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# The Right of Access in Digital Copyright: Right of the Owner or Right of the User?

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In the last decade, copyright scholarship has been suggesting the existence of a new right in copyright law: the right of access—that is, the right to control access to copyright works for the rightholder, and the right to access copyright works for the user. According to some authors, this new right was effected through the implementation and the legal protection of technological protection measures (TPMs). On the other hand, advocates of freedom of expression suggest that users have the right to access and use copyright works.
This article investigates whether a right of access exists either for owners or users of copyright works in the European Union (EU) law or international law impacting on it. It finds that no express reference to a right of access can be detected, on either side. However, the EU Copyright Directive (EUCD) gives *de facto* copyright holders the possibility of controlling access and use of copyright works beyond their exclusive rights, which is not counterbalanced by a user's right of access in the occurrence of copyright limits. Legislative action therefore needs to be taken to re-establish this balance. This action can be shaped by universal principles recognized in international human rights treaties and charters. From both owners' and users' side, the limits of the right of access can be drafted by bearing in mind the ultimate goal of copyright protection: the circulation of culture.

**Keywords** digital copyright; the right of access; digital right management; EU Copyright Directive

## The Digital Right of Access

Access control has always been part of the rights granted by copyright protection. The exclusive rights of reproduction and distribution were initially privileges of governments, willing to control the public access to knowledge. Subsequently, they became privileges of book publishers, who wanted to avoid unauthorized access to copyright works, in order to recoup their investment. More recently, issues of access to copyright works have been raised on the side of the user. With the increasing implementation of copyright limits, users gained access entitlements to copyright works that compete with the access-controlling privilege of the right owner.

The advent of the Digital Era raised the tension between owner and user in the matter of access. Digital Rights Management (DRM) systems were designed to enforce the exclusive rights of the owner in the digital environment, thanks to the implementation of access-restricting devices, such as technological protection measures (TPMs; Mackaay, 1996, pp. 16–9). Legal protection guaranteed to TPMs seems to expand traditional copyright protection, by creating an additional right for the owner: "The right of access" (Dusollier, 1999).

On the other hand, digital reproduction of copyright works, which is easy and cheap, provided an incentive for users to work around TPMs and to access copyright works without the authorization of the owner. Sometimes, they justified their acts by claiming that TPMs do not respect copyright exceptions. Copyright limits[1] and exceptions,[2] they argue, guarantee freedom of access to copyright works in the name of the circulation of culture (Guibault, 2003, pp. 39–40). In truth, TPMs are not technically designed to make a distinction between beneficiaries of copyright exceptions and other users. Sometimes they are also implemented on works fallen in the public domain (Elkin-Koren, 1998,

pp. 1190–7). According to some copyright literature, this represents a threat for users' rights.[3] This article aims at understanding where the boundaries between owner's and user's access rights are to be drawn. To this end, it analyses European Union (EU) legislative framework, the EU jurisprudence and international human rights that may have an impact on the right of access of the owner or of the user. It finds that fundamental principles protected by copyright, such as the right to information and circulation of culture, can help identifying these boundaries.

Focus of the article is the EU jurisdiction, and international legislation impacting on it. I therefore examine international copyright treaties[4] regarding TPMs, which are identified as the most problematic source of access privilege for the owner. The Conditional Access Directive (CAD),[5] the Database Directive[6] and the Software Directive[7] are reviewed in search of more explicit access regulations related to copyright protection. Most importantly, access-related dispositions in the EU Copyright Directive 2001 (EUCD) are also discussed.[8]

While the access right of the author seems to be mainly grounded on the EUCD, which is discussed in depth with the help of the copyright literature, access privileges of the users seem insufficiently protected by copyright exceptions.

However, fundamental constitutional rights may provide users of copyright works with prerogatives to access them, and this counterbalances the allowances of the right owner. To explore this path, I examine international conventions on human rights impacting on EU law, with the related debate of the copyright literature.

## Copyright Legislation and Access Rights

### *Copyright International Treaties*

At the international level, a form of access control relating to copyright works can be identified in the protection for technological measures (TPMs), stipulated by international treaties such as the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) 1996 and the WIPO Performances and Phonograms Treaty (WPPT) 1996.[9] The WCT in article 11 states that

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

The treaty provides legal protection for TPMs, and for remedies against their circumvention (Ayers, 2000, p. 70).[10] While TPMs, in principle, can control access to and use of copyright works, article 11 explicitly states that they have to be implemented within the statutory rights provided by copyright law (Barczewski, 2005). Arguably, this suggests that although in this regulation no express limits are set for TPMs, applicable copyright exceptions must restrict the scope of digital locks. However, the expression "effective measures" in the WCT, subsequently adopted in the EUCD, is not defined (Koelman and Helberger, 2000, p. 172).

Article 11 of the WCT further states that those measures, within the exercise of the exclusive rights, are allowed to restrict acts not authorized by the author or permitted by law. *A contrario*, one can argue that access to copyright works that is permitted by law (e.g. by virtue of copyright exceptions) or by rightholder's permissions, has to be deemed legitimate (Ginsburg, 2000; Koelman and Helberger, 2000, p. 172; Strowel, 2000a). The letter of the law does not specify whether access can be gained by circumventing TPMs when they exceed the exclusive rights of the author, but neither

excludes it. A similar regulation for performers and producers of phonograms can be found in article 18 of the WPPT 1996.[11]

In sum, the WCT 1996 and the WPPT 1996 protect technological measures, which are the tools to control access to and use of a digital copyright work, but they also specify that those technical measures have to be implemented within the exclusive rights of the owner. Since the exclusive rights of the owner are subject to specific limits and exceptions, TPMs are only protected by these treaties to the extent that they comply with copyright limits and exceptions (Ginsburg, 2003, p. 17).

Furthermore, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) does not refer expressly to TPMs. However, it includes among its provisions some dispositions on IP rights enforcement. In article 41.1, it states:

> Members shall ensure that enforcement procedures as specified in this Part [Part III-Enforcement of IP Rights] are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.[12]

If TPMs can be considered "expeditious remedies to prevent infringements", the TRIPS would appear to protect them. Certainly, TPMs are means to enforce copyright, and they are expeditious. Moreover, they are preventive tools against infringement utilized by rightholders. TPM, in short, seems to correspond to the description provided by article 41. However, this article also specifies that such tools should be implemented in a way to protect users from their abuse. Implementing TPMs over and beyond the exclusive rights of the owner can be interpreted as a form of abuse. In sum, the TRIPS seem to be in line with the other international treaties: they do not provide for a right to control access to copyright works beyond copyright entitlements.

More recently, other tools have been added by national and international legislation to enforce IP rights in the digital environment. These tools involve the internet service providers and require them to disclose personal data of users or interruption of the internet service upon a number of notices. At international level, the most recent example is the Anti-Counterfeiting Trade Agreement (ACTA), approved by the EU Parliament in 2010. At the national level, many European countries adopted legislation in the same vein.[13] This legislation, to some extent, raised issued of protection of privacy and of the right to defence for users of IP works. The heated debate surrounding this additional expansion of copyright owners' rights is still under way (Leith, 2011, p. 83). However, it does not seem to add any valuable contribution to our discourse.

***The Digital Millennium Copyright Act***

American legislation is beyond the scope of this article. However, the US Congress first transposed the WCT and the WPPT with the Digital Millennium Copyright Act 1998.[14] It is therefore useful to discuss it briefly, as a touchstone for the EU legislation. Somewhat similarly to what happened later in the EU, the US Congress seems to have expanded the protection granted by both treaties to the exclusive rights of the owner. It therefore provided in §1201 of the act an explicit "right of access" (Ginsburg, 2000) with this wording: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title".[15] This reference to access, according to some commentators, goes well beyond the copyright provisions in the WCT and WPPT (Dusollier, 2005a, p. 150; Strowel, 2000a, p. 22). It could be interpreted as giving rightholders the right to control access to copyright works, irrespective of copyright exceptions. In this way, a right

*ex novo* would be created for the rightholder (Ginsburg, 2000, pp. 56–60). This argument, as we will see below, is in line with the position of many European commentators on the EUCD 2001, after its entry into force.

