



D3.3 - Policy recommendations

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Description	This deliverable encapsulates the scientific output generated from Task 3.1. It is situated within the context of the REBOOT Project's Work Package 3 (WP3), which is dedicated to examining the policy and legal framework governing the European Film Industry (EFI). In alignment with the overarching aims and objectives of the REBOOT Project and WP3, the deliverable offers a comprehensive analysis of the policy and legal framework that influences and regulates the operation of the EFI, thereby impacting the competitiveness of the European audiovisual sector within the European Union (EU). It not only provides a systematic mapping and analysis of EU policy documents and legislation pertaining to the EFI and its operation, but it also offers a set of policy recommendations for EU and national policymakers. These recommendations address the existing gaps or legal fragmentation that hinder the competitive power of the EFI and necessitate the intervention of the EU and its Member States.
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EXECUTIVE SUMMARY

Audiovisual and cinematographic works are multifaceted cultural assets. From a market-oriented perspective, audiovisual/cinematographic works are considered cultural goods that generate economic returns for their authors and other market actors involved in the pre-production, production, and post-production phases of the filmmaking lifecycle and the retail chain. From a cultural standpoint, audiovisual/cinematographic content is an artistic expression and manifestation of creativity, disseminating its message to audiences across borders and time. Lastly, from a social viewpoint, audiovisual/cinematographic works function as tools that capture, document, and safeguard the cultural identity, collective memory, imagery, shared history, and communal values of the society from which they originate. Furthermore, these works contribute to the transmission and dissemination of such information, knowledge and heritage from one generation to another.

In accordance with these features, the operation of the European Film Industry (hereinafter ‘EFI’) and the access to, use, protection, and preservation of European audiovisual/cinematographic works and heritage are guided and regulated by a multitude of public policies, laws, and regulations. These policy and legal tools encompass the cultural and economic policies of the European Union (hereinafter ‘EU’) and its Member States, specifically the ones on cultural diversity, as well as copyright law, media law, the legal framework governing access to online content, and the norms concerning the protection of minors. The institutional context established at both the supranational and national levels is further complemented by the policies and legal instruments administered by international organisations, such as the United Nations and its specialised agencies, particularly the World Intellectual Property Organization, as well as the World Trade Organization. Additionally, regional organisations, mainly the Council of Europe, also play a significant role in shaping this policy and legal landscape.

This report, D3.3 - Policy Recommendations, is the outcome of a comprehensive and multi-level analysis of the abovementioned policies and legal instruments developed at the international, regional, supranational and national levels. It encapsulates the scientific output generated from Task 3.1, which examined the EU and national policies and legal instruments regulating the activities involved in different stages of the filmmaking lifecycle, including the distribution and preservation of audiovisual/cinematographic works. It is situated within the REBOOT Project’s Work Package 3



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(hereinafter ‘WP3’), which is dedicated to examining the policy and legal framework governing the EFI within and outside the EU.

In alignment with the overarching aims and objectives of the REBOOT project and WP3, the report offers a comprehensive analysis of the policy and legal framework that influences and regulates the operation of the EFI, thereby impacting the competitiveness of the European audiovisual sector within the EU. It provides a systematic mapping and analysis of EU policy documents and legislation pertaining to the EFI and its operation, and it offers a series of policy recommendations for EU and national policymakers based on such analyses. These recommendations address the existing gaps or legal fragmentation that hinder the competitive power of the EFI and necessitate the intervention of the EU and its Member States.

This report constitutes the foundation of the legal analyses conducted within the REBOOT Project, particularly in WPs 3 and 4. Furthermore, approaching and analysing the EFI's competitiveness mainly from a legal viewpoint, D3.3 complements the other tasks and deliverables of the REBOOT Project, which have been drafted from cultural studies, media studies, political science, and economics perspectives.

(Pelin Turan, Caterina Sganga (SSSA); Evangelia Psychogiopoulou (ELIAMEP); Katharine Sarikakis, Angeliki Chatziefrimidou, Yves Saint Clair Zogo (UNIVIE); 2025)



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LIST OF ABBREVIATIONS

AI	Artificial Intelligence
AVMSD	Audiovisual Media Services Directive (Directive 2010/13/EU)
CCL	Compulsory Collective License
CDSMD	Copyright in the Digital Single Market Directive (Directive (EU) 2019/790)
CEDS	Common European Data Space
CFREU	Charter of Fundamental Rights of the European Union
CHDS	Common European Data Space for Cultural Heritage/ Cultural Heritage Data Space
CHIs	Cultural Heritage Institutions
CJEU	Court of Justice of the European Union
CMOs	Collective Management Organisations
CoE	Council of Europe
CPC (Regulation)	Consumer Protection Co-operation (Regulation) (Regulation (EU) 2017/2394)
DRM	Digital Rights Management
DSM	Digital Single Market
E&Ls	Exceptions and Limitations
EC	European Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECL	Extended Collective License
ELIAMEP	Hellenic Foundation for European and Foreign Policy
EU	European Union



GDPR	General Data Protection Regulation (Regulation (EU) 2016/679)
GLAM	Galleries, Libraries, Archives and Museums
InfoSoc	Information Society Directive (Directive 99/EC)
IP	Intellectual Property
IPRED	Intellectual Property Rights Enforcement Directive (Directive 2004/48/EC)
IPRs	Intellectual Property Rights
ISPs	Internet Service Providers
JYU	University of Jyväskylä
MoU	Memorandum of Understanding
OCSSPs	Online Content-Sharing Service Providers
OOCW	Out-of-Commerce Works
OWD	Orphan Works Directive (Directive 88/EU)
RLD	Rental and Lending Directive (Directive 2006/115/EC)
RMI	Rights Management Information
SSSA	Scuola Superiore Sant'Anna (Sant'Anna School of Advanced Studies)
TFEU	Treaty on the Functioning of the European Union
TPMs	Technological Protection Measures
TRIPs	Agreement on the Trade-Related Aspects of Intellectual Property Rights
TVWFD	Television Without Frontiers Directive (Council Directive 89/552/EEC)
UCC	Universal Copyright Convention
ULIEGE	University of Liège
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNESCO	United Nations Economic Social Cultural Organisation



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UNIVIE	University of Vienna
US	United States
VSPs	Video-Sharing Platforms
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WP	Work Package
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation



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1 REBOOT: AN OVERVIEW OF THE PROJECT

This project aims to connect the existing strengths, identify and overcome weaknesses and plan for future competitiveness in the fields of policy, practice and experience. More concretely, the Project's objectives are, on the one hand, to explore the long-standing strengths and pervasive gaps in European competitiveness and policies for competitiveness. This includes ways of 'measuring', 'analysing' and 'evaluating' the impact of policies and strategic pathways. On the other hand, the project aspires to place attention on the active preparation for the future in the area of audiences by exploring audience preferences and their generation, as well as modes of film content production. The latter are elements which today's youth will carry and engage with in the coming decades as makers and consumers, as well as industry and policy leaders. Therefore, the consortium interrogates not only the 'what is' but also the 'what has been' and 'what will be' with fresh lenses.

REBOOT's ambition is to provide a full set of knowledge of the European film industry (hereinafter 'EFI'), which maximises its existing strengths, combined with strategic and tactical dimensions of action for the optimisation of the potential held in European youth public, understood both as emerging audiences and as citizens. Specifically, the ambition of the project combines several dimensions, which reinforce each other but are listed separately for analytical purposes (and in no particular order): **(a)** increasing support for young people's engagement with European film; **(b)** strengthening the place of the European Union (hereinafter 'EU') in the global audiovisual economy, particularly in light of the rise of video-on-demand (hereinafter 'VoD'); **(c)** supporting cultural diversity in the EU film industry; **(d)** addressing the need for a different understanding of competitiveness and relevant indicators in this context; and **(e)** recognising and supporting the importance for the EU of film and, more broadly, of the cultural and creative sector as a geopolitical asset.



2 INTRODUCTION

REBOOT: Reviving, Boosting, Optimising and Transforming European Film Competitiveness (hereinafter ‘the REBOOT project’ or ‘the Project’) is a multidisciplinary research project that brings together a consortium of twelve universities and research institutions across Europe to critically evaluate the current state and competitive power of the EFI within the EU and global audiovisual market (hereinafter ‘AV market’), in order to develop novel strategies to enhance the EFI’s share in the global AV market. Approaching the topic from different disciplinary perspectives, the REBOOT project aims to identify and map the indicators characterising the EFI’s strengths while addressing the various aspects that hinder the EFI from thriving.

In this context, the REBOOT project is committed to understanding the building blocks of ‘competitiveness’, particularly that of the EFI, through a retrospective analysis of the social, policy and legal background against which it is constructed. Building on and updating the defining elements of ‘competitiveness’ within such a multilayered framework, the REBOOT project aims to envision the future trajectories of the EFI and strategise its competitive strength in the European and global AV market. Therefore, the Project not only examines and maps current indicators of internal and international competitiveness but also seeks to identify new measures to evaluate this phenomenon in relation to technological progress, prevailing trends in the preferences and behaviours of key market actors, legislative reforms, and shifts in consumer habits. In doing so, the Project pays special attention to promoting European norms and values that comprise the cornerstones of the EU’s agenda regarding the European audiovisual sector (hereinafter ‘European AV sector’), such as safeguarding media pluralism, protecting cultural and linguistic diversity, and the protection of minors,¹ while reinforcing European culture.

Aligned with its goals, the REBOOT project recognises the unique perspectives of various market actors and stakeholders. These focus groups include cinema professionals involved in different stages of the filmmaking process, consumers of cinematographic content—particularly young audiences—and the EU and national policymakers shaping the policies and legislative framework that inform and

¹ Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Principles and Guidelines for the Community’s Audiovisual Policy in the Digital Age, COM(1999) 657 final; Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, COM(2001) 0534 final [2001] OJ C 43/6.



regulate the operation of the EFI. With this spirit, the project develops a set of policy tools to enhance the competitive power of the EFI, such as:

- **Policy briefings** to draw the attention of the general public to the EU strategies on the EFI,
- **Policy recommendations** addressed to the EU and national policymakers to trigger policy and legislative reforms,
- **Code of best practices** co-developed with cinema professionals, to provide experience-based information and guidance to the EFI, and
- **Public engagement and dissemination activities** to share the findings and the abovementioned policy tools of the REBOOT project with greater international and national audiences and stakeholders.

In this framework, this project deliverable is dedicated to developing a set of policy recommendations based on a comprehensive analysis of the policies and legislation that shape the operation of the EFI across the borders of the EU Member States, yet within the borders of the EU. Designed as such, this deliverable falls under the research endeavours of Work Package 3 - The Institutional Context of the EU Film Industry (hereinafter ‘WP3’). It constitutes Deliverable 3.3 - Policy Recommendations (hereinafter ‘D3.3’), which is derived from the data collection and analysis activities pursued in the context of Task 3.1 - EU and Comparative Mapping of the Filmmaking Regulatory Framework (hereinafter ‘T3.1’) from February 2022 until July 2025.

This project deliverable comprises six sections, accompanied by a list of references and eight annexed documents.

Section 1, above, briefly explained the overarching aims and objectives of the REBOOT project.

Section 2 herein contextualises the research endeavours undertaken by T3.1 and D3.3 vis-à-vis the overarching aims and objectives of the REBOOT project. Additionally, it includes a thematic overview of this document to help readers navigate through the different sections of the report.

Section 3 outlines the aims and objectives of T3.1 and D3.3, while offering detailed information on the scientific basis of the research. In doing so, it clarifies T3.1 and D3.3’s approach to defining the ‘internal competitiveness’ of the EFI, which dwells upon two specific parameters. First, it examines how the REBOOT project in general and other WP3 tasks, especially Task 3.4, (re-) formulate the ‘international promotion’ of the EFI; then, it adapts this definition to establish an indicator for assessing the competitiveness of the European AV sector within the EU for the purposes



of Task 3.1 (first parameter).² Second, it discusses and aligns its perspective on ‘internal competitiveness’ with the cultural, economic, social, and political significance of European audiovisual/cinematographic content (second parameter). Additionally, it details the methodology used to collect and analyse data to support the policy recommendations compiled in this deliverable.

Subsequently, Section 4 establishes the theoretical background of the report. This section is organised into four main sub-sections in line with the EU values that guide the European AV agenda and the legal framework that governs the EFI’s operation: Cultural diversity, copyright-related aspects, media law-related aspects of the access and discoverability of European audiovisual/cinematographic works, and the protection of minors. It reviews the literature and public policy documents that contextualise the indicators used to evaluate the internal competitiveness of the EFI. It maps and provides a multi-level comparison of the legal norms directly relevant to each indicator, also highlighting areas that require action from the EU or national policymakers. The analysis provided in Section 4 is extracted from the review of the EU policies and the multi-level mapping of the international, regional, supranational and national laws, which are demonstrated in thematic and schematic tables presented in the annexed Excel Spreadsheets.

Section 5, building upon the research outcomes of Section 4, presents a concise set of policy recommendations addressed to the EU and national policymakers to help enhance the competitiveness of the EFI across Europe and within the EU.

Finally, Section 6 provides the concluding remarks to the report and the policy recommendations presented within this report.

3 AIMS AND OBJECTIVES & METHODOLOGY

The REBOOT project is organised into seven work packages (hereinafter ‘WPs’), five of which are allocated to research activities. These packages aim to analyse the current indicators and future

² To have an insight into the REBOOT project’s take on ‘international promotion’, both as a concept to investigate and an ideal for the EFI to achieve, please see: Vlassis, A., Bissot, P., Houard, S., Dâmaso, M., Niutta, A., Garcia Leiva, MT., Albornoz, L., Vargas Miranda, I., Andriopoulou, I., Turan, P., Pilo, P., Glowacki, M., Mikucki, J., Hiltunen, K. (2025). Promotion of the EFI at the international level: Institutional and policy models across the EU Member States. In: Vlassis, A. Psychogiopoulou, E, Kandyla, A. and Sarikakis, K. (Eds.). (2025). Final report on the mapping and EU law of institutional models for the promotion of the EFI. Developed by the Horizon Europe project REBOOT (Reviving, Boosting, Optimising and Transforming European Film Competitiveness – REBOOT), funded by the European Union’s Horizon Europe Research and Innovation programme (Grant Agreement No. 101094769). <https://doi.org/10.5281/zenodo.15781266>.



trajectories of the EFI's competitiveness through different disciplinary lenses, such as culture and media studies, political science, law, and economics. Among these WPs, WP3 and the research tasks organised under WP3 are dedicated, principally, to contemplating the policy and legal landscape in which the EFI operates. Indeed, WP3, titled 'The Institutional Context of the EU Film Industry', centralises the public policies and legislative framework developed by the EU policymakers and legislator to shape the European policy and legal framework that informs, governs and harmonises the policy and legislative efforts of the EU Member States in order to support the competitiveness of the EFI within the EU's Single Market and the global AV market.

WP3 has two main research streams. The first stream focuses on the 'internal dimension' of the EU policies and laws concerning the EFI, and it evaluates the impact of the EU policy and legal framework on the functioning and competitiveness of the EFI within the EU. The second stream complements the former by studying the 'external dimension' of the subject, and it analyses the interplay of the EU policies and laws with the competitive power of the EFI in the global AV market and cultural scene.

T3.1 and D3.3 belong to the first stream of the research activities of WP3. T3.1, entitled 'EU and Comparative Mapping of the Filmmaking Regulatory Framework', sets the backbone of WP3's research activities on the internal dimension, given that it provides a comprehensive and multi-level mapping of the policies and legal norms that directly impact the filmmaking lifecycle—precisely, the production, distribution and exhibition phases—of European audiovisual and cinematographic works within the EU. To identify the policy and legislative corpus to be examined, T3.1 considers two major parameters.

The first parameter involves articulating the EFI's 'competitiveness', both as a market reality assessed by the REBOOT project and an ideal to be achieved by the EFI through the new indicators developed by the REBOOT consortium over the course of the Project. WP3 in general and particularly Task 3.4 consider the concept of 'international promotion' as defined in the report, entitled 'Public Support for the International Promotion of European Films', which was authored by Teresa Hoefert de Turégano under the auspices of the Council of Europe (hereinafter 'CoE') and the European Audiovisual Observatory (hereinafter 'EAO').



In her report, de Turégano describes the ‘international promotion’ of the EFI as enhancing the visibility of national cinematographic content in ‘countries outside the country of origin of a film’.³ Based on this formulation, the study identifies several indicative (rather than exhaustive) criteria to examine the ways in which the EFI can be promoted in supranational and international forums. While these criteria range from funding schemes for supporting cinema professionals to opportunities for discovering and nurturing new talents, the report remains silent on the legal aspects of the EFI's operation.

