

Against this background, in his recommendations of 31 January 2013¹⁰¹ which concluded stakeholdersmediation process on private copying and reprography levies, Mr António Vitorino while recognizing the shift from ownership to more access-based business models (including certain type of cloud-based services), identified double payments occurring in the digital environment among those issues which could have a negative impact on new, innovative business models. He therefore suggested that in order to favor their development and growth in the EU it should be clarified that copies that are made by end-users for private purposes in the context of an on-line service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies.

Further details are presented in Annex F.

3.2.1.3. User generated content

Since citizens can copy, use and distribute content at little to no financial cost, new types of online activities are developing rapidly, including the making of so-called “user generated content”, when users take one or several pre-existing works, change something to the work(s) and upload the result (such as a “kitchen video”, or “mash-up”) on the internet e.g. to platforms, including social networks, blogs, private websites, etc.¹⁰² UGC is not “new” as such. However, the development of social networking and social media sites which enable users to share content widely, has vastly changed the scale of such activities and increased the potential economic impact these activities have for the rights holders of the pre-existing works. Under the current legal framework, such uses are subject to acquiring authorisation from the relevant rights holders if the initial work(s) is protected by copyright.^{103 104} The development of digital tools has also increased the potential economic interest for the creators of UGC, who may themselves enjoy copyright protection. There nevertheless remain technological obstacles to the ability for UGC creators to identify themselves, and to reap economic reward for their efforts.

In practice, the market has recently developed in such a way that the hosting by large platforms of such content is covered by authorisations from rights holders (notably in the music sector), with both intermediaries and rights holders (including, in some cases, UGC creators) sharing in the advertising revenues so generated. However, coverage is not comprehensive, and smaller platforms/individual blogs cannot benefit from the legal certainty provided by such “blanket” arrangements though micro-licences may increasingly be available in the market place for some users.¹⁰⁵ Transformative use of “print” (literary works, fine art, illustration, photography, design, architecture and other visual works) and audiovisual content is not licensed in a systematic manner. However, some media companies are

would be worse-off as otherwise their revenue derived from levies could be out weighted by positive results of levy adjustment and the resulting increased demand. See Case C 463/12 Copydan Båndkopi

¹⁰¹ http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

¹⁰² User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/“uploaded” work does not require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content.

¹⁰³ Rights of reproduction, adaptation, and communication/making available to the public

¹⁰⁴ In the case those initial works were originally distributed through open licences, there is also the need to assess if such licences permitted the production of derivative works or if they imposed any further restrictions (requirement to also distribute the derivative under a similar open licence or prohibiting commercial exploitation).

¹⁰⁵ Small-scale licensing is being developed in the music industry and in the print sector (see the results of Licences for Europe (Working Group 2) in Annex B and the presentations available on: <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/WG2-UGC.pdf>)

developing platforms themselves enabling active developers to re-use published content, including for publishing purposes.

The evidence across all sectors is that currently UGC is flourishing (as of 2013, 100 hours of video content are uploaded to YouTube every minute). The lack of case law on the issue also suggests that rights holders have so far refrained from preventing its emergence, with notable isolated cases relating to the assertion of moral rights. User groups (in the context of Licences for Europe) have noted however, that, a small portion of UGC may in fact be prevented, and that legal uncertainty as to the possible application of certain exceptions e.g. for quotation, and parody places legal risks on end-users. In Licences for Europe, the positions of stakeholders were too divergent to agree on a common line.

Further details are presented in Annex E.

3.2.1.4. Text and data mining (TDM)

Text and data mining, content mining, data analytics¹⁰⁶ are different terms used to describe increasingly important techniques for the exploration of vast amounts of texts and data (e.g., online journals, web sites, databases etc.). The use of text mining in the field of research has a big potential to foster innovation and bring about economic and societal benefits.¹⁰⁷ Some stakeholders are concerned that the EU might already be losing ground to other regions of the world where TDM is increasingly becoming common practice in scientific research.

Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new knowledge and insights, patterns and trends. The texts and data used for mining are either freely accessible on the internet or accessible through subscriptions to e.g. journals and periodicals that give access to the databases of publishers.

Usually when applying TDM technologies, a copy is made of the relevant texts and data (e.g. on browser cache memories or in computers' RAM memories or to the hard disk of a computer), prior to the actual analysis. Under copyright law, it is often considered necessary for the making of such copies (even in the case where there is already a lawful access to the relevant text and data), to obtain the authorisation from the right holders¹⁰⁸ in order to mine protected works or other subject matter, unless such authorisation can be implied (e.g. content accessible to general public without restrictions on the internet, open access). Some types of text and data mining could however fall under the exceptions for non-commercial scientific research in Article 5(3)(a) of the InfoSoc Directive and Articles 6(2)(b) and 9(b) of the Database Directive,¹⁰⁹ which are however optional and have not been implemented in the national laws of all Member States. Some consider that the copies required for text and data mining are covered by the exception for temporary copies in Article 5(1) of the InfoSoc Directive.

