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ARTICLE

The Past, Present and Future of EU Copyright Flexibilities

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Abstract Building on a wealth of studies on the strengths and pitfalls of EU harmonisation in the field of copyright exceptions and limitations, and on the state of the art of the copyright balance across the Union, the H2020 project *reCreating Europe* performed an unprecedented comparative mapping of EU and national legislative acts and case law regulating copyright "flexibilities" (exceptions and limitations; definition of protectable subject-matter; terms of protection; exhaustion; judicial doctrines such as fair balance and the horizontal effects of fundamental rights on copyright law; statutory licensing schemes; paying public domain et al.). On this basis, it produced national and comparative reports, grouped into 12 homogeneous categories of permitted uses. The study aimed at (a) assessing the degree of harmonisation across the EU and the impact of their territoriality and optional nature on the proper functioning of the system; (b) mapping which "uses" and "purposes" are balanced against copyright and with what results, both in the EU and in each Member State; and (c) identifying the regulatory gaps and enablers impacting on the proper functioning of copyright flexibilities across the Union. This article will provide an overview of the background, methodology (Section 2) and main results of the research, sketching the past and present of EU copyright flexibilities (Section 3). On this basis, it will provide general and specific recommendations for future reforms (Section 4).

Keywords Exceptions and limitations · Statutory licenses · Public domain · Comparative mapping · EU harmonisation · Fragmentation · Policy recommendations

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1 Introduction

The last and most important intervention of the EU legislator in the field of copyright – the Directive on Copyright in the Digital Single Market (CDSMD, 2019/720/EU)[1] – will be remembered as a landmark step in the harmonisation process in the field, with the same standing as the historical InfoSoc Directive of 2001.[2] The Directive introduced a number of innovative and highly debated provisions, from the liability of online content-sharing platforms to the new related right of online press publishers, and made an important move in the field of authors' remuneration, intervening directly for the first time in copyright contract law. However, the CDSMD will also be long remembered for the decisive shift in the approach towards copyright exceptions and limitations (E&Ls), all of which have been declared mandatory, in light of their impact on the balance between copyright and fundamental rights and of their relevance in cross-border uses of protected works.

Against the background of such a historical turn, which builds on a wealth of studies highlighting the challenges raised by copyright territoriality and the optional nature of its balancing mechanisms – in contrast with fully harmonised exclusive rights – this is now the time to take stock of the more than two decades of harmonisation in the field, reassess the state of the art, and redefine the steps that still need to be made to make EU copyright a balanced and sustainable system fitting the needs of the EU digital single market. To this end, the H2020-funded project *reCreating Europe* performed an unprecedented comparative mapping of EU and national provisions involved in the copyright balance (exceptions and limitations, definition of protectable subject-matter, terms of protection, exhaustion, judicial doctrines, statutory licensing schemes, paying public domain et al. – together defined as "copyright flexibilities"), offering national and comparative reports on the state of the balance between copyright and conflicting uses, grouped into twelve homogeneous categories. This article will provide an overview of the background, methodology (Sect. 2) and main results of the research, sketching the past and present of EU copyright flexibilities (Sect. 3). On this basis, it will provide general and specific recommendations for future reforms (Sect. 4).

2 Background and Methodology of the Research

The research was able to build on an ample and varied literature and adopt a holistic approach to the matter. Institutional works that were taken into account as background were studies commissioned or developed independently by

[1] 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, OJ L-130/92, 17 May 2019.

[2] Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L-167/10, 22 June 2001.

organisations representing stakeholders;[3] reports issued by international agencies and organisations and regional/national legislators, ranging from the UN[4] and the WIPO Standing Committee on Copyright and Related Rights,[5] to independent studies and staff working documents commissioned by EU institutions to assess the effectiveness of E&Ls in the Union.[6] The increasing expansion of copyright also triggered numerous and valuable academic contributions, which adopted a variety of methodological approaches and spanned several jurisdictions. Their main focus revolves around the pitfalls affecting EU harmonisation in the field,[7] the evolution of the notion of the public domain, and the effectiveness of the system of E&Ls in the digital environment.[8] Recent publications feature comprehensive analyses of the current state of the art in the field in an attempt to systematise the matter with the help of theoretical, comparative and legal design approaches,[9] or to propose innovative solutions to rethink flexibilities in international and EU copyright law.[10] The research also benefitted from previous attempts at mapping Member States' copyright E&Ls across Europe[11] and internationally,[12] and from current experiences of mapping the national implementation process of the CDSM Directive.[13] None of these efforts, however, resulted in fully comprehensive analyses of all the copyright balancing tools, nor in a sufficient geographical coverage or in a dynamic comparative analysis that could critically assess the state of the art in the field. Filling in this gap was the ultimate goal of the research on EU copyright flexibilities performed within the framework of the H2020 project *reCreating Europe*.

Building on this background, the study took a step forward and provided a holistic, analytical account of EU copyright flexibilities, with the aim of (a) assessing

[3] *E.g.* Cabrera Blazquez et al. (2017); LIBER (2016); Gilbert (2015); Nobre (2014); COMMUNIA (2015); Malcom (2012).

[4] *See* Shaheed (2014); Guibault (2003); Lepage (2003).

[5] *E.g.* Crews (2015); Dusollier (2010a); Xalabarder (2009); Sullivan (2007).

[6] *Inter alia* Bux (2015); White and Morrison (2009); Ficsor (2009).

[7] Among the most relevant contributions, *see* Rosati (2014); Hugenholtz (2000); Guibault (2010); Quintais (2017); Dusollier (2010b); Geiger et al. (2014).

[8] As in Guibault et al. (2022).

[9] Hudson (2020); Balganesh et al. (2021); Okediji (2011); Greenleaf and Lindsay (2018); Hilty and Nérisson (2012); Mazziotti (2008); Burrell and Coleman (2010).

[10] Aplin and Bently (2020); Borghi (2021); Hugenholtz and Sentfleben (2011); Geiger (2009); Gervais (2008); Hugenholtz and Okediji (2008). *See* also, more recently, Hilty et al. (2021), who proposed an international instrument for permitted uses in copyright law. The instrument has been complemented by Explanatory Notes, which have also been translated into Spanish and Portuguese, and are available at https://www.ip.mpg.de/en/projects/details/international-instrument-on-permitted-uses-in-copyright-law.html, accessed 18 November 2023.

[11] 'Copyrightexceptions.Eu' <https://www.copyrightexceptions.eu/> accessed 18 November 2023.

[12] Limitations and Exceptions' <https://www.wipo.int/copyright/en/limitations/index.html> accessed 23 July 2023; 'CC Legal Database' (*Creative Commons*) <https://cc-caselaw.herokuapp.com/> accessed 18 November 2023.

[13] *E.g.*, 'CDSM Implementation Resource Page – CREATe' <https://www.create.ac.uk/cdsm-implementation-resource-page/> accessed 5 July 2022; 'DSM Implementation Tracker' (*Communia*) <https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879> accessed 18 November 2023.

their degree of harmonisation across the EU and the impact of their territoriality and optional nature on the proper functioning of the system; (b) mapping which "uses" and "purposes" are balanced against copyright and with what results, both in the EU and in each Member State; (c) identifying the regulatory gaps and enablers impacting on the proper functioning of copyright flexibilities across the Union. To this end, it performed a comprehensive mapping and analysis of all public regulatory sources in the field, evaluating the approach of the EU and each national legislator/judiciary *vis-à-vis* specific sectors, and the degree of convergence/divergence of national solutions. It also introduced a new classification of flexibilities going beyond the study of mere E&Ls, and categorises provisions according to the purpose they serve rather than the mechanism they use (E&Ls instead of statutory licenses, remuneration rights, paying public domain, exclusion from the subject matter etc) or the source by which they are regulated (e.g. statutes vs case law). This methodological approach, which is both functional and empirical, was adopted with the aim of providing a more precise outlook on the current state of the copyright balance with respect to specific beneficiaries and aims,[14] and of bringing systemic order in the matter while also reflecti ng its complexity and the interrelations between individual instruments and doctrines.

The blended taxonomy of copyright flexibilities used both in the questionnaires and in the final national and comparative reports was articulated around categories of uses, purposes/goals and rights/interests balanced against copyright, coupled with horizontal, all-encompassing and general categories (e.g. public domain). This resulted in a classification organised into 14 distinct groups of flexibilities, as follows:

1. *de minimis* uses (e.g. temporary reproduction, ephemeral recording, incidental inclusion, acts necessary to access and normal use by lawful user, freedom of panorama);
2. private non-commercial uses (e.g. reprography, private copy);
3. quotation;
4. parody, caricature and pastiche;
5. uses for teaching and research purposes (private study, illustration for teaching and scientific research, digital use for illustration for teaching, text and data mining);
6. uses for informational purposes (press review and news reporting, use of public speeches and lectures);
7. uses by public authorities (uses in legislative and judicial proceedings, other uses);
8. socially oriented uses;

[14] The research was complemented by a two-phase empirical collection and analysis of the EULAs and terms of uses of representative streaming service providers, online marketplaces and social media platforms, with the aim of evaluating their approach to copyright flexibilities (expansion or restriction of users' rights and prerogatives) and their compatibility with the new EU requirements, with particular regard to Art. 17 CDSMD and its national implementation. For an overview of the main research results *see* Mezei and Harkai (2022).

9. cultural uses (public lending, lending, preservation of cultural heritage, uses of orphan and of out-of-commerce works, specific uses by cultural heritage institutions);
10. uses by persons with disabilities;
11. the three-step test;
12. public domain (subject matter excluded from protection, paying public domain schemes);
13. special licensing schemes (mandatory, statutory, ECL);
14. external copyright flexibilities (fundamental rights, consumer protection, copyright contract law, media law, other instruments).

Exhaustion was not considered in light of the scarce and irrelevant nature of the data available for the comparative analysis.

The assessment of public regulatory sources required an approach that intertwined qualitative, systematic, plain-comparative and functional-comparative analyses. After a thorough review of the literature to shape the focus of the study, the first phase of the mapping was conducted as desk research and concerned EU Directives and Regulations, preparatory works and CJEU case law. The second phase included the preparation and administration of a questionnaire to national experts based on key principles of comparative law methodology. Thirty-six experts from 27 Member States responded to the questionnaire by December 2020, and to a follow-up covering amendments and the implementation of the CDSM Directive by March 2022.[15]

EU sources were analysed and classified through plain systematic analysis, while answers to the questionnaire were harmonised, verified against national sources (statutes and case law) and channelled into a database that is now freely available online (http://ww.copyrightflexibilities.eu).[16] Each national provision was classified on the basis of the taxonomy mentioned above, and qualitatively compared to the corresponding EU provision if such existed, in order to evaluate its convergences, divergences and relative degree of flexibility *vis-à-vis* the EU model. This led to the preparation of 12 comparative reports, one for each of the categories listed above, with the exclusion of sectors where the limited availability of data and/or their

[15] The Survey Addendum and Follow-up questionnaire was also used to verify with national experts the correctness and updated nature of national data, to clear inconsistencies in the responses and to fill in gaps. For a full list of national experts involved, *see* Annex A to Sganga (2023a, b).