T3.1 not only builds on this definition but also aims to address the gap in one of the leading authoritative sources in the field by investigating the interaction between EU policies and legislation regarding the visibility and circulation of European audiovisual/cinematographic works within the EU's Single Market. While this parameter defines the scope of this deliverable across different stages of the filmmaking lifecycle and emphasises the importance of distribution and exhibition for achieving EU-wide visibility and competitiveness, there remains a need to select the relevant EU policies and legislation for assessment in this context.

In that regard, the second parameter helps identify the main categories of EU policies and legislative corpus to analyse, as this parameter focuses on the cultural, economic, and social values associated with European audiovisual and cinematographic content.

The value that the EU assigns to audiovisual and cinematographic works arises from the diverse nature of such works. From a market-oriented standpoint, audiovisual/cinematographic works are regarded as cultural goods that yield economic returns for their authors and other market actors involved in the pre-production, production, and post-production stages of filmmaking.⁴ From a cultural viewpoint, audiovisual/cinematographic content represents the artistic expression and creativity of its authors, serving to share its message with audiences across borders and time.⁵ Lastly, from a social perspective, audiovisual/cinematographic works function as tools that capture, document, and preserve the cultural identity, collective memory, imagery, shared history, and

³ Teresa Hoefert de Turégano, Public Support for the International Promotion of European Films (Council of Europe - European Audiovisual Observatory, February 2006).

⁴ Resolution of the Council and of the Ministers responsible for Cultural Affairs, meeting within the Council of 13 November 1986 on the European cinema and television year (1988) (86/C 320/04) [1986] OJ C 320/04; Council Resolution of 5 November 1993 on the first century of the cinema [1993] OJ C 85/02; Communication from the Commission, COM(2002/C 43/04) (n 1); Communication from the Commission on State aid for films and other audiovisual works (2013/C 332/01) [2013] OJ C 332/1.

⁵ Ibid.



communal values of the society from which they originate; in addition, they help convey and transmit this information, knowledge and heritage from one generation to the next.⁶

Aligned with these distinct characteristics of audiovisual and cinematographic content, T3.1 contours the scope of the research presented here by mapping and analysing the EU and national policies and laws on cultural diversity, copyright, access to and discoverability of audiovisual/cinematographic content, and protection of minors.

The research outputs of T3.1 are compiled into D3.3, which aims to present a set of policy recommendations to the EU and national policymakers. These recommendations address the prevailing legislative gaps that require intervention at both the EU and national levels, supported by the theoretical and scientific background from which such recommendations are derived.

As a last remark, it is also worth noting that the research outputs, especially the legal mapping and comparative analysis activities pursued under T3.1, support and feed into Task 4.2 - Coping Strategies of Creative Non-Mainstream Filmmakers and Code of Best Practices, also led by Scuola Superiore Sant'Anna (hereinafter 'SSSA'). This task produces a Code of Best Practices addressed to and co-developed with cinema professionals. In a similar vein, the results of the multi-level legal mapping, which are consolidated into Excel Spreadsheets and annexed herein, are utilized to create an easy-to-navigate and open access online database, namely 'Multi-level mapping of the legal norms informing and regulating filmmaking in the European Union' platform, which falls under the research activities organised in the context of WP3's Deliverable 3.6 - Public Database on EU laws and cross-national frameworks,⁷ which the WP3 leader, Hellenic Foundation for European and Foreign Policy (hereinafter 'ELIAMEP'), leads.

3.1 Aims and Objectives

T3.1 aims to achieve two main objectives:

- To evaluate the extent of harmonisation and/or fragmentation of the EU and national regulatory frameworks that influence the operationalisation of the creative activities of the EFI, and
- to examine the regulatory enablers and barriers to creating a competitive and diverse EFI.

⁶ Ibid.

⁷ For more information on Deliverable 3.6, please see: Kandyla, A., Turan P. and Vlassis, A. (Eds) (2025). Public Database on EU laws and cross-national frameworks. (Forthcoming on Zenodo)



As a result of these research activities, D3.3 is expected to produce three specific lines of scientific outcomes:

- A systematic and thematic mapping of the legal norms within the EU legal framework that inform and govern access to, use, distribution, and diversity of European audiovisual/cinematographic content, as well as the protection of minors,
- a systematic mapping of the legal tools incorporated in the national legal frameworks of the selected EU Member States that inform and regulate access to, use, distribution, and diversity of European audiovisual/cinematographic content, as well as the protection of minors which will be compared to the EU tools to identify and substantiate areas needing intervention by national policymakers; and
- a systematic mapping and comparative analysis of the legal tools within international and regional legal instruments managed by the United Nations (hereinafter ‘UN’) and its specialized agencies, World Trade Organisation (hereinafter ‘WTO’), and the Council of Europe (hereinafter ‘CoE’), to guide and strengthen the policy recommendations derived from the comparative and cross-national legal analyses above.

3.2 Methodology

The aims and objectives of T3.1 require an eclectic research methodology, which not only helps analyse the current situation but also supports the development of policy recommendations that could improve the future competitiveness of the EFI in the EU by facilitating the circulation of European audiovisual/cinematographic works across the EU Member States.

In line with these aims, the data collection method adopted for this report combines a systematic review of existing literature and public policies with a multi-level mapping of legal norms and qualitative methods such as semi-structured interviews and/or focus groups conducted with European cinema professionals. The data gathered from the literature and policy document review is triangulated with the legal mapping that governs the filmmaking lifecycle, and the information obtained from deliberative exercises held with cinema professionals.

3.2.1 Data Collection

The data collection process involves theoretical and desk-based research, specifically a comprehensive and systematic review of EU public policy documents, primary sources of law (e.g.,



legislation), and secondary sources of law (e.g., books, book chapters, journal articles, studies, reports).

As the initial step, keyword-based research was conducted using online databases to identify and review scholarly literature in the field. This was followed by an online search of the publication catalogues of key institutions monitoring the operation of the EFI, such as the EAO, and relevant EU-funded projects, including the Horizon 2020 - reCreating Europe⁸ project (2020-2023), which was coordinated by SSSA. These data collection efforts and the review of scholarly and grey literature helped identify, thematically categorise, and list the major issues concerning the interaction between the EFI's operation and the EU's policies and legislative framework. This step prepared the ground for the subsequent phase of data collection: identifying and compiling EU policy documents that address the listed issues, as well as relevant EU and national legal norms.

The second step in the data collection process involved researching official EU databases (e.g., EUR-Lex) to locate and review EU policy documents and legislation concerning the operation of the EFI. While the EUR-Lex database has helped retrieve EU policy documents, Directives, and Regulations; the 'National Implementation' section on the webpages dedicated to each Directive and Regulation has been crucial for accessing the key legislation of the selected EU Member States in their official languages. The EU Member States' selection and national legislation are based on those represented in the REBOOT consortium (i.e., Austria, Finland, France, Greece, the Netherlands, and Spain). The national legislation analysed in this way has been reviewed with the support of machine translation tools such as Google Translate or DeepL, unless such information could be extracted from the data repository built by SSSA over the course of the reCreating Europe projects. The original texts of the EU laws and the machine-translated national norms are compiled into Excel sheets attached to this report to facilitate and support comparative analysis of the norms across different levels.

As the third step, to complement the double-level data collection and analysis effort outlined above and to create a comprehensive view of the regulatory framework that influences the operation and competitiveness of the EFI, the data collection efforts are expanded to the international legal instruments administered by the UN and its specialised agencies, specifically the United Nations

⁸ reCreating Europe is a research project funded by the European Union's Horizon 2020 programme under the Grant Agreement No: 870626. The Project lasted from January 1, 2020 until March 31, 2023. See: European Commission, 'Rethinking digital copyright law for a culturally diverse, accessible, creative Europe' (Cordis, 2020) <<https://cordis.europa.eu/project/id/870626>> accessed 9 July 2025.



Educational, Scientific and Cultural Organisation (hereinafter ‘UNESCO’) and the World Intellectual Property Organization (hereinafter ‘WIPO’); WTO; and regional legal instruments administered by the CoE, The norms extracted from the legal instruments administered by these organisations are also demonstrated on the Excel sheets, alongside the EU and national legal norms that can be found in the Annex of this document.

Last but not least, several semi-structured interviews and focus groups have been organised with cinema professionals (e.g., independent film producers, distributors, sales agents, representatives of broadcasting organisations) to gather data for triangulation with the information collected through systematic and thematic literature review and legal mapping, mainly to confirm whether the EFI’s challenges with the European legal framework which were identified through the review of literature prevail to be pressing issues for the EFI today.

3.2.2 Data Analysis

Aligned with the data collection process, the analysis of the collected data also involved several steps, as each stage of analysis and the interim conclusions thereof provided the basis for the next phase. In this regard, the data was analysed through data triangulation using comparative analysis and qualitative research methods. This was mainly done by comparing information from the literature with that from EU public policies and legislation, then with the legal norms mapped by reviewing international, regional, and national laws, and finally through semi-structured interviews and/or focus groups with cinema professionals.

The data analysis process started with reviewing the literature, including reports and studies, to evaluate the legal issues central to the EFI's competitiveness within the EU. The results of this preliminary analysis were consistent with the definition of ‘international promotion’, as articulated by de Turégano and elaborated in Task 3.4. Consequently, the ability of market players to distribute and boost the visibility and accessibility of audiovisual/cinematographic content was identified as the key to competitiveness, both within and beyond the EU.

Several authoritative sources have examined licensing schemes and practices in the European AV market,⁹ the remuneration of authors, and the existing and emerging business models for distributing

⁹ Please see: *From Script to Screen: The Importance of Copyright in the Distribution of Films* (World Intellectual Property Organization (WIPO) 2011); Lucie Guibault, Olivia Salamanca and Stef Van Gompel, *Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances: Final Report* (European Commission Publications Office 2015); Xalabarder R, *AV Remuneration Study* (1st edn, CISAC 2018); Bertrand Moullier, *Rights*,



audiovisual/cinematographic works, along with their legal implications. Therefore, this report aims to explore the different legal aspects that influence the production and distribution phases, given that these aspects are not only essential for licensing practices but also lack a comprehensive study. The deliberative exercises conducted with cinema professionals confirmed that such aspects are still pressing issues in the European AV sector. Whereas the review of the literature and the EU policies are consolidated into Section 4, ‘State of the Art & Key Findings’, the aspects mentioned earlier, which remain crucial to licensing practices and distribution, are grouped into nine categories and can be presented as follows:

- (1) Cultural diversity,
- (2) Key definitions used in the EU copyright *acquis* and the determination of authorship of individual and joint- or collectively authored works, including the presumption of authorship of such works,
- (3) The economic, moral and related rights essential for the filmmaking process and the retail chain,
- (4) The exceptions and limitations (hereinafter ‘E&Ls’) to copyright and related rights, which have a direct impact on the filmmaking lifecycle,
- (5) The term of legal protection provided for audiovisual/cinematographic works and other works essential for the production phase of the filmmaking lifecycle,
- (6) The legal norms related to and contouring the borders of the public domain,
- (7) The screen and catalogue quotas enabling access to and the discoverability of European works on television broadcasts and on-demand platforms, and
- (8) The socio-legal norms concerning the protection of minors.

The second phase of data analysis was dedicated to identifying the relevant EU legal norms relevant to the categories listed above. After meticulous examination of the pertinent EU norms, the legal norms that have transposed or corresponded to these EU norms within the legal systems of

Camera, Action! IP Rights and the Film-Making Process (2nd edn, World Intellectual Property Organization (WIPO) 2022); Amélie Lacourt, Justine Radet-Cormann and Sophie Valais, *Fair Remuneration for Audiovisual Authors and Performers in Licensing Agreements* (European Audiovisual Observatory (Council of Europe) 2023). Additionally, it is worth noting that during an event held at the WIPO premises in April 2025, the co-organisers of the event, which comprised of CISAC, FESAAL and SSA, announced the launch of a new report on the legal matters concerning the fair remuneration of audiovisual authors. See: ‘Audiovisual Authors Speak out and Urge WIPO Copyright Committee to Address Their Rights’ (SSA Society of Audiovisual Authors, 2025); ‘WIPO SCCR Side Event - Beyond the Credits: Strengthening Audiovisual Authors’ Rights’ (CISAC, 2025).



Austria, Finland, France, Greece, the Netherlands, and Spain were identified and analysed in a comparative manner. This stage of legal analysis demonstrated the extent to which the EU and Member States' legal regimes, as well as the national laws of the Member States, are harmonised or fragmented. The results of this research are also summarised in Section 4, with the complete legal mapping provided in the Annexes of this report.

Finally, the mapping of the legal norms extracted from the legal instruments administered by the UNESCO, WIPO, WTO and the CoE was taken as a reference point to assess whether the legislative gaps in the European legal landscape can be eliminated with any values or norms inherent in such international and regional legal instruments. The outcome of this phase comprises the policy recommendation and is presented in Section 5 of the report.

4 STATE OF THE ART & KEY FINDINGS

An overview of the EU policy documents adopted since the mid-1980s reveals that audiovisual/cinematographic works and heritage have historically been key items in the EU's cultural policies and agenda, including not only the policies tailored for the European AV sector and the EFI but also those on the digital transformation of Europe and the modernisation of EU media law and copyright frameworks. Indeed, the period following the declaration of 1988 as the 'European Cinema and Television Year'¹⁰ has witnessed the development of a plethora of public policies focusing on different aspects of the sector, accompanied by several legislative instruments to achieve the policy objectives set forth therein, such as Council Directive 89/552/EEC¹¹ (hereinafter 'Television Without Frontiers Directive' or 'TVWFD') (which was repealed in 2010), Directives 2010/13/EU¹² (hereinafter 'Audiovisual Media Services Directive' or 'AVMSD'), 2001/29/EC¹³ (hereinafter 'InfoSoc Directive'), Directive 2006/115/EC¹⁴ (hereinafter 'Rental and Lending Directive' or

¹⁰ Resolution of the Council and of the Ministers responsible for Cultural Affairs (86/C 320/04) (n 4).

¹¹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/23. (Repealed.)

¹² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1.

¹³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

¹⁴ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28.



‘RLD’), 2012/28/EU¹⁵ (hereinafter ‘Orphan Works Directive’ or ‘OWD’), and (EU) 2019/790¹⁶ (hereinafter ‘Copyright in the Digital Single Market’ or ‘CDSMD’).

The significance of audiovisual/cinematographic works and heritage within the European policy agenda and its legal outreach is justified by their multifaceted nature, which reflects their economic, cultural, and social importance, while also proving the value of audiovisual/cinematographic works and heritage for the EU and European market actors, especially in the digital era. As already mentioned in the previous sections of this report, from a market-oriented standpoint, audiovisual/cinematographic works are regarded as cultural goods that yield economic returns for their authors and other market actors involved in the pre-production, production, and post-production stages of the filmmaking lifecycle as well as in the retail chain, such as performers, phonogram producers, broadcasting organisations, film distributors and promoters.¹⁷ From a cultural viewpoint, audiovisual/cinematographic content represents artistic expression and creativity of its authors, which conveys a message to audiences across borders and time.¹⁸ Lastly, from a social perspective, audiovisual/cinematographic works comprise tools that capture, document, and preserve the cultural identity, collective memory, imagery, shared history, and communal values of the society from which they originate; in addition, they serve to convey and transmit this information, knowledge and heritage from one generation to another.¹⁹

This rich composition of audiovisual/cinematographic works and heritage has influenced and shaped the Union’s strategies and action plans on culture, cultural heritage, and the European AV sector, in tandem with the revision of the European media and copyright laws. From an economic or market-oriented perspective, the Union’s policy agenda, in line with the founding treaties of the EU,

¹⁵ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L 299/5.

¹⁶ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

¹⁷ Resolution of the Council and of the Ministers responsible for Cultural Affairs (86/C 320/04) (n 4); Council Resolution of 5 November 1993 (n 4); Communication from the Commission COM(2002/C 43/04) (n 1); Communication from the Commission (2013/C 332/01) (n 4). Also see: Antonios Vlassis, ‘Working Paper: Cultural Policies, Digital Platforms and Global Cultural Economy: European Union in the American Imperium (Still)?’ (Center for International Relations Studies, University of Liege, 2019); Antonios Vlassis, ‘European Union and Online Platforms in Global Audiovisual Politics and Economy: “Once Upon a Time in America”?’ (2021).

¹⁸ Ibid.

