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Creating Statutory Remuneration Rights in Copyright Law

What Policy Options under the International Legal Framework?

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ABSTRACT

Remuneration rights have the potential to realise the delicate balance between access to and protection of copyrighted works, while at the same time potentially safeguarding the interests of all parties involved in the process of cultural production. The creation of statutory remuneration rights also has some constraints as they need to comply with obligations resulting from international copyright law. Therefore, it is crucial that legislators know exactly what their room for manoeuvre is when using this tool to regulate copyright law. Surprisingly, this policy space remains quite blurry to date. This article attempts to bring clarity to the discussion: it analyses possible ways of creating remuneration rights in the light of international treaty obligations and maps all the options. It argues that international copyright law provides far more policy space than often assumed to create statutory remuneration rights, offers a classification of remuneration rights based on their relationship with the exclusive rights, and invites legislators in the future for better usage of the full range of possibilities when reforming their copyright laws in order to reach more balanced solutions and to enhance the acceptance of the system among citizens.

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A. INTRODUCTION

International treaty norms shape essential elements of national and regional copyright systems around the world. Modern policymakers interested in developing new legal tools for the benefit of creators while at the same time pursuing important public interest goals are thus confronted with copyright treaty norms that frame their action, without always knowing their room to manoeuvre. Indeed, international copyright norms often reflect difficult political compromises and therefore inevitably tend to use vague language and open concepts. Also, in contrast to national or regional norms, they often are less scrutinised by scholars and benefit from less exposure to judicial applications, as they are mainly addressed at legislators. Therefore, it is essential to determine with more precision the policy space available for the legislator in particular when it comes to imagining new or better copyright norms. As an illustration, this chapter looks at the international copyright framework for the creation of statutory remuneration as a tool for achieving a balance between the different interests involved in copyright law. It also proposes a taxonomy for remuneration rights and advocates using this legal construction more frequently in the future.

In recent times, legislators have shown an increasing interest in statutory remuneration rights as a policy solution to safeguard access to copyrighted works and secure fair remuneration for creators. Scholars have underlined the advantages of this legal construction to fulfil the rationales of copyright, thus helping to bridge the continental 'author's right' with the Anglo-Saxon 'copyright' tradition and create a framework of universal acceptance to reach balanced solutions respectful of the many interests involved in copyright law.[1] To advance this option for legislators, several arguments are put forward, mainly based on the fact that the existing copyright system based on exclusive rights has not 'done the job' it has been assigned, namely securing protection over and access to copyrighted works, while at the same time remunerating creators in a satisfying manner.[2] In fact, the current legislative framework seems particularly creator-unfriendly: creators can even be considered the losers of the copyright system, as they are (most of the time) not remunerated well

[1] C. Geiger (2016), 'Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests', in R. Giblin and K. G. Weatherall (eds.), *What if we Could Reimagine Copyright?*, Acton, Australian National University (ANU) Press, p. 106 sq.; C. Geiger (2010), 'Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law', *Vanderbilt Journal of Entertainment & Technology Law*, 12(3), p. 515; J. C. Ginsburg (2014), 'Fair Use for Free, or Permitted-but-Paid?', *Berkeley Technology Law Journal*, 29, p. 1446; A. Kur, M. Levin and J. Schovsbo (2011), 'Expropriation or Fair Game for All? The Gradual Dismantling of the IP Exclusivity Paradigm', in A. Kur and M. Levin (eds.), *Intellectual Property in a Fair World Trade System – Proposals for reforming TRIPS*, Cheltenham, UK: Edward Elgar, 408 sq.

[2] C. Geiger (2019), Empowering Remuneration Rights in Copyright Law, paper presented at the conference 'Innovation, Justice, and Globalization – A Celebration of J. H. Reichman', Harvard Law School, Cambridge, USA, 27 September 2019.

for their creations and often face hurdles in their creative process, in particular when they want to reuse creatively existing copyrighted material.[3] In short, this is a 'lose-lose situation' for creators, as the copyright system does not reward them appropriately for what they have done, and at the same time does not create the right framework for them to be creative and to enrich society through their cultural production.

On the remuneration side, several empirical studies have underlined that the current system of exclusive rights only rewards top-selling authors; other remuneration avenues have to be found for the rest of them. As demonstrated in a recent study about the earnings of writers, all surveys consistently revealed the presence of 'winner takes all' markets: 'There is a large gap between the earnings of successful writers and the rest. . . . The top 10% of writers still earn about 70% of total earnings in the profession'.[4] Similar results have been found for music creators:

> Composers and musicians in the top income brackets depend heavily on revenue that is directly related to copyright protection. But the vast majority of other musicians do not . . . . For most musicians, copyright does not provide much of a direct financial reward for what they are producing currently. The survey findings are instead consistent with a winner-takes-all or superstar model in which copyright motivates musicians through the promise of large rewards in the future in the rare event of wide popularity.[5]

[3] *See* detailed on this issue C. Geiger (2018), 'Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?', *UC Irvine Law Review*, 8/3, p. 413.

[4] M. Kretschmer, A. Azqueta Gavaldon, J. Miettinen and S. Singh (2019), '*UK Authors' Earnings and Contracts 2018: A survey of 50,000 writers*', CREATe, study commissioned by ALCS, pp. 19 and 20. *See* also in this sense the very interesting study examining empirically the amount of royalties authors and screenplay writers usually receive from the exploitation of their copyrights in Germany and UK (*see* M. Kretschmer and P. Hardwick (2007), *Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers*, Center for Intellectual Property Policy & Management, Bournemouth University). The authors of the study come to the following conclusion:

> This study shows quite conclusively that current copyright law has empirically failed to meet the aim of producing the necessary resources and safeguarding the independence and dignity of artistic creators and performers (Recital 11, Directive 1001/29/EC). The rewards of best-selling writers are indeed high but as a profession, writing has remained resolutely unprosperous. For less than half of the 25.000 surveyed authors in Germany and the UK, writing is the main source of income. Typical earnings of professional authors are less than half of the national median wage in Germany, and one third below the national median wage in the UK. 60% of professional writers hold a second job of some kind.

Danish CMO managing rights to musical works, KODA, reported that 'While 354 members received more than DKK 150,000 (EUR 20,000) in 2018, some 20,000 members – an 89% share – received less than DKK 10,000 (EUR 1,340)', CISAC Global Collections Report 2019, p. 38.

[5] P. C. DiCola (2013), 'Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives', *Arizona Law Review*, 55, p. 301. *See* more generally on

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Based on these findings, several authors have emphasised the interesting potential for creators in terms of statutory remuneration rights vis-à-vis exclusive rights.[6] It was in particular underlined that the earnings resulting from these rights can in many cases be much more interesting for authors than the royalty payments they receive from contracting parties resulting from their exclusive entitlements.[7] This reasoning was explicitly endorsed by some courts in Europe in order to justify the extensions of certain statutory remunerations from the analogue to the digital world through an extensive reading of certain copyright limitations.[8] Furthermore, these remuneration rights are sometimes considered inalienable for creators,[9] in contrast to the

the issue G. Lunney (2018), *Copyright's Excess: Money and Music in the US Recording Industry*, Cambridge, UK: Cambridge University Press.

[6] *See* e.g. C. Geiger (2017), 'Statutory Licenses as Enabler of Creative Uses', in K.-C. Liu and R. M. Hilty (eds.), *Remuneration of Copyright Owners, Regulatory Challenges of New Business Models*, Berlin, Germany: Springer, p. 305, and with further references; C. Geiger (2018), *supra* n 3, p. 444 sq.; G. Frosio (2020), 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity', *International Review of Intellectual Property and Competition Law*, 51, pp. 709–750.

[7] *See* R. M. Hilty (2005), 'Verbotsrecht vs. Vergütungsanspruch: Suche nach Konsequenzen der tripolaren Interessenlage im Urheberrecht', in A. Ohly, M. Lehmann, T. Bodewig and T. Dreier (eds.), *Perspektiven des Geistigen Eigentums und Wettbewerbsrechts. Festschrift für Gerhard Schricker zum 70. Geburtstag*, Munich, Germany: Beck, p. 325 ff. The argument that remuneration rights can be very beneficial for creators has been made on several occasions in the context of the debates on the future of private copying in the digital environment, *see* A. Dietz (2003),'Continuation of the Levy System for Private Copying also in the Digital Era in Germany', *A&M*, 5, pp. 348–350; C. Geiger (2008), 'The Answer to the Machine should not be the Machine: Safeguarding the Private Copy Exception in the Digital Environment', *European Intellectual Property Review*, 4, pp. 121–129; S. Dusollier and C. Ker (2009), 'Private copy levies and technical protection of copyright: the uneasy accommodation of two conflicting logics', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Cheltenham, UK: EE, p. 352, stating that

> from an economic point of view, the establishment of a levy system has permitted the creation of revenue for authors and other right holders for such private copies, whereas the reproduction right was revealed to be totally fruitless. Private copies remuneration now amounts to a significant part of the revenues of some authors and, particularly, of performers, whereas this remuneration should normally be only additional to their primary sources of copyright revenues.

K. Koelman (2005), 'The Levitation of Copyright: An Economic View of Digital Home Copying, Levies and DRM', in F. W. Grosheide and J. J. Brinkhof, *Intellectual Property Law 2004*, Oxford, UK: Intersentia, p. 437.

[8] German Federal Supreme Court, *'Elektronischer Pressespiegel'*, 11 July 2002, (2003) JZ 473 (extensive interpretation of limitation for press review as extending to electronic press reviews made by companies for internal use, on the grounds that a considerable *part of the received payment would flow to the authors themselves and that a narrow interpretation of the limitation would thus not improve the author's position*); and Swiss Supreme Court, 1st Civil Division, 26 June 2007, (2008). For a comment, *see* C. Geiger (2008), 'Rethinking Copyright Limitations in the Information Society: The Swiss Supreme Court Leads the Way', *International Review of Intellectual Property and Competition Law*, 39, pp. 943–950.

[9] *See* e.g. Section 63a of the German Copyright Act (Urheberrechtsgesetz). The limitation-based remuneration claims can only be transferred in advance to a collective management

exclusive right which is most of the time systematically transferred to exploiters. Finally, scholars have highlighted the interest for creators to set up statutory remuneration rights when the enforcement of exclusive rights is hardly achievable, in particular with regard to infringing mass uses in the digital environment, such as streaming or peer-to-peer file sharing. In these cases, the statutory model could mirror the model of the private copy exception in the analogue world, which secures considerable earnings for creators when their works are copied.[10]

On the creativity side, it has further been underlined that the exclusive right is hardly compatible with the fact that copyright law was originally meant to be 'the engine of free expression',[11] aimed at protecting creators from the interference of others and from all risk of censorship.[12] In effect, the need to ask for a licence might not be compatible with freedom of expression and freedom of artistic creativity for a creator of derivative works, as asking for authorisation introduces the possibility to say 'no' and thus of private censorship; this option leaves private entities deciding on what can (or cannot) be created. In addition to this uncertain compatibility with fundamental rights,[13] submitting derivative creations to the exclusive right is also problematic for a number of practical and economic reasons (high transaction costs

organisation (CMO). *See* also Article 5(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376/28: 'The right to obtain an equitable remuneration for rental cannot be waived by authors or performers'.

[10] *See* e.g. C. Geiger (2014), 'Challenges for the Enforcement of Copyright in the Online World: Time for a New Approach', in P. Torremans (ed.), *Research Handbook on the Cross-Border Enforcement of Intellectual Property*, Cheltenham, UK: EE, p. 704; P. B. Hugenholtz and J. P. Quintais (2018), 'Towards a Universal Right of Remuneration: Legalizing the Non-commercial Online Use of Works', in P. B. Hugenholtz (ed.), *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change*, Amsterdam, NL: Wolters Kluwer, p. 241sq; J. P. Quintais (2017), *Copyright in the Age of Online Access: Alternative Compensation Systems in EU Law*, Amsterdam, NL: Wolters Kluwer.

[11] Harper & Row Publishers Inc. *v.* Nation Enters., 471 U.S. 539, 559 (1985). More detailed on the freedom of expression foundations of copyright law from a philosophical and comparative law perspective, *see* C. Geiger (2004), *Droit d'auteur et droit du public à l'information, approche de droit comparé*, Paris, France: Litec, p. 27 sq.; and from a human rights perspective C. Geiger (2015), 'Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles', in C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, Cheltenham, UK: Edward Elgar, p. 676.

[12] C. Geiger (2018), *supra* n 3, p. 413; C. Geiger (2021), 'Fair Use' through Fundamental Rights in Europe, When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations', in W. L. Ng-Loy, H. Sun and S. Balganesh (eds.), *The Cambridge Handbook of Copyright Limitations and Exceptions*, Cambridge, UK: Cambridge University Press, p. 174.

[13] According to the European Court on Human Rights, there is an obligation on the state not to encroach unduly on the author's freedom of artistic expression (ECtHR, *Alınak* v. *Turkey*, no. 40287/98, 29 March 2005, § 42).

to get a licence and uncertainty with regard to who owns the right, etc.). Therefore, it is not surprising that derivative works have always been the subject of a lot of litigation on both sides of the Atlantic. To address this issue, proposals have increasingly been advanced to submit creative uses to a statutory remuneration right,[14] in particular in the context of user-generated content (UGC) online.[15] Furthermore, the potential of carving out certain uses from the veto power of rightholders has been analysed with regard to the incentive function of the copyright system, with interesting results. Recent empirical studies have established that these limitations to the exclusive right are incentivising follow-up creativity and that many very innovative industries are based on the free spaces left by copyright law.[16]

For all these reasons, statutory remunerations can have beneficial consequences for innovation and creativity, while also readjusting the copyright balance in favour of creators. Thus, they constitute precious tools in the hands of policymakers to design effective and balanced copyright legislation. However, national and regional legislators are not entirely free to design their copyright system according to their

[14] C. Geiger (2017), *supra* n 6; G. Frosio (2014), 'Rediscovering Cumulative Creativity from the Oral-Formulaic Tradition to Digital Remix: Can I Get a Witness?', *John Marshall Review of Intellectual Property Law*, 13(2), pp. 390–393.

[15] *See* M. Senftleben (2019), 'User-Generated Content – Towards a New Use Privilege in EU Copyright Law', in T. Aplin (ed.), *Research Handbook on Intellectual Property and Digital Technologies*, pp. 136–162; J. P. Quintais (2017), *Copyright in the Age of Online Access, Alternative Compensation System in EU Law*, Kluwer Law International (in particular Chapter 6, pp. 365–406); and J. P. Quintais (2017), 'Rethinking Normal Exploitation: Enabling Online Limitations in EU Copyright Law', *Tijdschrift voor Auteurs-, Media- & Informatierecht*, 6, pp. 197–205. In the US, several scholars have argued in favour of compulsory licensing to be applied to derivative works: P. Menel (2016), 'Adapting Copyright for the Mash-up Generation', *University of Pennsylvania Law Review*, 164, pp. 441–512; A. Kozinski and C. Newman (1999), 'What's So Fair about Fair Use? The 1999 Donald C. Brace Memorial Lecture', *Journal of the Copyright Society of the U.S.A.*, 46(4), pp. 512–530; D. Lange and J. Powell (2009), *No Law: Intellectual Property in the Image of an Absolute First Amendment*, Stanford University Press, pp. 179 and 384 (fn. 37); J. Rubenfeld (2002), 'The Freedom of Imagination: Copyright's Constitutionality', *Yale Law Journal*, 112, pp. 1–60.

[16] B. Gibert (2015), *The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity*, report for The Lisbon Council, p. 3: 'countries that employ a broadly "flexible" regime of exceptions in copyright saw higher rates of growth in value-added output throughout their economies"; Computer & Communications Industry Association (2017), *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*: 'Value added by fair use industries was 16% of the U.S. economy, employing 1 in 8 U.S. workers, and contributing $2.8 trillion to U.S. GDP; the combined value added by industries that are the most reliant on fair use and other limitations and exceptions to copyright protections has more than tripled in size over 2002'. S. Flynn and M. Palmedo (2018), The User Rights Database: Measuring the *Impact of Copyright Balance*, InfoJustice working paper, demonstrating the economic benefits of the 'flexible' systems of copyright exceptions and strong user's right: 'More open user rights environments are associated with *higher firm revenues in information industries*, including software and computer systems design. More open user rights environments are *not associated with harm to industries* known to rely upon copyright protection, such as publishing and entertainment' (emphasis added).

wishes and needs, as their laws have to comply with the international treaties they have ratified. For this reason, this chapter aims to analyse possible ways of creating remuneration rights in the light of international treaty obligations and to map all options.[17] In order to do so, the relationship between 'remuneration rights' and 'exclusive rights' was chosen as the decisive criterion of classification because of the way in which the copyright system is conventionally understood.[18] It needs however to be stressed from the outset that different theoretical and legislative approaches can be taken to conceptualise the role of 'remuneration rights' and their place in the copyright system. There is, for example, no universally agreed upon legal definition of 'remuneration rights'. Various other terms are used in scholarship to refer to mechanisms providing for remuneration to rightholders other than through 'exclusive rights', including terms such as 'legal licence', 'compulsory licence', 'obligatory licence', 'non-voluntary licence', 'statutory licence', 'right for compensation of remuneration', 'liability rule', and 'limitation-based remuneration rights'.[19]

Conceptually, as discussed elsewhere,[20] the terminology used of course matters and can potentially carry important nuances in the understanding of this legal

[17] The expression 'international treaties' is used in this article to refer to the major international multilateral treaties regulating copyright, administered by WIPO, ILO, UNESCO and WTO, as well as to bilateral and plurilateral trade agreements with intellectual property provisions concluded by the EU and its member states.

[18] As there is no unique master plan for international and national copyright systems, developing an alternative means of classification of rights can be a tricky exercise and may include some overlaps, such as by grouping a particular statutory entitlement to remuneration into one category and not in the other. Nevertheless, the proposed classification should serve as a useful mapping tool in light of international treaty obligations. It could be of use for informing decision-makers about available policy options for developing the copyright system with the aim of remunerating creators.

[19] M. Ficsor (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, WIPO Publication No. 891(E), pp. 277, 298 and 312; A. F. Christie (2011), 'Maximising permissible exceptions to intellectual property rights', in A. Kur and V. Mizaras (eds.), *The Structure of Intellectual Property Law: Can One Size Fit All?*, Cheltenham, UK: EE, p. 125; C. Geiger and F. Schönherr (2012), 'Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions', in T.-E. Synodinou (ed.), *Codification of European Copyright Law: Challenges and Perspectives*, Alphen aan den Rijn, the Netherlands: Kluwer Law, International, pp. 166–167; Z. Adamová and M. Husovec (2014), 'Slovakia', in H. Vanhees (ed.), *International Encyclopaedia of Laws for Intellectual Property Law*, the Netherlands: Kluwer Law International, pp. 53, 54 and 82; and C. Geiger (2010), 'Promoting Creativity through Copyright Limitations, Reflections on the Concept of Exclusivity in Copyright Law', *Vanderbilt Journal of Entertainment & Technology Law*, 12(3), pp. 515–548.

