



# Opphavsrett i digitale markeder i lys av forslaget til DSM-direktiv

Dr (LL.D.) Johan Axhamn, gjesteforsker ved Institutt for privatrett, Senter for rettsinformatikk



## *The development of the copyright system*

Copyright protection is an effect of technological development.

The Industrialism in the 19th Century and its development of the infrastructure

- increased the production and consumption, and
- the distance between producers and the end user
- widened the market and facilitated cross border trade
- gave need for protection of investments (and accordingly against copies made by third parties).



# Opphavsrett i digitale markeder

- ▶ Developments in technology and social behaviour
- ▶ Demands for "**more effective**" and at the same time "**more balanced**" protection
- ▶ Stimulation production/creativity, and providing reward v. providing dissemination and access
- ▶ The territoriality of copyright




# *EU-Directives*

- Computer Programs Directive (1991/250)
- Rental and Lending Directive (1992/100)
- Satellite and Broadcasting Directive (1993/83)
- Terms of Protection Directive ((1993/98) 2006/116)
- Database Directive (1996/9)
- InfoSoc Directive (2001/29)
- Resale Rights Directive (*Droit de suite*) (2001/84)
- Extension of term of protection Directive (2011/77)
- Orphan works Directive (2012/28)
- Directive on collective rights management (2014/26)
  
- Enforcement directive (2004/48)



# Opphavsrett i digitale markeder

1. Updates to the copyright norms due to the "digital agenda" (in the 1990s)
  - WCT, WPPT, Infosoc
2. Legal basis for use of copyright protected content: permission (license) or exceptions/limitations?
3. The territoriality of copyright
4. Liability and enforcement
5. Proposal for a Directive on Copyright in the Digital Single Market (2016)
6. Summing up




Updates to the international and regional copyright norms due to the "digital agenda" (in the 1990s)



# ***Preamble to the WIPO Copyright Treaty (1996)***


**Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,**



# Amendments to the international Copyright framework due to the WIPO "Digital agenda"

- ▶ Article 8 WIPO Copyright Treaty
  - ▶ *Right of Communication to the Public*
    - ▶ Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing 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 these works from a place and at a time individually chosen by them.**
- ▶ Agreed statement concerning article 8: It is understood that **the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication** within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2) .






# Right of communication to the public (article 3, dir 2001/29)

1. Member States shall provide authors with 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.**


Recital 27 (preamble): **The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.**



**“[T]he 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.**”**


# Some cases from the CJEU on the right of communication to the public...

- ▶ C-306/05 SGAE
- ▶ C-136/09 Organismos Sillogikis Diacheirisis...
- ▶ C-393/09 BSA
- ▶ C-403/08 och C-429/08 Football Association Premier League
- ▶ C-431/09 och C-432/09 Airfield
- ▶ C-283/10 Circul Globus București
- ▶ C-135/10 Marco Del Corso
- ▶ C-162/10 Phonographic Performance
- ▶ C-510/10 DR och TV2 Danmark
- ▶ C-607/11 ITV Broadcasting
- ▶ C-466/12 Svensson
- ▶ C-351/12 OSA
- ▶ C-314/12 UPC Telekabel
- ▶ C-348/13 BestWater International
- ▶ C-279/13 C More Entertainment
- ▶ C-325/14 SBS Belgium
- ▶ C-117/15 Reha Training
- ▶ C-151/15 Sociedade Portuguesa
- ▶ C-160/15 GS Media BV
- ▶ C-275/15 ITV Broadcasting
- ▶ C-301/15 Soulier & Doke
- ▶ C-641/15 Verwertungsgesellschaft Rundfunk
- ▶ C-138/16 Staatlich genehmigte Gesellschaft der Autoren...
- ▶ C-527/15 Stichting Brein
- ▶ C-610/15 Stichting Brein




# Amendments to the international Copyright framework due to the WIPO "Digital agenda"

- ▶ Article 1(4) WIPO Copyright Treaty
  - ▶ Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.
  
- ▶ Agreed statements concerning Article 1(4): **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.**



## Right of reproduction (article 2, dir 2001/29)

- ▶ Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, **temporary or permanent** reproduction by any means and in any form, in whole or in part:
  - a) for authors, of their works;
  - b) for performers, of fixations of their performances;
  - c) for phonogram producers, of their phonograms;
  - d) for the producers of the first fixations of films, in respect of the original and copies of their films;
  - e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.