[16] The online database is grounded on a FAIRified MediaWiki structure, where the remarkable amount of data obtained has been collected, organised, classified and tagged so as to be easily searchable via several browsing options, and to generate user-friendly and catchy visualisations, making the dataset interactive and accessible also to the broader public. Short explanations, glossaries and summaries framed in a user-friendly website that represent the front-end of the MediaWiki help users to navigate the complexity and technicalities of the regulatory framework.

fragmented nature did not allow the performance of a verifiable analysis (e.g. external copyright flexibilities).[17] The comparative reports were not limited to the juxtaposition of national provisions, but elaborated on the functional effects of each policy option on the copyright balance, with a focus on beneficiaries, requirements, conditions of applicability, scope, limitations and other features, in order to establish methodologically sound bases on which to evaluate the harmonisation of EU copyright law and the attitude of each Member State with respect to specific uses, works and beneficiaries.

3 The Past and Present of EU Copyright Flexibilities

Three years of mapping and analysis of EU and national sources of copyright flexibilities produced a very comprehensive and up-to-date overview of the state of the art of the copyright balance in the Union and in each of its Member States, and led to new and interesting findings that may inspire future legislative interventions in the field. The following pages will offer snapshots of the main conclusions of the study with regard to (a) EU legislative acts, (b) CJEU case law, and (c) Member States' laws, providing concise references to background sources and data.

3.1 EU Legislative Acts

The research covered all Directives, Regulations and preparatory works that in a relevant manner touched issues related to the copyright balance. The range of sources was limited to a reasonable number by eliminating provisions that only cursorily referred to copyright matters or the position of end users. The final sample included 15 Directives and two Regulations issued between 1991 and 2022. Provisions were categorised and analysed according to the taxonomy illustrated above.

Compared to the challenges highlighted by commentators in the past, the EU legislator has made several positive steps forwards, such as the standardisation of rules in specific fields (orphan works, out-of-commerce works, digital teaching, preservation of cultural heritage, text and data mining for scientific research, quotation, caricature, parody and pastiche for users of online content-sharing platforms (OCSSPs)). However, the study identified some persisting flaws, of which three deserve special mention.

(i) **A conceptual fragmentation of copyright flexibilities, with remaining lacunae.** EU copyright law continues to maintain a strict approach to E&Ls, which are framed within a closed list and do not feature any flexible clause that could respond to newly emerging needs for balance caused by the evolution of

[17] This led, for instance, to the exclusion of sectors which would have required, in light of their non-statutory basis, a reporting of sufficient judicial decisions by a substantial number of national experts, which unfortunately was not achieved in the 36-month span of this research (*e.g.* fundamental rights, public interest and users' rights). Similarly, heterogeneous sectors such as consumer protection law, contract law, media law and the like were not subject to comparative analysis due to the extremely fragmented nature of the national experts' responses.

markets, technologies and socio-cultural phenomena.[18] After the InfoSoc Directive, which left Member States free to pick and choose among twenty optional E&Ls that tried to cover as many conflicting interests as possible by using very general and vague definitions,[19] subsequent Directives and Regulations intervened on very specific balancing problems,[20] thus creating a clustered net of rules that at the same time shows overlaps and still leaves uncovered important beneficiaries and interests, including in situations where the balancing needs are similar to those already addressed by existing provisions. Examples of areas flawed by this problem are teaching and research, cultural access and preservation, disabilities, and uses related to freedom of expression.

(ii) **The existence of multiple regimes to the detriment of legal certainty.** After a long history of optional E&Ls, the EU legislator decided to overcome the problems created by copyright territoriality by introducing a number of mandatory horizontal provisions (e.g. the orphan work exception, the exception for persons with visual impairment, the CDSM exceptions for text and data mining for scientific research, digital education and preservation of cultural heritage), and declaring mandatory in specific fields exceptions that are generally optional (parody, quotation, caricature and pastiche for users of OCSSPs). This has led to a situation where some beneficiaries and cross-border uses enjoy legal certainty thanks to the uniformity of national laws, while others still suffer from the negative consequences created by the fragmentation of Member States' solutions as to beneficiaries, works covered and additional conditions of applicability, caused by the optional nature of several EU copyright E&Ls. Further uncertainty is created by the fact that the application of the mandatory or optional regime to single E&Ls does not follow explicitly enunciated or otherwise clarified rationales. Glaring examples are the attribution of a mandatory nature to the exceptions (a) for visually impaired individuals and not to other disabled individuals; (b) for digital education purposes and not for general teaching needs; and (c) for quotation, parody, caricature and pastiche by users of OCSSPs but not in general. This makes it difficult, if not impossible, to identify common patterns in the qualification of a provision as mandatory or optional, again to the detriment of legal certainty.

[18] On this matter, *see* the literature cited *supra* note 7.

[19] *See*, *e.g.*, the ample analysis of Guibault (2010).

[20] Such as Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, [2012] OJ L 299/5, 27 October 2012; 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 [2017] OJ L-242/6, 20 September 2017; Council Regulation (EC) 2017/1563/EU of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired, or otherwise print-disabled, [2017] OJ L242/1, 20 September 2017; and, lastly, the CDSM Directive of 2019.

(iii) **The outdated nature of several provisions, which severely limits their impact on the copyright balance in new settings.** Due to the strict reading of existing exceptions and the outdated nature of some of their key concepts and definitions – e.g. the material-only notion of "copy"[21] or the technical interpretation of the notion of "reproduction"[22] – a number of E&Ls end up not being able to respond to several new balancing needs. This circumstance, coupled with the inevitable slowness of the legislative process in following the evolution of markets and technologies, leads to remarkable delays in the readjustment of the copyright balance (see, e.g., the long wait that preceded the enactment of the TDM, cultural preservation and digital teaching E&Ls), and to the impossibility of applying existing flexibilities to the digital environment (see, e.g., the case of exhaustion,[23] reprography and private copy[24]).

3.2 CJEU Case Law

In order to effectively assess the state of EU copyright flexibilities, the study mapped and analysed more than 50 decisions issued by the CJEU from 2006 to July 2022. The contextual and systemic analysis of the arguments developed by the Court helped to highlight trends in the interpretation of specific provisions, to extract the key components of judicial-only doctrines that were consolidated in the past two decades, and to assess the degree of harmonisation of copyright flexibilities in the Union. The research sketched a heterogeneous picture, characterised by six main threads.

(i) Mostly due to the fragmented nature of referrals, the CJEU has *considerably harmonised some flexibilities* and specified them in great detail, while *other provisions have been largely left uncovered*, albeit with a general positive trend in the recent past. One of the areas that has been subject to the most pervasive intervention is the private copy exception (Art. 5(2)(b) InfoSoc), where the Court has provided detailed guidelines for the interpretation of the notion of "fair compensation" as an autonomous concept of EU law,[25] identified in the amount that makes good the harm suffered by the author as a consequence of

[21] Which caused several problems, for instance, for the interpretation of the principle of exhaustion. For an overview of the background and implications of the material-only reading of the notion of copy, *see* Sganga (2018a, b, c), p. 211.

[22] For the impact that a technical and not normative interpretation of the notion of reproduction had on the treatment of text and data mining activities, leading to the need to introduce ad hoc and narrow exceptions, *see* Strowel (2018a, b); Triaille et al. (2014); Stamatoudi (2016); Montagnani and Aime (2017); Caspers and Guibault (2016); Margoni and Kretschmer (2018); Hilty and Richter (2017); Geiger et al. (2018a); Rosati (2018).

[23] Along with Sganga (2022), p. 211; *see* also Drexl and Hilty (2019); Mezei (2015); Karapapa (2019).

[24] *See* the criticisms in Dusollier (2010a, b); Helberger and Hugenholtz (2007).

[25] As first in Case C-467/08 *Padawan SL v. Sociedad General de Autores y Editores de España (SGAE)* [2010] ECR I-10055, para. 33. This is rooted in the fact that the concept needs a consistent and harmonised interpretation in order to guarantee compliance with the InfoSoc Directive objectives to ensure a functioning internal market (*ibid*, paras. 35–36).

the copy.[26] Throughout a plethora of decisions,[27] the CJEU took the opportunity to elaborate on the notion of "fairness" and – despite the great factual specificity of each case – to develop a number of principles to assess the legitimacy of the exercise of discretionary power by Member States in establishing national private levy schemes.[28] Mechanisms that charge producers for the payment of compensation for private copies that can potentially be made with their devices are always judged to be fair, since their activity is a factual precondition for the copy, and they may pass the cost to final users by increasing the product price, while individual enforcement would be ineffective and too costly.[29] In this context, the Court ruled that the scheme should ensure that only those final users can be charged who are beneficiaries of the exception,[30] and also distinguished between lawful and unlawful sources, imposing levies only on the former.[31] More generally, a mechanism is now deemed fair if it sets a fair balance between conflicting interests,[32] i.e. if it excludes compensation in the case of minimal harm,[33] offers a simple, well publicised and transparent reimbursement system for non-beneficiaries of the exception,[34] and does not discriminate between economic operators.[35] The clarifications made to the interpretation of Art. 5(2)(b) InfoSoc were also transposed by analogy to the reprography exception (Art. 5(2)(a) InfoSoc). This helped the Court to shape *e contrario* the scope of both provisions, by noting that the reprography exception does not feature a limitation as to the type of

[26] *Ibid*, paras. 40–41.

[27] Among the most important precedents, *see* Case C-470/14 *Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA) e a. v. Administración del Estado e Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (AMETIC)* [2010] EU:C:2016:418; Case C-435/12 *ACI Adam and Others v. Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* [2014] EU:C:2014:254; Joined Cases C-457/11 to C-460/11 *Verwertungsgesellschaft Wort (VG Wort) v. Kyocera and Others (C-457/11) and Canon Deutschland GmbH (C-458/11) and Fujitsu Technology Solutions GmbH (C-459/11) and Hewlett-Packard GmbH (C-460/11) v. Verwertungsgesellschaft Wort (VG Wort)*[2013] EU:C:2013:426; Case C-462/09 *Amazon.com International Sales Inc. and Others v. Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH* [2013] EU:C:2013:515; Case C-462/09 *Stichting de Thuiskopie v. Opus Supplies Deutschland GmbH and Others* [2011] EU:C:2011:397. *See* also footnotes below.

