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DIGITAL RIGHT MANAGEMENT SYSTEMS AND COPYRIGHT EXCEPTIONS: A DRAMATIC SHIFT IN THE UNDERLYING PARADIGM OF COPYRIGHT LAW IN THE EUROPEAN UNION

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ABSTRACT

This dissertation critically examines how DRM systems and the European Information Society Directive have re-defined and reversed the scope of copyright protection and its boundaries, which have been historically constructed in a balanced framework by copyright law. Firstly, the dissertation makes an emphasis on the copyright protection and its exceptions, which has been designed by copyright law in a manner conducive to create a balance between the interests of right-holders and those of the public. Secondly, it points out how this balance has been heavily disturbed by the introduction of DRM systems and their legal basis in Europe, which provide over-protection by restricting or even removing copyright exceptions to the detriment of the interests of the public.

Within this framework, the first chapter deals with the philosophical considerations, the scope of copyright protection and the main exceptions to copyrights provided by copyright law. The second chapter analyses the development of DRM systems and the anti-circumvention provisions of the European Union Information Society Directive, and then critically examines how they have adversely affected and restricted copyright exceptions. The dissertation concludes with an overview of the adverse effects of the DRM systems and the Directive on the interests of public, while touching upon rising concerns and warnings from scholars and the international arena. Finally, it suggests that new legislative measures should be devised to restore the balanced spirit of copyright law in Europe.

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ABBREVIATIONS

DRM	Digital Right Management
DRMs	Digital Right Management Systems
ECJ	European Court of Justice
EU	European Union
TPM	Technological Protection Measures
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Decleration on Human Rights
US	United States of America
WCT	WIPO Copyright Treaty
WIPO	United Nations World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty

INTRODUCTION

Since its adoption in 2001, the European Union Information Society Directive[1] has caused a great deal of controversy in literature and the international arena in relation to its anti-circumvention provisions, which provide absolute legal protection for digital right management systems (DRM systems). There are considerable reasons for this controversy. These systems employ several controlling and monitoring techniques, including *inter alia* electronic passwords, encryption, and digital watermaking methods, which enable rightholders to control and prevent unintended or unauthorized access to intellectual works and put limitations on the utilisations of these works. Though the main idea behind the application of DRM systems was to prevent copyright infringements in the digital environment, their application has also blocked all forms of uses of intellectual works, including those falling under the copyright exceptions, and therefore provide absolute power for rightholders on intellectual works. Thus, DRM systems have raised serious concerns about the future of copyright exceptions, of which use does not depend on the permission of rightholders within the balanced framework of copyright law. Besides, these systems have been further protected by the law as the EU Information Society Directive has obliged Member States to strickly prohibit the circumvention of such systems and the trafficking in devices enabling such circumvention.[2] Thus, the historical issue, the balance of

[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 0010 – 0019.

[2] Severine Dusollier, 'The Relations Between Copyright Law and Consumers' Rights from a European Perspective' (European Parliament Directorate General for Internal Affairs, November 2010) , <http://www.europarl.europa.eu/studies> accessed 04 August 2011.

interests between those who own the copyrights and those who would seek to use the works within the scope of copyright exceptions, once again has come under scrutiny.[3]

Traditionally, while copyright law grants exclusive rights for authors, it also defines some exceptions to these rights. Copyright exceptions such as private copying and free uses for education, research, reporting current events and criticism or review are well recognised for public interest considerations such as access to information, stimulating broad dissemination of knowledge and creativity, and freedom of expression. These exceptions have provided a policy instrument for national legislative bodies to shape their copyright law in accordance with their local social conditions and necessities. Thus, copyright law has traditionally played a curicial role as a *melting pot* for the reconcilation of the different claims of rightholders and the society. However, this role has been disturbed since the DRM systems changed the way in which copyrighted works are produced, disseminated and protected.

During the last two decades, digital information systems, and most importantly computer technologies and the Internet, have complately modified and dominated the production, distribution and consumption patterns of copyrighted works.[4] These systems created new channels for users to utilise the works as well as great apportunities for rightholders in the creation and the

[3] Wallace & Watt, 'The Information Society Directive...' 16

[4] Lucie Guibault, 'The Nature and Scope Of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for The Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment' (UNESCO e-Copyright Bulletin, October-December 2003) 1 <http://unesdoc.unesco.org/images/0013/001396/139671e.pdf> accessed 23 May 2011.

communication of their intellectual works to the public. However, along with these developments in the digital environment, rightholders have also faced the fear of losing control over the copied numbers and distribution channels of their works.[5] This fear has resulted in the technologisation of copyright protection.[6]

In the digital environment, copyright holders have sought protection for their works through the sophisticated use of technological protection devices and associated measures,[7] known as DRM systems. As a response to rightholders' steps for technological protection, the users of the intellectual works have applied similar information technologies to circumvent DRM systems. Motives behind the circumvention acts vary. They are applied in order to infringe copyrights or to benefit from intellectual works within the scope of copyright exceptions.

This two-sided struggle in the digital environment resulted in the protection of DRM systems, and these systems gained legal status in the international arena under the guidance of the United Nations World Intellectual Property Organisation (WIPO). Two international agreements came into existence in

[5] Dirk Kuhlmann & Robert A Gehring, 'Trusted Platforms, DRM, and Beyond' in E. Becker et al. (Eds.): *Digital Rights Management* (Springer-Verlag, Heidelberg 2003) 178; Wencke Basler, 'Technological Protection Measures in the United States, the European Union and Germany: How Much Fair Use Do We Need in the "Digital World"?' [2003] 8 VJLT 11.

[6] Lee A. Bygrave, 'The Technologisation of Copyright: Implications for Privacy and Related Interests'[2002] 24 EIPR 51.

[7] Margaret Wallace & James Watt 'The Information Society Directive (UK Implementation): The End of Educational and Research Use of Digital Works?' 16, (BILETA, 19 May 2004) <http://www.bileta.ac.uk/Document%20Library/1/The%20Information%20Society%20Directive%20(UK%20implementation)-20the%20end%20of%20educational%20and%20research%20use%20of%20digital%20works.doc> accessed 05 June 2011.

December 1996: the WIPO Copyright Treaty (WCT)[8] and the WIPO Performances and Phonograms Treaty (WPPT).[9] These Treaties were adopted by WIPO as a response to the technological struggle between rightholders and users, and arrange *inter alia* general rules on the legal protection of DRM systems.

The WIPO Treaties appeared to pursue a balance between the differing interests of copyright holders and the society, and thus designed the thresholds of the legal protection of DRM systems in order to ensure certain exceptions to copyrights for users. However, a problem arose along with the implementation of the WIPO Treaties by the Information Society Directive in the European Union. In fact, the core policy behind the Information Society Directive was a desire to ensure that the pre-existing balance of rights between the rightholders and those of users be maintained at law in a manner appropriate to the digital environment.[10] However, in practice its anti-circumvention provisions have remained in contradiction of this intention. In this respect, the protection of DRM systems have subverted copyright exceptions to an alarming degree and raised serious concerns about the future of copyright exceptions in Member States.[11] Because, as will be discussed later in detail, the Directive requires Member States to provide legal protection not only for the DRM systems that protect copyrights, but also for all those which prevent activities falling within the scope of copyright exceptions not

[8] WIPO Copyright Treaty (WCT), adopted in Geneva 20 December 1996 and entered into force on March 6 2002.
[9] WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on December 20 1996, and entered into force on May 20 2002.
[10] Martina Gillen & Gavin Sutter 'DRMS and Anti-Circumvention: Tipping the Scales of the Copyright Bargain?' [2006] 20 IRLCT 289
[11] Ibid.

permitted by rightholders. In this respect, the Directive introduces new right to control access to a work, which has been created by DRM systems and has never been the subject of copyright law. Thus, it goes further than merely to provide adequate legal protection for DRM systems, and with its new standarts, remains far from the implementation of the WIPO Treaties. Overally, it can be said that the total effect of the anti-circumvention provisions of the Information Society Directive in Europe is the construction of almost-absolute power for the rightholders over the intellectual works and knowledge.

This study critically analyses how DRM systems and the European Union Information Society Directive have together re-defined and reversed the scope of copyright protection and its boundaries, which have been historically constructed in a balanced framework by copyright law. It comprises two main sections. The first section deals with philosophical considerations, the scope of copyright protection and main exceptions to copyrights traditionally provided by copyright law. This section intends to show how and by which instruments the delicate balance between the interests of copyright holders and those of the public has been constructed by copyright law, and puts a particular emphasise on how copyright exceptions are important as user rights for the public interest considerations such as free flow of information, dissemination of knowledge and freedom of expression. The second section concentrates on the development of DRM systems and of the European Union Information Society Directive, and then critically examines how they adversely effect and restrict copyright exceptions. Finally, the dissertation concludes with an overview of

the adverse effects of the DRM systems and the Directive on the interests of the public, while touching upon groving concerns and warnings for the Directive from scholars, case law and the international arena.

CHAPTER 1: THE BALANCED FRAMEWORK OF COPYRIGHT LAW

1.1. Overview

Copyright law has historically arisen on the grounds of reconciling the private interests of copyright holders and the interests of the public in a manner conducive to enable dissemination of knowledge, free flow of information and fredom of expression in the society.[12] While it provides legal protection for the creative efforts of rightholders, it also defines some exceptions to these rights for the public interest. In other words, copyright law on the one hand, promotes the creation of intellectual works by protecting the economic and moral rights of copyright owners, and on the other hand, defines some exceptions to these rights to achieve the social aims such as free flow of information, disemmination of knowledge and freedom of expression as much as possible. Thus, exceptions on copyrights are an integral part of the copyright law.

Along with its all aspects, copyright law has traditionally played a curicial role as a *melting pot* for the reconcilation of the different claims of rightholders and the society. As a result of this balanced framework, copyright law has

[12] Christophe Geiger, 'Copyright and Free Access to Information: For a Fair Balance of Interests in a Globalised World' [2006] 28 EIPR 366; Christoper Geiger, 'The Future of Copyright in Europe: Striking a Fair Balance Between Protection and Access to Information' [2010] 1 IPQ 2; Patricia Akester, 'The New Challenges of Striking the Right Balance Between Copyright Protection and Access to Knowledge, Information and Culture' [2010] 32 E.I.P.R. 372; Julius J. Marke, Richard Sloane & Linda M. Ryan, *Legal Research and Law Library Management* (Law Journal Press, New York, 2005) 23-16.

fundamentally never been the basis of absolute and monopolistic power for copyright holders.

1.2. Theories Behind the Copyright Law and the Balanced Framework

The idea behind the copyright protection and its balanced framework is rooted in certain fundamental theories about creativity and the nature of property as well as its possesion and its protection.[13] It is important to begin by analyzing these underlying theories which construct the theoritical basis for modern copyright law, since they help us to understand the differing philosophical positions of the private interests of rightholders and those of the public. There are mainly four approaches: Utilitarianism; Labor Theory; Personality Theory; and Social Planning Theory.