# Mandatory exception to the right of reproduction for certain temporary forms of reproduction (article 5.1, dir 2001/29)

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

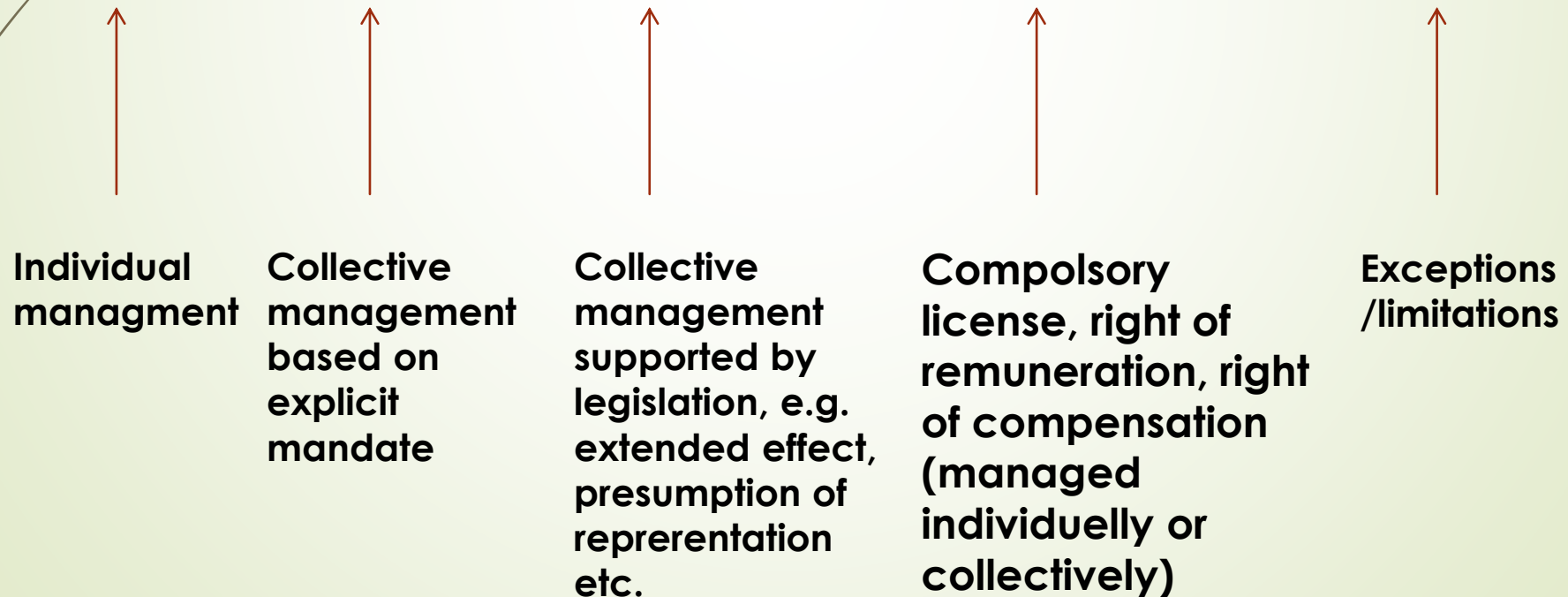
of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.



Legal basis for use of copyright  
protected content: permission (license)  
or exceptions/limitations?

# Legal basis for use of copyright protected content: permission (license) or exceptions/limitations?

Spectrum of **vehicles for access** to content protected by copyright and related rights








## Exceptions and limitations: Three step test (article 5.5, dir 2001/29)

- ▶ The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a **normal exploitation** of the work or other subject-matter and do not unreasonably prejudice the **legitimate interests** of the rightholder.