[20] *See* C. Geiger (2010), *supra* n 19, pp. 528 sq:

> "Compensation" or "indemnity" terminology seems to imply some kind of damage which has to be redressed . . . . The same can be said about the economically-oriented term "liability rule", often used to describe these kinds of legal situations where, instead of a possibility to forbid, the right owner only gets some monetary reward for the use of his works, as the notion of liability implies a prejudice that needs to be compensated. The term "statutory license", which is often used for limitations coupled with a right to

technique to design non-exclusive uses. For the purpose of inclusiveness, this chapter employs the term 'remuneration rights' to refer to statutory entitlements providing holders of copyright or related rights with a claim of remuneration *without* the ability to authorise or prohibit the use of copyrighted works or subject-matter covered by related rights.[21] In short, the use is 'permitted-but-paid', as Jane Ginsburg has put it in a foundational article on the matter.[22] This definition covers two broad categories of rights: remuneration rights created as such ('remuneration rights per se'), created either outside the scope of exclusive rights or coexisting and overlapping with them (section B); and remuneration rights created through exceptions and limitations to exclusive rights ('limitation-based remuneration rights', section C).[23]

B. REMUNERATION RIGHTS PER SE

For the purpose of this article, 'remuneration rights per se' are rights to remuneration provided as such by international treaties, regional norm or national legislation adopted outside the scope of those treaties. Enactment of such rights does not result

receive fair remuneration, seems more suitable to express the concept of remuneration for the use of a copyrighted work.

The term 'statutory remuneration rights' seems to be a better way to express that the remuneration for the use is granted by law as measure of public policy, independent from the potential scope of the exclusive right.

[21] The questions of moral rights, contractual entitlements to remuneration, collective negotiations of tariffs and non-voluntary collective management of exclusive rights are being put aside. According to many scholars, mandatory and extended collective management of exclusive rights are in fact only a form of exercise of these rights. *See* more detailed on this issue C. Geiger (2007), 'The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society', *UNESCO e-Copyright Bulletin*, January–March, p. 10 ('mandatory collective management does not deal with the existence of an exclusive right, which remains intact and is not questioned. It only intends to solve the question of the exercise of rights, of modalities of implementation: the exclusive right can only be exercised through the collective management society. It is in fact clearly the substance of Community case law, which specifies that collective management deals only with the exercise of rights and not with their existence'). For an exhaustive overview of extended collective licensing mechanisms in the EEA, see O. Bulayenko, S. van Gompel, C. Handke et al. (2021), *Study on emerging issues on collective licensing practices in the digital environment*, ECORYS/IViR, for DG CNECT, European Commission, SMART 2018/0069.

[22] *See* in this sense J. C. Ginsburg (2014), 'Fair Use for Free, or Permitted-but-Paid?', *Berkeley Technology Law Journal*, 29, pp. 1383–1446, stating that statutory licenses or privately negotiated accords within a statutory framework can ensure that 'uses the legislator perceives to be in the public interest proceed free of the copyright owner's veto, but with compensation – in other words: permitted-but-paid'; and T. Riis (2020), 'Remuneration Rights in EU Copyright Law', *International Review of Intellectual Property and Competition Law*, 51(4), p. 464): 'The nature of a remuneration right implies that the copyright holder cannot exclude others from using the protected work but is solely entitled to remuneration for other's use of the work'.

[23] Of course, the classification advanced by this article is a result of a conceptualising exercise, and it necessarily implies some approximation. By choosing a different criterion, another classification could be imagined.

in the creation of exceptions or limitations to exclusive rights provided by the international treaties, since the international copyright framework does not provide for an obligation to create corresponding exclusive rights, or, when it does, the exclusive rights coexist and overlap with the remuneration rights granted on the top of them.

I. *Remuneration Rights Created outside the Scope of Exclusive Rights Provided by the International Treaties*

1. Remuneration Rights Provided by the International Treaties outside the Scope of Exclusive Rights

This category of remuneration rights refers to the rights provided by the international treaties either *without corresponding exclusive rights* (the right to an equitable remuneration for broadcasting and communication to the public of commercial phonograms, and the resale right) or as *an alternative to the provision of an exclusive right* (the right to equitable remuneration for broadcasting and communication to the public of fixations of audio visual performances, and the right to an equitable remuneration for rental).

A. RIGHTS TO AN EQUITABLE REMUNERATION FOR BROADCASTING AND COMMUNICATION TO THE PUBLIC A right to a *single equitable remuneration* for the use of commercial phonograms for broadcasting or for any communication to the public is provided by Article 12 of the Rome Convention[24] and Article 15(1) of the WIPO Performances and Phonograms Treaty (WPPT).[25] While this provision is often referred to as a 'non-voluntary licence'[26] or 'compulsory licence'[27] (connoting

[24] 'If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, *a single equitable remuneration shall be paid* by the user to the performers, or to the producers of the phonograms, or to both' (emphasis added). International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted in Rome on 26 October 1961.

[25] 'Performers and producers of phonograms shall enjoy *the right to a single equitable remuneration* for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public' (emphasis added). WIPO Performances and Phonograms Treaty, adopted in Geneva on 20 December 1996.

[26] WIPO (2000), Overview of Collective Management of Copyright and Related Rights. (A) Establishment and Functioning of Collective Management Organizations: The Main Features, WIPO Doc. No. WIPO/CCM/APA/00/1(a), p. 29; and C. Rodrigues (1997), 'The Impact of Digital Technology on the Exercise and Collective Administration of Neighbouring Rights under the Rome Convention', *UNESCO Copyright Bulletin*, 31(4), pp. 15–23.

[27] S. Ricketson (2003), *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO Doc. No. SCCR/9/7, p. 45; and Media Consulting Group, A. Modot, H. Fontanel et al. (2011), *The 'Content Flat-Rate': A Solution to Illegal File-Sharing*, p. 84 (rightholders 'lose the right to authorise . . . . In exchange they get the right to a

a limitation of an exclusive right), it is important to clarify that this right to remuneration is provided as such for the sake of balancing the interests of rightholders and users, and is not an exception or limitation to the corresponding exclusive right of communication to the public.[28] This remuneration right is generally considered to be one of the central norms of these treaties, although contracting parties may decide to limit their application.[29] Payment of remuneration by users is paramount in case of remuneration rights, and it is the main condition for respect of these rights,[30] which cannot be exercised before a commercial phonogram is used for broadcasting or communication to the public. According to the Rome Convention, contracting parties have a choice of whether to provide remuneration to performers, producers of phonograms or both,[31] while under the WPPT parties retain only the

fair compensation'). In French, '*licence légale*', G. Vercken (2005), '*La gestion collective dans la tourmente : L'exemple de la reprographie*', Revue Lamy Droit de l'immatériel, février, 2, pp. 47, 48 and 53 (footnote 2); and N. Kaleski (2009), *Sociétés de perception et de répartition des droits : Société pour la perception de la rémunération équitable de la communication au public des phonogrammes du commerce (SPRE)*, JurisClasseur Propriété littéraire et artistique, Fasc. 1586, para. 1.

[28] C. Masouyé (1981), *Guide to the Rome Convention and the Phonograms Convention*, WIPO Publication No. 617(E), pp. 46–52; A. H. Olsson (1980), 'Administration of Neighboring Rights: Experience in the Nordic Countries', *Copyright*, 5, p. 192; M. Ficsor (2002), Collective Management of Copyright and Related Rights, WIPO Publication No. 855, pp. 24, 79, 138 and 139; and X. Blanc (2003), *Legal Frameworks for the Protection of Performers' Rights and Perfomers' Rights Management Systems*, WIPO Doc. No. WIPO/CCM/ADD/03/9, p. 9. For an opinion to the contrary, T. Holzmüller (2017), '*Rapport général : mécanismes visant à garantir une rémuneration appropriée des auteurs et des artistes*', in S. von Lewinski (ed.), *Remuneration for the use of works – Exclusivity vs Other Approaches*, Berlin, Germany: de Gruyter, p. 185.

[29] Complex negotiations leading to the conclusion of these two treaties led to the inclusion in Article 16(1) of the Rome Convention and Article 15(3) of the WPPT dispositions, allowing contracting parties limitation of the scope of the right to remuneration or its non-application. For example, by notification deposited with the Director General of WIPO, pursuant to Article 15(3) of the WPPT, governments of the following countries declared that they would limit the scope of Article 15(1): Australia (WPPT Notification No. 67, made in 2007), Canada (WPPT Notification No. 86, made in 2014), Chile (WPPT Notification No. 44, made in 2003), Japan (WPPT Notifications No. 38 and 68, made in 2002 and 2008), Korea (WPPT Notification No. 75, made in 2008), Singapore (WPPT Notification No. 52, made in 2005) and USA (WPPT Notification No. 8, made in 1999). The following governments declared that they would not apply the provisions of Article 15(1) at all: China (the People's Republic of), including Hong Kong and Macao (WPPT Notifications No. 66, 73 and 84, made in 2007, 2008 and 2013) and North Macedonia (WPPT Notification 46, made in 2004). On some reservations made with regard to Article 12 of the Rome Convention, *see* Commentary to Section 5 of the ILO/UNESCO/WIPO, Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done at Rome in 1961, Model Law concerning Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at 2nd Extraordinary Session, 6–10 May 1974.

[30] G. B. Dinwoodie, W. O. Hennessey and S. Perlmutter (2001), *International Intellectual Property Law and Policy*, Newark, NJ, USA: LexisNexis, pp. 552–553.

[31] For authoritative analysis of different implementation options, *see* Commentary to Section 5 of the ILO/UNESCO/WIPO, Intergovernmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done

possibility to determine the share of remuneration between the performers and producers if they do not reach an agreement.[32] Another important difference between the two treaties is that the Rome Convention requires the use to be 'direct' in order to trigger the application of the provision, whereas the conditions of the WPPT are satisfied when the use is 'direct or indirect'. The WPPT also defines and extends the notion of 'phonograms published for commercial purposes',[33] further encompassing phonograms made available to the public without production of copies.[34]

Regional copyright norms provide for some statutory remuneration rights in addition to the international treaties. Contracting parties to the Rome Convention and the WPPT may not adopt the right of performers and phonogram producers to a single equitable remuneration for broadcasting or for any communication to the public of commercial phonograms if they wish so.[35] Nevertheless, the twenty-eight member states of the European Union (EU)[36] and seventeen member states of the African Intellectual Property Organisation (OAPI) have to provide for this remuneration right by virtue of Article 8(2) of the EU Rental and Lending Directive[37] and Article 51 of Annex VII to the Bangui Agreement,[38] respectively.

at Rome in 1961, Model Law concerning Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted at 2nd Extraordinary Session, 6–10 May 1974. This Model Law was adopted to facilitate the transposition of the Convention into national laws.

[32] A. Sterling (2003), *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law*, 2nd edition, London, UK: Sweet & Maxwell, p. 739.

[33] Article 15(4) of the WPPT defines 'phonograms published for commercial purposes' as 'phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them'.

[34] According to Article 3(d) of the Rome Convention, 'publication' means the offering of copies of a phonogram to the public in reasonable quantity'.

[35] Article 16 of the Rome Convention and Article 15(3) of the WPPT.

[36] When an international treaty, to which an EU member state is a party, allows the EU member state to take a measure which is contrary to the EU law, the state must refrain from adopting such a measure, CJEU Judgments in *The Queen / Secretary of State for the Home Department, ex parte Evans Medical et Macfarlan Smith*, C-324/93, ECLI:EU:C:1995:84, para. 32; *The Queen, ex parte Centro-Com* v. *HM Treasury and Bank of England*, C-124/95, ECLI:EU:C:1997:8, 60; and *Luksan*, C-277/10, ECLI:EU:C:2012:65, para. 62.

[37] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376/28. For a comment of this provision, *see* CJEU Judgments in *Recorded Artists Actors Performers*, C-265/19, ECLI:EU:C:2020:677; *SENA*, C-245/00, ECLI:EU:C:2003:68; and S. Nérisson (2014), 'The Rental and Lending Rights Directive', in I. Stamatoudi and P. Torremans (eds.), *EU Copyright Law: A Commentary*, Cheltenham, UK: EE, pp. 186–190.

[38] The Agreement Revising the Bangui Agreement of 2 March 1977, on the Creation of an African Intellectual Property Organization, signed 24 February 1999 in Bangui, Central African Republic. Annex VII 'Literary and Artistic Property' establishes the common regime ('régime commun') for the protection of copyright, related rights and cultural heritage (Article 1 of Annex VII) and constitutes an integral part of the Agreement (Article 4(3) of the Bangui Agreement).

Provisions of regional EU instruments on remuneration rights were developed over time by the case-law of the Court of Justice of the European Union (CJEU), giving some 'flesh' to the at times generally worded legal texts that twenty-seven countries agreed to abide by.[39] The CJEU drew several critical distinctions between the nature of the *authors' exclusive right of communication to the public* (provided by Article 3(1) of the Information Society Directive[40]) and the *right of performers and phonogram producers to a single equitable remuneration for communication to the public of commercial phonograms* (provided by Article 8(2) of the Rental and Lending Directive). When comparing the exclusive right of authors and the remuneration right of performers and phonogram producers in the context of communication to the public, the CJEU concluded that the exclusive right is 'preventive', whereas the latter is 'compensatory'[41] and 'financial'[42] in nature. The finding is, consequentially, relevant in differentiating the scope of the two rights covering 'communication to the public'. According to the established case-law of the EU, the notions of the act of 'communication' and the 'public' are constituent parts of the 'communication to the public'. While the CJEU applied the same case-law for defining the notion of 'public' with regard to both of the rights above, it developed a slightly different approach for qualifying an act as a 'communication', relying on the different nature of the rights. The CJEU ruled that 'if it is relevant that a "communication" within the meaning of Article 3(1) of [the Information Society Directive] is of profit-making nature, this must be all the more true in the case of the essentially economic right to equitable remuneration of the performers and phonogram producers under Article 8(2) of [the Rental and Lending Directive]'.[43] Hence, the CJEU considered the profit-making nature of communicating to the public to be of higher relevance in case of the right to remuneration than for exclusive right of authors.[44]

[39] The UK left the EU on 31 January 2020, when the withdrawal agreement entered into force, bringing the number of EU member states from twenty-eight to twenty-seven. During the transitional period until 31 December 2020, the UK continued to apply EU law.

[40] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L 167/10; Corrigendum Article 5(1) in OJ 2001 L 6/70; as amended by Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on Certain Permitted Uses of Certain Works and Other Subject Matter Protected by Copyright and Related Rights for the Benefit of Persons Who Are Blind, Visually Impaired or Otherwise Print-Disabled and amending Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2017] OJ L 242/6.

[41] CJEU Judgment in *Reha Training*, C-117/15, ECLI:EU:C:2016:379, para. 30, and *SCF*, C-135/10, ECLI:EU:C:2012:140, para. 75.

[42] CJEU Judgment in *SCF*, C-135/10, ECLI:EU:C:2012:140, paras. 77 and 89.

[43] CJEU Judgments in Phonographic Performance (Ireland), C-162/10, ECLI:EU:C:2012:141, para. 36 and *SCF*, C-135/10, ECLI:EU:C:2012:140, paras. 88 and 89.

[44] On this ground, among others, the CJEU came to the conclusion that playing a radio at the private dentistry practice did not constitute a communication to the public, CJEU Judgment in *SCF*, C-135/10, ECLI:EU:C:2012:140. In the Judgment in *OSA*, C-351/12, ECLI:EU:C:2014:110 (para. 35), the CJEU concluded non-application of its conclusions regarding the right to

The CJEU also defined the significance of the word 'single' in the phrase 'a single equitable remuneration'. The Court interpreted it as meaning that, regardless of types and the numbers of rightholders, users are not obliged 'to pay separate remuneration several times for the same act of communication to the public, as that single remuneration will . . . be shared amongst the different beneficiaries of the equitable remuneration'.[45] Hence, the users need to pay only once.[46] This feature greatly simplifies compliance with the conditions for respective uses of commercial phonograms.

The established case-law of the CJEU also offers EU member states some guidelines on the concept of 'equitable remuneration'. National laws should 'enable a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable, and that it does not contravene any principle of [EU] law'.[47] Whether the payment is 'equitable' should be assessed, in particular, in light of the value of the use concerned in trade.[48] The Court provided for the following factors that could be taken into account for determining the equitable remuneration: 'the actual audience, the potential audience [and] the language version of the broadcast'[49] as well as the

> number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters represented by the broadcast organisation, the tariffs fixed by agreement in the field of performance rights and broadcast rights in respect of musical works protected by copyright, the tariffs set by the public broadcast organisations in the Member States bordering on the Member State concerned, and the amounts paid by commercial stations.[50]

remuneration for communication to the public of commercial phonograms to exclusive rights of authors:

> it suffices to note that the principles developed in *SCF* are not relevant in the present case, since *SCF* does not concern the copyright referred to in Article 3(1) of Directive 2001/29, but rather the right to remuneration of performers and producers of phonograms provided for in Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61).

[45] CJEU Judgment in Phonographic Performance (Ireland), C-162/10, ECLI:EU:C:2012:141, para. 54.

[46] J. Reinbothe and S. von Lewinski (1993), *The EC Directive on Rental and Lending Rights and on Piracy*, London, UK: Sweet and Maxwell, p. 98.

[47] CJEU Judgments in *SENA*, C-245/00, ECLI:EU:C:2003:68, para. 46 and Lagardère Active Broadcast, C-192/04, ECLI:EU:C:2005:475, para. 49.

[48] CJEU Judgments in *SENA*, C-245/00, ECLI:EU:C:2003:68, para. 37 and Lagardère Active Broadcast, C-192/04, ECLI:EU:C:2005:475, para. 50.

[49] CJEU Judgment in Lagardère Active Broadcast, C-192/04, ECLI:EU:C:2005:475, para. 51.

[50] CJEU Judgment in *SENA*, C-245/00, ECLI:EU:C:2003:68, para. 46.

Furthermore, the CJEU, when dealing with the comparison between requirements of 'remuneration' and of 'equitable remuneration', concluded that 'the amount of the *remuneration* will necessarily be less than that which corresponds to *equitable remuneration* or may even be fixed on a flat-rate basis'.[51]

In adition, '[p]referential trade agreements [PTAs] have become a major source of international intellectual property regulation',[52] and rights to remuneration did not escape from this trend. The right of performers and phonogram producers to a single equitable remuneration for broadcasting or for any communication to the public of commercial phonograms is provided by, for example, Article 237(3) of the EU – Central America PTA (2012);[53] Article 10.9(3) and (4) of the EU – Korea PTA (2010); Article 220(3), (5) and (6) of the EU – Andean Countries PTA (2012);[54] Article 285 of the EU – Moldova PTA (2014); Article 158 of the EU – Georgia PTA (2014); Article 20.8(2) of the EU – Canada (CETA) (2016); Article 170(3) of the EU – Ukraine PTA (2014); and Article 70 of the EU – Kazakhstan PTA (2015). Overall, this right to remuneration, formulated in terms similar to Article 15(1) of the WPPT, is the most frequently referred right to remuneration in the PTAs concluded between the EU and its member states with third countries.

The international treaties, regional instruments and PTAs do not specify whether this remuneration right could be waived or transferred, and countries are free to clarify this in their national legislation.[55] For example, the laws of France,[56] Germany,[57] and the UK[58] limit the transfer of this right from performers to producers.

[51] Emphasis added. CJEU Judgment in *VEWA*, C-271/10, ECLI:EU:C:2011:442, para. 33 (referring to the 'remuneration' for public lending, which does not have direct or indirect economic or commercial character).

[52] X. Seuba (2013), 'Intellectual Property in Preferential Trade Agreements: What Treaties, What Content?', *Journal of World Intellectual Property*, 16(5–6), p. 240.

[53] Here, the term 'Central America' covers six Central American countries: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

[54] Here, the term 'Andean Countries' covers three country members of the Andean Community: Colombia, Ecuador and Peru.

[55] T. Holzmüller (2017), *supra* n 28, p. 191. For an opinion to the contrary, considering that this right is non-transferable, X. Blanc (2003), *supra* n 28, p. 11.