[28] The discretion left to Member States in the definition of the features of private levy systems is first declared in Case C-463/12, *Copydan Båndkopi v. Nokia Danmark A/S* [2015] EU:C:2015:144, para. 26.

[29] *Padawan* (*supra* note 25) paras. 46–49.

[30] This led the Court to exclude the legitimacy of a national scheme that financed the contribution from the general state budget, as in *EGEDA* (*supra* note 27) para. 31. At the same time, however, the Court admitted the possibility for Member States to attribute the sums collected as compensation to social and cultural institutions set up for the benefit of the rightholders entitled.

[31] *ACI Adam* (*supra* note 27) paras. 29 et seq.

[32] *Stichting de Thuiskopie* (*supra* note 27) para. 34.

[33] *Copydan Båndkopi* (*supra* note 28) paras. 27–28.

[34] The reference is to legal persons and natural persons using the device in a professional capacity. *See Amazon.com* (*supra* note 27), paras. 25–27, and also *Copydan Båndkopi* (*supra* note 28) para. 55.

[35] *Ibid* at 33. This also includes the possibility to split proportionally the levy on different devices that are used in chain (*VG Wort* (*supra* note 27), para. 78).

beneficiaries and the purpose of the use, and that the private copy exception applies to any medium of reproduction and not just to reproductions effected by means of photographic techniques.[36] Similarly, this allowed a ruling that the principles developed to interpret the notion of fair compensation under Art. 5(2)(b) InfoSoc shall also be used under Art. 5(2)(a) InfoSoc,[37] with an appropriate distinction between reprographies made for private non-commercial uses by natural persons and other cases, in light of the different harm caused to rightholders. Another area that has been subject to a consolidated harmonisation is Art. 5(1) InfoSoc, which introduces the only mandatory exception under the Directive. Back in 2009 the CJEU already spelled out the five requirements that should be met for the provision to operate,[38] and gradually specified the content of each condition,[39] emphasising the need for a strict interpretation of the provision.[40] Other flexibilities, however, did not enjoy the same level of attention. In this respect, it is worth noting the silence on incidental inclusion (Art. 5(3)(i) InfoSoc), on technological protection measures and their interplay with L&Es (Art. 6(4) InfoSoc), on freedom of panorama (Art. 5(3)(h) InfoSoc), on illustration for teaching or research (Art. 5(3)(a) InfoSoc),[41] on uses of public speeches and lectures (Art. 5(3)(f) InfoSoc), on other uses by public authorities (Arts. 5(3)(g) InfoSoc, 6(2)(c) and 9(c) Database),[42] on socially oriented uses (Art. 5(2)(e) InfoSoc),[43] on orphan and out-of-commerce works,[44] and on uses by persons with disabilities.[45] Only a handful of cases refer to other flexibilities, though with landmark decisions (see below, point ii).

[36] Case C-572/13 *Hewlett-Packard Belgium SPRL v. Reprobel SCRL* [2015] EU:C:2015:750, paras. 30–34. In *VG Wort* (*supra* note 27) paras. 65–67, the CJEU used a cross-interpretation with Art. 5(2)(b) InfoSoc to rule that the final medium of reproduction under Art. 5(2)(a) InfoSoc can only be analogue, regardless of the technology used.

[37] *Ibid*, paras. 40–42, on the basis of Recital 35 InfoSoc, which applies to all E&Ls under Art. 5 InfoSoc.

[38] Order C-302/10 *Infopaq International A/S v. Danske Dagblades Forening* [2012] EU:C:2012:16. The act should (a) be temporary; (b) be transient or incidental; (c) be an integral and essential part of a technological process; (d) have the sole purpose of enabling a transmission in a network between third parties by an intermediary of a lawful use of a work or protected subject-matter; and (e) have no independent economic significance (*ibid* para. 54).

[39] *Ibid*; *see* also Joined cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v. QC Leisure and Others* (C-403/08) *and Karen Murphy v. Media Protection Services Ltd* (C-429/08) [2011] EU:C:2011:631 (FAPL); Case C-360/13 *Public Relations Consultants Association Ltd v. Newspaper Licensing Agency Ltd and Others* [2014] EU:C:2014:1195; Case C-610/15 *Stichting Brein v. Ziggo BV and XS4All Internet BV* [2017] EU:C:2017:300.

[40] *Infopaq* (*supra* note 38) para. 56; *FAPL* (*supra* note 39) paras. 160–162.

[41] The only decision that only incidentally mentions this provision is Case C-161/17 *Land Nordrhein-Westfalen v. Dirk Renckhoff*, [2018] EU:C:2018:634, with no remarkable outcome.

[42] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [2017] OJ L-77/20, 27 March 1996.

[43] Apart from Case C-351/12 *OSA v. Léčebné lázně Mariánské Lázně* [2014] EU:C:2014:110, which rules against its application.

[44] *See* Art. 3 Orphan Works Directive and Art. 8 CDSMD. This is also due to the fact that Art. 8 CDSMD has only recently been implemented by most of the Member States.

[45] As in Art. 5(3)(b) InfoSoc and Art. 3 Marrakesh Directive.

(ii) The CJEU has *clarified and harmonised* the conditions of the applicability of key flexibilities, such as parody,[46] quotation[47] and exhaustion,[48] and of clauses such as the three-step test,[49] using a contextual, teleological and fundamental rights-based interpretation. Along the same lines, some optional exceptions have been indirectly declared mandatory in light of their key role in ensuring a fair balance between copyright and conflicting fundamental rights. An obvious example is the parody exception (Art. 5(2)(k)) in *Deckmyn*.

(iii) The *horizontal application of fundamental rights* has also led to the *broadening of the scope of some provisions* with the aim of safeguarding their effectiveness and purpose. This was the case, for instance, for the public lending exception (Art. 6(2) Rental), which was stretched to include e-books to ensure that the provision continues to perform its role of granting access to culture to all also *vis-à-vis* new digital lending opportunities.[50] Similar considerations led the CJEU to expand the scope of the exception allowing libraires to make available digitised collections to their patrons by means of dedicated terminals (Art. 5(3)(n) InfoSoc), arguing that its goal of cultural promotion would be frustrated if libraries were not also allowed to digitise (thus to reproduce) their printed collections to such end.[51]

(iv) The CJEU has tried to *indirectly draw the boundaries of public domain* by defining the notion of protected works in a line of cases that identified two

[46] Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others* [2014] EU:C:2014:2132

[47] Case C-145/10 *Eva-Maria Painer v. Standard VerlagsGmbH and Others* [2013] EU:C:2013:138; Case C-476/17 *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624; C-516/17, *Spiegel Online GmbH v. Volker Beck* [2019] EU:C:2019:625

[48] Case C-128/11 *UsedSoft GmbH v. Oracle International Corp*. [2012] EU:C:2012:407 on digital exhaustion under the Software Directive, and Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV and Others* [2019] EU:C:2019:1111 on general digital exhaustion under the InfoSoc Directive.

[49] Defined as a general principle that should be taken into account by legislators when exercising their discretion in the national transposition of InfoSoc E&Ls in C-468/17 *Funke Medien NRW GmbH v. Bundesrepublik Deutschland* [2019] EU:C:2019:623, para. 51, *Spiegel Online* (*supra* note 47) para. 36 and *Pelham* (*supra* note 47) para. 34. In *ACI Adam* (*supra* note 27) the CJEU ruled that Art. 5(5) InfoSoc should be understood as requesting courts to consider the impact of the exception on the normal exploitation of the work and rightholders' legitimate interests, and to decide in favour of its non-application or limitation when the circumstances of the case cause the exception to alter the balance required by the three-step test (paras. 26–27).

[50] Case C-174/15 *Vereniging Openbare Bibliotheken v. Stichting Leenrecht* [2016] EU:C:2016:856.

[51] C-117/13 *Technische Universitat Darmstadt v. Eugene Ulmer* [2014] EU:C:2014:2196.

requirements (originality and expression) and later specified their content.[52] Interestingly, however, there was no attempt to implement a court-based harmonisation of categories of works excluded from protection – a matter that is still left to non-harmonised national rules.

(v) The Court has also provided *game-changing interpretations of fundamental provisions*. The main example is Art. 5(5) InfoSoc and its three-step test, which was transformed into a rule of thumb for the (non-)application of E&Ls by national courts.[53] In some instances this attitude has triggered a negative reaction by the EU legislator, which has explicitly overruled the CJEU reading in subsequent interventions, as was the case for *Reprobel* in Recital 60 CDSMD.[54]

(vi) Finally, two decades of case law have also allowed the Court to reshape the operation of copyright flexibilities with *the introduction of judge-made doctrines such as fair balance*. With subsequent iterations,[55] the CJEU has first opened to the use of fundamental rights in the interpretation of E&Ls,[56] abandoned the principle of the strict reading of exceptions in their favour,[57] used them to indirectly declare mandatory an optional provision[58] and, lastly, intervened to draw the boundaries of the doctrine in order to bring clarity in a hazy field. With a historical triad of decisions in 2019,[59] the Court ruled that

[52] *Infopaq* (*supra* note 38) confers protection on an 11-word excerpt from a journal article, for it already carries the touch of the author's own intellectual creation, paras. 34–35, while Case C-393/09 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v. Ministerstvo kultury* [2010] EU:C:2010:816, paras. 44–45, excludes the protectability of a graphic user interface, ruling that copyright cannot cover, for lack of originality, elements necessitated by their technical function, "since the different methods of implementing an idea are so limited that the idea and the expression become indissociable" (para. 48). Similar principles led the Court to reject the notion that copyright could protect an unregistered design (Case C-168/09 *Flos SpA v. Semeraro Casa e Famiglia SpA* [2011] EU:C:2011:29), videogames (Case C-355/12 *Nintendo Co. Ltd and Others v. PC BOX Srl and 9Net Srl* [2014] EU:C:2014:25), or sports events, which were not considered protectable since the existence of rules of the game does not admit creative freedom (*FAPL* (*supra* note 39), para. 98), and portraits (*Painer* (*supra* note 47), where the Court required, as in *FAPL*, the presence of a personal touch, that is the ability to make free and creative choices. Later, in Case C-310/17 *Levola Hengelo BV v. Smilde Foods BV* [2018] EU:C:2018:618, the CJEU added the criterion of "expression", which requires that a work should be a work that is "expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form" (*ibid* para. 40).

[53] *See supra* note 49.

