TECHNOLOGICAL PROTECTION MEASURES AND COPYRIGHT EXCEPTIONS IN EU27: TOWARDS THE HARMONIZATION

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The advent of the Digital Era caused, thanks to the ease and high quality of digital reproduction, an increase of copyright infringement. In order to provide a counter-measure, the European Parliament issued a new piece of legislation (Directive 2001/29/EC). The Directive aims to repress such infringement through the harmonization of copyright discipline and the safeguard of technological protection measures (usage restrictions implemented on digital copyright works). However, literature on this Directive has found several weaknesses with its approach. (Dusollier 1999, 2000, 2003; Guibault 2003; Hart 1998; Hugenholtz 1997; Koelman 2000; IViR report 2007). This paper aims at investigating how the European legislator intended to achieve its goal of harmonization and if its strategy was successful. The ultimate goal is to identify individual dysfunctions in the normative process, weaknesses in the final legislative instrument, and alternative routes to achieve the purpose of the Directive. These are suggested by both its legal history and its national implementations. First, the paper reviews the legal history of the European regulations, referring to protection of technological measures and to copyright exceptions. Second it performs a comparative study of all 27 national implementations of the parts of the Directive dealing with the same topics.

Findings suggest that both within the legal history of Article 5 EUCD and in its implementation by western European countries few exceptions "holds on" across time and space, despite successive modifications of the Directive and despite diversified national implementations. These exceptions happen to be functional to the circulation of culture, and grounded on fundamental liberties or on the public interest. This means that a diversified protection between "fundamental" and "non-fundamental" copyright exceptions is both possible and useful. Only fundamental exceptions should be compulsorily implemented in Member States, and technologic protection measures (TPMs) should comply with them. In practice, this would best serve the harmonising purpose of the Directive and would provide a less controversial list of exceptions with which TPMs have to comply.

A INTRODUCTION

The EU Copyright Directive of 2001 (hereinafter, the Copyright Directive or the EUCD) claims that its main goal is the harmonization of copyright protection among Member States, in order to benefit the Internal Market by allowing an easier circulation of copyright works.[2] Part of the harmonization strategy involves a strong protection of technological protection measures (TPMs), which are the instruments to enforce copyright in the digital environment.[3] The directive also mentions that the harmonization will regard copyright exceptions, to promote "learning and culture".[4]

Mainstream literature suggested that the dysfunctions of the EU Copyright Directive in achieving a balanced protection of copyright players is mainly due to the unrestrained protection of TPMs and to the weak protection of copyright exceptions, especially against

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[2] Coucil Directive 2001/29/EC, Recital 1.

[3] Coucil Directive 2001/29/EC, Recital 47.

[4] Coucil Directive 2001/29/EC, Recital 14.

TPMs.[5] This article will explore the extent to which these weaknesses depend on the design of the Copyright Directive and whether there is room for an improvement of such regulation. To this end, it will examine the anti-circumvention regulations and the discipline of copyright's exceptions at Community level and at the national level. The paper suggests that a diversified protection of fundamental and non-fundamental exceptions would better serve the rationale of the circulation of culture

The article is therefore organised as follows: The first part provides an analysis of the wording of the EU directive, with particular attention to: a) protection of technological protection measures (section B.1); b) the protection of users against TPMs (section B.2); and c) copyright exceptions (B.3). The second part of the article deals with a comparative study of national implementations of the parts of the directive regulating TPMs (section C.1) and copyright exceptions (section C.2). The inefficiencies of the EU directive are in fact best assessed in the light of the outcome of its implementations. Moreover, the analysis will be used to propose solutions towards a more efficient harmonization, which is consistent with the circulation of culture,

This paper shows that the concerns voiced in the literature are well-founded. The modalities with which the EUCD attempted to achieve the harmonization of copyright law do not seem to be consistent with the fundamental liberties grounding copyright. They appear to aim at the maximization of rightholders' profits rather than to the circulation of culture, thus unbalancing copyright protection and dispelling its rationale. The findings from the comparative analysis identify the need for further harmonisation in both fields of TPMs and of copyright exceptions. Importantly, in the field of copyright limits, the article provides concrete directions for a differentiation in the protection of copyright exceptions, which take into account their different ability to promote the circulation of culture.

B THE EU COPYRIGHT DIRECTIVE

B.1 TPMs as a New Right?

Some copyright literature is concerned by the presence of a new entitlement (somebody calls it an "access right") deriving from the adaptation of copyright law to the digital

[5] Generally Dusollier 1999, 2000, 2003; Guibault 2003;Hart 1998; Hugenholtz 1997; Koelman 2000; IViR report 2007.

environment. More precisely, this new entitlement derives from of the anticircumvention measures (mainly the protection of TPMs) in the EU Copyright Directive 2001. Thomas Heide argues that a different structure of rights seems to appear, enforced by TPMs, to which copyright limits are not applicable.[6] This represents an involution of copyright. [7] By implementing TPMs rightholders gain an unnecessary and undue control over copyright works, beyond their exclusive rights. According to Heide this is illustrated by the apparent inconsistency between the EU Copyright Directive and the EU Rental Rights directive. When drafting the latter, the European legislator applied to neighbouring rights the same privileges and the same limits as to copyright exclusive rights. In contrast, the limitations of this "new access right" differ from those of the exclusive rights of the owner.[8] Another indication of the presence of a new right, according to this commentator, is provided by the existence of a specific directive, the Conditional Access Directive 1998 (CAD),[9] expressly designed to control access to works in the digital environment. Conclusive evidence is represented by the exclusion of internet works from the compliance with copyright exceptions. They are left to contractually regulated access-control provisions.[10] In conclusion, Heide argues, the new regulations give rightholders extra powers to control access to copyright goods, thereby endangering copyright itself. If we do not want copyright law being replaced by access control devices, we should introduce specific limitations for access control technologies to preserve also in the digital environment the guarantees provided for by copyright protection.[11]

Also for Kamiel Koelman and Séverine Dusollier the right of access is present in the provisions of the EUCD on the protection of technological measures. Koelman, distancing himself from enthusiasts of access control as a weapon to defeat piracy, like Smith[12] and Olswang,[13] distinguishes three types of access: 1) the access to a webcast service, like the password necessary to enter a web site; 2) the access to a broadcast service, like the black box of a pay-TV; 3) the total control over every access and use achieved by advanced technical means embedded in a digital work.

The third type, Koelman argues, creates a problem. It allows, in practice, a new form of exploitation of the work, by realizing a pay-per use world. It allows reaping until the last straw from what it has been sawn.[14] Technological protection measures reach where no copyright law ever dared to push itself. Ignoring that their commodities are not simple products but a vehicle of knowledge and culture, rightholders exercise their privileges, and they eschew copyright limits. As Siva Vaidhyanathan puts it, this is "the surrender of culture to technology". [15]

Séverine Dusollier also highlights the new power *de facto* granted to rightholders by the dispositions of the EUCD. Its novelty, she argues, is demonstrated by the divergence between the technology and the law that serve the interests of copyright owners. Law and technology diverge in respect to the following points: a) both, technology and law are based on the concept of force, that is, forcing or guiding the behaviour of users. The technology, though, excise this force *ex ante*; the law *ex post*; b) the enforcement achieved by technical means

[6] See Heide 2001, at 370.
[7] *Ibid*, at 364.
[8] *Ibid*, at 378-379.
[9] Council Directive 98/84/CE (Conditional Access). *Ibid*, at 376.
[10] Council Directive 2001/29/EC, Art. 6.4. *Ibid*, at 380.
[11] See Heide 2001, at 381-382.
[12] N.A. Smith 1996, at 418.
[13] See generally Olswang 1995.
[14] Koelman 2000, at 276.
[15] See also Vaidhyanathan 2001, at 160, stating: "The surrender of culture to technology. The Digital Millennium Copyright Act forbids any circumvention of electronic locks that regulate access to copyrighted material. Before 1998 copyright was a public bargain between producers and users. It was democratically negotiated, judicially mediated, and often messy and imperfect. Now the very presence of even faulty technology trumps any public interest in fair use and open access."

does not cover all works protected by copyright. Only digital versions of a copyright work, on which a TPM has been implemented, are protected. The law, on the contrary, protects all works on which rightholders have exclusive rights;[16] c) the regulations imposed by the law and those imposed by the technology do not correspond. Citing the famous work of Lawrence Lessig,[17] Dusollier recalls that the number of actions allowed by a technological protection measure (e.g. performing only a certain number of reproductions, etc.) are "decided" by the technology (*rectius*, by those implementing it), not by the law.[18]

In sum the above literature is concerned that the new legislations protecting TPMs, prompted by the alleged dangers of the digital environment, bestow on rightholders access-control powers without a counterbalancing provisions in favour of copyright users, thus hindering the fulfilment of copyright's rationale. A historical overview of the evolution of Article 6 of the EU Copyright Directive, which protects technological protection measures, seems to endorse these concerns. The wording of the subsequent drafts of the directive shows a gradual strengthening and broadening of the protection of TPMs.

The EU Copyright Directive 2001 transposed Article 11 of the WCT 1996 protecting Technological Protection Measures (TPMs). The wording of the directive, though, diverges from the wording of the WCT on some important points. Article 11 of WCT states: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights…", whereas Article 6.4 of EUCD protects TPMs as "any technology…designed to prevent or restrict acts…which are not authorised by the rightholder". The former, therefore, makes express reference to the connection between TPMs and copyright, whereas the latter does not.

