a social contract with reciprocal obligations. This study explores what positive obligations must be imposed on rightholders as a consequence of the rights users enjoy under copyright law. Although specific access-enabling mechanisms already exist in EU copyright law, they are often not properly implemented or lack efficient enforcement tools. For that purpose, certain exceptions and limitations must be made mandatory, prohibitions on contractual override must apply horizontally, privileged institutions should enjoy enforceable rights to obtain copies on reasonable terms, and the existing 'lending' right must become a 'right to lend'. Supporting these substantive changes is the proposal for a new governance structure for the EU copyright framework through the establishment of an independent EU regulatory body. It is only through a blend of changes that copyright can serve society and that a sound ecosystem for creators and creativity is set up making the EU fit for the knowledge economy.

I. Introduction

Digitization has created a myriad of new opportunities to interact with a wide variety of content. The ease and speed of digital transmissions enable users to engage with information in creative and innovative ways, and emerging technologies, such as artificial intelligence (AI), have created unforeseen opportunities to work with copyrighted material. At the same time, accessing information for such purposes has seen an increase in speed, variety and diversity. Through these different ways to retrieve works, (digital) libraries and other repositories for knowledge, culture and entertainment content benefit users by providing access to vast amounts of information. These new platforms – broadly understood – have changed how users access and consume material in digital formats and are also essential sources for scientific research. In this context, copyright is an important legal framework that regulates the dissemination of information in a digital environment.

In the process of adapting copyright to the information society, rightholders have been granted powerful tools, in the form of exclusive rights, which enable them to control the use of protected subject matter. For example, rightholders can determine whether, or under which conditions, users may access protected subject matter, and tailor offers for specific user groups. The tools themselves are neutral, but rightholders can use them to fence off and segment access channels. In addition, these rights are reinforced by a diverse set of legal and technological enforcement mechanisms. As a consequence, the shift from analogue to digital across the entire range of education, research and cultural activities has enabled rightholders to exercise stronger control over the use of their assets.

As a result of these powerful control tools, navigating the legal rules that determine the conditions for accessing and reusing information has become more difficult for both individual and institutional users.[1] First, the interplay of technology and law has become increasingly complex. While the purchase of a physical book or a DVD

* Professor of law and Director of the Innovation Law and Ethics Observatory (ILEO) at the Luiss Guido Carli University in Rome, Italy.

** Assistant Professor in Intellectual Property Law, University College Dublin, Sutherland School of Law (Ireland), Chief Researcher at Vytautas Kavolis Institute, Vytautas Magnus University (Lithuania), and Visiting Professor at Luiss Guido Carli University in Rome, Italy.

1 See Kacper F Szkalej, *Copyright in the Age of Access to Legal Digital Content* (Uppsala University 2021) 27: 'in the digital environment simple acts that pertain to access to legal content involve a much more complicated set of legal circumstances and chain of events that in various ways involve copyright law and increases the dependency on copyright limitations'.

was essentially governed by a contract of sales, accessing content nowadays requires navigating license terms on top of technological restrictions on the use of that content. Second, digitization has led to a – at least partial, but significant – displacement of analogue media by digital media meaning the choice of how to access information has been largely narrowed down to 'digital by default'.

The implications of the shift from analogue to digital for users' ability to access information are significant and threaten to undermine the purpose of copyright. While copyright uses exclusive rights granted to rightholders as a mechanism to achieve a specific purpose, restricting access to information is not in itself the purpose of copyright.[2] On the contrary, copyright derives its *raison d'être* from its enabling function, which is to incentivize and enable creativity and innovation through access to creative works.[3] Ensuring that the general public enjoys access to information is therefore one of copyright's main tenets. Examining existing copyright rules through an 'access lens' can provide new perspectives on how copyright can better realize its purpose.[4] This perspective reveals a systematic problem of copyright law, namely that it offers an access control rather than an access-enabling framework.

In this study, we develop the argument that realizing copyright as a right that enables access to foster and promote creativity and innovation creates positive obligations for rightholders. These obligations require rightholders to grant users access to works and protected subject matter in cases in which users struggle to obtain or properly use material. This may be due to technological or legal restrictions imposed – through various means – by rightholders in the exercise of their exclusive rights. Imposing positive obligations on rightholders will mitigate the negative effects of digitization on access to protected works and subject matter. Put differently, copyright must not be understood as a right only for rightholders to control copying, but also as a right for users to access works. And, in the same way that rightholders can rely on strong enforcement mechanisms to prevent reproductions, similar means of enforcement or mechanisms that enable users to realize access to protected works and subject matter should be implemented in copyright law. While 'access' is a broader issue within copyright law, and indeed is touched by other areas of the law, this study proposes that specific privileges must be granted to institutions that function as gateways to information, such as libraries, educational institutions and similar entities. Clarifications of existing rules are necessary to reshape copyright as a right to obtain access, as are reasonable legislative adjustments to the current legal framework.

Copyright as an access right (section II.)[5] is rooted in an understanding of limitations and exceptions as mechanisms that define permitted uses which serve the purpose of copyright law. The emerging notion of user rights (section III.) provides the normative foundation to require more and better enforcement mechanisms. While the EU copyright acquis foresees certain mechanisms that enable access to subject matter in specific cases to enable the exercise of exceptions (section IV.), further clarifications and changes to existing copyright law are necessary to avoid rightholders exercising their exclusive rights to prevent access for specific purposes (section V.). This study concludes that access requires better and more balanced enforcement mechanisms for users' rights, as well as the introduction of a new mandatory right to e-lend. These modifications of copyright law are derived from constitutional imperatives, including fundamental rights, and are necessary to enable copyright law to function as an access enabling legal framework.

II. Copyright as an access right

Copyright law serves an essential social function.[6] Not only is it utilitarian in purpose by incentivizing the creation of works of artistic and scientific nature, it is also utilitarian in the sense that these productions should be used to further create and produce works that serve the advancement of 'the useful arts and sciences'. This function is also grounded in fundamental rights. Several international human rights documents expressly refer to the rights of authors in the context of cultural participation and the enjoyment of scientific progress.[7] Therefore, the cultural, economic and social imperatives of copyright law must be interpreted and applied to the effect that copyright law positively reinforces activities that foster the development of intellectual, cultural and technological progress. To a large extent, attaching intellectual

2 Alexander Peukert, 'Intellectual Property as an end in itself?' (2011) 33 European Intellectual Property Review 67; Christophe Geiger, 'Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights' in Gustavo Ghidini and Valeria Falce (eds), *Reforming Intellectual Property Law* (Edward Elgar 2022). See in this spirit the work of Abraham Drassinower, *What's Wrong with Copying?* (Harvard University Press 2015), who develops a theory of copyright as a system of communication and speech. See also, inspired by Drassinower, Elena Izyumenko, 'A Freedom of Expression Perspective on IP Law' (PhD thesis, University of Strasbourg 2020).

3 Christophe Geiger, 'Copyright as an access right: Securing cultural participation through the protection of creators' interests' in Rebecca Giblin and Kimberlee Weatherall (eds), *What if we could reimagine copyright?* (ANU Press 2017) 74-75. See also more generally Caterina Sganga, 'Right to Culture and Copyright: Participation and Access' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015); Lea Shaver and Caterina Sganga, 'The Right to Take Part in Cultural Life: On Copyright and Human Rights' (2010) 27 Wisconsin International Law Journal 637.

4 Christophe Geiger, *Droit d'auteur et droit du public à l'information, approche de droit comparé* (Litec 2004); Christophe Geiger, 'Author's Right, Copyright and the Public's Right to Information: A Complex Relationship' in Fiona Macmillan (ed), *New Directions in Copyright Law* (Edward Elgar Publishing 2007).

5 For the purposes of this study, but also as a general normative orientation, access right is understood not as a right to control access, but, to the contrary, to obtain access in ways that serve the *ratio* of copyright law. See in this sense and with further references: Geiger, 'Copyright as an access right' (n 3) 76.

6 Christophe Geiger, 'The Social Function of Intellectual Property Rights, Or how Ethics can Influence the Shape and Use of IP law' in Graeme B Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (Edward Elgar Publishing 2013) 153.

7 art 27 UDHR, art 15(1) ICSECR. See eg Klaus D Beiter, 'Where Have All the Scientific and Academic Freedoms Gone? And What Is 'Adequate for Science'? The Right to Enjoy the Benefits of Scientific Progress and Its Applications' (2019) 52 Israel Law Review 233 and Christophe Geiger and Bernd Justin Jütte, 'Conceptualizing a 'Right to Research' and its Implications for Copyright Law. An International and European Perspective' (2023) 38 American University International Law Review 1, 8 ff (with further references); Christophe Geiger, 'Taking the right to culture seriously: time to rethink copyright law' in Christophe Geiger (ed), *Intellectual Property and Access to Science and Culture: Convergence or Conflict?*' CEIPI/ ICTSD publication series on 'Global Perspectives and Challenges for the Intellectual Property System', Issue No 3 (CEIPI/ ICTSD 2016).

property rights – including copyright – to fundamental rights guarantees respect for the social function of these rights.[8]

The evolution of digital technologies has led to shifts in the normative structure of copyright and in public perception.[9] Rightholders have been equipped with an arsenal of legal and technological tools which enable them to control the various modes of exploitation and to maximize the economic benefits from their exclusive rights. These include exclusive rights, direct and indirect enforcement tools, and tools that add layers of protection to protected subject matter that can disable unlawful as well as lawful uses.[10] As a result, the dematerialization of cultural, artistic and scientific consumption has almost ironically made access to information in certain contexts expensive, burdensome and something close to a privilege. This is particularly true in relation to subject matter controlled by gatekeepers, such as publishers, who obtain the power to tailor access and use conditions through licensing and technical protection means. Moving against this trend requires re-establishing 'access' as a right within copyright's normative structure and to equip privileged users with tools as equally potent as those granted to rightholders.

1. Access as a normative foundation for limitations and exceptions

The recognition that copyright law has a social purpose and is grounded in human rights obligations arising at European and international level should, in principle, lead the legislature to ensure that copyright rules actually reflect the access rationales expressed in the relevant human rights instruments. It is for the national and European legislatures to draw the contours of copyright by imposing appropriate criteria that take account of the nature and *social function* of copyright, whilst also ensuring that authors participate fairly in the exploitation of their works.[11] The legislature is thus bound by an obligation to balance and to respect the fundamental rights of both rightholders and users when determining the contours of exclusive rights and permitted uses.[12]

An access rationale is firmly built on those fundamental rights that promote access to and the use of information, in accordance with the purpose of copyright to act as a vehicle of free expression and creativity. Therefore, the right to freedom of expression, which guarantees the right to receive and impart information, is the bedrock of an access-oriented copyright. The freedom of the arts and sciences, and the right to education, support and specify access scenarios. These rights – in their European and international dimensions – guarantee the participation in social and cultural life, also and especially for structurally disadvantaged groups and people with disabilities,[13] and are aimed at ensuring that individuals and communities can benefit from scientific and technological progress.[14] In addition, at least to a certain extent, the right to conduct a business[15] can provide arguments for access to information. Data and information are crucial for innovation and economic development in the knowledge economy.[16]

Attaching intellectual property rights to fundamental rights thus guarantees respect for the social function of the former.[17] In practical terms, the obligation to protect competing fundamental rights and values when implementing intellectual property legislation obliges the legislator and the judiciary to implement *legal obligations for rightholders*.[18] Philosophically speaking, this is required by the idea of the social contract that forms the basis of copyright's social function. This social contract, like any other contract, is based on reciprocity and can impose obligations on all parties. Within this social contract, exceptions and limitations, among other balancing mechanisms, are the reflection of competing fundamental rights and access rationales in copyright law: rightholders

8 Christophe Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (2004) 35 IIC 268.

9 Geiger, 'Copyright as an access right' (n 3) 74-75.

10 These tools, however, can also be used constructively to create a user-access experience that can be tailored to the respective needs and preferences of different user groups, see Szkalej, *Copyright in the Age of Access to Legal Digital Content* (n 1) 155-56.