[56] Article L212–11 of the French Intellectual Property Code (CPI). O. Bulayenko (2020), 'MusicMatic – the French Supreme Court's Decision on Creative Commons Plus (CC+), Commercial Licensing and Mandatory Collective Management of the Right to Remuneration for Communication to the Public of Commercial Phonograms', *International Review of Intellectual Property and Competition Law*, 51(5), pp. 668–679.

[57] Section 63a of the German Copyright Act (UrhG). This provision makes all the statutory remuneration rights unwaivable.

[58] Section 182 of the UK Copyright, Designs and Patents Act (CDPA). Assistant General Secretary of the British Musician's Union stated the following in 2015 with regard to the right to equitable remuneration for the public performance and broadcast of recordings: 'The equitable remuneration right has become the jewel in the crown of performers' rights because it is non-assignable under the law' (H. Trubridge (2015), 'Safeguarding the Income of Musicians', *WIPO Magazine*, 2, p. 9).

Countries around the world provide for this right to remuneration.[59] However, the scope of this right can differ to a large extent from country to country, as the Rome Convention and the WPPT make it possible for contracting parties not to apply this right to remuneration or to apply it only partially by making a formal notification to this end.[60] For example, the USA, non-party to the Rome Convention but a party to the WPPT,[61] provides for this right only in respect of communication to the public by means of a digital audio transmission. In the majority of European countries, this right to remuneration is interpreted in such a way as to cover not only traditional analogue 'broadcasting' but also 'simulcasting' (i.e., non-interactive linear transmission of broadcast programming via the Internet simultaneously to the original broadcast) and 'webcasting' (i.e., non-interactive linear transmission of broadcast programming via the Internet only).[62] Some countries do not limit this right to the phonograms published for commercial purposes and extend it to any phonograms.[63] Overall, of all the remuneration rights, the right to an equitable remuneration for broadcasting and communication to the public of phonograms constitutes the most significant source of revenue for European performers.[64]

The Rome Convention and the WPPT focused on the protection of audio performances. After many years of negotiations and a failed diplomatic conference,[65] 24 June 2012 marked the conclusion of the Beijing Treaty on audiovisual

[59] E.g., Argentina, Austria, Belgium, Canada, Croatia, Egypt, Finland, France, Greece, Germany, Hungary, Israel, Italy, Japan, Mexico, the Netherlands, Norway, Portugal, Spain, Switzerland, UK and USA (C. Geiger and O. Bulayenko (2017), *supra*, pp. 112, 116 and 118).

[60] Article 16 of the Rome Convention and Article 15(3) of the WPPT.

[61] Article 15(3) of the WPPT provides for the possibility to limit the scope of the remuneration right by submitting a declaration for this purpose. The USA submitted the declaration taking advantage of this provision (WPPT Notification No. 8, made in 1999).

[62] E.g., in Austria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, the Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland and UK, AEPO-ARTIS (2018), *Performers' Rights in International and European Legislation: Situation and Elements for Improvement*, pp. 11–12). In its Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC), the European Commission included the following acts within the scope of the right of communication to the public covered by the Rental and Lending Directive: 'webcasting, internet radio and simulcasting or near-on-demand services received either on a personal computer or on a mobile telephone' (para. 1(f)(ii) of the Recommendation).

[63] E.g., Croatia, Greece, Romania, Sweden and Switzerland, AEPO-ARTIS (2018), ibid., p. 30.

[64] AEPO-ARTIS (2018), ibid., pp. 34–45 and 147–149 (providing statistical information on the collections in twenty-five European countries from 2011 to 2017); and AEPO-ARTIS (2014), *Performers' Rights in International and European Legislation: Situation and Elements for Improvement*, pp. 22–24, 27, 104 and 105 (providing statistical information on the collections in twenty-five European countries from 2005 to 2013).

[65] S. von Lewinski (2001), 'International Protection for Audiovisual Performers: A Never-Ending Story? A resumé of the WIPO Diplomatic Conference 2000', *Revue Internationale du Droit d'Auteur*, 189, pp. 2–65.

performances.[66] Article 11(2) of the Beijing Treaty provides that '[c]ontracting Parties may ... declare that, *instead of the right of authorization*[67] ... , they will establish *a right to equitable remuneration* for the direct or indirect use of performances fixed in audiovisual fixations *for broadcasting or for communication to the public*.'[68]

In the case of Colombia, Ecuador, Peru, and the EU and its member states, Article 220(6) of the EU – Andean Countries PTA (2012) is also of relevance: 'The Parties may recognise to performers of audiovisual works an unwaivable right to obtain an equitable remuneration for broadcasting or for any communication to the public of their performances fixed'. This agreement was signed on 26 June 2016, just two days after the signing of the Beijing Treaty reconfirmed the policy space enjoyed by the parties. Under the national legislation of a number of European countries, the right to an equitable remuneration for broadcasting and communication to the public also covers fixations of audiovisual performances.[69]

B. RESALE RIGHT (*DROIT DE SUITE*) Article 14ter of the Berne Convention[70] indicates a possibility to introduce, for the benefit of authors, an inalienable right to an interest in any sale subsequent to the first transfer by the authors of original

[66] Beijing Treaty on Audiovisual Performances, adopted in Beijing on 24 June 2012.

[67] Exclusive right of performers to authorize the broadcasting and communication to the public of their performances fixed in audiovisual fixations, as stipulated in Article 11(1).

[68] Emphasis and footnote added. For introducing the remuneration right, the Treaty only requires the contracting parties to deposit a respective notification with the Director General of WIPO. Japan, in its declaration deposited upon accession (Beijing Notification No. 4, made in 2014) made the following statement pursuant to Article 11(2) of the Treaty: 'the Government of Japan will establish a *right to equitable remuneration, instead of the right of authorization* provided for in Article 11, paragraph (1) of the Treaty' (emphasis added). Peru declared (Beijing Notification 21, made in 2018) that 'it opts for the right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public'. Slovakia declared (Beijing Notification No. 3, made in 2014) upon its accession that 'it has set conditions in its legislation for the exercise of the *right to equitable remuneration*' (emphasis added). Switzerland declared (Beijing Notification No. 32, made in 2020) that 'instead of the exclusive right of authorization referred to in Article 11(1) ... Switzerland shall grant a right to remuneration subject to collective management and to the principle of reciprocity for the broadcasting, retransmission or public reception of an audiovisual fixation where it is made from a commercially available audiovisual fixation.'

[69] E.g., Belgium, Germany, Greece, Italy, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Switzerland, AEPO-ARTIS (2018), *supra* n 62, pp. 32, 33 and 47.

[70] Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979. The provision of the resale right was added to the Berne Convention during the revision conference in Brussels in 1948, M. M. Walter (2010), 'Resale Right Directive', in M. M. Walter and S. von Lewinski (eds.), *European Copyright Law: A Commentary*, New York, USA: Oxford University Press, p. 874.

works of art and writers and composers of original manuscripts.[71] The resale right is also widely known by the terms '*droit de suite*"and 'resale royalty right'.[72] Although the resale right is not mandatory for parties of the Berne Convention, the EU and OAPI member states have to grant this right by virtue of Article 1 of the EU Resale Right Directive[73] and Article 10 of Annex VII to the Bangui Agreement, respectively.

In the EU, the scope of the resale right encompasses, in addition to the original works of art,[74] original copies.[75] At the same time, EU legislation excludes the original manuscripts of writers and composers from the scope of the resale right[76] and, uniquely, limits the maximum amount of royalty to be paid.[77] The EU law makes clear that it is for sellers to pay the remuneration.[78] Even if sellers or dealers in works of art responsible for payment of the resale royalty agree with 'any other person, including the buyer, that that other person will definitely bear, in whole or in part, the cost of the royalty', such a contractual arrangement does not affect their obligations towards the authors to pay the royalty.[79] The CJEU clarified the obligation of the member states to make this remuneration right 'inalienable'.[80] This feature of the right does not prevent member states from making 'their own legislative choice in determining the categories of persons capable of benefiting from the resale right after the death of the author of a work of art' for the remaining term of protection.[81] Thanks to the common normative framework, a rather high level of

[71] Resale right is a right to remuneration and not an exception or remuneration. *See* also M. Ficsor (2003), 'Collective Management of Copyright and Related Rights at a Triple Crossroads: Should It Remain Voluntary or May It Be "Extended" or Made Mandatory?', *UNESCO Copyright Bulletin*, October 2003, pp. 2 and 4. There is an opinion that the resale right is not a remuneration right as such, R. Xalabarder (2018), *International Legal Study on Implementing an Unwaivable Right of Audiovisual Authors to Obtain Equitable Remuneration for the Exploitation of Their Works*, study conducted for CISAC, p. 44 (the author considered the resale right to be a compensation for 'the statutory "exhaustion" of the right upon the first sale of the tangible copy').

[72] L. Bently and B. Sherman (2014), *Intellectual Property Law*, 4th edition, New York, USA: Oxford University Press, p. 369.

[73] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32.

[74] As indicated in Article 14*ter* of the Berne Convention.

[75] Article 2(1) of the EU Resale Right Directive refers to 'copies considered to be original works of art'.

[76] J. Gaster (2014), 'The Resale Right Directive', in I. Stamatoudi and P. Torremans (eds.), *EU Copyright Law: A Commentary*, Cheltenham, UK: EE, p. 367.

[77] Article 4(1) of the Resale Right Directive establishes the 'ceiling' of €12,500.

[78] Article 1(4) of the Resale Right Directive: 'The royalty shall be payable by the seller'.

[79] CJEU Judgment in *Christie's France*, C-41/14, ECLI:EU:C:2015:119, para. 33.

[80] Article 1(1) ('an inalienable right, which cannot be waived, even in advance') and Recital 1 ('the resale right is an unassignable and inalienable right') of the Resale Right Directive.

[81] CJEU Judgment in *Fundación Gala-Salvador Dalí and VEGAP*, C-518/08, ECLI:EU:C:2010:191, paras. 33 and 36 (the Court based its judgment on the finding that the Resale Right Directive does not intend to harmonise member states laws of succession).

harmonisation was achieved among the member states of the EU by virtue of the Resale Right Directive.[82]

Some countries undertook the obligation to provide for the resale right under the terms of trade agreements. For example, Colombia, Ecuador, Georgia, Kazakhstan, Moldova, Peru, Ukraine, and the EU and its member states each have to provide for the resale right as a part of the implementation of the PTAs they concluded.[83] The inalienable and unwaivable character of the resale right is cemented in the international order by these PTAs referring to the right either as 'an inalienable and unwaivable right'[84] or as 'an inalienable right, which cannot be waived, even in advance'.[85] The position of the EU in the international trade negotiations involving copyright is informed by Recital 7 of the Resale Right Directive stating:

> The process of internationalisation of the [EU] market in modern and contemporary art, which is now being speeded up by the effects of the new economy, in a regulatory context in which few States outside the EU recognise the resale right, makes it essential for the European [Union], in the external sphere, to open negotiations with a view to making Article 14b [14ter] of the Berne Convention compulsory.[86]

The resale right was first introduced in the legislation of France (in 1920), Belgium (in 1921), Czechoslovakia (in 1926), Poland (in 1935), Uruguay (in 1937) and Italy (in 1941).[87] As of January 1986, national legislation of twenty-eight countries granted resale rights.[88] Although the resale right is not mandatory under the international treaties, multiple countries not bound by the EU, OAPI and PTAs norms introduced the resale right in their legislation. More than eighty countries around the world have introduced resale right.[89] The Tunis Model Law on Copyright for

[82] For an overview of the implementation of the Directive in the member states, *see* J. Gaster (2014), *supra* n 76, pp. 360–362.

[83] Article 223 of the EU – Andean Countries PTA (2012), Article 163 of the EU – Georgia PTA (2014), Article 290 of the EU – Moldova PTA (2014), Article 190 the EU – Ukraine PTA (2014), and Article 75 of the EU – Kazakhstan PTA (2015).

[84] Article 223(1) of the EU – Andean Countries PTA (2012).

[85] Article 163(1) of the EU – Georgia PTA (2014), Article 290(1) of the EU – Moldova PTA (2014), Article 190(1) the EU – Ukraine PTA (2014), and Article 75 of the EU – Kazakhstan PTA (2015).

[86] On the drafting process of this provision, M. M. Walter (2010), *supra* n 70, pp. 880 and 881.

[87] S. Ricketson (1987), *The Berne Convention for the protection of literary and artistic works: 1886–1986*, London, UK: Kluwer, pp. 206 and 411.

[88] Ibid., p. 411.

[89] CISAC (2018), Global Collections Report 2018: For 2017 Data, p. 32. E.g., Australia, Brazil, Chile, Costa Rica, Djibouti, India, Mexico, Morocco, Nigeria, Philippines, Tunisia, Turkey, Uganda and Uruguay, as well as the State of California and the Commonwealth of Puerto Rico of the USA (J. Hughes and R.P. Merges (2016), 'Copyright and Distributive Justice', *Notre Dame Law Review*, 92(2), pp. 570–572; L. Y. Ngombé (2009), *Le droit d'auteur en Afrique*, 2nd edition, Paris, France: L'Harmattan, pp. 90–91; and WIPO (2000), *Overview of Collective Management of Copyright and Related Rights. (A) Establishment and Functioning of Collective Management Organizations: The Main Features*, WIPO Doc. No. WIPO/CCM/APA/00/1(a), p. 18).

developing countries (Tunis Model Law) contains this remuneration right in its Article 4bis.[90] Currently, there are discussions about the development of an international treaty on the resale right.[91]

C. RIGHTS TO AN EQUITABLE REMUNERATION FOR RENTAL The TRIPS Agreement,[92] the WCT[93] and the WPPT, while conferring rightholders with the exclusive rental right,[94] enable contracting parties to continue providing for the right to an *equitable remuneration* for rental of phonograms *instead*.[95] Contracting parties that had and continue to have in place 'a system of equitable remuneration' to rightholders for the rental right on 15 April 1994 may maintain such a system provided that it does not lead to the material impairment of the exclusive right of reproduction.[96] Thus, once contracting parties bound by these provisions abandon the system of equitable remuneration for rental, they are not able to restore it in its former shape.[97]

[90] UNESCO/WIPO (1976), Tunis Model Law on Copyright for developing countries, WIPO Doc. No. 812(E).

[91] At the 30th session of the Standing Committee on Copyright and Related Rights (SCCR) of WIPO, held between 29 June and 3 July 2015, the delegation of the Democratic Republic of Congo proposed to add the topic of the resale rights to the agenda of the SCCR. The proposal was expressly supported by the EU, Sudan, Kenya, Tanzania and Côte d'Ivoire. Draft Report of the 31st session of the SCCR (WIPO Document SCCR/30/6), paras. 368, 371–374, 376 and 378, pp. 82–84. During the 31st session of the SCCR on 7 to 11 December 2015, a proposal from Senegal and Congo to include the Resale Right (*droit de suite*) in the Agenda of Future work by the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization (WIPO Document SCCR/31//5) was submitted. S. Ricketson (2015), 'Proposed International Treaty on Droit de Suite / Resale Royalty Right for Visual Artists', *Revue Internationale du Droit d'Auteur*, 245, pp. 2–263.

[92] Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh on 15 April 1994.

[93] WIPO Copyright Treaty, adopted in Geneva on 20 December 1996.

[94] Article 11 of the TRIPS Agreement (in respect of computer programs and cinematographic works), Article 7(1) of the WCT (in respect of computer programs, cinematographic works and works embodied in phonograms), Articles 9(1) and 13(1) of the WPPT (in respect of phonograms).

[95] Article 14(4) of the TRIPS Agreement, Article 7(3) of the WCT, Articles 9(2) and 13(2) of the WPPT. Interestingly, Article 9 of the Beijing Treaty does not provide for such option with respect to the fixations of audiovisual performances.

[96] E.g., Japan had such system of equitable remuneration of rightholders on 15 April 1994 (D. Gervais (2017), 'L'historique de l'Accord sur les ADPIC', in C. Geiger (ed.), *Le droit international de la propriété intellectuelle lié au commerce : L'accord sur les ADPIC, bilan et perspectives*, Collection du CEIPI, No. 65, Strasbourg, France: LexisNexis, pp. 20–21).

[97] This provision is often referred as a 'grandfather clause', 15 April 1994 being the date on which the Marrakesh Agreement Establishing the World Trade Organization was signed (A. Taubman, H. Wager and J. Watal (eds.) (2012), *A Handbook on the WTO TRIPS Agreement*, Cambridge, UK: Cambridge University Press, p. 52). Such grandfather clauses stipulating the irreversibility of changes from remuneration rights to exclusive rights demonstrate the past

The Agreed Statements concerning Articles 6 and 7 of the WCT and concerning Articles 2(e), 8, 9, 12 and 13 of the WPPT clarify that the scope of the rental right under the treaties is limited 'exclusively to fixed copies that can be put into circulation as tangible objects'. Due to this limitation of the medium, the remuneration right excluding digital uses, like other rights tied to a particular technology, might lose its economic significance for rightholders as a consequence of technological and consumption changes.[98]

2. Remuneration Rights Created outside the Scope of the International Treaties

Other than creating remuneration rights under respective provisions of international treaties, countries may introduce in their national copyright legislation statutory remuneration rights outside the scope of the minimum exclusive and remuneration rights provided by these treaties.[99] Notable examples of such remuneration entitlements adopted in a number of countries are the paid public domain ('*domaine public payant*'[100]) and the remuneration for use of works of expressions of folklore.[101]

A. REMUNERATION FOR USE OF WORKS OF EXPRESSIONS OF FOLKLORE The first provisions regulating use of folklore through copyright law were established in Tunisia (1967), Bolivia (1968, for musical folklore only), Chile (1970), Morocco (1970), Algeria (1973), Senegal (1973), Kenya (1975), Mali (1977), Burundi (1978),

trend to favour the exclusive rights as means to remuneration. For an analogous formula with regard to exceptions and limitations in the EU, *see* Article 5(3)(o) of the Information Society Directive, *infra* n 194.

[98] *See* also *infra* on the scope of Article 5 of the EU Rental and Lending Directive.

[99] Article 19 of the Berne Convention ('The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.') and Article 1(1) of the TRIPS Agreement ('[WTO] Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement.'). For a comment, C. M. Correa (2017), 'Le Préambule et les articles 1 à 6 de l'Accord : quel contenu pour les dispositions générales et les principes fondamentaux?', in C. Geiger (ed.), *Le droit international de la propriété intellectuelle lié au commerce : L'accord sur les ADPIC, bilan et perspectives*, Collection du CEIPI, No. 65, Strasbourg, France: LexisNexis, pp. 42–43.

[100] The idea of this mechanism is often attributed to Victor Hugo. Société des gens de lettres de France (1878), Comptes rendus in extenso et documents du Congrès littéraire international de Paris, France, pp. 142 ff.

[101] Although it could be argued that Article 15(4) of the Berne Convention covers works of folklore, while not specifically mentioning the protection of folklore (C. Masouyé (1978), *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, WIPO Publication No. 615(E), pp. 95–96; and L. Y. Ngombé (2009), *supra* n 89, pp. 45 and 49), only India deposited a notification required by Article 15(4)(b) of the Berne Convention, designating its Registrar of the Copyrights as a competent authority (Berne Notification No. 108, made in 1984).