The wording of the EU Copyright Directive 2001 has divided copyright scholars. Some of them consider the differences among the two formulations hardly significant, arguing that obviously the control over access can only be exercised to forbid unlawful communication or reproduction.[19] The fact that this is not specified by the Copyright Directive does not mean that a new right is born, as current copyright law only protects a defined number of exclusive rights of the owner.[20] Other scholars however are concerned that the current formulation of the EUCD broadens the power granted to rightholders by a protection of TPMs not expressly dependent on the contextual infringement of copyright law.[21] Some consider a more literal implementation of the WIPO treaties to be preferable.[22] In fact, as Kamiel Koelman states, "although it may have been the intention, the wording of the provision does not provide for a clear link between the scope of protection of technological measures and the scope of copyright".[23]

The first proposal of the copyright directive of 1997[24] did not explicitly forbid the sheer act of circumvention of TPMs. It rather aimed to suppress "any activities, including the manufacture or distribution of devices or the performance of services, which have only limited

[16] See Dusollier 2005, at 109.
[17] See generally Lessig 1999.
[18] See Dusollier 2005, at 110.
[19] See for example Barczewski 2005, at 168, arguing that "protection should focus on the infringement of copyright only"; see also Koelman and Helberger 2000, at 173.
[20] See for example Strowel 2000, at 12; the author considers this as one of the misconstructions (malentendus) on the droit d'auteur.
[21] See Hugenholtz 2000b, at 501: "In a move that reflected its ambition to set the copyright norms of the world, the European Commission chose in an early stage not to settle for the level of protection agreed upon at the WIPO level, but to raise the standard". See Dusollier 2005, at 132-133, stressing that the change of wording cannot be empty of significance.
[22] See Koelman 2000, at 275.
[23] See Koelman 2000, at 273.
[24] COM(97) 628 final-1997/0359/COD, *Official Journal C 108/6 , 7/41998*

commercially significant purpose or use other than circumvention".[25] Although it refers to "activities" in general, Article 6 in the proposal of the directive seems more focussed on circumventing devices than on circumventing behaviour. Moreover, this draft of the directive protects "technological measures designed to protect any copyright or any rights related to copyright as provided by law".[26] There is an express link here between TPMs and copyright protection, which suggests that TPMs are means to enforce copyright and therefore have to be implemented within its purview.

The amended draft of 1999[27] proposed to explicitly forbid the circumvention of technical protection measures. Moreover, with regards to the definition of effective technological measures, Article 6.3 in the amended formulation[28] of 1999 states that:

> the expression 'technological measures', as used in this Article, means any technology, device or component that, in the normal course of its operation, is designed to prevent or inhibit the infringement of any copyright or any right related to copyright as provided by law or the sui generis right [database].

The EU Commission, in the explanatory memorandum accompanying the amended proposal, states[29] that the amended formulation

> …introduces a more restrictive interpretation of the types of process controlling the accessibility or use of a protected work and, within the definition of the technological measures, it reinstates the concept of "infringement of copyright".

The second version of the Copyright Directive, therefore, even more explicitly than the version of 1997, declares that technological protection measures can be implemented only to control *infringing* acts, and not to control every act of access and use of the copyright work. Yet, the last version of the Copyright Directive, currently in force, deleted the reference to copyright infringement. Article 6.3 of the EUCD 2001 in fact recites:

> For the purposes of this Directive, the expression 'technological measures' means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis [database protection].[30]

Clearly, while in the previous version (1999) of this article TPMs had to be *designed to prevent copyright infringement*, in the current version (2001) they can be designed to prevent *any act not authorized by the rightholder*. The rightholder, it is stated, has to be entitled to exclusive rights. But the fact that she has an exclusive right does not imply necessarily that she has to implement her TPMs only to protect *that* right, because this is not specified by law.

Another indication that the Copyright Directive 2001 protects TPMs over and above the exclusive rights of the owner is given by the presence in the directive of separate lists of exceptions: one for TPMs, one for the reproduction right, and one for the communication right. Article 5 of the EUCD provides the exceptions to the reproduction[31] and

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[25] *Ibid*, Art. 6.1.
[26] *Ibid*.
[27] COM/99/0250 final - COD 97/0359, *Official Journal C 180 , 25/06/1999 P. 0006*
[28] Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society COM/99/0250 final, Art. 6(3).
[29] See Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM/99/0250 final - COD 97/0359) and Explanatory Memorandum., at its comment on Art. 6(3)
[30] Council Directive 2001/29/EC, Art. 6.3. The *sui generis* protection is provided for by the Directive 96/9/EC on the legal protection of databases.
[31] Council Directive 2001/29/EC, Art. 5.2.

communication[32] rights of the owner, whereas Article 6.4 of the EUCD, provides specific exceptions, selected from the previous list, with which TPMs have to comply.

The first draft of Article 6.4 did not provide specific exceptions with which TPMs have to comply, but referred directly to Article 5 of the EUCD, which contains the copyright exceptions to the exclusive rights of the owner.[33] Subsequently, the EU legislator decided to indicate a selection of copyright exceptions that have to be respected by TPMs, without express justification.[34] The presence in the EUCD of different lists of exceptions protected in a different way suggests that TPMs do not depend on the exclusive rights granted by copyright law. If they were dependent on the exclusive rights, they would be bound to comply with the same exceptions stipulated for them. Moreover, the exceptions to the exclusive rights of the owner are almost all facultative for Member States to implement, whereas the exceptions for TPMs are compulsory.

In conclusion, whilst the first drafts of the EUCD, like the WCT, expressly link TPMs with copyright, the last version of the directive, currently in force, does not. This suggests that the variation in the wording could be intentional. The fact that TPMs initially had to comply with all copyright exceptions and subsequently with only some of them is another indication of the process of separation between the exclusive rights of the owner and TPMs. If this is true, the status of TPMs, protected over and beyond copyright law although not justified by copyright law, is uncertain. The concerns about an undue broadening of the powers of the owner seem to be well-grounded. Whether the entitlements of the user are equally broadened by the EUCD is discussed in the next section.

B.2 Remedies against Non-Compliant TPMs

The EU Copyright Directive 2001 stipulates in Article 6.4 a selection (from Article 5.2) of seven exceptions with which TPMs have to comply. Article 6.4 of the EUCD enjoins rightholders to take "voluntary measures" in order to comply with a number of copyright exceptions.[35] Failure to do so, according to the directive, should lead Member States to take "appropriate measures" to make sure that rightholders comply with the listed copyright exceptions. Further clarification on both "appropriate measures" and "voluntary measures" is provided by Recital 51 of the EUCD. On "voluntary measures" it states:

> Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. [36]

Clearly, the EUCD relies on self-regulation amongst copyright players to settle the question of the compliance of TPMs with copyright exceptions. Self-regulation can involve collective contractual agreements between rightholders and users. Self-regulation by industry is a popular instrument of EU policy-makers in regulatory areas like consumer protection, because of its perceived flexibility. [37] However, the law stipulates counter-measures in case

[32] Reproduction and communication right, Council Directive 2001/29/EC, Art. 5.3.

[33] Council of the European Union, Amended Proposal for a Directive of the European Parliament and of the Council on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, (COM 250 Final) (1999), Dec. 22, 1999, DOC. 14238/99 at 22

[34] Council of the European Union, Amended Proposal for a Directive of the European Parliament and of the Council on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, (COM 250 Final) (1999), May 19, 2000, DOC. 8695/00 at 21.

[35] For a discussion on this selection see *infra* C.2.

[36] Council Directive 2001/29/EC, Recital 51, second paragraph.

[37] Contractual agreements are considered by some a more flexible solution. See Casellati 2001, at 381.

the voluntary agreements fail to materialise "within a reasonable period of time".[38] In this case it is the task of Member States to ensure that they comply with the directive. To this end, they have to take "appropriate measures", which are better specified in Recital 51:

> In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means...[39]

The wording of this recital does not explicitly suggest a course of action to be taken by national authorities in the case rightholders do not comply with copyright exceptions. However, it seems a little more precise with regard to the course of action that rightholders have to take. In the body of the directive, Article 6.4 states that "Member States shall take appropriate measures to ensure that *rightholders make available…the means of benefiting from that exception or limitation* [emphasis added]". The recital offers some clarification on these "means". They have to be "appropriate", and they have to involve "modifying an implemented technological measure". This wording explicitly suggests modifying the lock. But the following "or by other means"[40] suggests that, as an alternative to modifying the lock, rightholders can make available the work through different channels. The directive does not specify what these other channels should be. Rightholders could, for example, provide beneficiaries of exceptions with analogue copies. Such a disposition, it might be argued, would be perfectly reasonable, as long the analogue product can be deemed identical to the digital one from the user's perspective.[41] However, nothing of this is specified by the EU legislation. As a consequence, Member States did not prescribe alternative formats to replace inaccessible digital copyright works.[42] In fact, in Europe many copyright works protected by TPMs are not available in commerce in alternative formats. This shows a rather feeble action of the Copyright Directive in order to have rightholders comply with copyright exceptions.

Another indication of the unbalanced protection of TPM versus users' access entitlements is the rule that users cannot bypass technical locks under any circumstance.[43] Even beneficiaries of one of the seven compulsory exceptions of Article 6.4., cannot "lawfully hack" a copyright good, neither copy-protected nor access-protected.[44] In fact, the previous version[45] of the Article 6.1 recited: "Member States shall provide adequate legal protection against the circumvention *without authority* of any effective technological measures…[emphasis added]". At this point, the article seems to leave some room for claims of "legal circumvention". But in the version currently in force the reference to authority has been deleted. The EUCD 2001 states: "Member States shall provide adequate legal protection against the circumvention of any effective technological measures…" *tout court.*

The above shows that the European legislator does not seem willing to take concrete action to force rightholders to comply with copyright exceptions. As a result of the vagueness of its wording, the indications of Recital 51 have almost entirely been ignored by the implementations of Member States.[46] With the only exception of Lithuania, no Member State enjoins rightholders to modify their TPMs to respect copyright exceptions. General directions given into a recital do not seem to be the right instrument to achieve the goal of

[38] Council Directive 2001/29/EC, Recital 51, third paragraph.
[39] Council Directive 2001/29/EC, Recital 51, third paragraph.
[40] See Braun 2003 at 500, criticising the vagueness of this reference.
[41] One could argue that allowing certain categories of users to access a different format only could form a subtle form of discrimination.
[42] With the exception of Italy and Germany. See *infra,* C3.
[43] See Braun 2003, at 499.
[44] See Koelman 2000, at 275.
[45] COM/99/0250 final - COD 97/0359, *Official Journal C 180 , 25/06/1999 P. 0006.*
[46] See *infra*, C3.

harmonization, especially in such a controversial field and in the absence of established best business practices.