¹⁹ Ibid. Also see: Decision No 1718/2006/EC of the European Parliament and the of the Council of 15 November 2006 concerning the implementation of a programme support for the European audiovisual sector (MEDIA 2007) [2006] OJ L 327/12, Rec. 1, Art. 1(2).



specifically Article 26 of the Treaty on the Functioning of the European Union (hereinafter ‘TFEU’), centralises ‘the free movement of persons and products related to audiovisual activities.’²⁰ This agenda item not only underlines the audiovisual/cinematographic content’s economic value to the Single Market but also reassures the EU’s devotion to enabling the circulation of related goods and services, and also cinema professionals, within the borders of the EU, as guaranteed by the freedoms of the EU’s Single Market.²¹ From a cultural and social perspective, the EU policies revolving around the European AV sector and the EFI advocate for ‘a strong audiovisual industry [that is] able to compete with the large overseas industries in this field’²², in order to foster creativity within Europe whilst reinforcing the common European identity within the EU and abroad.²³

As a result of the embodiment of economic, cultural and social values within audiovisual/cinematographic content, the principle of cultural and linguistic diversity, as enshrined in Article 22 of the Charter of Fundamental Rights of the European Union²⁴ (hereinafter ‘CFREU’), has become the Union’s compass down the path to achieve the market-driven and culturally- and socially-informed policy goals.²⁵ This principle has, on the one hand, underpinned the EU policymakers’ efforts to preserve the plurality of cultures and languages within the EU, as well as the endeavours to facilitate the engagement of European societies with the cultural and linguistic values and heritage of others.²⁶ On the other hand, it has justified the policy measures and legislative instruments addressed to safeguard the European identity, culture and cultural heritage from the adverse impacts of economic globalisation and the influx of non-European cultural content, goods

²⁰ Resolution 86/C 320/04 (n 4); also see Green Paper of 27 April 2010 – Unlocking the potential of cultural and creative industries, COM(2010) 183 final.

²¹ Green Paper COM(2010) 183 final (n 20).

²² Resolution of the Council and of the Ministers responsible for Cultural Affairs (86/C 320/04) (n 4); European Parliament resolution of 16 November 2011 on European cinema in the digital era (2010/2306(INI)) (2013/C 153 E/12) [2013] OJ CE 153/102).

²³ Ibid, also see: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European film in the digital era – Bridging cultural diversity and competitiveness, COM(2014) 272 final.

²⁴ Charter of Fundamental Rights of the European Union [2016] OJ C 202/389.

²⁵ Council Decision of 21 December 1990 concerning the implementation of an action programme to promote the development of the European audiovisual industry (Media) (1991 to 1995) [1990] OJ L 380/37, Preamble; Decision No 1718/2006/EC (n 19), Rec. 4; Decision No 1041/2009/EC of the European Parliament and of the Council of 21 October 2009 establishing an audiovisual cooperation programme with professionals from third countries (MEDIA Mundus) [2009] OJ L 288/10, Rec. 4, Rec. 5.

²⁶ See in general: Communication from the Commission, COM(2014) 272 final (n 23).



and services in the European cultural space and audiovisual market.²⁷ In light of these objectives, the EU policymaker has prioritised promoting, distributing, and exhibiting European audiovisual/cinematographic content and heritage within the EU and across the borders of the Union.²⁸

These aspects of the EFI's competitiveness have been central to many policies outlined in the last three decades. A glance at the chronology of the key policy documents shows the genesis and evolution of the Union's approach to the competitiveness of the European AV sector in general and of the EFI in particular.

The first wave of the Union's public policies on the distribution and preservation of the European audiovisual/cinematographic works and heritage can be traced back to the Council Resolution of 5 November 1993, which encouraged the dissemination of European cinematographic content, including the films that are part of the European film heritage, and the exhibition of such content in European theatres and film festivals.²⁹ In light of this Resolution, as well as to streamline several *ad hoc* initiatives at the national level and to have an EU-wide robust policy framework, the EU eventually launched the MEDIA Programme in 1990, initially for the period 1991-1995.³⁰ The MEDIA programme, which has been extended several times upon its expiry, is a long-lasting initiative that supports and funds the EU actions in the culture, including matters concerning media, hence the European AV sector and the EFI. It aims to safeguard, develop and promote European cultural and linguistic diversity and heritage.³¹ In so doing, it seeks the ways in which the European cultural and creative sector's economic potential and competitiveness can be fostered,³² while paying

²⁷ Ibid. Also see: Psychogiopoulou, E., Kandyla, A., Turan, P., Samaras, A., Comerma, L., Sganga, C. (2025). EU law and governance and the promotion of the EFI on the international scene. In: Vlassis, A. Psychogiopoulou, E., Kandyla, A. and Sarikakis, K. (Eds.). (2025). Final report on the mapping and EU law of institutional models for the promotion of the EFI. Developed by the Horizon Europe project REBOOT (Reviving, Boosting, Optimising and Transforming European Film Competitiveness – REBOOT), funded by the European Union's Horizon Europe Research and Innovation programme (Grant Agreement No. 101094769). <https://doi.org/10.5281/zenodo.15781266>.

²⁸ See: Council Decision of 21 December 1990 (n 25), Art. 2; Decision No 1718/2006/EC (n 18), Art. 1(2)(b), Art. 1(3)(b); Decision No 1855/2006/EC of the European Parliament and of the Council of 12 December 2006 establishing the Culture Programme (2007 to 2013) [2006] OJ L 372/1 (Repealed), Recs, 1, 2, Art. 3(2).

²⁹ Council Decision of 21 December 1990 (n 25); Council Resolution of 5 November 1993 (n 4); also see: Council Resolution of 26 June 2000 on the conservation and enhancement of European cinema heritage [2000] OJ C 193/01.

³⁰ See: Council Decision of 22 December 1995 on the implementation of a training programme for professionals in the European audiovisual programme industry (Media II - Training) (95/564/EC) [1995] OJ C 321/33.

³¹ Decision No 1718/2006/EC (n 19), Rec. 8, Art. 1.

³² Ibid, Artt. 1, 5.



special attention to the European AV sector and encouraging creation, circulation and visibility of European films.³³

It is worth noting that the MEDIA programme³⁴ has been recently extended until 2027.³⁵ Yet, the EU is currently considering the continuum of this programme, along with the Creative Europe programme, through the ‘AgoraEU’ initiative and programme, whilst further emphasising the multifaceted nature of the European audiovisual/cinematographic works and heritage as along with the role that the European AV sector plays in establishing a common European identity and in the competitiveness of the EU in general.³⁶ In this regard, it can be argued that the launch of the MEDIA programme constitutes a milestone, if not a turning point, in the chronology of the Union policies concerning the European AV sector and EFI.

The second wave of policies, which were developed under the auspices of the MEDIA programme, concentrated mainly on the new ways to produce and exploit European cinematographic content with the aid of technology and the Internet.³⁷ In this regard, the MEDIA 2007 programme, for instance, advocated for EU-wide efforts to digitise audiovisual/cinematographic works, also as a means to enhance the European AV sector and the EFI’s competitive power in the digital market; it also encouraged the traditional exhibition venues, such as movie theatres, to benefit from the opportunities that digital distribution provides.³⁸ Along the same lines, Council Conclusions of 18 November 2010 welcomed and praised the online distribution of European cinematographic content, also by emphasising the suitability and probability of online platforms to include arthouse movies, heritage films, and films produced in the languages spoken by national or regional minorities in their catalogues, hence providing access to and promoting such ‘non-mainstream’ content.³⁹ The

³³ Communication from the Commission (2013/C 332/2) (n 4).

³⁴ For the purposes of this report, the ‘MEDIA programme’ referred herein serves as an umbrella term that encompasses Media I, Media II, MEDIA Plus, MEDIA Mundus and their derivatives.

³⁵ Regulation (EU) 2021/818 of the European Parliament and of the Council of 20 May 2021 establishing the Creative Europe Programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013 [2021] OJ L 198/34.

³⁶ See: Proposal for a Regulation of the European Parliament and of the Council establishing the ‘AgoraEU’ programme for the period 2028-2034, and repealing Regulations (EU) 2021/692 and (EU) 2021/818, COM(2025) 550 final.

³⁷ Council Decision 95/564/EC (n 30); Decision No 163/2001/EC of the European Parliament and of the Council of 19 January 2001 on the implementation of a training programme for professionals in the European audiovisual programme industry (MEDIA - Training) (2001-2005) [2001] OJ L 2001/1; Decision No 1718/2006/EC (n 19); Regulation (EU) 2021/818 (n 34).

³⁸ Decision No 1718/2006/EC (n 19), Artt. 3(1)(c), 5; also see: Decision No 1041/2009/EC (n 25), Rec. 12, Art. 7.

³⁹ Council Conclusions of 18 November 2010 on the opportunities and challenges for European cinema in the digital era (2010/C 323/05) [2010] OJ C 323/15, also see: Green Paper COM(2010) 183 final (n 20); Opinion of the Committee of



succeeding public policy documents further emphasised the possible positive impact of online distribution opportunities on European social cohesion and cultural and linguistic diversity, as well as the internal and global competitiveness of European content.⁴⁰

With respect to the interaction of the European AV sector and EFI with the digital era, it shall be noted that the earlier policy documents adopted a positive approach to the digitisation of the European AV sector and the EFI, especially the online distribution and exhibition of audiovisual/cinematographic content. Nevertheless, the later policy documents reveal that the platformisation phenomenon in the 1990s and the shift in consumer behaviours from in-theatre consumption to online consumption introduced new challenges to the sector. Whereas digital means of distributing and exhibiting content have initially been considered as complementary, rather than competing, services to the traditional means of distribution and exhibition (e.g., movie theatres, DVD);⁴¹ the policy documents with more recent dates, especially the ones published in the aftermath of the COVID-19 pandemic, showcase that the European AV sector ought to adopt new strategies to boost European AV sector's capacity to compete with the global market actors, mainly of the United States (hereinafter 'US') origin, dominating the AV market.⁴²

Under the influence of these policy objectives, as well as economic globalisation⁴³ and developments in international norm-setting forums, such as the UN, the WTO, and the CoE,⁴⁴ the EU legal framework, specifically the EU media and copyright regimes, has undergone significant transformations since the 2000s. The treatment of audiovisual/cinematographic works merely as

the Regions on 'European cinema in the digital era' (2011/C 104/07) [2011] OJ C 104/31; European Parliament Resolution of 16 November 2011 (2013/C 153 E/12) (n 22).

⁴⁰ Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Opportunities and Challenges for European Cinema in the Digital Era' COM(2010) 487 final (2011/C 248/25) [2011] OJ L 248/144; European Parliament resolution (2013/C 153 E/12) (n 23); Council conclusions on improving the cross-border circulation of European audiovisual works, with an emphasis on co-productions (2019/C 192/05) [2019] OJ C 192/5; Council conclusions on increasing the availability and competitiveness of European audiovisual and media content (2021/C 501 I/02) [2021] OJ C 501 I/7.

⁴¹ Communication from the Commission, COM(1999) 657 final (n 1); Communication from the Commission, COM(2002/C 43/04) (n 1).

⁴² Communication from the Commission, COM(2014) 272 final (n 23); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation, COM(2020) 784 final.

⁴³ Decision No 1718/2006/EC (n 20), Rec. 18; Decision No 1041/2009/EC (n 26), Rec. 7.

⁴⁴ For a comprehensive analysis of the influence of the economic globalisation on the EU's role in the international norm-setting and the external policies adopted to enhance the global competitiveness of the European AV sector and the EFI, please see: Psychogiopoulou E. and others (n 35).



goods, dissociated from their inherent cultural and social aspects, by global market players in the global norm-setting forums and during the negotiations over the transatlantic import of such goods have, on the one hand, encouraged the EU to seek for an alternative forum to vocalise the intertwined relationship between such ‘cultural’ goods and cultural diversity.⁴⁵ On the other hand, the interplay of global trade with the European cultural landscape and audiovisual market paved the way for the adoption of innovative legal tools, such as screen quotas and catalogue quotas, by the EU legislator within the TVWFD and the AVMSD, which revoked and replaced the former Directive.⁴⁶

The screen and catalogue quotas were a reaction to the influx of non-European content, which does not necessarily reflect European values and identity, into the European audiovisual market. Therefore, the quotas introduced with the TVWFD and revised with the AVMSD aimed to secure the ‘prominence of European works’⁴⁷ by allocating a certain percentage of the streaming programmes of television broadcasting organisations and the catalogues of on-demand platforms operating in the Single Market to European audiovisual/cinematographic works.⁴⁸

Aside from the need to tackle the adverse impacts of economic globalisation on the EFI and the capacity of European content to compete with non-European works; the early 2000s have witnessed significant technological developments, while global market trends toward digitisation exposed the vulnerability of such content to the ‘perils’ of digital technologies and the limitations to EU policymakers’ efforts to set a sound and future-proof policy and legal framework for the European AV sector and the EFI. Indeed, from the early 2000s onward, the EU policymaker’s focus also encompassed the interplay of audiovisual/cinematographic works with digital preservation technology, especially after the realisation of the fact that analogue content that constitutes the European audiovisual heritage, is stored on fragile media, which may easily deteriorate, especially given the physical conditions of archives or repositories, or become inaccessible since the technology used to digitise them may soon become obsolete, making the support unreadable by state-of-the-art hardware or software.⁴⁹ Therefore, the EU policymakers’ agenda and efforts extended to digitising

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Directive 2010/13/EU (n 13), Art. 13(1).

⁴⁸ Council Decision of 10 July 1995 on the implementation of a programme encouraging the development and distribution of European audiovisual works (Media II – Development and distribution) (1996-2000) [1995] OJ L 321/25, Rec. 17, Art. 2(2). Council Directive 89/552/EC (n 12), Art. 4; Directive 2010/13/EU (n 13), Art. 13.

⁴⁹ Council of Europe, European Convention for the Protection of the Audiovisual Heritage (adopted 8 November 2001, entered into force 1 January 2008) ETS No. 183, Preamble; Council of Europe, Explanatory Report for the European



analogue audiovisual/cinematographic works, online availability and digital preservation of audiovisual/cinematographic works and heritage, also as a means to promote cultural diversity and the public's engagement with culture and cultural heritage.⁵⁰

Aside from the novel challenges introduced by technological developments and the platformisation phenomenon, a handful of policy documents pinpoint the prevailing legislative gaps in the EU legal regime concerning the interface with audiovisual/cinematographic works with copyright. For instance, the report issued by the Council in 2002 in the aftermath of the adoption of Directive 92/100/EEC⁵¹, which was repealed by Directive 2006/115/EC⁵² (hereinafter 'Rental and Lending Directive' or 'RLD'), stresses that, regardless of the RLD's aim to harmonise the notion of 'authorship' in audiovisual/cinematographic works, the review of the national copyright laws of the Member States expose the nuances in the national legislators' approaches to the matter and the divergences in their implementation strategies.⁵³ The opacity around the notion of 'authorship' has significant spill-over effects on the European audiovisual market, given that the identification of authors of a work, especially of joint-authored works such as audiovisual/cinematographic works, is essential for licensing practices and the distribution of such content within and across the borders of the EU.⁵⁴ Yet another issue that has been mentioned is the need for an EU-wide harmonisation on the copyright-related aspects of the collection, cataloguing, preservation and restoration of cinematographic/audiovisual works and heritage, along with the legal measures that would facilitate making such compilations or copies available to the public for academic, educational, research, and cultural purposes.⁵⁵ Last but not least, the European Parliament Resolution of 11 September 2012, while focusing on the enablers of and barriers to the cross-border distribution of

Convention for the Protection of Audiovisual Heritage, para. 1; Council Resolution of 25 June 2002 on preserving tomorrow's memory – preserving digital content for future generations [2002] OJ C 162.

⁵⁰ Decision No 1718/2006/EC (n 20), Art. 1(2)(a); Communication from the Commission, COM(2014) 272 final (n 23). Also see: Giulia Dore and Pelin Turan, 'When Copyright Meets Digital Cultural Heritage: Picturing an EU Right to Culture in Freedom of Panorama and Reproduction of Public Domain Art' (2024) 55 IIC - International Review of Intellectual Property and Competition Law 668.

⁵¹ Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L 346/61. (Repealed)

⁵² See: *Infra*, Footnote 14.

⁵³ Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community, COM(2022) 691 final.

⁵⁴ *Ibid*.