The US Congress postponed the entry into force of the law by 2 years to reconcile the newborn author's right with copyright exceptions, which in the United States go under the fair use provision and other specific exceptions.[16] More importantly, §1201 of DMCA provides for two general exempting clauses that address the rights of the users of copyright works, embodied by copyright limits.[17] The first clause intends to exempt from the right of access "rights, remedies, limitations or defences to copyright infringement, including fair use"; the second clause states that the new right does not enlarge or diminish "vicarious or contributory copyright infringement". Furthermore, §1201 provides for a regular supervision by the Library of Congress in order to protect fair use and six additional beneficiaries of copyright exceptions from this "access right". The additional beneficiaries are as follows: (1) non-profit libraries, archive and educational institutions; (2) reverse engineering; (3) encryption research; (4) protection of minors; (5) personal privacy and (6) security testing.[18]

The above might suggest that the US legislator made an attempt to keep the balance between owners and users. However, in practice, the American scenario is not overly different from its European counterpart: rightholders can self-enforce their rights through TPMs, whereas users cannot self-enforce fair use through circumvention of TPMs (Ginsburg, 2003, pp. 128–9).[19] We will see this more in detail below.

***The EU Directives on Software, Database and Conditional Access***

In addition to the EUCD, other EU directives deal with access to copyright works. The scope of copyright has been extended to software and database, which are regulated by two specific EU directives. Further, the CAD[20] established access-controlling rights for the providers of internet services, through which many copyright works are commercialized. All these directives provide special allowances for users of copyright works, albeit in different ways.

Articles 5 and 6 of the EU Software Directive[21] state that the authorization of the owner is not needed for acts that "are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction", to perform back-up copies, for studying or testing[22] and for decompilation to achieve interoperability.[23] Since the source code of software is protected by copyright law, the above are additional copyright exceptions in favour of users of copyright works. However, the Software Directive does not provide for protection to TPMs, and therefore does not raise particular issues related to access to copyright works.

Furthermore, the Database Directive[24] states that

> The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5[25] which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database.[26]

Access to the database and normal use of its content are therefore exempted from the authorization of the owner in the Database Directive.[27] For copyright works that are collected in database, this represents a supplementary exception.

In contrast to the Software Directive, in the regulation of database a reference to access is explicit. However, this access privilege cannot be extended to copyright works that are not included in a database. On the other hand, copyright works included in a database enjoy also the protection of the Copyright Directive, including the protection of TPMs and copyright exceptions.

The CAD 1998[28] regulates internet services that are subject to access restrictions. It protects "measures against illicit devices which give unauthorised access to protected services".[29] "Protected services" are television and radio broadcasting; and information society services within the meaning of article 6[30] of the EUCD. Those services are provided "against remuneration and on the basis of conditional access".[31] The CAD therefore provides express protection to access-control devices implemented on internet services; and most of the material provided by these services is protected by copyright.

However, the CAD, as the EU Commission declares, does not tackle copyright goods. In the explanatory memorandum to the directive's proposal,[32] the Commission clarifies that the protection of conditional access must be distinguished from copyright protection, "even though, from an economic point of view, rightholders will certainly benefit from such measures, this will be an indirect effect, and their interest remain distinct" (Koelman and Helberger, 2000, p. 174). Although the CAD indirectly provides rightholders with the means of controlling access to copyright works, therefore, it does not provide for an explicit right of controlling access to works based on copyright protection.

In conclusion, the international treaties protecting copyright do not provide for an access right over and beyond the exclusive rights of the owner. Among EUCDs impacting on copyright works, the Software Directive does not provide for any access privilege beyond its list of exceptions for the user; the Database Directive provides access allowance only to works stored in a database, irrespective of whether they are protected by copyright or not; and the CAD, although it regulates access to services supplying also copyright works, does not specifically regulate access to copyright works. The above is not entirely surprising, because digital copyright works in Europe are regulated by the EUCD 2001.

### *The EU Copyright Directive*

The EUCD 2001 is the first legislative instrument intended to address copyright regulation (and infringement) in the digital environment.[33] Ever since the presentation of its bill, it raised heated debates (Hugenholtz, 2000b). The EUCD does not provide for an explicit "right of access" in the form of either the right to access or to control access to copyright works.[34] However, the literature reviewed below[35] identifies a right of access within (1) a broad interpretation of reproduction and communication rights; (2) the anti-circumvention provisions (the legal protection of TPMs).

The reproduction right gives rightholders "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form".[36] Its broad interpretation, as discussed below, includes temporary reproduction, and therefore it extends the scope of this exclusive right. In turn, the communication right gives rightholders the "exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them".[37]

I will argue that only an incorrect interpretation of this provision can create an undue access control prerogative for the owner of copyright works. However, a correct interpretation of both provisions, based on the circulation of culture as main copyright's goal, would restore the access privilege of the owner within its original boundaries.

More complex is the problem of an access right matured from anti-circumvention provisions, namely the protection of TPMs. The issue seems to be rooted in the wording of the EUCD on this topic, which diverges significantly from the wording of the international treaties that the EUCD should transpose.

Article 6 of the EUCD recites:

> Member States shall provide adequate legal protection against the circumvention of any effective technological measures . . . [38]

The definition of "effective measures" is provided further on, in paragraph 3.

> Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.[39]

In a previous version of the EUCD as amended by the EU Council (in 2000), which reflected the results of negotiations between member states, the reference to "access control" had been deleted, with the motivation that questions related to access to work "fell outside the field of copyright".[40] In the current version of the EUCD (2001) reference to access has been reinserted, despite a specific directive (the CAD[41]) was already in force to address access control issues.

Moreover, the definition of "effective measures" provided by the EUCD 2001, appears broadened in comparison with the previous definitions. Effective measures are not only access-controlling devices, but also copy-controlling devices and every other "protection process" applied on copyright works.

The above suggests that although no express "access right" is granted to rightholders by the Copyright Directive 2001, *de facto* the directive gives rightholders the right to control access and use of the work through the protection of access-controlling and copy-controlling devices that are not restrained by copyright limits.

As for copyright users, the EUCD does not provide for any explicit right to access copyright works. However, in article 6.4 states that

> Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

Article 6.4 therefore selects seven copyright exceptions from the list provided in article 5. Only these exceptions enjoy protection against TPMs. The reason for this selection is not clear. In the Commission's explanatory memorandum, the criteria for this particular selection are not mentioned. For example, only copyright exceptions that can possibly be protected from TPMs in the current state-of-art could have been included in the list. Private copy, for example, can be technically managed by setting the number of copies one can make of an optical disk, whereas the exception for public speeches is unlikely to be affected by TPMs. However, even at a superficial look, this list of exceptions reveals that technical constraints are not the reason for choosing these particular exceptions.

The selection was not based on the importance of the exception protected, either. For example, according to some commentators, it is regrettable that important exceptions based on fundamental freedoms, as the exception for parody, for news reporting, or for criticism/quotation, are excluded from the list (Dusollier, 2003, p. 473; Guibault, 2003, pp. 9–10; Rutz, 2004).[42] Also the exclusion of the exception for archives, for example, preserving the cultural patrimony of a community (Torremans, 2010, pp. 111–28), should be included in the list, and it is not.