Utilitarianism, the most popular of the four theory, is attributed to English philosopher Jeremy Bentham (1748-1832) who introduced the theory of moral philosophy. The main idea of utilitarianism is that the moral value of an act is determined by its total outcome for all interested beings, and an action is morally valuable if it achieves maximum pleasure for the maximum number. In the context of intellectual property, the main point of the utilitarian approach is that maximization of the well being of the whole society should be a guide line when shaping private property rights.[14] In the utilitarian framework, intellectual property rights are usually depicted as a form of

[13] William P. Cornish, *Copyright: Interpreting the Law for Limbaries, Archives and Information Services,* (2nd edn. Library Assosiation Publishing, London, 1997) 15.
[14] William Fisher, 'Theories of Intellectual Property' in Stephen Munzer, (ed) *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, Cambridge, 2001) 168.

instrument constructed through social contrats to serve social aims.[15] In this context, the *rights* component of the concept of intellectual property rights is merely rhetorical, and it is useful only if it is functional in achieving social welfare rather than a manifestation of actual rights.[16] Thus, it is generally thought that on the pursuit of social benefits, law makers should 'strike an optimal balance between on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and on the other, the partially offsetting tendency of such rights to curtail widespread the public enjoyment of those creations.'[17]

The second theory was originated in the writings of the English philosopher John Locke (1632-1704). The labour theory submits that a person who applies his mental and physical labour upon raw materials that are either unowned or held in common has a natural property right to the fruits of his or her efforts, and that the right has to be respected and enforced by the state.[18] In other words, it is stated that the fruits of a person's mental and physical labour belongs to him or her; natural property rights on the fruits of applied labor precede the society and state, and they can not be disposed of arbitrarily. The labour theory is "widely thought to be ... applicable to the field of intellectual property, where the pertinent raw materials (facts and concepts) do seem in some sense to be 'held in common' and where labor seems to contribute so

[15] Vu Nguyen, 'Incomplete Rationales For Intellectual Property Ownership and a Social-Relations Perspective' (SCRIPD, April 2010) 2 <http://www.scribd.com/doc/34779018/3/THE-UTILITARIAN-THEORY-OF-INTELLECTUAL-PROPERTY> accessed 20 May 2011.
[16] Ibid.
[17] Fisher, 'Theories of Intellectual Property' 168.
[18] Ibid. 171.

importantly to the value of finished products."[19] On this ground, it is argued that authors are able, or have a will, to invest their labours in creating new works, only if their property rights are secured and they are remunerated as a result of their efforts.

The grounds of the third theory, namely personality theory, are attributed to the thoughts of Immanuel Kant (1704-1824) and Friedric Hegel (1770-1831. According to Kant and Hegel, a person materialises his/her 'wills' through the possession of something external, and thus property is an embodiment of human personality and freedom.[20] Private property rights are the internal components of personality and reflect fundamental human needs. From this standpoint, in the context of intellectual property rights, it is generally thought that if one's expression of ideas and facts are synonymous with one's personality, then they deserve to be protected, since personality and property as the expression of human *wills* constitute an indivisible whole.[21]

The last theory arises from the eclectic combination of the thoughts of Karl Marx, Thomas Jefferson, the Legal Realists, and the various proponents (ancient and modern) of classical republicanism.[22] Fisher states the main essence of social planning theory as follows: "[P]roperty rights in general -and intellectual-property rights in particular- can and should be shaped so as to

[19] Ibid.
[20] David A. Duquette, 'Hegel's Social and Political Thought' (IEP, 20 September 2001) <http://www.iep.utm.edu/hegelsoc/> accessed 20 May 2011.
[21] Garima Gupta and Avih Rastogi, 'Intellectual Property Rights: Theory & Indian Practice' (CCSINDIA Working Paper Series, Summer 2002) 3 <ttp://www.ccsindia.org/ccsindia/policy/rule/articles/IPR_India.PDF> accessed 20 May 2011.
[22] Fisher, 'Theories of Intellectual Property' 174.

help foster the achievement of a just and attractive culture"[23] While this theory appears similar to the utilitarian theory in relation to its teleological orientation, it differentiates while it deploys "visions of a desirable society richer than the conceptions of 'social welfare' deployed by utilitarians."[24]

To sum up, while the spirits of labour theory and personality theory are mostly seen in the codification of the economic and moral rights of authors and other interested parties, the presence of the utilatirian and social planning theories are heavily felt in the designation of exceptions to copyrights. Thus, copyright law has traditionally arisen on the eclectic cluster of these four theories and does not exclude one of them, while it has designed the protected subject matter, rights and exceptions to these rights. The main rational behind the combination of these theories appears to create a proper balance between the individual claims of rightholders and the interests of the public.

1.3. Protected Subject Matter and Recognised Rights

Copyright law covers the original form of the expressions of ideas resulted from a wide range of human creativity. It protects literary, artistic, dramatic and musical works and derivative works such as films, sound recordings and broadcasts for certain periods.

There are slight variations in the composition of granted rights depending on the work. Copyright law mainly provides economic rights for rightholders to

[23] Ibid.
[24] Ibid.

control the exploitation of their works in a number of ways such as by making copies or selling copies to the public, performing in the public, broadcasting, or granting permission to others to do these acts. Copyright law also acknowledges the moral rights of authors such as the right to be recognised as the author or the director of a work and the right to object to a derogatory treatment of the work.

However, the copyright protection is limited in its lifespan. After a certain period of time provided for the protection has elapsed, the authors or rightholders loose their exclusive rights on the works. According to the Berne Convention[25], copyright in literary works lasts for 50 years from the end of calendar year in which the author dies.[26] This is the minimum standart set by the Berne Convention. The choosen protection term is 70 years from the death of the author both in Europe since 1993[27] and in USA since 1998.[28] Once the protection term has expired, copyrighted works falls into the public domain and become common and free as air to be used by the public.

1.4. Exceptions to Copyrights

1.4.1. Overview

[25] The Berne Convention for the Protection of Literary and Artistic Works, first international agreement for regulating copyrights, accepted in Berne, Switzerland in 1886.
[26] Article 7.1 of the Bern Convention.
[27] Article 1.1 of the Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights. Article 1.1 of the Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.
[28] Section 102.b of US Copyright Term Extension Act of 1998

Since its inception, copyright law has acted as an instrument which reconciles the differing claims of rightholders and the society in general.[29] While it provides legal protection for the interests of rightholders, it also defines some exceptions to these rights in order to create an appropriate balance between the private interests of rightholders and those of the public. As a result of this balanced framework, the public can freely use protected works in certain specific conditions without the permission of rightholders or even without paying compensation to them.[30] In such an environment where there is no balanced approach, the excessive protection of copyrights may unduly limit access to the knowledge and information, dissemination of knowlege, freedom of expression and the "ability of the public domain to incorporate and embellish creative processs in the long-term interests of society as a whole."[31]

The aim behind the recognasition of copyright exceptions is fully attainable in an environment where copyrighted works are accessible to the public and where there are no barriers to disseminaion of knowledge.[32] Thus, in order to create such an environment, copyright law does not fundamentally provide absolute and monopolistic rights for copyright holders. "Even the countries most committed to the advancement of author's rights recognise the need for exceptions upon these rights in particular circumstances."[33]

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[29] Geiger, 'The Future of Copyright in Europe...' 2.
[30] Akester, 'The New Challenges of Striking the Right Balance...' 373.
[31] Ian R. Kerr, Alana Maurushat and Christian S. Tacit, 'Technical Protection Measures: Tilting At Copyright's Windmill' [2002-2003] 34 OLR 40.
[32] Robert A. Kreiss, 'Accessibility and Commercialization in Copyright Theory' [1995] 43 UCLALR 1
[33] Guibault, 'The Nature and Scope of Limitations and Exceptions...' 2.

The following pages contain an overview of the exceptions as user rights which were adopted as a safeguard for the free flow of information, the dissemination of knowledge and the freedom of expression, with a particular focus on the rights to make reproductions for the purposes of private use, criticism or review, education, reporting current events, uses for libraries, archives, handicapped persons and administrative, parliamentary or judicial proceedings.

1.4.2. Defining Copyright Exceptions as User Rights

Copyright law provides free access for the public to intellectual works even in the protection periods of copyrighted works in certain conditions. The Berne Convention recognises the exceptions to copyrights and allows member states to limit authors' rights in certain circumstances.[34] Contracting parties are free to impose whatever restrictions they wish on copyrights, or even to deny protection altogether.[35] Along with this recognisation, national laws on copyrights contain a mixture of exceptions on the protection. Though the content of this mixture chances from country to country according to national needs, it contains main exceptions in connection to non-commercial research and private study, quotation for criticism or review, education, reporting current events, use of works in libraries and archives, use for disabled people

[34] Articles 9(2), 10 and 10bis of the Bern Convention. Except Articles 9(2), TRIPs does not provide special regulation for copyright exceptions but by its Article 9(1) refers to the Berne Convention. Exceptions to related rights such as the rights of performers, producers and broadcasting organisations take place in the aticle Article 15 of Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961.

[35] Sam Ricketson, 'Wipo Study On Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (Wipo, 5 April 2003) 20 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.doc> Accessed 23 May 2011.

and for the purposes of administrative, parliamentary or judicial proceedings.[36] These exceptions allow copyrighted works to be used without obtaining the rightholders' approval to do so. Exceptional uses are lawful even where the permission of rightholders has been sought and denied.[37]

All these exceptions are based on the public interest considerations and accommodated by several international conventions[38] and national laws as to the copyrights. By means of these exceptions, copyright law has traditionally maintained a balance between protecting authors' rights and preserving the interests of the public which mainly include such fundamental imperatives as free flow of information, dissemination of knowledge and freedom of expression.[39] For example, the preamble of WIPO Copyright Treaty of 1996 emphasises on "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information." Similarly Article 7 of the TRIPs Agreement[40] states that "[t]he protection and enforcement of intellectual property rights should contribute to

[36] "Exceptions most frequently recognized in domestic laws related to the following methods of use: (1) public speeches, (2) quotations, (3) school books and chrestomathies, (4) newspaper Articles, (5) reporting of current events, (6) ephemeral recording, (7) private use, (8) reproduction by photocopying in libraries, (9) reproduction in special characters for use by the blind, (10) sound recording of works for the blind, (11) texts of songs, (12) sculptures on permanent display in public places, (13) use of artistic works in film and television as background, and (14) reproduction in interests of public safety. To this list might be added reproductions for judicial and administrative purposes, for example, in the course of court proceedings" Ricketson, 'Wipo Study On Limitations and Exceptions…' 20 at foodnote 47.

[37] Timothy K. Armstrong, 'Digital Right Management and the Process of Fair Use' [2006] 20 HJLT 57.

[38] Article 2, 2bis, 10 and 10bis of the Bern Convention, Article 15 of Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961. Except Articles 9(2), TRIPs does not provide special regulation for copyright exceptions but by its Article 9(1) refers to the Berne Convention.

[39] Myra J. Tawfik, ' International Copyright Law And Fair Dealing As A User Right' (UNESCO e-Copyright Bulletin, April-June 2005) 7 <http://unesdoc.unesco.org/images/0014/001400/140025e.pdf> accessed 23 May 2011.