11 German Constitutional Court, 7 July 1971, [1972] GRUR 481, (1972) 3 IIC 394 – *Schoolbook* (note by W Rumphorst).

12 Christophe Geiger, 'Reconceptualizing the Constitutional Dimension of Intellectual Property – An Update' in Paul Torremans (ed), *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2020); Christophe Geiger, 'Copyright's Fundamental Rights Dimension at EU Level' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing 2009); Christophe Geiger, 'Intellectual "Property" after the Treaty of Lisbon: towards a different approach in the new European legal order?' (2010) 32 European Intellectual Property Review 255; Christophe Geiger, 'Fundamental Rights as Common Principles of European (and International) Intellectual Property Law' in Ansgar Ohly (ed), *Common Principles of European Intellectual Property Law* (Mohr Siebeck 2012).

13 Non-discrimination – on the basis of disability, could for example require access to specific format copies; in the EU, subject to a 'lawful access' requirement, a broad exception is provided to enable blind, visually impaired or otherwise print-disabled persons to access suitable format copies (art 3, Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ('Marrakesh'-Directive [2017] OJ L242/6-13); on this directive see Delia Ferri, 'The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled in the European Union: Reflecting on Its Implementation and Gauging Its Impact from a Disability Perspective' (2024) 55 IIC 89); see from a human rights a perspective: Sanya Samtani, 'New Frontiers in Intellectual Property and Human Rights: Copyright Discrimination' [2024] GRUR International 189.

14 With regard to people with disabilities, this flows directly from art 26 EUCFR which states that '[t]he Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. A 2023 study highlighted the limited availability of appropriate format copies for people with print disabilities, see Delia Ferri and Giulia Rossello, 'The Role of the Marrakesh Treaty in Supporting Access to Printed Material for People Who Are Blind or Visually Impaired: A Critical Discussion of the Results of an Empirical Study Conducted in Six European Countries' (2023) 3 Disabilities 147. This non-discrimination principle is enclosed in art 10 of the TFEU and art 21 of the Charter of Fundamental Rights of the EU. For a more substantive discussion generally on the right to receiver information, see Geiger and Jütte, 'Conceptualizing a 'Right to Research' and its Implications for Copyright Law. An International and European Perspective' (n 7) 41 ff.

15 As expressly recognized under art 16 EUCFR.

16 ibid 55.

17 Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (n 8) 268.

18 For details on the legal consequences of the 'constitutionalization' of IP for legislators, see Christophe Geiger, '"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 International Review of Intellectual Property and Competition 371, 397 ff.

cannot control certain uses explicitly permitted by copyright law through exceptions and limitations. Formulated positively, they incur an obligation to guarantee that certain uses permitted by copyright law are *de facto* possible and not constrained by their actions.

2. The implementation of the access-rationale (rights vs exceptions)

When understood as an access 'right', copyright should be designed and structured to facilitate access. The 'rights' granted (initially) to authors are incentives for the initial production of works. Their exclusive nature – i.e. the right to exclude others from using protected subject matter without permission – allows rightholders to disable access to works or to segment certain exploitation markets. The effect is that users are often restricted in accessing works due to the spillover effects of formally legitimate exercises of exclusive rights. Access by default changes into access as an exception.

Instead of addressing the issue, modern copyright law has tended to enable rightholders to restrict access beyond what they should be legitimately entitled to. As a general rule, outside the public domain, users of protected materials require authorization from the rightholder to use protected material. While consuming (i.e. analogue reading or otherwise processing) protected material is not *per se* protected by an exclusive right, accessing such material has copyright implications, particularly in a digital environment.

Therefore, a robust system of copyright exceptions to the various exclusive rights is of crucial importance in order to ensure access for specific, socially beneficial purposes. However, exceptions and limitations are governed by the so-called *three-step test* which makes the unauthorized use of protected works, including access or access modalities, subject to three restrictive conditions.[19]

As a result of an overly restrictive understanding of the three-step test[20] and the implementation model of exceptions chosen in the EU[21] – a list system as opposed to the arguably more flexible US fair use doctrine – instances in which users can avail of protected material without prior authorization are inherently limited. This legal framework is prone to create barriers for creative and innovative uses, especially for emerging uses such as text and data mining (TDM), which makes prior authorization the default, and a right to access (and use) the exception.[22]

a) Persisting disharmonization

One major critique of the existing system of exceptions and limitations is their optional nature, which creates disharmonization across the Member States of the EU.[23] Furthermore, not all exceptions apply to all relevant exclusive rights. For example, the new text and data mining exceptions and – depending on the relevant national implementation – also the research exception of Art. 5(3)(a) InfoSoc Directive,[24] apply to acts of reproductions but not expressly to the exclusive rights (e.g. communication to the public) that would enable the sharing of protected works for the same or related necessary purposes. While a full picture of the problems of disharmonization of exceptions, as opposed to the full harmonization of exclusive rights, cannot be developed fully here,[25] suffice it to say that the differences in national copyright regimes across the EU Member States create a high level of legal uncertainty. As a result, at least those exceptions that constitute users' rights (see *infra*) should be implemented by all Member States in a consistent manner.

Moreover, even when properly implemented, exceptions contain conditions to their exercise that leave a level of (often unjustified) control with rightholders.

b) Lawful access requirements

The exercise of some exceptions is subject to the condition that users have lawful access to the respective work or subject matter. Although this is not a textual requirement for most of the exceptions contained in the InfoSoc Directive,[26] the Directive states that cultural participation 'must not be achieved by sacrificing strict protection of

19 See originally in art 9(2) Berne Convention, art 13 TRIPS Agreement and art 5(5) InfoSoc Directive. There is however a large degree of uncertainty regarding the understanding of the criteria set forth by the three-step test. As a large portion of more recent scholarship on the issue has demonstrated, these criteria are far less restrictive than traditionally presented and offer room to manoeuvre when it comes to implementing access friendly copyright reforms. More detailed with further references see Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29 American University International Law Review 581.

20 See Geiger, 'Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law?' (n 8) 268.

21 See P Bernt Hugenholtz, 'Why the Copyright Directive is unimportant, and possibly invalid' (2000) 22 European Intellectual Property Review 499, 500-10; Lucie MCR Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) 1 Journal of Intellectual Property, Information Technology and E-Commerce Law 55.

22 Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?' (2018) 49 International Review of Intellectual Property and Competition 814.

23 Christophe Geiger, Franciska Schönherr and Bernd Justin Jütte, 'Limitations to Copyright in the Digital Age, Safeguards for User's Rights, Creativity and Author's Remuneration Interests' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (2nd edn, Edward Elgar publishing 2023).

24 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10-19 (InfoSoc Directive).

25 Detailed on this issue see Christophe Geiger and Franciska Schönherr, 'Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law, Challenges and Perspectives* (Kluwer Law International 2012).

26 The only exception or limitation that expressly requires that the work must have been lawfully made available to the public is that for the purposes of quotation for uses such as criticism or review (art 5(3)(d) InfoSoc Directive). This only requires that the work is generally available, i.e. has been published, not necessarily that a specific user enjoys lawful access. Within the InfoSoc Directive, art 5(1) further requires a 'lawful use' for the applicability of the applicability of the exception for temporary reproduction. Exceptions in other directives refer to a 'lawful user of a database', eg art 6(1) of the Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20-28) or 'lawful acquirer' in art 5 Software Directive (Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16-22) or also a 'person having a right to use a copy of a computer program' (art 5(3)) or a 'licensee or another person having a right to use a copy of a program' (art 6(1)).

rights or by tolerating illegal forms of distribution of counterfeited pirated works.'[27] The CDSM Directive[28] makes the two new TDM exceptions subject to an express lawfulness requirement and the exception for the preservation of cultural heritage to a requirement that the works to be preserved by reproduction must be permanently present in their collections.

However, for the exceptions and limitations contained in Art. 5(2) and (3) of the InfoSoc Directive that do not expressly require some form of lawful access, certain scholars have considered that such a requirement seems to be implied.[29] Therefore, according to these opinions, the lawful access requirement found in newer or more sectoral exceptions might apply more broadly as a horizontal requirement. The CJEU has ruled that, at least for the private copying exception under Art. 5(2)(b), lawfulness of access is an implied requirement in that reproductions made under that exception are only subject to a claim for remuneration if the source copy is lawful.[30]

This would have the consequence that the exercise of a specific exception, unless specifically permitted, cannot be based on a copy of a protected work or subject matter that has been put in circulation without the consent of the rightholder. If not the exercise of the limitation or exception itself, then the acquisition of works or subject matter in preparation of that exercise would likely be considered unlawful and lead to potential liability.

It is essential that this uncertainty is addressed.[31] The requirement of lawful access is not specific and does not explain how lawful access can be gained, or through which means. Determining the lawfulness of a source can sometimes be very problematic, particularly in a digital environment. Analogous to the CJEU's *GS Media* ruling, the lawfulness of an act (e.g. hyperlinking) might even be dependent on subjective factors.[32] In this case, the CJEU excluded liability for not-for-profit uses as long as the user, in setting a hyperlink, is unaware of the unlawfulness of the source. The Court set out its argument to exclude certain uses from liability specifically on the potentially detrimental effects on the exercise of the right to freedom of expression.[33]

In a similar scenario, a particular problem for the automated collection and aggregation of information arises. The privileged uses for TDM under Arts. 3 and 4 CDSM Directive require lawful access as a condition for the exercise of these exceptions. More problematically, the automated gathering of information does not permit the assessment of every single source as to its protection under copyright law or indeed its lawfulness.[34]

While lawful access as a precondition for the exercise of user rights is already problematic,[35] the uncertain nature of the concept highlights the importance of enabling lawful access through an obligation imposed on rightholders.[36] This would also pre-empt another threat to the access of essential information, namely the fact that rightholders can determine who may lawfully access it and who may not. For example, 'the "lawful access" requirement of the EU exception for text and data mining may turn the exception into a decision by rightholders to allow machine learning in the context of their decision to allow access.'[37]

As a consequence of this uncertainty, lawful access can therefore not be an absolute requirement, whether it is expressly written into the law or not. If it is a requirement, it must be subject to proportionate derogations in certain cases. This assessment is best left to the application stage of an exception, in which the consideration of fundamental rights' – and user rights – will have ample space. It must take into consideration the interests of the rightholder as well as those of the user, specifically those rooted in fundamental rights, including the right to freedom of expression and the access-function of copyright law in general. However, an access-rationale, taken seriously, can also mean that exceptions must be given effect through an ancillary right to lawful access if they could otherwise not be effectively exercised.[38]

27 Recital 22 InfoSoc Directive.

28 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92-125.