In addition, I submit that two different lists of copyright exceptions, one for the exclusive rights and one for TPMs, may suggest the presence of a separate "right" of the owner, independent of the other exclusive rights of the author (reproduction and communication), to which different exceptions apply. If TPMs were bound to enforce the exclusive rights of the owner, in practice, they would also be bound to comply with the exceptions to these exclusive rights (Favale, 2008, p. 688).

Finally, although the European legislator enjoins member states to take appropriate measures to force rightholders to provide copyright users with "the means of benefiting" from the above list of exceptions,[43] the nature of those "means" is not specified. This suggests a certain weakness of the EU legislator in protecting users' access entitlements.

In conclusion, the EUCD 2001 does not acknowledge an express right of access for either party. While it grants access control to the owner by protecting TPMs, it also provides access allowances for copyright users through the exceptions with which TPMs are legally obligated to comply. However, the protection of owners and users, according to a great part of copyright literature, appears to be unbalanced, and this lack of balance does not meet convincing legal justifications.

## The Right of Access of the Owner

### *Access Included in Exclusive Rights*

Traditionally, copyright scholars do not differentiate between the exclusive rights of the owner and the right of access of the owner. The privilege of the owner to control access to copyright works derives directly from her exclusive rights (Cornish and Llewellyn, 2003, p. 108; Strowel, 2000b, p. 5).

Access-control devices (as TPMs) therefore, according to some commentators, are designed to facilitate access from the public, rather than denying it. In fact, the more rightholders can control access and impede free riding, the stronger will be their incentives to make available digital goods (Strowel, 2000b, p. 12).

However, others argue that the advent of digital technology led to a broadened interpretation of traditional exclusive rights and to the creation of new ones. Some commentators found the source of an access right in the new interpretation of the rights of reproduction or in the new right of communication. Also the moral right of disclosure has sometimes been called into question to explain access prerogatives. I will examine these arguments more in detail.

### *Access and Reproduction Right*

The access right is said to stem from the reproduction right in all cases in which protection against unlawful reproduction necessarily implies control over access. In the digital environment, this is mostly evident from the onset of a temporary reproduction right (Dusollier, 2000).

Every time we use software, the Operating System of our computer loads it in a temporary memory, the random access memory (RAM),[44] where files are stored until they are "saved" (stored in the permanent memory: the hard drive, an USB memory unit, a flash card etc.). Moreover, when computers are connected to a network, they need to temporarily store data in a cache memory.[45] One may therefore argue that the common use of digital products involves the reproduction of copyright works, thereby infringing the reproduction right of the owner. This construct seems to be rooted in the World Copyright Treaty of 1996.

In truth, the text of the WCT does not specify that this is the case.[46] However, the Agreed Statement on the WCT concerning article 1(4) states:

> The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form

> in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.[47]

According to this text, therefore, every access to a digital product implies a transient reproduction; and control over reproduction, undisputed privilege of the rightholder, implies control over access. This provision is supported by the EUCD 2001, which explicitly specifies that "temporary reproduction" is reproduction under the meaning of article 9 of the Berne convention.[48] However, according to the same directive, temporary reproduction is also the object of a specific copyright exception, which is compulsory for member states.

> Temporary acts of reproduction referred to in article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable
>
> (a) a transmission in a network between third parties by an intermediary, or
> (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in article 2.[49]

This wording of the directive is subject to different interpretations. Caching copies, made automatically on networks to allow data circulation, are undoubtedly an exception to the exclusive rights of the owner. In contrast, other RAM copies, made by the Operating System of a computer while using files and applications, are more controversial (Hugenholtz, 2000a). In the legislation regarding computer software (Dusollier, 2000, 2005b, p. 202), for example, they are included in the reproduction right, whereas copyright legislation does not explicitly regulate them.[50] RAM copies do not seem to be covered by the first part of article 5.1 of the Copyright Directive, because they do not enable an act of transmission.[51] However, they might be regulated by the second subsection of article 5.1, which exempts lawful uses and acts that do not have any "separate economic value".[52]

It has been argued that RAM copies ("client caching") do not enable further communication of the work, because the copy is fragmented and stored within the system in a non-recognizable way. Moreover, they are lost when the computer is switched off. Therefore, they do not have separate economic value and they are included in the caching exception (Hugenholtz, 2000a, pp. 487–8). The economic significance of temporary reproduction, for example, can depend on the lawful use of the work. Once the product has been purchased, or the internet service subscribed, further temporary reproductions would be part of its normal use and would not have an independent economic significance. Only an unlawful access to the work (e.g. receiving a digital copy from a friend) would have for the recipient an economic significance. However, the requirement of lawful use is already in the text of the article and therefore the economic significance requirement seems to be redundant (Dusollier, 2000, p. 37–8). The reference to lawful use (which implies the consent of the rightholder) transforms therefore the reproduction right into a "use right", assimilating copyright to industrial IP rights, and this unduly expands copyright protection (Westkamp, 2004, pp. 1098–9).[53]

At the roots of this problem, there is the suppression of the requirement of "fixation" in the European legislation. In fact, for the traditional copyright doctrine reproduction requires the fixation of a work for it to be perceived by the human mind. However, the EUCD overrides this requirement because within its norms the material fixation" is no longer necessary. This alone broadens the reproduction right of the owner (Dusollier, 2005b, p. 202; Westkamp, 2004, p. 1098). In sum, subjecting both permanent and temporary reproduction to the consent of rightholders transforms the reproduction right in a "right to prevent copy". This assumes that there cannot be unauthorized

reproduction without infringement. In the case of a temporary copy, furthermore, it assumes that there cannot be unauthorized access without infringement.

This interpretation is highly debatable. In practice, the act of copying does not damage rightholders, until the copy is made available to the public in direct competition with them (Dusollier, 2005b, p. 156); and temporary copies are even less likely to be infringing, because they have even less likely an independent economic value (Patterson and Lindberg, 1991). Having an independent economic significance, therefore, seems the only relevant requirement to identify infringing acts of reproduction (The Wittem Group, 2011, p. 79).

In conclusion, including temporary reproduction within the right of reproduction may be considered somewhat arbitrary and running fool of traditional copyright doctrine. Moreover, it runs fool of the fundamental goal of copyright protection in the first place, which is to foster the circulation of culture. This new interpretation of the reproduction right, therefore, unnecessarily broadens the power of the copyright owner, without a sound justification, legal or economical. Both from a legal or economical point of view, in fact, it is difficult to see how temporary reproduction can in any way represent a prejudice for rightholders.

***Access and Communication Right***

The right of communication and making available to the public has been introduced by the EUCD 2001 in order to address copyright problems arising from new business models implemented on the internet.[54] The directive enjoins member states to "provide authors with the exclusive right to authorise or prohibit" both communication and making available to the public of internet services. This internet-tailored right has the characteristics of an access right, intended as the right to "authorize or prohibit" access to digital goods through technological measures (Fraser, 1997, p. 774).

According to some, thanks to the communication right, righholders can control the first access to the work, but not necessarily the following acts of access. Communicating the work is an exclusive privilege of the rightholder. However, once this is done, users can freely access to it, within the limits of the law (Disollier, 2000, p. 39). This argument is not unchallenged. One can argue that the exclusive right of "making available to the public" only refers to a mirroring duty for the user to refrain from making available the work. It does not stop the user from accessing the work (Heide, 2001, p. 372). Under this construct, the first access to the work is not protected by the communication right. It is in fact protected by the right of disclosure, which is a moral right of the author and can be exercised only once (Heide, 2001, p. 368). Moreover, this act of making available should be addressed to a "public", that is a plurality of persons. It has been put forward that these persons, in order to constitute a "public" do not have to be bound by personal relationship ((The) Wittem Group, 2011, p. 80).