[54] From Recital 60 CDSMD: "In order to take account of this situation and to improve legal certainty for all parties concerned, this Directive allows Member States that have existing schemes for the sharing of compensation between authors and publishers to maintain them. That is particularly important for Member States that had such compensation-sharing mechanisms before 12 November 2015, although in other Member States compensation is not shared and is due solely to authors in accordance with national cultural policies. While this Directive should apply in a non-discriminatory way to all Member States, it should respect the traditions in this area and not oblige Member States that do not currently have such compensation-sharing schemes to introduce them."

[55] For a broader and detailed overview of the CJEU saga, *see* Sganga (2018c).

[56] Case C-275/06 *Promusicae v. Telefonica de Espana* [2008] ECR I-271.

[57] First in *FAPL* (*supra* note 39) para. 163.

[58] As in *Deckmyn* (*supra* note 46) para. 25.

[59] *Funke Medien* (*supra* note 49), *Spiegel Online* (*supra* note 47) and *Pelham* (*supra* note 47).

the validity of E&Ls *vis-à-vis* fundamental rights should be presumed, and that a departure from statutory sources is justified only against gross violations of the essence of a fundamental right, that is when there is no other way to protect their exercise. This implies that fundamental rights cannot justify the introduction of new exceptions beyond those provided by law.[60] However, they should inspire the interpretation of E&Ls, which may also lead to their extensive readings or application by analogy when necessary to protect the former.[61] To guide the balancing exercise, after long years of silence on the matter, the CJEU made explicit reference to Art. 52(2) Charter of Fundamental Rights of the European Union (CFREU) and its proportionality test, looking at the functions of copyright as a benchmark to define the core content of each exclusive right involved in the balance.[62]

3.3 Comparative Reports on Member States' Statutes and Judicial Decisions

The most ground-breaking part of the research concerned the mapping of Member States' legal sources of copyright flexibilities, articulated in *27 national reports* that illustrate and analyse the main features of national provisions and related case law, assessing convergences, divergences and relative flexibility *vis-à-vis* the EU model, when such existed.

This static mapping revealed five key trends.

Member States operate a full reception of EU Directives and Regulations, and their copyright acts now tend to align around the flexibility categories provided by the InfoSoc Directive, with only a few countries presenting more original provisions compared to the EU benchmark. The remarkable impact of the InfoSoc Directive also emerges from the wave of amendments of national copyright flexibilities after 2001, albeit only in certain sectors (e.g. temporary reproductions, private copy, ephemeral recordings, disabilities, cultural uses) and not in others (e.g. quotation and parody). Interestingly, Member States show some differences in the conceptualisation of specific permitted uses, either in terms of divergences in the label used or in terms of their theoretical qualification as acts outside the scope of copyright instead of as exceptions.[63] The most interesting finding, however, comes from the judiciary. In several instances, in fact, it was possible to observe a non-homogeneous reception of CJEU doctrines and principles by national courts, which go so far as to blatantly ignore the EU highest court's decisions and to continue to follow local precedents.[64]

[60] In *Funke Medien* (*supra* note 49) paras. 56–63; *Spiegel Online* (*supra* note 47) paras. 41–48; and *Pelham* (*supra* note 47) paras. 58–64.

[61] In *Funke Medien* (*supra* note 49) para. 71; and *Spiegel Online* (*supra* note 47) para. 55.

[62] Guidelines for the balancing exercise in line with Art. 52(2) CFREU were well explained in Case C-401/19 *Republic of Poland v. European Parliament and Council of the European Union*, C-401/19, ECLI:EU:C:2022:297.

[63] *E.g.* temporary reproduction, some lawful uses, private copy/reprography, private study, illustration for teaching and research) *See* Sganga et al. (2022), pp. 110 ff.

[64] The most glaring example comes from the parody exception. *See* below, note 76.

This static analysis was coupled with a comparative assessment of the state of 12 categories of copyright flexibilities, with the exclusion of sectors for which the quality and amount of data gathered could not allow the performance of a reliable and sound evaluation.[65] Comparative reports assessed the degree of harmonisation of national solutions as to beneficiaries, rights, uses and works covered, conditions and requirements of applicability, remuneration, purpose limitations and any other aspect relevant for the balancing exercise. It also evaluated the compliance of national sources with the CJEU case law and assessed the degree of flexibility of national solutions *vis-à-vis* the EU model.

The findings and conclusions of each comparative report confirmed the general patchwork picture that has been highlighted by previous studies, albeit with new positive convergence trends and thus greater legal certainty. This change has mostly been due to the EU introduction of mandatory exceptions, from the Orphan Works Directive onwards. In contrast, areas not touched by EU harmonisation, or harmonised only to a lesser extent, remain tainted by a high degree of fragmentation, posing issues that the EU legislator will be forced to face in the coming years. Giving a full account of the results of the research for each category of flexibility would go beyond the scope and length of this contribution, which will offer, instead, a concise overview of the most relevant findings of the 12 comparative reports, referring back to *reCreating Europe*'s datasets and publicly available studies for additional details.

Temporary reproduction, lawful uses, *de minimis* uses. This category includes flexibilities that showcase the greatest level of harmonisation across the Union, mostly due to the mandatory nature of most of its provisions (see, e.g., temporary reproduction under Art. 5(1) InfoSoc, backup, interoperability and testing exceptions under Arts. 5(2)–(3) and 6(1) of the Software Directive), and lawful uses of databases (Arts. 6(1), 7(5), 8(1)–(2) of the Database Directive). Limited divergences here pertain to the qualification of the flexibilities,[66] which in some countries are

[65] This led to the exclusion of sectors which would have required, in light of their non-statutory basis, the reporting of sufficient judicial decisions by a substantial number of national experts (*e.g.* fundamental rights, public interest and users' rights), and of heterogeneous sectors such as consumer protection law, contract law, media law et al., due to the extremely fragmented nature of the national experts' responses, which made it impossible to draw meaningful conclusions.

[66] Only France shows a relevant variation in the language used to define the necessity benchmark under Art. 6(1) Database. Art. L. 122-5-5° CPI, in fact, states that a lawful user can perform restricted acts according to "the needs and within the limits of the use provided for by contract". However, the divergence is mostly formal, and the notions functionally equivalent to those used in the EU text.

defined as acts outside the scope of protection, while in others are framed as E&Ls,[67] to the definition of the benchmark of the necessity of the lawful use and to the introduction of small quantitative limitations.[68] Areas that are not subject to mandatory harmonisation present, on the other hand, some divergences. This is the case for ephemeral recording (Art. 5(2)(d) InfoSoc) and freedom of panorama (Art. 5(3)(h) InfoSoc), where Member States either failed to implement the EU provision or added varying conditions of applicability on top of the EU model.[69]

Private copy and reprography. Although the private copy and reprography exceptions, introduced as optional provisions by Arts. 5(2)(a) and (b) InfoSoc, are present in most of the Member States, their degree of harmonisation is relatively low. As to beneficiaries, national laws show a general convergence, with the exception of some countries that stretch the EU model to also cover copies made by third parties on behalf of the user[70] or, more rarely, by legal persons.[71] More fragmentation affects the objective scope of the provision, with a number of restrictions on the number of works that can be copied and on the categories of works covered.[72] Remuneration schemes converge around the private levy model, now sharing common features thanks to the numerous interventions by the CJEU. Nevertheless, distinctions remain.[73] It is also worth noticing that national courts have contributed to the patchwork implementation of the exception, particularly

[67] This is particularly the case in the field of lawful uses of databases, which are codified *prima facie* as a limitation of the scope of protection. *See*, *e.g.* the Croatian (Art. 176 NN); Italian (Art. 102bis(1)(b)(c) l.aut); Latvian (Sec. 57(2) LaCA); Luxembourgish (Art. 67 LuDA); Belgium (Art. XI.307 CDE) and French (Art. L.342-2 CPI) implementations, which allow *de minimis* uses based on the insubstantiality of the portion of the database involved and the insignificance of the use. Also lawful uses of the database under Art. 6(1) Database are defined as rights in Sweden (Art. 26g URL – user are "entitled" to perform such acts, and "contractual stipulations which limit the right of the user" are void); Austria (Sec. 40h(3) – "this right cannot be effectively waived"); Estonia (Sec. 251 AutÕS – declaring void "any contractual provisions which prejudice the exercise of the right" of the user); Lithuania (Art. 32 LiCA – "a lawful user of a database or a copy thereof shall have the right, […], to perform" the restricted acts).

[68] In the back-up exception, Germany modifies the necessity benchmark to allow only back-up copies that are necessary to secure a "future use" of the program (Sec. 69d UrhG-G). Lithuania provides that they can be made only "in the event that the computer program is lost, destroyed or unfit for use" (Art. 30 LiCA). Poland, Slovenia, and Sweden set up additional conditions for the enjoyment of this exception. Poland states that copies shall not be used simultaneously (Art. 75(1) UPA). Slovenia lays out a quantitative limit of two copies (Art. 114 ZASP (2001)). Sweden requires that the use of back-up copies ceases immediately the period of lawful use of the original copy of the software expires (Art. 26g URL).

[69] *See* Sganga et al. (2022), pp. 427 ff.

[70] Finland (Sec. 12(2) TL) and Germany (Sec. 53(1) UrhG-G).

[71] Czechia (Sec. 30(30(3) CzCA).

[72] Typical exclusions are: architectural works (Croatia (Art. 183 NN); Denmark (Sec. 12(2) DCA); Estonia (Sec. 18 AutÕS); Finland (Sec. 12(3)(4) TL); France (Art. L. 122-5-2° CPI generally excludes artistic works); Slovenia (Art. 50 ZASP); Greece (Art. 18(1) GCA); Hungary (Sec. 35(1) SZJT); Lithuania (Art. 20(1) LiCA); and Poland (Art. 23(1) UPA)); software and electronic databases (Estonia (Sec. 756(1) AutÕS); Finland (Art. 12(3)(4) TL); Lithuania (Art. 10(13) LuDA; France (Art. L.122-5-2° CPI); Slovakia (Art. 50 ZASP)); musical, cinematographic, 3D objects, as well as any other artistic work including sculptures (Finland, Sec. 12(3)(4) TL); sheet music and works of visual art (Greece (Art. 18(1) GCA); Belgium (Art. XI.190.9° CDE); France (Art. L.122-5-2° CPI).