[40] Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994 (TRIPs). TRIPs was administered by the World Trade Organization (WTO) and negotiated and accepted at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994.

the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Furthermore, Article 8 of the same Agreement allows member states to take measures necessary "to promote the public interest in sectors of vital importance to their socio-economic and technological development"[41] and those necessary "to prevent the abuse of intellectual property rights by rightholders."[42] In conformity with these provisions, the copyrights must be constructed in a manner that they realize and contribute to the interests of the public.

Within this framework, there is no consensus on whether the exceptions to copyrights are user rights or not. While some argue that the rights in creative works only belong to authors who sacrifice their intellectual efforts on creations, and thus exceptions to copyrights can or should only be defences in copyright infringement cases, others argue that the exceptions to copyrights are fundamental user rights and human rights such as the freedom of expression and the access to knowledge and culture. The latter argument has a substantial basis when the balanced approach of the conventions mentioned above and that of Universal Decleration on Human Rights of 1948 (UDHR) are taken into consideration. This admittance is also supported by several approaches in case law.

[41] Article 8.(1) of TRIPs Agreement.
[42] Article 8.(2) of TRIPs Agreement.

The UDHR recognises and guarantees the balance between the private claims of copyrights holders and the interests of the public. Article 27 of the Decleration reads that: "1) 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. 2) 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." In this framework, UDHR recognises both author's interests on his/her creative works and users' interests on access to knowledge and culture as basic human rights.

In several copyright infringement cases, the exceptions are defined in the same perspective by the courts including Supreme Court of Canada in Case *CCH Canadian Ltd. v. Law Society of Upper Canada*[43] which strongly affirmed the exceptions as users rights:

> "The fair dealing[44] exception, like other exceptions...is a user s right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."[45]

Though there are also other court decisions[46] contrary to above mentioned recognasiton, it appears that defininig exceptions as user rights is consistent

[43] [2004] SCC 13.
[44] Fair dealing an umbrealla concept which covers free uses of copyrighted works for non-commercial research and private study, quotation for criticism or review, education and reporting current events. Sections 29 and 30 of UK Copyright Patent And Design Act of 1988 (CPDA) permits fair dealing for research or private study, critisizm or review and reporting current events.
[45] *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] SCC 13. (Footnote added).
[46] For example, in Belgium, in Case, *L'ASBL Association Belge des Consomateurs Test Achats* in which a record company was sued for restricting the users' ability to make private copies of CDs by applying DRM systems on those CDs, the Court held that private copying is not a user

with the balanced approach which mediates the differing interests of copyright owners and the society.

1.4.3. Private Copy Exception

The private copy exception is one of the first recognised copyright exceptions by copyright law, which is directly dealing with users' interests.[47] It allows users to freely use copyrighted works without the consent or the permission of the rightholders when such use is strictly made for non-commercial personal purposes.[48] Especially, its importance has grown with the development of digital technologies and the users are more aware of the possibility to make private copies by using digital reproduction technologies.[49] In the digital environment, the users have a broad apportunities to utilise the copyrighted works in different places and at different times, on their computers, phones, MP3 players and car radios.[50] Thus, it is considered to be one of the user rights which can not be deprived of.

Most national laws spesifically recognise this copyright exception. The UK Intellectual Propert Office (IPO) defines the following activities as those remaining within the scope of this exception:

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right but merely an exception to the copyrights, and only grants an immunity to users, but this does not give the consumer the right to demand from the copyright holders that a private copy always technically can be made. *L'ASBL Association Belge des Consomateurs Test Achats*, Tribunal of First Instance of Brussels, 2004/46/A, April 27, 2004; Brussels Court of Appeal, September 9, 2005, case 2004/AR/1649.

[47] Severine Dusollier, 'The Relations Between Copyright Law and Consumers' Rights...' 17, <http://www.europarl.europa.eu/studies> accessed 04 August 2011.

[48] Ibid.

[49] Ibid.

[50] Ibid.

> "[1] "Fair dealing" with a literary, dramatic, musical or artistic work for the purposes of private study. This may cover the making of a single copy of a short extract of a work or other very limited use of a work, so long as it falls within the scope of the term[s] [non-commercial research or] "private study". This includes study purely for personal enjoyment. [2] A recording of a broadcast can be made in domestic premises for private and domestic use to enable it to be viewed or listened to at a more convenient time...[3] Drawing, taking a photograph or making a film of buildings or sculptures and works of artistic craftsmanship in a public place or in premises open to the public. [4] Making a necessary back up copy of a computer program where you are a lawful user."[51]

Several court decisions recognise the importance of private copy exception and confirm that these uses do not infringe copyrights. For examble, in Case *Sony Corp. of America v. Universal City Studios Inc.*[52], known as the "Sony Betamax Case", the Court held that:

> "[there must be] a balance between a copyright holder's legitimate demand for effective - not merely symbolic - protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce ... When one considers the nature of a televised copyrighted audiovisual work ... and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact ... that the entire work is reproduced ... does not have its ordinary effect of militating against a finding of fair use."[53]

This decision clearly recognises that the private copying for non commercial personal uses are lawful and a user right. Likewise, in Case *Padawan v.*

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[51] IPO, 'What are the Private Use Exceptions?' (IPO, 14 January 2009) <http://www.ipo.gov.uk/types/copy/c-other/c-other-faq/c-other-faq-excep/c-other-faq-excep-priv.htm> accessed 20 May 2011.
[52] [1984] 464 U.S. 417.
[53] Ibid.

SGAE,[54] the European Court of Justice's line of reasoning in its decision implicitly affirms private copying as a user right.[55]-[56] Such recognition has significant practical implications. As Karapapa explains, this recognation means that end-users' ability to make private copies is not in the discretion of the rightholders to inhibit or restrict either technologically or contractually.[57] Moreover, it also signifies that "end-users are actually in capacity of invoking this "right" as legal basis of substantiating claims against potential restrictions in their ability to make private copies and not just as an affirmative defence against allegations of copyright infringement."[58]

1.4.4. Quotation for Criticism or Review

Generally the term "quotation" can be defined as "the taking of some part of a greater whole -a group of words from a text or a speech, a musical passage or visual image taken from a piece of music or a work of art- where the taking is done by someone other than the originator of the work."[59] It has long been recognised in copyright law that making of quotations from copyrighted works is lawful as an exception to copyright protection. Article 10(1) of Berne Convention regulates it "as a mandatory requirement to which each

[54] Padawan SL v. Sociedad General de Autores y Editores de Espana (SGAE) (C-467/08) [2011] E.C.D.R. 1 (ECJ (3rd Chamber)
[55] Stavroula Karapapa, '*Padawan v. SGAE*: A Right to Private Copy?' [2011] 33 EIPR 252.
[56] "The ECJ did not make such express declaration in *Padawan* but clearly opened the road to this line of thinking. This is because it has not settled directly the relationship between authors and users but that of users and the manufacturers and distributors of media and equipment by holding that natural persons are rightly presumed to *use media and equipment* to make private copies." Ibid, 258.
[57] Ibid, 252.
[58] Ibid.
[59] Ricketson, 'WIPO Study on Limitations and Exceptions...' 12.

[contracting states] must give effect in relation to works claiming protection under the Convention."[60] It states as follows:

> "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries."

As seen from the wording of Article, there are no limitations on the forms of work that may be quated. In this scope, quotations may fairly be done for making a criticism or review both while writing a book or an article, or creating a visual work of art. This exception is also benefited within the course of a lecture, performance or broadcast.[61]

Since the exception provides necessary tools for interested parties to express their opinions about other views and expressions in copyrighted works, like any other exceptions, it can be also seen one of the necessary components of the basic human right of the freedom of expression which are well established in Article 19 of the UDHR as follows:

> "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."

[60] Ibid, 11.
[61] Ibid, 12.

1.4.5. Exception for Educational Purposes

From the point of view of copyright law, primary objective of this exception for educational institutions is to disseminate existing knowledge in the society.[62] Since the inception of the Berne Convention in 1886, it has always been agreed that using copyrighted works for educational or teaching purposes is lawful in both elementary, secondary and higher education institutions which may be private or public, as well as in distance teaching.[63] Article 10(2) of the Convention provides as follows:

> "It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided that such utilization is compatible with fair practice."

There are no quantitative limitations in the provision, but only the general qualification that the utilisation of works should be "to the extent justified by the purpose, ... by way of illustration ... for teaching, provided that such utilization is compatible with fair practice."[64] The provision is made more open-ended by these references to purpose and fair practice, which implies no necessary quantitative limitations.[65] In this framework, all literary, dramatic, musical and artistic works can be copied or reproduced partly or as a whole by

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[62] Guibault, 'The Nature and Scope of Limitations and Exceptions...' 2.
[63] Raquel Xalabarder, 'Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe Caucasus, Central Asia and Israel' (Wipo, 5 November 2009) 14 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_8.doc> Accessed 23 May 2011.
[64] Ricketson, 'Wipo Study on Limitations and Exceptions...' 15.
[65] Ibid.

educators and students for educational purposes so long as the utilisation is compatible with fair practice in any environment, no matter the teaching establishment is a public or private.

In Case *Sony Corp. of America v. Universal City Studios Inc.*[66] the Court held that non-commercial or non-profit character of an activity makes the use of copyrighted works presumptively fair.[67] The "[e]ducational uses of copyrighted works, even entire works, are presumptively fair, unless the plaintiff can sustain the burden of proving that the potential for substantial harm exists."[68]

It is an indisputable fact that copyrighted works contributes to the existing stock of knowledge of the society, and thus plays an important role in education, access to knowledge, the creation of future works and the dissemination of knowledge. Kasunic clearly explains the public interest in free educational uses of copyrighted works as follows:

> "Given the fundamental goals of copyright, educational uses of copyrighted material serve an important public function. Educational photocopying disseminates otherwise-unavailable information to students and scholars. It encourages the creation of new works and facilitates the development of existing information. Without substantial harm to the copyright owner, educational photocopying promotes the progress of knowledge and the public interest ... While educational photocopying certainly results in some loss to authors and publishers, this loss must be weighed

[66] [1984] 464 U S 417.
[67] Robert Kasunic, 'Fair Use and the Educator's Right to Photocopy Copyrighted Material For Classroom Use' (Kasunic, 8 January 2008) <http://www.kasunic.com/article1.htm#article#article> accessed 24 May 2011.
[68] Ibid.

against the loss to students and the educational system if professors did not use works ... In short, neither the public nor the copyright owner gains from the non-use of copyrighted works."[69]

1.4.6. Exception for Reporting Current Events

The exception for reporting current events and informing the public, which is set forth by Article 2*bis*(2)[70] 10*bis*(1)[71] and 10*bis*(2)[72] of the Berne Conveniton, takes place among the traditional exceptions to copyrights.