Interpretation of the Three-step test: Panel Report,  
United States – Section 110(5) of the US Copyright Act,  
WT/DS160/R (June 15, 2000)

- 1. certain special cases**
  - A limitation in national legislation must be clearly defined and should be narrow in scope and reach
- 2. which do not conflict with a normal exploitation of the work or other subject-matter,**
  - Uses that do not deprive authors of an actual or potential market of considerable economic or practicable importance
- 3. and do not unreasonably prejudice the legitimate interests of the rightholder**
  - The legitimate interests of the right holders include at least the economic value of the exclusive rights conferred by copyright on their holders

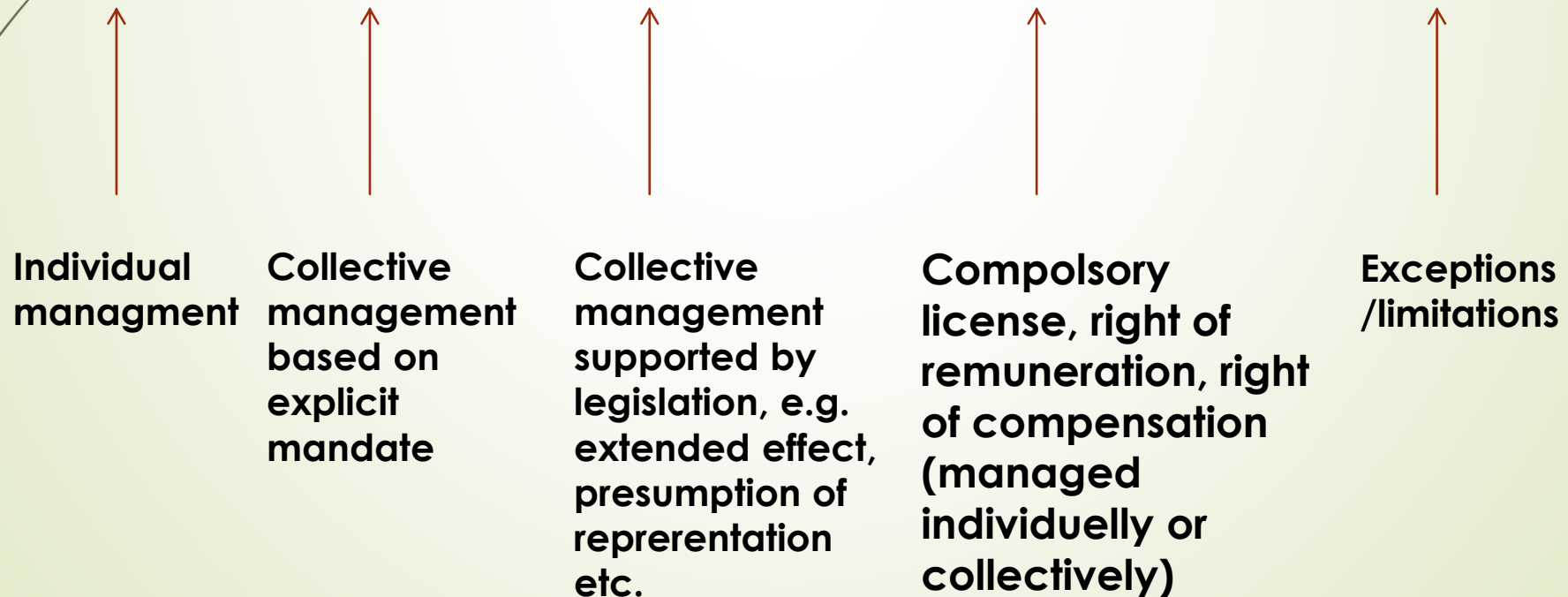


# Case law from the CJEU on exceptions and limitations

- ▶ Exceptions and limitations must be **interpreted strictly** because they constitute a derogation from the general principle of exclusive right. (Case C-5/08, Infopaq)
- ▶ None the less, the interpretation must enable the **effectiveness of the exception** thereby established to be safeguarded and permit **observance of the exception's purpose**. (Joined Cases C-403/08 and C-429/08, Premier league)

# Legal basis for use of copyright protected content: permission (license) or exceptions/limitations?

Spectrum of **vehicles for access** to content protected by copyright and related rights






# Core elements of ECL

- ▶ **Extended effect** of a collective agreement between a **representative** organisation and a user
- ▶ Possibility for outsiders to **opt out (?)**
- ▶ Outsiders have a right of **equal treatment**
- ▶ Outsiders have a right of **individual remuneration** (if they put forward an individual claim)



# The territoriality of copyright



# National Treatment and Conflict-Of-Laws rules

- ▶ Article 5(2) of the Berne Convention
  - ▶ The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, **the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.**
- ▶ Article 8(2) of the Rome (II) EU Regulation
  - ▶ The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be **the law of the country for which protection is claimed.**