This prerogative of the copyright owner (which is more of a "use" right than an "access" right) embedded in the right of communication to the public (Westkamp, 2004, p. 1078) can depend on the commercial nature of the act of communicating Westkamp, 2004, pp. 1081–2). In short, when the owner communicates a work to the public to get a financial gain, this can be considered "communication to the public" within the scope of copyright protection.

Neither the EUCD nor the WIPO treaties however explicitly make reference to the commercial nature of the communication of the work. This in practice leads every unauthorized communication to the public to be restricted. A most striking consequence of this "super right" creates a hindrance to freedom of information (Westkamp, 2004, p. 1103).[55] This is particularly debatable if one thinks that the circulation of information and culture should be the incentive for copyright protection and should not be impaired by it.

In essence, the digital revolution seems to set the context for a broad interpretation of traditional exclusive rights. Interestingly, the root of the problem seems to be the interpretation rather than the

letter of the law. For example, grounding the interpretation of the law on a factual prejudice for the owner, would probably lead to a correct interpretation of the communication right. In this sense, an act of communication of a copyright work without commercial connotation could not be considered infringing (Dusollier, 2000, p. 204; Westkamp, 2004, p. 1104).[56] The "new" exclusive rights of the owner, compelled by the advent of the Digital Era, should therefore be interpreted according to the original copyright rationale, which has not been changed by new technologies, that is the circulation of information and culture.

***Evolution or Involution of Copyright***

The existence of an access right created by the adaptation of copyright law to the digital environment is perceived by some as necessary. In the Digital Era, the array of exclusive rights of the owner would be "unrealistic and incomplete" without the right of access, because authors cannot effectively protect their exclusive rights. Even more, in an access-based world, copyright legislation neglecting access-controlling rights would make the exclusive rights of the owner useless (Ginsburg, 2003, p. 113–66).

Further, not all defences of copyright users have to remain in the digital environment: some might do, others may have to be eliminated, and others may have to be created. However, in the digital environment a right of "fair access" needs to be ensured to current beneficiaries of copyright exemptions. Some has argued that without such limitation, rightholders' protection will result in a "Űbercopyright law" (Ginsburg, 2003, pp. 130–1). In sum, this access right seems to be a by-product of the digital environment. However, this right needs to be clearly defined and limited, as much as every other exclusive right.

Within the digital environment, therefore, a different structure of rights seems to appear, enforced by TPMs, to which copyright limits are not applicable. This can be seen either an evolution of copyright or an involution, depending on the stance of the observer (owner's or user's side; Heide, 2001, pp. 364–70). Evidences of this process can be provided, for example, by a comparison between the EUCD and the EU Rental Rights directive. In the latter, neighbouring rights have the same privileges and the same limits as copyright exclusive rights. Whereas in the former the limitations of TPMs, interpreted as enforcing a new access right, differ from those of the exclusive rights (Heide, 2001, pp. 378–9).[57] That a new access right exists, moreover, can be suggested on the one hand by the existence of a specific directive, the CAD, regulating access to internet services,[58] and on the other hand by the exclusion of internet services from the remit of the EUCD.[59] Although internet services deal very often with copyright works, in sum, they are protected by access control restrictions irrespective of their compliance with copyright exceptions (Heide, 2001, pp. 376–82).

In conclusion, a new access right of the owner is *de facto* being created by the wording of the EUCD, and this is arguably instrumental to protect copyright in the digital environment. However, the digital revolution did not change copyright rationale and goals, which are still revolving around the circulation of culture and the diffusion of knowledge. This implies that if new allowances are *de facto* being created for the owner, these have to be balanced by new allowances for the users, implementing copyright limits.

***The Protection of TPMs***

With reference to the right of access, the most problematic provision of the EUCD seems to be the protection of TPMs. While to some controlling access seem to be the only way to defeat internet piracy (Olswang, 1995; Smith, 1996, p. 418), to others this seem to create a disturbing pay-per-use world (Koelman, 2000, p. 276). TPMs reach where no copyright law ever dared to reach. Ignoring that their commodities are not simple products but a vehicle of knowledge and culture, rightholders

exercise their privileges; and they avoid respecting copyright limits. As some commentator puts it, this is "the surrender of culture to technology" (Vaidhyanathan, 2001, p. 160).[60]

Other evidence of the existence of a new and separate access right for the copyright owner is provided by a comparison between the technology and copyright law. First, both technology and law are based on the concept of force: they both force or guide the behaviour of users. However, the technology exercises this force *ex ante*; the law does it *ex post*. Further, the enforcement achieved by technical means does not cover all works protected by copyright. Only digital versions of a copyright work, on which a TPM has been implemented, are protected. The law, on the contrary, protects all works on which rightholders have exclusive rights. Finally, the restrictions imposed by law and those imposed by the technology do not coincide. The number of actions allowed by a TPM (e.g. performing only a certain number of reproductions, etc.) are chosen by the technology (*rectius*, by those implementing it), not by law (Dusollier, 2005a, pp. 109–10). The digital code, in short, prevails on the legal code (Lessig, 1999).

In conclusion, rightholders should not have the right to control access to copyright works beyond their exclusive rights. Every interpretation of the exclusive rights of the owner in the sense to grant access control to owners over and beyond the copyright rationale is incorrect. Moreover, the new legislation protecting TPMs, prompted by the alleged dangers of the digital environment, bestow on rightholders access-control powers without counterbalancing provisions in favour of copyright users, thus hindering the fulfilment of copyright rationale. This is a problem that cannot be solved merely by a different interpretation of the existing law, but it requires normative action.

## Fundamental Liberties and Access Rights

I have argued above that although neither international treaties nor EU directives literally provides for a right of access of the owner or of the user of expressive works, the EUCD indirectly confers rightholders the possibility to control access and use of these works.[61] From another stance, some access prerogatives for the user of copyright works could stem from fundamental rights and liberties, such as freedom of information and the right to circulation of culture (Dusollier *et al.*, 2000; Grosheide, 2001; Hugenholtz, 1997).[62]

### *The Right to Knowledge*

The Universal Declaration of Human Rights (UDHR), at article 27(1) states that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".[63] Enjoying the arts and sharing benefits of scientific progress, therefore, are fundamental human rights.

Furthermore, in article 19 the Declaration states that "everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".[64] Information should freely circulate[65] through culture, ideas, thought, speeches, opinions and creativity. While article 27(1) of the UDHR directly protects the circulation of culture, article 19 allows free expression and access to information, and therefore it protects as well the circulation of culture, although indirectly.

According to the Human Rights doctrine, freedom of expression is grounded on several justifications: it brings moral autonomy; it takes to the truth by means of discussion; it enables meaningful participation in democracy and it allows self-fulfilment.[66] A government that suppresses those important liberties, in the absence of any special circumstances, offends the moral dignity of its citizens.

The UDHR mentions, in the same article, both the active and the passive right of information. It sanctions not only the liberty to communicate ideas, but also the right to access them. Moreover, the constitutions of most EU member states have transposed both these universal principles of law.[67]

The European Convention on Human Rights (ECHR),[68] signed in Rome in 1950, reinforces the same idea in article 10.

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.[69]

The ECHR therefore protects freedom of information and expression while at the same time making some room for copyright protection. Interestingly, the EUCD 2001 does somewhat the opposite: it protects the rights of the owner while at the same time making some room for freedom of expression. In recital 3, it states:

> The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

Arguably, the directive here refers to all interests protected by copyright law: (1) the economic interest of the owner; (2) the freedom of expression and the public interest, for the user.

However, in the body of the directive only indirect protection is granted to freedom of expression and the public interest, through some of the copyright exceptions listed in article 5. Moreover, the implementation of these exceptions is optional for member states, whereas the protection of the exclusive rights of the owner and of TPMs is compulsory.

The balance outlined in recital 3 of the directive therefore does not seem to find an equivalent in the norms of this piece of legislation.