This exception provides facilities for press in reporting current events and informing the public to use "lectures, addresses and other works of the same nature" orally delivered in the public and "articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character" as long as sufficient acknowledgment is made.[73] Moreover, the incidental uses of works in the reporting of current events "by

[69] Ibid.
[70] Article 2*bis*(2) of the Bern Convention reads as follows: "It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11*bis*(1) of this Convention, when such use is justified by the informatory purpose."
[71] Article 10*bis*(1) of the Bern Convention states that "It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of Articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed."
[72] Article 10*bis*(2) of the Bern Conveniton "It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public."
[73] See supra notes *70* and *71*.

means of photography, cinematography, broadcasting or communication to the public" remain within the scope of the same exception.[74]

Main justification behind this exception is to expedite the free flow of information on current events and to enable the freedom of expression.[75] In Case *Newspaper Licensing Agency Limited v Marks & Spencer Plc.*[76] Lightman J pointed out that this exception aims to achieve "a *proper* balance between [the] protection of the rights of a creative author and the wider public interest (of which free speech is a very important ingredient)" and it has "wide and indefinite scope and should be interpreted liberally."

1.4.7. Exception for Libraries and Archives

Libraries and archives enable the public to easily access to knowledge and appear important ingredients of the preservation and dissemination of knowledge. "Either through catalogues, (electronic) databases, compilations of press articles, and other sources, libraries make current social and cultural information available to the public on a non-profit basis. ... With the digitisation of works, several of the libraries' and archives' main activities have given rise to an intensification of use of works by the public, either off- or on-line, on the premises or at a distance."[77] In this sense, the exception to copyrights for libraries and archieves plays an important role. The Berne Convention does not contain spesific exceptions for libraries and archives. But

[74] See supra note *72*.
[75] Ricketson, 'Wipo Study on Limitations and Exceptions...' 17.
[76] [1999] RPC 545.
[77] Guibault, 'The Nature and Scope of Limitations and Exceptions...' 21.

it provides flexibilities in enacting of exceptions by member states for the public interest considerations.[78] While some national laws[79] explicitly contain this exception, others implicitly construct it on the exception for educational purposes.

This exception generally covers the non-commercial reproduction of copyrighted works in certain conditions in the libraries, archives or other similar institutions open to the public "for purposes such as private research and study, preservation and replacement of materials, and document supply and interlibrary lending."[80] This exception not only play an important role in facilitating the services of libraries and archives, but also enables citizens to have continuing access to the rich variety of intellectual works held in these institutions.[81] Thus, its role does more than simply regulating library activities.[82] Crews points out this role further as follows:

"The specific terms of the library exceptions ... are a reflection of cultural, historical, and economic objectives. Sometimes those objectives are in conflict with one another. The statutes are therefore often a compromise among competing interests, typically permitting

[78] Article 9(2) of the Convention: "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."
[79] For examble, Section 108 of US Copyright Act of 1976; Sections 37-44A of UK Copyright Patent and Design Act of 1988; Sections 48-53 of Australian Copyright Act of 1968; Section 57(p) of the Copyright Ordinance (1965) of Pakistan; and Section 21 of Ghanaian Copyright Act of 2005.
[80] Kenneth Crews, 'Study on Coypright Limitations and Exceptions for Libraries and Archives' (WIPO 26 August 2008) 7 <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.doc#_Toc208637890> accessed 27 May 2011.
[81] Ibid.
[82] Ibid.

libraries to make certain uses of copyrighted works, while setting limits and conditions to protect the interests of copyright owners, publishers, and other rightsholders."[83]

1.4.8. Exception for the Purposes of Administrative, Parliamentary or Judicial Proceedings

Since the flexibility to enact any exceptions to copyright in certain condition is provided by the Berne Convention for member states, most of national laws have introduced this kind of copyright exception. [84] This exception allows reproducing of copyrighted works or anything done for the purpose of administrative, parliamentary or judicial proceedings or for the purpose of reporting such proocedings. It goes without saying that it is in the interests of the public to provide this exceptions for state departments in order to provide the public services as efficient as possible.

1.4.9. Exception for Orally and Visually Impaired Persons

Among the exceptions in copyright law which aim at encouraging the dissemination of knowledge and information among the members of the society, is the exception adopted for the benefit of orally and visually impaired persons.[85] Generally, in the scope of this exception, orally and visually impaired persons "can make for themselves, or be provided with, an 'accessible copy' of a literary, dramatic, artistic or musical work [without the

[83] Ibid.
[84] For examble, Section 45-50 of UK Copyright Patent and Design Act of 1988; Article 30 of Turkish Copyright Law of 1951, Sections 43 of Australian Copyright Act of 1968; Article 42(1) of Japan Copyright Law of 2003; Section 57(c) of Ghanaian Copyright Act of 2005.
[85] Guibault, 'The Nature and Scope of Limitations and Exceptions...' 17.

permisson of rightholders], providing that no such accessible copy is already available in the format required."[86] As a result of the negation of their disabilities, orally and visually impaired persons are generally distance learners. Thus, the exception is of vital importance to access to information and use copyrighted works for them.

Though the Berne Convention does not contain a spesific provision about this exception, its general provision[87] gives filexibilities to member states to arrange it. Moreover, "[t]he rights of disabled persons are enshrined in the UDHR and the United Nations Standard Rules on the Equalization of Opportunity for Disabled People."[88] Thus, all these international conventions legalise an exception to copyrights to secure the right to access to knowledge for visually and orally disabled people, and guide contracting states to take action in this direction.[89] Within this framework, most national laws contain spesific regulations which guarantee the exception to copyrights for the benefit of these persons.[90]

1.5. Overall Assesment

As substantially discussed above, copyright law aims on the one hand, to

[86]University of Birmingham, 'Visually Impaired Persons and Copyright' (Bham, 2011) <http://www.library.bham.ac.uk/support/copyright/VisuallyImpairedPersons.shtml> accessed 27 May 2011.
[87] See supra note 78.
[88] Denise R. Nicholson, 'Copyright - Are people with sensory-disabilities getting a fair deal?' (UWI, 23 August 2006) <http://pcf4.dec.uwi.edu/viewabstract.php?id=379> accessed 27 May 2011.
[89] Ibid.
[90] For examble, Section 121 of US Copyright Act of 1976; Section 32 of Canadian Copyright Act of 1997; Sections 31A-31F of UK Copyright Patent and Design Act of 1988; Sections 135ZN-135ZT of Australian Copyright Act of 1968; Article 33bis of Japan Copyright Law of 2003; Article 34 of Nicaraguan Copyright Law of 1999;

promote the creation of new intellectual works by protecting economic and moral rights of copyright owners, and on the other hand, to enable the free flow of information, the dissemination of knowledge and the freedom of expression as much as possible by defining some exceptions to these rights. In this sense, copyright law has historically avoided creating under-protection and over-protection to the rights in order to construct a proper balance between the differing interests of rightholders and the society.

Moreover, while creating a balanced framework, two general aims of copyright law have coincided with each other, and thus the one has appeared to be indispensable for the other. In other words, while the promotion of the creation of new intellectual works by copyright protection further dissiminates knowledge in the society, the dissimination of knowledge results in the creation of future works by enabling others to access to the copyrighted works, and consequentally to build new works upon the existing ones. In this manner, the functions of both copyright protection and exceptions to copyrights constitute an indivisible whole. In this point, the access to existing copyrighted works, which is inherently enabled by means of the copyright exceptions, plays a central role in achieving the social goals of copyright law. As a result of this fact, copyright law has historically never restricted the access to copyrighted works.

However, this fact has been reversed since the technological developments changed the way in which copyrighted works produced, disseminated, exploited and protected in the digital environment. In other words, especially

during the last three decades, digital information systems, most importantly computer technologies and the Internet have dominated the structure, distribution and dissemination of knowledge. While technological developments significantly changed the production, dissemination, exploitation and storing routes of intellectual works and provided increased ability to easily access to intellectual works, they also created highly incresased infringing acitivities. Copyright holders have responded these infringing activities in the digital environment by applying DRM systems which are so called as "technological self-help."[91]

Rightholders who apply the DRM systems claim that rapid changes in information technologies in the digital environment make traditional copyright law not sufficient for enforcing their rights.[92] Schneider and Henten explains this point of view in more detail as follows:

> "In particular, it is stated that in circumstances characterized by rapid changes, reliance on the law alone will not lead to a desired outcome ... For instance, it is argued that lengthy court trials are not effective means to address the mass copyright infringements in the form of illegal reproduction and distribution of copyright protected content over P2P networks on an individual basis. [DRM systems], on the other hand, are in principle fast and effective. Hence, the use of technology as a tool to enforce license conditions is logical. From a practical perspective, copyright holders themselves will have ... [DRM systems] which are useful in effectively

[91] Brian W. Esler, 'Technological Self-Help: Its Status Under European Law and Implications for U.K. Law' (BILETA, 5-6 April 2002) <http://www.bileta.ac.uk/Document%20Library/1/Technological%20Self-Help%20-%20Its%20Status%20under%20European%20Law%20and%20Implications%20for%20U.K.%20Law.pdf> accessed 20 May 2011.

[92] Markus Schneider & Anders Henten 'DRMS, TCP and the EUCD: Technology and Law' [2005] 22 JTI 29-30.

> enforcing license conditions. ... the law (enforcement) cannot sufficiently guarantee that rights are respected by the other party in the Internet environment."[93]

Despite the above argument, the traditional copyright protection and its balanced framework are still necessary. Because, though the main idea behind the application of DRM systems is to prevent the copyright infringement in fast and effective ways in the digital environment, these systems, by their very nature, have not recognised copyright exceptions and prevent them to be freely benefited from. Thus, as will be discussed in detail, these systems have deeply affected pre-existing balance between the individual interests of copyright holders and those of the public which have been struck by the nature of copyright law. These issues and arising legal concerns on the technologisation of copyrights constitute the subject matters of the following chapter.

[93] Ibid, 30-31.

CHAPTER 2: DIGITAL RIGHT MANAGEMENT SYSTEMS AND THE LEGAL FRAMEWORK: THE PROBLEMATIC IMPLEMANTATION OF THE WIPO TREATIES IN THE EUROPEAN UNION

2.1. DRM Systems and the Legal Framework

The advance in information technologies have dramatically revolutionised the way in which the production, dissemination, storing and using mechanisms of knowledge take place. These technologies such as computer technologies, digital content readers, players, recorders and conventers, electronic communication and file/content sharing networks (Internet, Web 1.0 and Web 2.0 technologies) have upgraded the speed of these activities. They have also facilitated the dublication and the dissemination of digital contents such as text, pictures, music, and movies "without [any] loss of quality and transmitted to a large number of recipients around the world at costs close to zero."[94] All these developments have enabled the public to access to knowledge and cultural products, in efficient and speedy ways. As a natural consequence, this environment provided many apportunities such as at large rapid, inexpensive and the global production and the dissemination of knowledge for content holders, users, businesses and the public in general."[95]

[94] Urs Gasser, 'Legal Frameworks and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model', 2 (Harward Berkman Center For Internet&Security, June 2006) 4 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908998 > accessed 30 May 2011.
[95] Ibid.

Compared with the analogue technologies of the past, developments of digital information technologies have created more efficient ways of the dissemination of knowledge and contributed more and more to the ability of the public to access to knowledge.[96] The rapid evaluation of digital technologies have facilated the uses of intellectual works which remains within the scope of copyright exceptions.