Côte d'Ivoire (1978) and Guinea (1980).[102] The most significant binding regional legal authority is Annex VII to the Bangui Agreement, relevant for seventeen OAPI member states. Article 59 of Annex VII makes use of works of expressions of folklore subject to an appropriate payment ('*une redevance y afférente*') and requires a part of the sums collected to be spent for social and cultural purposes.[103] Copyright-based protection of folklore is also provided by Articles 1(3) and (5bis), 2(1)(iii), 6, 16(2) and 17 of the Tunis Model Law. Some African countries outside the OAPI grant copyright-related protection to folklore.[104]

B. REMUNERATION FOR USE OF PUBLIC DOMAIN WORKS (*DOMAINE PUBLIC PAYANT*) Like in the case of folklore, the international treaties do not provide for remuneration for use of works where the term of protection has expired, as they only refer to the minimum term of protection. In the first half of the 20th century, only a few countries had in place legislation providing for the *domaine public payant* (Uruguay, Bulgaria, Italy, Romania and Yugoslavia).[105] By the second half of the 1980s, *domaine public payant* systems were already in place in Algeria, Argentina, Brazil, Bulgaria, Chile, Côte d'Ivoire, Cuba, Czechoslovakia, Guinea, Hungary, Italy, Mali, Mexico, Portugal, Senegal, Portugal, Tunisia, Uruguay, USSR and Zaire.[106] However, an international study on the subject concluded in 2010 for WIPO demonstrated the existence of *domaine public payant* systems in fewer countries than was previously the case, namely, Algeria, Republic of the Congo, Côte d'Ivoire, Kenya, Paraguay, Ruanda and Senegal.[107] Remuneration for use of works in the public domain remains a recurring idea in national policy debates.[108]

[102] UNESCO/WIPO (1985), Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, p. 5 (para. 9). It is, however, uncertain whether copyright laws of all the aforementioned countries designed the protection as a system of remuneration.

[103] The protection given to folklore under the Bangui Agreement is sometimes described as a *sui generis* protection based on copyright, N. F. Matip and K. Koutouki (2008), 'La protection juridique du folklore dans les États membres de l'Organisation africaine de la propriété intellectuelle', *Revue québécoise de droit international*, 21.1, p. 247.

[104] E.g., Algeria, Madagascar and Namibia. For information on legislative provision of these countries and a general overview of the protection of folklore and remuneration for its use in African countries, L. Y. Ngombé (2009), *supra* n 89, pp. 41, 44–53, 72, 73 and 130–133.

[105] UNESCO (1949), *Domaine public payant*, UNESCO/DA/7, 27 May 1949.

[106] UNESCO/WIPO (1982), Committee of Non-Governmental Experts on the 'Domaine Public Payant', Analysis of the Replies to the Survey of Existing Provisions for the Application of the System of 'Domaine Public Payant' in National Legislation, 26–30 April 1982, UNESCO/WIPO/DPP/CE/I/2, paras. 8(c) and 10(a). *See* also A. Dietz (1994), '*Tendances de l'évolution du droit d'auteur dans les pays d'Europe centrale et orientale*', *Revue Internationale du Droit d'Auteur*, 162, pp. 164–166 (referring to *domaine public payant* legislation in Hungary, Poland, Russia and Slovakia (where the former Czechoslovak law continued to be applied)).

[107] S. Dusollier (2010), *Scoping Study on Copyright and Related Rights and The Public Domain*, WIPO Doc. No. CDIP/4/3/REV./STUDY/INF/1, pp. 40–41.

[108] E.g., in France, an idea was expressed to establish remuneration for use of audiovisual works in the public domain; P. Zelnik, J. Toubon and G. Cerutti (2010), *Création et Internet*, Rapport

Article 59(1) of Annex VII to the Bangui Agreement provides for the *domaine public payant*. The amount of payment for the use of public domain works should be determined as half of the usual amounts, according to contracts and practices, for the use of protected works (Article 59(2) of Annex VII). Creation of the *domaine public payant* is also referred to in Article 17 of the Tunis Model Law. Some European countries provide for some forms of the *domaine public payant* – such as Croatia (communication to the public of folk literary and artistic creations),[109] Hungary (for the resale of original works of art), Norway (for the broadcasting of phonograms)[110] and Slovakia.[111]

II. *Remuneration Rights Coexisting and Overlapping with Exclusive Rights Provided by the International Treaties*

In addition to the possibility to grant remuneration rights provided by international treaties and remuneration rights outside the scope of exclusive rights, states may grant remuneration rights *coexisting and overlapping* with the scope of the exclusive rights provided by the international treaties or by national legislation. Such remuneration rights, granted in addition to the corresponding exclusive rights, cover the same types of uses[112] and can be exercised only once economic operators (e.g., audio and audiovisual producers), to whom the exclusive rights had been transferred, have authorised use of the respective works and/or protected subject-matter.[113]

The main reason for granting such rights is the alteration of the distributive justice achieved by the copyright system with regard to creators (i.e., authors and performers).[114] Holders of exclusive rights (e.g., audio and audiovisual producers-owners or transferees by virtue of legal presumptions or contracts) in their negotiations with users always aim at charging profit-maximising fees for the use of protected works and subject-matter (i.e., the maximum fee that users are willing to pay). It is likely that the grant of remuneration rights to authors and performers covering the same uses does not lead to an increase of users' willingness or resources available for payment. The probable consequence is the redistribution of revenues generated by pre-existing fees in favour of holders of the remuneration rights (in accordance with

au Ministre de la Culture et de la Communication, pp. 10, 46 and 47 (generated revenues would be used for the digitisation of audiovisual cultural heritage).

[109] Articles 8(3) and 156(2) of the Croatian Copyright Act.

[110] C. Geiger and O. Bulayenko (2017), *supra* n 59, p. 122 (referring to Hungary and Norway).

[111] Z. Adamová and M. Husovec (2014), *supra* n 19, pp. 56–57.

[112] T. Riis (2020), *supra* n 22, p. 448 (such 'remuneration rights do not affect the scope of copyright protection').

[113] R. Xalabarder (2018), *supra* n 71, pp. 91–92.

[114] On the analysis of copyright tools, including unwaivable rights to remuneration, in light of John Rawls' principles of justice, J. Hughes and R.P. Merges (2016), 'Copyright and Distributive Justice', *Notre Dame Law Review*, 92(2), pp. 513–577.

the so-called 'pie theory'[115]). The consequential factual decrease in revenues for the transferees of exclusive rights is overcome by reliance on a legal fiction commonly used when creating new copyright entitlements: additional rights do not prejudice pre-existing rights.[116] Granting coexisting remuneration rights cannot alter all the consequences of granting exclusive rights, but this mechanism could contribute to the increase of real income for creators.[117]

Granting coexisting remuneration rights could be a useful policy option for countries that either replaced remuneration rights by exclusive rights (e.g., due to international commitments[118]) or introduced into their national legislation exclusive rights beyond the requirements of international treaties (e.g., in order to favour some industry groups[119] or due to foreign pressure) and would still like to have some of the benefits of non-exclusive remuneration entitlements. Even if new evidence favours a

[115] The 'pie theory' is a shorthand for referring to the observation that the mere increase of the number of beneficiaries entitled to remuneration for a particular use does not proportionately increase the commercial value of the use concerned and the amounts that are to be distributed to the beneficiaries. For other references to this notion in copyright, J. Pomianowski (2016), 'Toward an Efficient Licensing and Rate-Setting Regime: Reconstructing § 114(i) of the Copyright Act', *The Yale Law Journal*, 125(5), pp. 1531–1547; W. Patry (1999), 'The Failure of the American Copyright System: Protecting the Idle Rich', *Notre Dame Law Review*, 72(4), pp. 930–931 H. Cohen Jehoram (1990), 'The Nature of Neighbouring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations', *Columbia-VLA Journal of Law & the Arts*, 15(1), p. 83; and C. Masouyé (1981), Guide to the Rome Convention and the Phonograms Convention, WIPO Publication No. 617(E), pp. 17 and 52.

[116] E.g., Article 1 of the Rome Convention ('Protection granted under [the Rome] Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works.'), Article 1(2) of the WPPT (which supplements the aforementioned provision of the Rome Convention with the following: 'Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.'), and Article 1(2) of the Beijing Treaty ('Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.'); CJEU Judgment in *C More Entertainment AB* v. *Linus Sandberg*, C-279/13, ECLI:EU:C:2015:199, para. 35.

[117] The distributive justice achieved by this mechanism greatly depends on the way in which it is implemented (e.g., whether the remuneration rights are unwaivable and non-transferable, whether tariffs are negotiated collectively and whether they are subject to collective management).

[118] E.g., Austria and Denmark provided for a right to remuneration for cable retransmission on the date of the adoption of the Satellite and Cable Directive but had to introduce exclusive rights due to the 'sunset' clause of Article 8(2) of the EU Satellite and Cable Directive (T. Foged (2015), 'Danish licences for Europe', *European Intellectual Property Review*, 37(1), p. 16 (footnote 8); and T. Dreier (2010), 'Satellite and Cable Directive', in M. M. Walter and S. von Lewinski (eds.), *European Copyright Law: A Commentary*, New York, USA: Oxford University Press, pp. 447 and 449).

[119] On the recording industries' negative perception of the right to remuneration for communication to the public of phonograms, including streaming and webcasting, L. Rechardt (2015) 'Streaming and copyright: a recording industry perspective', WIPO Magazine, 2, pp. 6–7.

return to the pre-existing situation, it is usually a challenging task; for policy makers, it is easier to grant rights than to take them away.[120]

Remuneration rights coexisting and overlapping with exclusive rights and dependent on their transfer are often described in legal scholarship as 'residual' rights to remuneration. They are called 'residual' because authors and performers enjoy the unwaivable right to remuneration only upon the transfer of exclusive rights to audio and/or audiovisual producers.[121]

The Beijing Treaty is the only international multilateral treaty that explicitly mentions this option. Its Article 12(3) provides that '[i]ndependent of the transfer of exclusive rights … , national laws … may provide the *performer* with the right to receive royalties or *equitable remuneration for any use* of the performance, as provided for under this Treaty including as regards Articles 10 [right of making available] and 11 [right of broadcasting and communication to the public]' (emphasis added). This article of the Beijing Treaty explicitly provides for the possibility of persistence of the rights to remuneration after the transfer of exclusive rights.[122]

The provision of Article 12(3) of the Beijing Treaty was inspired by Article 5(1) of the EU Rental and Lending Directive,[123] which obliges member states[124] to provide

[120] 'The first law of copyright' states that: 'Once created, exclusive rights never seize to exist'. This rule-observation was humorously referred to by J. Griffiths, Professor at Queen Mary University of London, at the conference of the European Copyright Society 'EU copyright, quo vadis? From the EU copyright package to the challenges of Artificial intelligence', held in Brussels 25 May 2018. See also M. Husovec (2020), 'The fundamental right to property and the protection of investment: how difficult is it to reapeal intellectual property rights?', in C. Geiger (ed), *Research Handbook on Intellectual Property and Investment Law*, Cheltenham, UK: EE, p. 385.

[121] Some scholars consider such remuneration rights to be an economic component of the corresponding exclusive rights, R. Xalabarder (2018), *supra* n 71, p. 46; Europe Economics, L. Guibault, O. Salamanca and S. van Gompel (2016), *Remuneration of authors and performers for the use of their works and the fixations of their performances*, Study prepared for the European Commission, DG Communications Networks, Content & Technology, pp. 24, 27 and 29 (referring to the 'Exclusive right with mandatory remuneration on transfer'). On the notion of 'residual' remuneration rights, *see* also S. von Lewinski (2012), 'Collectivism and its role in the frame of individual contracts', in J. Rosén (ed.), *Individualism and Collectiveness in Intellectual Property Law*, Cheltenham, UK: EE, pp. 120–126; and M. Ficsor (2002), *supra* n 28, pp. 23 ('"residual right" for individual creators "surviving" the transfer of rights') and 139 ("residual rights'; that is, rights to remuneration which are provided for (usually for authors and performers) in the case of transfer of certain exclusive rights (such as in the case of the right of rental under the Rental and Lending Directive of the European Community).').

[122] T. Pistorius (2016), 'The Beijing Treaty on Audiovisual Performances', in I. A. Stamatoudi (ed.), *New Developments in EU and International Copyright Law*, Alphen aan den Rijn, the Netherlands: Kluwer Law International, p. 165; S. von Lewinski (2012), 'The Beijing Treaty on Audiovisual Performances', *Auteur & Media*, 6, p. 542; and M. J. Ficsor (2012), *Beijing Treaty on Audiovisual Performances (BTAP): First Assessment of the Third WIPO 'Internet Treaty'*, pp. 7–8, available at: www.copyrightseesaw.net/en/papers. S. von Lewinski and M. J. Ficsor disagreed as to whether contracting states would be able to provide for the right to receive remuneration after transfer of the exclusive rights without the explicit provision in the Treaty.

[123] S. von Lewinski (2012), ibid., p. 542 (the author was the Deputy Head of the German Delegation at the Beijing Diplomatic Conference).

[124] E.g., Section 27(1) of the UrhG, Section 93B of the CDPA and Article 78(2) of the Hungarian Copyright Act. Before adoption of the first Rental and Lending Directive in 1992, Germany was

authors and performers with a 'residual' remuneration right for rental of phonograms and films:[125] 'Where an author or performer has *transferred or assigned* his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that *author or performer shall retain the right to obtain an equitable remuneration for the rental*'.'[126] The notions of 'rental' and 'copies' in the Rental and Lending Directive refer only to physical objects.[127] The title of Article 5 of the Rental and Lending Directive refers to the right to an equitable remuneration as 'unwaivable', and Article 5(2) states that '[t]he right to obtain an equitable remuneration for rental cannot be waived by authors or performers.' The provision does not say anything on whether the right is 'inalienable',[128] but the CJEU interpreted the 'unwaivable' character of the right to equitable remuneration for rental in a broad way, concluding that the right is not only 'unwaivable' but also 'inalienable'. The remuneration right cannot be transferred by contracts between private parties as well as by a national legislative presumption of transfer of rights[129] from performers and authors to film producers.[130]

Since its integration in the EU *acquis*, the above-described formula of 'residual' remuneration rights was used in trade agreements. For instance, the text of Article 179, titled 'Unwaivable right to equitable remuneration', of the EU – Ukraine PTA (2014) is identical, *mutatis mutandis*, to the text of Article 5 (with the same title) of the EU Rental and Lending Directive. Article 220(5) of the EU – Andean Countries PTA (2012), although formulated as a 'may' provision and referring only to

the only member state whose legislation provided for the remuneration right for rental (J. Reinbothe and S. von Lewinski (1993), *The EC Directive on Rental and Lending Rights and on Piracy*, London, UK: Sweet and Maxwell, p. 148).

[125] The 'rental' is defined as 'making available for use, for a limited period of time and for direct or indirect economic or commercial advantage' (Article 2(1)(a) of the Rental and Lending Directive).

[126] Emphasis added. For a comment on this unwaivable right, *see* S. Nérisson (2014), *supra* n 37, pp. 153, 174–176; and J. Reinbothe and S. von Lewinski (1993), *supra* n 124, pp. 65–66.

[127] CJEU Judgment in *Vereniging Openbare Bibliotheken*, C-174/15, ECLI:EU:C:2016:856, para. 35. Due to this scope of the right, continuous technological and consumption changes are steadily decreasing revenues collected through this right, AEPO-ARTIS (2018), *supra* n 62, pp. 127–130 (providing statistical information on the amounts collected in the majority of the European Economic Area (EEA) member states in the period 2011–2017); AEPO-ARTIS (2014), *supra* n 64, pp. 91 and 93 (providing statistical information on the amounts collected in the majority of the European Economic Area (EEA) member states in the period 2005–2013); and Europe Economics, L. Guibault, O. Salamanca and S. van Gompel (2016), *supra* n 121, pp. 78 and 95. In the past, the European Commission entertained the idea of applying the rental right to some digital services: 'Video on demand and similar forms of use closely resemble the making available for a limited period of time of a cinematographic or audio-visual work, and could be considered a form of remote video rental.', Commission of the European Communities, Green Paper, Copyright and Related Rights in the Information Society, 19 July 1995, COM(95) 382 final, p. 30.

[128] For a distinction on 'unwaivable' and 'inalienable', R. Xalabarder (2018), *supra* n 71, p. 5 (footnote 1).

[129] Possible under Article 5(3) and (4) of the Rental and Lending Directive.

[130] CJEU Judgment in *Luksan*, C-277/10, ECLI:EU:C:2012:65, paras. 107–109.

performers, refers to the act of making available in addition to the unwaivable remuneration for rental: 'Where performers have transferred the *right of making available or the right of rental*, a Party may provide that *performers retain the unwaivable right to obtain an equitable remuneration*, which may be collected by a collecting society duly authorised by law, in accordance with its domestic law.'[131]

Another example of the remuneration right coexisting and overlapping with the scope of exclusive rights could be found in the EU Term Directive,[132] which extended the term of protection of phonograms beyond fifty years after publication, or communication, whichever is earlier. This legislative instrument provides *performers*, whose contract with phonogram producers on transfer or assignment of their rights gives a right to claim a non-recurring remuneration (typically, session musicians), with the *unwaivable right to an annual supplementary remuneration* from phonogram producers.[133] The remuneration right is supplementary to the exclusive right and has no legal impact on the existence[134] or exercise of the exclusive right; that is, recording companies to whom the rights were transferred continue to exercise them as they deem fit. This remuneration 'shall correspond to 20% of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question'.[135]

With regard to the definition of the 'revenue' from which the aforementioned percentage should be calculated, Recital 13 of the Term Directive clarifies that 'no account should be taken of the revenue which the phonogram producer has derived from the rental of phonograms, of the single equitable remuneration received for broadcasting and communication to the public or of the fair compensation received for private copying'. The purpose of this statement is to ensure that the

[131] Article 220(5) of the EU – Andean Countries PTA (2012) (emphasis added).

[132] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L 372/12, as amended by Directive 2011/77/EU of the European Parliament and the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011], OJ L 265/1.

[133] Article 3(2b) of the Term Directive. For a comment on this right, G. Minero (2014), 'The Term Directive', in I. Stamatoudi and P. Torremans (eds.), *EU Copyright Law: A Commentary*, Cheltenham, UK: EE, p. 270. On the implementation of this right in some member states, A. Ramalho and A. Lopez-Tarruella (2018), *Implementation of the Directive 2011/77/EU: copyright term of protection*, Study requested by the European Parliament's Committee on Legal Affairs, PE 604.957, pp. 26–27 and 31–32.

[134] E.g., Article 159(3)(b) and (4)(a) of the EU – Georgia PTA (2014) and Article 286(3)(b) and (4)(a) of the EU – Moldova PTA (2014), by which Georgia, Moldova, EU and its member states undertook the obligation to provide performers and phonogram producers with the term of protection of phonograms of seventy years, do not refer to the remuneration right for performers from the fiftieth year onwards.

[135] Article 3(2c) of the Term Directive.

remuneration right is supplementary to and independent from other remuneration rights.[136] This distinction is essential because the term extension remuneration right could be presented as an entitlement to an annual lump sum payment covering all types of uses controlled by the publisher holding exclusive rights. Unlike the duration of other remuneration rights (closely tied to the usual terms of protection of respective exclusive rights of authors, performers and phonogram producers), the right of performers to annual supplementary remuneration limited by the term extension starts immediately following the fiftieth year after publication of the phonogram (or, failing that, lawful communication).

In a number of EU member states, 'residual' remuneration rights (i.e., coexisting with the corresponding exclusive rights and dependent on their transfer) were introduced beyond the obligations under the Rental and Lending Directive and the Term Extension Directive.[137] Some stakeholders and scholars proposed unwaivable ('residual') remuneration rights for making available of audiovisual authors,[138] and of audio and audiovisual performers[139] and of authors and performers.[140]

Discussions on the creation of new remuneration rights coexisting with exclusive rights were entertained by EU policymakers. In its Green Paper of 2011, the European Commission considered as a policy option the introduction of unwaivable remuneration rights for authors and performers for making audiovisual works available and subject to mandatory collective management:

[136] If this is indeed the objective of this statement, the legislative drafting technique could be improved by referring to all other entitlements to remuneration instead of referring to specific rights to remuneration, in order to avoid a possible overlap with unmentioned remuneration rights.