# The territoriality of copyright

- ▶ **EU's harmonisation in the field of copyright has to a large extent left the territoriality of copyright untouched**
  - ▶ The combination of the international private law rule of ***lex loci protectionis*** and the substantive (copyright) rule that a copyright relevant act in the form of communication to the public occurs in every place where the/a public may access the work
  - ▶ **There is not (sufficient) political support for a general EU copyright Regulation.**



# The territoriality of copyright

- ▶ Many rightholders and commercial users have traditionally based their licensing- and business models on the territoriality





# The territoriality of copyright

- ▶ The **negative sides** of the territoriality of copyright has gained more and more attention in recent years
  - ▶ Consumers do not have access to movies etc. at the same time as they are launched in other member states
  - ▶ Difficulties for consumers to "bring" their online digital services (subscriptions) with them when they are on temporary visit in other member states
  - ▶ Very costly to establish online services that cover more than one member state
  - ▶ Collective management becomes subject to unnecessary administrative costs
  - ▶ The range and scope of limitations and exceptions to copyright differs between the member states

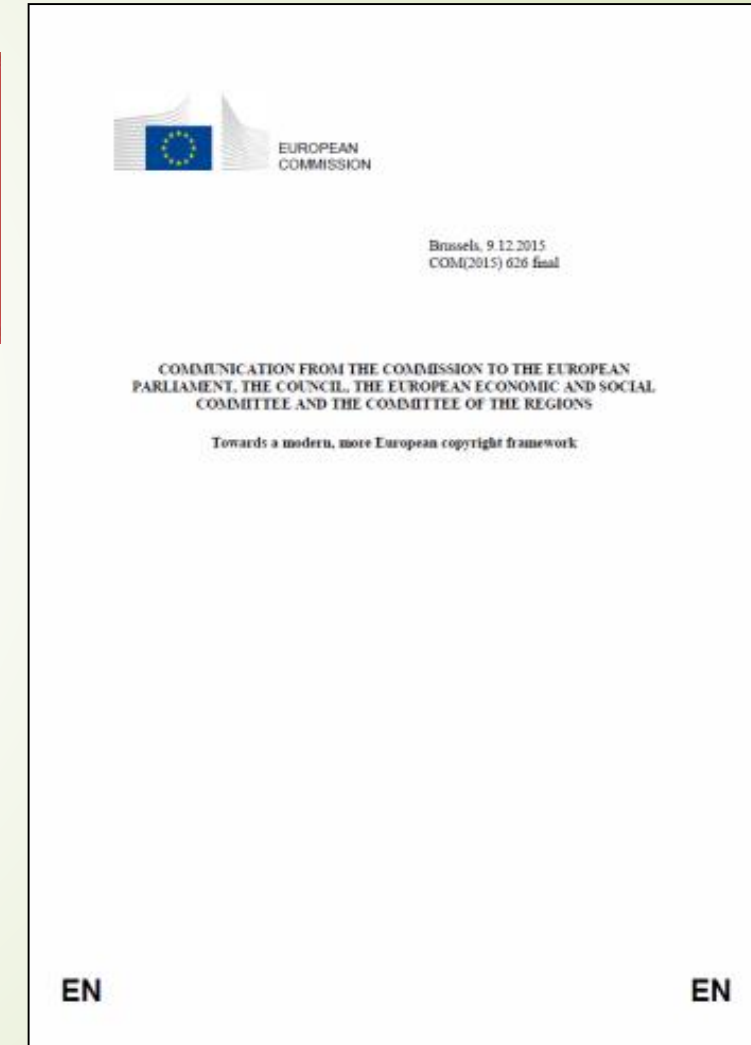


# Regulation (EU) 2017/1128 on cross-border portability of online content services in the internal market

- ▶ The regulation introduces a common approach to ensure that subscribers to online content services in the Union, which are delivered on a portable basis, can receive these services when temporarily present in another Member State (cross-border portability)
- ▶ “**Member State of residence**” means the Member State in which the subscriber habitually resides.
- ▶ “**Temporarily present**” means that a subscriber is present in a Member State other than his or her Member State of residence.