B.3 Copyright Exceptions

A further example of ineffective attempt to achieve an effective harmonization of copyright law within the EUCD is represented by the regulation of copyright exceptions. The first draft of the EUCD of 1997, in its Article 5, contained an essential list of facultative copyright exceptions. [47] Among the limits to reproduction and communication rights there were photocopy,[48] personal copy,[49] libraries,[50] teaching and research,[51] handicap,[52] news,[53] quotation,[54] and public security/administration.[55]

In the amended draft of the EUCD of 1999[56] The exception for the personal copy was divided in two parts a) audio or video analogue recording, and b) audio or video digital recording. The latter, moreover, is conceded "without prejudice" to TPMs. This means that TPMs can be implemented despite the presence in national law of an exception for private copying. Both types of private copying, the exception for photocopies, and the exception for archives, libraries and similar institutions were all subjected to "fair compensation" for the rightholder thanks to an amendment proposed by the Legal Affair Committee of the EU Parliament. Moreover, a new exception was inserted for ephemeral fixation by broadcasters. Finally, the exception for visually impaired people was extended to all people with disabilities. [57]

The European Commission, in its explanatory memorandum, accepted the amendment proposed by the Parliament distinguishing digital from analogue copying, by stressing that this distinction is important in the digital environment.[58] Moreover, it replaced the expression "without prejudice to the technical means [i.e. TPMs]" with the expression proposed by the Parliament "where there are no reliable and effective technical means ..."[59] In this way the Commission stipulated that either TPMs or private copying have to be implemented by Member States. Finally, the EU Commission accepted the amendment on fair compensation for the author in some cases, such as "reproduction on paper, private [digital] copying and illustration for teaching and scientific research".[60]

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[47] COM(97) 628 final-1997/0359/COD, Official Journal C 108/6 , 7/41998.
[48] *Ibid* (proposal 1997), Art. 5.2(a) "in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects".
[49] *Ibid*, Art. 5.2(b) in respect of reproductions on audio, visual or audio-visual recording media made by a natural person for private use and for non-commercial ends.
[50] *Ibid*, Art. 5.2(c) in respect of specific acts of reproduction made by establishments accessible to the public, which are not for direct or indirect economic or commercial advantage.
[51] *Ibid* Art. 5.3(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.
[52] *Ibid*, Art. 5.3(b) for uses for the benefit of visually-impaired or hearing-impaired persons, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability.
[53] *Ibid*, Art. 5.3(c) use of excerpts in connection with the reporting of current events, as long as the source is indicated, and to the extent justified by the informatory purpose.
[54] *Ibid*, Art. 5.3(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.
[55] *Ibid*, Art. 5.3(e) use for the purposes of public security or for the purposes of the proper performance of an administrative or judicial procedure.
[56] Explanatory memorandum COM/99/0250 final - COD 97/0359, *Official Journal* C 180, 25/06/1999 P. 0006
[57] *Ibid*, at 2.4.
[58] *Ibid*, at 2.1.
[59] Recital 26, Article 5.2(b) and (ba) new, See Explanatory memorandum COM/99/0250 final at 2(1).
[60] *Ibid*, at 2.2.

Interestingly, the European Commission did not accept a modification subjecting the "main act of use of a work" to the authorisation by the rightholders or the permission by law. This amendment was initially proposed to address infringing file-sharing on networks. Yet, the Commission considered this not "the most appropriate or commensurate means of achieving that objective", fearing this could jeopardise the proper functioning of networks [61]This suggests that at that time (1999) the Commission was resisting the pressures from rightholders (through the European Parliament) for more powers over control of copyright works. However, the expression "without prejudice to the technical means" was reinserted in the following formulation of the directive.[62] Clearly, the formulation favoring TPMs over private reproduction eventually prevailed.

In the amended proposal of 1999, the following exceptions were provided for the reproduction rights: photocopies (subject to author's compensation);[63] audio/video analogue recording (subject to compensation);[64] audio/video digital recording[65] "without prejudice to operational, reliable and effective technical means capable of protecting the interests of the rightholders" (subject to compensation); archiving by cultural institutions (libraries, etc. - with compensation);[66] ephemeral fixation by broadcasters.[67] For both the reproduction and communication right there were provided the following exceptions: teaching/researching;[68] disability;[69] news;[70] quotation;[71] public security/administration.[72]

Compared to the amended proposal of 1999 the list of exceptions of the EUCD 2001 was almost twice as long. One exception on temporary reproductions (so-called exception for caching copy) which are "integral and essential part of a technological process" has to be compulsorily implemented by Member States. All the other exceptions could be optionally implemented by Member States.[73] This exception for caching copy was introduced following the debate on temporary reproduction.[74] The other exceptions can be optionally implemented by Member States.

The compensation for libraries and similar institutions, provided for the draft of 1999, was eliminated in the law of 2001. Moreover, a new exception for broadcasting performed by public institutes like prisons or schools was introduced. Further, a supplement of new exceptions is provided in the draft currently in force. Most of them are *de minimis*, like the exceptions for celebrations or demonstration (e.g. inclusion in catalogues). Important at this stage was the inclusion of the exception for parody, which is clearly grounded on freedom of expression. Moreover, Article 5.2 (o) of the EUCD refers to other minor exceptions already present in the legislation of Member States. With this the EU Commission wanted the list to be exhaustive.

In sum, the final list comprehended for the reproduction right: photocopies (with "fair compensation"); personal copy (regardless whether analogue or digital, with compensation); libraries, schools, museums and archives, with no commercial purposes; broadcasting

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[61] *Ibid*, at 4.5: "The amendments or parts of amendments not accepted by the Commission for reasons of substance relate to: (1) The introduction in Art. 5(1) of the condition that the main act of use of a work should be authorised by the rightholders or permitted by the law".
[62] Council Directive 2001/29/EC, Art 5.2(b).
[63] *Ibid*, Art. 5.2(a).
[64] *Ibid*, Art. 5.2(b).
[65] *Ibid*, Art. 5.2(b)bis.
[66] *Ibid*, Art. 5.2(c).
[67] *Ibid*, Art. 5.2(d).
[68] *Ibid*, Art. 5.3(a).
[69] All disabilities, *Ibid*, Art. 5.3(b).
[70] *Ibid*, Art. 5.3(c).
[71] *Ibid*, Art. 5.3(d).
[72] *Ibid*, Art. 5.3(e).
[73] This format was unchanged since the first proposal of 1997.
[74] See generally Hugenholtz 2000a.

organizations and no-profit institutions like hospitals or prisons (with compensation). For the reproduction and communication rights the following exceptions were provided: teaching and research (with citation of the source and author and to the extent of the function pursued); disabled people (within the limits of their disability); news and quotation for criticism (with citation of the source); public security and administration;[75] speech/lectures; celebrations; architecture/sculpture (they can be photographed); incidental inclusion; advertising; parody; demonstration (for commercial purpose); drawings of buildings; private networking; others (already in the legislation of Member States).

As in the previous versions of the Copyright Directive, copyright exceptions are limited by a lawful use and by the three-step test of the Berne Convention.[76] In other words, only a lawful user can benefit from copyright exceptions, and copyright exceptions have to constitute special cases, which do not conflict with the normal exploitation of the work, and do not unreasonably prejudice the interests of rightholders.

The above shows that the progress of copyright exceptions in the EU starts from a short and essential list and ends with an extensive and detailed one. The exceptions of the current list of Article 5.2 are all protected in the same way, without a distinction between more and less fundamental exceptions, on the basis of their different justifications. Exceptions based on Freedom of Expression, like the exception for news reporting, for example, are protected as much as the exception for advertising. Arguably, the EU legislator deems the length of the list, rather than a diversification in the protection of the exceptions, would provide the user with a wide coverage of protection.

The Criticisms

The list of exceptions of 2001 was greeted with scepticism by the copyright literature. The criticisms focus on the following issues: Heide warned against the facultative nature of most exceptions and against the restrictions imposed to the exceptions themselves, which could affect innovation-driven competition.[77] Hart criticised the harmonization of the three exclusive rights of the owner facing the non-harmonization of the exceptions.[78] The Dutch Advisory Board warned against the choice of an exhaustive list, for the practical impossibility to compile a really "exhaustive" one. They suggested that a wildcard clause exempting further cases not foreseen by the Commission at the time of the drafting would be recommendable; something similar in spirit to the American fair use.[79] Guibault highlighted the derivation of some important copyright exceptions from the freedom of expression and the right to the dissemination of culture; and regretted the lack of harmonization in those important fields.[80] Hugenholtz stated that the exhaustive nature of the list was not realistic, because it is not possible to foresee all possible uses liable to be exempted by copyright.[81] He likened the list to a set of tips, which Member States are free to follow, and to a shopping list from which national legislators are free to purchase different exemptions.[82] He also mused on the role of the lobbying that motivated some exceptions.[83] Moreover, in the recent EU report on the state of the implementation of the EUCD, he stressed the need for a compulsory list of exceptions, which should be clearly worded.[84]

[75] Council Directive 2001/29/EC, Art. 5.2, 5.3
[76] Council Directive 2001/29/EC, Art. 6.4.
[77] See Heide 2000, at 223.
[78] See Hart 1998 commenting on the proposed directive, at 171
[79] See the CPB Netherlands report 4.4.
[80] Guibault 2003, at 39-40.
[81] See Hugenholtz 2000b, at 502.
[82] See generally Hugenholtz 2000c.
[83] See Hugenholtz 1997.
[84] See IViR Study on the Implementation and Effect in Member States' Laws Of Directive 2001/29/EC On The Harmonisation Of Certain Aspects Of Copyright And Related Rights In The Information Society, at http://www.ivir.nl, at 63-64.