It has also been suggested that (certain techniques for) text and data mining do not at all involve copying and therefore are not covered by copyright. None of this is clear, in particular

¹⁰⁶ For the purpose of the present document, the term "text and data mining" will be used.

¹⁰⁷ Big data technologies such as text and data mining have, considered together, the potential to create 250 bn EUR of annual value to Europe's economy (2011 Study of the McKinsey Global institute: Big data –The next frontier for innovation, competition, and productivity)

¹⁰⁸ It is common practice in Europe for researchers to contractually transfer their copyrights to publishers

¹⁰⁹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

8.6. ANNEX E – USER-GENERATED CONTENT

User Generated Content (UGC) is understood in this Impact Assessment as referring to cases where a pre-existing work is taken by a user as a starting point for his/her own expression, modified or transformed in one way or another, and then made available online. A typical example is where an individual takes a music track, adds his/her video, and uploads the result onto a platform. It may also include the merging of two pre-existing works (“mash-ups”). The threshold may be lower than “a certain amount of creative effort”.²⁰⁰ It excludes the case of “mere upload”, where a user merely distributes on the internet (by uploading and sharing it) pre-existing works without having intervened in any way on the work. It also excludes “creation from scratch”, i.e. the case where a user creates a new work “from scratch”, without relying on a pre-existing work.

UGC involves (1) the reproduction right and (2) the communication to the public right (except where the UGC work is only made available to a limited group of friends or relations), including the right to make available .

(1) The reproduction right: There will be at least a “reproduction in part” in any User Generated Content since the user will start from a pre-existing work to generate a new/modified version of that work.

In addition, UGC involves the adaptation right every time the pre-existing work is a copyright protected work, since the user will, in some way, arrange the work or modify it.²⁰¹ Article 12 of the Berne Convention provides for an exclusive right for authors to authorize adaptations of their works: “Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.” The Berne Convention does not explicitly authorize Member States to provide for exceptions to the adaptation right but it is generally recognized that they may provide for an exception for parodies and caricatures, which are then to be considered as “excused adaptations”.²⁰² Contrary to the reproduction right and the communication to the public/making available right, there is no express rule with respect to adaptations in the Infosoc Directive (unlike the Software Directive and in the Database Directive). However, the broad manner in which the reproduction right in Article 2 of that Directive is formulated and the CJEU’s jurisprudence on the scope of the reproduction right notably in Infopaq²⁰³ and Eva-Maria Painer²⁰⁴ seem to cover adaptations, which give rise to a further reproduction within the meaning of Article 2. The pending case of Allposters²⁰⁵ will shed further light on the scope of Article 2.

²⁰⁰ Proposed definition by the OECD

²⁰¹ In the same sense, M. Ficsor, “Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights” (23 October 2010), available at http://www.copyrightseesaw.net/archive/?sw_10_item=31, p. 3.

²⁰² S. Ricketson & J. Ginsburg, *International copyright and Neighboring Rights*, Oxford University Press, 2005, p. 483-484, as quoted by M. Ficsor, “Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights” (23 October 2010), available at http://www.copyrightseesaw.net/archive/?sw_10_item=31, p. 5.

²⁰³ Judgment of the Court of 16 July 2009, Case C 5/08, Infopaq - Infopaq International A/S v Danske Dagblades Forening

²⁰⁴ Case C-145/10 – Eva-Maria Painer v Standard VerlagsGmbH

²⁰⁵ Case C-419/13 – Allposters v Stichting Pictoright

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(2) The right to make available: Uploading UGC on a Web platform or site, whether for commercial purposes or not, amounts to communication to the public and/or making available²⁰⁶

Consequently, when UGC involves copying and adapting parts of pre-existing works and is communicated to the public, a licence from the right holder covering the user's activities will be necessary, unless exceptions to the reproduction, communication to the public (making available) and adaptation right apply.²⁰⁷ In several cases open licences already provide this authorisation to anyone willing to produce UGC.

In addition to the mandatory exception for technical acts of reproduction provided in article 5(1) of the Info Soc Directive, three exceptions in the Directive are relevant, at least in part, in the event that UGC is created and distributed without the authorisation of the right holder(s):

(a) Quotation for criticism or review: Article 5.3(d) of the InfoSoc Directive allows Member States to provide for an exception or a limitation to the rights provided for in Articles 2 and 3 (i.e. the reproduction right and the public communication right): *"quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose"*.