# Requests for a Copyright Regulation

- ▶ **Wittem Project**, <http://www.copyrightcode.eu/>
- ▶ **Commission proposals?**
  - ▶ “The full harmonisation of copyright in the EU, in the form of a single copyright code and a single copyright title, would require substantial changes in the way our rules work today. Areas that have so far been left to the discretion of national legislators would have to be harmonised. Uniform application of the rules would call for a single copyright jurisdiction with its own tribunal, so that inconsistent case law does not lead to more fragmentation.
  - ▶ These complexities cannot be a reason to relinquish this vision as a long-term target. Notwithstanding the particularities of copyright and its link with national cultures, difficulties and long lead-times have also accompanied the creation of single titles and single rulebooks in other areas of intellectual property, notably trademarks and patents, where they are now a reality.”

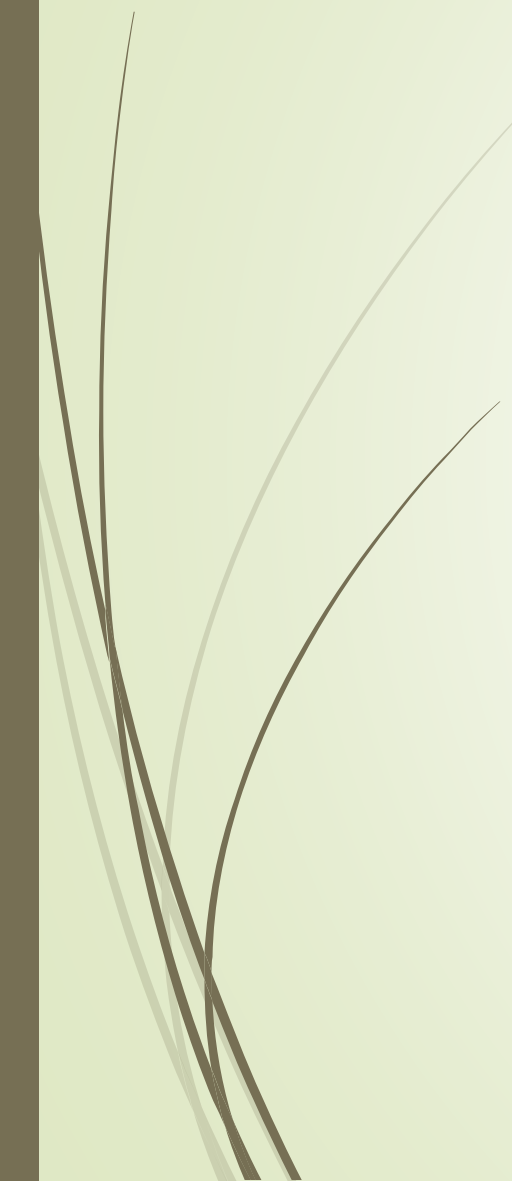




# Liability and enforcement



# Enforcement Directive 2004/48

- ▶ Evidence (article 6)
  - ▶ Measures for preserving evidence (article 7)
  - ▶ Right of information (article 8)
  - ▶ Provisional and precautionary measures (article 9)
  - ▶ Corrective measures (article 10)
  - ▶ Damages (article 13)
  - ▶ Publication of judicial decisions (article 15)
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# Right of information (article 8)

Member States shall ensure that, **in the context of proceedings concerning an infringement of an intellectual property right** and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale;

(b) was found to be using the infringing services on a commercial scale;

**(c) was found to be providing on a commercial scale services used in infringing activities;**

or

(d) was indicated by the person referred to in point (a), (b) or (c) as being involved in the production, manufacture or distribution of the goods or the provision of the services.



# Liability for intermediaries

- ▶ When is an intermediary infringing?
  - ▶ Direct infringement
  - ▶ Indirect (contributory) infringement



# Does it matter if an intermediary is liable or not?

- ▶ Article 8.3 of directive 2001/29: “Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”
- ▶ Recital 59: “In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. **The conditions and modalities relating to such injunctions should be left to the national law of the Member States.**”



Proposal for a Directive on Copyright in  
the Digital Single Market (2016)



# Proposal for a Directive on Copyright in the Digital Single Market (2016)

- ▶ Bring the EU's **cultural heritage** online
  - ▶ Facilitating the digitalisation and dissemination of works that are out-of-commerce, also for **cross-border** use
- ▶ **Mandatory exceptions to digital and cross-border environments**
  - ▶ Teaching activities
  - ▶ Text and data mining
  - ▶ Preservation of cultural heritage
- ▶ Creating a “**fairer market place**” for online content
  - ▶ Related or “neighbouring” right for **press publishers**
  - ▶ **A reinforced position** of right holders to negotiate and be remunerated for the online exploitation of their content of video-sharing platforms
  - ▶ Remuneration of authors and performers via **new transparency rules**



# Proposed new right for press publications

- ▶ **Article 11 – Protection of press publications concerning digital uses**
- ▶ **1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.**
- ▶ 2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.
- ▶ 3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.
- ▶ 4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.