29 cf Tatiana-Eleni Synodinou, 'Lawfulness for Users in European Copyright Law: Acquis and Perspectives' (2019) 10 Journal of Intellectual Property, Information Technology and E-Commerce Law 20, 27 ff.

30 Case C-435/12 *ACI Adam* ECLI:EU:C:2014:254, para 40 and Case C-572/13 *Hewlett-Packard Belgium* ECLI:EU:C:2015:750, para 60; see João Pedro Quintais, *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law* (Kluwer Law International 2017) 220 ff.

31 See further Martin Kretschmer, Thomas Margoni and Tatiana Eleni Synodinou, 'The Paradox of Lawful Access', Presentation at the Annual Conference of the European Copyright Society on the topic 'Conflict and Trust in the European Copyright System', Goethe University, Frankfurt am Main, 24 May 2024.

32 Case C-160/15 *GS Media* ECLI:EU:C:2016:644, paras 46 ff.

33 ibid paras 44-45.

34 Thomas Margoni and Martin Kretschmer, 'A Deeper Look into EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology' [2022] GRUR International 685, 597; Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU' in Conceptión Saiz Garcia and Raquel Evangelia Llorca (eds), *Propiedad intelectual y mercado único digital europeo* (Tirant lo blanch 2019) 54.

35 Thomas Margoni, 'Saving research: Lawful access to unlawful sources under Art. 3 CDSM Directive?' (*Kluwer Copyright Blog*, 22 October 2023) <https://copyrightblog.kluweriplaw.com/2023/12/22/saving-research-lawful-access-to-unlawful-sources-under-art-3-cdsm-directive/> accessed 12 March 2024. See also in the context of the TDM exceptions, Jonathan Griffiths, Tatiana Synodinou and Raquel Xalabarder, 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 3 to 7 of Directive (EU) 2019/790 on Copyright in the Digital Single Market' [2023] GRUR International 22, 26: '"Lawful access" is a key concept in the EU TDM provisions, but is not defined in the main text of the DSMD. Member states could further clarify this concept by promoting a flexible understanding of "lawful access." An understanding of "lawful access" as necessitating a "lawful source" of copies or extractions of works and other protectable subject matter would substantially jeopardize the possibility of performing TDM activities on content available online without technical access restrictions.'

36 It has also been argued that uncertainty as to the lawfulness in a chain of uses can make the exercise of an exception unlawful, thereby creating significant uncertainty, see Synodinou, 'Lawfulness for Users in European Copyright Law' (n 29) 30.

37 Martin Kretschmer, Thomas Margoni and Pinar Oruç, 'Copyright Law and the Lifecycle of Machine Learning Models' (2024) 55 IIC 110, 111. Further, the lawfulness requirement of the TDM exception essentially subjects its application to private ordering since 'the exception can effectively be denied to certain users by a rightholder who refuses to grant "lawful access" to works or who grants such access on a conditional basis only' (European Copyright Society, 'General Opinion on the EU Copyright Reform Package' (*European Copyright Society*, 24 January 2017) <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf> accessed 14 April 2024; see also Griffiths, Synodinou and Xalabarder (n 35) 26.

38 Similar to Case C-117/13 *Eugen Ulmer* ECLI:EU:C:2014:2196, para 43. In this case the CJEU argued that the effective realization of the exception under art 5(3)(n) InfoSoc Directive would suffer 'if [publicly accessible libraries] did not have an ancillary right to digitise the works in question.'

Therefore, in other cases certain privileged exceptions cannot be subject to a lawfulness requirement to avoid private ordering.[39] Furthermore, certain exceptions should be coupled with an express or implicit obligation for the rightholder to facilitate lawful access. Some of these exceptions are examined below (in section II.3.), and the imperatives that justify the imposition of an access obligation are subsequently developed (in section V.).

3. Specific access-based exceptions

A number of exceptions are particularly important to guarantee that copyright functions as an enabling framework for creativity and innovation. In three specific areas, recent legislative interventions have also highlighted the importance of the exercise of these permitted uses in a digital environment. In 2019, the EU legislator underlined the challenges and opportunities of digital technologies and the legal uncertainty flowing from existing copyright norms.[40] It introduced three new mandatory exceptions that remedied some of the shortcomings of older copyright rules, while introducing new mechanisms to ensure that the exercise of these new limitations and exceptions is respected.

The exceptions introduced by the CDSM Directive relate to uses that are highly reflective of copyright's social function. Articles 3 and 4 introduce two separate exceptions for the purposes of text and data mining, namely Art. 5, which is an exception for digital and cross-border teaching, and Art. 6, which permits reproductions for the preservation of cultural heritage. Two of the exceptions or limitations came with some form of reservation, or potential reservations, that limit the scope of the new exceptions. Their introduction demonstrates the need to readjust the balance of interest to copyright law as a reaction to changes in technology. Even more indicative of this need to readjust copyright in the light of other developments (e.g. new business models) is Art. 7, which protects the exercise of exceptions against contravening contractual arrangements and reiterates the applicability of Art. 6(4) InfoSoc Directive to these new exceptions.[41]

Strong access-rationales are common to all newly introduced exceptions and limitations. Their introduction – as mandatory measures – highlights the need to facilitate access to and conservation of protected works for specific purposes that reflect the social function of copyright. Their mandatory nature provides legal certainty in a borderless internal market, especially for digital uses. However, three of the four exceptions or limitations are subject to a lawfulness requirement that is either included expressly in the formulations of the norms or is implied by other conditions. In addition, all new permitted uses, with the exception of Art. 4, have specific institutions as their beneficiaries. These are institutions whose role is to provide access to knowledge repositories and to conserve information in their collections.

a) Teaching and learning

The new exception or limitation for the use of works and other subject matter in digital and cross-border teaching activities supplements the existing exception for the illustration for teaching in Art. 5(3)(a) InfoSoc Directive. The new rules apply in a strict institutional context in that the acts privileged under Art. 5 CDSM Directive can only be exercised under the responsibility of educational establishments.[42] A requirement of lawful access is not expressly included in the provision. The recitals qualify that most uses under the exception should be limited to parts or extracts because such uses 'should not substitute for the purchase of materials primarily intended for the educational market.'[43] For other works, this implies that full reproductions, communication to the public or making available are permitted if circumstances require. This will certainly be the case for individual images, but also the full performance of audio-visual works (including feature films) would be justified in many cases. Furthermore, the relevant recital underlines that 'the exception or limitation should be understood to cover the specific accessibility needs of persons with a disability in the context of illustration for teaching.'[44]

The exception is subject to a carve-out that prevents the application of the exception or limitation to specific material provided that suitable licenses for the uses of such material are available. Such licenses must take account 'of the needs of educational establishments and of different levels of education.'[45] These licenses cannot be more restrictive than if the use were exercised under a 'pure' exception or limitation. The suitability condition also requires that the licenses are easily available so that educational establishments can make use of them where required. In order to make these licensing arrangements effective and to prevent their abuse, licenses offered under a carve-out to the exception must also be affordable and be suitable for the needs and requirements of educational establishments in their economic dimension.[46] The use of the carve-out cannot have the result of making material required for teaching purposes inaccessible due to real or transaction costs. Anticipating at least one of the aspects, it is suggested that mandatory collective rights management or extended collective licensing could play an important role in the administration of what is

39 European Copyright Society, 'General Opinion on the EU Copyright Reform Package' (n 37) 4.

40 Recital 5 CDSM Directive: 'In the fields of research, innovation, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the existing Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 96/9/EC, 2001/29/EC and 2009/24/EC in those fields could negatively impact the functioning of the internal market.'

41 art 6(4) InfoSoc Directive reads: 'Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.'

42 art 5(1)(a) CDSM Directive.

43 Recital 21 CDSM Directive.

44 Recital 21 CDSM Directive.

45 Recital 23 CDSM Directive.

46 Bernd Justin Jütte, 'Uneducating copyright: Member States can choose between "full legal certainty" and patchworked licensing schemes for digital and cross-border teaching' (2019) 41 EIPR 669, 671.

effectively a remunerated use-right.[47] A scenario under which rightholders could freely negotiate higher prices and thereby prevent the effectiveness of the exception is already excluded by the *ratio* of Art. 5.

The idea of an access-enabling mechanism is therefore already contained in the carve-out solution, which some Member States have opted for.[48] The requirement of suitability implies that rightholders must enable access in format and to conditions that make access realizable and affordable for educational establishments.

b) Research

Articles 3 and 4 CDSM Directive introduce new exceptions for TDM. While Art. 3 is restricted to non-commercial TDM for scientific research, Art. 4 permits the mining of text and data for other purposes, subject to a potential reservation by the relevant rightholder. As for the exception of Art. 5 CDSM Directive, Art. 3 supplements existing exceptions, for example that in Art. 5(3)(a) InfoSoc Directive and in Arts. 6(2)(b) and 9(b) of the Database Directive.[49] To increase legal certainty, the new exceptions are more specifically aimed at TDM and are mandatory. The potential reservation only applies to acts exempted, in principle, under Art. 4, that is to TDM for commercial purposes.

The distinction between Art. 3 – as an unconditional right – and Art. 4 – as a right subject to private ordering – highlights the importance and desirability of the acts privileged under Art. 3. The potential reservation of Art. 4 can be criticized as a measure that potentially prevents access to protected works and subject matter for innovative and creative uses and, as a result, created an uneven playing field vis-à-vis other jurisdictions.[50] But the absence of an opt-out under Art. 3 must be understood to imply an obligation for rightholders not to interfere with an access right.

The potential restrictive effect of technological protection measures (TPMs) is addressed by permitting rightholders to employ such measures subject to a strict proportionality requirement.[51] Moreover, Art. 7(2) extends the application of Art. 6(4) InfoSoc Directive to uses covered by both exceptions, thereby encouraging rightholders to take measures to enable the use of works and other subject matter protected by TPMs.

c) Cultural preservation

Article 6 CDSM Directive adds a specific provision for the preservation of cultural heritage. This exception is subject only to the requirement that the permitted acts of reproduction are performed by specific institutional actors (cultural heritage institutions) and that the works or subject matter reproduced under the exception are permanently in the collection of the cultural heritage institution. Reproductions under the exception can be made in any format or medium.

While the exception only permits the making of reproductions for conservation purposes, the subsequent use of conserving copies can enable the exercise of other exceptions or limitations.[52] Accessibility of protected works and other subject matter in specific formats will enable the exercise of exceptions and limitations for private use, research and other uses that potentially enable creative and innovative processes.

Moreover, read in connection with Art. 8 CDSM Directive, the conservation efforts by cultural heritage institutions are an essential step in making out-of-commerce-works accessible to the general public. Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject matter in their permanent collections should remain subject to the authorization of rightholders, unless permitted by other exceptions or limitations provided for in Union law.[53]

Considering the broad definition of a cultural heritage institution, meaning a 'publicly accessible library or museum, an archive or a film or audio heritage institution',[54] such institutions play an important role in creating access routes to protected works and subject matter in accessible formats for a variety of uses. More importantly, and this is particularly true for libraries, they provide lawful access to a wider user base, including marginalized groups which would otherwise not have access to a broad spectrum of information, knowledge and cultural artifacts.[55]

Such institutions therefore constitute important repositories of information and enable cultural participation in a lawful manner. In this role they are indispensable for the exercise of user rights in relation to published works and other subject matter, which justifies a broad and enabling interpretation and further design of copyright rules to the effect that these institutions can properly and effectively fulfil their public interest mission.