⁵⁵ Proposal for a Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities, COM(2004) 171 final.



audiovisual/cinematographic works, underlines the differences in the national copyright regimes of the Member States, especially in the regulation of the copyright and related rights vested in audiovisual/cinematographic works, given that such differences complicate the cross-border licensing, hence the distribution of such works.⁵⁶ Along the same lines, the document highlights the absence of EU-wide uniformity concerning the collective management of copyright and related rights, which could have simplified the cross-border licensing of audiovisual/cinematographic works, especially for digital exploitation and distribution of such works.⁵⁷ In this regard, the document also addresses the additional complexities concerning the licensing and exploitation of ‘orphan works’.⁵⁸ Last but not least, the legal uncertainty surrounding the remuneration of authors and other rightsholders of audiovisual/cinematographic works, especially in the case of digital exploitation, has also been an issue brought up by the Resolution of 11 September 2012.⁵⁹

Whereas some of these legislative gaps continue to impact the European AV sector and the EFI, certain others have been addressed by the EU legislator. The legislative responses to the urge to digitise cultural assets and heritage, including audiovisual/cinematographic works, were first addressed by the InfoSoc Directive, adopted in 2001, and then with the CDSMD, adopted in 2019. The InfoSoc Directive was essential for the modernisation of the EU copyright regime vis-à-vis the international legal regime⁶⁰, as well as the technological developments at the time.⁶¹ It set the minimum standards in the Union-wide copyright regime, by introducing a set of rules addressed to clear the legal uncertainty that hindered the free movement of copyright-protected goods by harmonising several aspects—including the economic rights encompassed by copyright, a bundle of E&Ls to copyright to ease the access and use of such works, norms regarding technological protection measures and digital rights information to support the protection of copyright in the digital space, along with sanctions and remedies to ensure the enforcement of copyright—in order to lay the legal groundwork for the EU’s transition into an information society and to ensure a smoothly functioning Single Market.⁶² The CDSMD further adjusted the EU copyright regime to the Digital Single Market

⁵⁶ European Parliament resolution of 11 September 2012 on the online distribution of audiovisual works in the European Union (2011/2313(INI)), (2013/C 353 E/08) [2013] OJ C 353 E/64.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ See: Directive 2001/29/EC (n 13), Rec. 15.

⁶¹ Ibid, Recs. 5-7.

⁶² Ibid, Artt. 2-8.



and the data-agile economy that the EU aimed for.⁶³ It not only adapted certain E&Ls to the particularities of the digital space, but it also introduced a new licensing scheme tailored for out-of-commerce work, along with norms on the online availability of audiovisual works on VoD platforms, intending to ensure wider access to content.⁶⁴ The OWD, on the other hand, harmonised the access to and use of orphan works, including audiovisual/cinematographic works whose authors cannot be identified or found.

Despite the EU legislator's legislative intervention mentioned above, the latest EU policy documents addressing the enhancement of the competitiveness of the EU and European market actors within the global digital economy confirm that the limitations to the competitiveness of the European AV sector and the EFI are still relevant today, even more than ever. The EU's new flagship initiative, Common European Data Space (hereinafter 'CEDS'), is proof of this.

Launched in 2018, CEDS is designed to establish a smoothly functioning 'single market for data' to enable cross-border and cross-sectoral flow and reuse of multiple types of data, including digital cultural assets, to help European market actors use the vast corpus of data collected and stored in the EU to develop new data-based goods and services.⁶⁵ Envisaged as 'a seamless digital area', the CEDS comprises fourteen sector- and domain-specific data spaces devised to realise cross-border and cross-sectoral data transfers through a trustworthy and secure digital infrastructure.⁶⁶ Each data space is dedicated to one area that ranks at the top of the EU policy agenda. Among these data spaces is the Common European Data Space for Cultural Heritage (hereinafter 'CHDS'), which was launched in 2021 and whose success depends on the mass-digitisation of cultural heritage assets.⁶⁷

The groundwork for the CHDS revealed that the issues mentioned within the New European Agenda for Cultural Heritage, which was adopted in 2018 in the European Year of Cultural Heritage, regarding the digitisation and circulation of European artworks across Europe,⁶⁸ still prevail. Indeed,

⁶³ Directive (EU) 2019/790 (n 16), Rec. 3.

⁶⁴ Ibid, Artt. 2-6; Art. 17.

⁶⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a common European data space, COM(2018) 232 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data, COM(2020) 66 final.

⁶⁶ Ibid.

⁶⁷ Commission Recommendation (EU) 2021/1970 of 10 November 2021 on a common European data space for cultural heritage [2021] OJ L 401/5, para. 19.

⁶⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A New European Agenda for Culture, COM(2018) 267 final.



the preparatory stages of the CHDS exposed that audiovisual/cinematographic works and heritage have remained on the periphery of the mass-digitisation projects, given that content makes up less than 3% of the digitised and digitally preserved content.⁶⁹ The figures revealing the position of the European AV sector and the EFI, as well as the European audiovisual/cinematographic works, within the analogue-digital spectrum also constitute an indicator to assess the online availability and accessibility of European cultural content by consumers within and across the EU, hence signalling the pitfalls in the sector's competitiveness within the Single Digital Market and also on a global scale.⁷⁰

Even more recently, the Proposal for a Regulation establishing the 'AgoraEU' programme for the period 2028-2034 stresses that:

The European media industries are a beacon of quality and creativity, but today they compete with global online platforms for the attention of citizens and consumers. Circulation of EU audiovisual content continues to be fragmented along national lines, and non-EU players capture most of the box office and streaming subscriptions. (...) Culture and the cultural and creative sectors and industries in the Union are fragmented as well along national and linguistic lines, reflecting our rich diversity. This limits transnational artistic collaboration, audience reach, the development of innovative practices, as well as the sectors' resilience and potential for competitiveness, and strengthening societal wellbeing. Culture and creative sectors' professionals struggle to work across borders and to access new opportunities and markets, which exacerbates geographical imbalances and reduces the circulation of European cultural works. The limited cross-border mobility and cooperation hinders networking, economies of scale, pooling expertise, and co-creation, all that is crucial for sustaining careers and strong culture and creative sectors. Meanwhile, Europe's rich cultural heritage faces threats from a combination of budgetary constraints, vulnerability to pollution, climate change and natural disasters, as well as misappropriation or destruction.⁷¹

⁶⁹ Commission Recommendation (EU) 2021/1970 (n 67).

⁷⁰ For more information on the interplay of the EFI with the CEDS, and particularly the CHDS, please see: Caterina Sganga and Pelin Turan, 'Pathway to the Operationalisation of the Common European Data Space for Cultural Heritage: Unravelling the Copyright-Related Aspects of Populating the Data Space with Cinematographic Works'; Caterina Sganga and Pelin Turan, 'Pathway to the Operationalisation of the Common European Data Space for Cultural Heritage: On the Interplay of Cultural Heritage Law and Digital Cultural Assets' in Gentiana Ramadani and others, *Policy briefings deriving from WP2-5 (M24)* (2025).

⁷¹ Proposal for a Regulation of the European Parliament and of the Council, COM(2025) 550 final (n 36), 1-2.



These statements prove that the REBOOT project is a timely initiative, with the potential to contribute to shaping the future of the EU policies on the European AV sector and the EFI. Besides, it should also be noted that the CHDS is awaiting an implementing act, which might introduce new tools to cope with the shortcomings of the current legal regime concerning the digitisation of European audiovisual/cinematographic works and heritage.⁷² At the same time, the EU policymaker is launching calls for research projects that provide evidence-based policy recommendations for amending the post-CDSMD EU copyright regime.

Therefore, bearing these prospective legislative interventions in mind and against this general overview of the EU policies and agenda on the various aspects of the European AV sector and the EFI, the remainder of this report focuses on four specific indicators of the European AV sector and the EFI's competitiveness: **(1)** cultural diversity, as a general principles that guides the EU policies and legislation concerning the operation of the European AV sector and the EFI, **(2)** copyright law, as one of the main legal disciplines that govern the production, distribution, exhibition and preservation of European audiovisual/cinematographic content, **(3)** media law, due to constituting the primary legal discipline that presents the interplay of cultural diversity and access to and discoverability of European audiovisual/cinematographic works, and finally **(4)** the policy and legal framework regarding the protection of minors, given the REBOOT's project's focus on young audiences as the future policymakers, legislators, content creators, cinema professionals and audiences.

Accordingly, the remainder of this section is organised into four main sub-sections: cultural diversity, copyright law, media law, and the protection of minors. Each section provides a review of the literature in the field. The literature review of each indicator is accompanied by a map of the relevant norms extracted from the legal instruments of the UNESCO, WIPO, WTO, CoE, EU, and the selected EU Member States.

⁷² See: Sganga and Turan (n 70).



4.1 Cultural Diversity

Author of Section 4.1 - Cultural Diversity:

Evangelia Psychogiopoulou (ELIAMEP)

The nature of the competence of the EU in the field of culture has long raised questions about the interconnection between culture and the market, especially in the light of the EU's preeminent economic focus and the complexity surrounding the concept of cultural diversity. The extent to which the Union's economic policies can accommodate cultural diversity considerations has been a legal and policy issue that has lied at the heart of European integration, proving a persistent challenge for the EU institutions.⁷³ The Union's copyright policies, which have been closely associated with the Union's market building efforts, are no exception in this regard: EU copyright law has been regularly faced with fundamental questions pertaining to cultural diversity, and its respect and promotion in an economic setting.⁷⁴

Respect for cultural diversity has come to be expressly affirmed as a fundamental value of the Union. The Treaty of Lisbon has underlined respect for cultural diversity, together with safeguarding and enhancing Europe's cultural heritage, as main EU tasks in Article 3 of the Treaty on European Union⁷⁵ (hereinafter 'TEU').⁷⁶ Respect for cultural diversity has also been pronounced in the CFREU of the EU, which acquired binding legal force with the Treaty of Lisbon.⁷⁷ However, the ways in which EU economic policies, including EU copyright policies, are confronted with cultural diversity

⁷³ Rachael Craufurd Smith (eds), *Culture and European Union Law* (Oxford University Press, 2004); Annebelle Littoz-Monnet, *The European Union and Culture: Between Economic Regulation and European Cultural Policy* (Manchester University Press, 2007); Evangelia Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (Martinus Nijhoff Publishers, 2008); Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe* (Palgrave Macmillan, 2015); Evangelia Psychogiopoulou and Sarah Schoenmaekers, *European Union Economic Law and Culture: Towards a European Culturally Corrected Market Economy* (Edward Elgar Publishing, 2024); David Ward, *The European Union and the Culture Industries: Regulation and the Public Interest* (Ashgate, 2008).

⁷⁴ Guiseppe Mazziotti, 'Cultural Diversity and the EU Copyright Policy and Regulation' in Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union: Protecting and Promoting Cultural Diversity in Europe* (Palgrave Macmillan, 2025), 91; Caterina Sganga, 'Making Room for Cultural Policies within a Market-Oriented Copyright Law: A Function-Based Approach' in Evangelia Psychogiopoulou and Sarah Schoenmaekers (eds), *European Union Economic Law and Culture: Towards a European Culturally Corrected Market Economy* (Edward Elgar Publishing, 2024), 150.

⁷⁵ Consolidated Version of the Treaty on European Union [2012] OJ C 326/1.

⁷⁶ See: Ibid, Art. 3(3).

⁷⁷ See: Ibid, Art. 6(1).



have been inherently linked to the place culture holds in the system of EU competences and how this system addresses cultural diversity.

Culture, as a competence of the Union, forms part of its ‘complementary, coordinating or supporting competences’⁷⁸. The EU has the competence to carry out actions to support, coordinate or supplement the actions of the Member States without superseding Member States’ competences.⁷⁹ This means that cultural policy basically remains a prerogative of the Member States. The Union’s cultural policy, for its part, as stated in Article 167(1) of the TFEU, which is devoted to culture, shall ‘contribute to the flowering of the cultures of the Member States’. The Union’s role in the field of culture is accordingly about assisting Member States in the development of their cultures. This cultural mission of the EU goes hand in hand with two specific objectives set forth in Article 167(1) of the TFEU: respecting Member States’ national and regional diversity and bringing the common cultural heritage to the fore.

The cultural policy objective of fostering the common cultural heritage sits well with the objectives that usually characterise the Union’s policies. EU action in several policy fields revolves around reinforcing ties between the Member States and eliminating barriers so as to bring the peoples of Europe closer together. Indeed, the EU cultural policy activities that address the common cultural heritage (or the cultural heritage of European significance, as noted in Article 167(2) of the TFEU) highlight commonalities, they focus on cooperation, and they are associated with strengthening Europeanness, and a mutual understanding and a sense of European belonging.⁸⁰ They are thus characterised by a genuine *European* approach to their design and rationale.

The cultural policy objective of respecting cultural diversity is also a *European* objective, considering that respect for cultural diversity is not always a priority objective when it comes to domestic cultural policies. This cultural policy objective of the EU addresses respect for cultural

⁷⁸ Ibid.

⁷⁹ See Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C 202/47, Art. 2(5), in conjunction with Article 6 of the TFEU.

⁸⁰ See, for instance, Article 3(1) of Decision No 1194/2011/EU of the European Parliament and of the Council of 16 November 2011 establishing a European Union action for the European Heritage Label [2011] OJ L 303/1, according to which the objectives of the European Heritage Label cover strengthening European citizens’ sense of belonging to the Union, in particular that of young people, based on shared values and elements of European history and cultural heritage. Also see: Bruno de Witte, ‘Legal Framework of the EU’s Cultural Policy’ in Evangelia Psychogiopoulou and Sarah Schoenmaekers (eds), *European Union Economic Law and Culture: Towards a European Culturally Corrected Market Economy* (Edward Elgar Publishing, 2024), 15.



diversity *between* and *within* the Member States⁸¹ and thus respect for Member States' *national* and *regional* diversity. This makes it clear that the Union does not pursue cultural approximation or homogenisation. Rather, it values and cherishes cultural differences. However, the operationalisation of the Union's cultural policy objective of respecting cultural diversity depends on the conceptualisation of cultural diversity by the EU institutions and whether this emphasises *diversity-as-distinctiveness* or *diversity-as-pluralism*.⁸² The former centres on the preservation of Member States' national and regional cultures and could be seen as partly finding expression in Article 4(2) of the TEU, which recognises that the Union shall respect the national identities of the Member States. The latter is more focused on cultural interaction and diverse cultural points of reference. Respect for cultural diversity can thus be as much about respecting the cultural identities of Member States, and about cultural exchanges and enhancing opportunities for access to diverse cultures. In fact, most cultural activities of the Union appear to be aligned with this second reading of cultural diversity, favouring cultural openness and cooperation. Seminal cultural policy instruments of the Union, such as Creative Europe, are centrally concerned with establishing a common, open cultural space where cultures can be accessed and enjoyed.⁸³

At the same time, Article 167 of the TFEU depicts a carefully demarcated cultural mandate for the Union, confirming that responsibilities for cultural matters essentially remain with the Member States. Article 167(2) of the TFEU stipulates that EU action shall be aimed at encouraging cooperation between the Member States and, only 'if necessary', at supporting and supplementing their action in specifically defined areas: improving the knowledge and dissemination of the culture and history of the European peoples; safeguarding the cultural heritage of European significance; promoting non-commercial cultural exchanges; and facilitating artistic and literary creation. The Union's circumvented cultural policy space is clearly reflected in the emphasis which Article 167(2) of the TFEU places on the principle of subsidiarity, according to which EU actions can only be adopted if and in so far as their objectives cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level. Pursuant to Article 5(3) of the TEU, any measure taken

⁸¹ See: TFEU (n 79), Art. 167(1).

⁸² Bruno de Witte, 'The Value of Cultural Diversity in European Union Law' in Hildegard Schneider and Peter Van den Bossche (eds), *Protection of Cultural Diversity from a European and International Perspective* (Intersentia, 2008), 219.

⁸³ See, for instance, Recital 5 of Regulation (EU) 2021/818 (n 34), according to which Creative Europe, the Union's main cultural policy instrument, promotes the transnational circulation of artistic and cultural works, cultural exchanges, and the transnational mobility of artists and of cultural and creative professionals with a view to fostering a "shared area of cultural diversity for the peoples of Europe".



by the Union in areas which do not fall within its exclusive competence has to comply with the principle of subsidiarity. Article 5(3) of the TEU leaves no doubt that the principle of subsidiarity also applies in areas which fall within the Union's complementary, coordinating or supporting competences. Still, the drafters of the TFEU chose to openly refer to subsidiarity when formulating the TFEU provisions on culture. Pursuant to Article 167(3) of the TFEU, the EU and its Member States are also to foster cooperation with third countries and relevant organisations in the sphere of culture.