All Member States either already had or have introduced such exception when implementing the InfoSoc Directive.²⁰⁸ Variations persist:

- "Quotation" is often considered as meaning that only parts (or "small parts" of a work may be reproduced but this is not always the case and some countries (the Netherlands) are more liberal than others (France, Luxembourg), while in Ireland, it is debatable whether the size of the quotation matters or not;
- It is sometimes recalled that the intellectual legacy of the pre-existing work must be respected and reflected in a recognizable way (Estonia, Belgium²⁰⁹), but not all Member States require that condition;
- Some Member States (Belgium, Italy) prohibit quotations for commercial purposes; in some Member States, the quotation may not prejudice the commercial exploitation of the work or otherwise cause a prejudice to the author, in some other Member States, such condition is not mentioned or not existing.

(b) Parody, caricature or pastiche: Article 5.3(k) of the Info Soc Directive allows Member States to provide for an exception for *"for the purpose of caricature, parody or pastiche"*.

²⁰⁶ in the sense of Article 3 of the InfoSoc Directive "the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them"

²⁰⁷ See in this sense, IDATE, TNO & IVIR, User-Created-Content: Supporting a participative Information Society, SMART, 2007/2008, p.188.

²⁰⁸ See the De Wolf Study for the European Commission

²⁰⁹ M.C. Janssens, in *La loi belge sur le droit d'auteur, Commentaire par article, Hommage à Jan Corbet*, Larquier, ed. F. Brison & H. Vanhees, 3rd ed., p. 139.

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There is currently a case pending before the CJEU which should shed light on the scope of this exception.²¹⁰

- Ten Member States have introduced an explicit exception:
 - Belgium, Germany, Estonia, Spain, France, Lithuania, Latvia, Luxembourg, Malta, and the Netherlands;
- In a further seven member States, it is considered that even though there is no explicit exception, such use may be otherwise authorised by virtue of the copyright framework:
 - Austria, Denmark, Finland, Hungary, Italy, Portugal, Sweden;
- In the remaining 11 Member States there appears to be no provision authorising the use of protected content for the purpose of caricature, parody and pastiche (see table X below).

(c) Incidental inclusion Article 5.3(i) of the Info Soc Directive allows Member States to provide for the “*incidental inclusion of a work or other subject-matter in other material*”. The incidental inclusion exception may apply to certain cases of UGC, such as the examples often referred to of private video of weddings or other private or family events where some music may be heard in the background. There is as yet no CJEU judgment on the scope of this exception, so its scope is unclear. From a policy point of view, it can be argued that “incidental” does not equal “in the background” but rather refers to “accidental” or “unintentional” takings and thus to situations in which the purpose of the user was not to capture the sounds or the images at stake but where such capture happened at the occasion of the recording of another element which was the real subject matter of the recording/creation by the user.²¹¹

- It is not implemented at all in some Member States :
 - Austria, Bulgaria, the Czech Republic, Greece, Italy, Latvia, Poland, Romania, the Slovak Republic, Slovenia, did not implement the exception;
 - Finland, Germany, Ireland, Malta, the Netherlands, Portugal, Sweden and the United Kingdom did;
 - France accepts it in court decisions but the law does not mention the exception; the same seems to more or less apply in Hungary;
- its inclusion via article 5.3. (h) limits in many countries its scope of application to architectural works and sculptures (fine arts mainly) but can hardly be said to apply to music and “remix” for instance (Belgium, Estonia, Lithuania, Luxembourg).
- Sometimes, the purpose of the inclusion must be for reporting on current events (Denmark, Spain).

The overall picture of the legal framework for UGC at EU level is one lacking in harmonisation.

²¹⁰ Case C-201/13 – Deckmyn & Vrijheidsfonds v. family Vandersteen and others

²¹¹ De Wolf Study for the European Commission

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The possible “chilling effect” of the current situation is hard to assess because one would need, by definition, to gather information about projects which were not carried out on account of fears by users or caricaturists of the risks involved. In the meantime, the growing production of UGC suggests that users seem at the moment not to be deterred by an uncertain legal framework.

As of 2013, 100 hours of video content are uploaded to YouTube every minute, and more than 1 million creators from over 30 countries, globally, earn money from their YouTube videos. More than 4,000 “partners” use Content ID to monetise the use (and re-use) of their material on YouTube, including major US network broadcasters, film studios, and record labels. For the time being rights holders have refrained from preventing the emergence of UGC, and have been rather inclined to embrace the commercial opportunities.²¹² It is predominantly the big platforms that have concluded licensing agreements with right-holders. In parallel, right-holders are working on creating solutions for micro-licensing.