III. Exceptions and limitations as user rights

The two poles of copyright – exclusive rights and exceptions and limitations – must at least stand on an equal

47 See more generally on this issue Christophe Geiger, Franciska Schönherr and Bernd Justin Jütte, 'Limitation-based remuneration rights as a compromise between access and remuneration interests in copyright law: what role for collective rights management?' in Daniel Gervais and João Pedro Quintais (eds), *Collective Management of Copyright and Related Rights* (4th edn, Kluwer Law International) (forthcoming 2024); see also Quintais, *Copyright in the Age of Online Access* (n 30).

48 Giulia Priora, Bernd Justin Jütte and Péter Mezei, 'Copyright and Digital Teaching Exceptions in the EU: Legislative Developments and Implementation Models of Art. 5 CDSM Directive' (2022) 53 IIC 543, 552 ff.

49 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20-28 (Database Directive).

50 Griffiths, Synodinou and Xalabarder (n 35) 22, 29; Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'Crafting a Text and Data Mining Exception for Machine Learning and Big Data in the Digital Single Market' in Xavier Seuba, Christophe Geiger and Julien Pénin (eds), *Intellectual Property and Digital Trade in the Age of Artificial Intelligence and Big Data*, CEIPI/ ICTSD Series on 'Global Perspectives and Challenges for the Intellectual Property System' Vol 5 (CEIPI/ICTSD 2018, 107). This is particularly discussed in the context of training AI systems with copyright protected works in the context of generative AI, see on the issue Christophe Geiger, 'Elaborating a Human Rights friendly Copyright Framework for Generative AI' (2024) 55 IIC 1129 ff.

51 art 3(3) CDSM Directive.

52 Recital 27 CDSM Directive.

53 ibid.

54 art 2(3) CDSM Directive.

55 cf Séverine Dusollier, 'A manifesto for an e-lending limitation in copyright' (2014) 5 Journal of Intellectual Property, Information Technology and E-Commerce Law 213, para 85.

footing for copyright to function as a normative framework that promotes access.[56] Historically, however, exclusive rights were considered the norm, and exceptions and limitations the 'exception' to a general rule. At EU level this translated into a paradigm that gave a broad interpretation to the various exclusive rights while adopting a narrow one for exceptions and limitations.[57] The formulation of copyright limitations and exceptions in the InfoSoc Directive itself suggested that they are somewhat 'weaker' than exclusive rights: while the latter were mandatory provisions that Member States had to adopt, the majority of exceptions were optional and Member States were under no obligation to adopt all or any of them. Recital 9 moreover states that '[a]ny harmonisation of copyright and related rights must take as a basis a *high level of protection*, since such rights are crucial to intellectual creation.' (emphasis added)

No such firm statement exists in the InfoSoc Directive in relation to copyright exceptions or other mechanisms that support access to protected subject matter for specific purposes. The high-level of protection paradigm is only mitigated by references to a fair balance between the interests of users and rightholders, which is to be realized by an interpretation of the applicable rules with a view to 'achieving the objectives of certain exceptions or limitations'.[58] The granting of stronger enforceable rights to users had first been proposed by academic commentators.[59] In fact, precursors of user rights can be found in EU legislation. The relevant substantive rules – for the InfoSoc Directive in particular, Art. 6 on the prohibition of circumventing TPMs – include a form of ex-post protection for the interest of users. However, this is arguably not very efficient since Member States have largely failed to provide effective mechanisms to protect users against the broad application of TPMs[60] (see under 4.1.).

The development of a notion of users' rights has progressed more forcefully at the level of the judiciary. While the CJEU had still assumed a restrictive position and argued for a narrow or strict interpretation of exceptions and limitations in its earlier case law,[61] it has slowly moved away from this very imbalanced position. When establishing its paradigm of narrow interpretation, the CJEU had still argued that the general authorization requirement for the exercise of exclusive rights constituted a general rule, while exceptions and limitations constituted a derogation from that rule.[62] Later, the Court gradually moved away from a narrow interpretation. As a first step, it qualified that an interpretation of a copyright exception 'must enable the effectiveness of the exception' considering the purpose for which the exception has been established.[63]

The notion of user rights as a stronger position was subsequently created based on the imperative of a balance[64] and out of the link between exceptions and limitations and fundamental rights. In consideration of the serving function of copyright exceptions as enablers of freedom of expression and other fundamental rights, the CJEU underlined that 'exceptions or limitations do *themselves confer rights* on the users of works or of other subject matter' (emphasis added). This requires an interpretation of exceptions and limitations that ensures their effectiveness, which has to be interpreted to the effect that their exercise aims at ensuring the exercise of fundamental freedoms.[65] This interpretation illustrates the close link between an elevated level – to at least parity – of protection for the exercise of exceptions and limitations, certainly of those which are reflective of and rooted in fundamental rights. This must particularly be the case for exceptions that directly or indirectly enable the exercise of the right to freedom of expression as a right that protects the dissemination of information, but also the reception of and access to information.

To remove barriers to the exercise of exceptions and limitations, the CDSM Directive reiterated the protection of user rights by making certain exceptions and limitations mandatory, restating the applicability of Art. 6(4) InfoSoc Directive, and by protecting certain exceptions against contractual override. It did so particularly to ensure 'wider access to content', not only, but also in a digital environment.[66]

While users' rights have been firmly established as a concept, their effective realization lags behind. Particularly in a digital environment, rightholders can also rely on intermediaries to support them in enforcing their rights. Moreover, in specific circumstances, users can be obliged to negotiate with rightholders if the latter wish to offer a license to the respective user.[67] Even if in *UPC Telekabel Wien* the CJEU clearly advanced the idea of 'users' rights' as enforceable rights of equal value

56 See Abraham Drassinower, 'Taking User Rights Seriously' in Michael Geist (ed), *In the Public Interest: The Future of Canadian Copyright Law* (Irwin Law 2005) 479, according to which users' rights are 'absolutely integral to the innermost structure of copyright law. To take them seriously is to refuse to see them as negotiable instruments intended to serve goals external to themselves'.

57 See only CJEU, Case C-5/08 *Infopaq* ECLI:EU:C:2009:465, paras 41, 56.

58 InfoSoc Directive, recital 51.

59 Favouring the granting of positive rights to users, see eg Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact* (CUP 2005) 279; Thomas Riis and Jens Schovsbo, 'User's Rights, Reconstructing Copyright Policy on Utilitarian Grounds' (2007) 29 EIPR 1; Christophe Geiger, 'Copyright and Free Access to Information, For a Fair Balance of Interests in a Globalised World' (2006) 28 EIPR 366, 371 ff; Maurizio Borghi, 'Exceptions as users' rights? in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (Routledge 2021). In the context of technical measures, see Andrea Ottolia, 'Preserving Users' Rights in DRM: Dealing with 'Judicial Particularism' in the Information Society' (2004) 35 IIC 491.

60 Teresa Nobre, 'The Post-DSM Copyright Report: research rights' (*COMMUNIA*, 5 February 2025) <https://communia-association.org/2024/02/05/the-post-dsm-copyright-report-research-rights/> accessed 21 March 2024; see also European Commission, *Assessment of the impact of the European copyright framework on digitally supported education and training practices* (Publications Office of the European Union 2016) 62-64.

61 Case C-5/08 *Infopaq I* ECLI:EU:C:2009:465, para 56.

62 *Infopaq I* (n 61) para. 57.

63 Joined Cases C-403/08 and C-429/08 *FAPL/Murphy* ECLI:EU:C:2011:631, para 163.

64 *Eugen Ulmer* (n 38) para 31.

65 Case C-469/17 *Funke Medien NRW* ECLI:EU:C:2019:623, paras 70-71.

66 CDSM Directive, recital 3.

67 This obligation arises out of art 17(4)(a) CDSM Directive, which requires specific online platforms – so-called online content-sharing service providers (OCSSPs) – to make best effort to obtain authorization for uploads of protected works and other subject matter by their users. Since per art 17(1) OCSSPs are considered to perform the relevant acts themselves, they can be considered direct users of protected works.

to the rights of copyright holders,[68] the lack of effective mechanisms to secure enforceability of users' rights in EU copyright legislation significantly tilts the balance within copyright to the benefit of rightholders. Users are left with claims based on 'rights', but do not have the ability to realize their proper enjoyment. The detrimental effect of this imbalance is that uses which support the object and purpose of copyright, including its fundamentally social function, cannot be realized. The unacceptability of this situation led the legislator in 2019 to include a 'right to the exception' in Art. 17(9) CDSM, without however detailing how this right should be implemented at national level.[69] This calls for further interventions. Providing access as a precondition for the exercise of user rights is therefore essential in order to realize the social function of copyright as an access right through the unhindered exercise of exceptions and limitations.

IV. Realizing user rights by facilitating access

For uses which are subject to some specific exceptions or limitations, a right to obtain access to that work or subject matter in relation to which the user right can be exercised can in certain circumstances be derived directly from that exception or limitation. An interpretation of the relevant provision of EU copyright law that makes the exercise of users' rights conditional on the permission of the rightholder cannot be reconciled with the normative intention of the relevant rules and, in general, the systematic relationship between exclusive rights and user rights.

This permission-conditionality, which is rooted in an outdated traditionalist understanding of copyright law, must be countered with positively formulated obligations in the form of a right to access. Positive obligations can be derived directly from the user rights that exist in copyright law, in particular those rights that are reflective of fundamental rights, such as freedom of expression, freedom of information, artistic freedom or the fundamental right to research.[70] The existence of fundamental rights-based user *rights* creates an obligation for the legislator to provide a minimum level of protection to guarantee the effective exercise of those rights, and to avoid a reduction of their scope – even if through permitted private ordering – that would render them virtually ineffective. Therefore, copyright must implement mechanisms similar to those that it makes available to rightholders for the protection of their exclusive rights. At a minimum, 'appropriate measures'[71] must be introduced to ensure, for example, that certain institutions and user groups can obtain works or other subject matter in a usable format to pursue their core mission of providing access to culture and information.[72] This should be the case for public libraries that rely on an implementation of the public lending right pursuant to Art. 6(2) of the Rental and Lending Right Directive.[73]

User rights must be supplemented with mechanisms that help to realize their exercise. Mechanisms that encapsulate the idea that limitations and exceptions are user rights whose exercise cannot be prevented by rightholders already exist in the EU copyright *acquis*. These mechanisms have been designed to ensure that users who already have access to a work cannot be prevented from exercising exceptions or limitations. Unfortunately, the effective application of these mechanisms at national level remains inefficient, and their proper implementation into national law has so far been neglected.[74] However, they provide normative guidance for instances of a right to access that imposes positive obligations on right holders to either grant access or refrain from exercising their exclusive rights with the aim of controlling privileged uses. The obligation included in the InfoSoc Directive, for example, according to which Member States must take appropriate measures to secure the proper use of certain limitations, is nothing else but the confirmation of the existence of an access right to secure the values behind the exceptions.[75]

1. Existing mechanisms in the EU copyright acquis

EU copyright law contains mechanisms that enable the exercise of user rights. The first of this type of measure was integrated into the InfoSoc Directive even before

68 See Case C-314/12 *UPC Telekabel Wien* ECLI:EU:C:2014:192, para 57: '[I]n order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, the national procedural rules must provide a possibility for internet users *to assert their rights before the court* once the implementing measures taken by the internet service provider are known.' (emphasis added).