On the other hand, these tehnologies have also facilitated and increased the infringing uses of copyrighted works at a great dimension. On the side of copyright holders, it has become more and more difficult to monitor their works and to enforce the decision of whether or not to divulge them.[97] Accordingly, it can be said that development of information technologies has also created an environment where the holders of intellectual works have almost lost control over the copied numbers and the distribution channels of their works.[98] Akester explains these facts as follows:

> "This is because works can easily be placed on the internet without the authors' agreement, thus violating their right of divulgation. Even if the work is disseminated with the author's agreement, the work may be manipulated, with or without his authorisation, and the manipulated version may be made available to the public on the internet. Digital alteration can jeopardise the integrity of the work, easily amounting to a distortion or other modification of a work, which may endanger the author's legitimate interests in the work, his honour or his reputation. Economic

[96] Kuhlmann & Gehring, 'Trusted Platforms, DRM, and Beyond' 178.
[97] Akester, 'The New Challenges of Striking the Right Balance...' 373.
[98] Kuhlmann & Gehring, 'Trusted Platforms, DRM, and Beyond' 178.

rights too are at risk, as works may be reproduced, communicated, adapted and distributed, illegally."[99]

As a reponse to increasing infringing activities in the digital environment, copyright holders have correspondingly sought the solution in digital technologies for controlling the copying, distribution, dissemination and use of, and access to, their works.[100] However, the intense application of these measures to intellectual works have brought about a problematic situation in which the lawful use of copyrighted works and the right of access to knowledge have been restricted at a very large scale. In other words, as will be discussed in detail below, the application of these measures, without any reliance upon any copyright regime, has broaden the protection covering the activities such as copyright exceptions which have never been the subject of traditional copyright law. The total effects of these measures are the construction of almost-absolute power for copyright owners over the contents of their works and the derogation of the social "ideals recognised by both national and international copyright instruments."[101]

In their simplest form, technological protection measures under the umbrealla of DRM systems are the technological systems applied by rightholders to regulate the access to digitalised works and various uses of such works by third parties including playing, copying, distributing and storing. Main functions of the application of these systems are to regulate the access and

[99] Akester, 'The New Challenges of Striking the Right Balance...' 373.
[100] Gasser, 'Legal Frameworks and Technological Protection of Digital Content...' 2.
[101] Hugenholtz & Okediji, 'Conceiving An International Instrument...' 8.

terms of the use of intellectual works, and to prevent the unauthorised access and the uses of the works in the digital environment.[102]

DRM systems employ several controlling and monitoring techniques including *inter alia* electronic passwords, encryption, and digital watermaking methods. These measures are usually applied in a mixed combination. While passwords and encryption techniques are commonly applied in order to control and prevent unintended or unauthorized users from accessing to the works, on the other hand, digital watermaking techniques are most commonly used for the regulation of the uses of works, once they are accessed by authorised users. These measures have created such an inveronment in which for example a digital book or an article can not be accessed without the identification codes or passwords; a music CD can not be copied several times, stored or played in different devices or played in the CDROM drives of personal computers; audio music formats can not be converted into mp3 formats; a film and music CD, DVD or digital files can only be playable in defined durations, devices or regions and can not be played wherever and whenever wanted, as a result of defined limitations and restrictions. All in all, these measures are designed to prevent any access, copying or use not permitted by rightholders, and "ensure that access to the material 'expires' after a certain period of time, or restrict the number of uses or even the number of hard drives to which it can be transferred [or played]."[103]

[102] Kerr, Maurushat & Tacit, 'Technical Protection Measures...' 13.
[103] Catherine Stromdale, 'The Problems with DRM' [2007] 17 ELR 2.

However, the struggle between copyright holders and users did not reach an end by the application of DRM systems in the digital environment. As a reponse to rightholders' steps on applying DRM systems, technological devices have been created to circumvent these measures by end-users. As cited by Kerr, Maurushat and Tacit, there are several examples of circumvention technologies which are commonly applied for removing the DRM systems embedded in intellectual works, such as "posting passwords and registration", "intercepting decrypted content", "brute force decryption", "stealing the key during transmission", "hacking closed systems" and "pirated plug-ins."[104] Here, it is important to mention which reasons motivate the users for circumvention. Kerr, Maurushat and Tacit explains these reasons as follows:

> "Although sometimes motivated by "infringement" and the desire to illegally disseminate copyrighted digital works, there are also legitimate reasons for circumvention. Circumvention has often been motivated by: the aim of achieving system interoperability; the desire to test the robustness of a [DRM system] and thereby improve the state of the art; the desire to satisfy intellectual curiosity; other purely academic purposes; and the aim of advancing the science of cryptography. Some people also claim to be motivated to circumvent [DRM systems] for the sake of justice, especially when they perceive that [DRM systems] prevent them from

[104] "*Posting passwords and registration numbers*: The posting of such information allows others who have not purchased access rights to use pirated versions of software or to gain unauthorized access to a network or other system containing copy-righted works. *Intercepting decrypted content:* This method involves using software that captures the program as it is decrypted and before it interacts with the software used for viewing or playing the content. *Brute force decryption:* This form of circumvention employs multiple variations of algorithms until the content is decrypted and therefore requires substantial computer power. *Stealing the key during transmission:* Digital pirates engage in channel interception in order to intercept a key when it is transmitted. *Hacking Closed Systems:* This form of circumvention involves dissembling closed system trusted devices and breaking the decryption code by interacting with the circuits. *Pirated Plug-ins:* This circumvention method entails the development of illegal software plug-ins that can override the trust-enabled player plug-ins." See Kerr, Maurushat & Tacit, 'Technical Protection Measures...' 24.

exercising rights in a digital work that they claim to have, or ought to have, under the law."[105]

As clearly understood from the explanation, there are several lawful claims as well as illegal reasons for circumvention. In reponse to the circumvention attempts, rightholders and main industrial agents such as software, film and music companies and alliances in the mid-1990s strongly lobbied in both international and national levels in order to create legal framework for the protection of DRM systems. As a consequence of these efforts and long-lasting negotiations which sought to reach a consensus between the contracting parties for creating a balance between the DRMs-based protection of copyrights and the public interests, firsty two international agreements were made by the United Nations World Intellectual Property Organisation (WIPO) in December 1996. The WIPO adopted the WIPO Copyright Treaty (WCT)[106] and the WIPO Performances and Phonograms Treaty (WPPT).[107] These Treates appear to be a response to the technological struggle between rightholders and users, and contains *inter alia* general rules on the protection of DRM systems.

As mentioned above, main factors behind these Treaties were the strong lobbying activities of rightholders and software, film and music companies and alliances in the US.[108] The original proposal made by the US delagetions were stronger than the final provisions and "included a blanket prohibition on

[105] Ibid 24-25.
[106] WIPO Copyright Treaty (WCT), adopted in Geneva 20 December 1996 and entered into force on March 6 2002.
[107] WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on December 20 1996, and entered into force on May 20 2002.
[108] Kerr, Maurushat & Tacit, 'Technical Protection Measures...' 32.

the circumvention of [DRM systems] (rather than restricting the ban to circumvention for infringing purposes). Moreover, under the U.S. proposal, a manufacturer could be liable even where it had no knowledge that a device would be used for infringement."[109] However, as will be seen below, from the wording of the provisions, they were written more moderately and in a balaced approach which is stated in the preambles, after long-lasting debates in the drafting process.[110]

The WCT and the WPPT are the only international treaties which contain legal provisions on DRM systems. Other international treaties such as the TRIPs or other WIPO Treaties on intellectual property rights does not deal with DRM systems. As stated in their preambles, the WCT and the WPPT were established "to develop and maintain the protection of the rights of authors [and other rightholders] ... in a manner as effective and uniform as possible" and "to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information" in the digital environment.[111] The Treaties adopted this balanced approach, while "[r]ecognizing 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", and "the profound impact of the

[109] Ibid.
[110] For more detailed debates and initially drafted proposals by delagations in the eve of adaptation of the WCT and WPPT see Ibid, 32-32.
[111] Ibid.

development and convergence of information and communication technologies on the creation and use of literary and artistic works"[112]

Article 11 of the WCT and Article 18 of the WPPT are the key provisions of these treaties which provide legal protection against circumvention of DRM systems. Article 11 of the WCT requires contracting states to "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."[113] Article 18 of the WPPT contains similar provisions for the technological protection measures applied by performers or producers of phonograms concerning to their performances or phonograms.

Other crucial provisions are Article 12 of the WCT and Article 19 of the WPPT which prohibide the alteration and removal of digital rights management information. Article 12 of the WCT and similarly Article 19 of the WPPT require contracting parties to "provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that *it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:* (i) to remove or alter any

[112] Ibid.
[113] Emphasis added.

electronic rights management information[114] without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority."[115]

According to the wording of these provisions, the WCT and the WPPT do not require contracting parties to provide protection against all the acts of circumvention and removal or alteration of right management informations, but only for those resulting in violating economic or moral rights on works, performences or phonograms protected under copyright law. This contention is very clear from the statements of related Articles mentioned above such as "...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 "...it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention..." In other words, only the circumventions and the acts of removal or alteration of right management informations that cause copyright infringement remain within the scope of the prohibition. Any kind of these acts that are designed for benefiting from copyright exceptions such as for the purposes of mere access to works, education, research, use in libraries and archives etc. does not appear to be the subject of the provisions.

[114] "Rights management information" is defined in Artcle 12(2) of the WCT as follows: "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public"
[115] Emphasis added.

The provisions shall not be evaluated in a sense that they also provide protection for such technologies that prevent access to works. Such an exclusive right to control individual access to a work is not defined and recognised by the WIPO Treaties or the Berne Convention.[116] As Gasser clearly states, contracting parties have no obligation to outlaw circumventions and removal or alteration of DRM systems that enable users to gain access to works in the public domain, nor to prohibit such acts that allow users to engage in non-infringing activities according to copyright limitations and exceptions granted in their national legislations.[117]

2.2. European Union Information Society Directive

2.2.1. Overview

After the adoption of the WIPO Treaties, the European Union accepted the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (the Information Society Directive)[118] on May 22, 2001 in order to implement the related provisions of the WCT and the WPPT. The Directive is not directly applicable in the Member States of the European Union, but Member states have to implement it into their national laws by choosing the means that the Directive provides. In this respect, the aim of the Information Society Directive is to harmonise the national laws of Member States by setting certain objectives within the framework of the

[116] Gasser 'Legal Frameworks and Technological Protection of Digital Content...' 9.
[117] Ibid, 10.
[118] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 0010 – 0019.

WIPO Treaties. The Directive covers six main subjects which are the right of reproduction, the right of communication of works to the public, the right of distribution, the exceptions and limitations to copyrights and related rights, the technological protection measures and the digital rights management information.