In terms of instruments, Article 167(5) of the TFEU provides that the EU may only make use of incentive measures and recommendations as part of its cultural policy. Recommendations are non-binding legal acts of the Union.⁸⁴ As for incentive measures, Article 167(5) of the TFEU expressly notes that any harmonisation of the laws and regulations of the Member States is excluded. While incentive measures are not defined in the TFEU, policy practice shows that they commonly take the form of financial support measures aimed at encouraging cooperation between Member States and their cultural professionals.⁸⁵

While the cultural provisions of the TFEU go to great lengths to carefully delineate the contours of the Union's cultural activities, EU cultural policy stands alongside a range of EU policies with a cultural dimension. This cultural dimension may have to do with financial support given to culture, cultural heritage, and the cultural and creative industries. It can also be regulatory in nature and derives from the opportunities the TFEU provides for the linking of culture with other policy domains which fall under EU competence. The key provision in this context is Article 167(4) of the TFEU, which is known as the 'cultural mainstreaming clause' or the 'cultural horizontal clause' of the TFEU.⁸⁶ Article 167(4) of the TFEU provides that '[t]he Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures'. Enacted to allay Member States' fears over the implications of EU integration for their powers in the realm of culture,⁸⁷ Article 167 of the TFEU enables the

⁸⁴ See: TFEU (n 79), Art. 288.

⁸⁵ See, for instance, Regulation (EU) 2021/818 (n 34).

⁸⁶ Rachael Craufurd Smith, 'Community Intervention in the Cultural Field: Continuity or Change?' in Rachael Caufurd Smith (ed), *Culture and European Union Law* (Oxford University Press, 2004); Evangelia Psychogiopoulou, 'Cultural Mainstreaming: The European Union's Horizontal Cultural Diversity Agenda and Its Evolution' [2014] *European Law Review* 626; Evangelia Psychogiopoulou, 'The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice' [2022] 7(3) *European Papers – A Journal on Law and Integration* 1357, 1361.

⁸⁷ Psychogiopoulou (n 73).



accommodation of cultural considerations in general EU action with a view to respecting and promoting cultural diversity. This provision thus turns cultural diversity into a cross-cutting, horizontal EU policy objective and in doing so, it also approaches cultural diversity in both defensive (to *respect*) and active (to *promote*) ways. As a result, in the context of its various policies, the EU is not simply bound to refrain from interfering with cultural diversity, but is also required to take appropriate measures to enhance it.

The legal consequence of the cultural mainstreaming clause is that other treaty provisions besides Article 167(5) of the TFEU can be used for the adoption of cultural policy measures at the EU level. The difference between these measures and the recommendations and incentive measures adopted on the basis of Article 167(5) of the TFEU is that while the latter can only serve for the introduction of cultural policy measures understood in a strict sense, the former can be used for the introduction of measures that pursue cultural diversity objectives, along with other legitimate policy objectives of their own. Thus cultural diversity objectives can be integrated into EU policy measures which primarily seek to pursue other goals which are not cultural goals. Significantly, the ensuing policy measures may be EU funding instruments but also harmonising measures if the treaty provision that is used as their legal basis allows for the harmonisation of Member States' laws and regulations. Contrary then to Article 167(5) of the TFEU, which precludes harmonisation, harmonisation of national cultural laws may occur through cultural mainstreaming.

The horizontality of cultural diversity as an EU value is further reflected in Article 22 of the CFR, which states that the Union shall respect cultural, religious and linguistic diversity.⁸⁸ According to the CFR Explanations, which as stated in Article 6 of the TEU must be given consideration when interpreting the CFR, Article 22 of the CFR has been based, among other treaty provisions, on Article 167(4) of the TFEU.⁸⁹ There thus exists a clear link between Article 22 of the CFR and Article 167(4) of the TFEU. Article 51(1) of the CFR requires the EU institutions—and the Member States when they implement EU law—to respect the CFR provisions and promote their application in accordance with and respecting the limits of the powers of the Union. On this basis, there thus exists a horizontal

⁸⁸ Rachael Craufurd Smith, 'Article 22' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2021), 639.

⁸⁹ According to the Explanations relating to the Charter of Fundamental Rights (OJ C 303, 14.12.2007, p. 17), Article 22 CFR has also been based on what was, prior to the Treaty of Lisbon, Article 6 of the TEU, which provided in para. 3 that "[t]he Union shall respect the national identities of its Member States"—now part of Article 4(2) TEU. It has also been inspired by Article 167(1) of the TFEU, Article 3(3) of the TEU and Declaration No. 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations, now taken over in Article 17 of the TFEU.



duty incumbent on the EU institutions to ensure and promote respect for cultural diversity when exercising the Union's competences.

A similar duty also derives from the 2005 UNESCO Convention on the protection and promotion of the diversity of cultural expressions⁹⁰ (hereinafter '2005 UNESCO Convention' or 'the UNESCO Convention'), which was signed and approved by the Union.⁹¹ The UNESCO Convention seeks to protect and promote the diversity of cultural expressions, which are understood as 'those expressions that result from the creativity of individuals, groups and societies and that have cultural content', namely a 'symbolic meaning, [an] artistic dimension and cultural values that originate from or express cultural identities'.⁹² The UNESCO Convention aspires to safeguard and foster the capacity of the parties for cultural policy-making, enshrining their right to formulate and implement cultural policies and measures, while encouraging international cooperation in the field. Cultural policies and measures in this context are defined as 'those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services'.⁹³ The UNESCO Convention thus recognizes the right of parties, including the right of the Union which is a party to it, to formulate and implement cultural policies and measures, which do not only cover policies and measures regarding culture per se but also other policies and measures that impact the cultural sphere. From this perspective, the UNESCO Convention replicates and reinforces the underlying logic of cultural mainstreaming embedded in Article 167(4) of the TFEU.

In the light of preceding analysis, it is clear that the EU's cultural competences encompass competences for the pursuit of different kinds of cultural policies imbued with cultural diversity considerations: First, an EU cultural policy in the strict sense, which is aimed to support the development of Member States' cultures, foster the common cultural heritage and also ensure respect

⁹⁰ UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted 20 November 2005, entered into force 18 March 2007) UNTS 2440 (p. 311).

⁹¹ Council Decision 2006/515/EC of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions [2006] OJ L 201/15. Also see: Evangelia Psychogiopoulou, 'The Convention on the Diversity of Cultural Expressions and the European Union: The Quest for Competence and Implementation' in Toshiyuki Kono and Steven Van Uytsel (eds), *The UNESCO Convention on the Diversity of Cultural Expressions: A Tale of Fragmentation in International Law* (Intersentia, 2012), 356; Hanania Richieri, 'Trade, Culture and the European Union Cultural Exception' [2019] 25(5) International Journal of Cultural Policy 568.

⁹² See: UNESCO Convention (n 90), Art.4.

⁹³ Ibid.



D3.3. Policy recommendations

for cultural diversity. Second, indirect cultural policies based on regulatory and financial support measures which are taken in the context of EU policies other than the EU cultural policy in the strict sense through processes of cultural mainstreaming that support respect for and promotion of cultural diversity. This is clearly the case with the EU's copyright harmonisation project which has been repeatedly faced with the challenge of striking a balance between EU market integration requirements and cultural diversity concerns.

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The multi-level mapping of the legal norms concerning cultural diversity is attached as **Annex no. 1**.



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4.2 Copyright Law

Copyright and related rights are legal institutions that shall be taken into account from the earliest stages of the filmmaking lifecycle until the end of the retail chain—and even in the aftermath of the exhibition of audiovisual/cinematographic works on traditional and digital distribution channels (e.g., movie theatres, DVD, Blu Ray, pay TV, online streaming platforms, VoD platforms). Indeed, these concepts and the normative framework on copyright and related rights, first and foremost, regulate the licensing practices for the reuse of existing content (e.g., books for literary adaptations, music, photographs, excerpts of other audiovisual/cinematographic or works), as well as the acquisition and management of new audiovisual/cinematographic works. Furthermore, they shed light upon and underpin the artistic, commercial, financial and technical decisions to be made throughout the pre-production, production, and post-production stages of the filmmaking lifecycle; the distribution and exhibition phases of the retail chain; and finally, upon the expiry of the retail chain, the preservation of audiovisual/cinematographic content for future commercial or non-commercial reuse or archiving purposes. It is also worth noting the existence of norms to help protect and enforce copyright, especially in the digital space, such as technological protection measures (hereinafter ‘TPMs’) and digital rights management (hereinafter ‘DRM’) tools.

In this regard, copyright law responds to several legal matters, including but not limited to:

- the notion of ‘authorship’,
- scope of economic and moral rights subsisting in copyright,
- related rights of performers, phonogram producers, film producers, broadcasting organisations,
- term of legal protection,
- transfer of rights and licensing practices,
- E&Ls to copyright and related rights that would enable the reuse of works and other subject matter without the authorisation of the rightsholders,
- remuneration of the creative workers involved in different stages of the filmmaking lifecycle and the retail chain,
- the CHIs that would archive, preserve and restore the audiovisual/cinematographic works and heritage,
- measures to enable effective copyright protection, management and enforcement, such as TPMs and DRM; and finally,



- sanctions and remedies concerning the illegitimate uses of legally protected content.⁹⁴

Evident from these explanations, analysing all the copyright-related aspects of the making, retail and preservation of European audiovisual/cinematographic works in a single work is a challenging task, and it goes beyond the goals of T3.1 and D3.3. Moreover, the abovementioned copyright-related aspects that are essential to the European AV sector and the EFI, particularly the matters related to licensing and the remuneration of authors, have been intensively investigated by key organisations, such as the EAO, and by prominent copyright scholars, particularly within the framework of comparative studies conducted under the auspices of the EU and the EAO.⁹⁵

Therefore, in line with the aims and objectives as well as the scope of T3.1, this section reviews the key literature that investigates the EU copyright regime vis-à-vis the indicators identified to explore the catalysers and the pitfalls within the EU legal framework that impact the competitiveness of the European AV sector and the EFI. These indicators consist of the articulation of authorship, scope of copyright and related rights, E&Ls to copyright and related rights, and the term of legal protection and public domain in the context of the European AV sector and the EFI. In so doing, the section pays special attention to reviewing the literature on the harmonisation of the EU Member States' national copyright regimes, especially in the areas mentioned above.

In this regard, Pascal Kamina's seminal work, 'Film Copyright in the European Union'⁹⁶, which was published in 2016, can be deemed the crown jewel of this line of scholarship. Kamina's book constitutes a key scholarly reference as it encapsulates all the copyright-related aspects of filmmaking and distribution in the European context. It begins with a historical narrative on film production chronology and its interplay with copyright law in the EU and national legal contexts. Subsequently, it elaborates not only on the areas listed above, but also on contractual arrangements concerning

⁹⁴ For an overview of the interaction of copyright and related rights with different stages of filmmaking lifecycle and the retail chain, see, for instance: Natali Helberger, Francisco Javier Cabrera Blázquez and Susanne Nikoltchev, 'Copyright and Related Rights in the Audiovisual Sector' (2000) 2 IRIS Legal Observations.

⁹⁵ *From Script to Screen: The Importance of Copyright in the Distribution of Films* (World Intellectual Property Organization (WIPO) 2011); Lucie Guibault, Olivia Salamanca and Stef Van Gompel, *Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances: Final Report* (European Commission Publications Office 2015); Xalabarder R, *AV Remuneration Study* (1st edn, CISAC 2018); Bertrand Moullier, *Rights, Camera, Action! IP Rights and the Film-Making Process* (2nd edn, World Intellectual Property Organization (WIPO) 2022); Amélie Lacourt, Justine Radel-Cormann and Sophie Valais, *Fair Remuneration for Audiovisual Authors and Performers in Licensing Agreements* (European Audiovisual Observatory (Council of Europe) 2023); Christopher Meir and Petar Mitric, 'Intellectual Property and the Contemporary European Audiovisual Industries' (CEPi - European Audiovisual Production 2025).

⁹⁶ Pascal Kamina, *Film Copyright in the European Union* (2nd edn, Cambridge University Press 2016).



audiovisual/cinematographic works and protection of foreign audiovisual/cinematographic works in light of the WIPO-administered treaties and the EU copyright *acquis*. In so doing, Kamina also looks at the level of fragmentation and/or harmonisation in these areas.

While Kamina's book is an essential source for the research endeavours pursued herein, it is also worth noting that the pan-European legal framework governing the copyright-related aspects of filmmaking, distribution and preservation has radically changed shortly after the publication of this book. Indeed, the adoption of the CDSMD not only introduced new provisions of significant importance to the European AV sector and the EFI (such as the E&L on the preservation of cultural heritage and the activities of the online content-sharing service providers (hereinafter 'OCSSPs')) but it also triggered a legal reform in the national copyright frameworks of most of the EU Member States, which resulted in the transposition of the E&Ls enshrined in the InfoSoc Directive or the amendment of the existing copyright rules in light of the EU copyright *acquis*.⁹⁷

Along the same lines, Günter Poll's journal article, 'The Harmonization of Film Copyright in Europe', constitutes one of the earliest scholarly works that focuses on the interplay of copyright with the European AV sector and the EFI.⁹⁸ Published shortly after the adoption of the InfoSoc Directive in 2001 and at the brink of its national transposition to the national copyright regimes of the EU Member States, Poll's seminal, first and foremost, provides an overview of the historical background of the first legislative attempts to grant copyright protection to audiovisual/cinematographic works.⁹⁹ In so doing, Poll mentions the industrialisation of the 'filmmaking business' and the globalisation of trade of audiovisual/cinematographic works in the 20th century, which called for legal responses, both at the national and international levels. As Poll explains in detail, not only were the national copyright protection schemes incompatible with this new category of intellectual works, but there also emerged the need to set an international standard to entitle such works with legal protection, especially to tackle their cross-border illegitimate reproduction and distribution.¹⁰⁰ Therefore, the first legislative attempts in the field were expected to crystallise three main aspects of a prospective legal regulation:

⁹⁷ See in general: Caterina Sganga and others, 'D2.3- Copyright Flexibilities: Mapping and Comparative Assessment of EU and National Sources'.

⁹⁸ Günter Poll, 'The Harmonization of Film Copyright in Europe' (2002) 50 Journal of the Copyright Society of the U.S.A. 519.

⁹⁹ Ibid, 519-521.

¹⁰⁰ Ibid, 520-521.



the subject matter of ‘film copyright’, the authorship of audiovisual/cinematographic works, and the scope of legal rights subsisting in ‘film copyright’.¹⁰¹

To contextualise the legal norms concerning audiovisual/cinematographic works within the WIPO-administered legal instruments, Poll offers an overview of the international norm-setting forums and the negotiations that led to the Berlin, Rome, Brussels, and Stockholm Conferences to revise the Berne Convention on the Protection of Literary and Artistic Works¹⁰² (hereinafter ‘Berne Convention’), respectively, in 1908, 1927, 1948, and 1967.

It shall be noted that Poll’s narrative on the debates concerning the authorship of audiovisual/cinematographic works—whether to have a joint-authorship model for such works or to leave the authorship in the hands of the film producers as the ‘entrepreneurs’ who realise a cinematographic project—not only reveals the disparate national approaches to the matter at the time, but also sheds light upon the prevailing divergences in the national copyright regimes of the signatory parties, including the EU Member States.¹⁰³ Indeed, the final solution adopted by the Berne Union during the Stockholm revision granted the Union Members a margin of discretion to determine the author or authors of an audiovisual/cinematographic work.¹⁰⁴ On that note, Poll argues that the EU copyright directives adopted in the 1990s, specifically the RLD and Directive 2006/116/EC¹⁰⁵ (hereinafter ‘Term Directive’), further exacerbated the discrepancies across the EU Member States’ copyright regimes by acknowledging ‘the principal director of cinematographic or audiovisual work’ as the author and a giving the national legislators to ‘provide for others to be considered as co-authors.’¹⁰⁶

Poll indicates that, just like authorship, the subject matter of copyright has also paved the way for fragmentation across the national copyright regimes in Europe, especially between the Continental European States, on the one hand, and the UK and Ireland, on the other.¹⁰⁷ The Continental European States have opted for a dual approach to legally protecting audiovisual/cinematographic works. In

¹⁰¹ Ibid, 521.

¹⁰² World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (as amended by the Paris Act of 1971) (adopted 9 September 1886, entered into force 15 December 1972) UNTS 828 (p. 2221).

¹⁰³ Ibid, 522-523.

¹⁰⁴ Ibid, Art. 14bis(2a).

¹⁰⁵ 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 [2006] OJ L 372/12.

¹⁰⁶ Poll (n 98), 530.

¹⁰⁷ Ibid, 525-527.



principle, in the Continental European legal tradition, the dramatic work (or the film) embedded in a recording is entitled to copyright protection; the first fixation of the film (or the recording itself) has been protected via related rights of the producer of the first fixation of the film (or, simply, the film producer).¹⁰⁸ Nevertheless, Poll adds that while in some European States cinematographic works (or films) are regarded as sub-categories of audiovisual works, some other States use these concepts together or interchangeably.¹⁰⁹ Thus, Poll concludes that the EU's copyright regime was in need of better harmonisation.