69 art 17(9) CDSM directive of April 2019 recognized expressly a 'Right to the exception' with procedural safeguards: 'In particular, Member States shall ensure that users have access to a court or another relevant judicial authority *to assert the use of an exception or limitation* to copyright and related rights' (emphasis added); enforceability clarifies that exceptions and limitations can no longer be seen as mere defences and that positive actions are needed to ensure the effectiveness.

70 Christophe Geiger and Bernd Justin Jütte, 'Conceptualizing a 'Right to Research' and its Implications for Copyright Law. An International and European Perspective' (n 7) 1; Christophe Geiger and Bernd Justin Jütte, 'The Right to Research as Guarantor for Sustainability, Innovation and Justice in EU Copyright Law' in Taina Pihlajarinne, Jukka Tapio Mähönen and Pratyush Nath Upreti (eds), *Intellectual Property Rights in the Post Pandemic World. An Integrated Framework of Sustainability Innovation and Global Justice* (Edward Elgar 2023) 138.

71 For rightholders, the CJEU argued that a minimum level of enforcement must be made available to ensure the effective protection of exclusive rights (Case C-414/14 *Mc Fadden* ECLI:EU:C:2016:689, para 98).

72 The concept of user rights, just like exclusive rights, cannot be exhaustive and needs to be considered as an open concept. If certain exceptions have been explicitly declared user rights because they directly reflect fundamental rights, other uses authorized by copyright law to facilitate and enable the enjoyment of fundamental rights but that have not yet been expressly considered as such by the CJEU or the legislator should also fall in this category. This is the case for institutional players performing a public interest mission of access to knowledge such as libraries or research institutions, which have a crucial role in securing the access function of copyright law. As we develop infra, access to copyrighted works does not mean that the access should be granted for free but that it should be possible under fair conditions.

73 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L376/28-35; art 1 obliges Member States to introduce an exclusive right 'to authorise or prohibit the rental and lending of originals and copies of copyright works, and other subject matter' for certain categories of authors and rightholders. However, the right can be made subject to an exception subject to art 6(1), which effectively creates a remuneration-based (non-exclusive) right.

74 Patricia Akester, 'The impact of digital rights management on freedom of expression – the first empirical assessment' (2010) 41 IIC 31, and Séverine Dusollier, 'Exceptions and technological measures in the European Copyright Directive of 2001 – An empty promise' (2003) 34 IIC 62.

75 In that sense see Christophe Geiger and Franciska Schönherr, 'The Information Society Directive' in Paul Torremans and Irini Stamatoudi, *European Copyright Law. A Commentary* (2nd edn, Edward Elgar Publishing 2021) para 11.99.

the CJEU expressly recognized certain exceptions and limitations as user rights. These measures, which are discussed in more detail below, protect users against collateral effects of TPMs, which are protected against circumvention only insofar as TPMs prevent unlawful uses.[76] The second type of measure, a general protection against contractual derogations from exceptions and limitations, was introduced expressly in 2019 by the CDSM Directive. While both are designed to ensure that users can exercise limitations or exceptions, there is a qualitative difference between them. While the provisions on TPMs acknowledge the interests of rightholders to protect their rights in a digital environment with tools that mainly aim at the prevention of unlawful uses, the prohibition against contractual derogations prevents rightholders from negating rights granted to users by statute. Specifically, the latter serves to prevent the further manifestation of existing imbalances in the statutory rules through abuses of stronger bargaining positions by rightholders or their licensees vis-à-vis users of protected works.

a) Removal of TPMs and/or obligation to provide for a TPM-free copy

Access to and use of protected works and subject matter for the purpose of exercising user rights can be thwarted by the employment of TPMs. Such measures enjoy protection by virtue of Art. 6 InfoSoc Directive, which implements Art. 11 WCT. However, Art. 6(4) InfoSoc Directive provides, at least implicitly, that rightholders can be requested to remove TPMs if their application disables the exercise of copyright exceptions and limitations, or to provide for a copy that is exempt of TPMs.[77] This has recently been reiterated in Art. 7(2) CDSM Directive in relation to the newly introduced exceptions for cultural preservation, distance teaching activities and text and data mining.

The provision does not directly oblige rightholders to remove TPMs that restrict the lawful use of works and other subject matter and it therefore falls short of constituting a concrete positive obligation that could be enforced. Instead, rightholders are encouraged to take voluntary measures to enable the exercise of certain exceptions and limitations. Amongst these are privileged uses for publicly accessible libraries, for social institutions in relation to broadcasts, for the purpose of teaching and research, and uses for the benefit of people with disabilities.[78] Article 7(2) CDSM Directive extends the effect of this provision to include the exceptions introduced by that Directive. In the absence of voluntary measures, Member States must take 'appropriate measures' to ensure that the relevant privileged uses can be performed by users. This is subject to the condition that the user enjoys lawful access to the works or subject matter which use is restricted by TPMs. However, Art. 6(4) does not specify what these measures could consist of. Arguably, it would be contrary to the States' obligations under Art. 15 ICESCR, Art. 10 ECHR and to the social function of copyright more generally if it is not assured that the beneficiaries of exceptions listed in Art. 6(4) are able to benefit from them. Whilst this specific user safeguard is well-intended, it is insufficient to ensure unhindered and effective access to protected works and other subject matter for the purpose of exercising user rights. In the absence of concrete measures at national level, Art. 6(4) does not meet the requirements of direct effect sufficiently to be relied on directly by private individuals.

b) Prohibition of contractual overridability

Restrictions to contractual overridability have recently been expressly written into certain provisions of copyright law. Article 7(1) CDSM Directive prohibits any contractual provisions contrary to the exceptions for digital and cross-border teaching activities, text and data mining performed by research institutions, and for the preservation of cultural heritage. This restriction must be understood to broadly encompass negotiated contractual provisions as well as provisions contained in general terms and conditions or similar terms that govern the rights and obligations of users of services.

The prohibition to override exceptions and limitations underlines their status as user rights,[79] which are therefore non-derogatory in nature. Since private parties cannot limit the rights granted under copyright law, their nature becomes absolute, and they themselves constitute limitations to the right granted by rightholders in the same way that exclusive rights constitute limitations to the general rule of free access to work in the public domain.

The protection against contractual override is a negative obligation for rightholders, preventing them from hindering the effective exercise of user rights. Indeed, if rightholders were able to use contractual terms to prevent users from relying on exceptions and limitations, their effectiveness would be seriously compromised. As, in addition to Art. 7(2), Art. 17(9) stipulates that certain platforms must positively inform users that the exercise

76 Case C-355/12 *Nintendo and Others* ECLI:EU:C:2014:25, para 31.

77 More generally on the difficult relationship of TPM and copyright exceptions see detailed Séverine Dusollier, *Droit d'auteur et protection des œuvres dans l'univers numérique: droits et exceptions à la lumière des dispositifs de verrouillage des œuvres* (Larcier 2005); Christophe Geiger, *Droit d'auteur et droit du public à l'information, Approche de droit compare* (Litec 2004) 376 ff; Geiger, 'Copyright and Free Access to Information' (n 59) 366; Marie-Christine Janssens, 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing 2009) 317, 334. On the delicate issue on how to accommodate the limitations with TPMs, see Christophe Geiger, 'The Answer to the Machine should not be the Machine, Safeguarding the Private Copy Exception in the Digital Environment' (2008) 30 EIPR 121; Séverine Dusollier and Caroline Ker, 'Private copy levies and technical protection of copyright: the uneasy accommodation of two conflicting logics' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar Publishing 2009) 349.

78 For reproductions for private use pursuant to art 5(2)(b), Member States may take such measures, indicating that private reproduction does not rise to the level of importance as the other privileged uses under art 6(4). However, the distinction seems arbitrary, as other important exceptions, such as parody and reporting on current events, have not been privileged under art 6(4), see Dusollier, 'Exceptions and Technological Measures' (n 74) 73.

79 More generally on the issue see Lucie Guibault, *Copyright Limitations and Contracts* (Kluwer Law International 2002) and Lucie Guibault, 'Copyright Limitations and Click-Wrap Licences: What is Becoming of the Copyright Bargain?' in Reto M Hilty and Alexander Peukert (eds), *Interessenausgleich im Urheberrecht* (Nomos 2004) 221.

of exceptions and limitation is permitted on their platforms,[80] a simultaneous contractual override would seem systematically paradoxical. The mandatory nature of certain exceptions, paired with an information requirement is indicative of an elevated status of user rights, even if the notion of user rights does not extend to all exceptions.

c) Indirect obligations to contract

An express obligation to license does not exist in EU copyright law. Some exclusive rights are limited to the extent that rightholders can only exercise these rights through collective management organizations, or rights are generally conceived as remuneration right.[81]

Obligations to license exist in other areas of intellectual property law, for example standard essential patents (once declared as such) will be subject to fair, reasonable and non-discriminatory (FRAND) licensing terms. Concrete obligations to license can arise under EU competition law pursuant to the essential facilities doctrine, which has already been applied to copyright in *Magill* and *IMS Health*.[82]

Within copyright law, an obligation to grant access does not exist expressly. However, an equivalent mechanism is contained in Art. 15 AVMSD, which obliges Member States to ensure that broadcasters have 'access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction'. Here, the access-rationale is expressly integrated into an exception to the otherwise exclusive rights of broadcasting organizations and serves to realize a public interest objective, rooted in the right to receive information.[83]

Recently, Art. 17(4) CDSM Directive implicitly introduced an obligation for platforms to negotiate with rightholders. While this obligation to negotiate – and arguably also to accept reasonable licensing offers – does not include users, it sets a precedent that obligations to 'deal' with a potential licensor or licensee are not entirely unimaginable.

Article 17 CDSM Directive creates a complex set of obligations, including a condition to make best efforts to obtain authorization for content uploaded to a service operated by an Online Content-Sharing Service Provider (OCSSP).[84] The fulfilment of this condition – and others – relieves an OCSSP from direct liability for content uploaded by its users. Underlying this obligation is the idea that rightholders should participate in the (*prima facie* unlawful) use of their works and other protected subject matter by users of OCSSPs for which the users have not obtained prior authorization.