[137] E.g., the unwaivable remuneration right for cable retransmission of broadcasts coexisting with exclusive rights to cable retransmission (Section 20b(2) of the UrhG and Article XI.225(1) of the Belgian Economic Law Code). For a comment on those rights, T. Dreier (2010), *supra* n 118, pp. 458–459 (the author considered this as being more advantageous for individual authors than the grant of exclusive rights only, which can be assigned to broadcasters without the right to share of any future revenues). *See* also Article 108(3) of the Spanish Intellectual Property Law providing audio- and audio-visual performers with a residual remuneration right for making available of recordings of their performances, P. Lopez (2017), 'The making available right for performers in Spain: a case of a statutory remuneration right managed by performers' collecting societies', in S. von Lewinski (ed.), *Remuneration for the use of works – Exclusivity vs Other Approaches*, Berlin, Germany: de Gruyter, pp. 234–237.

[138] R. Xalabarder (2018), *supra* n 71; SAA (2015), *Audiovisual Authors' Rights and Remuneration in Europe*, White Paper, pp. 37–43; KEA European Affairs (2010), *Multi-Territory Licensing of Audiovisual Works in the European Union*, Final Report, prepared for the European Commission, DG Information Society and Media, pp. 10 and 172; and SAA (2011), *Audiovisual Authors' Rights and Remuneration in Europe*, White Paper, pp. 26–28.

[139] AEPO-ARTIS (2018), *supra* n 62, pp. 74 and 159; and AEPO-ARTIS (2014), *supra* n 64, pp. 46, 92, 111 and 112.

[140] S. Dusollier, C. Ker, M. Iglesias et al. (2014), Contractual *Arrangements Applicable to Creators: Law and Practice of Selected Member States*, Study requested by the European Parliament's Committee on Legal Affairs, PE 493.041, pp. 15, 94 and 104; and S. von Lewinski (2017), 'A model that may indeed help', in S. von Lewinski (ed.), *Remuneration for the use of works – Exclusivity vs Other Approaches*, Berlin, Germany: de Gruyter, p. 257.

> It could be argued that *authors* have no economic benefit from the online exploitation of their works if no proportional remuneration is being passed on a per use basis. To remedy this, one option would be the introduction of *an unwaivable right to remuneration for their 'making available' right managed, compulsorily, on a collective basis*.
>
> . . .
>
> It could be argued that *performers* should equally be entitled, on a harmonised basis, to *an unwaivable right to remuneration* from which they would benefit *even after* they have transferred their exclusive right of making available. This right could also be *compulsorily collected by collective management societies*.[141]

In 2012, the European Parliament called 'for the bargaining position of [audiovisual] authors and performers vis-à-vis producers to be rebalanced by providing authors and performers with an unwaivable right to remuneration for all forms of exploitation of their works, *including* ongoing remuneration where they have transferred their exclusive "making available" right to a producer'.[142] In September 2017, the Committee on Culture and Education (CULT) of the European Parliament proposed the Committee on Legal Affairs (JURI) to include the following Article 14a(1), 'Unwaivable right to fair remuneration for authors and performers', in the Draft Directive on copyright in the Digital Single Market (DSM) Directive: 'Member States shall ensure that where authors and performers transfer or assign the right of making available to the public their works or other subject-matter for their use on information society services that *make available works or other subject-matter* through a licensed catalogue, those *authors and performers retain the right to obtain fair remuneration* from such use.'[143]

The adopted text of the DSM Directive, however, deviated from the approach promoting the grant of substantive statutory rights to remuneration. DSM Directive's Article 18(1), titled 'Principle of appropriate and proportionate remuneration', reads as follows: 'Member States shall ensure that where *authors and performers license or transfer* their exclusive rights for the exploitation of their works or other subject-matter, *they are entitled to receive appropriate and proportionate remuneration*.' (emphasis added). This provision does not require member states to establish a substantive statutory right to remuneration, as it aims primarily at regulating the conditions of exploitation contracts. Still, according to the European Copyright

[141] European Commission, Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market, 13 July 2011, COM(2011) 427 final, 16 (emphasis added).

[142] European Parliament, Resolution on the online distribution of audiovisual works in the European Union (2011/2313(INI)) of 11 September 2012, P7_TA(2012)0324, para. 48 (emphasis added).

[143] Committee on Culture and Education of the European Parliament, Opinion of 4 September 2017, for the Committee on Legal Affairs, on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8–0383/2016 – 2016/0280(COD)), Amendment 92 (emphasis added).

Society (ECS), 'Member States are also free to use non-contractual mechanisms to implement the principle of a fair remuneration. One such mechanism that Member States are free to maintain or introduce in their law code consists of an unwaivable right to remuneration that authors or performers cannot transfer'.[144]

Another relevant provision of the DSM Directive is Article 15(5), stating that 'Member States shall provide that author of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.'[145] Similarly to the cited Article 18(1), it also does not require member states to implement it by granting authors a right to remuneration. Yet, it is one of the ways in which this provision of the DSM Directive could be transposed into the national laws of member states.

As is demonstrated by the preceding paragraphs, the grant of remuneration rights coexisting with exclusive rights covering the same uses is a legislative tool of distributive justice, provided by a few international and regional instruments as well as by the national law of some countries. Those instruments are usually interpreted as permitting or requiring the provision of remuneration rights entering into play *only upon the transfer* of the exclusive rights to economic operators (e.g., producers). Those instruments, nevertheless, do not prohibit the introduction of unwaivable remuneration rights coexisting with corresponding exclusive rights, *without requiring the transfer of exclusive rights*.

Nowadays, thanks to technological and business developments, notably in the accessibility of recording technologies and online platforms enabling an easy reach to the public, many creators participate in the copyright-based economy without passing through traditional economic actors playing the role of intermediaries, publishers and producers. Granting of a right to an equitable remuneration only to creators who transferred their exclusive rights, but not to those who preferred to keep them (e.g., self-publishing and self-recording[146]), does not seem to have a solid legal or economic public policy rationale. In the case of remuneration rights existing independently from the transfer of exclusive rights, an equitable remuneration requirement could also be applicable to the transfer of exclusive rights. Further empirical and interdisciplinary research on the impact of the grant of remuneration

[144] S. Dusollier, L. Bently, M. Kretschmer et al. (2020), Comment *of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market*, 8 June 2020, available at: https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18–22_contracts_20200611.pdf.

[145] This safeguard of authors' interests was not present in the much criticised version of Article 15 (ex Article 11) of the DSM Directive, C. Geiger, O. Bulayenko and G. Frosio (2017), 'The Introduction of a Neighbouring Rigths for Press Publishers at EU Level: The Unneeded (and Unwanted) Reform', *European Intellectual Property Review*, 39(4), pp. 202–210.

[146] On the alternative supply chain for performers, Europe Economics, L. Guibault, O. Salamanca and S. van Gompel (2016), *supra* n 121, pp. 80–63.

rights coexisting with exclusive rights is necessary (e.g., on the welfare of creators, on the cost of production of investment-intensive works, and on the prices for consumers). It seems that, given the ultimate purpose of the mechanism is to ensure some minimum standard of revenue-sharing from the results of creators' artistic input, some outcomes of policy discussions and their conclusion in the domain of *minimum wage* could be of high relevance. The link between the conclusions of the discussion on minimum wage and the proposals for the grant of coexisting remuneration rights is strong where the creative input of authors and performers is the primary outcome of their labour.

With regard to the situations of coexistence and overlapping of exclusive and remuneration rights independent from the transfer of the exclusive rights, it could be observed that they could occur not only when entitlements to remuneration are granted to creators in addition to the pre-existing exclusive rights. The same situations should, in principle, occur when countries required by the international treaties to provide for a remuneration right decide to grant an exclusive right in addition to the corresponding remuneration right.[147]

The unwaivable nature of some remuneration rights permits ensuring a connection between the commercial success of the creations and their creators, unlike the one-time payments of the commonly practiced 'buy-outs' (i.e., 'all-rights included' contracts by which authors and performers transfer all their rights to publishers, phonogram and audiovisual publishers, and other economic operators for the full term of copyright and for all the territories).[148]

If the natural-person creators are the intended beneficiaries of the grant of remuneration rights, in addition to merely declaring such rights 'unwaivable' (and non-transferable), it is important to consider situations where, by virtue of statutory provisions, original creators (often employee creators and contributors to collective works) are not considered to be 'authors' or 'owners', for the purpose of initial allocation of rights. This runs contrary to the 'creator doctrine'[149] of copyright law but is in line with the labour law.[150]

[147] X. Blanc (2003), *supra* n 28, p. 9 ('Nothing prevents the laws of the States having ratified [the Rome Convention and the WPPT] from combining its exercise with the existence of an exclusive right as soon as such a right to equitable remuneration constitutes a minimum guarantee of protection.').

[148] On this practice and consequences for creators' income, Europe Economics, L. Guibault, O. Salamanca and S. van Gompel (2016), *supra* n 121, pp. 5, 31, 51 and 78; Europe Economics, L. Guibault and O. Salamanca (2016), *Remuneration of Authors of Books and Scientific Journals, Translators, Journalists and Visual Artists for the Use of Their Works*, Study prepared for the European Commission, DG Communications Networks, Content & Technology, pp. 53, 75, 80, 90–96, 109 and 111; SAA (2015), *Audiovisual Authors' Rights and Remuneration in Europe*, White Paper, pp. 6 and 18–20; and S. Dusollier, C. Ker, M. Iglesias et al. (2014), *supra* n 140, pp. 12, 81 and 84–86.

[149] On the doctrine, J. Seignette (1994), *Challenges to Creator Doctrine: Authorship, Copyright Ownership and the Exploitation of Creative Works in the Netherlands, Germany and the United States*, Deventer, the Netherlands: Kluwer Law and Taxation Publishers.

[150] One of solutions proposed by the legal doctrine is to entitle employee-creators to a right to remuneration proportionate to the benefits of the use of works they created. This way, the remuneration of employee-creators would not entirely depend on the (mostly fixed) salary but

Of course, not all creators always create with commercial motives in mind, and some creators sometimes do not want to put a price tag on the use of their works. Today, many creators legally express their wish for free non-commercial uses through free public non-exclusive copyright licences, such as the popular Creative Commons non-commercial licences.[151] In this regard, it is important to provide for an exception to the unwaivable character of rights where creators grant such licences.[152]

C. LIMITATION-BASED REMUNERATION RIGHTS

States not bound by international treaties establishing minimum obligations with regard to exclusive rights are free to introduce and design statutory remuneration rights instead of exclusive rights, as they see fit, in their national policies.[153] The vast majority of the international community signatory of the international conventions however can transform the exclusive rights provided by international norms into remuneration rights only under certain conditions and to the extent permitted by the treaties. Limitation-based remuneration rights, unlike remuneration rights per

would also integrate revenue streams linked to the revenues generated by the works they created (S. Le Cam (2014), *L'auteur professionnel : Entre droit d'auteur et droit social*, Paris, France: LexisNexis, pp. 252, 391 and 392).

[151] Creative Commons, About The Licenses: https://creativecommons.org/licenses/?lang=en. Section 2(b)(3) of the Creative Commons licences (4.0 International) states the following:

> To the extent possible, the Licensor waives any right to collect royalties … for the exercise of the Licensed Rights, whether directly or through a collecting society under any voluntary or waivable statutory or compulsory licensing scheme. In all other cases the Licensor expressly reserves any right to collect such royalties, including when the Licensed Material is used other than for NonCommercial purposes.

On the issue of the relation between Creative Commons licences and the unwaivability (and/or non-transferability) of the right to remuneration for communication to the public of commercial phonograms, C. Angelopoulos (2011), 'Creative Commons and Related Rights in Sound Recordings: Are the Two Systems Compatible?', in L. Guibault and C. Angelopoulos (eds.), *Open Content Licensing: From Theory to Practice*, Amsterdam, the Netherlands: Amsterdam University Press, pp. 244, 245 and 284–295.

[152] A provision to this end was developed by the Committee on Culture and Education (CULT) of the European Parliament, proposing that the unwaivable character 'shall not apply where an author or performer grants a free non-exclusive right for the benefit of all users for the use of his or her work.' (Committee on Culture and Education of the European Parliament, Opinion of 4 September 2017, for the Committee on Legal Affairs, on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM (2016)0593 – C8–0383/2016 – 2016/0280(COD)), Amendment 92 (Article of 14a(2))).

[153] E.g., Eritrea, Ethiopia, Iran (signatory of the Phonograms Convention only), Iraq and Timor-Leste are not bound by the international treaties on copyright requiring grant of exclusive rights. However, Iraq has to accede to the Rome Convention, WCT and WPPT by virtue of Article 60(2) of the EU – Iraq PTA (2012).

se,[154] are generally also called 'non-voluntary licences', 'compulsory licences' or 'statutory licences'. As explained above, we prefer the use of a unified terminology referring to remuneration rights, be it per se or based on limitations, since the remuneration entitlement is in both cases not technically based on a 'licence' but on a right given to rightholders, by law, to be remunerated for a particular use.

Many exceptions and limitations are explicitly mentioned in the international treaties. Some provisions require payment of remuneration to rightholders, and others do not. Regardless of the requirement of payment, such provisions can be implemented in national or regional law as remunerated exceptions and limitations to exclusive rights (referred as 'limitation-based remuneration rights' in this chapter).[155] Many other exceptions and limitations to exclusive rights, not mentioned by the international treaties, were created through the legislative flexibility available under the three-step test.[156] This section analyses the categories of entitlement, in the presented order.[157] As was stressed at the beginning of this chapter, the lines between the different categories of remuneration rights are sometimes difficult to draw precisely in practice. Nevertheless, the proposed classification could still be helpful for understanding different ways and grounds for creating limitation-based remuneration rights.

I. *Limitation-Based Remuneration Rights Created within the Scope of Exceptions and Limitations Provided by the International Treaties*

All the exceptions and limitations to exclusive rights provided by the international treaties have to comply with certain conditions, incorporated from what is generally referred to as the 'three-step test'.[158] However, as there are different views on the

[154] *See supra* in the text:

> A right to a *single equitable remuneration* for the use of commercial phonograms for broadcasting or for any communication to the public is provided by Article 12 of the Rome Convention and Article 15(1) of the WPPT. *While this provision is often referred to as a "non-voluntary license" or "compulsory license", (connoting a limitation of an exclusive right), it is important to clarify that this right to remuneration is provided as such for the sake of balancing the interests of rightholders and users, and is not an exception or limitation to the corresponding exclusive right of communication to the public*. (Emphasis added).

[155] For theoretical work behind this notion, *see* C. Geiger (2010), *supra* n 19, pp. 529, 542–543; and C. Geiger and F. Schönherr (2014), *supra*, p. 133.

[156] *See infra* the part on limitation-based remuneration rights created under the flexibility of the three-step test.

[157] The proposed classification is a theoretical exercise permitting to conceptualise the different possibilities for replacing exclusive rights required by the international treaties by remuneration entitlements. The categories presented in this article are not hermetic structures, and some limitation-based remuneration rights provided by national laws could fall under more than one category.

[158] Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement, Article 10(1) of the WCT, Article 16(2) of the WPPT, and Article 13(2) of the Beijing Treaty. On these conditions,

interpretation of the test, and as the test is inherently an imprecise tool, it could be challenging to define with precision the contours of each and every limitation-based right that could be created under this flexibility mechanism.

Some international norms which explicitly mention possible exceptions and limitations provide some level of confidence with regard to the permitted legislative action at the national or regional level. This part provides an overview of limitation-based remuneration rights created within the scope of such exceptions and limitations mentioned by the international treaties.

1. Limitation-Based Remuneration Rights Provided by the International Treaties

Some of the international treaties explicitly foresee a possibility of making exceptions and limitations to exclusive rights subject to remuneration ('limitation-based remuneration rights').

Article 11bis(2) of the Berne Convention provides contracting parties with the competency to determine the conditions under which authors may exercise their right prescribed by this article,[159] provided that it is not prejudicial to authors' right to obtain 'equitable remuneration'.[160] Similarly, Article 13(1) of the Berne Convention allows state parties to impose reservations and conditions, subject to 'equitable remuneration', on the exclusive right granted to the author of a musical work, the recording of which has already been authorised.[161] The Phonograms Convention foresees that if contracting states permit the duplication of phonograms for the purpose of teaching or scientific research, they ought to subject it to the payment of 'an equitable remuneration' to the producers of phonograms.[162] The

see M. R. F. Senftleben (2004), *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague, the Netherlands: Kluwer Law International, and *infra*.

[159] Namely, the exclusive rights of authorizing broadcasting, other wireless communication to the public, cable retransmission, rebroadcast, public communication of broadcast by loudspeaker or analogous instruments.

[160] As some countries are parties to the Berne Convention and the WCT at the same time, it is important to highlight that Article 8 of the WCT providing for the exclusive right of communication to the public, including the making available to the public, does not preclude contracting parties from applying Article 11bis(2) of the Berne Convention (Agreed statement concerning Article 8 of the WCT). In the WTO dispute opposing the USA and the European Communities (EC; now EU), the EC recognised 'a levy system for the audio/TV equipment purchased by the establishment being allowed to play copyrighted works without authorisations' as one of possibilities for providing such remuneration (WTO, Panel Report on United States – Section 110(5) of the US Copyright Act, adopted on 15 June 2000, WT/DS160/R, para. 6.84 (footnote 103)).

[161] S. Ricketson (2003), *supra* n 27, pp. 28–32; and G. B. Dinwoodie, W. O. Hennessey and S. Perlmutter (2001), *supra* n 30, p. 545.

[162] Article 6 of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, adopted in Geneva on 29 October 1971.

Marrakesh Treaty provides that parties to the treaty may subject to remuneration certain exceptions and limitations regarding the making of accessible format copies that give persons with visual impairments or other print disabilities access to copyrighted works.[163] Contracting parties may also subject to remuneration the importation of accessible format copies.[164] Article 3(6) of the EU Directive implementing the Marrakesh Treaty[165] reconfirms the liberty of EU member states to provide that specified uses undertaken by authorised entities for the benefit of visually impaired persons could be subject to 'compensation schemes', but imposes some limitations on such schemes.[166]

[163] Article 4(5) of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted in Marrakesh on 27 June 2013. For commentary of this provision, *see* L. R. Helfer, M. K. Land, R. L. Okediji et al. (2017), *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals*, available at: www.worldblindunion.org/English/our-work/our-priorities/Pages/WBU-Guide-to-the-Marrakesh-Treaty.aspx, pp. 123–126, 144 and 166–168; R. Hilty, K. Köklü, A. Kur, S. Nérisson, J. Drexl and S. von Lewinski (2015), 'Position Paper of the Max Planck Institute for Innovation and Competition, Concerning the Implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled', *International Review of Intellectual Property and Competition Law*, 46, pp. 6–7 (para. 26); and M. J. Ficsor (2013), *Commentary to the Marrakesh Treaty on Accessible Format Copies for the Visually Impaired*, pp. 20–28, available at: www.copyrightseesaw.net/en/papers.

[164] Agreed statement concerning Article 6 of the Marrakesh Treaty: 'It is understood that the Contracting Parties have the same flexibilities set out in Article 4 when implementing their obligations under Article 6.', S. von Lewinski (2016), 'The Marrakesh Treaty', in I. A. Stamatoudi (ed.), *New Developments in EU and International Copyright Law*, Alphen aan den Rijn, the Netherlands: Kluwer Law International, pp. 136 and 138.