Recently, a more positive view of the list of exceptions of the EUCD has been expressed by Coleman and Burrell.[85] They are satisfied with the general approach of the directive, although they had hoped for a more faithful implementation by member countries. However, it is fair to say that most commentators have been critical. The ALAI conference of Barcelona of 2006 examined the case of copyright exceptions worldwide, and the general report compiled by Michel Vivant stressed once again the worrisome heterogeneity of legislations on the matter.[86]

The above criticisms can be summarised in two points: a) the list of copyright exceptions cannot be exhaustive; and b) with this facultative instrument the harmonization is impossible.

Exceptions for TPMs

In contrast to exclusive rights where exceptions have been in the main facultative, the EUCD has been considerably stricter and more synthetic in the matter of TPMs, It selected only seven exceptions from the list of twenty-one discussed above. But in the case of TPM these are all compulsory. The seven exceptions with which TPMs are legally obliged to comply[87] are: photocopy;[88] reproduction made by libraries and archives;[89] ephemeral recordings by broadcasting organizations;[90] reproductions of broadcasts by social institutions;[91] teaching or research;[92] disables;[93] public security/administration.[94]

What strikes immediately, as Dusollier remarks, is the absence of the exceptions for quotation and news reporting, which are traditional testimonials of the freedom of information Moreover, these exceptions are mandatory under the Berne convention, whilst ephemeral broadcasting is only permissive,[95] and the broadcasting by a particular organization is not contemplated.[96] Moreover, the need of a specific provision for the two "broadcasting" exceptions is debatable. The exception for ephemeral broadcasting only requires that one is allowed to perform back-up copies. This exception, for example, would benefit from a broad allowance for private reproduction, which includes the archiving purpose. The meaning of "private" in this case, would not only refer to a reproduction performed by a natural person, but also to commercial activities, as long as they reproduce copyright works that have already been lawfully purchased. Broadcasting by public institutions, furthermore, could be covered by the exemption for libraries, or teaching. Less surprising, on the contrary, is the absence of the exception for private copying, which is the most controversial of the copyright exceptions. The literature is divided between those grounding it only on economic justifications[97] and those considering it as buttressed by civil liberties.[98]

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[85] See Burrel and Coleman 2005, at Article 9.
[86] Not only the quantity and quality of the exceptions recognized by different countries is in question, according to this commentator; but also the "force" of the exceptions themselves, which can be overridden or not by contract and by TPMs, according to the country. See the general report by Michel Vivant at the ALAI 2006 (Barcelona 19-20 June), at 5-16.
[87] Council Directive 2001/29/EC, Art. 6.4.
[88] Council Directive 2001/29/EC, Art. 5.2(a).
[89] Council Directive 2001/29/EC, Art. 5.2(b)
[90] Council Directive 2001/29/EC, Art. 5.2(c).
[91] Council Directive 2001/29/EC, Art. 5.2(e).
[92] Council Directive 2001/29/EC, Art. 5.3(a).
[93] Council Directive 2001/29/EC, Art. 5.3(b).
[94] Council Directive 2001/29/EC, Art. 5.3(e).
[95] Berne Convention, Art.11bis(3).
[96] Berne Convention, Artt. 10(1) and 2.8.
[97] See e.g. Gordon 1982, at 1654. The author argues that reproduction made by private users do not seem to suggest the presence of a public interest, as for transformative works, or research and teaching. Neverhteless, the author suggests that also private copying can be found "fair use" under her test.
[98] See e.g. Hugenholtz 1997, arguing that private copying could be backed by fundamental rights, like the right to privacy.

In sum, it is difficult to escape the impression that the choice of exceptions reflects a certain arbitrariness which may suggest that the choice of the items on the list in Article 6.4 was strongly influenced by European lobbying groups and less so by rigorous legal reasoning.[99]

C IMPLEMENTATIONS OF THE EUCD IN MEMBERS STATES

C.1 TPMs among Member States

The European Union Copyright Directive 2001 aims at harmonizing copyright legislations of member states[100] in order to protect and enhance the mechanisms that underlie the Internal Market.[101] Part of this harmonization process is the protection of TPMs[102] and of copyright exceptions.[103] The EUCD therefore sets clear anti-circumvention provisions and selects a list of copyright exceptions with which TPMs have to comply.

However, the means of protection provided by Member States implementing the EUCD to owners and users of copyright works are unbalanced and diversified. The focus of the analysis is on: a) the sanctions against circumvention of TPMs (non-professional infringement and not in the course of business); b) the measures to be taken by rightholders to comply with copyright exceptions; c) the different remedies granted to beneficiaries in case of non-compliance by rightholders. To this end, first a synoptic table will give an outline of the positions of the EU countries[104] on the matters above mentioned. We compare national EU laws on the sanctions provided for the circumvention of TPMs, on the measures that rightholders have to take to make TPMs compliant with copyright exceptions, and on the remedies available to users in case of rightholders' incompliance.

Table C.1-TPM regulation in Europe

	Sanctions for circumvention of TPM	What the owner has to do to have TPM comply with exceptions	Remedy for absence of voluntary measures
Austria	**Imprisonment up to two years if professional[105]**	**Nothing**	**None**
Belgium	**Fine (100/100.000Fr)[106]**	**Voluntary measures[107]**	**Court of Law**
Bulgaria	**Fine**	**Nothing**	**None**
Croatia	**Civil remedies (Fine if legal entity or business)**	**Shall make available copyright works to beneficiaries**	**The competent Minister shall provide means to access**
Cyprus[108]	**Imprisonment up to 3 years and/or up to £(Cyprus) 30.000**	**Voluntary measures**	**None**

[99] See Hart 2002 at 63. The author states: "What is clear is that Art. 6.4 is a highly unusual and unclear provision and very much the creature of political compromise".
[100] Council Directive 2001/29/EC , Recitals 1-7.
[101] Council Directive 2001/29/EC, Recital 47; see Braun 2003, at 499.
[102] Council Directive 2001/29/EC, Recitals 47-53.
[103] Council Directive 2001/29/EC, Recitals 32-45.
[104] The legislation of Germany and Austria is not available in English or French. Data are acquired from literature reviewing these legislations.
[105] Austrian Copyright Act, §91, par 2(a).
[106] Belgian Copyright Act, Art 80. Recidivisms are punished, in alternative or not, with the same fine and/or a sentence from 3 months to 2 years.
[107] Belgian Copyright Act, §4: "The Technological Protection Measures seen at §1 cannot forbid a legitimate purchaser of works and services to utilize those works and services in conformity with their normal destination" [unofficial translation]. 22 MAI 2005. - Loi transposant en droit belge la Directive européenne 2001/29/CE du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information.

Czech Republic	**None**	**Nothing**	**None**
Denmark	**Fine. Imprisonment up to 12 month if professional.**[109]	**Voluntary measures**	**Copyright License Tribunal**[110]
Estonia	**Civil remedies (Fine if trade in "pirated copies")**	**Shell adjust TPMs to allow exceptions**	**Copyright Committee**
Finland	**Fine, jail up to 1 year. If with intent fine, 2 years, confiscation**[111]	**Shall make available copyright works to beneficiaries**	**Arbitration procedure**
France	**Fine € 3.750**[112]	**Voluntary measures**	**Mediation board**
Germany	**Imprisonment up to one year or a fine. Imprisonment up to three years of or a fine if professional.** [113]	**Voluntary measures (for private copy, he has to allow at least analogue copy)**	**Court of Law**[114]
Greece	**Imprisonment of one year minimum and a fine of €2.900 min and €15.000 max** [115]**. Minimum 10 years if professional.**	**Voluntary measures**	**Mediators selected from the list drawn up by the Copyright Organisation**
Hungary	**Civil remedies**	**Nothing**	**None**
Ireland	**Imprisonment up to 5 years and/ or £ 100.000 fine**[116] **if course of business of prejudice to owner.**	**Shall make available copyright works to beneficiaries**	**High Court**
Italy	**Imprisonment from 6 months to 3 years plus fine *if for profit.*** [117] **Fine from €51 to € 2065. Imprisonment for 1 to 3 years if more that 50 copies, or upload on networks, or professional.**	**Voluntary measures (for private copy, he has to allow at least analogue copy)**	**Mediation board**
Latvia	**Civil remedies**	**Shall make available copyright works to beneficiaries (indirectly inferred)**	**Court of Law**
Lithuania	**Civil remedies**	**Shall provide access means (decoding devices)**	**Copyright Council**[118]
Luxembourg	**Fine from € 251 to € 250.000**[119]	**Voluntary measures**	**Court of Law**