Freedom of expression, however, is not without boundaries. In second paragraph, article 10 ECHR introduces a limitation to this fundamental right:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The exceptions to freedom of expression, therefore, are called into action only in very serious circumstances: war or public emergency; national security or public order; public health and morals; the rights and reputation of others (Smith, 2005, p. 288).[70] Fundamental rights including freedom of expression cannot be restricted unless they present a threat to a superior interest that is universally recognized (Barlow, 2003).[71]

Perhaps the most interesting among these exceptions, for our discourse, is the reference to the "rights of others", which may suggest a reference to copyright.[72] Even though this might be true, I do not believe that a reference to copyright here is possible comprehending both moral rights and patrimonial rights. The "rights of others", in the wording of the ECHR, stand close to "reputation"; and the right of reputation is a personality right, that is, related to a human person. The moral

rights of the author, as the right of integrity, paternity and disclosure, are also personality rights. Conversely, patrimonial rights related to copyright are enjoyed by both physical and moral entities. Moreover, international case law[73] and the transposition of the convention into national law[74] suggest that "rights and reputation of others" refers either to acts against the reputation, such as libel and defamation, or to acts against basic values such as the human dignity; for example, the protection against child pornography and child abuse (Smith, 2005, pp. 293–4).

The above suggests that this reference to the "rights of others" may include moral rights but it is unlikely to include the patrimonial rights of the copyright holder.

***Copyright as a Human Right***

I have argued above that DRM gives copyright owners a *de facto* right of access, without an explicit legal basis in existing copyright provisions.[75] Can human rights provide such a basis? Article 27, paragraph 2 of the UDHR states:

> Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[76]

Furthermore, the Covenant on Economic, Social and Cultural Rights (CESCR)[77] transposed the principles embedded in the UDHR. Article 15 of the CESCR draws on the wording of the UDHR and states:

1. The States Parties to the present Covenant recognize the right of everyone:
   (a) To take part in cultural life;
   (b) To enjoy the benefits of scientific progress and its applications;
   (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[78]

Both formulations refer to the "moral and material interests" of the author and to "scientific, literary or artistic production". This suggests that they protect all IP rights: copyright (author's right) and industrial rights (patents and trademarks).

Copyright seems also to be recognized to some extent by European human rights codifications. For example, article 1 of the First Protocol to the ECHR,[79] which protects the "peaceful enjoyment of property", is applicable to IP rights. In support of this construct is a decision of the European Court of Human Rights, which affirmed that IP benefit without question of article 1 of protocol 1.[80]

Moreover, the EU Charter of Fundamental Rights (EUCFR)[81] when covering the right of property in article 17 also mentions IP. With this disposition, in Europe, the author's right "enters the pantheon of fundamental rights". Yet, since the reference of article 17 is to property, I may argue it only refers to the financial entitlements of the copyright owner. No mention is made of personality rights (Caron, 2001, p. 25). These European provisions therefore show a focus on the due reward to the author rather than on his personality rights (Geiger, 2004, p. 173).

However, some commentators find that copyright is rather weak as a human right (Caron, 2001, p. 9), especially when compared with other fundamental rights. This is because the formulation of article 15 of the covenant includes the protection of "development and diffusion of science and culture",[82] "scientific research and creative activity"[83] and "international contact and cooperation in the scientific field".[84] These provisions have to be respected by the material and moral right of the author because article 15 has to be interpreted as an organic structure, not as a set of stand-alone rights (Dubuisson, 2006, pp. 90–9; Torremans, 2004, p. 9). The reference to the diffusion of culture and knowledge as a key to interpret the scope of copyright protection is important. It represents a precise limit to copyright.

Although there seems to be an international consensus of the fact that all human rights have and deserve the same status and consequent protection, there is a relevant difference from the copyright framed by the UDHR (and the following covenant) and the financial interest protected by copyright law (Chapman, 2002, p. 863; Torremans, 2004, p. 10). The goal of the protection of copyright as a human right is promoting the circulation of the culture, not to maximize profits of entertainment producers (Chapman, 2002, p. 867).[85] In essence, IP rights should promote the circulation of culture as a first objective, and this alone has to restrain IP rights.

In support to the above arguments, we may add that IP rights are substantially different in nature and are in fact subject to different regulation in positive law. Copyright does not need any formality to exist; whereas patents and designs do. Copyright encompasses personal and patrimonial rights, while industrial rights mostly emphasize material issues. Born in the Civil Law culture, personal IP Rights are mostly non-transferable, imprescriptible, indefeasible and unlimited.[86] Conversely, patrimonial IP rights, more popular in common law countries, are transmissible, transferable, subject to forfeiture and waivable.[87]

In sum, moral and patrimonial rights are treated differently across jurisdictions, which may suggest that although article 27 of the UDHR and article 15 of the CESCR do not explicitly differentiate between moral and material rights, they may not necessarily carry the same weight. Infringing a moral right can have practical effects close to the damage to reputation, which is an accepted limit to freedom of expression.[88] An act of infringement against patrimonial rights, on the contrary, has different implications.

Granting a fair reward to the author is intended to ensure a living to creators, and provide incentives for creation. The reward for the author, in other words, indirectly promotes the circulation of culture. When this reward is proportional, copyright infringement is detrimental to the circulation of culture. *A contrario*, it might be inferred that an exclusive right of the owner resulting in excessive compensation (e.g. because of DRM implementation) is not grounded on the general interest and therefore calls for a different—lower—protection.[89]

In sum, the international conventions on human rights examined above protect the rights of the author, but not indiscriminately. The first paragraph of article 27 of the UDHR and the sub-paragraphs (a) and (b) of article 15.1 of the CESCR, for example, include both the rationale of copyright protection and its boundaries. The point of reference represented by the ultimate goal of copyright, the circulation of culture, allows one to define the limits of the reward for the authors. Only within those limits, access control can be allowed. The limits existing in copyright legislation can in principle provide those boundaries. However, drafting these limits by keeping into account their rationale, the circulation of culture, is crucial.

## The Right of Access of the User

Some copyright commentators believe there is an access right of the user of copyright works grounded on fundamental liberties such as freedom of expression and information. They assume that access to culture and information implies access to copyright works, and therefore copyright law has to make allowance for users to exercise their fundamental rights.

However, the correspondence between access to information and ideas and access to copyright works is not uncontroversial. The "access to information" identified in article 10 of the ECHR[90] does not necessarily includes access to all copyright works, which are often made simply to entertain and not to inform (Lucas, 1997, p. 20; Strowel, 2000b, p. 5). A distinction should be made between "information and ideas", protected by human rights, and "artistic and literary works, protected by copyright law. The distinction is confirmed by the choice of national and international legislators

(Dubuisson, 2006, p. 95). However, there are some authors in copyright literature that intend the term "information" in its broadest sense, including all creations of the human mind (Hugenholtz, 1999).

The above debate is mainly based on the argument that copyright does not protect ideas, but their expression. However, in practice distinguishing between information and ideas on the one hand and their expression on the other may be difficult, if not impossible (Macmillan, 1996, pp. 217–9). The distinction is more obvious for literary works than for cinema or music, for example. Moreover, sometimes expressing criticism or reporting news (activities shielded by freedom of expression) can be rather ineffective without a citation of the work itself, as case law shows.[91] While access to culture and information may not always derive from access to copyright works, many works of culture and information are protected by copyright, and accessing them could be the only way to access the information. We cannot therefore exclude an impact of the above fundamental rights on copyright.

The debate on the right of access of the user of copyright works underpinned by fundamental freedoms seems to revolve around one key question: are fundamental liberties such as freedom of expression and information sufficiently protected by copyright law? If so, the additional protection of human rights conventions will be redundant. Both doctrine and jurisprudence do not seem to be able to reach an agreement on this point.