# DSM-directive: Proposal by the European Parliament

- ▶ Article 12 a


- ▶ **Protection of sport event organizers**

- ▶ Member States shall provide **sport event organizers** with the rights provided for in Article 2 and Article 3 (2) of Directive 2001/29/EC and Article 7 of Directive 2006/115/EC.




# Value gap?

- ▶ Article 13 – *Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users*
- ▶ **1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers.** Those measures, such as the use of effective **content recognition technologies**, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.



# Fair remuneration to authors and performers?

- ▶ The exclusive rights provided by copyright law only turn into **financial reward**, and thus **incentives** to creators, through a contract with a third party to exploit protected material.
- ▶ With the emergence of digital technology the production and distribution of copyright protected content is rapidly shifting from the physical to the online domain.
- ▶ Content is now offered digitally via a wide range of different business models, such as 'on-demand' streaming, 'near-on-demand', for download-to-own, download-to-rent, webcasting etc.
- ▶ **These emerging modes of content distribution pose challenges to the rights of authors and performers to receive adequate or fair remuneration for the use (exploitation) of their creative content.**



# Imperfect information and asymmetric information problems

- ▶ **Imperfect information** refers to a situation in which the value of a relevant economic variable is uncertain.
  - ▶ E.g. the market success of the author's work cannot be known by either party ex ante.
- ▶ **Asymmetric information** refers to a situation in which one party to a transaction has relevant information, whereas the other does not.
  - ▶ E.g. the author has less information than the exploiter on the effort and investments the exploiter will make in order to maximise the economic exploitation of the author's content.
  - ▶ Also, the exploiter is likely to have superior information on the current market conditions and sales.
- ▶ **Both imperfect information and asymmetric information will affect the perceived expected value of the authors' content and the level of remuneration.**





# DSM Directive (the proposal)

- ▶ **Article 14** requires Member States to include **transparency obligations** to the benefit of authors and performers.
- ▶ **Article 15** requires Member States to establish a **contract adjustment mechanism**, in support of the obligation provided for in Article 14.
- ▶ **Article 16** requires Member States to set up a **dispute resolution mechanism** for issues arising from the application of Articles 14 and 15.
- ▶ **“Transparency measures would rebalance contractual relationships between creators and their contractual counterparties** by providing the creators with the information necessary to assess whether their remuneration is appropriate in relation to the economic value of their works and if the remuneration is deemed inappropriate, a legal mechanism in order to seek out a renegotiation of their contracts.”



# Summing up

- ▶ Developments in technology and social behaviour
- ▶ Demands for "more effective" and "more balanced" protection – also to take aim at cross-border situations
- ▶ Stimulation production/creativity, and providing reward v. providing dissemination and access
- ▶ Challenges related to the territoriality of copyright



# Comments



- ▶ Increased demand for solutions based on **collective management**?
- ▶ The EU/EEA copyright framework becomes more and more fragmented and is based on territorial/national application. **Do we need a general copyright EU Regulation?**
- ▶ Is there something **fundamentally "unfit"** with the structure of copyright in the digital environment – such as the scope of the exclusive rights combined with a list of exceptions/limitations?
- ▶ Should be go **back to the "drawing table"** and "redraft" the exclusive rights?



# Contact

- ▶ Dr. (LL.D.) Johan Axhamn
- ▶ [johan.axhamn@jus.uio.no](mailto:johan.axhamn@jus.uio.no)
- ▶ [johan.axhamn@juridicum.su.se](mailto:johan.axhamn@juridicum.su.se)
  
- ▶ Related publications
  - ▶ Exceptions, limitations and collective management of rights as vehicles for access to information
  - ▶ Cross-Border Extended Collective Licensing: A solution to Online Dissemination of Europe's Cultural Heritage?
  - ▶ Forthcoming: Upphovsrätten och internet (Norstedts juridik, 2019)