[108] The translation of Cyprus legislation is courtesy by Foteini Papiri, Lecturer in Law, University of Nottingham.
[109] Danish Copyright Act, s75c.
[110] If the rightholder does not comply with the order within 4 weeks from the decision of the Tribunal, the user may lawfully circumvent the effective technological measure (Section 75 d (1). But a case cannot be brought before the Tribunal unless the parties have made reasonable attempts to make an arrangement. See Consolidated Act No. 618 of June 27, 2001, as amended by Act No. 1051 of December 17, 2002
[111] See Ville Oksanen and Mikko Valimaki at http://www.fipr.org/copyright/guide/finland.htm.
[112] French Copyright Act Art. L. 335-3-1 – I and L. 335-3-2 –I. On the 03-01-2007 the Ministry of Justice issued a circular with the aim of assisting courts in delivering sentences proportionate to the specific types of infringement. It is made a distinction between circumvention, communication to the public (uploading), downloading. See http://www.juriscom.net/documents/circulaire-DAVDSI.pdf.
[113] But not if it is done for private use. See German Copyright Act of September 9, 1965, as amended on September 10, 2003.
[114] The rightholder faces a fine up to € 50.000,00. *Ibid*, § 111a (1) no. 2.
[115] In the event the illegal benefit of the infringer is exceedingly high, the minimum penalty of imprisonment and the fine margins are doubled. If it is done professionally, the sentence is minimum 10 years of imprisonment plus a fine of €14,673 up to €58,694. See Law 3057/2002, entitled "Amendment and Completion of Law 2725/99, Government's Gazette 10/10/02 (issue 239A).
[116] £ 1.500 and/or up to 12 month if summary conviction. Irish Copyright Act PT2 S. 140.
[117] From 1 to 3 years of prison, plus fine, if are reproduced more then 50 copies or works are diffused *on networks* for profit (peer to peer is included) or it is an entrepreneurial activity. See Decreto Legislativo 9 Aprile 2003, n. 68: Attuazione della direttiva 2001/29/CE sull'armonizzazione di taluni aspetti del diritto d'autore e dei diritti connessi nella societa' dell'informazione. (GU n. 87 del 14-4-2003 - Suppl. Ordinario n.61).
[118] The proceeding seems to be particularly prompt. The Council issues a written proposal of conciliation; if any of the parties object in writing within one month, the conciliation is considered as approved. The conciliation can be appealed before ordinary courts.

Malta	**Civil remedies**	**Voluntary measures**	**None**
Netherlands	**Civil remedies**	**Nothing**[120]	**None**
Poland	**Civil remedies**	**Nothing**	**None**
Portugal	**Imprisonment for up to 1 year or a fine of up to 100 days**	**Voluntary measures**	**Mediation board**
Romania	**Unspecified**	**Shall make available copyright works to beneficiaries**	**Unspecified**
Slovakia	**Civil remedies**	**Nothing**	**None**
Slovenia	**Civil remedies (or punitive damages- Fine if professional)**	**Shall make available copyright works to beneficiaries**	**None**
Spain	**Civil remedies**	**Voluntary measures**	**Court of Law**
Sweden[121]	**Civil remedies**	**Shall make available copyright works to beneficiaries**	**Court of Law**
United Kingdom	**Only civil remedies. Imprisonment up to 2 years if in the course of business or prejudice to owner.**[122]	**Voluntary measures**	**Notice of complaint to the Secretary of State**

A comparison among the national laws that implement the EUCD shows that most of Western European countries provided for criminal sentences against the circumvention of technological protection measures. Sometimes the sentences provide for imprisonment; more often, for a fine. The imprisonment ranges normally from six months to one year for non-professional infringement. For professional infringement there are higher sentences, up to three years. Exceptional is the case of Greece, which stipulates minimum rather then maximum sentences. They are extremely severe: a minimum of one year (doubled in grave cases) for non-professional infringement and a minimum of ten year for a professional one. The case of Italy could be misleading. The imprisonment up to three years, given the wording "if for profit", may give the impression that it refers to professional infringement. But the wording "per profitto" of the original text refers to "every advantage", not to commercial gain.[123] This means that this severe sentence is applicable to occasional infringement as well as professional infringement.[124]

Interestingly, most Eastern European countries provided only for civil remedies against circumvention of TPMs while sometimes stipulating criminal sentences for copyright infringement. This suggests that very few of them consider the circumvention of TPMs itself as copyright infringement, in contrast to many Western European countries.

The measures that rightholders have to take to ensure copyright exceptions are different. Eleven countries joined the EU legislation in *wishing* that stakeholders would take "voluntary

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[119] Unless it is done for private use Copyright, related rights and database rights Act of April 18, 2001 (as amended on April 18, 2004).

[120] However, the Minister of Justice, according to the Copyright Act, can issue a decree, in case is deemed necessary, to order to rightholders to comply with some fundamental exceptions (disabled, teaching, research, etc.)

[121] Sweden implemented the Copyright Directive in 2005, but the text of the law is available only in Swedish at <http://www.notisum.se/rnp/sls/lag/19600729.HTM>.

[122] Up to 3 months with summary conviction. See UK Copyright Act s107.

[123] The commercial revenue corresponds to the translation "a scopo di lucro", which was the previous wording of the law. The modification triggered a heated debate; a bill has been presented to return to the old formulation. See Italian copyright Act (Legge 633/41) Artt. 171-174*quinques*.

[124] In fact, for the professional infringement and for non-professional peer to peer diffusion it is provided for a sentence from 1 to 3 years of imprisonment (the former version of the law provided for 1 to 4 years). [124] However, the Highest Criminal Court recently ruled that uploading on peer-to-peer is not illegal if there is no financial gain. See Corte di Cassazione, Terza Sezione Penale, Sentenza n. 149 del 09-01-2007, at <www.diritto-in-rete.com/sentenza.asp?id=331> . But the infringement at hand took place before the issue of the new law.

measures" (as worded in the Copyright Directive.[125]) to grant access and use to beneficiaries of exceptions; mostly they are from Western Europe. The others either impose rightholders to make available copyright works to beneficiaries of copyright exceptions, or do not provide for any remedy. Unfortunately, those enjoining rightholders to make available copyright works for beneficiaries of copyright exceptions do not specify how this has to be done. An encouraging exception is represented by Lithuania, which expressly requires a technical adaptation of TPMs to the "right of users to benefit from copyright exceptions".[126]

Also the provision of remedies in case rightholders refuse to comply spontaneously with the law is rather diverse. A few countries set up specific mediation boards and arbitrators, whereas many others left the matter to ordinary courts (which are however mostly referable in case of mediation failure). Remarkably, many Eastern EU countries ignored the issue altogether. The solutions implemented by Member States against non-compliance of rightholders involving arbiters and ordinary courts have been criticised, because they involve significant costs which may act as a deterrent for users to exercise their rights. Copyright boards and tribunals, conversely, are not expensive, because they do not require legal assistance, but can be slow.[127] A positive - but isolated - example is provided again by Lithuania, which sends its claimants to the Copyright Council for mediation. The council will issue a solution, and if none of the parties opposes the solution in writing within one month, the latter is considered as accepted. This seems an efficient system, especially if the solution of the Copyright Council is issued expeditiously.

It is interesting to notice that some countries listed above, such as Germany, Luxembourg, Austria, the UK and Denmark, specify that TPMs have to be implemented *within the scope* of copyright law. The rest only draw on the formulation of the Copyright Directive, which allows rightholders to implement TPMs independently from their relation with the exclusive rights of the owner.[128] As a consequence, many national copyright laws now protect every restriction on access or use of a copyright work, whether or not the access/use-control is implemented within the exclusive rights of the owner.

In conclusion, there is no consistency among Member States as for protecting technological measures. Moreover, users are protected against them with an even greater diversity. Almost all Member States outlawed the circumvention of TPMs[129] and no "right to circumvent" is provided".[130] However, the remedies against circumvention greatly differ from country to country. Some Member State provide for severe criminal sanctions and some other for civil remedies only. Moreover, users are protected against non-compliance of rightholders with copyright exceptions in different ways. More than one third of EU Member States do not provide for any remedy. Most of the others refer users to courts or arbiters, the costs of which may represent a deterrent for users to exercise their rights. Moreover, the great heterogeneity

[125] Council Directive 2001/29/EC, Art. 6.4.
[126] Lithuanian Copyright Act, Art. 74.6.
[127] Like for example the solution of the UK, for which complaints have to be addressed to the Secretary of State. *See* Ian Brown and Nicholas Bohm, reporting on the UK implementation of the EUCD in 'Implementing the European Copyright Directive', available at <http://www.fipr.org/copyright/guide/>, at 121.
[128] *Supra*, B.2.
[129] Many non-EU countries protect TPMs as well, because this is imposed by the WIPO treaties. An only exception is represented by Canada. See the general report of Michel Vivant at ALAI 2006 (Barcelona, 19-20 June), at 16.
[130] There are minor exceptions to this principle, such as the possibility to circumvent, in the UK, for purpose of research in cryptography, Copyright Act (amended in 2003), section 269ZA (2). Sweden provides for a right to circumvent in case of few determined fundamental exceptions. Switzerland does not punish who circumvent a measure for a licit purpose and Denmark allows circumvention if access is not granted by the owner after four weeks. *Ibid*, at 11. Finland allows circumvention for private copying; see Ville Oksanen and Mikko, at < http://www.fipr.org/copyright/guide/finland.htm>; Lithuania allows circumvention, but only for software exceptions (back-up and decompilation) Art. 74.5.

in the sentences for infringement raises questions about their fairness. This demonstrates the difference of protection reserved to owners and users among Member States.

Also in the field of copyright exceptions the EUCD attempted to reach further harmonization. The following comparative analysis of the implementation of copyright exceptions in national laws shows to what extent the directive achieved this goal. The focus is on the facultative exceptions provided for by Article 5 EUCD, and on the implementation of the specific exceptions for TPMs provided for in Article 6.4.