Aside from authorship, the E&Ls to copyright and related rights have also been a matter for scholarly discussions concerning EU-wide harmonisation. These scholarly works focus on the ways in which E&Ls to copyright and related rights impact the competitiveness of the European AV sector and the EFI, primarily by facilitating the time-consuming and costly licensing procedures to produce audiovisual/cinematographic content. One key study elaborating on copyright E&Ls is the report, 'Exceptions and Limitations to Copyright'¹¹⁰, published by the EAO in 2017. This study provides general information on the basics of copyright and E&Ls to copyright, as well as the significance of E&Ls to the EU's economy, and the licensing schemes to reuse copyright-protected content. Driven by these goals, the study maps the E&Ls encompassed within the WIPO-administered treaties and the EU directives.

As the scope of the study is not necessarily tailored for the European AV sector and the EFI, the study outlines the E&Ls to the acts of reproduction; the E&Ls for private use, reporting of current events, quotation, parody, and the E&Ls addressed to CHIs. The scope of the report is limited to the InfoSoc Directive, the RLD, the OWD and Directive 2017 (EU) 2017/1564¹¹¹ (hereinafter 'Marrakesh Directive'). Yet, given its publication date, the report does not include the E&Ls and the licensing schemes introduced with the CDSMD for the purposes of the preservation of cultural heritage and the use of out-of-commerce works.

Aside from the EAO's comprehensive study, there are other scholarly works with a sectoral focus, such as the study penned by Bartolomeo Meletti and Stef van Gompel, with the contributions of Luna

¹⁰⁸ Ibid, 523.

¹⁰⁹ Ibid.

¹¹⁰ Francisco Javier Cabrera Blázquez and others, 'Exceptions and Limitations to Copyright' (2017) 1 IRIS Plus.

¹¹¹ Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2012] OJ L 242/6.



Schumacher and Tycho Mol, which was published in 2021 as a project deliverable of the reCreating Europe project.¹¹² The report, entitled ‘D4.10 - Issue reports on how copyright exceptions and other permitted uses that are relevant for documentary filmmaking and immersive digital heritage practitioners are understood in the Netherlands and the UK’, centralises the experiences of documentary filmmakers as well as the curators and creators of immersive digital heritage practices who pursue their creative activities in the Netherlands and the UK. It aims to understand how these two groups of creative workers perceive copyright, especially the flexibilities introduced by copyright E&Ls and other permitted uses (e.g. fair dealing of the UK copyright regime), and to what extent they benefit from copyright flexibilities while performing their creative practices.¹¹³ In this regard, the report investigates ‘niche’ areas—documentaries and digital cultural heritage practices—which have remained not only in the periphery of the EFI but also of the literature. Therefore, the report constitutes one of the few sources that sheds light on an understudied area of the European filmmaking ecosystem by analysing the qualitative data collected through focus groups with documentary filmmakers and creative workers in the digital cultural heritage sector.¹¹⁴

The report provides an insight into the key findings of the interviews Meletti and van Gompel conducted with documentary filmmakers who utilise in-copyright and public domain works and materials, often deposited in the archives of public or private institutions, to produce works to be exhibited through television broadcasting or in alternative venues, such as art galleries, as well as festivals.¹¹⁵ The interviewees vocalised several concerns that influence and shape their creative practices. Among these concerns, the lack of a profound understanding of copyright E&Ls in the EU context (and the fair dealing in the UK context) among professionals involved in different stages of the filmmaking lifecycle (e.g., film producers, broadcasting organisations, funding organisations) is presented as an overarching concern.¹¹⁶ It is worth noting that the letter of the EU copyright norms was deemed inaccessible by creative workers, and this issue added to the uncertainty about certain

¹¹² Bartolomeo Meletti and Stef van Gompel, ‘D4.10- Issue Reports on How Copyright Exceptions and Other Permitted Uses That Are Relevant for Documentary Filmmakers and Immersive Digital Heritage Practitioners Are Understood in the Netherlands and the UK’.

¹¹³ Ibid, 5.

¹¹⁴ Ibid.

¹¹⁵ Ibid, 6, 11.

¹¹⁶ Ibid.



key copyright E&Ls, such as those permitting reproduction of in-copyright works for quotation, parody and pastiche.¹¹⁷

The limited understanding of and legal uncertainty about copyright flexibilities is explained to pave the way, first and foremost, for a ‘conservative, risk-averse approach and lack of support from funders’¹¹⁸, as these market actors insist on copyright clearance to eliminate any risk of copyright infringement, despite the limited financial sources they provide filmmakers with.¹¹⁹ Also, from the documentary filmmakers’ perspectives, there seems to be a general concern about applying certain E&Ls, such as quotation, to audiovisual/cinematographic works whilst eliminating any risk of unauthorised use of an in-copyright work.¹²⁰ Consequently, creative workers are left with no choice but to clear copyright or formalise the use of public domain works, which often requires legal aid, hence additional costs, along with the complications imposed by the hardship in identifying the authors or rightsholders of in-copyright archival works, including orphan works.¹²¹ In this context, the ‘theoretical and physical public domain’ dichotomy, which Claudy Op Den Kamp has previously studied in her book, ‘The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen’,¹²² comes into play.¹²³ As explained in detail by Op Den Kamp, this divide refers to the bureaucratic and economic procedures required by the custodial and memory institutions for those who wish to access and use the public domain materials reserved in their collections.¹²⁴ Therefore, creative workers are burdened with time-consuming and costly procedures to access and use work which they should have, in principle, accessed and used without seeking authorisation.

Yet another issue connected to this conundrum is the difficulty in determining the ‘public domain’ status of a work, as the absence of a copyright registry, as in the US, leaves creative workers with the burden to conduct research in case they wish to include excerpts of an archival work within their documentaries.¹²⁵ Last but not least, Meletti and van Gompel point to the territoriality of copyright, which, in the absence of a uniform approach within the EU, deprives creative workers and other

¹¹⁷ Ibid, 9, 13-14.

¹¹⁸ Ibid, 6-8, 12.

¹¹⁹ Ibid, 6, 9-10.

¹²⁰ Ibid, 14.

¹²¹ Ibid, 6, 12.

¹²² Claudy Op Den Kamp and Eye Film Instituut Nederland, *The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen* (Amsterdam University Press 2018).

¹²³ Ibid, 102-107.

¹²⁴ Ibid.

¹²⁵ Meletti and van Gompel, D4.10 (n 112), 6, 12.



cinema professionals of legal clarity and the confidence to rely on the legal tools inherent in the EU copyright regime.¹²⁶ Based on these, the report revealed that most documentary filmmakers had no experience with how E&L to copyright and related rights could facilitate documentary filmmaking.¹²⁷

As to the experiences of creative workers involved in the digital cultural heritage sector, the report exposes the sector's challenges with the use of contemporary (and in-copyright) works, aside from archival (and public domain) materials, as well as the term of legal protection that further hinders the unrestricted use of such works, despite the role that immersive digital works play in young audiences' engagement with cultural heritage and archival content.¹²⁸ Except for these two major topics, the other concerns raised by this category of creative workers are in line with those expressed by documentary filmmakers (e.g. hesitation to rely on copyright E&Ls due to lack of information, hardship in identifying the authors and/or rightsholder of a work, complications of the copyright clearance process, determining the 'public domain' status of a work).¹²⁹

Meletti and van Gompel, upon analysing the copyright-related concerns raised by creative workers, explain that the acts performed to make documentaries and to curate immersive experiences by utilising already existing content, such as incorporating excerpts of in-copyright works in a documentary or immersive experience, interfere with the copyright owner's exclusive right of reproduction, as well as the rights to make available to the public and to communication to the public.¹³⁰ The performance of these acts, while in principle necessitating the copyright owners' authorisation and often payment of a remuneration, can fall under the E&Ls for quotation or parody, caricature and pastiche.¹³¹ Nevertheless, the formulation of these E&Ls within the national copyright regimes—in this case, the Dutch copyright regime, which also applies to those covered in the InfoSoc Directive—does not respond to the needs of the documentary filmmakers and curators of immersive experiences.¹³² In the Dutch copyright regime, both the quotation exception and the parody, caricature and pastiche exception permit the reproduction of an in-copyright work to be proportionate

¹²⁶ Ibid, 13.

¹²⁷ Ibid, 8.

¹²⁸ Ibid, 16-17.

¹²⁹ It is worth noting that the report reflects on the use of artificial intelligence tools to produce immersive experiences; nevertheless, the AI-related aspects of filmmaking are out of the scope of Task 3.1, hence the literature review provided herein, in D3.3. See: Meletti and van Gompel, D4.10 (n 112), 21-27.

¹³⁰ Ibid, 29.

¹³¹ Ibid, 30.

¹³² Ibid.



and informed by a specific purpose, such as review, humour, or mockery.¹³³ Additionally, the legitimacy of the permitted uses depends on whether the original work has been lawfully disclosed to the public. Therefore, Meletti and van Gompel conclude that the need to verify these conditions exacerbates the legal uncertainty about E&Ls, let alone facilitating the filmmaking process.¹³⁴

The findings of the Meletti and van Gompel study set the theoretical background of two other project reports drafted by the authors, once again, in the context of the reCreating Europe project: ‘Code of Best Practices on Creative Reuse for Documentary Filmmaking’ and ‘Code of Best Practices on Creative Reuse for Immersive Experiences’.¹³⁵ These ‘twin codes of best practices’ are designed to guide creative workers in their day-to-day practices. To achieve this goal, the codes are written in a language accessible to non-legal experts. They list and explain the copyright E&Ls inherent, mainly in the InfoSoc Directive, that are key to the legitimate reuse of in-copyright works, such as the E&Ls for incidental inclusion, freedom of panorama, quotation, parody, and pastiche. This information is complemented by a brief overview of the reuse of works and other subject matter allocated to the public domain, along with the fundamental principles of the term of legal protection.

Whereas the Meletti and van Gompel reports outline and explain the major copyright-related challenges in specific sub-sectors of the AV and film industry, Lionel Bently’s study, which is part of the ‘CREATe Working Papers’ series and entitled ‘Copyright and Quotation in Film and TV’¹³⁶, delves into the details of the quotation exception/fair dealing by way of quotation and its relevance to the AV sector and the film industry. In so doing, it expands on the application of this copyright flexibility to audiovisual/cinematographic works in light of the case law of the Court of Justice of the European Union (hereinafter ‘CJEU’), which was touched upon within Meletti and van Gompel’s report, D4.10.

It shall be noted that Bently’s study investigates the interface of copyright, notably the fair dealing by way of quotation, with audiovisual/cinematographic works within the context of the UK copyright regime. Whereas the UK is not a jurisdiction encompassed in this report, this section reviews and summarises the key arguments of Bently’s study, given that the interpretation of the requirements to

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ The abovementioned two deliverables are incorporated in a single project deliverable. See: Bartolomeo Meletti and Stef van Gompel, ‘D4.11- Two Codes of Best Practice on Creative Reuse for Documentary Filmmakers and Immersive Experiences’.

¹³⁶ Lionel Bently, ‘Copyright and Quotation in Film and TV’.



benefit from the fair dealing by way of quotation, as explained by Bently, provides essential guidance and responds to European creative workers' concerns underlined in the Meletti and van Gompel reports and the quotation exception introduced into the EU copyright regime with Article 5(3)(d) of the InfoSoc Directive.¹³⁷

As a preliminary remark, Bently explains that the articulation of the quotation exception within the InfoSoc Directive and its implementation into the UK copyright legal regime are narrower than the global blueprint of the fair use for quotation formulated within Article 10 of the WIPO-administered Berne Convention. Given the volume of its signatory parties, Bently considers the Berne Convention's provision as a 'global, mandatory, fair use' clause.¹³⁸ He argues that, whereas the *travaux préparatoire* of the Stockholm revision of the Convention confirmed that any pre-determined purposes shall not constrain this provision, the EU and the UK legislators have introduced the 'criticism or review' as an exemplary pre-determined purpose to restrict the permitted uses of copyright-protected works.¹³⁹

Based on the various ways in which an in-copyright visual work can be reused in another work in the audiovisual/cinema sector, Bently argues that quotation is 'a broad concept that needs to draw on all cultural fields covered by Berne (...) [without being] defined by necessary or sufficient conditions (...) [but] as a much more open-textured concept.'¹⁴⁰ He further suggests that, contrary to the narrowly construed approach of the CJEU to the quotation exception in the landmark *Pelham*¹⁴¹ case, the legitimacy of reuses as such shall be determined by taking into account a broad spectrum of criteria, such as the amount reused compared to the original work, context, purpose of reuse, integrity, and distinctiveness.¹⁴²

Against this theoretical background, Bentley underlines the different forms that 'quotation' might mean for literary works (e.g., 'blocks of writings that are inset, in quotation marks, left intact'¹⁴³) and visual arts (e.g., impracticability to use quotation marks, the reproduction of the whole work, or the transformative use of an entire work or excerpts thereof)¹⁴⁴, and asks: 'What does it mean to quote

¹³⁷ Also see: Bently (n 136), 7-8.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid, 17.

¹⁴¹ Judgment of the Court (Grand Chamber) of 29 July 2019, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, C-476/17, ECLI:EU:C:2019:624.

¹⁴² Bently (n 136), 18.

¹⁴³ Ibid, 13.

¹⁴⁴ Ibid, 16.



from a film, a piece of music or a film?’¹⁴⁵ He seeks to answer this question by analysing three case studies concerning the use and missed opportunities to use in-copyright cinematographic works in new audiovisual/cinematographic works.

The first case study reflects on the biographical film, ‘Love is the Devil: Study for a Portrait of Francis Bacon’ (1998), which narrates the painter’s life without showing any of his artworks, as Bacon’s estate, which held his copyright after he died in 1992, withheld permission for the use of Bacon’s copyright-protected works.¹⁴⁶ Despite the narrow formulation of the exception within the InfoSoc Directive and the CJEU case law, Bently argues that the reproduction of the original works of Bacon and their communication to the public through a cinematographic work would fall under the quotation exception.¹⁴⁷ Whereas such a reuse would not necessarily be a criticism or review of the work, as required by Article 5(3)(d) of the InfoSoc Directive, Bently explains that the reuse of the original works would be fair and proportionate, especially given the biographic nature of the film, regardless of the commercial value of the film, which hardly overrides advantage deriving from the reuse of Bacon’s copyrighted works.¹⁴⁸ Additionally, the authors and the source of the original works could be easily listed and incorporated into the film’s credits to meet the attribution requirement set by the InfoSoc Directive.¹⁴⁹

The second case study focuses on the scene from the blockbuster film, ‘Titanic’ (1997), where a derivative work based on Pablo Picasso’s artwork ‘Les Demoiselles d’Avignon’ appears on the screen, which caused a legal dispute between the film producer and a collective management organisation.¹⁵⁰ Bently also considers this a fair use, and explains that this scene comprises only a few seconds of the entire movie, while giving credit to the author of the original work in the dialogue between the two main characters.¹⁵¹ While the use herein cannot be considered as criticism or review, he mentions that the reuse of a derivative of Picasso’s work has little to no impact on the commercial success of the movie; hence, it does not challenge the fairness of the acts of reproduction and communication to the public of the in-copyright work.¹⁵²

¹⁴⁵ Ibid, 10.

¹⁴⁶ Ibid, 2.

¹⁴⁷ Ibid, 26.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid, 2-3.

¹⁵¹ Ibid, 27-28.

¹⁵² Ibid.



The last case study examines the copyright-related aspects of the film, ‘The Clock’ (2010), which comprised a 24-hour recording of a collage of in-copyright film excerpts, hence sparking a public debate on whether it was a brilliant work legitimised by the fair use principle or a series of copyright infringements.¹⁵³ Whereas this case study presents a more challenging legal question, given the nature of the final work—a collage of snippets from multiple cinematographic works—as well as the impracticality of giving credit to each and every reused work’s author.¹⁵⁴ Still, Bently argues that the acts performed to produce *The Clock* would also fall under the quotation exception, also given that the exhibition of this film in art galleries, rather than traditional and online distribution channels, does not interfere with the commercial value and exploitation of the original works from which extracts are taken.¹⁵⁵

That said, Bently’s study can be argued to be a landmark study on the interplay between copyright, the European AV sector, and the EFI. Indeed, it is one of the very few sources that situates copyright-related conundrums in real-life examples and delves into the details of the extent to which copyright norms and particularly the quotation exception, which is inspired by and tailored for in-print materials, fit the particularities of other types of works, such as audiovisual/cinematographic works.