[73] *See*, *e.g.*, Greece (Art. 18(1) GCA), which provides different remuneration criteria if private copying takes place via analogue or mechanical means. For more details *see* Sganga et al. (2022), pp. 446 ff.

through the introduction of additional criteria and conditions of applicability, ranging from the impact of TPMs on the remuneration due to the three-step test and the interpretation of the notion of non-commercial use.[74]

Parody. Similar fragmentation characterises the important area of parody-related flexibilities. Art. 5(3)(k) InfoSoc has not been implemented in several Member States,[75] which continue to cover parodic uses under the quotation or free-use exceptions.[76] Even when transposed, only some national statutes offer a *verbatim* version of the EU provision,[77] while others add at least one – and usually different – additional requirement, scope limitation, subjective or objective condition of applicability.[78] In addition, the concept of parody itself has been subject to various interpretations by national courts, often changing in time and going beyond the criteria harmonised by the CJEU in *Deckmyn*. Back in 2014, the Court ruled that a parody should be different from the original work (structural parameter), and contain humour or mockery (functional parameter). National decisions, however, often refer to other requirements, such as the fact that: (i) the parody explicitly targets an earlier work;[79] (ii) there is no doubt as to the fact that the authors of the parody and the targeted work are different;[80] (iii) the parody indicates the paternity of the earlier work;[81] (iv) there is no intention to compete with the original work or

[74] In France (Art. L. 331-5 CPI) the use of TPMs shall not interfere with users' prerogatives such as, *inter alia*, the exception for private copy. In Italy Art. 71^{sexies} l.aut. allows the private reproduction of phonograms and videograms made by a natural person for personal non-commercial use but specifies that the exception does not apply if TPMs are in place, but Art. 71^{sexies}(4) l.aut. obliges rightholders to ensure that users have access to the protected works in order to benefit from the private copying exception. Greece (Art. 28C GCA), Italy (Art. 71^{sexies} l.aut.) and Portugal (Art. 81(b) CDA) explicitly refer to the three-step test.

[75] This is the case of Austria, Bulgaria, Denmark, Finland, Italy, Greece, Portugal and Sweden.

[76] Finland and Sweden (free uses); Bulgaria, Italy, Denmark and Portugal (quotation). In Denmark (Sec. 22 DCA), this translates into a very restrictive implementation (*See*, *Ugeskrift for Retsvæsen* 2007.280SH; *Ugeskrift for Retsvæsen* 1999.547Ø; *Ugeskrift for Retsvæsen* 2019.1294). Austria allows parodic works, even in the absence of a specific exception, through a direct application of freedom of expression (OGH 4 Ob 66/10z.)

[77] Czechia (Sec. 38(g) CzCA); Germany (Sec. 51a UrhG-G); Latvia (Sec. 19(1)(9) LaCA); Ireland (Sec. 52(5) CRRA) and Malta (Art. 9(1)(s) MCA).

[78] *E.g.*, the Belgian exception (Art. XI. 190. § 1. CEL) provides that parody must respect *usages honnêtes* (honest practices), while the French (Art. L. 122-5-4° CPI) and Polish (Art. 29[1] UPA) provisions refer to the artistic genre of parody; the Dutch implementation (Art. 18(b) AW (2004)) requires the parodic work to comply with what social customs regard as reasonably acceptable. In Luxembourg too (Art. 10(6) LuCA), parody should comply with "good practices".

[79] In Germany this was framed as a structural requirement of parody under the free use clause (Sec. 24 UrHG-G), but subsequent case law softened it. For an overview of the most relevant decisions *see* Sganga et al. (2022), p. 457.

[80] Romania (Art. 37(b) RDA), Slovakia (Sec. 38 ZKUASP), Slovenia (Art. 53(2) ZASP), and Spain (Art. 39 TRLPI) require that there is no risk of confusion between the original work and the new derivative one, and the Spanish exception also demands that no damage occurs to the work or its author (Art. 39 TRLPI). However, France (Art. L. 122-5-4° CPI) and the Netherlands (Art. 18(b) AW), albeit silent about it in their copyright acts, also consistently apply this criterion in their case law. *See* Sganga et al. (2022), pp. 452–453.

[81] Croatia (Art. 206 NN), Estonia (Sec. 19(7) AutÕS), and Lithuania (Art. 58(12) LiCA), while others might require it indirectly, since they implement parody through the quotation exception (Bulgaria, Hungary, Italy and Portugal).

profit from its reputation;[82] (v) the parody does not borrow from the original work more than necessary for its purpose;[83] and (vi) the moral rights of the original author are respected.[84] This has been the case even after the issue of the *Deckmyn* decision, which explicitly prohibits the introduction of additional conditions for the parodic use to benefit from the exception. The entry into force of Art. 17(7) CDSMD, which makes mandatory the introduction of an exception for quotation, parody, caricature and pastiche for the benefit of users of OCSSPs, could have constituted an opportunity for Member States to achieve a greater convergence also with regard to the general parody exception. However, most Member States have opted for a *verbatim* implementation, limited to online uses,[85] thus increasing the complexity of the system.

Quotation. Thanks to its mandatory nature under the Berne Convention, the quotation exception is featured in all Member States' laws. National provisions converge on basic matters such as the undefined nature of beneficiaries, the obligation to mention the author's name and source quoted and, in limited instances, the purpose of the quotation. Divergences, however, emerge with regard to the type of work and the amount that can be quoted,[86] and some countries include additional conditions such as compliance with fair practice and the non-commercial use of the

[82] *See supra* note 82. Bans on commercial uses come from national courts, especially in Germany, the Netherlands, France, Belgium, Austria (Sganga et al. 2022, pp. 458–459), or due to the application of the quotation exception (Italy, Art. 70 l.aut.)).

[83] Croatia (Art. 206 NN), Estonia (Sec. 19(7) AutÕS); Luxembourg (Art. 10(6) LuCA); Poland (Art. 29.1 UPA). In Belgium the requirement has been introduced by courts (from Wittevrongel en csrten/Aspeslag en Cocquit Court of First Instance of Ghent, 13 May 2013, A&M 2013, 352), and the same happened in Austria due to the introduction of parody through the horizontal application of the constitutional freedom of expression (OGH 4 Ob 66/10z).

[84] Luxembourg (Art. 10(6) LuCA). In other countries (France, Austria, Germany) the requirement has emerged in case law. *See* Sganga et al. (2022), p. 460.

[85] *See*, *e.g.* Malta (Law n. 261 of 2021, adding Art. 16(7) to the MCA); France (Art. L. 331-32-1 of ARCOM); Denmark (Sec. 52c(10) DCA); Luxembourg (Law n. 158 of 5 April 2022 resulting in the new Art. 70bis(8) LuDA); Austria (Sec. 42f(2) UrhG-A); Italy (Art. 102^{nonies}(2) in l.aut); Hungary (Art. 34/A(1) SZJT); Sweden (Art. 52(p) URL).

[86] The Dutch implementation (Art. 15(a) AW (2004)) applies the quotation exception only to quotations of literary, scientific and artistic works. Malta (Art. 9(1)(k) and (o) MCA), for instance, mentions audio-visual, musical, artistic, literary works, and even databases. Poland (Art. 29 UPA) also refers to "graphic works, photographic works, and minor works", Slovenia (Art. 51 ZASP) to "photographs, works of fine arts, architecture, applied art, industrial design and cartography" (but Slovenian courts have confirmed that quotation is also allowed with respect to audio-visual works or films), and Spain (Art. 32.1 TRLPI) to works of a "figurative plastic or photographic nature". A relevant number of countries make an explicit reference to the fact that quotations should be in the form of passages or short extracts [Croatia ("excerpts", Art. 202 NN); Cyprus ("passages", Art. 7(2)(f) CL); Czechia ("*excerpt from a work or small works in their entirety*", Sec. 31(1) CzCA); France ("*analyses and short quotations*, L. 122-5-3° a) CPI); Greece ("*short extracts*", Art. 19 GCA); Hungary (Sec. 34(1) SZJT); Ireland (Sec. 52(4) CRRA); Italy ("*fragments or parts of a work*", Art. 70 l.aut); Latvia ("*quotations and fragments*", Sec. 20(1) LaCA); Lithuania ("*a relatively short passage*", Art. 21 LiCA); Luxembourg ("*short quotations*", Art. 10(1) LuDA); Poland ("*fragments of distributed works*", Art. 29 UPA); Romania ("*brief quotations*", Art. 35(1)(b) RDA); Slovenia ("*parts of a disclosed work*", Art. 51 ZASP); Spain ("*fragments of other works*", Art. 32.1 TRLPI). Many national courts use the principle of proportionality/necessity of the amount quoted for the purpose, leading to divergent and uncertain results (*see* Sganga et al. 2022, pp. 468–470).

quotation.[87] Despite the CJEU's attempt to reach some harmonisation on basic requirements, national decisions are still not fully aligned with its precedents.

Informational purposes. While the EU model is characterised by great simplicity, national flexibilities for informational purposes are the most varied. The public interest in receiving information on current events is protected in all Member States, but balancing tools are largely different. Not all the informational purpose E&Ls introduced by the InfoSoc Directive have been implemented by all countries.[88] Beneficiaries are also differently identified by national laws – from general users to mass media only, sometimes specifically defined by law.[89] In addition, the overlap between these provisions and exceptions protecting freedom of expression (quotation et al.) often leads to confusing outputs in judicial decisions.[90] This fragmentation is likely to have a negative impact on the operation of news outlets in the digital cross-border environment. The situation is also made worse by the fact that most of the national E&Ls in the field use traditional definitions based on "analogue" media publishers – a circumstance that renders such provisions useless in online contexts.[91]

[87] Bulgaria (Art. 24(1)(2) BCA); Croatia (Art. 202 NN); Cyprus (Art. 7(2)(f) CL); Czechia (Sec. 31(1) CzCA); Denmark (Sec. 22 DCA); Greece (Art. 19 GCA); Malta (Art. 9(1)(k), (o) MCA); Lithuania (Sec. 21 LiCA); Finland (Sec. 22 TL)); Belgium, requiring compliance with "honest practices of the profession" (Art. XI.189, §1er CDE); the Netherlands (Art. 15(a) AW (2004)) Slovakia (Sec. 37 ZKUASP), requiring compliance with "social customs"; Sweden (Art. 22 URL), requiring the quotation to comply with "good practice"; and Romania (Art. 35(1)(b) RDA), requiring quotations to "conform to proper practice" and to comply with the three-step test. Hungary (Sec. 34(1) SZJT) requires that there is no commercial exploitation of the resulting work, while Italy (Art. 70 l.aut.) provides that the quotation is allowed as long as the quotation does not compete, on the market, with the original work.

[88] Belgium, Denmark, Estonia, Greece, Luxembourg, Latvia, Ireland, Portugal, Romania and Sweden have not implemented the press review exception.