The Directive describes its aims as *inter alia* to harmonise the laws on copyrights and related rights in the European Union in line with the WIPO Treaties, since it "will help to implement the four freedoms[[119]] of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, the freedom of expression and the public interest."[120] In this framework, one function of the Directive apears "to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect."[121] It is stated in the Directive that while this protection is provided, "[a] fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded."[122] The Directive also mentions that it should be sought "to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching."[123]

[119] The term "four freedoms of internal market" refers to the free movements of people, goods, services and money within the European single market.
[120] Council Directive 2001/29/EC, Recital 3.
[121] Conucil Directive 2001/29/EC, Recital 47.
[122] Council Directive 2001/29/EC, Recital 31.
[123] Council Directive 2001/29/EC, Recital 14.

However this is not the case in practice. Though the Directive intents to safeguard the public interest and states its desire to create a fair balance between the interests of rightholders and those of users or the public, its anti-circumvention provisions remain in contradiction with this intention, and raise serious concerns about the interests of the public. As Dusollier points out, the protection of DRM systems by the Directive is broad and goes far beyond the boundaries of copyright law; the copyright exceptions are overridden.[124] In other words, anti-circumvention provisions of the Directive have a great potential to create an imbalance between above-mentioned interests by constituting an impediment to benefite from copyright exceptions. For example, it requires Member States to provide legal protection not only for DRM systems that protect copyrights, but also for all those which prevent activities falling within the scope of copyright exceptions not permitted by rightholders. In this respect, the Directive approves new right to control access to copyrighted works which has been created by DRM systems and has never been the subject of copyright law. Thus, it goes further than merely to provide adequate legal protection for DRM systems, and with its new standarts, remains far from the implementation of the WIPO Treaties.

Overally, it can be said that the Directive appears to broaden the power of rightholders by providing unrestricted protection for DRM systems and weak protection on copyright exceptions. This situation endangers the balanced framework which were historically embedded in copyright law. These issues

[124] Severine Dusollier, 'Tipping the Scale in Favor of the Right Holders: The European Anti-Circumvention Provisions' in E. Becker et al. (Eds.): *Digital Rights Management* (Springer-Verlag, Heidelberg 2003) 462.

and related ones raised by the Directive are the discussion topics under following subtitles.

2.2.2. Broad Scope of Protected Subject Matter

First two pragraphes of Article 6 of the Directive deal with the prohibited activities in connection to DRM systems and the third pragraph defines the subject matter of the protection. Under Article 6(1) Member States are required to provide "adequate legal protection" against "the circumvention of any effective technological measures" which are "designed to revent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright or any right related to copyright[s]."[125] Member states are also mandated to provide protection under Article 6(2) against the traficking of devices, products or services such as "the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services" enabling the circumvention of these technological measures.[126] On the other hand, Article 7 of the Directive imposes similar

[125] Article 6(1): "Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective."
Article 6(2): "Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures."

[126] Article 6(2): "Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which: (a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c)

obligations in connection with electronic rights-management information,[127] and Article 6(3) broadly defines "technological measures" as "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subjectmatter, which are not authorised by the rightholder ... Technological measures shall be deemed 'effective' where the use of a protected work or other subjectmatter 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."

These provisions are all mandatory, and thus each member state has to implement them in their domestic legislations. As a result of this obligation, almost all Member States prohibited the circumvention of DRM systems and did not provided for users "right to circumvent" for benefiting from copyright exceptions.[128]-[129]

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are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures."

[127] Article 7(1): "Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts: (a) the removal or alteration of any electronic rights-management information; (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

[128] Marcella Favale, 'Technological Protection Measures and Copyright Exceptions in EU27: Towards Harmonisation' (DEPAUL-CIPLIT, 15 July 2007) <http://www.law.depaul.edu/centers_institutes/ciplit/ipsc/paper/Marcella_FavalePaper.pdf> accessed 05 June 2011.

[129] "There are minor exceptions to this principle, such as the possibility to circumvent, in the UK, for purpose of research in cryptography...Sweden provides for a right to circumvent in case of few determined fundamental exceptions. Switzerland does not punish who circumvent a measure for a licit purpose and Denmark allows circumvention if access is not granted by the owner after four weeks...Finland allows circumvention for private copying...Lithuania

As understood from the provisions, there are two main activities within the scope of prohibition. The first activity is the act of circumvention and the second one is the traficking of circumvention devices, products or services, which are known as "prepatory acts." In both situations, it does not matter whether the act of circumvention or prepatory acts infringe the legitimate interests of rightholders or not. Mere focus is only on any act of circumvention or traficking as such. In this respect, the Directive actually expands the scope of protection provided by the WIPO Treaties for rightholders in relation to their copyrights. Article 11 of the WCT (and similarly Article 18 of the WPPT) 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 WCT or Berne Convention.*"[130] Firstly, the protection provided by the WIPO Treaties does not cover traficking of devices, products or services enabling circumvention and is only against the circumvention acts which infringe copyrights. Moreover, from the wording of the provision, Its scope does not cover any circumvention act which may be applied for lawful uses of copyrighted works within the scope of copyright exceptions. This is also the case in the US *Digital Millennium Copyright Act* of 1998 which is the implementation of the WIPO Treaties as well. But in the Directive, the protection covers "any technology, device or component that is ... designed to prevent or restrict acts ... which are not authorised by the rightholder."[131] All

allows circumvention, but only for software exceptions (back-up and decompilation)." Favale, 'Technological Protection Measures...', at foodnote 130.

[130] Emphasis added.

[131] Article 6(3).

circumvention acts of DRM systems, no matter they infringe copyrights or not, are prohibited within this scope.

Thus, it can be clearly said that the protection provided by the Directive goes far beyond the European Union's international obligations, since it can, in principle, be invoked for acts of circumvention accomplished for purposes that would be lawful under copyright law.[132]

2.2.3. Introduction of New "Right": Access Control Right

The Directive does not distinguish between access control and copy or use control measures; and provides protection for any type of effective technological measures used by rightholders.[133] As mentioned above, Article 6(3) states that the technological protection measures are "effective" only when the measures ensure "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." According to this defination, the effectiveness can namely be met when an access control is afforded to the works.[134] This protection introduces a new exclusive right of conrolling the access to works, which has been previously *de facto* created by DRM systems.[135] Thus, the Directive goes again "further

[132] IViR, 'Study on the Implementation and Effect in Member States' Laws Of Directive 2001/29/Ec on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' (European Commission, February 2007) 79, <http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study_en.pdf> accessed 05 June 2007.
[133] Basler, 'Technological Protection Measures...' 11.
[134] Dusollier, 'Tipping the Scale in Favor of the Right Holders...' 466.
[135] Ibid.

than the WCT and equally protects any work against any use, whether from the perspective of copy-protection or via access control."[136]

Such protection provides for copyright holders both the ability of the control of the access to copyrighed works and the ability of control of the uses of the works. Copyright holders are able to either prevent access and control any use by applying DRM systems to their works. Thus, rightholders have obtained legal means by the Directive to control any kind of uses which may be either within the scope of copyright exceptions, and as a result, their authorisation are now also required for lawful uses which were not subject to permission previously. In this respect, the existence of copyright law that defines protection and safeguards the copyright exceptions does not make any sense and falls into controversy. This is clearly pointed out by Lysandrides who states that "In such circumstances the owner is not relying directly on copyright laws to protect its position but rather the [DRM systems]...With such an extensive power coupled with an owner's right to control access, [DRM systems] and the protection afforded by the Directive not only offer an alternative rights protection to that of copyright law, but does so without reliance on it."[137] By excluding the rule of what copyright law has historically constructed and defined, these provisions, as Gasser stresses, have a potential to "create a technically executed monopoly over all uses of copyrighted works, since they [are used or] can be used by rightsholders to block genuinely lawful

[136] Jason Lysandrides, 'Copyright Directive 2001/29/EC–Part 1' (Lawdit, 23 July 2004) <http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/CD%202001%20-20Article%206%20-%2023.07.04%20v12.htm > accessed 05 june 2011.
[137] Ibid; Favale, 'Technological Protection Measures... , 13.

acts such as copying permitted by exception or copying of works where the term of copyright has expired."[138]

2.2.4. Ambiguity of Article 6(4)

In the preparation process of the Directive, the EU authorities had an intent to lessen the adverse effets of above-mentioned provisions which introduce over-protection and monopoly for rightholders over their works. That is why, Articles 6(4) of the Directive were designed. Main aim behind these provisions were to ensure users to benefite from copyright exceptions while providing legal protection to DRM systems. However, as will be discussed in the following parts, these provisions has created ambiguity and introduce no practical solutions to over-protection.

2.2.4.1. Impractical Solution to Over-protection

Sub-pragraph 1 of Article 6(4) appears to be designed to create a balance against the over-protection of DRM systems, and to safeguard the users to benefite from copyright exceptions while DRM systems are applied by rightholders to their works. The provision obliges rightholders to take "voluntary measures" for users to enjoy copyright exceptions, and in the absence of voluntary measures, requires Member States to take appropriate measures to ensure rightholders to do so. The sub-pragraph 1 reads: "Notwithstanding the legal protection provided for in paragraph 1[[139]], in the

[138] Gasser, 'Legal Frameworks and Technological Protection of Digital Content...' 16.
[139] *Paragraph 1* refers to Article 6(1).

absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, 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."

Though the Directive, formally aims to reconcile the DRM systems with the safeguarding of copyright exceptions, its wording and implications are far from reaching to this end. The Directive neither defines the "voluntary measures" taken by rightholders apart from mentioning "the agreements between rightholders and other parties concerned", nor clarifies the time and meaning of "appropriate measures" taken by Member States. Guibault highly critical of this provision and submits following questions: "[W]hat type of voluntary measures must be put in place by rights owners? What are the criteria for considering the appropriateness of the measures taken by the rights owners? How long must Member States wait before taking action and what type of action must instituted?"[140] There are no answers to these questions in the Directive. The interpration of the above-mentioned terms and the finding of appropriate solutions to these issues are left to Member States. As Dusollier states, this choice is likely a way to get rid of these tricky issues.[141] Dusollier

[140] Guibault, 'The Nature and Scope of Limitations and Exceptions...' 38.
[141] Dusollier, 'Tipping the Scale in Favor of the Right Holders...' 473.

further adds that "it will also be a likely failure of the objective for harmonization amongst Member States. Should rightholders make their technically protected works and products compliant with different measures from one country to another, it would certainly not help a smooth functioning of the Internal Market."[142] Indeed, when considering the rather discretionary aspect of the provisions of Article 5, both the decision to enact exceptions, and what form such measures will take is left to Member States.[143] It has created concern that different Member States may adobt different exceptions.[144] In this respect, the aim of the harmonisation in Member States appears to be highly questionable.