Some case law in Belgium and France, for example, reflects the view that freedom of expression is perfectly safeguarded within copyright regulations through copyright limits.[92] Among these, a decision of the French Supreme Court confirms that there are no exceptions other than those already sanctioned by law. This decision was applauded by some commentators (Lucas, 2006, p. 139) and heavily criticized by others (Dusollier, 2006). In the Netherlands, conversely, the cases of *Church of Scientology v Dataweb*[93] and *Dior v Evora*[94] show a willingness to use criteria external to copyright exceptions to determine the infringement of freedom of expression. In both cases, the party sued for copyright infringement has successfully invoked the constitutional freedom of expression to justify the allegedly infringing acts. These rulings are not isolated. Other case law in Europe supports the view that the prerogative of the users of copyright works can also be identified outside copyright law (e.g. Utrillo—1st degree,[95] Journal d'Anne Frank,[96] Germania 3[97] and Scientology[98]).

The EU copyright literature is affected by the same divide. Some argue that freedom of expression represents a limit to copyright, beyond the list of copyright exceptions, and criticizes the exhaustive list of copyright exceptions offered by the EUCD 2001, which makes the prerogatives of the user rigid, as opposed to the flexible economic rights of the owner. The decision in the case *Dior v Evora*[99] has even been saluted as an opening of the European case law to a more flexible definition of copyright exceptions, on the model of the American fair use (Hugenholtz, 2000c).[100]

The argument for a broad interpretation of copyright exceptions is based on the original rationale of copyright protection, which is the diffusion of culture. The need for a broad interpretation is prompted by the status of copyright exceptions, which are "exceptions" to exclusive rights rather than rights themselves. This creates an unbalanced protection of owners and users of copyright works. The solution therefore lies in granting a clear status of rights to copyright exceptions (Geiger, 2006, p. 121). Thomas Hoeren, for example, states that access right is only a symbol for the deconstruction of copyright in the modern era. The new construction of copyright, according to this commentator, should be based on the principle "*in dubio, pro libertate*". This means that copyright exceptions have to be interpreted extensively, because they are *all* expressions of fundamental rights (Hoeren, 2001).

In contrast, another part of the literature argues for a restrictive interpretation of copyright exceptions. For these commentators, article 10 of the ECHR and 15 of the CESCR have to be interpreted in the context of international legislation on copyright, such as the Berne convention and the WIPO treaties. There is no conflict between the rights of copyright players, because a balance

is already stricken by the *iure condito* (Dubuisson, 2006, p. 95). In essence, copyright limits set by copyright legislation are sufficient to protect freedom of expression and other fundamental rights. For this argument, the content of the protected work is the key to determine the extent of the protection (Strowel and Tulkens, 2006, pp. 36–7).

There is a crucial difference, between content-related and content-neutral copyright protection. In the first case, copyright legislation impacts on works whose content is the reason why the rights are claimed. For example, this normally occurs when parody or criticism is called into play. In this case, the scrutiny in the light of freedom of expression has to be strict. This means that freedom of expression can be protected also beyond the boundaries of copyright limits.

In the second case, copyright entitlements are claimed irrespective of the content of the work. One example could be the exception for private copying. In the case of content-neutral claims, it is not necessary "a strict scrutiny" on the compliance with freedom of expression. In this second case, copyright exceptions have to be interpreted narrowly; that is, no fundamental rights can be called into play from outside copyright legislation (Netanel, 2005).

To our discourse, this argument submits that all issues regarding access are content-neutral, therefore they only require an intermediate scrutiny. As for access to copyright works, in short, the in-built safety valves of copyright provide enough scrutiny for freedom of expression (Strowel and Tulkens, 2005, pp. 287–313).

The above arguments are by and large convincing. However, they refer to the type of content rather than to the actual content. There is still room for dysfunction when a content-neutral norm is called into play to protect works containing material directly or indirectly important for the circulation of culture. Given the impossibility to ascertain the actual content of a work before granting copyright protection, or the protection of a copyright exception, there is only one possible solution: greater protection should be granted to users of copyright works in order to fulfil the copyright goal of circulation of culture. In short, here there is room for the implementation of the principle proposed by Hoeren: *in dubio*, *pro libertate*.

## Conclusion

Twenty years ago, no copyright scholar would have thought of a stand-alone access right stemming from the exclusive right of the author or from the freedom of information of the user. However, this changed with the advent of the Digital Era, which facilitated access to copyright works from the public,[101] but also provided new opportunities for rightholders to self-enforce their rights.[102]

The international treaties examined, from which the current European copyright legislation derives, concede to rightholders full protection for TPMs, but only if used within the exclusive right granted by copyright law.[103] This means that TPMs are obliged to comply with copyright limits, whatever their nature, rights or legal exceptions.

However, the EUCD seems to provide broader protection to TPMs in comparison to the international legislation (namely, the WCT 1996).[104] In the former, TPMs have to respect only a limited list of copyright exceptions whereas in the latter TPMs have to be implemented within the boundaries of copyright law. Hence, copyright literature sees an expansion of the prerogatives of copyright owners, which in practice gives birth to an enhanced access control on copyright works.

I have argued that in part this can be addressed with a correct interpretation of copyright law, underpinned by the fundamental principle on which copyright is grounded: the circulation of culture. Yet, some normative action is required to address the unbalanced protection of owners and users of copyright works in the EUCD. For example, the existence of a separate and narrower list of copyright

exceptions for TPMs does not seem to be consistent with the construct that TPMs are mere means to enforce the exclusive rights of the owner (and therefore they are subjected to the same limits).

On the side of the user, as well, problems of access rights can be addressed by choosing a broad rather than a narrow construct of copyright exceptions, based on fundamental principles. The analysis of the UDHR, the ECHR and the CESCR, shows that fundamental liberties such as freedom of expression and communication can form the basis for the interpretation of copyright limits. However, here as well some normative action at the EU level could help clarify which exceptions are based on fundamental principles and which are not, providing for the former a differentiated protection, namely versus TPMs.

In conclusion, appropriate normative action and the correct interpretation of the legislation in force can guarantee to both owners and users of copyright works an access right, consistent with the ultimate rationale of copyright: the circulation of culture.

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## Notes

1 Copyright limits are as follows: exhaustion (first sale) principle, idea-expression dichotomy, copyright expiry and copyright exceptions. Hereinafter, I will refer indifferently to copyright "limits" and "exceptions", although focus of this work is on copyright exceptions.
2 Here intended in a broad sense, including fair use and fair dealing.
3 See OECD (2005 p. 92); see generally Hugenholtz (2000b); see also Westkamp (2004 p. 1078); Koelman (2000 p. 275) and Dusollier (2003 p. 477).
4 I do not discuss here the Berne convention, because it does not include TPMs provisions.
5 Council Directive 98/84/EC of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, *Official Journal*, L 320, November 1998, pp. 54–7.
6 Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases, *Official Journal*, L 077, March 1996, pp. 0020–8.
7 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *Official Journal*, L 122, May 1991, pp. 0042–6.
8 Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, *Official Journal*, L 167, June 2001, pp. 0010–9.
9 The Berne Convention does not include provisions on copyright enforcement. The TRIPS do not provide anything explicit on TPMs, but it stipulates rules for copyright enforcement.
10 According to Ayers, this already expands rightholders privileges.
11 WPPT 1996, article 18: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law".
12 TRIPS, article 41.1.
13 For example, see the Digital Economy Act 2010 in the United Kingdom and the HADOPI 2009 and HADOPI 2 2009 laws in France.