[89] As to the press review exception, Austria (Sec. 44(1) UrhG-A) allows articles to be "reproduced and distributed in other newspapers and magazines"; Germany (Sec. 49(1) UrhG-G) "in other newspapers or information sheets of this kind"; Czechia (Sec. 34 CzCA) "in periodical press or in broadcasting or in any other mass media"; Finland (Sec. 23(1) TL) "in other newspapers and periodicals"; Italy (Art. 65 l.aut.) "in other magazines or newspapers, also in broadcast news programmes"; the Netherlands (Arts. 15–16 AW) "daily or weekly newspaper, a weekly or other periodical, a radio or television programme or other medium that has the same function; Poland (Art. 25 UPA) "through press, radio and television"; Spain (Art. 33.1 TRLPI) and Bulgaria (Art. 24(1)(5) BCA) "mass media" only; Hungary (Sec. 36(2) SZJT) and Lithuania (Art. 24(2) LiCA) the press only. As to the reporting of current events, Bulgaria (Art. 24(1)(5) of the BCA) limits beneficiaries to "mass media", Croatia (Art.s 201(1) and 201(2) NN), Estonia (Sec. 19(4) AutÕS), and Lithuania (Art. 24 LiCA), limit them to "press, radio or television"; Germany allows uses by "broadcasting or similar technical means in newspapers, periodicals and other printed matter or other data carriers mainly devoted to current events, as well as on films" (Sec. 50 UrhG-G); the Netherlands opens the exception to derived works in the form of "a photographic, film, radio or television report"; and Romania allows uses in "press articles and radio or televised reportages" (Art. 35(2)(a)). As to the public speeches exception (Art. 5(3)(f) InfoSoc), Bulgaria, Greece, Croatia, Germany, Greece, Italy, Lithuania and Portugal limit it to mass media, press and broadcasting.

[90] *See* Sganga et al. (2022), pp. 483–485.

[91] *See*, *e.g.* the Austrian Supreme Court, which excludes online press publishers (OGH 4 Ob 230/02f), similarly to the Polish courts (Sąd Apelacyjny (Appellate Court) in Gdańsk of 6th April 2017 V Aca 687/15; LEX nr 2343498), while in the Netherlands the courts follow a case-by-case approach (Rechtbank Utrecht, 12 May 2010, ECLI:NL:RBUTR:2010:BM4200 *(Eredivisiee)* versus Rechtbank Breda, 30 May 2012, ECLI:NL:RBBRE:2012:BW7204 *(Cozzmoss/Belastingplanet)*).

Teaching and research uses. Flexibilities in this area are by far the least harmonised in the EU. This is due not only to the optional nature of a large part of the EU provisions in the field, but also to the fact that all EU acts except for the CDSMD regulate teaching and research under the same vague E&Ls.[92] Such an approach left Member States free to decide how to frame their exceptions, with the result that some countries cover both uses or only one (mostly teaching), and the same diversity features the identification of beneficiaries and permitted uses. As to beneficiaries, they are either not defined or listed in open or closed lists of educational entities, with research organisations rarely mentioned.[93] Member States often provide limitations as to the categories and extent of works that can be used,[94] or to the types of uses admitted,[95] sometimes introducing additional conditions of applicability,[96] with too many differences to identify common paths. The introduction of a mandatory exception for digital teaching (Art. 5 CDSMD) has led to a greater convergence of national solutions, but also here variations appear on aspects left to Member States' discretion,[97] the negative effects of which are tackled by the country-of-origin principle dictated by the EU provision, which requires the application of the law of the country of establishment of the educational establishment. The sole research-only purpose exception introduced by the CDSMD on text and data mining (Art. 3) has been transposed almost verbatim by Member States, with a few differences as to the list of beneficiaries – usually in favour of a broader approach compared to the EU model.[98]

Cultural uses. Before the entry into force of the CDSMD, flexibilities for the preservation of cultural heritage (Art. 5(2)(c) InfoSoc) and public lending (Art. 6(1) Rental) were largely fragmented. As to beneficiaries, national provisions feature a variety of solutions, being either silent on the matter[99] or identifying them in closed or open lists, with different combinations of entities.[100] Some Member States allow

[92] *See* Art. 5(3)(a) InfoSoc; Arts. 6(2)(b) and 9(b) Database; Art. 5(3) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L-111/16, 5 May 2009.

[93] The majority of the countries leave the list unspecified, while others provide an open list of beneficiaries. For a detailed overview *see* Sganga et al. (2022), pp. 490–491.

[94] *Ibid* at 494–496. Many national exceptions chose to leave this unspecified; others include an open list of selected works; very few provisions specify the kind of work covered by the flexibility.

[95] *Ibid* at 491–494, ranging from a general right of use to open lists and, in rare instances, narrowly specified uses.

[96] Such as limitations in purpose and necessity benchmarks (*ibid* at 497–499), three-step test (*ibid* at 500–501) and remuneration (*ibid* at 496–497).

[97] *Ibid* at 501–504.

[98] *Ibid* at 504–506.

[99] Denmark (Sec. 19(1)(3) DCA); Ireland (Sec. 42A(5) CRRA); Slovenia (Art. 36 ZASP); Sweden (Sec. 19 URL).

[100] Bulgaria (Art. 22a(2) BCA); Estonia (Sec. 133 AutÕS); France (Arts. L. 133-1 to L. 133-4 CPI); Germany (Sec. 27(2) UrhG-G); Greece (Art. 22(2) GCA); Hungary (Sec. 39 SZJT); Ireland (Sec. 42(4) CRRA); Latvia (Sec. 19 LaCA); Lithuania (Art. 15 LiCA); Luxembourg (Art. 65 LuDA); Spain (Art. 37.2 TRLPI).

the lending of a broad list of works, while others exclude specific categories,[101] or provide additional conditions of applicability and/or require remuneration in the case of the lending of specific materials.[102] Additional complexity derives from the non-homogeneous introduction of remuneration schemes[103] or purpose-oriented limitations.[104] With regard to the preservation exception, beneficiaries are generally identified as museums, archives and libraries,[105] while some countries also include educational establishments,[106] or broaden the scope of the provision by adding a plethora of specific institutions.[107] Many national legislations do not specify the types of works covered,[108] or exclude a few types. However, Member States often feature additional provisions on top of the general exceptions which relate to specific categories of works and introduce additional conditions of applicability.[109] As to permitted uses, many countries go beyond mere reproduction, as set out in the InfoSoc provisions, and stretch the exception to cover other exclusive rights, and/or also digital formats.[110] Limitations appear in some national acts with regard to the maximum number of copies allowed,[111] or to the needs and purposes that may justify the reproduction.[112] The enjoyment of the exception may also be

[101] Few countries belong to this category. Croatia, Czech Republic, Denmark, Sweden and Finland. Under Art. 34(10)NN, in Croatia, the flexibility for public lending does not apply to databases, buildings and works of applied art. Czechia (Sec. 37(3) CzCA) excludes the lending of works in audio and audiovisual form. Denmark (Sec. 19 DCA) excludes cinematographic works and copies of computer programs in digital form, as do Finland (Sec. 19(3) TL) and Sweden (Sec. 19 URL).

[102] In Italy cinematographic and audiovisual works can be lent only 18 months after the first distribution or 24 months after production (Art. 69(1) l.aut.); similarly but with different timeframes Estonia (Art. 13(3) AutÕS) and Romania (Art. 18 RDA). Poland (Art. 28(4) UPA) impose remuneration obligations for printed works, while Slovenia (Art. 36(2) ZASP), Belgium (Art. XI.243 CDE) and Romania (Art. 18(3) RDA) exclude specific works from remuneration.

[103] *See* Sganga et al. (2022), pp. 512–514.

[104] *Ibid* at 514.

[105] *Ibid* at 515–517.

[106] *Ibid.*

[107] *Ibid.*

[108] Bulgaria (Art. 22a(2) BCA); Estonia (Sec. 133 AutÕS); France (Arts. L. 133-1 to L. 133-4 CPI); Germany (Sec. 27(2) UrhG-G); Greece (Art. 22(2) GCA); Hungary (Sec. 39 SZJT); Ireland (Sec. 42(4) CRRA); Latvia (Sec. 19 LaCA); Lithuania (Art. 15 LiCA); Luxembourg (Art. 65 LuDA); Spain (Art. 37.2 TRLPI).

[109] For a list of works excluded or subject to specific conditions of applicability (*e.g.* cinematographic works, periodicals, videogames, etc.), *see* Sganga et al. (2022), pp. 518–519.

[110] E.g. Austria (Sec. 42(8) UrhG-A), Slovenia (Art. 50(3) ZASP) and Czechia (Sec. 37(1) CzCA) expressly mention the possibility of reproducing the protected work in any format. Denmark (Sec. 16(b) DCA) specifically allows it in digital format for specific kinds of works, also covered by an ECL scheme under Sec. 50 DCA. Format-shifting is allowed in Ireland by Sec. 68A CRRA. For other rights covered *see* Sganga et al. (2022), p. 519.

[111] *Ibid* at 520–521.

[112] Belgium (Art. XI.190.12° CDE); Bulgaria (Art. 24(1)(9) BCA); Croatia (Art. 193 NN); Czechia (Sec. 37(1) CzCA); Finland (Sec. 16 TL); Germany (Secs. 60(e)(1) and 60(f)(1) UrhG-G); Greece (Art. 22(1) GCA); Ireland (Sec. 65 CRRA); Latvia (Sec. 23(1) LaCA; Luxembourg (Art. 10(10) LuDA); the Netherlands (Art. 16n AW); Poland (Art. 28(1) paragraph (2) UPA); Romania (Art. 35(1)(d) RDA); Slovakia (Sec. 49 ZKUASP); Sweden (Sec. 16 TL).

subordinated to the impossibility of purchasing the work on the market.[113] The entry into force of Art. 6 CDSMD, a mandatory provision that allows cultural heritage institutions (CHIs) to make copies of any works in their collections, in any format or medium, for purposes of preservation, has recently led to a strong push towards the standardisation of national solutions, which appear to depart only rarely and minimally from the EU model.[114] The same can be said for Art. 8 CDSMD, which introduced a mandatory extended collective licensing scheme (or exception, should the country lack a CMO that can adequately represent rightholders) for out-of-commerce works.[115] Convergence can also be found in the field of orphan works, where the mandatory exception introduced in 2012 encouraged a high degree of harmonisation across the Union.[116] However, some Member States still feature residual exceptions concerning lawful uses by CHIs and educational establishments, variously framed in terms of beneficiaries, purposes and limitations, with no convergence in focus.[117] This increases the density and complexity of the net of national solutions in the field, to the detriment of legal certainty and cross-border cooperation among CHIs, and ultimately hindering the implementation of consistent EU cultural policies when protected works are involved.