On the other hand, in the absence of voluntary measures taken by rightholders, "[o]nly if the Member States provide means to force the rightholder to permit the exercise of the excepted use will the provisions of Article 6(4) be of value."[145] As mentioned above, individuals are not given a right to use devices to circumvent DRM systems, because the Directive puts an absolute prohibition on the acts of circumvention and circumvention devices.[146] In these conditions, even if Member States take so called "appropriate measures", it is very difficult and requires long-lasting efforts for an individual to claim to benefit from copyright exceptions. This is not the situation historically constructed by copyright law. Copyright law does not require users to hold

[142] Ibid.
[143] Jacqueline Lipton, 'Copyright in the Digital Age: Acomparative Survey' [2001] 27 RCTLJ 348
[144] Ibid.
[145] Basler, 'Technological Protection Measures...' 16.
[146] Ibid; Patricia Akester, 'Technological Accommodation of Conflicts Between Freedom of Expression and DRM: The First Empirical Assessment' (Cambridge Universirty, 05 May 2009) 16, <http://www.law.cam.ac.uk/faculty-resources/download/technological-accommodation-of-conflicts-between-freedom-of-expression-and-drm-the-first-empirical-assessment/6286> accessed 27 May 2011.

prior conset or permission from rightholders or to apply to state before enjoying copyright exceptions for forcing rightholders to respect users' lawful uses. In other words, any user, who reaches the copyrighted works in legitimate ways such as buying them in stores or downloading contents uploaded by rightholders on Internet, could benefit from copyright exceptions without any need to get authorisation of rightholders. It is compulsory for rightholders to respect copyright exceptions within the historical framework of copyright law. But apparently, the contrary conditions are created by DRM systems and recognised by the Directive.

Moreover, under the wording of subparagraph 1 of Article 6(4), rather than safeguarding copyright exceptions, the Directive creates an environment where copyright exceptions are the subject of bargaining, contracts and licences mediated by rightholders.[147] In other words, the Directive relies on the contractual relations and self-regulation amongst rightholders and users to settle the question of the compliance of DRM systems with copyright exceptions.[148] This is more clear from the wording of Recital 51 of the Directive which reads that "Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of the agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive." Therefore, it can be sait that copyright exceptions are now seen as a matter of negotiation and contracting in favor of rightholders, even if the Directive vaguely urges

[147] Dusollier, 'Tipping the Scale in Favor of the Right Holders...' 472.
[148] Favale, 'Technological Protection Measures...', 6.

Member States to take appropriate measures, in case rightholders do not enable them to be benefited from.

Furthermore, even in these higly restricted conditions, the Directive does not make every copyright exception technologically available to users. To be more clear, the Directive recognises only limited number of exceptions for which "Member States should take appropriate measures...to the extent such exceptions exist in their regulatory framework."[149] The specific exceptions referred in Article 6(4)(1) are reprographic reproduction, copying by publicly accessible libraries, educational establishments or museums, ephemeral recordings of intelectual works made by broadcasting organisations; copying of broadcasts made by social institutions for non-commercial purposes, such as hospitals and prisons, copying of illustration for teaching or scientific research, copying for the benefit of disabled people and copying for the purposes of public security or for the proper performance or reporting of administrative, parliamentary or judicial proceedings.[150] It can be asked here why the list are so selective to include some exceptions stated in Article 5 and why it does not cover others such as exceptions for parody, news reporting,

[149] Ibid, 473.

[150] Article 5(2)(a): "reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation"; Article 5(2)(c): "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage"; Article 5(2)(d): "ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted"; Article 5(2)(e): "reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation."; Article 5(3)(a): use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved" Article 5(3)(b): "uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability."

ciriticism and research? There is no explanation in the Directive with respect to this problematic and restrictive approach. Besides, it should be also stated here that Article 5 of the Directive contains twenty three exceptions, but they (except the temporary acts of reproduction) are not abligatory, but optional to be implemented. the Member States may choose or exclude any of them at their own discretion. Thus, if one member state does not choose one exception referred in Article 6(4)(1), there is no sense in defining exceptions for users "in the case of a technological restraint."[151] Dussollier clearly illustrates this as follows:

> "For instance, France does not know any education or research–related exceptions. This should not change when implementing the [D]irective. The French legislature will not be obliged to make available to educational institutions the means to benefit in the practice from an exception that does not exist in the law. This underlines the strangeness of the whole article 6(4) that makes mandatory the safeguarding of exceptions whose enactment itself is not."[152]

The above explanations shows that the EU does not seem willing to take concrete action to clearly require rightholders and Member States to secure copyright exceptions in the technological environment where DRM systems are applied.[153] As a result, the aim of legislative harmonistaion on DRM systems and copyright exceptions in the EU appears to be unreachable. This is also clear from Favale's recently-held research, which clearly shows different legislative approaches taken by Member States as to the subject matter.[154] Favale points out that no Member State except Lithuania urges rightholders to

[151] Dusollier, 'Tipping the Scale in Favor of the Right Holders...' 474.
[152] Ibid.
[153] Favale, 'Technological Protection Measures...', 7.
[154] Ibid 7-15.

modify their DRM systems to ensure users to benefit from copyright exceptions,[155] and adds following findings:

> "Eleven countries joined the EU legislation in *wishing* that stakeholders would take "voluntary measures"...to grant access and use to beneficiaries of exceptions; mostly they are from Western Europe. The others either impose rightholders to make available copyright works to beneficiaries of copyright exceptions, or do not provide for any remedy. Unfortunately, those enjoining rightholders to make available copyright works for beneficiaries of copyright exceptions do not specify how this has to be done. An encouraging exception is represented by Lithuania, which expressly requires a technical adaptation of [DRM systems] to the "right of users to benefit from copyright exceptions." Also the provision of remedies in case rightholders refuse to comply spontaneously with the law is rather diverse. A few countries set up specific mediation boards and arbitrators, whereas many others left the matter to ordinary courts (which are however mostly referable in case of mediation failure). Remarkably, many Eastern EU countries ignored the issue altogether ... No member state obliges the owner to implement [DRM systems] that automatically respect copyright exceptions (except Lithuania). Very few countries corrected the "oversight" of the [the Directive], specifying that [DRM systems] have to protect only the exclusive rights of the owners. Most of them draw on the letter of the [D]irective, proving the same inequity."[156]

These findings clearly indicate whether the harmonisation in question is succesful, and demonstrate how a costly and difficult process has been constructed for users to benefite from copyright exceptions.

[155] Ibid 7.
[156] Ibid 14-15, 24.

2.2.4.2. Tightened Scope of Private Copy Exception

The second sub-pragraph of Article 6(4) peculiarly contains similar arrangement in respect to private copying. It reads that "[a] Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b),[157] unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions." However, this measure is not a mandatory requirement for Member States, but its implementation is at their discretion. In other words, if rightholders do not provide users with the means of benefiting from private copy exceptions, Member States do not have to enforce rightholders to do so. Even if it is provided, its conditions might also be slightly different in each Member States.[158]

Moreover, even if rightholders provide private copy exception, they have the power of restricting the conditions of these exceptions. According to Recital 52[159] and Article 5(2)(b)[160], rightholders have also power to construct voluntary

[157] According to Article 5(2)(b), Member States may provide for exceptions or limitations "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subjectmatter concerned".

[158] Dusollier, 'The Relations Between Copyright Law and Consumers' Rights...' 18.

[159] Recital 52 reads: "...Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent

contractual agreement with users as to the scope of private copy exception and may demand extra price for benefiting from this exception. The Directive indicates further that "all technological measures either applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, or applied in the implementation of the measures taken by Member States, shall enjoy the legal protection provided for" in Article 6(1).[161]

Users apply private copy exception, which has been previosly ensured by copyright law, mostly for practical reasons such as for creating a bakcup copy, playing, reading or using the work in different devices and places and distributing it in the family/friends circle.[162] It is quite clear how important this exception is for promoting "the circulation of expressive works, and therefore culture and information in a broad sense."[163] However, as seen in the provision of the Directive, its availability is now mostly subject to the discration of rightholders. Similar to the other exceptions, rightholders can avoid to provide means for users to benefite from private copy exception or make this exception to be paid for and can reduce it as a matter of conditional contractual agreement.

In practice, rightholders mostly prefer not to permit users to benefit from private copy exception. This has been the case in several judicial proceedings

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with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection."

[160] See the supra note 157.

[161] Dusollier, 'Tipping the Scale in Favor of the Right Holders...' 474.

[162] Favale, 'Technological Protection Measures...' 21.

[163] Ibid.

in Europe. In these proceedings, courts convicted rightholders of the application of DRM systems which blocked the private copy exception. As will be seen below, court decisions shows the noncomformity of DRM systems and therefore their strict protection by the Directive with users' legitimate interests in private copy exception.

For example, in 2005 in Case *Stephane P., UFC-Que Choisir v.Universal Pictures Video France*[164] the Court of Appeal of France held that it is the burden of rightholders to permit analogue and/or digital copying of their works under Art.L 122-5 of the French Intellectual Property Code, which provides the private copy exceptions for the users. The Court also pointed out that the exception for private copy was a lawful restriction on copyrights and was not at the discretion of rightholders. Thus, the Court finally ordered the prohibition of rightholders (defendants in that case) from using DRM systems which are incompatiple with the private copy exception and prevent users from benefiting this exception.

[164] Coud d'Appel de Paris 4eme Chamber, Section B, Arret du 22 Avril 2005, Stephane P., UFC Que Choisir / Universal Pictures Video France et autres. The decision of the Court in English is available at <http://patentlaw.typepad.com/patent/Mulholland_20Drive_20Translation.pdf> accessed 05 June 2011. In this case the issue before the court was whether the DRM sytstem consisted of anti-piracy or anti-copying software on the DVD of 'Mulholland Drive' distributed by Universal Pictures Video France is the violation of the copyright exception for private copy. the user namely Mr. Christoper P. purchased a DVD of the film 'Mulholland Drive' wanted to play it at his mother's house where there was no DVD player but only VHS player. Thus he attempted to copy the DVD in VHS format. However, due to the DRM system embedded in the DVD, he was not able to do so. He then noticed the French Consumer Union (UPC) which had similar complaints before referred from other consumers. Then UPC brought suit against Universal Pictures Studio France and other parties by relying on private copy exception provided by copyright law (in this case, by French Intellectual Property Code).

Another example arises again in France in Case *Christpher P., UFC Que Choisir v. Warner Music.*[165] In 2006, in this Case[166] the Court interprated Article 6(4) of the Information Society Directive in a way which led it to the conclusion that DRM systems must respect private copy exception and other copyright exceptions, and the application of anti-copying protection devices by phonogram producers undermines the statutory limitations and exceptions on copyrights.[167] The court finally ruled that it is the task of the DRM user to make private copy exceptions available while applying DRM systems on the works, and thus condemned Warner Music Company not to apply DRM systems that restricts private copying.[168]

These decisions implicitly justify the impractical effects and the detrimental consequences of the non-mandatory provisions of the Directive on users' interests in private copy exception.

2.2.4.3. Invalidation of Safeguarding Mechanism and Further Promotion of Contractual Agreements Between Rightholders and Users

Fourth subpragraph of Article 6(4) further weakens and undermines the

[165] Tribunal de Grande Instance de Paris 5eme Chambre, 1ere Section Jugement du 10 Janvier 2006, *Christophe R., UFC Oue Choisir / Warner Music France*. Available at <http://www.legalis.net/spip.php?page=breves-article&id_article=156 > accessed 05 June 2011.