14 Pub.L. No. 105–304, 12 Stat 2860 (1998) adding §§512 and 1201–1203 to the Copyright Act 1976.
15 DMCA 1998, §1201 (a) (A).
16 Title 17, §107 of US Copyright Act.
17 Memorandum of the US Copyright Office of December 1998 [online]. Available at <http://www.wizards-of-os.org/> [Accessed February 2008].
18 For an in-depth analysis of those, see Ginsburg (2000, pp. 65–9).
19 Note, however, that although the DMCA does not explicitly provide for a "right to circumvent", it does not forbid circumvention of copy-control technologies.
20 Council Directive 98/84/EC, *Official Journal*, L 320, November 1998, pp. 54–7.
21 Council Directive 91/250/EEC, *Official Journal*, L 122, May 1991, pp. 0042–6.
22 Council Directive 91/250/EEC, article 6.1.
23 Council Directive 91/250/EEC, article 6.2.
24 Council Directive 96/9/EC, *Official Journal*, L 077, March 1996, pp. 0020–8.
25 (a) Temporary or permanent reproduction by any means and in any form, in whole or in part; (b) translation, adaptation, arrangement and any other alteration; (c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community; (d) any communication, display or performance to the public; (e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).
26 Council Directive 96/9/EC, *Official Journal*, L 077, March 1996, pp. 0020–8, article 6.1.
27 Once users of database purchase a lawful right to access the good, further access and reproduction, which are part of the normal utilization of the good, are guaranteed with or without the authorization of the owner. See Dusollier (2000, p. 32).
28 Council Directive 98/84/EC, *Official Journal*, L 320, November 1998, pp. 54–7.
29 Council Directive 98/84/EC, *Official Journal*, L 320, November 1998, pp. 54–7, article 1, "Scope of the directive".
30 Article 6 of the EUCD refers to works or other subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.
31 Council Directive 98/84/EC, *Official Journal*, L 320, November 1998, pp. 54–7, article 2, "Definitions".
32 European Commission. (1997) 'Communication from the Commission to the European Parliament, the Directive on the Legal Protection of Services Based on or Consisting of, Conditional Access', Brussels, 9 July 1997, COM(97) 356.
33 Council Directive 93/98/EEC (harmonizing the copyright term), *Official Journal*, L 290, November 1993, pp. 0009–13; Council Directive 93/83/EEC (satellite broadcasting and cable retransmission), *Official Journal*, L 248, October 1993, pp. 0015–21; Council Directive 92/100/EEC (rental right and lending right), *Official Journal*, L 346, November 1992, pp. 0061–6.
34 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010—9, article 8.3. Article 8 sanctions the right to access to information and documentation against intermediaries that could be useful to identify potential infringers. The article refers to the possibility, for prosecutors of copyright infringers, to apply to internet service providers to obtain personal data of suspicious users. Obviously, this access right does not affect the possibility for the public to access copyright goods.
35 Section "The right of access of the owner".
36 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010—9, article 2.
37 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010—9, article 3.
38 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010–9, article 6.1.

39 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010–9, article 6.3, second paragraph.
40 See Common Position of 22 September 2000, C 344 01.12.2000, p. 0001, n. 45: In Article 6(3) second sentence, the Council deleted the term "access to" considering that questions relating to access to works or other subject matter fell outside the field of copyright. See also Koelman (2000), at footnote n. 26.
41 Council Directive 98/84/EC, *Official Journal*, L 320, November 1998, pp. 54–7.
42 Moreover, Dusollier indicates in parody a potential backdoor for the much awaited exception for transformative works. See her intervention at the 4 Wizard of OS Conference. Available at <http://www.wizards-of-os.org/> [Accessed February 2008].
43 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010–9, article 6.4. The exceptions are: photocopy; reproduction made by libraries and archives; ephemeral recordings by broadcasting organizations; reproductions of broadcasts by social institutions; teaching or research; disabled people; public security/administration.
44 Random Access Memory (RAM): it is the short-term memory in which the computer applications are put during the work. For a discussion on the nature of reproduction of the RAM, see Spoor (1996, p. 70).
45 Cache memory is RAM that a computer microprocessor can access more quickly than it can access regular RAM. As the microprocessor processes data, it looks first in the cache memory and if it finds the data there (from a previous reading of data), it does not have to do the more time-consuming reading of data from larger memory. It is normally used by the browser to optimize the timing of net-surfing.
46 The drafting process of the WIPO Copyright Treaty however was far from easy due to considerable disagreement across countries. At the Diplomatic Conference working on the WIPO Copyright Treaty, the US delegation proposed an article 7 that defined the reproduction right more extensively. Their formulation of article 7 included also "direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form. The amendment was not accepted . . . ". See the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference, Geneva, 2–20 December 1996, reprinted in 43 *Journal of the Copyright Society of the U.S.A.*, 399 (1996), pp. 416–17. See also generally Ricketson (2003).
47 The agreed statement is available at <http://www.wipo.int/treaties/en/ip/wct/statements.html> [accessed 22 November 2011].
48 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010–9, article 2. Article 9 of the Berne Convention recites: (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.
49 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010–9, article 5.1. On the matter see also Koelman (2000).
50 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010—9.
51 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010 – 0019, article 5(1) (a).
52 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010—9, article 5.1(b).
53 The author argues that this happens especially thanks to the protection of TPMs.
54 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010–9, article 3.
55 Interestingly, the author also notes that access right granted only to digital goods creates discrimination with analog works of art.
56 Westkamp moreover argues that there is a danger to create a monopoly over information.

57 Technological protection measures, according to the Copyright Directive, have to respect a number of compulsory copyright exceptions extracted from the list of optional copyright exceptions provided for the exclusive rights of the owner.
58 Council Directive 98/84/CE (Conditional Access), *Official Journal*, L 320, November 1998, pp. 54–7.
59 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010–9, article 6.4.
60 The author states: "The surrender of culture to technology. The Digital Millennium Copyright Act forbids any circumvention of electronic locks that regulate access to copyrighted material. Before 1998, copyright was a public bargain between producers and users. It was democratically negotiated, judicially mediated and often messy and imperfect. Now the very presence of even faulty technology trumps any public interest in fair use and open access".
61 Section "The right of access of the owner".
62 The authors raise concerns about on the creation of an entrepreneurial copyright law and the necessity of specific rights for users of copyright works. For more general positions, see, for example, Litman (1994); and also Litman (2001, p. 184), arguing: "The public had, and the public should have, an affirmative right to gain access to, extract, use and reuse the ideas, facts, information and other public domain material embodied in protected works". See also generally Samuelson (2003) and Vinje (1996).
63 UDHR, article 27(1).
64 UDHR, article 19.
65 On the threats to freedom of circulation of culture by current copyright law, see generally Heins (2003). See also generally Nadel (2004).
66 For a more in-depth analysis of freedom of expression limits and justifications, see Campbell (1994, p. 17). He enlists all claimed rationales of the right: the three classic (1) sole path to truth, (2) right to self-determination, (3) presupposition of democracy, to which he adds (4) the stimulus to tolerance, (5) the flourishing of plurality, (6) the efficient allocation of resources, (7) the intrinsic worth of communicative experience. He concludes, though, that the freedom of expression is not an absolute right, and from this list he acknowledges mainly the classic three rationales, with some provisos.
67 For example, the German Constitution (Grundgesetz), article 5 (1): "Everyone has the right freely to express and to disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources.[ . . . ]; the Portuguese Constitution, article 37(1): "Everyone has the right to express and publicise his or her thoughts freely, by words, images or other means, and the right to impart, obtain and receive information without hindrance or discrimination"; the Spanish Constitution of 1978, article 20(1) "The following rights are recognized and protected: "[ . . . ] d) the right to freely communicate or receive truthful information by any means of dissemination whatsoever.[ . . . ]".
68 The Convention and its five protocols are available online at <http://www.hri.org/docs/ ECHR50. html> [accessed 22 November 2011].
69 Council Directive 2001/29/EC, *Official Journal*, L 167, June 2001, pp. 0010—9, recital 3.
70 Those limits have to be provided by law and necessary, as mentioned by the comment 10 of the Human Rights Committee on article 19.
71 The author states that "receiving an information is often creative an act as generating it". In fact, data about a specific subject—as for example, anthropology—may *seem* overly mysterious to a person out of the field.
72 *Anheuser-Busch v Portugal*, 11 October 05, n. 73049/01. The decision has been appealed. The final judgment of the court was issued on 11 January 2007, and confirmed that in the case at hand there was no violation of protocol 1. However, the court specified that this was because in the case at hand the claimant was not sure to be the owner of the trademark (Budweiser) in question. It specified, though, that in the case of registered IP rights, the meaning of "possession" within the terms of protocol 1 was in fact applicable. Also the European Charter of Fundamental Rights of 2000, which states at article II-1(2) "the Intellectual property will be protected" could be noted.