C.2 Exceptions in Europe

The EUCD in Article 5 provides a detailed list of copyright exceptions. The list is meant to be exhaustive.[131] Of this list, the first exception is compulsory for Member States to implement, and the other twenty are facultative.[132] As discussed in section 4.2.3, the present regulation on copyright exceptions has been extensively criticised by the literature.[133] Main criticisms regard: a) the facultative nature of the list; and b) its misguided ambition of being exhaustive.

What follows will demonstrate that the facultative nature of the list led Member States to adopt very different solutions. Member States (Western Europe especially) seem to show a conservative attitude in implementing the directive. Thanks to the almost entirely facultative list of copyright exceptions, they appear to have implemented many exceptions that were already present in their national copyright law before the implementation of the EUCD. This is suggested by the remarkable differences in terms of the structure and the wording of the different national legislations, which are more similar to the pre-existing legislation than to the structure and the wording of the EUCD.

The facultative list of exceptions of the EUCD therefore was probably not the most suitable instrument to reach copyright harmonization.[134] Moreover, the list of the EUCD did not achieve the purpose of being exhaustive either. Some Member States introduced in their legislation exceptions not present in the Article 5 of the EUCD. Slovenia, for example, inserted among its exceptions one for transformative works, which is not mentioned by the EUCD. However, a more consistent implementation of some fundamental copyright exceptions suggests that they could be accepted as compulsory by all EU Member States. [135] This list should apply to both copyright exclusive rights and technological measures, unless technological reasons make this impossible.

In principle, the presence in the EU of different national cultures requires flexible solutions rather than rigid ones.[136] These solutions would best suit the goal of harmonising the national legislations respecting local diversities. However, from a technological point of view the solution cannot be flexible, as for example the American “fair use” provision. In this respect, professor Felten acutely stated that making TPMs compliant with fair use is like putting a judge in a microchip.[137] Technological solutions need a precise set of instructions, which cannot consider the nuances of a flexible legislation. Of course, the compulsory list of copyright exceptions would need to be adapted to the material possibilities of the technology in order to be made compulsory also for TPMs.

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[131] See the workshop sponsored by WIPO and conducted in 1999 by Professor Sirinelli on www.wipo.org, document code: WCT-WTTP/IMP/1.
[132] Council Council Directive 2001/29/EC, Art. 5.2.
[133] See Heide 2000, at 223; Hart 1998 commenting on the proposed directive, at 171; the CPB Netherlands report 4.4; Hugenholtz 1997; Dusollier 2003, at 473; and Guibault 2003, at 39-40.
[134] This is consistent with the literature examined in section C.2.
[135] For a perspective compulsory nature of copyright exception see Heide 2000, at 229-230.
[136] See Hugenholtz 2000b, at 501-502.
[137] See Felten 2003, at 58; see also Garnett 2006, at viii.

An essential list of exceptions with a flexible closing clause appears to be the most suitable solution. It would suit to both the harmonisation of copyright exceptions and their compliance by TPMs. Obviously the closing clause[138] would not be compulsory for TPMs. Beneficiaries claiming exceptions falling within the scope of the clause would have to refer to copyright tribunals, mediators or courts, when they are not satisfied with the usage rules implemented on a copyright work.

At the outset, it is worth clarifying that in February 2007, when this paper was already complete, the IViR centre of the University of Amsterdam issued a report commissioned by the EU on the Copyright Directive. The report reaches on many issues the same conclusions of this paper. For example, it also states that a list of compulsory exceptions, made flexible by a closing clause would be advisable. On the choice of the exceptions, the report indicates a selection grounded of fundamental rights;[139] and a second selection concerning exceptions that "have a noticeable impact on the Internal Market or concern the rights of European consumers".[140] However, finding a list of copyright exceptions was not among the goals of this report.

In contrast, this paper adopts a specific approach, detailed below, to select a list of exceptions from the existing ones. The approach is motivated by the goal of identifying a solution readily feasible in the short run; and acceptable by EU Member States. Moreover, part 2 of the IViR report includes a comparative study on the implementation of copyright exceptions carried on by Guido Westkamp.[141] The table below, compiled independently, does not completely coincide with his findings. The differences are caused by our different goals. Westkamp's work aims to report on the exceptions that *at every title* are present in national legislations, in order to find gaps and areas in need of a regulatory action. Conversely, the present paper excludes exceptions based on, for example, case law or common law. It takes into account only those exceptions expressly included in copyright legislations. The reason is that we are not looking for what is missing in national legislations, but rather for what is present within the exceptions transposed from the Copyright Directive.

This section therefore starts from the current national implementation of the EUCD list of copyright exceptions,[142] and singles out the exceptions that are most commonly implemented. Arguably, this will help to identify the exceptions that are perceived by European legislators as most fundamental. Instead of selecting the "best" copyright exceptions on the basis of their grounds on fundamental rights or public interest, this section observes which copyright exceptions have been chosen by the majority of Member States. An examination of the list obtained will reveal that indeed the items most implemented are grounded on fundamental freedoms and the public interest.[143] The adoption of such exceptions, therefore, would also be consistent with the ultimate rationale of copyright limits: the circulation of culture.

An overview of the current copyright legislations of Member States after the implementation of the EUCD is given by the synoptic table displayed below.[144] The difficulties encountered during its compilation include the different wording that national legislators adopted referring to each exception. It must be stressed, therefore, that since the work required homogenizing the data in our possession, this have come at a price of simplification is some instances. An attempt was made at identifying similarities among exceptions, mostly on the basis of their rationale.

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[138] For example, the three-step test of the Berne convention could serve as a model for the "wild card" exception.
[139] See IViR Report on the Infosoc Directive of 2007 on <www.ivir.nl>, at 65.
[140] *Ibid*, at 66.
[141] See generally the IViR report on the Infosoc Directive of 2007, part II, available on <www.ivir.nl>.
[142] Council Directive 2001/29/EC, Art. 5.
[143] For a discussion on the classification see Dusollier et al. 2000, at 19-20.
[144] *Infra*, Table C.2.

In general and preliminarily, the table below does not include the following issues:

1) Fair compensation: for some exceptions, many countries prescribed a "fair compensation" for the author, as provided by the Directive.[145] Every regulation on fair compensation was disregarded, because not immediately useful for this comparison.

2) New exceptions: some Member States added new exceptions to their list, tailored to their specific socio-economic setting, or to the need of the most powerful lobbies.[146] None of them have been included in the table, because of their exceptional nature.

3) Different wordings: with the only exception of Malta, no Member State followed literally the wording of the EUCD. Moreover, although the exceptions in the directive are quite detailed, some Member States worded them in an even more detailed way. For example, Article 5.2(c) of the EUCD allows limitations of exclusive rights for reproductions made by publicly accessible libraries or similar institutions. Some countries interpreted that in a more restrictive way, allowing, for example, only one copy.[147] Those nuances have been disregarded, in order to simplify the regulations and allow the comparison. The purpose of the work is not to identify the differences among regulations, but rather to highlight the common points.

The linguistic barrier also presented a hurdle in the analysis, because some countries have not translated their copyright legislation in English or in French.[148] In place of the original text of the law which were not translated and whose language was not known to the researcher (mainly German), papers written by local scholars in English have been analysed.[149] Despite the difficulties above mentioned, a common pattern can be identified. The table below shows the findings of this comparison.

Table C.2 – The copyright exceptions among Member States
Key: X= exception for exclusive rights; x= exception for TPM

Panel A

Exceptions	AU	BE	DE	DK	ES	FI	FR	GR	IE	IT	LU	NL	PT	SE	UK	West
5.2a photocopy	X	Xx	X	X		X	X	Xx		Xx	X	X	Xx	X		12/15
5.2b priv.copy	X	X	Xx[150]	Xx	Xx	X	Xx	Xx[151]	Xx[152]	Xx[153]	Xx	X	Xx	X[154]	Xx[155]	15/15
5.2c libraries	X	Xx	X	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	Xx	15/15
5.2d ephim/broadc		Xx	X[156]	Xx	Xx	Xx	Xx		Xx	X	X	X	Xx	Xx	Xx	13/15
5.2e broadc.rep by instit.		Xx	X	Xx	Xx	Xx			Xx	Xx			Xx			8/15
5(3)a teaching/ research	X	Xx	X	Xx	Xx	Xx	Xx[157]	Xx	Xx	Xx	Xx	Xx	Xx	X	Xx	15/15

[145] Council Directive 2001/29/EC, Art. 5.2(a)(b)(e).
[146] See Hugenholtz 1997.
[147] Italian Copyright Act, art. 70(1-2) and Austrian Copyright Act, §42(6).
[148] We have been able to read the original versions of French, Belgian, Portuguese, Spanish and Italian legislation, but not the German and the Austrian. There is no English version available.
[149] In particular, a study by the Foundation for Information Policy Research, 'Implementing the European Copyright Directive', available at <http://www.fipr.org/copyright/guide/> and the project EuroCopyright.org by the Free University of Amsterdam, available at <http://www.euro-copyrights.org>. Moreover, also the Romanian law was drawn form a scholarly article at <http://eucd.wizards-of-os.org/index.php/Rumania>.
[150] Even analogue only.
[151] Even analogue only.
[152] For time shifting purposes. S.101 Copyright Act.
[153] Even analogue only.
[154] Not necessarily digital copy. See Article 12 of the Swedish Copyright Act.
[155] For time shifting purposes.
[156] Only for archiving purposes. See §55 German Copyright Act.