While the obligation to make best efforts to obtain authorization for user uploads is not absolute, it entails an obligation to engage with rightholders in reasonable negotiations, certainly if requested by rightholders, subject to the principle of proportionality. In a recent judgment, the Regional Court Munich I underlined that OCSSPs must enter into constructive negotiations with relevant rightholders.[85] According to the EU Commission's guidance, OCSSPs might even be obliged to proactively seek out relevant rightholders.[86]

The foundation for the obligation to negotiate implies an obligation to accept a license offer if the latter is reasonable. The German court identifies certain factors that, on a case-by-case basis, must be considered in order to assess whether an OCSSP is obliged to conduct negotiations with rightholders. OCSSPs are obliged to enter into negotiations if the requesting rightholders offer a relevant repertoire.[87] The condition of relevance should limit the transaction costs for rightholders by avoiding the need to engage with an extremely high number of smaller rightholders. This limitation seems to be an expression of the proportionality principle. On the other hand it implies that the benefits for the rightholders (i.e. remuneration) and the effort required from OCSSPs (engaging in negotiations) are balanced appropriately. Admittedly, Art. 17(4) does not oblige rightholders to enter into negotiations if they prefer not to license their works or other subject matter.

Article 17(4) is designed to enable the commercial exploitation of protected subject matter with a view to close the so called 'value gap',[88] i.e. the discrepancy between the extent to which rightholders benefit from uploaded content and the benefit derived by rightholders from such uploads. While this is an example of how an obligation to deal pursues the aim of ensuring appropriate economic compensation for rightholders for the use of their works, this obligation to negotiate can easily be translated to a rightholder-user relationship. The underlying rationale – to realize one of copyright's functions – is essentially the same. Instead of ensuring a fair return

80 art 17(9) CDSM Directive: 'content-sharing service providers shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.'

81 See for example art 9(1) SatCab Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15-21) which provides that the cable retransmission right of art 8 'may be exercised only through a collecting society'.

82 Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* ECLI:EU:C:1995:98 and Case C-418/01 *IMS Health* ECLI:EU:C:2004:257; see Rok Dacar, 'The Essential Facilities Doctrine, Intellectual Property Rights, and Access to Big Data' (2023) 54 IIC 1487. A right to obtain access to protected works or subject matter might occur in cases where an abuse of a dominant position could be proven or where access to specific works or subject matter would be required to access a new market. However interesting competition law can be to secure access to copyrighted work in certain situations, this avenue cannot be explored here as this would require important developments beyond the scope of the analysis. Nevertheless, the access rationale for innovation purposes present in EU competition law would certainly deserve further analysis in this context too.

83 cf recital 55 (Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L303/69-92).

84 art 17(4)(a) CDSM Directive.

85 LG München I (Regional Court Munich I), 9 February 2024 – 42 O 10792/22, para 160.

86 COM(2021) 288 final, p 9

87 LG München I (Regional Court Munich I), 9 February 2024 – 42 O 10792/22, paras 40 ff.

88 Critically on the concept see Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio, 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform' (2017) 38 EIPR 202 and Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction' (2018) 40 European Intellectual Property 4.

for the use of their works to rightholders by obliging an intermediary to negotiate licenses, an obligation for rightholders to negotiate with users to enable them to exercise their rights is easily imaginable. In addition, the 'obligation' rationale is even stronger given the more persuasive fundamental rights dimension of user rights as opposed to the exclusive control interests that are 'merely' rooted in the proprietary dimension of their right. Providing an obligation to 'deal' with certain institutions to provide access can therefore be considered to be the functional equivalent of Art. 17(4)(a) for closing the 'Access Gap'.

2. Interim conclusion

All of these examples illustrate that EU copyright law already foresees mechanisms that are aimed at ensuring that users can obtain access to exercise user rights – or exceptions and limitations more broadly. However, some of the mechanisms which are particularly important for the exercise of user rights are largely ineffective (for example due to a lack of proper implementation) and systematically poorly integrated into copyright law. It is not clear why Arts. 3-6 CDSM Directive are expressly excluded from contractual override but not the exceptions privileged in Art. 17(7).

While the prohibition of contractual override is largely symbolic, even positive statements that affirm the 'right' to take advantage of exceptions and limitations on OCSSP-platforms do not necessarily guarantee the unconditional exercise of user rights. Technological realities in a digital environment give rightholders efficient tools that can be used to restrict the exercise of user rights. These tools are either of a technological nature (such as TPMs and online filters) or they lie in the nature of exclusive rights that enable rightholders to tailor the dissemination channels and formats for their works and other subject matter.

While the former is addressed (albeit insufficiently) by Art. 6(4) InfoSoc Directive – a provision that certainly merits reform – the latter requires a broader approach. Existing mechanisms must be supplemented with positive obligations that are imposed on rightholders, obligations that allow users to gain lawful access to works in a format that facilitates specific uses.

V. Removing access barriers

The realization of a right to access that supports the unrestricted exercise of (certain) exceptions and limitations requires – for that purpose – anchoring 'access imperatives' for specific uses within the copyright rules. Access imperatives means more concretely that legal and procedural guarantees must ensure that users can effectively benefit from certain exceptions and limitations. Approaches from other regulatory regimes such as competition law, for example the essential facilities doctrine and FRAND-like licenses, seem attractive. However, these mechanisms do not necessarily translate easily into existing copyright law or cater to the needs of users and institutions for which access-based exceptions are relevant. Moreover, the standard-setting institutional framework for FRAND and the relatively high requirements under the essential facilities doctrine might not offer the legal certainty required by educational and research institutions as it implies lengthy and costly legal procedures in order for judges to issue a compulsory licence under EU competition law.[89]

Therefore, copyright law must foresee specific mechanisms tailored to the needs of copyright user groups that address the specific obstacles faced by these groups. For example, the requirements of public libraries to obtain specific format copies to enable e-lending (on reasonable economic terms) will be different from those of a researcher who would require the removal of technological protection measures from databases or websites that should form part of a TDM process, or the requirements of an educational establishment which wants to avail itself of an exception to show audio-visual material to its students. The specific needs therefore require different types of mechanisms: on the one side, L&Es must be appropriately formulated and given efficient enforcement tools, on the other, legal mechanisms must be designed to enable access through institutions that can serve as information gateways.

Whilst it is necessary to expressly anchor positive access obligations into the relevant copyright laws at both EU and national levels, the rationale for these obligations can already be directly derived from European fundamental rights as they take effect through user rights (see *supra* under 3.). In order to realize the effective exercise of fundamental rights, for example to access information, Member States must foresee, within the boundaries of proportionality, mechanisms that facilitate access to protected works and subject matter. In certain cases, this must mean that rightholders, who are generally free to dispose of their exclusive rights, will be subject to limitations of these rights. A limitation to an exclusive right to prevent certain acts must also mean that rightholders can be *positively obliged* to permit or authorize the use of their protected works or subject matter. If that was not the case, rightholders would be able to restrict the exercise of fundamental rights through copyright.

Even if it is now largely recognized that fundamental rights can have a horizontal effect,[90] the imperatives of copyright being understood as an access right suggest that such positive obligations therefore *must* be written into statutory law. This would serve a signal function, but also

89 The essential facilities doctrine permits the granting of what are effectively compulsory licenses when access to a specific 'facility' (which could also be subject matter protected by copyright, see Case C-241/91 P *RTE and ITP v Commission* ECLI:EU:C:1995:98) is essential. Essentiality means that the facility cannot be substituted, which would be difficult to prove in relation to access requests to literary and artistic works (cf Case C-7/97 *Bronner* ECLI:EU:C:1998:569, paras 37-41, see James Turney, 'Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation' (2005) 3 Northwestern Journal of Technology and Intellectual Property 179, 189-90. Underlying the essential facilities doctrine is a competition-rationale which should prohibit the abuse of a dominant position to prevent competition. However, in relation to access to works and other subject matter that are already available in some for an absolute competition rationale would not apply, and moreover a fundamental-rights rational (including the right to choose which information to access) would provide strong arguments against a strict 'indispensability' standard.

90 The so-called '*Drittwirkung*' has been relied upon largely in cases in which parties suffered from structural inequalities, for example in Case C-341/05 *Laval un Partneri* ECLI:EU:C:2007:809 and Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* ECLI:EU:C:2007:772; see Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657, 676.

provide a strong normative bulwark against the abuse of copyright by rightholders (see under 5.2 and 5.3).[91] In addition, strengthening the access role of institutional actors will require the creation or refinement of specific access rights, such as a right to lend (see under 5.4).

1. An obligation to grant access

Certain user rights – not all exceptions and limitations necessarily constitute user rights, at least not under current CJEU case law – derive their justification directly from fundamental rights,[92] and their effective exercise must be guaranteed by the Member States. Enabling access is part of the societal bargain that promotes creativity and innovation, but it is also a condition – within copyright law – for the realization of the constitutional objectives of the EU.[93] The latter require the EU to realize a common market that works for the 'sustainable development of Europe … aiming at … social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.'[94] Education, research and cultural participation lie at the heart of this mission.

As a result, when access is a *conditio sine qua non* for the exercise of certain exceptions and limitations, Member States incur an obligation to ensure that access is granted in appropriate cases and under reasonable conditions. Therefore, EU copyright law must foresee effective mechanisms that ensure the proper exercise of user rights by granting users access for the performance of privileged uses. This obligation also derives from the non-discrimination principle enshrined in EU law.[95] While EU copyright rules provide efficient enforcement rules for rightholders to ensure compliance with the legal framework, users are missing out on general enforcement tools that would ensure the proper exercise of their rights. A general singular obligation to grant effective access constitutes the foundation of a user-rights-compliant copyright framework. This general obligation is broad and requires concrete adaptation to context-specific scenarios, requiring that for the purpose of exercising user rights, directly or indirectly, rightholders incur certain obligations to provide access to works or subject matter.

In short, the EU legislator must ensure that fundamental rights are appropriately implemented in the EU copyright framework and that user rights are protected against private ordering that would render the exercise of users' rights ineffective.[96] However, user rights are essentially ineffective if users find it technically impossible or economically difficult to lawfully access digital versions of works in the first place. Thus, a duty to safeguard the exercise of user rights also implies the necessity to overcome a refusal to grant appropriate access to a work.

A positive obligation to grant access can take various forms and depends on the specific requirements and needs of the respective user. Two specific obligations illustrate the access-problem: an obligation for rightholders to provide access, either in general or to a specific format copy of a work when the user is legally entitled to use the work by contract or law (the access is already lawful); and an obligation to 'deal' with a user, i.e. to grant a use-specific license (obtaining of initial lawful access); or – where needed – a combination of both (provide access to a format copy and authorise the use).

First, a specific obligation to give a user access to a specific format copy of a work would arise in cases where a use is lawful, but the rightholder does not, or even refuses to, provide a copy of a work to a user without which the exercise of the use is rendered impossible.[97] For example, a library in an EU Member State which has chosen to implement the public lending right as a remuneration right pursuant to Art. 6(1) of the Rental and Lending Right Directive[98] would find it impossible to lend copies of e-books or audiobooks if publishers would not offer the appropriate format copies. Although digitization by the library based on an existing analogue format copy could be an option, this might not be feasible for every institution. A refusal to provide such format copies (even if under a separate a license, see *infra*) would render the exercise of a legal entitlement difficult. The purpose of an exception to the public lending rights, which is to provide opportunities to the general public to access a variety of media, would be undermined by the exercise of copyright's exclusive rights. Particularly for institutions that provide access to works for disabled persons with specific access requirements, such as blind, visually impaired or otherwise print-disabled persons, an obligation to provide access to available format copies would support the provisions of the Marrakesh Directive.