Whilst Bently’s study was published after the OWD’s adoption, several other scholarly works shed light upon the copyright-related challenges imposed by orphan works on the European AV sector and the EFI prior to the OWD and even before the term ‘orphan works’ was coined. In this regard, published in 2002, Francisco Javier Cabrera Blázquez’s journal article, ‘In Search of Lost Rightsholders: Clearing Video-on-Demand Rights for European Audiovisual Works’¹⁵⁶, elaborates on the ways in which digitisation of the European AV sector and the digital distribution of European audiovisual/cinematographic works can benefit the EFI and the European audiences.

Aligned with the EU policy documents on this interplay, Blázquez states that the online streaming platforms would enhance the competitiveness of the European AV sector and the EFI, as these platforms not only ease access to cultural content but also provide opportunities for cultural heritage or archival content by creating a new market, with multiple language options, to enable the access to

¹⁵³ Ibid, 4-5.

¹⁵⁴ Ibid, 32.

¹⁵⁵ Ibid, 30-31.

¹⁵⁶ Francisco Javier Cabrera Blázquez, ‘In Search of Lost Rightsholders: Clearing Video-on-Demand Rights for European Audiovisual Works’ (2002) 8 IRIS Plus Legal Observations.



and consumption of such content while also serving to the cultural diversity policies of the EU.¹⁵⁷ Nevertheless, the exhibition of European audiovisual/cinematographic works requires a comprehensive—and complicated—copyright clearance, as opposed to the American content, especially given that European audiovisual/cinematographic works are joint-authored works, rather than made-for-hire works which entitle the film producer as the sole copyright owner, as well as the absence of a copyright registry in Europe, which would help identify and track multiple copyright owners for copyright clearance.¹⁵⁸ This problem is exacerbated in the case of older works, including heritage works, given that such works might require the identification of the heirs to the deceased copyright owners of the content to be exhibited via online streaming platforms.¹⁵⁹ In this context, Blázquez refers to the challenges of European broadcasting organisations. He explains that copyright clearance impedes the activities of broadcasting organisations even though their collections hold an abundance of audiovisual/cinematographic content which displays European history and has significant cultural value, yet cannot be made available to the public through online streaming platforms, given the hardship in identifying their rightsholders and obtaining their authorisation.¹⁶⁰

Against this background, Blázquez provides two normative solutions to cope with the orphan works-related problems: the introduction of compulsory collective licensing (hereinafter ‘CCL’) or extended collective licensing (hereinafter ‘ECL’) schemes, or the establishment of an EU-wide centralised rights information system.¹⁶¹ The first solution, the CCL and ECL schemes, would be legislative interventions requiring the exercise of ‘online rights’ through collective management organisations (hereinafter ‘CMOs’). Drawing upon the CCL of cable transmission right within Council Directive 93/83/EEC¹⁶² (hereinafter ‘Sat-Cab Directive’), Blázquez advocates adopting a similar system for orphan works. As an alternative, he suggests that centralised rights management systems can help clear copyright, either by comprising ‘one-stop shops’ to retrieve up-to-date and reliable information about the rightsholders of works, or by constituting ‘clearing houses’ that would not only provide information on the rightsholders but also enter into negotiations on behalf of their

¹⁵⁷ Ibid, 2.

¹⁵⁸ Ibid, 2-3.

¹⁵⁹ Ibid, 6.

¹⁶⁰ Ibid, 4.

¹⁶¹ Ibid, 5-6.

¹⁶² Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15. (Amended)



members to conclude license agreements.¹⁶³ In either case, it is essential to maintain the balance between the public interest in access to culture and information against the private interests of copyright owners, which can be achieved through the implementation of the three-step test into the system.¹⁶⁴ It is worth noting that the OWD, which was adopted ten years after the publication of Blázquez's journal article, facilitates the digitisation, reproduction, making available and communication to the public of orphan works by combining the ECL schemes, backed up by the three-step test as well as an opt-out mechanism, as suggested by Blázquez, with a centralised rights management system.

Yet another journal article on the orphan works conundrum is 'Audiovisual Archives and the Inability to Clear Rights in Orphan Works'¹⁶⁵, which was penned by Stef van Gompel and published in 2007. Also published before the OWD was adopted, van Gompel has a broader focus, as he investigates the secondary uses of orphan works not only on online streaming platforms but in general and for both commercial and non-commercial purposes, including the uses for the creation of new works rather than mere exhibition of orphan works. In this sense, van Gompel's work provides an overview of the EU policies concerning the digitisation of orphan works, which was initiated with the 'i2010: Digital Libraries' initiative; therefore, it sheds light upon the path that led to the adoption of the OWD.

Van Gompel explains that the 'orphan works' puzzle occurs when the reuse of a work cannot be realised due to the prevailing copyright protection, despite the hardship in identifying the rightsholders, and also in the absence of a copyright E&L that would permit the reuse of the works without having to seek authorisation from the rightsholders.¹⁶⁶ Therefore, van Gompel concentrates on finding normative solutions to this conundrum and comes up with six alternatives. Aside from the CCL and ECL option previously explored by Blázquez, van Gompel suggest, firstly, an efficient rights management system, which would rely on tools such as DRMs, a centralised database compiling information on the rightsholders of a work, or the promotion of open licensing schemes that would authorise the prospective uses of a work.¹⁶⁷ Secondly, an 'indemnity or security' system

¹⁶³ Blázquez (n 156), 5.

¹⁶⁴ Ibid, 6.

¹⁶⁵ Stef van Gompel, 'Audiovisual Archives and the Inability to Clear Rights in Orphan Works' (2007) 4 IRIS Plus Legal Observations.

¹⁶⁶ Ibid, 2-3.

¹⁶⁷ Ibid, 4.



is explored, as this system could authorise the representative of a private organisation to monitor the efforts of potential users to identify the rightsholders of a work and can grant indemnity or security to them.¹⁶⁸ Thirdly, van Gompel discusses the efficacy of a ‘limitation-on-remedy’ model that would limit the legal liability of users of an orphan work, who have conducted a diligent search to identify the rightsholders and obtain authorisation for the reuse of the work.¹⁶⁹ Finally, the possibility of an E&L, accompanied by a fair remuneration scheme for the rightsholders who might be revealed upon the reuse of the work.¹⁷⁰ Aligned with Blázquez’s suggestions, van Gompel also stressed the importance of balancing the public interest in accessing and using orphan works against the authors’ and rightsholders’ private interests and copyright.¹⁷¹

The legal complexities concerning the cultural assets essential for European cultural heritage, explained by Blázquez and van Gompel, are not the only legal hurdles that have implications for cultural heritage. There is a line of literature focusing on the preservation of audiovisual/cinematographic works and heritage. Sabina Gorini’s seminal ‘The Protection of Cinematographic Heritage in Europe’ elaborates on the absence of an automated curation and preservation mechanism in the EU legal framework.¹⁷² Published shortly after the adoption of the InfoSoc Directive in 2001 and the E&L enshrined in Article 5(2)(c) to permit the reproduction of in-copyright works by CHIs, Gorini explores the shift in the acknowledgement of audiovisual/cinematographic works merely as ‘a form of entertainment (...) [whose] value do not stretch beyond their commercial exploitation’¹⁷³ to cultural assets that are ‘invaluable historical record of the last century, worthy of being preserved.’¹⁷⁴ Gorini explains that the EU Member States started to adopt legislative measures to initiate the preservation of such cultural assets only in the 1970s.¹⁷⁵ These legislative measures consisted mainly of mandatory legal deposit systems,¹⁷⁶ which aimed to ensure the sustenance of a ‘reference copy’¹⁷⁷, as required by the CoE’s European

¹⁶⁸ Ibid, 5.

¹⁶⁹ Ibid, 6.

¹⁷⁰ Ibid, 7.

¹⁷¹ Ibid.

¹⁷² Susanne Nikoltchev, ‘The Protection of Cinematographic Heritage in Europe’ (2004) 8 IRIS Plus Legal Observations.

¹⁷³ Ibid, 2.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Council of Europe, Explanatory Report to the European Convention for the Protection of Audiovisual Heritage (2001), para. 6.



Convention on Protection of the Audiovisual Heritage, adopted in 2001.¹⁷⁸ Other measures comprised voluntary deposit systems and public financing plans allocated to rescue and restore older audiovisual/cinematographic works.¹⁷⁹

Gorini underlines that, despite the overarching aims and objectives that unite these efforts, the legal characteristics (e.g., mandatory, voluntary), addresses (e.g., national film producers, co-producers, foreign producers), scope (e.g., cinematographic works, ancillary materials, DVDs), and requirements of these legislations vary widely from one country to another.¹⁸⁰ Yet, it is noted that these legislative instruments often do not specify whether the proprietorship of the physical material is transferred via the deposit of the original work or a copy thereof.¹⁸¹ Whereas there had been discussions at the EU level to assess the optimal ways in which the EU Member States' efforts on this front can be harmonised and further systematised, the EU policymaker and legislator have left the legal grounds for audiovisual/cinematographic heritage to the discretion of the Member States.¹⁸²

The legislative efforts at the national level help secure the deposit of a 'reference copy'; nevertheless, the operationalisation of the restoration and duplication for preservation purposes requires copyright flexibilities, given that such an act would lead to the reproduction of the copyright-protected materials deposited in the competent State bodies. In this regard, Gorini advocates for an EU-wide copyright E&L, as provided by the InfoSoc Directive, and explains that this would help ease the reproduction of such work without having to seek and trace the rightsholder or rightsholders of the deposited works, especially in cases where the maintenance of a work in the collections of CHIs does not rely on a written contractual agreement.¹⁸³ Whereas Article 5(2)(c) of the InfoSoc Directive introduced an E&L in this regard, Gorini highlights that different EU Member States have transposed this provision in different ways, generating legal fragmentation across Europe.¹⁸⁴

Last, Christina Angelopoulos' seminal work shall also be encompassed herein this literature review, as it focuses on another topic that is closely related to the preservation of cultural heritage, but also of great importance to the filmmaking lifecycle and retail chain: the term of legal protection

¹⁷⁸ Council of Europe, European Convention for the Protection of Audiovisual Heritage (adopted 8 November 2001, entered into force 1 January 2008) ETS No. 183.

¹⁷⁹ Nikoltchev (n 172), 2.

¹⁸⁰ Ibid, 3-4.

¹⁸¹ Ibid, 3.

¹⁸² Ibid, 5.

¹⁸³ Ibid, 5.

¹⁸⁴ Ibid, 6.



granted for audiovisual/cinematographic works and its implications on the public domain. In her journal article, ‘Determining the Term of Protection for Films: When Does a Film Fall into the Public Domain in Europe’¹⁸⁵, Angelopoulos outlines the EU norms that regulate the term of protection envisioned for audiovisual/cinematographic works, while also addressing the disparities in the national copyright regimes of the EU Member States as a result of the lack of uniformity across Europe on the notion of ‘authorship’ in the context of audiovisual/cinematographic works.

Angelopoulos explains that the term of legal protection was one of the few copyright-related aspects harmonised by the EU legislator.¹⁸⁶ The Term Directive, which was first adopted in 1993 and last amended in 2011, sets the minimum standards concerning copyright protection, while leaving room for the EU Member States to introduce stronger protection for eligible works and other subject matter. In this regard, Article 1(1) of the Directive holds that copyright subsists in a work during the author's lifetime and an additional 70 years after their death.¹⁸⁷ This general rule is followed by several exceptions, including the one for determining and calculating the term of legal protection for joint-authored works such as audiovisual/cinematographic works.

Article 1(2) of the Term Directive holds that, in the case of joint-authored works, the term mentioned in Article 1(1) shall be calculated from the death of the last surviving author. Article 2 of the Directive immediately introduces the special norms for audiovisual/cinematographic works. This provision holds that ‘[t]he term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.’¹⁸⁸ Yet, Angelopoulos stresses the recent advent of filmmaking technologies, which hints at the fact that only from 2035 and onward will the copyright protection of the earliest audiovisual/cinematographic works lapse, hence enriching the public domain with such works.¹⁸⁹ Besides, several factors shall be considered to assess the interface of copyright protection and the

¹⁸⁵ Christina Angelopoulos, ‘Determining the Term of Protection for Films: When Does a Film Fall into the Public Domain in Europe?’ (2012) 2 IRIS Plus 7.

¹⁸⁶ Ibid, 8.

¹⁸⁷ Directive 2006/116/EC (n 105), Art. 1(1).

¹⁸⁸ Ibid, Art. 2(1).

¹⁸⁹ Angelopoulos’ statement takes the death of the last survivor among the Lumière brothers and clarifies that the 70-year postmortem period ends in 2024; while the same calculation for preeminent film producers, such as Stan Laurel and Charlie Chaplin, indicates that the works of these authors will fall into the public domain, respectively, in 2023 and 2047. See: Angelopoulos (n 185), 7.



public domain in the context of audiovisual/cinematographic works. Indeed, the reference to the last surviving author of an audiovisual/cinematographic work complicates the calculation of the term of legal protection, given that the authorship of this category of works has not been harmonised at the Union level but largely left to the discretion of the Member States.¹⁹⁰

Aside from the abovementioned issue, Angelopoulos draws attention to the fact that the Term Directive regulates the term of legal protection only for economic rights, while leaving the term of moral rights, which has significant implications on the reuse of such content, to the discretion of the Member States.¹⁹¹ As a consequence, the national copyright regimes across Europe present different approaches at different ends of the spectrum, from no postmodern moral right to perpetual moral rights.¹⁹² In Angelopoulos's words, this legislative strategy leads to 'two separate regimes for the determination of the term of protection in Europe: an EU (quasi-)harmonised regime for economic rights and a patchwork of national provisions for moral rights.'¹⁹³

Different approaches to providing copyright protection to audiovisual/cinematographic works across Europe also shatter the notion of a common European public domain and create, instead, various public domains in Europe, as previously discussed by Séverine Dusollier.¹⁹⁴ This phenomenon is also visible in the divergences in the national copyright regimes which regulate the term of protection for foreign works, in light of Article 7 of the Term Directive. To add more, Angelopoulos clarifies that the lapse of copyright protection does not necessarily lead to allocating such works into the public domain, as the cultural priorities and laws of different Member States might grant other forms of legal protection to such content.¹⁹⁵

Based on the review of the existing literature, revisiting the current level of EU-wide harmonisation in the regulation of authorship, the scope of economic and moral rights, E&Ls, and the norms concerning the public domain—particularly in the post-CDSMD European copyright landscape—appears to be essential. Aside from the factors, such as the second wave of copyright reform that the CDSMD triggered across Europe, the reviewed literature often takes the EU norms as benchmarks to analyse the national legal landscapes of the EU Member States. Whereas this

¹⁹⁰ Ibid, 10.

¹⁹¹ Ibid, 11-12.

¹⁹² Ibid, 11.

¹⁹³ Ibid.

¹⁹⁴ Séverine Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain* (World Intellectual Property Organization (WIPO)).

¹⁹⁵ Angelopoulos (n 185), 21.



practice is crucial to assess the level of harmonisation/fragmentation in Europe, they do not necessarily lead to the mapping and analysis of the national legal norms, which have not necessarily derived from the EU directives and regulations, but the national cultural priorities and strategies. Therefore, the remainder of this section, on the one hand, provides a mapping and comparative analysis of the legal norms on authorship, economic and moral rights, E&Ls, the term of legal protection and the norms concerning the public domain, in order to provide an up-to-date analysis of the legal harmonisation achieved at the EU level. On the other hand, it glances at the national copyright regimes of the selected EU Member States to map and analyse the legal norms that might inspire EU-wide implementation through the prospective legislative efforts of the EU legislator.

4.2.1 Authorship and Other Key Definitions

Authorship. Two EU directives, the Sat-Cab Directive and the RLD, elaborate on the concept of ‘authorship’ with respect to the European AV sector and the EFI. Article 1(5) of the Sat-Cab Directive and Article 2(2) of the RLD adopt the same approach to identify the author(s) of an audiovisual or cinematographic work, and both provisions have the same letter of law. These provisions require the acknowledgement of the principal director of an audiovisual or cinematographic work as the author or one of the co-authors of the work. Nevertheless, the provisions neither crystallise the authorship model for audiovisual or cinematographic works (e.g., single authorship, co-authorship) nor identify or harmonise the co-authors of the principal director. Instead, the EU legal framework leaves these matters to the discretion of the EU Member States, hence leaving a leeway for legal fragmentation across Europe.