[165] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2017] OJ L 242/6.

[166] Recital 14 of the Directive:

> Member States should only be allowed to provide for compensation schemes regarding the permitted uses of works or other subject matter by authorised entities. In order to avoid burdens for beneficiary persons, prevent barriers to the cross-border dissemination of accessible format copies and excessive requirements on authorised entities, it is important that the possibility for Member States to provide for such compensation schemes be limited. Consequently, compensation schemes should not require payments by beneficiary persons. They should only apply to uses by authorised entities established in the territory of the Member State providing for such a scheme, and they should not require payments by authorised entities established in other Member States or third countries that are parties to the Marrakesh Treaty. Member States should ensure that there are not more burdensome requirements for the cross-border exchange of accessible format copies under such compensation schemes than for non-cross border situations, including with regard to the form and possible level of compensation. When determining the level of compensation, due account should be taken of the non-profit nature of the activities of authorised entities, of the public interest objectives pursued by this Directive, of the interests of beneficiaries of the exception, of the possible harm to rightholders and of the need to ensure cross-border dissemination of accessible format

The Appendix to the Berne Convention[167] and Articles Vter and Vquater of the Universal Copyright Convention[168] accord developing countries a possibility to introduce remunerated exceptions and limitations to the rights to translation and reproduction of copyrighted works for the purposes of education and research, subject to a 'just compensation' (Article IV(6) of the Appendix). A number of developing countries availed themselves of the faculties provided by Articles II (right of translation), III (right of reproduction) or V (right of translation) of the Appendix.[169] It is important to note that countries that opted for a regime for translation under Article V cannot reverse to the regime of compulsory licences for translations under Article II of the Appendix, and vice versa.[170] As the overview of the Berne Notifications demonstrates, while many of the 'developing countries' made respective declarations to avail

copies. Account should also be taken of the particular circumstances of each case, resulting from the making of a particular accessible format copy. Where the harm to a rightholder is minimal, no obligation for payment of compensation should arise.

[167] The Appendix forms an integral part of the treaty (Article 21(2)), and all parties to the Berne Convention are at the same time bound by the Appendix.

[168] Universal Copyright Convention, adopted in Geneva on 6 September 1952 and revised in Paris on 24 July 1971.

[169] The following 'developing countries' availed themselves of the faculties provided for in Articles II and III of the Appendix: Algeria (Berne Notifications No. 262, 256 and 194, made in 2014, 2012 and 1998), Bahrain (Berne Notification No. 177, made in 1996), Bangladesh (Berne Notifications No. 269, 234 and 200, made in 2014, 2000 and 1999), China (Berne Notification No. 140, made in 1992), Cuba (Berne Notifications No. 270, 238 and 176, made in 2014, 2004 and 1996), Egypt (Berne Notification No. 128, made in 1990), Guinea (Berne Notification No. 100, made in 1980), India (Berne Notifications No. 280 and 110, made in 2018 and 1984), Jamaica (Berne Notification No. 152, made in 1993), Jordan (Berne Notifications No. 232 and 204, made in 2004 and 1999), Kuwait (Berne Notification No. 271, made in 2015), Lesotho (Berne Notification No. 124, made in 1989), Liberia (Bene Notification No. 122, made in 1988), Malaysia (Berne Notification No. 130, made in 1990), Mauritius (Berne Notification, No. 123, made in 1989), Mexico (Berne Notifications No. 109 and 79, made in 1984 and 1976), Mongolia (Berne Notifications No. 237 and 190, made in 2004 and 1997), Niger (Berne Notification No. 91, made in 1978), North Korea (Berne Notification No. 224, made in 2003), Oman (Berne Notification No. 233, made in 2004), Philippines (Berne Notification No. 235, made in 2004), Singapore (Berne Notification No. 198, made in 1998), Sri Lanka (Berne Notification No. 248, made in 2005), Sudan (Berne Notification No. 240, made in 2004), Suriname (Berne Notification No. 83, made in 1976), Syria (Berne Notification No. 245, made in 2004), Tanzania (Berne Notification No. 156, made in 1994), Tunisia (Berne Notification No. 74, made in 1975), United Arab Emirates (Berne Notification No. 266 and No. 236, made in 2014 and 2004), Vietnam (Berne Notification No. 241, made in 2014) and Yemen (Berne Notification No. 263 and 254, made in 2014 and 2008).

The following countries availed themselves of the faculties provided for in Article II only: Cook Islands (Berne Notification No. 277, made in 2017), Thailand (Berne Notifications No. 264, 239 and 167 made in 2014, 2004 and 1995) and Samoa (Berne Notification No. 250, made in 2006). L. Y. Ngombé (2009), *supra* n 89, pp. 98 and 99 (also referred to Malawi and Nigeria as having introduced translation provisions under the Appendix, and to Angola, Djibouti, Nigeria and Togo as having introduced provisions for reproduction under the Appendix). Cyprus seems to be the only country that made a declaration regarding the provision of Article V (Berne Notification No. 105, made in 1983).

[170] Article V(1)(e) read in conjunction with Article V(2) of the Appendix. G. B. Dinwoodie, W. O. Hennessey and S. Perlmutter (2001), *supra* n 30, pp. 547–548.

themselves of the faculties provided for in Articles II and III of the Appendix, they did not renew their declarations upon the expiration of the ten-year period (according to Article I(2) of the Appendix). Hence, their national legislation cannot provide for respective remuneration rights outside the prescribed renewable ten-year period for which declarations are made under the Appendix.

The lending right is not dealt with by the major international treaties.[171] However, in 2014, Ukraine and the EU and its member states bound themselves by an Association Agreement, Article 178(1) of the intellectual property chapter of which obliges the parties to provide for an exclusive right of lending.[172] At the same time, Article 178(3), (4) and (5) of the EU – Ukraine PTA (2014), reproducing *mutatis mutandis* Article 6 of the EU Rental and Lending Directive, makes it possible for the contracting parties' legislators to replace the exclusive right by 'a remuneration' to 'at least authors'.[173] Prior to the adoption of the original Rental and Lending Directive in 1992,[174] out of all the EU member states[175] only Germany provided for a copyright-based system, while other members provided for remuneration for lending and based their systems outside the copyright framework.[176] By 2014, the following

[171] Non-profit lending is not regulated by the TRIPS Agreement and is outside of its scope, since its Article 11 concerns only 'commercial' rental. C. M. Correa (2007), *Trade Related Aspects of Intellectual Property Rights: A Commentary of the TRIPS Agreement*, Oxford, UK: Oxford University Press, p. 130.

[172] Article 1 of the EU Rental and Lending Directive already provided for an exclusive right of lending of originals and copies of copyrighted works, prior to the conclusion of the EU – Ukraine PTA (2014).

[173] Article 178(3) and (4) of the EU – Ukraine PTA (2014):

> 3. The Parties may derogate from the exclusive right . . . of public lending, provided that *at least authors obtain remuneration* for such lending. The Parties shall be free to determine this remuneration, taking account of their cultural promotion objectives.
>
> 4. Where the Parties do not apply the exclusive lending right provided for in this Article as regards phonograms, films and computer programs, they shall introduce, *at least for authors, remuneration*.

For a comment on the quasi-identical wording of Article 6 of the EU Rental and Lending Directive, Commission of the European Communities, *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Public Lending Right in the European Union*, 12 September 2002, COM(2002) 502 final, pp. 5–6. At the time of the Report the following member states granted remuneration right for the public lending: Austria, Denmark, Finland, Germany, Luxembourg, the Netherlands and Sweden (p. 8 of the Commission Report). In multiple countries the public lending system was originally designed to remunerate authors only (not publishers), e.g., in Canada, Denmark, Finland, Iceland, Israel, New Zealand, Norway and Sweden, S. von Lewinski (1992), 'Public Lending Right: general and comparative survey of the existing systems in law and practice', *Revue Internationale du Droit d'Auteur*, 154, pp. 19 and 79.

[174] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L 346/61.

[175] Back then, twelve members of the European Communities: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and UK.

[176] WIPO, Draft Model Law on Copyright, Memorandum prepared by the International Bureau of the WIPO, Third session of the Committee of Experts on Model Provisions for Legislation

EU member states provided for the right to remuneration for public lending: Austria, Belgium, Czech Republic, Estonia, France, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands and Spain.[177]

The CJEU interpreted the provision of Article 6 'Derogation from the exclusive public lending right' of the Rental and Lending Directive requiring 'remuneration' (rather than 'compensation') for lending as providing for the 'public lending exception'.[178] It further stated that the 'concept of "remuneration" [in case of public lending] is also designed to establish recompense for authors, since *it arises in order to compensate for harm to the latter*'.[179] In the EU, the remuneration for public lending should be determined taking into account the number of works lent and the number of persons borrowing from lending establishments.[180] For example, a flat-rate remuneration mechanism taking into account only the number of borrowers registered with public lending establishments is not compatible with the EU law.[181]

Although the notion of 'remuneration' for lending was interpreted narrowly, the judges reached the conclusion that the notion of 'lending' in Articles 1(1), 2(1)(b) and 6(1) of the Rental and Lending Directive encompasses so-called 'e-lending."[182] Member states of the EU may decide to make the public lending of digital copies of works available for lending

in the Field of Copyright, 30 March 1990, WIPO Doc. No. CE/MPC/III/2, para. 206 (referring to Finland, Iceland, the Netherlands, New Zealand, Norway, Sweden, UK and USA, as the countries that provided for non-copyright lending rights); and S. von Lewinski (1992), *supra* n 173, pp. 5, 11, 13 and 27. *Sui generis* national remuneration systems had, as their consequence, non-application of national treatment required by the international copyright treaties.

[177] I. Kikkis (2014), 'L'avancée du droit de prêt public en Europe suite à une harmonisation qui laisseistemarer', in C. Bernault, J.-P. Clavier, A. Lucas-Schloetter et al. (eds.), *Mélanges en l'honneur de Professeur André Lucas*, Paris, France: LexisNexis, pp. 456–459 (according to the author, only the Dutch system is entirely based on copyright law).

[178] CJEU Judgment in Vereniging Openbare Bibliotheken, C-174/15, ECLI:EU:C:2016:856, paras. 50 and 51. According to the settled case-law of the CJEU, exceptions and limitations must be interpreted strictly. Some scholars do not interpret the remuneration for lending as a remunerated exception or limitation but as a remuneration right introduced instead of the exclusive right, L. Guibault, O. Salamanca and S. van Gompel (2016), *supra* n 121, pp. 27 and 29. M. Ficsor considered the remuneration right for lending not to be a remunerated exception or limitation but a remuneration right as such, M. Ficsor (2016), 'Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU 'Acquis", in D. Gervais (ed.), *Collective Management of Copyright and Related Rights*' 3rd edition, Alphen aan den Rijn, the Netherlands: Kluwer Law International, p. 52.

[179] CJEU Judgments in *VEWA*, C-271/10, ECLI:EU:C:2011:442, paras. 29 and 40; and *Luksan*, C-277/10, ECLI:EU:C:2012:65, para. 103 (emphasis added). Here the Court seems to be equating the notions of 'compensation' and 'remuneration'. *See surpa* on the notion of 'compensation'.

[180] CJEU Judgment in *VEWA*, C-271/10, ECLI:EU:C:2011:442, paras. 37–39.

[181] CJEU Judgment in *VEWA*, C-271/10, ECLI:EU:C:2011:442, para. 43.

[182] More precisely, e-lending that

> covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user

conditional to a prior 'first sale or other transfer of ownership of that copy' in the EU by the holder of the right of distribution, or otherwise with his consent.[183]

Article 178(5) of the EU – Ukraine PTA (2014) and Article 6(3) of the Rental and Lending Directive permit member states to 'exempt certain categories of establishments from the payment of the remuneration' for public lending. The CJEU established that since this derogation is quantitative in nature and must be strictly interpreted, exemption of almost all categories of establishments undertaking the public lending of works from the obligation to pay remuneration for the lending carried out is prohibited by the Rental and Lending Directive.[184] However, it seems that some qualitative restrictions to this limitation-based remuneration right are tolerated. Denmark, Norway and Sweden, historically the world's first countries to have introduced public lending systems in 1946, 1947 and 1954 respectively, remunerate only authors of works written in their national languages.[185] In Lithuania and the UK, the remuneration is due only for the public lending of books and similar publications.[186]

International instruments do not explicitly deal with the question of whether the right to remuneration for lending could be waived, and different approaches were taken in different states. For example, while the right to remuneration for lending could be waived in the Netherlands, it is unwaivable in Austria and Italy.[187]

2. Limitation-Based Remuneration Rights Created within the Scope of Unremunerated Exceptions and Limitations Provided by the International Treaties

Provisions of the international treaties foreseeing the possibility of introducing unremunerated exceptions and limitations can also serve as a basis for the

CJEU Judgment in Vereniging Openbare Bibliotheken, C-174/15, ECLI:EU:C:2016:856, para. 54. The dispute dealt with the Dutch system of fair remuneration for lending (Article 15c of the Dutch Copyright Act). The CJEU did not refer to the EU – Ukraine PTA (2014) but the judgment could be of relevance for interpreting the identical treaty language.

[183] For the purpose of Article 4(2) 'Distribution right' of the Information Society Directive. CJEU Judgment in Vereniging Openbare Bibliotheken, C-174/15, ECLI:EU:C:2016:856, paras. 64 and 65.

[184] CJEU Judgments in *Commission v Ireland*, C-175/05, ECLI:EU:C:2007:13; *Commission v Spain*, C-36/05, ECLI:EU:C:2006:672, paras. 27, 32 and 39–43; and Commission v Portugal, C-53/05, ECLI:EU:C:2006:448, paras. 25, 27, 28, 36 and 42.

[185] J. Parker (2018), 'The public lending right and what it does', WIPO Magazine, 3, pp. 38–39; and I. Kikkis (2014), *supra* n 177, p. 460. Probably, to maintain such language-bias remuneration systems, these countries could rely on Article 178(3) of the EU – Ukraine PTA (2014) and Article 6(1) of the Rental and Lending Directive according to which the countries are free to determine remuneration for public lending 'taking account of their cultural promotion objectives.'

[186] L. Guibault, O. Salamanca and S. van Gompel (2016), *supra* n 121, p. 31.

[187] Article 15c of the Dutch Copyright Act and Article 18, 5 of the Italian Copyright Act. Europe Economics, L. Guibault and O. Salamanca (2016), *Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works*, Study prepared for the European Commission, DG Communications Networks, Content & Technology, p. 36 (referring to Italy and the Netherlands); and H. Karl (2009), 'Austria', in S. Nikoltchev (ed.), *Creativity Comes at a Price: The Role of Collecting Societies*, Strasbourg, France: EAO, IRIS Special, pp. 11 and 13.

introduction of remunerated exceptions and limitations ('limitation-based remuneration rights').[188] If a treaty explicitly allows contracting parties to establish an exception or limitation for certain uses without any payment to rightholders, this does not necessarily preclude making the same use conditional to payment, provided of course that it is compliant with international copyright norms[189] – but also with human rights obligations at the international and national levels.[190]

[188] Recital 36 of the EU Information Society Directive explicitly states the following: 'The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.' In support of this possibility *see* also, M. M. Walter and S. von Lewinski (eds.) (2010), *European Copyright Law: A Commentary*, New York, USA: Oxford University Press, pp. 1027–1028.

[189] Because of the mandatory nature of the quotation exception under international copyright law, quotations e.g. cannot be subject to the payment of a remuneration. As L. Bently and T. Aplin very convincingly argue in: (2019) 'Whatever Became of Global Mandatory Fair Use? A Case Study in Dysfunctional Pluralism', in S. Frankel (ed.), *Is Intellectual Property Pluralism Functional?*, Cheltenham, UK: Edward Elgar, p. 8, the mandatory nature of Article 10(1) of the Berne Convention, which must be complied with in the context of the TRIPS Agreement as well,

> creates an obligation, and thereby imposes a ceiling on the freedom of action of Members of the Union. The breadth of the obligatory exception is wide: as enacted in national law, it should not be limited by work, nor by type of act, nor by purpose. The exception should *not be subjected to additional conditions* beyond those recognized in Article 10: *to do so is to breach the obligation*
>
> (emphasis added).

However, looking closer, things might be more complicated, and remunerations might still play a role in the context of 'quotations'. First, many national laws have added, in breach of international law, further conditions to Article 10(1), narrowing its scope (*see* the examples cited by Bently and Aplin, *supra*, p. 16). Therefore, the understanding what is a 'quotation' is unfortunately often very restrictive. In the absence of workable 'transnational compliance procedures' for copyright exceptions, as Bently and Aplin recall (*supra*, p. 9), should there not be any possibility to subject to a remuneration a use that would otherwise be subject to the exclusive right under national law? Second, even under Article 10(1) of the Berne Convention, the scope of the quotation right is not clearly defined and is subject, like the US fair use, to a 'fairness test' which leaves space for interpretation. This is in particular the case for transformative uses (which should be covered by the quotation right, as Bently and Aplin rightly underline (*supra* p. 34), but for which the borderline with derivative works (usually considered, as exceeding mere 'quotations') is not always easy to draw. Therefore, there should still be room for statutory remuneration rights, for example in the context of commercial creative reuses; even if arguable under some circumstances, this could be considered as an admissible free use (because it is covered by the US fair use or the global mandatory fair use of the quotation right). If the purpose of copyright law is to facilitate those creative uses while rewarding creators, then the legal security created by a remuneration right might be more favorable to creators (of the original work and the derivative) than the uncertain and case by case-dependent quotation right, and thus should be allowed in a functional and purposive understanding of copyright law (see in favor of such a statutory remuneration right, C. Geiger (2018), *supra* n 3, pp. 446 sq).

[190] In certain situations, bodies of norms other than copyright (e.g., human rights) may oblige legislators to leave certain uses free of charge. This is certainly the case when an exempted use has a very strong human rights justification, such as in the case of quotations or parody. *See* on this issue C. Geiger (2004), *Droit d'auteur et droit du public à l'information, approche de droit*

The Berne Convention refers to some specifically permitted exceptions and limitations to the exclusive authors' rights. Examples are Article 2(4) (regarding official texts of legal nature and their official translations), Article 2bis (regarding political speeches and speeches delivered in the course of legal proceedings, as well as certain uses of lectures and addresses), Article 10 (use of works for teaching) and Article 10bis (certain uses of works related to reporting current events).[191] Article 11bis (3) also leaves it to the contracting parties to 'determine the regulations for ephemeral recordings made by a broadcasting organisation by means of its own facilities and used for its own broadcast'. Under the 'minor exceptions' doctrine (also referred to as 'implied exceptions' or 'minor reservations'[192]), contracting parties to the Berne Convention and the TRIPS Agreement may provide minor exceptions to the rights provided, notably, by Articles 11 and 11bis of the Berne Convention.[193] In the EU, Article 5 of the Information Society Directive[194] and Article 6 of the Databases Directive[195] reproduce some of those unremunerated exceptions.

For example, instead of providing for an unremunerated exception or limitation for teaching purposes, as permitted by the international treaties, some countries provide for a limitation-based remuneration right for reproduction for the purpose of education (e.g., Croatia, France, Germany and the Netherlands).[196] Article 5(4) of the recently adopted DSM Directive, which is still being transposed into member states' national laws, unambiguously states that 'Member States may provide for fair compensation for rightholders for the use of their works or other subject matter [in

comparé, Paris, France: Litec, pp. 144 sq. More generally on the human rights implications of certain limitations, *see* D. Voorhoof (2015), 'Freedom of Expression and the Right to Information: Implications for Copyright', in C. Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property*, Cheltenham, UK: EE, pp. 331–353.