5(3)b disabled	X	Xx	X	Xx	X	Xx	Xx	Xx	[158]	Xx	Xx	Xx	Xx	Xx	X	14/15
5(3)c news	X	X	X	X	X	X	Xx	X	[159]	X	X	X	X	X	Xx	14/15
5(3)d quotation/critic.	X	Xx	X	Xx	Xx	X	Xx	X	Xx	Xx	X	X	X	X	Xx	15/15
5(3)e pub security/ administer.	X		X	Xx	Xx	X	X	Xx	Xx	Xx	Xx		Xx	Xx	Xx	13/15
5(3)f speech/ lectures			X	X	X	X	X	X	X	X	X	X	X	X		12/15
5(3)g celebrations				Xx	X			X	X			X			X	6/15
5(3)h architecture/ sculpture	X	X	X	X		X	X	X	X		X	X	X	X	X	13/15
5(3)i incidental			X	X	X	X			Xx			X	X	X	Xx	9/15
5(3)j advertising	X	X	X	X		X	Xx		X			X	X	X		10/15
5(3)k parody		X			X		Xx				X	X				5/15
5(3)l demonstration	X		X						X				X			4/15
5(3)m building/drawing				X	X	X							X	X		5/15
5(3)n private networking		X		X	X	X				X	X	X	X			8/15
5(3)o others				X								Xx		X		3/15
Three-step		X	X				X			X	X		X			6/15

Panel B

Exceptions	**BG**	**CY**	**CZ**	**EE**	**HU**	**LT**	**LV**	**MT**	**PL**	**RO**	**SK**	**SI**	**East**[160]	**TOT**	**West**
5.2a photocopy	X	X	X	X	X	Xx	X	Xx	X		X	X	11/12	23/27	12/15
5.2b priv.copy	X	X	X	Xx	X	Xx[161]	X	Xx	X	X	X	X	12/12	27/27	15/15
5.2c libraries	X	X	X	X	X	Xx	Xx	Xx	X	Xx	X	X	12/12	27/27	15/15
5.2d ephim/broadc	X	Xx		Xx	X	Xx	Xx	Xx	X	Xx	X		10/12	25/27	13/15
5.2e broadc.rep by instit.		Xx			X[162]			Xx					3/12	11/27	8/15
5(3)a teaching/ research	X	X	X	Xx	X	Xx	Xx	Xx	X	Xx	X	X	12/12	27/27	15/15
5(3)b disables	X	Xx	X	Xx	X	Xx	Xx	Xx	X	Xx	X	X	12/12	26/27	14/15
5(3)c news	X	Xx	X	Xx	X	X	Xx	X	X	X	X	X	12/12	26/27	14/15
5(3)d quotation/critic.	X	Xx	X	X	X	X	Xx	X	X	X	X	X[163]	12/12	27/27	15/15
5(3)e pub security/ administer.	X	Xx	X	Xx	X	Xx	Xx	Xx	X	Xx		X	11/12	24/27	13/15
5(3)f speech/ lectures		X	X	X	X		X	X	X	X	X		9/12	21/27	12/15
5(3)g celebrations			X		X	X	X	X	X	X	X		8/12	14/27	6/15
5(3)h	X	X	X	Xx		X	X	X	X	X	X	X	11/12	24/27	13/15

[157] Only small quotation.
[158] But libraries have to provide special copies. See s. 104 of Copyright Act.
[159] News reporters can appeal to criticism and review exception. S. 51 Copyright Act.
[160] Including Mediterranean countries: Malta and Cyprus. The sub-division here is not relevant.
[161] Only one copy. See Article 20.1 of Lithuanian Copyright Law.
[162] Only partial. See Art. 38 Hungarian Copyright Act.
[163] More restrictive than the Directive. S. 25 Copyright Act.

architecture/ sculpture															
5(3)i incidental		X			X	X		X			X		5/12	14/27	9/15
5(3)j advertising			X					X		X	X	X	5/12	15/27	10/15
5(3)k parody						X		X		X		X[164]	4/12	9/27	5/15
5(3)l demonstration			X			X		X		X			4/12	8/27	4/15
5(3)m building/drawing			X			X		X	X			X	5/12	10/27	5/15
5(3)n private networking		X				X		X				X	4/12	12/27	8/15
5(3)o others							X				X	X	3/12	6/27	3/15
Three-step								X		X		X	2/12	8/27	6/15

First, results from this comparison among EU Member States[165] shows that universally recognised exceptions appear to be those for teaching/research, for libraries and similar institutions, and for quotation/criticism. The exceptions for news reporting and disabled people were also much valued by all Member States.[166] Also broadly recognised are the exceptions for use from public bodies, like the one for public security/judicial-administrative proceedings and the ephemeral broadcasting by public institutions. Note that the above mentioned exceptions are almost the same of the first draft of the Copyright Directive of 2007. Only the exception for reprographic reproduction, present in the draft of 1997, does not appear widely implemented , possibly because reproduction on paper can easily fall under the exception for private copying or reproduction for libraries.[167] Finally, note that the above mentioned exceptions, apart from the one for administrative proceedings, are strongly functional to the circulation of culture.

More complex is the case of private copying, which is implemented by every country but in different ways. Some EU members concede to their users only an analogue copy,[168] like Germany, Greece, Italy, and Sweden. Some others specify the purpose of it (time-shifting),[169] like the UK and Ireland. This makes it unclear to what extent an exception for private digital reproduction is valued by Member States. For example, in the UK civil groups are excising pressure for the introduction of a proper exception for private copying.[170] Further, it is interesting to notice that Eastern European countries tend to be less strict than Western European on this matter, by allowing private reproduction without further conditions. Only Lithuania, among Eastern European countries appears to be strict on private copying, by conceding to one private reproduction only.

[164] In fact this exception, as unique case in the EU is reserved to transformative works, among which parody is included. See Art. 53 of Slovenian Copyright Act.

[165] This section initially included a study of Western European countries. The Eastern European ones, plus Malta and Cyprus have been added afterwards The division in two tables, one for Western Europe and another for Eastern/Mediterranean Europe is not directly functional to this research. However, it reveals interesting insights, which could be of inspiration for further research.

[166] Ireland provides for alternative formats to be provided to disabled people. This does not seem to suggest an intention to restrict th exceptions for disabled people. See s. 104 Irish Copyright Act.

[167] Like in Austria (section 42, subsection 6) and Germany (§53(a)1).

[168] Germany and Italy.

[169] Ireland and the UK.

[170] See the Joint Proposals of LACA/Museums Copyright Group (MCG) to the UK Government for Revisions to the Copyright Designs and Patents Act 1988 and the Response to the Gowers Review of Intellectual Property Call For Evidence (April 2006). See also the report released by the Institute for Public Policy Research (www.ippr.org.uk), asking for an exception of private copying in the UK, at http://www.ippr.org.uk/pressreleases/?id=2404. Most importantly, see the recent Gowers Review, at <www.hm-treasury.gov.uk/independent_reviews/gowersreview_index.cfm>.

For the purpose of this research it is interesting to note that, essentially, most of the EU Member States recognize the possibility of making personal copies, although with different wordings. However, the relevance of private copying for the circulation of culture is debatable. Private reproduction strictly performed for personal use is certainly based on practical reasons. A limited number of copies distributed in the family/friends circle, conversely, could be said to promote the circulation of expressive works, and therefore culture and information in a broad sense.

Often present among legislation is the exception for three-dimensional works. This exception is worded in many different ways in the legislation of Member States, and mostly allows taking pictures of sculptures and buildings. This exception is certainly functional for the circulation of culture. Note, however, that it has scarce impact on technological protection measures. The remaining exceptions had a much lower impact on the legislation of EU Member States. They have been implemented in less than half of Member States.[171]

Incidentally, it is interesting to notice the unbalance between Eastern/Mediterranean countries and Western ones in reference to the exceptions for broadcasting by public institutions and for celebrations or public ceremonies. The exception for broadcasting seems more important in Western European EU countries, whereas the exception for ceremonies seems to be comparatively more popular in Eastern Europe.

The overview shows that on the one hand there is a stronghold around few uncontroversial exceptions, which closely correspond to those introduced with the first proposal of the Copyright Directive.[172] On the other hand, there is a remarkable indifference towards exceptions that were introduced by following amendments of the directive. Among them, rather disappointing is the implementation of the exception for parody, indicated by some literature[173] as an important carrier of freedom of expression, just as news reporting or criticism/quotation. This might however be explained by the fact that parody can fall under other exceptions, like quotation or criticism; or it is protected by Freedom of Expression.[174]

Summing up, the most implemented exceptions are: personal copy;[175] reproduction by libraries;[176] teaching and research;[177] disables;[178] news reporting;[179] quotation/criticism.[180] We note that according to the classification of copyright exceptions performed by Bernt Hugenholtz and subsequently drawn on by other literature,[181] *all of them* are justified either by fundamental liberties or by the public interest,[182] and all of them are directly or indirectly

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[171] With the only exception of Article 5.3.(f) – public speech/lectures, which has been implemented in 21 countries.

[172] COM(97) 628 final-1997/0359/COD, *Official Journal C 108/6 , 7/41998*.

[173] See Guibault 2003, at 9-10; Dusollier, 2003, at 473; see also generally Rutz 2004. Moreover, Dusollier indicates in parody a potential backdoor for the much awaited exception for transformative works. See her intervention at the 4 Wizard of OS conference, at < www.wizards-of-os.org/>

[174] This is confirmed by the IViR report, part 2. In their table the exception for parody is more present, because they consider the exceptions *de facto* present in the legislation of member states. See the above report, at 45.

[175] *Ibid*, Art. 5.2(b) in respect of reproductions on audio, visual or audio-visual recording media made by a natural person for private use and for non-commercial ends.

[176] *Ibid*, Art. 5.2(c) in respect of specific acts of reproduction made by establishments accessible to the public, which are not for direct or indirect economic or commercial advantage.

[177] *Ibid* Art. 5.3(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.

[178] *Ibid*, Art. 5.3(b) for uses for the benefit of visually-impaired or hearing-impaired persons, which are directly related to the disability and of a non-commercial nature and to the extent required by the specific disability.