An obligation to provide an appropriate format copy would certainly have to arise if the relevant format copy is already marketed by the rightholder through other channels, e.g. as part of a commercial subscription-based model. While it would not always be proportionate to

91 cf Caterina Sganga and Silvia Scalzini, 'From abuse of right to European copyright misuse: a new doctrine for EU copyright law' (2016) 48 IIC 405.

92 cf *Funke Medien NRW* (n 65) para 60.

93 art 3 TEU, see Geiger and Jütte, 'The Right to Research as Guarantor for Sustainability, Innovation and Justice in EU Copyright Law' (n 70) 138, 165.

94 art 3(3) TEU.

95 See art 21 EUCFR.

96 This implies also that at least the exceptions and limitations that are rooted in fundamental rights rationales are declared mandatory and that mechanisms are implemented to secure their effectiveness, especially in the digital environment (where they are endangered by technical protection measures and online contracts), see Geiger, 'The Answer to the Machine should not be the Machine' (n 77) 121. It must be noted that not all the exceptions and limitations have the same justification and importance with regard to securing access. The limitations that necessitate particular attention include exceptions for libraries and archives, for teaching and research purposes, for news reports, for press reviews, for quotations and parodies and, more incidentally, an exception for people with disabilities, as well as private copying when it allows access to information and is not covered by one of the exceptions already mentioned.

97 To use an image, it is possible to think of a bridge: the user would have the right to cross the bridge, but could not pass because the rightholder has not removed the gate at the head of the bridge. Rightholders (or the metaphorical bridge wardens) must then have a unilateral obligation to enable a crossing of the bridge, because the user is already entitled to (by statutory right or contract). In copyright terms, this means that sometimes the use is lawful because it is covered by a limitation or because the work is in the public domain, but in the absence of an access to a digital copy, the potential benefits of this user (access) right cannot be realized. An obligation of result regarding access should lead to making the user right effective by any means.

98 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L372/28-35 (Rental and Lending Rights Directive).

oblige a rightholder to create specific format copies for certain user groups, in certain instances rightholders or their licensees could even be obliged to provide copies in formats that are currently not marketed. Such an obligation is similar to that which should arise under national law based on Art. 6(4) InfoSoc Directive, which requires rightholders to provide copies free of TPMs if the latter prevent a lawful use.[99] In either situation, the obligation would consist in the making available of a copy that can be used for a specific purpose as long as the relevant format to be provided is lawfully available to other users.

Second, in order to enable the effective exercise of user rights, rightholders must, in certain circumstances incur an obligation to grant (lawful) access to copies of their works or other subject matter. That must mean that rightsholders, in certain cases, must incur an obligation to offer suitable licenses to specific users. Where lawful access for the exercise of an exception is an express requirement, a fundamental-rights based access rationale can, depending on the circumstances, result in an obligation to provide such lawful access. For example, the use of audio-visual material in academic institutions or for educational purposes more broadly would, in certain circumstances, require that appropriate licenses are offered to enable lawful access to the relevant material. This obligation must go further than the carve-out model introduced by Art. 5 CDSM Directive, which requires rightholders to offer suitable licenses if certain types of works or subject matter are excluded from the scope of the exception.[100] Uses that are clearly reflective of the purpose-bound social contract underpinning copyright law cannot be subjected to the discretion of rightholders. Although a horizontal 'lawfulness' requirement does not apply to all exceptions, including that of Art. 5 CDSM Directive, promoting access to works also through contractual arrangements is necessary to prevent chilling effects through legal uncertainty.

These are just two scenarios that illustrate that an obligation to provide access is necessary to ensure the effective exercise of user rights, for example such rights that are based on limitations and exceptions. However, the obligation must be applied flexibly and have regard to the specific purpose of the use as well as the economic context of the use.

2. Unenforceability of license terms that restrict exceptions and limitations

Access to works in a digital environment is nowadays largely governed by licensing terms. Lawfulness of access is thereby governed by the term of the license under which initial access to a work is given. Once lawful access has been obtained by a user for any purpose, this access should enable the user to exercise exceptions and limitations within the boundaries of proportionality, including for uses not expressly covered by the access-enabling license. Lawful access for this purpose must be understood broadly.[101] As a result, a prohibition to enforce licensing terms when a use covered by a contractual prohibition enables the effective exercise of an exception and limitation must therefore be interpreted broadly. As a general rule, a user must be able to perform permitted acts based on any lawful access to a work to the extent that the use does not constitute a disproportionate harm to the rightholder.

Currently, only Art. 7(2) CDSM Directive prohibits the contractual override of exceptions and limitations. But even beyond the scope of application of Art. 7(2) CDSM Directive – which only extends to the exceptions of the CDSM Directive – a prohibition to contractually limit the exercise of exceptions and limitations must be applied to other exceptions that qualify as user rights. In the same way that users cannot unilaterally restrict the exercise of exclusive rights, contractual overrides included in standard licensing agreements and terms and conditions cannot be considered a lawful restriction of user rights. Users would usually find it impossible to change restricting terms in use agreements due to the generally prevalent imbalance in bargaining power. Therefore, clauses that constitute a restriction of users' rights must be unenforceable.

For that purpose, it is also indispensable to give Art. 7(2) a broad interpretation to the effect that not only express, but also implicit contractual restrictions to exceptions and limitations are unenforceable. Express limitations would mean, for example, a term in a license that prohibits the non-commercial mining of text and data from a database, giving the user access to scientific articles; implicit limitation would mean a purpose-bound license that permits private use but does not expressly permit uses that are not private.

A broad interpretation of a principle of unenforceability of restrictive contractual terms would encompass clauses that prohibit the exercise of specific acts. For example permitted acts that are not subject to conditions such as Art. 3 CDSM Directive – which permits unrestricted text and data mining for non-commercial research purposes – cannot be excluded by contract.[102] Furthermore, more general restrictions such as a restriction to use a streaming service only for 'personal and non-commercial use'[103] should not prevent the use of content offered by that service for the purpose of illustration in a teaching environment, provided no other lawful access can be obtained.

As long as a lawful access is required by the statutory exception, an exercise that is based on a generally lawful use cannot be overridden by a contractual agreement without significantly limiting the exercise of user rights, even when that initial use is granted for a different purpose (e.g. a private, non-commercial use). If that were the case, the exercise of user rights, particularly those with a strong fundamental rights dimension, could be undermined by

99 The situation would be similar, not identical, as the requirement of 'legal access' contained in art (6)4 cannot be applicable in this case, considering that the obligation to provide access, either by an obligation to 'deal' or by the provision of an appropriate format copy, is specifically aimed at providing lawful access.

100 See Jütte, 'Uneducating copyright' (n 48).

101 In that sense see Synodinou, 'Lawfulness for Users in European Copyright' (n 29).

102 See for example Netflix Terms of Use, 4.6.(vi), which prohibits to 'use any data mining, data gathering or extraction method' <https://help.netflix.com/legal/termsofuse> accessed 1 March 2024.

103 Netflix Terms of Use, 4.2. Similarly, Spotify's Terms of Use state that users are permitted to 'make personal, non-commercial use' of the service, under 3 <https://www.spotify.com/ie/legal/end-user-agreement/#3-your-use-of-the-spotify-service> accessed 1 March 2024.

private ordering and their exercise thereby rendered ineffective. Such an interpretation would be in line with a proper balancing of access-based exceptions and limitations in the light of the right to freedom of expression in general, but also the right to freedom of the arts and sciences, including academic freedom. Such a broad interpretation of copyright's user rights is also strongly supported by CJEU jurisprudence in *Funke Medien* and *FAPL/Murphy*.

3. Use-specific proportionality

An obligation to grant access constitutes a significant limitation of the property right of the relevant rightholder. A *general* duty to offer licenses is therefore difficult to defend even in the light of fundamental rights and a general balancing of interests. Therefore, a specific request from a user to obtain a license must be assessed individually and in consideration of the facts of each case. Certain generalizations can be made for specific user groups, but even here distinctions must be made based on the specific institutional context (e.g. public library or university library) and the type of work or subject matter (e.g. a recent release of a work of fiction or a scientific work).

Proportionality must ensure that certain economic interests of rightholders are protected in the sense that rightholders can realize an 'appropriate'[104] return on their investment. An obligation for rightholders to cooperate by providing access to protected content either in the form of a suitable format copy or other access format should be interpreted broadly within the boundaries of proportionality. A proportionality analysis must consider the purpose of the use based on an exception or limitation and the burden it places on rightholders. As a general rule, rightholders must be required to provide access to works that are lawfully available in any format provided that giving access does not unduly limit the interest of rightholders. Based on the three-step test of Art. 5(5) InfoSoc Directive, rightholders would only be obliged to provide access to works in the special cases defined by the applicable limitations and exceptions. Such cases would also usually fall outside the scope of a normal exploitation – with (currently) the exception of the public lending right. The third step would be subject to a case-by-case analysis of the concrete obligations a rightholder could incur. These can either lie in an obligation to provide lawful access provided that the work or subject matter requested by a user will exercise an exception, or limitation has already been made lawfully available in a similar format. For example, a library could request the licensing of an e-book for e-lending provided that the same e-book is available to private users for individual purchase, or as part of a subscription-based access model. These can also lie in an obligation of a rightholder to provide access to a specific format copy or access portal for uses falling under an exception or limitation when the work or other subject matter is lawfully available in a specific format, but the specific use requires access in a different format, provided the rightholder offers that format to other users.

Other factors must come into play in the proportionality analysis, including a general 'reasonableness' standard that shields rightholders from excessive transaction costs. However, as a general rule, a rightholder should be required to provide lawful access to protected subject matter to a specific user or user group if the rightholder already makes the subject matter available to other users in that specific form. In certain circumstances this must amount to a requirement to license content for specific uses on reasonable terms. In certain cases, specific uses must be subject to broader obligations if user rights cannot be exercised otherwise. This could, for instance, be the case when certain works are no longer commercially available (so called 'out of commerce works'). Of course, the obligation to provide access for specific uses must still be proportionate with regard to the extent of cooperation required from rightholders and the discretion the latter enjoy as to how access will be provided.[105]

4. A right to lend

Public libraries, archives and other non-for-profit institutions play an important role in providing access to a wealth of information. The access they provide enables their users to benefit from a lawful source of access as a prerequisite for the exercise of their user rights. More generally, public repositories fulfil a broader function by enabling cultural and intellectual participation. The rationale behind e-lending and physical access to media in libraries are similar, if not identical: to provide access to works protected by copyright to a wider public.[106]

However, public lending is also subject to an exclusive right under Art. 2 of the Rental and Lending Rights Directive, which enables rightholders to control the lending of their assets. Member States can derogate from this right pursuant to Art. 6(1) of the Directive and instead adopt the public lending right as a remuneration right, and Member States can even exclude certain establishments from the obligation to pay remuneration (Art. 6(3)). The implementation of the 'lending right' varies across the EU Member States.[107] A 'related' exception is contained in Art. 5(3)(n) InfoSoc Directive, which enables libraries to communicate or make available, via dedicated terminals, works in their collection for the purpose of research and private study. Although optional in nature, in *VOB* the CJEU has referred to this exception as part of the 'right and interests' of users which have to be balanced against those of rightholders.[108]

There are two main concerns with the current appearance of the lending right in the EU. First, depending on the Member State, rightholders have full control over the physical and electronic lending of their repertoires. Second, the exercise of the lending right enables rightholders to determine the conditions under which media designated for e-lending are licensed, including metered

104 cf *FAPL/Murphy* (n 63) paras 108-09.