73 For example, *Ross v Canada*, UN Doc. CCPR/C/70/D/736/1997(2000). The case involved a schoolteacher holding controversial opinions on religious matters, who underwent disciplinary action by the school board, following a complaint by a Jewish parent. The teacher, Mr. Ross, appealed to the UN human Rights Committee, invoking freedom of expression. The court concluded that the freedom of expression of the teacher was rightly constrained by the rights and reputation of the Jewish students. See paragraph 11.6 of the ruling.

74 See, for example, Spanish Constitution, article 20(4) (4) "These freedoms are limited by respect for the rights recognized in this Part, by the legal provisions implementing it, and especially by the right to honour, to privacy, to the own image and to the protection of youth and childhood". German Constitution, article 5 (2). These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth and the right to inviolability of personal honour.

75 Section "The right of access of the owner".

76 Its draft was extensively debated within the Assembly. Reportedly, the party advocating the moral right of the author was—not surprisingly—led by the French delegation. Conversely, the party adding the "material" interest was embodied by the Mexican and Cuban delegation, which insisted to take inspiration by the newly approved American Declaration on the Rights and Duties of Man. See Torremans (2004, p. 6).

77 International Covenant on Economic, Social and Cultural Right, G.A. res. 2200A (XXI), 21 U.N. GAOR Suppl. (no. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976. The treaty has been signed by 145 UN Member States. The United States did not sign it.

78 Similarly to the UDHR, the formulation of subparagraph (c) was all but straightforward during the assemblies of the framers. Several proposals and counter-proposals alternated, with article 15(c) and without it, until a favourable vote, obtained with a stretched majority (39 votes against 9, but with the abstention of 24 members). See Torremans (2004, p. 9).

79 The full text of the ECHR and its five protocols is available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> [accessed 22 November 2011].

80 *Anheuser-Busch v Portugal* 11-10-05, n. 73049/01.

81 The Charter has been signed by the presidents of the EU Council, Parliament and Commission. But not yet by member states. It is available at <http://ec.europa.eu/justice_ home/unit/charte/index_en. html> [accessed 22 November 2011].

82 CESCR, article 15.2.

83 CESCR, article 15.3.

84 CESCR, article 15.4.

85 The author states: "The goal is to improve human welfare and not to maximize economic benefits". And "intellectual property protection is understood more as a social product with a social function and not primarily as an economic relationship".

86 I refer to moral rights of the author, now enforced in all countries signatory of Berne Convention such as integrity and paternity, but also to the other instances of *droit morale* as applied by France and other civil law countries. Here, moral rights are mostly not disposable; whereas they are waivable in common law countries.

87 The UK Copyright Act 1988, modified in order to implement the Copyright Directive, provide for moral right of the author (paternity, integrity and privacy of certain photographs and films), but, as said, they are waivable and transferable. In Austria and Germany, on the contrary, since personal and patrimonial rights are indissolubly linked, they are both not assignable. But the economic rights are in practice transferred through the licensing system. See Rahmatian (2000, pp. 102–3).

88 It is the "the protection of the reputation or rights of others" of which UDHR at article 10.2.

89 On a position in support of the proportionality of the reward, within the balance between copyright protection and freedom of expression, see Strowel and Tulkens (2006, p. 37).

90 European Convention of Human Rights 1950 (ECHR). Available at <http://www.echr.info/> [accessed 22 November 2011].
91 See, for example, *Campbell v Acuf-Rose Music*, 510 US 569 (1994), and *Time Warner Ent. v Channel 4*, (1994) EMLR 1.
92 Belgium: *Testaankoop v EMI Music, BMG, Sony Music* Cass., 25-08-03, A&M, 1/2004, p. 29; France: *Studio canal, Universal Pictures vidéo France v UFC Que Choisir, Stéphane P* Cass., 1re Chambre Civile, 13-11-03, J.C.P., G, 2004, II, 10080. Both commented by Lucas (2006, pp. 124–5).
93 In this case, the court denied to Scientology copyright infringement claims on the ground that copyright was not used to obtain compensation but rather to restrain further access to a copyrighted material. They argued in favour of a copyright aimed at the diffusion of culture, which cannot be used for censorship. See Ct of App (Gerechtshof)' s-Gravenhage, 04-09-03, Computerrecht, 2003/6, 357; Hoge Raad, 20-10-95, NJ, 1996, 682. See also the comment of Strowel and Tulkens (2005, pp. 309–10).
94 Dior sued Evora for copyright infringement on perfume bottles reproduced in advertisements. The Court recognized that no express exemption applied to the facts of the case. However, it upheld the position of Evora on the ground that there was room to move *outside* the existing system of exemptions, by balancing the interests at stake on a rationale similar to the rationale underlying copyright exemptions. See *Dior v Evora*, Dutch Supreme Court (Hoge Raad) 20 October 1995, [1996] Nederlandse Jurisprudentie 682.
95 The Utrillo estate sued the national television station France 2, for showing 12 copyrighted paintings in the news on a Utrillo exhibition. The Paris Court reminded that article 10 ECHR is superior to national law, and therefore the right of the public to be informed of cultural events prevails over the interests of the copyright owner. See Court of First Instance Paris 23 February 1999, Case 98/7053 (unpublished).
96 In this case the "missing pages" of Anne Frank's diary were reprinted without authorization by the Dutch newspaper "Het Parool", the Amsterdam Court of Appeal in 1998 ruled that the freedom of expression and information guaranteed under article 10 prevailed on the copyright entitlements of the Anne Frank Foundation, owner of the copyrights in the diary. See *Anne Frank Fonds v Het Parool*, Court of Appeal Amsterdam 8 July 1999 [1999] Informatierecht/AMI 116.
97 In this case, an artist had incorporated in his artistic creation two quotations from different works by Berthord Brecht. The German constitutional court found the freedom of artistic creation, sanctioned by article 5 al. 3 of the German Fundamental Law prevailed on the author's rights of the Brecht estates. See Bundesverfassungsgericht (29 juin 2000, ≪ Germania 3 ≫, GRUR 2001, p. 149).
98 Ct of App (Gerechtshof)'s-Gravenhage, 04-09-03, Computerrecht, 2003/6, 357; Hoge Raad, 20-10-95, NJ, 1996, 682, illustrated above.
99 *Dior v Evora*, Dutch Supreme Court (Hoge Raad) 20 October 1995 [1996] Nederlandse Jurisprudentie 682.
100 Hugenholtz quotes A. Strowel (1993, pp. 144–7). See also Lucas (1998, p. 173).
101 See generally Kretschmer (2003), arguing about radical changes prompted by the Digital Era.
102 For a position in favour of digital locks to fight new technological dangers, see generally Olswang (1995).
103 WCT 1996, article 11 and WPPT 1996, article 18.
104 Council Directive 2001/29/EC, article 6.1.

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