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²¹² For example, in Europe, the licensing of ad-supported services (such as YouTube) accounts for 8% of the digital revenues of the members of IFPI or 2.3% of total revenues of IFPI members (IFPI « Recorded Industry in Numbers 2012 », p.29)

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Table A3 - Implementation of Art 5.3.k InfoSoc Directive - Exception for Parody, caricature, pastiche

AT	No explicit exception. Some commentators consider that “the freedom to make caricatures is safeguarded under general principles of copyright law and will seldom amount to a reproduction or adaptation” ²¹³
BE	Yes, existed since 1886. Case law has interpreted narrowly and requires the following cumulative conditions: the parody must itself be original, have a purpose of criticism, be somewhat humorous and may not cause confusion with the pre-existing work. It is sometimes further required that the parody not have a commercial purpose and not have as its main or sole purpose to cause prejudice to the pre-existing work. The parody may not overrule the moral right of integrity (the honour or reputation of the author may not be damaged) and article 10 of the EDHR may not be invoked to allow infringements to the moral right of integrity. The weighing of these different principles is described as a difficult exercise ²¹⁴ .
BG	Not introduced
CZ	Not introduced
CY	Not introduced
DK	No explicit exception. However, caricatures will often be deemed new and independent works of art under Section 4 (2) of the Copyright Act and thus fall outside of the copyright protection of the pre-existing work ²¹⁵ .
DE	Yes. The caricature exception existed prior to the Copyright Directive ²¹⁶ . It is sometimes considered that this is not even a limitation to copyright but presupposes that caricatures do not constitute reproductions or adaptations ²¹⁷
EE	Yes, introduced. A parody may be made of a lawfully published work, to the extent justified by such purpose, which must be scientific, educational or informational ²¹⁸ .
EL	Not introduced
ES	Pre-existing exception retained.
FI	The caricature exception was not introduced explicitly when implementing the Copyright Directive (contrary to most exceptions of the catalogue), but it is admitted that parodies may be made, on the basis that ideas may not be protected, and with this limit that the parody may not be an adaptation of the pre-existing work (in which case it requires a licence) ²¹⁹ . Some commentators add that parody is recognised

²¹³ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 113.

²¹⁴ M.C. Janssens, in *La loi belge sur le droit d’auteur, Commentaire par article, Hommage à Jan Corbet, Larcier, ed. F. Brisson & H. Vanhees, 3rd ed., p. 168.*

²¹⁵ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 163.

²¹⁶ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Germany by M. Schaefer), 223.

²¹⁷ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 230.

²¹⁸ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Estonia by V. Naslund), p. 180.

²¹⁹ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Finland by K. Harenko), p. 191.

²²⁰ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 197.

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	as a general principle of Finnish copyright law ²²⁰
FR	Yes. The caricature exception already existed before the Copyright Directive and the text was not changed upon implementation of said Directive; caricatures must however comply “with the laws of the genre” (which gave rise to numerous court decisions) ²²¹ .
HR	
HU	No explicit provision exists under the Copyright Act. However, legal literature and practice accept the exception provided that the use must correspond to the conditions of the quotation exception or (yet this view is not shared by all, all the more so if one considers that exceptions must be interpreted narrowly) ²²² consist in a humoristic-critical imitation of a given author’s style ²²³ .
IE	Not introduced
IT	Not introduced. However, there is consistent case-law stating that caricature and parody are allowed on the basis of Article 21 of the Constitution that enshrines the fundamental right of freedom of expression ²²⁴ .
LT	Yes, introduced.
LV	Yes, introduced, similar to Art 5.3.k.
LU	Yes. The Copyright Act allows caricatures aimed at mocking the parodied work provided that they are in accordance with fair practice and that they only use elements strictly necessary for the parody and do not disparage the work.
MT	Yes, the pre-existing exception was kept.
NL	Yes, introduced. The caricature must be made in accordance with what is reasonably permitted according to the rules of social intercourse.
PL	Not introduced.
PT	Not introduced. Some commentators consider that it is allowed as a free use in general, being a use merely inspired by an existing work ²²⁵ .
RO	Not introduced
SE	No parody exception in the law but it is accepted that general principles of law, confirmed on this by case-law, lead to the conclusion that parodies are not infringing the rights of the authors.
SK	Not introduced
SI	Not introduced
UK	Not introduced.

²²¹ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on France by P. Kamina), p. 214.

²²² Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 262, where no reference is made to such possibility.

²²³ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Hungary by M. Ficsor), p. 265.

²²⁴ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Italy by S. Ercolani), p. 316.

²²⁵ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 396 (referring to article 2 (1) n of the Copyright Act.