[191] For a more exhaustive overview, S. Ricketson and J. C. Ginsburg (2006), *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd edition, New York, USA: Oxford University Press, paras. 13.38–13.94.

[192] For a comment, S. Ricketson (2003), *supra* n 27, pp. 34–39.

[193] WTO, Panel Report on *United States* – Section 110(5) *of the US Copyright Act*, adopted on 15 June 2000, WT/DS160/R, paras. 6.48, 6.49, 6.52 (footnote 61), 6.54 (footnote 64), 6.55 (footnote 67), 6.57, 6.87 and 6.93, as well as accompanying references. *See* also paras. 6.60, 6.92 and 6.158 for the finding that the 'minor exceptions doctrine' forms part of the context of, at least, Articles 11 and 11bis of the Berne Convention.

[194] The so-called 'grandfather clause' provision of Article 5(3)(o) provides member states with a competence to continue to provide for exceptions or limitations 'in certain other cases of minor importance where exceptions or limitations already exist[ed] under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community'. This clause effectively further extends the room for diversity of remunerated exceptions and limitations in the EU (C. Geiger and F. Schönherr (2014), *supra*, p. 115).

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

[196] C. Geiger and O. Bulayenko (2017), *supra*, p. 116. The scope of the teaching exception in different countries is different.

digital and cross-border teaching activities]'.[197] This clearly indicates that unremunerated exceptions or limitations under international treaties may nevertheless be turned into a limitation-based right to remuneration and remain compliant with international treaty norms.

With regard to the related rights, Article 15(2) of the Rome Convention, Article 6 of the Phonograms Convention, Article 16(1) of the WPPT[198] and Article 13(1) of the Beijing Treaty contain general clauses declaring that the contracting parties may provide for the same type of exceptions or limitations with regard to the rights of performers, audio and audiovisual producers, and broadcasters as they provide for copyright. In the EU, Article 10(2) of the Rental and Lending Directive establishes the same general rule.

Article 15(1) of the Rome Convention specifically refers to the possibility to introduce limitations for the following uses: private use[199]; use of short excerpts in connection with the reporting of current events; ephemeral fixation by broadcasters by means of their own facilities and for their own broadcasts; and use solely for the purposes of teaching or scientific research. This list is reproduced verbatim by Article 10(1) of the EU Rental and Lending Directive, leaving EU member states free to pick and choose from the list. A different approach was taken in the OAPI, where Article 58 'Remuneration for private copying' ('*Rémunération pour copie privée*') of Annex VII to the Bangui Agreement prescribes the grant of a right to remuneration for private copying to performers and phonogram producers. Still, the limitation-based right of performers and producer to remuneration for private copying is provided by the majority of European countries. The remuneration for private copying provides European performers with the second most significant source of revenue among all the remuneration rights.[200]

[197] Recital 24 of the DSM Directive further indicates that 'In setting the level of fair compensation, due account should be taken, inter alia, of Member States' educational objectives and of the harm to rightholders.'

[198] Agreed statement concerning Article 16 of the WPPT: 'The agreed statement concerning Article 10 (on Limitations and Exceptions) of the [WCT] is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the [WPPT].' Agreed statement concerning Article 10 'Limitations and Exceptions' of the WCT:

> It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately *extend into the digital environment limitations and exceptions* in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. … It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention. (emphasis added).

[199] Unlike the 'private use' of phonograms referred by the Rome Convention, international treaties on the rights of authors do not explicitly provide for such exception or limitation. On this distinction, Y. Gaubiac and J. C. Ginsburg (2000), 'L'Avenir de la copie privée numérique en Europe', *Com. com. électr.*, janvier, footnote 8.

[200] AEPO-ARTIS (2018), *supra* n 62, pp. 115 (for statistical information on the amounts collected as compensation for private copying by performers' CMOs in the majority of the EEA member

II. *Limitation-Based Remuneration Rights Created Only under the Flexibility of the Three-Step Test*

The creation of remuneration rights on the basis of exceptions and limitations has some consequences. Even if public policies, new technologies and business practices may seem to favour the transformation of some exclusive rights (or their parts) into limitation-based remuneration rights, the international legal framework imposes constraints on how governments can create exceptions or limitations to the rights. Countries acting within the limits imposed by the international legal framework may introduce remuneration rights not explicitly mentioned by copyright treaties through the margin of flexibility provided by the three-step test of Article 13 of the TRIPS Agreement,[201] Article 9(2) of the Berne Convention, Article 10(1) of the WCT, Article 16(2) of the WPPT and Article 13(2) of the Beijing Treaty.[202] The three-step test also constitutes an integral part of the EU copyright law[203] and applies to exceptions and limitations to exclusive rights provided by the EU law.[204] Understanding the utility of the three-step test in the formation of limitation-based remuneration rights may shed some light on the ability of member states to adapt their domestic laws to accommodate new norms.

1. The Three-Step Test and Its Room to Manoeuvre to Create Remuneration Rights

Much has been written about understanding the exact scope of the so-called 'three-step test'. The criteria enumerated for the test are rather vague, and no particularly

states in the period 2011–2017) and 152–155; and AEPO-ARTIS (2014), *supra* n 64, pp. 80 (for statistical information on the amounts collected as compensation for private copying by performers' CMOs in the majority of the EEA member states in the period 2005–2013) and 104–107.

[201] The tree-step test of the TRIPS Agreement is not limited to the rights introduced by this agreement. WTO, Panel Report on *United States – Section 110(5) of the US Copyright Act*, adopted on 15 June 2000, WT/DS160/R, para. 6.80 ('neither the express wording nor the context of Article 13 or any other provision of the TRIPS Agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS Agreement').

[202] There are some differences between the three-step tests formulated in various international treaties. M. Senftleben (2004), *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague, the Netherlands: Kluwer Law International; A. Kur and T. Dreier (2013), *European Intellectual Property Law: Text, Cases and Materials*, Cheltenham, UK: EE, pp. 27–28; and A. Taubman, H. Wager and J. Watal (eds.) (2012), *supra* n 97, p. 48.

[203] Article 5(5) of the Information Society Directive; Article 10(3) of the Rental and Lending Directive; Article 6(3) of the Database Directive; Article 6(3) of the Computer Programs Directive; Recital 20 of the Orphan Works Directive; Article 3(3) of the Directive implementing the Marrakesh Treaty; and Recital 6 of the DSM Directive.

[204] Even if the respective rights are not provided by the international treaties, as it is the case for public lending.

clear guidelines for their application emerge from the legislative history of their adoption and their diverse applications over time by courts at the international, European and domestic levels.[205] In fact, it seems that it is generally their vagueness and their imprecise contours that guaranteed their successful subsequent introduction in copyright legislation. As has been underlined, the wording of the criteria – even if similar at first glance – diverges slightly from one instrument to another, and the context of the adoption of the particular treaties that codified the criteria are also diverse,[206] so that a unified reading is not possible.[207]

The question of the scope of the three-step test is of course crucial to determine how much policy space is available to legislators for the implementation of limitation-based remuneration rights, and the stricter the interpretation, the fewer are the possibilities for other approaches than 'exclusivity'. However, the interpretation of the test is controversially discussed among scholars: to simplify, the flexibility to introduce limitation-based remuneration rights will depend whether a sequential ('step by step') approach is followed, stopping the assessment of the legality of the use if one step is not fulfilled, or a holistic approach to the test is followed. It is not possible to discuss here the arguments advanced in this debate. As demonstrated elsewhere[208] and supported by a large group of academics,[209] there are strong reasons to consider the three-step test rather as a flexibility tool, allowing to adapt the copyright system to new circumstances, rather than as a mere restriction mechanism for legislators.[210] In any case, as convincingly shown by Geiger,

[205] *See* with further references C. Geiger, D. Gervais and M. Senftleben (2014), 'The Three Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law', *American University International Law Review*, 29(3), pp. 581–626.

[206] *See* M. R. F. Senftleben (2006), 'Towards a Horizontal Standard for Limiting Intellectual Property Rights? – WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law', *International Review of Intellectual Property and Competition Law*, 37, p. 407; and A. Kur (2009), 'Of Oceans, Islands, and Inland Water – How much Room for Exceptions and Limitations under the Three-step Test?', *Richmond Journal of Global Law and Business*, 8, p. 287.

[207] C. Geiger, D. Gervais and M. Senftleben (2014), *supra* n 205, pp. 629 sq.

[208] C. Geiger (2007), *supra*, pp. 1 sq; (2005) 'Right to Copy v. Three-Step Test, The Future of the Private Copy Exception in the Digital Environment', *Computer Law Review international*, 12, pp. 7–13; (2006) 'The Three-Step Test, a Threat to a Balanced Copyright Law?', *International Review of Intellectual Property and Competition Law*, 37, p. 696.

[209] C. Geiger, J. Griffiths, and Reto M. Hilty (2008), Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law, *International Review of Intellectual Property and Competition Law*, 39(6), pp. 707–712. On this declaration, *see* C. Geiger, J. Griffiths and R.M. Hilty (2008), 'Towards a Balanced Interpretation of the 'Three-step test' in Copyright Law', *European Intellectual Property Review*, 4, pp. 489–496.

[210] D. Gervais (2005), 'Towards a New Core International Copyright Norm: The Reverse Three-Step Test', *Marquette Intellectual Property Law Review*, 9(1), pp. 18–19, stating 'that the inclusion of a reasonableness or justifiability criterion is a key that allows legislators to establish a balance between on the one hand, the rights of authors and copyright holders, and the needs and interests of users, on the other hand'; K. J. Koelman (2006), 'Fixing the Three-Step Test', *European Intellectual Property Review*, 8, pp. 407–412; M. R. F. Senftleben (2010), 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation', *Journal of*

Gervais and Senftleben, even if the steps are considered sequentially, there is hardly any doubt that the test in any case constitutes a single analytical whole and should serve the ultimate goal of striking an appropriate balance of the different interests involved.[211] Also, the provision of a remuneration to the benefit of creators or rightholders under exceptions and limitations makes it easier to comply with the third step of the test (precluding 'unreasonable prejudice' to rightholders or authors) than in case of unremunerated exceptions or limitations.[212] In short, limitation-based remunerations are likely to pass the test if the use is justified by important competing interests, as the remuneration aspect for the use is safeguarded,[213] which is one core mission of the copyright system – provided, however, that the exclusive right is not entirely replaced by a remuneration right, as this would contravene the provisions on exclusive rights established by the treaties.[214]

In the EU, some of the exceptions and limitations provided by Article 5 of the Information Society Directive, Article 10 of the Rental and Lending Directive, Article 6 of the Databases Directive,[215] Articles 5 and 6 of the Computer Programs Directive[216] and Article 6 of the Orphan Works Directive[217] are not explicitly

Intellectual Property, Information Technology and Electronic Commerce Law, 1, pp. 67–82; (2007) '*L'application du triple test: vers un système de fair use européen*', *Propriétés intellectuelles*, 25, pp. 453–460; (2009) 'Fair Use in the Netherlands – A Renaissance?', *Tijdschrift voor Auteurs-, Media- & Informatierecht*, 33(1), pp. 1–7; C. Geiger (2007), *supra*, p. 17; C. Geiger (2007), 'From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test', *European Intellectual Property Review*, 29(12), pp. 486–491.

[211] C. Geiger, D. Gervais and M. Senftleben (2014), *supra n 205*, p. 611: 'Even if one decides to apply each step independently and/or sequentially, the steps should not be treated as completely separate. Instead, the answer provided under each step even in a distinct analysis should be combined in the final result'; and C. Geiger, R. Hilty, J. Griffiths and U. Suthersanen (2010), 'Declaration a Balanced Interpretation of the 'Three-Step Test' in Copyright Law', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 1, pp. 119–122.

[212] C. Geiger, D. Gervais and M. Senftleben (2014), *supra* n 205, p. 595; and S. Ricketson (2003), *supra* n 27, pp. 15, 18, 27, 33, 72 and 74–78.

[213] *See* in this sense Articles 4 and 6 of the Declaration on a balanced interpretation of the Three-Step Test in Copyright Law, *supra*.

[214] *See* in this sense J. Griffiths (2009), 'The 'Three-step test' in European Copyright Law – Problems and Solutions', *Intellectual Property Quarterly*, 4, p. 457, concluding that the test should only be considered 'as a form of long-stop, a loose constraint prohibiting only exceptions that would generally be acknowledged to be unjustifiable'.

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

[216] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version) [2009] OJ L 111/16.

[217] 'Member States shall provide that *a fair compensation* is due to rightholders that put an end to the orphan work status of their works or other protected subject-matter for the use that has been made' (emphasis added) Article 6(5) of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L 299/5. For comment on this provision, *see* U. Suthersanen and M. M. Frabboni (2014), 'The Orphan Works Directive', in I. Stamatoudi and P. Torremans (eds.), *EU Copyright Law: A Commentary*, Cheltenham, UK: EE, p. 686.

mentioned by the international treaties and were created under the flexibility of the three-step test of the international treaties. The same is true with regard to the exceptions and limitations newly introduced by the DSM Directive for text and data mining (Articles 3 and 4),[218] digital cross-border teaching activities (Article 5), preservation of cultural heritage (Article 6) and use of out-of-commerce works (Article 8(2)).[219]

Introduction of three of those EU exceptions and limitations into national law is subject to the requirement of 'fair compensation' to authors in respect to the following: reprography ('reproductions on paper or any similar medium, effected by the use of any kind of photographic technique'), private copying ('reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial'), and reproductions of broadcasts made by social institutions pursuing non-commercial purposes (e.g., hospitals and prisons).[220] Recital 17 of the DSM Directive, to the contrary, explicitly prohibits making the text and data mining exception introduced by Article 3 subject to compensation.[221]

2. Two Examples of Limitation-Based Remuneration Rights Created under the Flexibility of the Test: Private Copying and Reprography

A. PRIVATE COPYING While international treaties do not explicitly provide for the possibility to make copies of works for private use, the right to remuneration for private copying, replacing the respective exclusive right, is one of the most prominent examples of limitation-based remuneration rights created under the flexibility of the three-step test.[222] This statutory mechanism creates a revenue stream for

[218] For a comment, C. Geiger, G. Frosio and O. Bulayenko (2019), 'Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU', in C. Saiz García and R. Evangelio Llorca (eds.), *Proistematuallectual y mercado único digital europeo*, Valencia, Spain: Tirant Lo Blanch, pp. 27–71.

[219] For a general comment on the draft provisions and some critical remarks, C. Geiger, G. Frosio and O. Bulayenko (2018), 'The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction', *European Intellectual Property Review*, 40(1), pp. 4–15.

[220] Article 5(2)(a), (b) and (e) of the Information Society Directive. The exception for the benefit of social institutions was implemented in nine member states (Belgium, Czech Republic, Cyprus, Denmark, Finland, Italy, Portugal, Romania and Sweden), M. Borghi, V. Katos, A. Garanasvili et al. (2019), *Illegal IPTV in the European Union: Research on online business models infringing intellectual property rights*, Report for EUIPO, p. 23. For the implementation of private copying and reprography, *see infra*.

[221] Recital 17 of the DSM Directive: 'In view of the nature and scope of the exception, which is limited to entities carrying out scientific research, any potential harm created to rightholders through this exception would be minimal. Member States should, therefore, not provide for compensation for rightholders as regards uses under the text and data mining exceptions introduced by this Directive.'

[222] CISAC (2017), *Private Copying Global Study*, pp. 8 and 309; and M. Ficsor (2003), *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, WIPO Publication No. 891(E), p. 155.

rightholders (who would not otherwise receive remuneration for private copying of their works) by imposing the obligation to pay on manufacturers, importers and/or retailers of devices used for private copying as well as on economic operators who make devices available for private copying by individuals. Rightholders cannot control the marketing of devices capable of copying and are merely entitled to remuneration. Natural persons are free to either purchase copying devices or use services provided by third parties.[223]

Article 58 'Remuneration for private copying' ('*Rémunération pour copie privée*') of Annex VII to the Bangui Agreement provides authors with a right to remuneration for private copying,[224] and twenty-three African countries (Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Gabon, Ghana, Kenya, Madagascar, Mali, Mauritius, Morocco, Mozambique, Niger, Nigeria, Senegal and Tunisia) provide for remuneration for private copying exception.[225] Six countries in North and South America (Canada, Dominican Republic, Ecuador, Paraguay, Peru and USA)[226] and nine countries in Asia (Azerbaijan, Georgia, Israel, Japan, Kazakhstan, Kyrgyz Republic, Turkey, Turkmenistan and Uzbekistan)[227] introduced remuneration for private copying into their national legislation. In Europe, thirty-seven countries created a remunerated limitation for private copying.[228] In 2015, global collections of levies for private copying of copyrighted works represented almost €310 million.[229]

[223] In the EU, *see* CJEU Judgments in *Copydan Båndkopi*, C-463/12, ECLI:EU:C:2015:144, paras. 89 and 91 (the ownership of equipment used for copying is outside the scope of the Information Society Directive) and *Padawan*, C-467/08, ECLI:EU:C:2010:620, para. 48 (referring to the *making available of copying equipment or supply of copying services* as 'the factual precondition for natural persons to obtain private copies').

[224] However, it seems that many of the OAPI member states (Central African Republic, Comoros, Congo, Equatorial Guinea, Guinea, Guinea Bissau, Mauritania and Togo) did not provide for the remunerated exception for private copying (CISAC (2017), *Private Copying Global Study*, pp. 10, 12, 14–16, 21, 25 and 35).

[225] CISAC (2017), *Private Copying Global Study*, pp. 10 and 308 (there was evidence of the establishment of an operating collection and distribution mechanism only in Algeria, Botswana, Burkina Faso and Kenya).

[226] CISAC (2017), *Private Copying Global Study*, p. 94 (while there was no evidence of effective collection and distribution mechanism in Ecuador and Dominican Republic).

[227] CISAC (2017), *Private Copying Global Study*, p. 131 (only Georgia, Israel and Japan had in place an effective collection and distribution system)

[228] Twenty-six of them are EU member states (Ireland and UK did not have a private copying exception). Bulgaria, Cyprus, Luxembourg, Malta and Slovenia, which provided for private copying exception, did not have in place an effective system of collection and distribution. CISAC (2017), *Private Copying Global Study*, pp. 175 and 308. Another industry-based report, while confirming the situation in Bulgaria and Slovenia, found that Cyprus, Luxembourg and Malta did not have the private copying exception (like Ireland and UK), de Thuiskopie and WIPO (2017), *International Survey on Private Copying: Law and Practice 2016*, WIPO Publication No. 1037E/17, p. 3.

[229] CISAC (2017), *Private Copying Global Study*, p. 6. As this number reflects only collections by the CMOs members of the International Confederation of Societies of Authors and Composers (CISAC), it generally excludes private copying collection for performers, for example.

The contours of the private copying systems are similar in different countries. Uses need, in general, to be undertaken by a natural person[230] in a manner that is considered private and for a non-commercial purpose.[231] The main aspects differentiating the scope of the right in different countries are the type of products on which the private copying levies are imposed and the setting of tariffs. For example, in France, Germany, Italy and the Netherlands, levies cover a wide range of devices, including set-top boxes, smartphones and tablets,[232] whereas only blank compact discs are levied in Canada[233] and blank cassettes in Israel,[234] thus excluding devices corresponding to modern consumption habits.[235] In the EU, the CJEU interpreted the Information Society Directive (Article 5(2)(b) on private copying) as not covering provision by commercial undertakings of 'a cloud service for the remote recording of private copies of works protected by copyright, by means of a computer system, by actively involving itself in the recording, without the rightholder's consent'.[236] It is likely that similar cases will appear in the future, testing the compliance of different technologies and business models (e.g., provision to customers of Network Personal Video Recorders, NPVRs) with the condition of 'active involvement'.