105 See by analogy *UPC Telekabel Wien* (n 68) para 52.

106 See further on the issue COMMUNIA, Communia Policy Paper No 19, 'E-Lending' 9 (*COMMUNIA*, May 2024) <https://communia-association.org/wp-content/uploads/2024/05/Policy-paper-19-on-e-lending.pdf> accessed 28 May 2024.

107 See eg Maria-Daphne Papadopoulou, 'The public lending right in Greece: Sleeping Beauty and Snow White' (*Kluwer Copyright Blog*, 25 September 2023) <https://copyrightblog.kluweriplaw.com/2023/09/25/the-public-lending-right-in-greece-sleeping-beauty-and-snow-white/> accessed 12 March 2024.

108 *Eugen Ulmer* (n 38) para. 31.

licensing models which are economically unsustainable for public institutions, and which also potentially prevent the establishment of comprehensive and diverse collections of works.

Legislative intervention would therefore be required in order to adapt the lending right fully to the digital environment and in line with the *VOB* ruling to enable e-lending. While the preferred option would be to implement a remunerated 'right to lend', a retention of the exclusive right would require a more enabling framework with a view to making content accessible. While the CJEU has already provided a reasonable interpretation of the relation between the lending right and the right of distribution with a view to safeguard the legitimate expectations of rightholders,[109] libraries still struggle to obtain the relevant material under licenses that would allow lending to a general public. The interests of rightholders would also have to be considered and questions of embargo periods and simultaneous user accesses be mitigated via the three-step test.[110] There are models that aim at striking a compromise between the reasonable interests of users and lending institutions and right holders, for example license-based remuneration systems and one-copy-one-user models.[111] Such solutions must, however, always be efficiently improving access conditions and be based on a constructive collaboration between rightholders and institutional lenders. The obligations developed under 5.1. would also apply by analogy.

5. Towards an EU copyright (access) regulator

As we have argued, access to copyrighted works under fair conditions is crucial to secure the main goals of copyright law and maintain a fair progress-promoting balance within copyright rules. Within this balance, user rights are meaningless and remain so if there is no initial access, as it can be increasingly controlled in the digital world. Therefore, it is necessary to guarantee that barriers to lawful uses can be overcome efficiently and expeditiously. For lawful access, this must mean that the conditions (i.e. the price) of access can also be negotiated efficiently. This raises the delicate question of whether the existing institutional framework is well equipped to deal with these issues. Without developing an institutional framework in detail – and this is certainly not within the scope of this study – our analysis has exposed weaknesses in the existing copyright ecosystem. More concretely, leaving the resolution of access conditions to private parties bears the risk that rightholders deny access because they cannot agree with potential users on the terms and conditions of access. Moderated stakeholder dialogues (often by the European Commission) have not delivered the expected results in the past.[112] They are also extremely slow and do not live up to the urgency of making the EU an innovation friendly environment. Likewise, judicial solutions are too time intensive and costly for most of the users.

Therefore, as proposed elsewhere with more detail,[113] we consider that an EU regulatory body should be tasked with mediating and resolving these issues.[114] Its competences could be, for example, to identify access issues by collecting complaints from users with regard to the access to copyrighted works, to analyse the blocking factors, and to mediate between the parties involved. In order to be efficient, it should have regulatory powers to be able to investigate and issue legally binding decisions in case of unsuccessful mediation. It could also conduct market assessment and empirical studies to help determine the fairness of the terms of a licence on a case-by-case basis and/or for certain categories of users. In this spirit, it could also act as a facilitator for large scale agreements between rightholders and user groups or public interest institutions.[115] Finally, it could also issue policy recommendations to the EU legislator when the need for legislative intervention is identified and provide the necessary legal, economic and technical expertise to assist the law-making process.

109 cf Case C-174/15 *Vereniging Openbare Bibliotheken* ECLI:EU:C:2016:856; the Court ruled that Member States can make the application of the exception under art 6(1) of the Rental and Lending Rights Directive subject to the condition that the relevant media have been obtained by sale or other transfer of ownership (para 64).

110 See for example Rita Matulionytė, 'Lending e-books in libraries: is a technologically neutral approach the solution? (2017) 35 International Journal of Law and Information Technology 259, 275 ff.

111 See for an overview of national solutions: WIPO, SCCRR, Scoping Study on Public Lending Right, SCCR/45/7, 4 April 2024.

112 See for example the outcomes of the stakeholder dialogues initiated pursuant to art 17(10) CDSM Directive: Communication from the Commission to the European Parliament and the Council. Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market, COM(2021) 288 final. Although the CJEU attached a certain importance to the stakeholder dialogue (Case C-401/19 *Poland v Parliament and Council* ECLI:EU:C:2022:297, paras 96-97).

113 See in particular Christophe Geiger and Natasha Mangal, 'Regulating Creativity Online: Proposal for an EU Copyright Institution' [2022] GRUR International 933.

114 For other proposals to introduce a specialised EU institution to regulate access to copyrighted works in the EU see in particular: Christophe Geiger, 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?' (2018) 8 U.C. Irvine L. Rev. 413, 455 (proposing to set up an 'Observatory on access to copyrighted work' on the model of EU competition authorities); Franciska Schönherr, 'The Construction of an EU Copyright Law, Towards a Balanced Institutional and Legal Framework' (PhD thesis, University of Strasbourg 2017)) (proposing to set up an 'EU Copyright council'); Natasha Mangal, 'EU Copyright Reform: An Institutional Approach' (PhD thesis, University of Strasbourg 2022) (exploring the design of a new EU copyright institution, among other potential policy options). In the context of online platforms regulation and content moderation, see also Giancarlo Frosio and Christophe Geiger, 'Taking Fundamental Rights Seriously in the Digital Service Act's Platform Liability Regime' (2023) 29 European Law Journal 31 (mentioning the creation of a 'Digital Single Market and Ethics EU Observatory'); Christophe Geiger and Bernd Justin Jütte, 'Platform liability under Article 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' [2021] GRUR International 517, 541 (calling for the creation of an independent EU institution to monitor the implementation of platform liability in a fundamental rights compliant manner); Ben Wagner and others, 'The next step towards auditing intermediaries' (*Verfassungsblog*, 23 February 2022) <https://verfassungsblog.de/dsa-auditing/> accessed 14 April 2024 (advocating for an independent 'European public auditing intermediary' to facilitate the implementation of the DSA and provide adequate platforms' oversight); in the context of AI, see Christophe Geiger and Vincenzo Iaia, 'Towards an Independent EU Regulator for Copyright Issues of Generative AI: What Role for the AI Office (But More Importantly: What's Next)? [2024] Auteurs & Media (forthcoming).

115 In the absence of a specific EU institution, collective management organizations could be tasked with such a role, but their territorial nature could lead to inefficiencies in the EU context and would thus be a second-best solution in the case the creation of an EU regulator would prove too difficult. However, this would require profoundly rethinking the role of CMOs, their missions and their functioning which might prove even more complicated.

VI. Conclusions

Copyright law privileges certain uses by providing for exceptions and limitations that are reflective of copyright's rationale as an access right. Copyright, as the CJEU has pronounced, thereby grants users of protected works and other subject matter rights whose exercise must be safeguarded. Often, these user rights enable the exercising of fundamental rights as protected by the ECHR and the EUCFR. These fundamental rights are under pressure in the digital environment, requiring concrete safeguarding measures.[116] To effectively realize these rights, the ability of rightholders to negatively impact user rights through private ordering, by contractual or technological means, must be restricted. Moreover, the imperatives of user rights strongly suggest that positive obligations must also be imposed on rightholders. These positive obligations are aimed at putting users in a position to exercise their rights. Therefore, in specific circumstances rightholders can be obliged to make works and other subject matter available to users in a way that enables the latter to take advantage of copyright exceptions, or more generally, to access information for specific purposes either directly, or through institutional intermediaries.

These obligations constitute necessary and proportionate restrictions on the exercise of the exclusive rights of rightholders and they benefit users in their direct or indirect exercise of fundamental rights. Given the limitation of competition rules in private proceedings, and to realize the horizontal effects of fundamental rights, these obligations should be more clearly written into copyright law. Certain elements of the existing copyright acquis already foresee mechanisms that oblige rightholders to enable access for users, or to prevent them from restricting access through private ordering. While these rules form a solid basis for an access-oriented copyright system, and in many cases create direct rights for users to realize access in specific cases, certain privileged uses require a better legislative anchoring as access rights.

An access rationale therefore imposes negative and positive obligations on rightholders. In terms of negative obligations, rightholders must refrain from imposing contractual restrictions on uses that fall within the scope of an exception or limitation. Such prohibition of contractual overrides must go beyond those uses expressly addressed by Art. 7(2) CDSM Directive and must at least include those privileged by Art. 17(7) CDSM Directive. Based on the *ratio* of Art. 7(2) as a minimum research, teaching and other access-based exceptions should be shielded from contractual overrides.

In terms of positive obligations, rightholders should incur an obligation to make works available, in particular if access to such works is necessary to exercise an exception or limitation. This obligation is subject to the primary condition that the work for which access is requested by a user is already made available in the same or similar format to other users. In some instances, such an obligation can take the form of a requirement to grant a license for a specific use, in cases in which other routes to access would appear to be disproportionately burdensome. Refusing to grant permission for specific uses or refusing to provide format copies required for a specific use while such format copies exist and are lawfully provided to other users, would constitute an abusive exercise of exclusive rights. Furthermore, the lawful uses prevented in this way constitute significant limitations of fundamental rights in a horizontal relationship between rightholders and users of protected works. A positive obligation to enable access, whether through granting a license or otherwise, can be derived directly from certain copyright exceptions, interpreted in the light of EU fundamental rights, but more generally from the social function of copyright as an access right.

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116 In this context, the emerging legal theory of digital constitutionalism is helpful framework for copyright reform proposals: see further on this issue: Christophe Geiger and Bernd Justin Jütte, 'Digital Constitutionalism and Copyright: Towards a New Social Contract for the Regulation of Creativity in the Digital Environment' in Oreste Pollicino, Giovanni de Gregorio and Peggy Valcke (eds), *Oxford Handbook of Digital Constitutionalism* (OUP 2024) (forthcoming), available at <https://ssrn.com/abstract=4896143>, and from the same authors: 'Designing Digital Constitutionalism: Copyright Exceptions and Limitations as a Regulatory Framework for Media Freedom and the Right to Information Online' in Martin Senftleben and others (eds), *Cambridge Handbook of Media Law and Policy in Europe* (CUP 2024) (forthcoming), available at <https://ssrn.com/abstract=4548510>; Alexander Peukert, 'Intellectual Property as an end in itself?' (2011) 33 EIPR 67; Christophe Geiger, 'Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights' in Gustavo Ghidini and Valeria Falce (eds), *Reforming Intellectual Property Law* (Edward Elgar Publishing 2022).