Socially oriented uses. Very few countries have transposed Art. 5(2)(e) InfoSoc, allowing the reproductions of broadcasts made by social institutions pursuing non-commercial purposes (e.g. hospitals or prisons), subject to the payment of fair compensation,[118] and also a limited number of national laws include provisions allowing the reproduction, performance and/or the communication to the public of protected works in specific non-profit events.[119]

Copyright and disability. Thanks to the Marrakesh Directive, which introduced a mandatory E&L for the reproduction and making available of protected works in accessible format for visually impaired individuals and authorised entities, Member States present a high degree of convergence in the field, with limited distinctions. Beneficiaries are sometimes identified very strictly by requiring a special appointment of authorised entities,[120] other times broadly with the inclusion of a wide range of disabilities and institutions.[121] A number of countries exclude specific works from the scope of the exception,[122] or provide specific rules for certain

[113] Latvia (Sec. 23(1) LaCA); Ireland (Sec. 65 CRRA); Greece (Art. 22(1) GCA); Finland (Sec. 16 TL) and Denmark (Sec. 16(3) DCA).

[114] On the implementation of Art. 6 CDSMD, *see* Sganga et al. (2022), pp. 524–526.

[115] *Ibid* at 534–542.

[116] Only limited divergences can be found with regard to the subjective scope of the provision and the range of permitted uses. *Ibid* at 530 ff.

[117] *Ibid* at 528–530.

[118] Only in Portugal, Malta, Ireland, Hungary, Czech Republic, Italy, Finland, Denmark and Cyprus.

[119] Sganga et al. (2022), pp. 538–541.

[120] Third party intervention is prevented in the Italian system, while the same provision (Art. 71bis l.aut.) also establishes that a governmental decree must define the concept of "disability" under Italian law, while the notion of authorised entities follows the EU model.

[121] The most virtuous examples are Austria, Denmark, France, Germany, Greece, Lithuania and Ireland.

[122] Denmark (Sec. 17(1) DCA) excludes musical works and sound recordings. Lithuania (Art. 25 LiCA) explicitly excludes works expressly created for persons with disabilities. The same can be said for Art. 33(1) UPA (Poland).

categories of works.[123] Additional limitations are very rare. The majority of Member States do not require remuneration, with others providing for it only in specific circumstances, and just two countries impose it in all cases.[124] More fragmentation characterises the implementation of the general disability exception (Art. 5(3)(b) InfoSoc). National laws offer a panoply of different solutions as to the types of disability considered.[125] Rights covered range from reproduction only[126] to also distribution[127] and various combinations of communication to the public, lending and public performance.[128] Most countries do not comply with the InfoSoc Directive's request to implement measures that ensure that TPMs do not hinder the exercise of the exception,[129] or do so only partially.[130] There is no convergence either on the side of remuneration obligations, with some states providing for instruments similar to compulsory licenses.[131] The patchwork of national solutions worsens the complexity of the system, already tainted by the fact that other Directives do not include any disability exception, thus often excluding some works – such as computer programs and databases – from the scope of national provisions.

Uses by public authorities. Flexibilities in this area are very country-specific. Not all the Member States have implemented Art. 5(3)(e) and (g) InfoSoc, which allow the reproduction and communication to the public of protected works for public security, for performing and reporting on administrative, parliamentary and judicial proceedings, or for uses in religious or other public ceremonies. When they have, they have mostly followed the EU model, sometimes omitting one or more of its purposes,[132] excluding specific categories of works from the scope of the

[123] *E.g.*, Art. L. 122-5-1-2° b) CPI (France) obliges publishers of textbooks to make such works available for reproduction and in digital format to disabled people within ten years from the date of first publication.

[124] Austria (Sec. 42d(8) UrhG-A) and the Netherlands (Art. 15i AW).

[125] Sganga et al. (2022), p. 544.

[126] Bulgaria (Art. 26a BCA); Croatia (Art. 193 NN); Greece (Art. 28A(2)); Lithuania (Art. 25 LiCA).

[127] Austria (Sec. 42d UrhG-A); Czechia (Sec. 39 CzCA); Estonia (Sec. 19(6) AutÕS); Germany (Sec. 45b(1) UrhG-G); Hungary (Sec. 41(1) SZJT); Ireland (Sec. 104 CRRA in Ireland); Latvia (Sec. 19(1)(3) LaCA); the Netherlands (Art. 15i AW); Slovenia (Art. 48(a) ZASP).

[128] Belgium (Art. XI.190 CDE); Denmark (Sec. 17(1) DCA); Finland (Sec. 17c TL); France (Art. L. 122-5-7° CPI); Italy (Art. 71bis l.aut.); Luxembourg (Art. 10(11) LuDA); Malta (Art. 9(1)(i) MCA); Poland (Art. 33(^{1}) UPA); Portugal (Art. 75(2)(i) CDA); Slovakia (Sec. 46(1) ZKUASP); Sweden (Art. 17 URL).

[129] As in Austria (Sec. 42dUrhG-A); Bulgaria (Art. 26a BCA); Finland (Sec. 17c TL); Hungary (Sec. 41(1) SZJT); Italy (Art. 71bis l.aut.); Poland (Art. 33(^{1}) UPA); Slovakia (Sec. 46(1) ZKUASP).

[130] Delegating conflict resolution to mediation or agency or court interventions. Croatia (Art. 193 NN); Denmark (Sec. 17 DCA); Estonia (Sec. 19(6) AutÕS); France (Art. L. 122-5-7° CPI); Germany /Secs. 45a–45c UrhG-G); Greece (Art. 28A GCA); Latvia (Sec. 19(1)(3) LaCa); Lithuania (Art. 25 LiCA); the Netherlands (Art. 15i AW); Portugam (Art. 75(2)(i) CDA); Slovenia (Art. 48(a) ZASP); Sweden (Art. 17 URL).

[131] Germany (Secs. 45a–45c UrhG-G); the Netherlands (Art. 15i AW); Slovenia (Art. 48(a) ZASP) and Sweden (Art. 17 URL).

[132] *E.g.*, Hungary (Sec. 41(2) SZJT) and Slovenia (Art. 55 ZASP) do not mention public security and limit the use in judicial/administrative proceedings to the purpose of providing evidence. Generally, Art. 5(3)(g) on uses in religious or official celebrations is much less implemented by Member States than Art. 5(3)(e).

provision, introducing subject-specific restrictions,[133] or expanding/restricting the range of permitted uses for specific beneficiaries.[134] The most frequent condit ions of applicability imposed at national level are the limitation as to the purpose of permitted uses, often read strictly by national courts,[135] the limitation of events where the public performance of protected works is allowed, and the types of works that can be performed.[136]

Public domain. Several Member States feature one or more provisions that exclude specific subject matters from copyright protection. However, public domain and paying public domain regimes remain highly fragmented, uncovered and not harmonised in the EU. Some convergence can be traced in the common exclusion of two groups of materials – official documents[137] and facts, including daily news and press information,[138] and, in some instances, abstract concepts and ideas.[139] Also in these cases, however, national distinctions remain, with different degrees of specification.[140] Member States are not aligned *vis-à-vis* the treatment of folklore,[141] and only a few provide for paying public domain schemes.[142] The harmonisation attempt made by Art. 14 CDSMD, which denies protection to reproductions of any work of visual art if the term of protection of the original work has expired, unless the reproduction constitutes an original work, represents a welcome first step towards an EU-wide definition of the boundaries of the public domain. However, the provision is optional and has not been transposed by all Member States. CJEU case law on the notion of protected work has also contributed, albeit in very vague terms, to the process of harmonisation of the

[133] Such as the exclusion of collections in Croatia (Art. 200 NN), computer programs in Latvia (Sec. 24 LaCA), images in the Netherlands (Art. 22 AW).

[134] *See* the specific provisions introduced in Denmark, Finland, Germany, Hungary, Ireland and the Netherlands, reported in Sganga et al. (2022), p. 555.

[135] As in Austria, Czechia and Sweden. *See* Sganga et al. (2022), pp. 557–558.

[136] *Ibid* at 559.

[137] Austria (Sec. 7 UrhG-A); Belgium (Art. XI.172 CDE); Bulgaria (Art. 4 BCA); Czech Republic (Sec. 3 CzCA); Denmark (Sec. 9 DCA); Finland (Sec. 9 TL); Germany (Sec. 5 of UrhG-G); Hungary (Sec. 1(4)–(7) SZJT); Italy (Art. 5 l.aut.); Latvia (Sec. 6 LaCA); Lithuania (Art. 5 LiCA); the Netherlands (Art. 11 AW); Poland (Art. 4 UPA); Portugal (Art. 7(1) CDA); Romania (Art. 9 RDA); Slovenia (Art. 9 ZASP); Slovakia (Art. 5 ZKUASP); Spain (Art. 13 TRLPI) and Sweden (Art. 9 URL).

[138] Slovakia (Sec. 5 ZKUASP); Portugal (Art. 7(1) CDA); Romania (Art. 9 RDA); Malta (Art. 3(2) MCA); Poland (Art. 74(2) UPA); Luxembourg (Art. 1 LuDA); Latvia (Sec. 6 LaCA); Ireland (Sec. 17(3) CRRA); Hungary (Sec. 1(5)–(6) SZJT); Czech Republic (Secs. 2(6); 65(2) CzCA); Bulgaria (Art. 4 BCA); Cyprus (Art. 3(3) CCL) and Greece (Art. 3(2) GCA).

[139] Slovakia (Sec. 5 ZKUASP); Romania (Art. 9 RDA); Poland (Art. 74(2) UPA); Malta (Art. 3 MCA); Estonia (Sec. 5 AutÕS) and Czechia (Art. 65(2) CzCA).

[140] More details are provided in Sganga et al. (2022), pp. 565–566.

[141] Folklore is excluded from protection in Bulgaria (Art. 4 BCA); Estonia (Sec. 5 AutÕS); Greece (Art. 3(2)–(5) GCA); Hungary (Art. 1(7) SZJT); Lithuania (Art. 5 LiCA); the Netherlands (Art. 1(a) AW); Poland (Art. 85 UPA) and Portugal (Art. 7(1) CDA). The Dutch and Polish provisions explicitly also address performances undertaken by folklore artists. Italy (D.lgs. 22 January 2004, No. 42 (Cultural and Natural Heritage Code)) and Romania (Law no. 26/2008 on the Protection of the Intangible Cultural Heritage), instead, consider such works protectable under copyright, but under a different regime.

[142] Slovakia (Sec. 10 of the Art Funds Act of 1994); France (Art. 111-4-3 CPI); Finland (Sec. 47 TL); Hungary (100 SZJT) and Bulgaria (Art. 179(2) of the Tax Code).

subject matter of copyright, including via the consolidation of the idea-expression dichotomy.[143] Still, the uniformity needed to ensure legal certainty and the correct functioning of the EU copyright law architecture is still far from being reached.