B. REPROGRAPHY Reprographic reproduction is another example of a limitation-based remuneration right created under the flexibility of the three-step test.[237] The

[230] There are some exceptions to this general approach, e.g., according to Article 19(1)c of the Swiss Copyright Act, private use is understood to mean the reproduction of copies of works within enterprises, public administrations, institutions, commissions and similar organisations for internal information or documentation purposes.

[231] Legislation of some countries specifies that private copies, in order to fall within the scope of the exception or limitation, need to be made from a licit source (e.g., in France, according to Article L311–1 of the CPI).

[232] De Thuiskopie and WIPO (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17, pp. 10 and 11 (Table 4).

[233] Tariff of Levies to Be Collected by the Canadian Private Copying Collective (CPCC) in 2015 on the Sale, in Canada, of Blank Audio Recording Media certified by the Copyright Board 13 December 2014.

[234] Article 3D of the Israeli Copyright Ordinance. T. Afori (2017), 'The Compensation Regime in Israel for Private Copying on Blank Cassettes', in S. von Lewinski (ed.), *Remuneration for the use of works – Exclusivity vs Other Approaches*, Berlin, Germany: de Gruyter, pp. 282–288.

[235] It seems that if the types of devices to which the levies are applied in Canada and Israel are not extended, the system will eventually completely lose its significance for rightholders, as the technological evolution continues to change the way in which people access protected subject-matter.

[236] CJEU Judgment in *VCAST*, C-265/16, ECLI:EU:C:2017:913, para. 54 (the Court arrived at this conclusion following a strict interpretation of the exception, which according to the Court does not deprive rightholders of their rights 'to prohibit or authorise access to the works or the subject matter of which those same natural persons wish to make private copies' (para. 39)). The Court scrutinised Article 71sepies of the Italian Copyright Law, but its analysis is also of relevance to the French provision on provision of digital private copying services to individuals (Article L311–4 of the CPI).

[237] Report on the Work of Main Committee I (Substantive Provisions of the Berne Convention: Articles 1 to 20), Records of the Intellectual Property Conference of Stockholm, 11 June to

remunerated reprography limitation is not tied to any particular users (e.g., natural persons) nor purposes (e.g., private use), but is restricted to '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'.[238] So the remuneration for reprography is required from various organisations in different spheres of activities, such as schools – in Austria, Belgium, Czech Republic, Germany, Hungary, Lithuania, Portugal (sold copies) and Slovakia; higher education institutions – in Austria, Belgium, Czech Republic, Germany, Hungary, Lithuania, Portugal (sold copies) and Slovakia; public administration – in Belgium and Czech Republic; and businesses – in Belgium, Czech Republic and Lithuania.[239] There could be some overlap between private copying and reprography exceptions. In the EU, however, the CJEU came to the conclusion that, with regard to the relationship between reprography and private copying,

> it is necessary to draw a distinction according to whether the reproduction on paper or a similar medium effected by the use of any kind of photographic technique or by some other process having similar effects is carried out by any user or by a natural person for private use and for ends that are neither directly nor indirectly commercial.[240]

Furthermore, the scope of both exceptions cannot cover uses undertaken from unlawful sources in the EU.[241]

14 July 1967, reproduced in WIPO (1986), *Berne Convention Centenary: 1886–1986*, WIPO, para. 85, stating that only if the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author,

> would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use.

[238] Article 5(2)(a) of the Information Society Directive.

[239] IFRRO and WIPO (2017), *International Survey on Text and Image Copyright Levies: 2016 Edition*, WIPO Publication No. 1042E/17, pp. 11, 28 (Table 2) and 32 (Table 8).

[240] CJEU Judgment in *Hewlett-Packard Belgium*, C-572/13, ECLI:EU:C:2015:750, para. 43 (the Court interpreted Article 5(2)(a) of the Information Society Directive in combination with its Article 5(2)(b)).

[241] The same is true with regard to the public lending. CJEU Judgment in *ACI Adam and Others*, C-435/12, ECLI:EU:C:2014:254, paras. 37, 41, 45, 54 and 58, and Judgment in *Copydan Båndkopi*, C-463/12, ECLI:EU:C:2015:144, para. 79, read in conjunction with Judgments in *Hewlett-Packard Belgium*, C-572/13, ECLI:EU:C:2015:750, para. 62 (extending the application of the case-law on Article 5(2)(b) of the Information Society Directive established by *ACI Adam and Others*, C-435/12, ECLI:EU:C:2014:254, to Article 5(2)(a)), and Vereniging Openbare Bibliotheken, C-174/15, ECLI:EU:C:2016:856 (extending the application of the case-law

The notion of 'fair compensation', required for exceptions and limitations permitting reprography, private copying and reproductions of broadcasts made by social institutions pursuing non-commercial purposes, is an autonomous concept of EU law, and it must be interpreted uniformly in all the member states that have introduced those exceptions.[242] According to the CJEU, 'fair compensation' must be regarded as 'recompense for the harm' suffered by authors as a consequence of introduction of the exception(s),[243] and it must be calculated on the basis of the 'criterion of the harm' in order for a 'fair balance' between the persons concerned to be achieved.[244] Definition of the 'harm' as the core criterion for determining what amount is 'fair' is not without consequences. The fair compensation required by the Information Society Directive should not exceed the 'actual harm suffered',[245] and hence '"overcompensation" would not be compatible with the requirement, set out in recital 31 in the preamble to Directive 2001/29, that a fair balance be safeguarded between the rightholders and the users of protected subject-matter'.[246] A lump sum compensation system that does not provide for a reimbursement[247] mechanism

established by *ACI Adam and Others*, C-435/12, ECLI:EU:C:2014:254, to Article 6(1) of the Rental and Lending Directive).

[242] CJEU Judgments in *Padawan*, C-467/08, ECLI:EU:C:2010:620, para. 37, *EGEDA and Others*, C-470/14, ECLI:EU:C:2016:418, para. 38 and *VG Wort*, C-457/11 to C-460/11, ECLI:EU:C:2013:426, para. 75 read in conjunction with Judgment in *Hewlett-Packard Belgium*, C-572/13, ECLI:EU:C:2015:750, para. 37 (extending the application of the case-law on Article 5(2)(b) of the Information Society Directive established by *Padawan*, C-467/08, ECLI:EU:C:2010:620, to Article 5(2)(a)). The CJEU has not yet dealt with a case on the reproductions of broadcasts made by social institutions pursuing non-commercial purposes Article 5(2)(e)) but it seems that it would reach the same conclusion.

[243] CJEU Judgment in *Padawan*, C-467/08, ECLI:EU:C:2010:620, paras. 39 and 40, read in conjunction with Judgment in *Hewlett-Packard Belgium*, C-572/13, ECLI:EU:C:2015:750, para. 37 (extending the application of the case-law on Article 5(2)(b) established by *Padawan*, C-467/08, ECLI:EU:C:2010:620, to Article 5(2)(a)). *See* to that effect also, Judgments in *Nokia Italia and Others*, C-110/15, ECLI:EU:C:2016:717, paras. 26 and 28, *EGEDA and Others*, C-470/14, ECLI:EU:C:2016:418, paras. 19 and 26, Austro-Mechana, C-572/14, ECLI:EU:C:2016:286, paras. 19 and 43, *Stichting de Thuiskopie*, C-462/09, ECLI:EU:C:2011:397, para. 24, *VG Wort*, C-457/11 to C-460/11, ECLI:EU:C:2013:426, paras. 31 and 75, and *Copydan Båndkopi*, C-463/12, ECLI:EU:C:2015:144, para. 21. The CJEU relied, notably, on Recitals 35 and 38 of the Information Society Directive to arrive at this conclusion.

[244] CJEU Judgment in *Padawan*, C-467/08, ECLI:EU:C:2010:620, paras. 42 and 50 read in conjunction with Judgment in *Hewlett-Packard Belgium*, C-572/13, ECLI:EU:C:2015:750, paras. 37 (extending the application of the case-law on Article 5(2)(b) established by *Padawan*, C-467/08, ECLI:EU:C:2010:620, to Article 5(2)(a)), 68 and 69 (referring to the 'criterion of actual harm suffered').

[245] CJEU Judgment in *Hewlett-Packard Belgium*, C-572/13, ECLI:EU:C:2015:750, para. 84.

[246] CJEU Judgment in *Hewlett-Packard Belgium*, C-572/13, ECLI:EU:C:2015:750, para. 86.

[247] Reimbursement has to be 'effective and does not make it excessively difficult to obtain repayment'. This conclusion regarding the qualities of the reimbursement led the CJEU to conclude that the system providing for the payment of compensation by economic operators making available copying equipment and for the reimbursement to natural persons on whom the price of goods and services is passed does not satisfy the requirements to the reimbursement (CJEU Judgment in *Nokia Italia and Others*, C-110/15, ECLI:EU:C:2016:717, para. 55).

limiting the amounts paid by users to the amount defined by the 'criterion of the actual harm suffered' is prohibited by the EU law.[248] It seems, however, that 'overcompensation' is practically inevitable, given the factual impossibility for distributors of devices to know in advance the purchasers and the subsequent indiscriminate application of the compensation. The integration of a remuneration rationale in the structure of limitation-based remuneration rights could enable remuneration to rightholders beyond the mere 'harm' suffered.

In a few countries, remuneration for private copying is paid to rightholders from the state budget. Under such systems, not only the consumers of copying devices but all taxpayers effectively contribute to private copying levies. Such remuneration schemes are in place in Finland,[249] Israel[250] and Norway.[251] The CJEU interpreted Article 5(2)(b) of the Information Society Directive as precluding the establishment of a scheme where fair compensation would be paid from the general state budget and where it would be impossible to ensure that the cost of the compensation is borne by the natural persons benefitting from the exception.[252] For this reason, Spain, which had had a state budget-funded system in place, had to revert back to the levy-funded model.[253]

The international treaties do not explicitly deal with the issue of whether remuneration due under exceptions and limitations can be waived or transferred. In the EU, prior to the adoption of the DSM Directive, the CJEU interpreted the fair compensation for private copying and reprography under the Information Society Directive as unwaivable entitlements of authors.[254] Yet, the adoption of Article 16[255]

[248] CJEU Judgment in *Hewlett-Packard Belgium*, C-572/13, ECLI:EU:C:2015:750, para. 88.

[249] Article 26a(1) of the Finish Copyright Act. This mechanism of compensation from the state budget was established at the end of 2014 and entered in force 1 January 2015 by virtue of *Laki tekijänoikeuslain muuttamisesta* 19.12.2014/1171. de Thuiskopie and WIPO (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17, pp. 7, 9 and 10.

[250] T. Afori (2017), 'The Compensation Regime in Israel for Private Copying on Blank Cassettes', in S. von Lewinski (ed.), *Remuneration for the use of works – Exclusivity vs Other Approaches*, Berlin, Germany: de Gruyter, pp. 282–288.

[251] De Thuiskopie and WIPO (2017), International Survey on Private Copying: Law and Practice 2016, WIPO Publication No. 1037E/17, p. 9; and AEPO-ARTIS (2018), *supra* n 62, pp. 90 and 153.

[252] CJEU Judgment in *EGEDA and Others*, C-470/14, ECLI:EU:C:2016:418, paras. 41 and 42. For a comment on this case condemning the Spanish legislation, I. Garrote Fernández-Díez (2017), 'Spain is different: Los problemaistemauste del sistema español con la Directiva 2001/29 en materia de compensación equitativa derivada de reproducciones para uso privado', in S. von Lewinski (ed.), *Remuneration for the use of works – Exclusivity vs Other Approaches*, Berlin, Germany: de Gruyter, pp. 270–281.

[253] In 2016, after the EGEDA decision, Spain reintroduced the levy-funded system it had in 2011, R. Xalabarder (2018), *supra* n 71, p. 64.

[254] CJEU Judgments in *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750; and in *Luksan*, C-277/10, ECLI:EU:C:2012:65, para. 105.

[255] Article 16(1) of the DSM Directive reads as follows: 'Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a

and Recital 60[256] of the DSM Directive has changed this presumption, leaving the question of publishers' entitlement to a share of a fair compensation under exceptions and limitations to member states. National legislation of some member states stipulates that the remuneration for private copying is unwaivable (and non-transferable).[257] Such a national approach is preferred if the remuneration of creators is the core objective of the copyright system.

D. CONCLUSIONS

As this chapter has tried to demonstrate, international copyright law provides far more policy space than often assumed to create statutory remuneration rights. It offers a classification of remuneration rights based on their relationship with the exclusive rights provided by international treaties. The three broad categories encompass remuneration rights defined as such by international or national norms and usually created outside the scope of exclusive rights ('remuneration rights per se'); remuneration rights coexisting and overlapping with exclusive rights (including the so-called 'residual remuneration rights'); and remuneration rights created through exceptions and limitations to exclusive rights ('limitation-based remuneration rights'). The proposed classification demonstrates the policy options available for opting for the 'middle way' in copyright – between exclusive rights and unremunerated free uses, where appropriate.

Review of the international normative framework confirms that there is a variety of options for remunerating creators, other than through the grant of exclusive rights. Statutory remuneration rights are one of such instruments suitable to achieve a reasonable balance of interests between authors and exploiters. They also secure broad access to copyrighted works as they remove the blocking effects of exclusivity: they guarantee access and thus enhance the acceptance of copyright norms amongst the general public. Although there is relatively limited mention of statutory remuneration rights in the international treaties (in comparison with exclusive rights), such rights could also be introduced either as remunerated exceptions or limitations under the flexibility provided by the three-step test or in addition to exclusive rights. However, this is where grey areas remain due to the unclear interpretation of this crucial hurdle for legislators, as all limitations and exceptions to exclusive rights have to comply with the three-step test.

sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.'

[256] Recital 60 specifically refers to 'exceptions or limitations such as those for private copying and reprography, including the corresponding existing national schemes for reprography in the Member States, or under public lending schemes' and to the CJEU Judgment in *Hewlett-Packard Belgium*, C-572/13, EU:C:2015:750 that it refers in this respect.

[257] E.g., Belgium, Croatia and Germany. Article XI.229 of the Belgian Code of Economic Law, Article 32(7) of the Croatian Copyright Act, and Section 63a of the UrhG (this provision makes all the statutory remuneration rights unwaivable).

Therefore, in order to fully profit from the potential of introducing remuneration rights as sound balancing mechanisms in copyright law, legislators at the international level need to clarify the scope of the test in the future. This can be done via the implementation of hard law (such as agreed statements or an appendix) or soft law (declarations, guidelines or codes of conduct), thus securing the needed room to manoeuvre for legislators.[258]

As we have seen, in the cases when the international treaties explicitly permit the creation of unremunerated exceptions and limitations, there seems to be increased acceptance that limitation-based remuneration rights comply with the test. Another possibility, consisting of creating remuneration rights coexisting and overlapping with the scope of exclusive rights (i.e., granted in addition to the exclusive rights), could be of use in situations where – for example – the leeway or political opportunities for the creation of limitation-based remuneration rights are few and where it is desired to alter the distributive justice achieved through a system of exclusive rights.[259] As mentioned earlier, politically it is easier to grant rights than to take them away.

Provisions on remuneration rights in international treaties are so far less frequent than on exclusive rights. Those provisions are either formulated as 'may' norms, or it is possible to avoid their application by maintaining some reservations to international treaties. However, multiple preferential trade agreements concluded with the EU, and regional copyright rules in the EU and OAPI, make the grant of some remuneration rights mandatory. Furthermore, national legislation of many countries provides for remuneration rights beyond the minimum rights referred by the international treaties.

The language used to formulate legal provisions on remuneration rights is not without consequences for defining the extent of the remuneration. As demonstrated by the example of the case-law of the CJEU, there are real consequences on the calculations of the amounts to be paid resulting from the precise interpretation of the terms used for describing rightholders' entitlements to payment: 'equitable remuneration', 'remuneration' and 'fair compensation'. On a teleological level, if one of the purposes of a remuneration right – including a limitation-based remuneration right – is to remunerate creators, the determination of its amount does not have to be limited to the 'harm' or 'market value' dilemma[260] but should further take into account the remuneration objective.

[258] *See* in this sense C. Geiger (2009), 'Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions', *International Review of Intellectual Property and Competition Law*, 40(6), pp. 627–642; and P. B Hugenholtz and R. Okediji (2008), Conceiving an International Instrument on *Limitations and Exceptions to Copyright*, Final Report, sponsored by the Open Society Institute (OSI).

[259] On the distributive justice rationale in copyright law, *see* the foundational article by J. Hughes and R. P. Merges (2016), 'Copyright and Distributive Justice', *Notre Dame Law Review*, 92(2), pp. 513–577.

[260] T. Riis (2020), *supra* n 22, p. 465.

Within the copyright system, some remuneration rights are the only economic entitlements with regard to which the international, regional and national norms specify that they cannot be waived and/or transferred. This feature of the remuneration rights, differentiating them from the tradable exclusive rights, is often seen as one of their key elements ensuring a direct connection between generated revenues and remuneration to creators. To put it simply, the impossibility to waive and/or transfer remuneration rights ensures a revenue stream to authors and performers in spite of the common industry practice of buy-out contracts. EU copyright law seems to be developing in the direction of rendering the remuneration rights per se unwaivable and non-transferable. For remuneration rights to serve their purpose, it seems that the unwaivable and inalienable character should be their necessary characteristic.[261] Yet, the adoption of the DSM Directive reversed past decisions of the CJEU and again left the question of sharing of compensation under exceptions and limitations between authors and publishers to the discretion of member states.

In many instances, if properly implemented, remuneration rights provide a very interesting option. They secure 'a middle way' in copyright law (a way between exclusivity and free use),[262] making sure cultural goods are accessible while at the same time helping to reduce the difference between revenues of creators (i.e., authors and performers) on the one side, and of economic operators (e.g., publishers, audio and audiovisual producers), on the other side.[263] Without any doubt, the creation of remuneration rights is a feasible option under the existing international treaty framework, and it deserves more research and policy attention as one of the components of the up-to-date and balanced copyright system.

[261] For a concurring conclusion, *see* also S. Dusollier, C. Ker, M. Iglesias et al. (2014), *supra* n 140, pp. 15 and 104.

[262] D. J. Gervais (2016), 'Is there a 'middle way' in international intellectual property?', *International Review of Intellectual Property and Competition Law*, 47(2), pp. 135–137 (referring to the way between 'IP maximalists' and 'IP minimalists').

[263] According to an artist and founder of Broken Record campaign for equitable remuneration in the UK, out of £9.99 monthly subscription fee on Spotify in 2020, '£4.58 goes to the record labels. Spotify takes about £2; taxes account for a similar sum; and £1 goes to music publishers and rights owners. Just 46p trickles down to artists', J. Nimmo (2020), 'Who Gets your Spotify £9.99 (Spoiler Not the Artists!)', *The Sunday Times*, 29 November 2020. Very similar numbers were quoted for France, in 2014, where out of €9,99 paid by consumers to online music streaming services like Spotify, Deezer, Google Play or Fnac Juke Box, €6,54 went to phonogram producers and service providers, €1,99 was deduced for taxes (VAT), €1 went to holders of copyright and €0,46 to performers (ADAMI (2014), 'Partageons équitablement les fruits du numérique', *Le Monde*, 21709, 4.11.2014, p. 9; and ADAMI, Annual review 2014, p. 31, available at: www.adami.fr/wp-content/uploads/2018/03/ADAMI_2014_RapportActivite.pdf).