[179] *Ibid*, Art. 5.3(c) use of excerpts in connection with the reporting of current events, as long as the source is indicated, and to the extent justified by the informatory purpose.

[180] *Ibid*, Art. 5.3(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that the source is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

[181] See generally Hugenholtz 1997, Guibult 2003 and Dusollier et al. 2000.

[182] They are, in short, the lions and monkeys of Hugenholtz's zoo. *Ibid*.

functional to the circulation of culture. Also broadly recognised are the exceptions for ephemeral broadcasting, for three-dimensional works, and for public security/administration. Thus we propose to include these, because of their popularity, in the compulsory list of copyright exceptions. However, they do not have any impact on technological protection measures.

Exceptions for TPMs

We now turn to the analysis of copyright exceptions that TPMs have to respect. Article 6.4 lists seven exceptions with which TPMs have to comply. This list has to be implemented by Member States. The comparative analysis above shows that despite the list in Article 6.4 is mandatory, Member States implemented it discontinuously. Some countries, like the UK,[183] decided that TPMs are legally obliged to comply with all exceptions, without making a difference between compulsory and non-compulsory ones. Some others, like Austria, Bulgaria, Czech Republic, Hungary, Poland, Slovenia, and Slovakia did not envisage any compliance for the rightholders.[184] The latter approach seems more popular among Eastern European countries. Many others, as Germany[185] and Italy,[186] followed the steps of the directive, shortlisting a few fortunate categories.[187] Nevertheless, every country that decided to single out only some exceptions, picked from the list a different selection from that of the directive; and from that of the other countries. This clearly shows that in matter of exceptions for TPMs the EUCD is far from achieving the homogeneity aimed at.

Arguably, the EUCD made a few exceptions arbitrarily chosen compulsory for TPMs, rather than those universally recognised as most fundamental. This choice was so unconvincing that the Member States decided autonomously which exceptions they wanted to be respected by TPMs. Some selected few exceptions and some other referred TPMs to the list of copyright exceptions with which the exclusive rights of the owner have to comply. A compulsory rule, therefore, was not enough to reach the harmonizing goal of the directive.[188] It might be argued that the main weakness of the provision is the lack of consistency between exceptions for TPMs and exceptions for exclusive rights or, alternatively, a convincing justification for this different treatment.

In conclusion, if this list of fundamental exceptions that are already recognised by most EU Member States. were made compulsory by the EUCD, this would give a strong signal towards a distinction between fundamental and less fundamental exceptions; and towards a strong protection of the former. The latter could be represented within a safety valve, in the form of a wild card clause encompassing the exceptions left out of the proposed list. Finally, this list should be compulsory also for TPMs, unless this is impossible because of technological constraints.

D CONCLUSION

The analysis above suggests that a harmonization of copyright law has not yet been achieved by the EUCD. Moreover, the goal of the circulation of culture cannot be effectively pursued by the current regulation, stipulating an unbalanced protection of users and producers of copyright goods. The unbalanced protection at Community level, moreover, produces a diverse and unbalanced protection at the national level.

[183] UK Copyright Act, Section 296ZE.
[184] Those two countries adopted the approach "wait and see". They would take action only in case of problems arising from practice. The same approach is taken by half of the Eastern EU countries.
[185] German Copyright Act §95(b)1.
[186] Italian Copyright Act, Art. 71quinquies.
[187] Different shortlists depend on different lobbying; See Hugenholtz 1997.
[188] The incongruence of a compulsory norm that recalls a facultative one is stressed also by Dusollier 2003, at 473.

At Community level, the Copyright Directive 2001 appears to grant full protection to technological measures,[189] irrespective of their implementation within the purview of copyright law.[190] More precisely, the letter of the directive appears to allow every use of TPMs to every owner of exclusive rights.[191] This is confirmed by the following evidence: a) the wording of the last draft of the directive, unlike the previous one, does not seem to require that TPMs have to be implemented within the boundaries of the exclusive rights;[192] b) the provision that TPMs have to comply with a limited number of exceptions suggests the construct of a separate right;[193] c) the provisions on circumvention of TPMs are strict, and the provisions on compliance of TPMs with copyright exceptions are loose ("voluntary measures"); d) the technological measure in order to be protected by law has to be only "effective". The effectiveness consists, by express definition of law, in being an anticopy or antiaccess device involving encryption or other technology: in short, by being TPMs. It is not explicitly required for TPMs to act within the boundaries of the exclusive rights of the owner.[194] The crucial point is that the EU directive does not provide for the owner to modify TPMs in order to allow automatically a lawful use of the protected good; and in consequence almost no European legislation does so.[195]

The remedies required by the EU directive to be taken by Member States in order to force rightholders to comply with copyright exceptions are at best vague. The definitions are entrusted to a recital, which indeed suggest to rightholders modifying digital locks, but only in alternative to not better specified "other means". The choice of the EU legislator to put hazy directions in a recital clearly shows the absence of a serious intention to enforce users' entitlements. It would be therefore recommendable to entrust users' protection to a more suitable and effective regulatory instrument.

The rights of the user in the EUCD are restricted to a list of twenty-one copyright exceptions of which only one is compulsory.[196] The legal history of the Article 5 shows how the EU legislator went from a logical and consistent draft, with few, clear and basic exceptions, to the diverse collection in force today. While adding new and often minor exceptions to the list, the EU legislator did not deem to provide them with a different protection, depending of the importance of the justifications on which each exception is grounded. The EU aimed to an exhaustive list, but its facultative nature, as suggested by some copyright literature, appears inefficient for the claimed purpose of the EU legislator to homogenise copyright regulations.[197] Moreover, other copyright literature explained that an exhaustive list is not a realistic ambition, and this is confirmed by the above analysis.

The EUCD in Article 6.4 provides for a list of seven copyright exceptions with which technological protection measures have to comply. They are selected from the main list of Article 5 of the directive, referring to exceptions for to the rights of reproduction and communication. The selection has been criticised because a) it excludes fundamental exceptions grounded on civil liberties; b) it is impossible to understand the criterion that the

[189] Declaring outlawed every circumvention, Council Directive 2001/29/EC, 6.1.
[190] See for example Barczewski 2005, at 168, arguing that "protection should focus on the infringement of copyright only".
[191] Council Directive 2001/29/EC, 6.3 first paragraph.
[192] This is equivalent, as Dusollier notes, to giving free hand to TPMs, whilst giving an uncertain protection to copyright exceptions. See Dusollier 2005, at 160-162.
[193] Council Directive 2001/29/EC, 6.4. in fact, if technological means could be used only within the limits of copyright law, they would automatically be bound to comply with the copyright exceptions devised for exclusive rights.
[194] Council Directive 2001/29/EC, 6.3 second paragraph.
[195] With the exception of Lithuania.
[196] Council Directive 2001/29/EC, Art.5
[197] Explanatory memorandum, recital 21: "existing differences in the limitations and exceptions to certain restricted acts have direct negative effects on the functioning of the Internal Market of copyright and related rights".

EU legislator used for the selection.[198] In addition to those criticisms, we submit that the existence of a second list of exceptions, not based on technological reasons, suggests the existence of a separate entitlement for the owner.

At the national level, TPMs are protected in every country, but with different sanctions, which range from civil remedies to several years in jail. The unbalance between Eastern and Western EU Member States is evident here. The former tend to stipulate civil remedies; the latter are stricter. In a global market characterized by the absence of geographical boundaries, where users can buy everything from everywhere, such a mixed regulation can only create disruption.

The actions that rightholders have to take in order to have TPMs comply with copyright exceptions are, in most EU countries, "voluntary measures". No member state obliges the owner to implement TPMs that automatically respect copyright exceptions (except Lithuania).[199] Very few countries corrected the "oversight" of the EUCD, specifying that TPMs have to protect only the exclusive rights of the owners. Most of them draw on the letter of the directive, proving the same inequity.

Further, the almost entirely facultative list of the Article 5 of the EUCD led each member state to absorb different exceptions, in the attempt to disrupt as little as possible the pre-existing regulation; and the result was that they remained essentially in their previous diverse condition.[200] However, a synopsis of the current situation in national countries, after the implementation, shows a greater consistency around those exceptions which are envisaged to protect fundamental liberties or the public interest.[201] These exceptions are directly or indirectly functional to the circulation of culture. A distinction between fundamental copyright exceptions and less important ones, and a stronger protection of the former, is therefore possible. This distinction would achieve the double purpose of more consistently fulfilling copyright rationale (the circulation of culture) and of facilitating the compliance of TPMs with copyright exceptions.

In conclusion, the EU Copyright Directive shows several inconsistencies and dysfunctions. It shows an unbalance between the protection of the copyright owners and users. This unbalance is mostly evident from the protection of TPMs and the undiversified protection of copyright exceptions. The EUCD seems much more focused on the economic rights of the owners than on the civil rights of the users. It appears to penalize the social function of copyright, aiming at the circulation of culture, to the advantage of its economic – misinterpreted - justifications.[202] The above analysis showed that a re-focus on the circulation of culture would strike a better balance between copyright players in Europe, both at community level and at the national level.

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[198] The differentiation is not driven by technological constraint, as it would have been logical

[199] See previous section.

[200] This conclusion is more valid for Western European Member States than for Eastern European ones. The former in fact in most cases had pre-existing articulated copyright discipline.

[201] *Supra*, C.2.

[202] An incorrect interpretation of the economic justification of copyright leads to the maximization of rightholders' profits an incentive for further production. We argued elsewhere that a correct interpretation of these economic justification would take into account the social function of copyright. Main support to this argument was provided by the work of Wendy Gordon. See generally Gordon 2003.

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