4 Back to the Future: An Agenda for Future EU Copyright Reforms

The results of the mapping of EU and national sources highlight a number of flaws that will require future policy interventions to ensure that EU copyright law achieves an effective balance between conflicting private and public interests without hindering the correct functioning of the internal market. Reforms are needed at different levels, both with regard to the general system of copyright flexibilities and with regard to specific provisions.

As to *general matters*, the persisting fragmentation of national solutions, coupled with the territoriality of copyright, suggests (G1) the need to *reconsider the approach to harmonisation for all copyright flexibilities*. The most recent EU acts, from the Orphan Works Directive to the CDSMD, opted for mandatory and very detailed provisions and for the introduction of the country-of-origin principle to overcome the problems created by copyright territoriality, with very positive effects. However, this paradigm shift has been only forward-looking, with the majority of E&Ls and other balancing tools still remaining regulated by optional provisions or uncovered, in stark contrast with the maximum harmonisation of exclusive rights. In the short term, this scenario highlights the need to conduct an assessment of the effects of the optional nature of the existing provisions on the functioning of the internal market and on the copyright balance.[144] In the medium term, a possible solution would be to extend the country of origin principle used for Art. 5 CDSMD to all existing flexibilities. In the long term, it would be advisable to make mandatory those flexibilities the fragmentation of which is proven to have a negative effect on cross-border uses and, more generally, to provide for mandatory and detailed balancing tools every time a greater harmonisation does not harm national cultural diversities.

Due to the shift in the approach to the harmonisation of copyright flexibilities, the current system features simultaneously mandatory provisions, optional provisions, and provisions that are generally optional but mandatory only with respect to certain uses. Apart from side references, such as Recital 70 CDSMD, there is no common rationale that could justify the attribution of a given regime to a specific flexibility, to the detriment of legal certainty and predictability. This suggests the need to (G2) *simplify the flexibilities regimes, and ensure consistency in the rationales underlying their adoption*.

[143] In *Levola Hengelo* (*supra* note 52) para. 40.

[144] On the EU copyright *acquis* and its harmonisation *see* Ramalho (2016); Hugenholtz et al. (2006); Griffiths (2013); Sganga (2023a, b); Schoeletter (2014); Strowel (2016); Xalabarder (2016); Van Eechoud et al. (2009); Geiger (2016); Rosati (2019a, b). Specifically, on copyright territoriality, *see* Fitzgerald et al. (2015); Hugenholtz (2009); on orphan works and Art. 8 CDSMD, *see*, among the others, Brown (2020); de la Durantaye (2015). On EU copyright flexibilities and the inadequacy of the EU system, *see* Burrell and Coleman (2010); Borghi (2021); Geiger et al. (2023).

To overcome the traditional rigidity of the E&Ls system, which straightjackets the adaptability of the copyright balance to new technological and market developments, a possible way out is to (G3) *adopt a purpose-oriented language* in future flexibility provisions.[145] EU and national case law demonstrate how rules of this kind are more adaptive to changes, and constitute a valid alternative to the general doctrine of the fair-use clause, which is alien to the continental *droit d'auteur* tradition and has also been rejected by the CJEU. To the same end, the EU legislator may want to consider (G4) *operating a horizontal joint update of "traditional" flexibilities*, which use a language that is not fully technology-neutral and rigid definitions, to adapt them to new technological, market and socio-cultural developments. This could take the form of provisions updating the definition of key copyright terms and concepts (e.g. copy, original, good/product), which would allow the preservation of the effectiveness of existing provisions in achieving their goals.

The findings of the EU and comparative mapping have also revealed a weak reception by national courts of landmark CJEU doctrines that are consolidated and strongly contribute to the development of the EU copyright system. To tackle this problem and ensure the uniform implementation of CJEU precedents at national level, the EU legislator should evaluate the possibility (G5) *to channel key CJEU principles in future acts via specific provisions or recitals. Training opportunities for national judges* on copyright and related matters may constitute a valid short-term solution as well.

A sector where harmonisation is fully lacking, but the need for convergence has become pressing in recent years – particularly *vis-à-vis* the advent of AI and the surge of the data economy – is the definition of the boundaries of the public domain. Despite the intervention of the CJEU, the lack of uniformity among Member States' laws poses serious challenges to the push for protection coming from sectors that are alien to copyright principles but still raise doubts as to their potential to be considered eligible subject-matters. This suggests that the time has come for (G6) *a harmonisation of copyright subject-matter and of clear-cut exclusionary rules for data and information*, starting from the EU Data Package and the regulation of AI.[146]

Substantial divergences also affect the treatment of uses that, although falling under exclusive rights and outside the scope of E&Ls, do not conflict or compete with the normal exploitation of a protected work, with some national courts shielding them from protection and others protecting, instead, the author of the original work. To complicate the framework, national provisions on free uses have also been censured by the CJEU in recent decisions.[147] Transformative uses may

[145] On the "enabling" interpretation of the three-step test, *see* Senftleben (2004); Aplin and Bently (2021); Geiger et al. (2015); Hugenholtz and Senftleben (2011). About a purpose-oriented language of E&Ls, *see* Karapapa (2020); Borghi and Karapapa (2019); Elkin-Koren (2017); Chapdelaine (2013); Dussolier (2020); Strowel (2018a, b).

[146] Borghi and Karapapa (2013a, b); Strowel and Ducato (2019, 2021); Flynn (2022); Geiger et al. (2018b); Margoni and Kretschmer (2018). On the interplay between data and IP, Leistner and Antoine (2022); Leistner (2020, 2021); Hugenholtz (2017); Drexl and Hilty (2019); Deloitte (2020).

[147] *Pelham* (*supra* note 47) paras. 56–65.

have a positive impact on the economy of creativity without hampering existing creators. In this sense, it would be advisable to (G7) *conduct an impact assessment of the divergences in national practices in the field, evaluating on this basis the opportunity to introduce an EU-wide E&L for transformative uses*, with related limitations to ensure a proper balance between conflicting interests.

Additional attention should also be paid to *specific flexibilities*.

The high degree of fragmentation of national *private copy and reprography exceptions* persists despite the massive number of CJEU decisions in the field, which only had the result of standardising the main features of local remuneration schemes. The lack of convergences among Member States' solutions challenges the equal treatment of rightholders in the EU and the development of a competitive cross-border market for CMOs. After a short appearance in the Public Consultation on the modernisation of EU copyright, the EU Commission's plan to intervene on the matter disappeared from the agenda. In light of the Digital Single Market goals, it is advisable to (S1) *conduct an impact assessment and consultations* with stakeholders to evaluate the effect of the lack of harmonisation in the field of private copy and levy schemes, evaluating the possibility to *adopt bottom-up solutions* and, if not effective, to *increase the harmonisation of related E&Ls* to improve legal certainty and the fairness of the market in the case of cross-border uses.

One of the most problematic areas requiring intervention is that of parody and quotation. Such provisions, which are fundamental for the balance between copyright and freedom of expression, are far from being harmonised across the Union. The patchwork of national solutions inevitably has negative effects in cross-border online settings, and the limited scope of Art. 17(7) CDSMD does not seem enough to tackle the problem. In this sense, the EU legislator should consider (S2) *intervening on the parody and quotation InfoSoc exceptions, making them mandatory* and amending their content by *introducing specific and clearer requirements*, also on the basis of the clarifications offered by the CJEU. For similar needs, the lack of harmonisation in the field of (S3) *flexibilities for informational purposes* and their outdated nature compared to the needs of the new online information industries also require *new interventions*, with new technology-neutral provisions and the adoption of solutions (e.g. country-of-origin principle) that may allow seamless cross-border uses.

The recent boost in the EU commitment to Open Science (OS) policies and the problematic situation of research-related flexibilities across the EU, which has only been limitedly repaired by the introduction of the TDM exception by the CDSMD, also call for (S4) *the alignment of EU copyright law with OS goals*, chiefly with the introduction of a *mandatory secondary publication right* limited to self-archiving for authors and/or their employers that cannot be overridden by contract, and harmonising the largely different approaches of Member States that have already intervened on the matter;[148] and (S5) *the introduction of a general, purpose-oriented mandatory research exception*, modelled on the basis of the TDM and digital education exceptions (Art. 3 and 5 CDSMD), or, as an ultimate instance, *the amendment of Art. 5(3)(a) InfoSoc* to split the teaching and research exceptions and

[148] *See*, *e.g.*, Caso and Dore (2021); Angelopoulos (2022).

increase the level of detail of the provision, in order to ensure coordination with EU OS policies.[149]

Finally, the advent of the Marrakesh Directive and its positive effects on the harmonisation of the E&Ls for people with visual impairments has help shed light on the work that still has to be done to ensure that EU copyright and accessibility laws act in synergy to enhance access to culture for differently able individuals.[150] In light of the extreme fragmentation in the national transpositions of the *disability exception under Art. 5(3)(b) InfoSoc, (S6) its extension, clarification and transformation into a mandatory provision* represents a pressing priority for the EU legislator to be taken into account for future policy actions.

5 Conclusions

Three years of research and assessment of EU and Member States copyright flexibilities, mapping both legislative acts and case law, allowed an almost all-comprehensive picture to be drawn of the degree of harmonisation in the field and on the state of the copyright balance *vis-à-vis* specific beneficiaries, works and uses in the Union and at national level. Thanks to the new taxonomy adopted by the study, it was also possible to shed light on the treatment of various uses and interests in conflict with copyright enforcement. Thanks to the holistic and innovative methodological approach and encompassing coverage, the wealth of the data set and national and comparative reports produced by the H2020 project *reCreating Europe* offer a strong evidence base for the EU and national legislators to learn from the past and present about copyright flexibilities, and to inform future policy actions objectively and soundly, along the lines of the policy recommendations the project elaborated on the basis of its findings. With the new Commission term kicking off in the second half of 2024, the hope is that this EU-funded effort will also help highlight the importance of keeping the EU copyright agenda alive, and shaping part of its pillars in the coming years.

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[149] *See* Senftleben (2022); Van Eechoud (2022); Guibault (2011); Pfeifer (2020).

[150] Directive (EU) 2019/882 of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services [2019] OJ L-151/70, 7 June 2019, which will ensure the production and distribution of accessible publications and, from June 2025, consumers will be able to acquire and read e-books irrespective of their disability. Accessibility requirements do not apply when they would imply a significant change in a product or service that results in the fundamental alteration of its basic nature. Since the transformation of an e-book into a paper Braille book may be interpreted as a fundamental alteration, the copyright disability exception should be amended in order to ensure a proper coordination between the goals of the two legislations.

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