[166] Christopher R. who bought the CD "Testify" by Phil Collins discovered "that he could not play the CD on his laptop and make copies from the CD".76 Christophe R. and the Consumer union UFC thought that all these restrictions were originated from some form of incorporated electronic copy protection measures which was in conflict with the "right to private copying" thus they brought the case before the court. Natali Helberger, 'Christophe R. vs Warner Music: French court bans private-copying hostile DRM' (INDICARE, 01 March 2006) <http://www.indicare.org/tiki-read_article.php?articleId=180> accessed 05 June 2011.

[167] Ibid.

[168] Ibid.

safeguarding mechanism of the first two provisions, of which the weakness is already apperent. The provision does not safeguard copyright exceptions any more in accordance with the works supplied online on agreed contractual terms and further promotes rightholders to create contractual agreements which will construct barrier for users to benefit from copyright exceptions. It reads that "[t]he provisions of the first and second subparagraphs shall not apply 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."[169]

Disollier defines this provision as "the greatest defect of the whole construction" of Article 6.[170] Depending on this provision, rightholders may totally prevent users from benefiting from copyright exceptions on on-line digital environment. In other words, as Maciej states, "since this condition applies to everything found on the internet, it seems obvious that this provision has the potential to eliminate [copyright exceptions] altogether and to create a factual case in which contract actually replaces copyright."[171] In this framework, any contractual expansion of the rights beyond what is provided for under copyright law risks disrupting the balance of interests.[172] This expansion privatises the access to intellectual works and provides for rightholders the means of replacing or removing any rights that a user may

[169] Artcile 6(4)(4) of the Directive.
[170] Dusollier, 'Tipping the Scale in Favor of the Right Holders...' 474.
[171] Maciej Barczewski, 'International Framework For Legal Protection of Digital Rights Management Systems', [2005] 27 EIPR 167.
[172] Lucie Guibault, 'Pre-Emption Issues In The Digital Environment: Can Copyright Limitations Be Overridden By Contractual Agreements Under European Law?' 1, (IViR, 04 December 2003) < http://www.ivir.nl/publications/guibault/article2.doc> Accessed, 05 June 2011.

have under copyright law.[173] The problematic provision is a clear indication of that "the European lawmaker has given more value to contract than to the balance established by copyright law between rights and exceptions."[174]

Copyright exceptions are not merely default rules.[175] The exceptions based on the universally recognised notions of the free flow of information, the dissemination of knowledge and the freedom of expression, such as the right to make reproductions for purposes of education, research, criticism, news reporting and so on, "undeniably constitute imperative rules of copyright law whose application should not be waived by the parties to a contract."[176]

2.3. Overall Assesment

Corporal interests of rightholders have appeared to be the main factor of the introduction of DRM systems and its strict recognisation with its all adverse effects by the EU Information Society Directive. It is difficult to find any public interest within these choices. As the argument goes, even if the abusive actions against copyrights in the online digital environment are triggering reasons for these developments, this does not and should not alter the social considerations such as the dissemination of knowledge, the right to access to knowledge, the freedom of expression and the information equality that motivated the designation of copyright exceptions.[177] It can be said that DRM

[173] Nicola Lucchi, 'The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society' 15 IJLIT 193.
[174] Dusollier, 'The Relations Between Copyright Law and Consumers' Rights...' 28.
[175] Guibault, 'Pre-Emption Issues In The Digital Environment...' 21.
[176] Ibid.
[177] Lucchi, 'The Supremacy of Techno-Governance...' 193.

systems within the scope of the Directive appears to be unlawful since copyright law have properly defined copyright protection, its limits and exceptions, and already provided the means to fight against the infringing acts wherever occured without any need to create additional rights and measures.

It is safe to say that the EU has failed either to fulfill its international obligations and to achieve the aim of the harmonisation throughout the European Community in safeguarding copyright exceptions, while providing legal protection for DRM systems. This lack of harmonisation creates trouble for the users who do not have a clear picture of their rights.[178] Moreover, this failure has also given rise to the problem of inequality in the treatment between the citizens of different countries, which is contrary to the principle of non-discrimination laid down in the EC Treaty,[179] which is known as the constitutional basis of the EU.[180]

CONCLUDING REMARKS

Though the fight against the infringement of copyrighted works in the digital environment is the main rational behind DRM systems, the problem with them arises while they also give way to the restriction or the prohibition of lawful uses falling within the scope of copyright exceptions, and enable rightholders to control the access to the works, which has historically never been the subject of copyright law. Moreover, the legal basis of DRM systems in

[178] Dusollier, 'The Relations Between Copyright Law and Consumers' Rights...' 18.
[179] The EC Treaty, "Treaty establishing the European Community" of 1993, the re-arranged version of the Treaty of Rome. The EC Treaty was lastly amended in 2009 and renamed as "Treaty on the Functioning of the European Union".
[180] IViR, 'Study on the Implementation...' 63.

Europe, the anti-circumvention provisions of the Information Society Directive, recognises and legalises the DRM systems in such a way that reverses the underlying paradigm of copyright law which has constructed a delicate balance between the interests of rightholders and those of the public. While the Directive provides strict protection for DRM systems, it heavily relies on voluntary measures taken by rightholders for enabling copyright exceptions in the digital environment, where DRM systems are applied. However, there is no doubt that where there is much more reliance and emphasis on voluntary measures taken by rightholders for enabling copyright exceptions, most probably they will not be disposed to do so.[181] Accordingly, this "may further result in the development of information monopolies and possible abuse of market dominance."[182] This dominance also threatens the technological innovation that has created important new ways to communicate and share the creative works and knowledge in the society.[183]

Along with its all adverse effects, the Directive appears to be inconsistent with the international norms such as the WCT and the WPPT which construct a clear connection between the legal protection of DRM systems and copyright law.[184] In other words, it fails to directly corelate the legal protection of DRM systems with the acts of circumvention that result in copyright infringment.[185] Its focus is only on the acts of circumvention and the prepatory acts, no matter whether these acts aim to infringe copyrighted works or to benefit from

[181] Lysandrides, 'Copyright Directive...'
[182] Ibid.
[183] Daniel P. Homiller, 'The Digital Millennium Copyright Act and the European Union Copyright Directive: Next Steps' (Duke Law, 27 April 2005) 17, < http://www.law.duke.edu/cspd/papers/nextsteps.doc> accessed 05 June 2011.
[184] IViR, 'Study on the Implementation...' 96,
[185] Ibid.

copyright exceptions. Thus, what copyright law has historically ensured and recognised within a blanced framework does not fall within the scope of the Directive. The resulting imbalance in the anti-circumvention provisions of the Directive heavily harms the interests of the public in non-infringing uses of copyrighted works.[186]

In such an environment where the domination of DRM systems is a fact, there is no practical social consequences or benefits left in the definetion of limited life-span of copyright protection; nor does it make any sense to feel or know that copyright law provides exceptions to copyrights in the protection periods. It can be clearly said that DRM sytems and its legal basis in Europe undeniably shrink and destroy the historical facts and the balance between the interests of rightholders and those of the public.

Moreover, its aim to hormonise the related legislations of Member States on DRM systems has appeared to be problematic. The Directive has created dishormonising effects in the EU rather than the harmonising of Member States' copyright legislations on the protection of DRM systems. Due to the ambiguity of anti-circumvention provisions, Member States have been "confronted with the difficult task of interpreting the intention of the European legislator and of putting in place an entirely new form of protection against the circumvention of [DRM systems]."[187] Thus, observing differences in the way

[186] Pamela Samuelson, Jerome H. Reichman & Graeme Dinwoodie, 'How to Achieve (Some) Balance in Anti-Circumvention Laws' [2008] 51 Communication of the ACM 21.
[187] Ibid, 97.

Member States have implemented the anti-circumvention provisions of the Directive should not be surprising at all.[188]

As referenced several times above, increasing number of scholars criticises the adverse effects of DMR systems and those of the anti-circumvention provisions of the Directive. On the other hand, it seems that European Commission recognised the concerns arisen on the anti-circumvention provisions of the Directive, and firstly in 2004, issued a fact sheet titled "Intellectual Property Rights and Digital Rights Management Systems," which mentioned the balance between the interests of rightsholders and users, and pointed out that "DRM must not be allowed to become a commercial or technology licensing control point."[189] Similarly, the Commission adopted the "Green Paper on Copyright in Knowledge Economy"[190] in 2008 in which rising issues with respect to copyright exceptions were discussed. By issuing the Paper, The Commission opened the discussion for the anti-circumvention provisions of the Directive and called interested parties for comments about whether the combination "of broad exclusive rights with specific and limited exceptions" under the Directive achives a fair balance between the differing interests of rightholders and users in rapidly changing digital environment.[191]

These rising issues and concerns are being discussed in the international level as well. In 2009, the WIPO put the adverse effect of DRM systems and related regulations on the agenda of its Standing Committee on Copyright and Related

[188] Ibid.
[189] European Commission, Information Society, Intellectual Property Rights and Digital Rights Management Systems, Fact Sheet 020, September 2004.
[190] Green Paper on Copyright in the Knowledge Economy, Brussels COM(2008) 466.
[191] Ibid. 466/20.

Rights, and started to study on various proposals for a new treaty on this field.[192] WIPO emphasises that "...in order to maintain an appropriate balance between the interests of the rightholders and the users of protected works, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorisation of the right-holder and with or without payment of compensation."[193] It also points out that: "...[D]ue to the development of new technologies and the ever-increasing worldwide use of the Internet, it has been considered that the above balance between various stakeholders' interests needs to be recalibrated."[194]

Since their introduction, the side effects of DRM systems and their absolute protection by the Directive have gained a great deal of contreversy so far. As Favale points out, the Directive appears to penalize the social function of copyright, aiming at the smooth dissemination of, and access to, knowledge, freedom of expression and the circulation of culture.[195]

Though copyright protection and the exceptions to copyrights have separately designed to serve different interests, their functions constitute an indivisible whole. The access to knowledge, which is inherently enabled by means of copyright exceptions, plays a central role in achieving the social goals of copyright law. The confronting attitute of the Directive towards these facts shows that the immediate need to take measures for restoring the social objectives of copyright law and therefore to rehabilitate the copyright

[192] Geiger, 'The Future of Copyright in Europe...' 7.
[193] Ibid.
[194] Ibid. For the WIPO discussion papers see <http://www.wipo.int/copyright/en/limitations/index.html>.
[195] Favale, 'Technological Protection Measures...', 24.

exceptions is evident beyond question. As Hugenholtz speculates, the Directive lacks a proper legal basis, and should be annulled or amended.[196] Rightholders and especially digital content providers should be encouraged to develop users-friendly DRM systems, complying with copyright exceptions.[197] Moreover, a better protection of users' interests would require declaring copyright exceptions non-overridable, at least those exceptions conveying public interests.[198] Overally, new legislative measures should be devised to restore the balanced spirit of copyright law in Europe.

[196] Bernt Hugenholtz, 'Why the Copyright Directive is Unimportant, and Possibly Invalid' [2000] 11 EIPR 12.
[197] Dusollier, 'The Relations Between Copyright Law and Consumers' Rights…' 7.
[198] Ibid.

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