In this regard, the international legal instruments might guide the regulation of the authorship of audiovisual or cinematographic works. Article 14*bis*(2)(a) of the Berne Convention holds that the Berne Union Members shall regulate copyright ownership in cinematographic works within their national laws. However, Article 14*bis*(3) of the Berne Convention hints at the persons who can be acknowledged as the joint-authors of a cinematographic work by cumulatively referring to the principal director, and the authors of the scenarios, dialogues and musical works. This provision, in fact, is aimed at securing these market actors’ capacity to exercise their rights to ‘object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or the subtitling or dubbing of texts, of the work’, unless otherwise provided in the national legislation. Along the same lines, Article 14*bis*(2)(b) of the Convention acknowledges the fact that the Berne Union Members might recognise the authorship or



copyright ownership of other market actors who contribute to the making of a cinematographic work in addition to the ones mentioned earlier. Yet, this latter provision restricts this second category of contributors' capacity to exercise the catalogue of rights mentioned above for the principal director, the authors of scenarios, dialogues and musical works, unless otherwise agreed or regulated.

Whereas the Berne Convention leaves a wide margin of discretion to the national legislators and allows vesting of copyright to multiple market actors, the CJEU judgment of 9 February 2012 in *Martin Luksan v Petrus van der Let*¹⁹⁶ case¹⁹⁷ ruled that:

(...) rights to exploit a cinematographic work, such as those at issue in the main proceedings (reproduction right, satellite broadcasting right and any other right of communication to the public through the making available to the public), vest by operation of law, directly and originally, in the principal director. Consequently, those provisions must be interpreted as precluding national legislation which allocates those exploitation rights by operation of law exclusively to the producer of the work in question [and that] [the statutory presumptions of transfers of exploitation rights shall 'not [be] an irrebuttable one precluding the principal director of that work from agreeing otherwise'].¹⁹⁸

Informed by flexible international and supranational norms, the EU Member States' national legislative approaches to identifying audiovisual or cinematographic work authors vary greatly. For instance, Article 39(1) of the *Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz)*¹⁹⁹ (hereinafter 'Austrian Copyright Act'), first and foremost, uses the term 'commercially produced cinematographic works', hence implying a different treatment of commercial cinematographic works from those of a non-

¹⁹⁶ Judgment of the Court (Third Chamber) of 9 February 2012, *Martin Luksan v Petrus van der Let*, C-277/10, ECLI:EU:C:2012:65.

¹⁹⁷ The legal dispute subject to the *Luksan* case stems from the 'directing and authorship' agreement concluded between Mr. Luksan, as the scriptwriter and the principal director, and Mr. van der Let, as the film producer. Per this contract, Mr. Luksan assigns his copyright and related rights to Mr. van der Let, except for the rights that would authorise Mr. van der Let to make the work available to the public on digital networks and broadcast by closed circuit television and by pay TV. The aforementioned agreement lacked any provisions concerning the statutory rights to remuneration. Nevertheless, Mr. van der Let made the work available to the public by digital means, by assigning exploitation rights to several market actors to enable the exhibition of the work via Pay TV and through Movieeurope.com and YouTube. In response to Mr. Luksan's claims, Mr. van der Let argued that Article 38(1) of the Austrian Copyright Act holds that the film producer is the owner of exploitation rights of a cinematographic work, and the same provision allows contractual arrangements that depart from the rule set therein regarding the equal share of the remunerations for reproductions made on a medium. The Austrian Court inquired the compliance of the Austrian Copyright Act with the EU copyright *acquis*, which considers the principal director as one of the authors, hence the initial rightsholder, of a cinematographic work. Thus, the Austrian Court requested a preliminary ruling from the CJEU.

¹⁹⁸ *Martin Luksan v Petrus van der Let* (n 196), para. 110.

¹⁹⁹ Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz). StF: BGBl. Nr. 111/1936 (StR: 39/Gu. BT: 64/Ge S. 19.) (as amended by BGBl. I Nr. 182/2023).



commercial nature. Secondly, the same provision, while acknowledging the contribution of various actors in making a commercial cinematographic work, refers to the film producer as the one who can be assigned as the author by all the co-authors and other contributors. While Article 39(2) of the Austrian Copyright Act requires the indication of the author of the cinematographic work within the work itself and its ancillary materials (e.g., advertisements, posters), it is worth noting that Article 38(1) of the Austrian Copyright Act still contains a statutory presumption of transfer of rights and acknowledges the film producer as the sole owner of the economic rights vested in the cinematographic work. Similarly, Article 6 of the *Auteurswet*²⁰⁰ (hereinafter ‘Dutch Copyright Act’) holds that the author of a work that is created ‘based on the design of a person and under that person’s direction and supervision’ should be that person, hence implying the principal director.

While Section 1 of the *Tekijänoikeuslaki*²⁰¹ (hereinafter ‘Finnish Copyright Act’) does not necessarily provide a special provision for the authorship of cinematographic works, but acknowledges the creator of an intellectual work as the author of that work, Article 9 of the *Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα*²⁰² (hereinafter ‘Greek Copyright Act’) incorporated a rigid interpretation of the Sat-Cab Directive and RLD by acknowledging the principal director as the sole author of a cinematographic work.

Article L1113-7 of the *Code de la propriété intellectuelle*²⁰³ (hereinafter ‘French Copyright Act’) recognises any natural person who contributed to the creation of an intellectual work as the author of that work. Finally, Article 87 of the *Ley del Propiedad Intelectual*²⁰⁴ (hereinafter ‘Spanish Copyright Act’) stipulates that the director, authors of scenario, dialogues, adaptations and musical works are the joint-authors of a cinematographic work.

Presumption of Authorship. To facilitate the timely exercise of economic rights, the EU legislator has introduced a presumption of authorship within Directive 2004/48/EC²⁰⁵ (hereinafter ‘Intellectual Property Rights Enforcement Directive’ or ‘IPRED’). Article 5 of the IPRED provides a general rule regarding the presumption of authorship, without necessarily tailoring it to audiovisual or

²⁰⁰ *Auteurswet* (as amended in 2025).

²⁰¹ *Tekijänoikeuslaki* (404/1961) (as amended by 1216/2023).

²⁰² *Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα* (Εισηγητική έκθεση για το ν. 2121/1993) (as amended by Law 5046/2023).

²⁰³ *Code de la propriété intellectuelle* (as amended by LOI n°2020-1674 of 24 December 2020).

²⁰⁴ *La Ley del Propiedad Intelectual* (Texto consolidado) (as amended in 2022).

²⁰⁵ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 157/45.



cinematographic works. Article 5(a) of the IPRED holds that, in the absence of counterproof, the person whose name appears on a literary or artistic work in the usual manner shall be entitled to exercise the right to initiate infringement proceedings and request the necessary measures to prevent and remedy such illegitimate acts. As Article 5(b) of the IPRED indicates, the same rule applies to the related rights holders, such as the producer of the first fixation of a film.

Article 15(2) of the Berne Convention contains a similar legal regulation, however, tailored for cinematographic works. It holds that, in the absence of counterproof, the natural or legal person whose name appears on the cinematographic work in a usual manner is deemed the author of the work.

The presumption of authorship in the national copyright regimes of the EU Member States shows significant variations from these international and supranational approaches. For instance, the presumption of authorship introduced within Article 12 of the Austrian Copyright Act applies only to works of fine art. While Section 38 of the Finnish Copyright Act, Article 10(3) of the Greek Copyright Act, Section 2(1) of the Dutch Copyright Act and Article 6(1) of the Spanish Copyright Act follow the WIPO model, the French legislature has opted for a more detailed regulation. Article L133-7 of the French Copyright Act indicates that, unless there is proof otherwise, a cinematographic work's authors are the film's director, and the authors of the scenario, dialogues, adaptations and musical work.

Other Key Definitions: Audiovisual works, Cinematographic works, Television films, Films, Moving image material. The concepts of ‘audiovisual work’ and ‘cinematographic work’ lie at the heart of the copyright norms concerning the European AV sector and the EFI, particularly those identifying the authorship of these types of works. Nevertheless, the EU directives and regulations neither provide a binding legal definition for these concepts nor explicate their interrelation. The WIPO-administered copyright instruments do not define these concepts either.

As opposed to the international and supranational norm-setting forums, the CoE’s regional norm-setting endeavours have extended to this area. Indeed, the European Convention for the Protection of Audiovisual Heritage²⁰⁶ administered by the CoE defines ‘cinematographic works’ within its Article 2(b) as follows: ‘moving image material of any length, in particular cinematographic works of fiction, cartoons and documentaries, which is intended to be shown in cinemas’.

²⁰⁶ Council of Europe, European Convention for the Protection of the Audiovisual Heritage (adopted 8 November 2001, entered into force 1 January 2008) ETS No. 183.



The CoE's articulation of 'cinematographic works' by taking the exhibition venue of the work, despite being unfamiliar with the EU legislator's copyright-oriented approach, is coherent with the formulation of two other key concepts by the CoE: 'moving image materials', which is the umbrella category encapsulating cinematographic works, and 'television films', which are also defined with reference to the exhibition venue.

Indeed, Article 2(a) of the European Convention for the Protection of Audiovisual Heritage defines 'moving image material' as 'any set of moving images recorded by whatever means and on whatever medium, whether or not accompanied by sound, capable of conveying an impression of movement'. As to 'television films', Article 2 of the European Agreement concerning Programme Exchanges by means of Television Films²⁰⁷ holds that 'all visual or sound and visual recordings intended for television' fall under this category.

Moving image material, cinematographic works, and television films are key concepts for the European AV sector and the operation of the EFI. They are also closely related to the European copyright framework, given that the vast majority of cultural content that falls under either one of these categories is protected by copyright. Whereas the EU legislator remains silent on the ways in which these CoE conceptualisations interact with the EU copyright regime, the definition provided for 'films' by the EU legislator within Article 2(1)(c) of the RLD resembles yet also creates conceptual opacity, especially when considered along with the CoE legal framework.

Article 2(1)(c) of the RLD defines 'films' as 'a cinematographic or audiovisual work or moving images, whether or not accompanied by sound'. While this definition implies that films are a sub-category, it falls short of clarifying the interrelation of cinematographic and audiovisual works and moving images. Instead, it gives the impression of using these three concepts, two of which have specific meanings in the context of the CoE legal framework, being used interchangeably.

The conceptual turmoil caused by the clash of CoE and EU legal frameworks has affected the national copyright laws of EU Member States. None of the EU Member States studied herein, which are also members of the CoE, holds a definition for the concepts of 'moving image', 'audiovisual works', or 'television film'. Besides, only the Austrian, French and Spanish copyright laws define 'cinematographic works' among the EU Member States studied herein.

²⁰⁷ Council of Europe, European Agreement concerning Programme Exchanges by means of Television Film (adopted 15 December 1958, entered into force 1 July 1961) ETS No. 027.



Article 4 of the Austrian Copyright Act broadly defines ‘cinematographic works’ as moving images, whether or not accompanied by sound. Whereas this provision explicitly states that the production and exhibition methods of such works are irrelevant, Article 86(1) of the Spanish Copyright Act posits the exhibition method at the heart of its definition. This provision holds that cinematographic works and other audiovisual works are not only moving images with or without sound but also works, which are essentially intended to be shown through projection devices or by any other means of public communication of image and sound, regardless of the nature of the material supports of works in question. Last, Article L122-2 of the French Copyright Act, while adopting the Austrian legislator’s approach, also considers cinematographic works a subcategory of audiovisual works, just like the Spanish legislator.

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The multi-level mapping of the legal norms on key definitions and authorship is attached as **Annex no. 2**.

4.2.2 Economic, Moral and Related Rights

Mapping the economic, moral, and related rights, as presented herein, is essential for the European AV sector and the EFI for two main reasons: First, the catalogue of rights listed herein sheds light on the exclusive rights of authors, performers, phonogram producers, and broadcasting organisations—the actors involved in the various stages of the filmmaking process. Second, mapping the rights and their rightsholders herein offers insight into the licensing practices of the market actors involved in the film production and distribution phases, given that such a mapping helps identify the rights that shall be cleared for filmmaking and distribution, as well as the ones who are authorised to clear such rights.²⁰⁸

²⁰⁸ It shall be noted that the economic rights encompassed within this sub-section of the report have been extended to various objects of related rights (i.e., performances, phonograms, first fixations of films, broadcasts) by the EU Member States studied herein. See: Austrian Copyright Act, Art. 68(1)(1) (for performances), Art. 74(1) (for photographs), Art. 76(1) (for phonograms), Art. 76a(1) (for broadcasts); Dutch Neighbouring Rights Act, Art. 2(1)(d) (for performances), Art. 6(1)(c) (for phonograms), Art. 7a(1)(c) (for the first fixations of films), Art. 8(1) paras. (c) and (d) (for broadcasts); Finnish Copyright Act, Sec. 45 (for performances), Sec. 46 (for phonograms), Sec. 46a (for the first fixations of films), Sec. 48 (for broadcasts); French Copyright Act, Art. L212-3(I) (for performances), Art. L213-1 (for phonograms), Art. L215-1 (for the first fixations of films), Art. L216-1 (for broadcasts); Greek Copyright Act, Art. 46(2) (for performances), Art. 47(1) (for phonograms and first fixations of films), Art. 48(1) (for broadcasts); Spanish Copyright Act, Art. 106-109 (for performances), Art. 115-117 (for phonograms), Art. 121-124 (for first fixations of films), Art. 126 (for broadcasts).



Broadcasting right. The Sat-Cab Directive consist of two legal provisions that guarantee the protection of the broadcasting rights of authors, on the one hand, and performers, phonogram producers and broadcasting organisations, on the other hand. Indeed, Article 2 of the Directive holds that the EU Member States shall provide an exclusive broadcasting right to the author to authorise the communication to the public of their copyright-protected works by satellite. Likewise, Article 4(1) of the Directive requires the protection of the broadcasting right of performers, phonogram producers and broadcasting organisations. Whereas these provisions harmonise the recognition of broadcasting rights as an economic right encapsulated within copyright and related rights, they do not provide further details regarding the scope of the right.

Broadcasting right is encompassed within the international and regional legal instruments as well. Article 11*bis*(1) of the Berne Convention recognises the exclusive right of the author of literary and artistic works to authorise the broadcasting of their works or communication to the public of their works by wire and wireless means, rebroadcasting of their works by an organisation other than the original broadcasting organisation, and communication to the public of their works by loudspeakers or any other analogous instruments transmitting—by signs, sounds or images—the broadcast of the work. While complying with the Berne Convention’s articulation of the broadcasting right,²⁰⁹ Article 14 of the Agreement on the Trade-Related Aspects of Intellectual Property Rights²¹⁰ (hereinafter ‘TRIPs Agreement’) also guarantees broadcasting organisations’ exclusive right to authorise the rebroadcasting of a broadcast by wireless means, and communication to the public of television broadcasts. Along the same lines, the CoE’s European Agreement on the Protection of Television Broadcasts²¹¹ require, with its Article 1, the signatory parties to entitle broadcasting organisations with the exclusive right of the re-broadcasting of broadcasts, the diffusion of such broadcasts to the public by wire, as well as the re-broadcasting, wire diffusion or public performance with the aid of fixations or reproduction of the work, unless such fixations and reproductions have been authorised for sale by the rightsholder organisation.

²⁰⁹ Article 9(1) of the TRIPs Agreement holds that the signatory parties to the Agreement shall comply with Articles 1 through 21 of the Berne Convention, which encompasses the term of copyright protection, and the Appendix thereto.

²¹⁰ World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights (as amended on 23 January 2017) (TRIPs Agreement) (adopted 15 April 1994, entered into force 1 January 1995).

²¹¹ Council of Europe, European Convention on the Protection of Television Broadcasts (adopted 22 June 1960, entered into force 1 July 1961) ETS No. 034.



The abovementioned provisions of the Sat-Cab Directive have been implemented in the national copyright regimes of the EU Member States studied herein. Article 17 of the Austrian Copyright Act is dedicated to the author's right to broadcasting, by wire and wireless means, as well as the broadcasting organisation's right to rebroadcast by means of wire. Along the same lines, paragraphs (g) and (h) of Article 3(1) of the Greek Copyright Act hold that author's exclusive economic rights encompass the broadcasting or rebroadcasting of their works to the public by radio and television, by wire and wireless means, satellite, cable or any other means, as well as the communication of their works to the public, by wire or wireless means or by any other means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Aside from the Austrian and Greek Copyright Acts, which consider broadcasting right as a stand-alone right, the copyright regimes of other EU Member States encompass this right under other rights, such as the right of communication to the public or the right to representation. Article 12(1) subparagraphs (5°) and (6°) of the Dutch Copyright Act considers broadcasting in the context of the right of communication to the public, by holding that the broadcasting of a work included in a radio or television programme by means of a satellite or another transmitter or a broadcasting network, as well as the publication of a work by transmission by means of cable or any other means are considered communication to the public. Furthermore, Article 12(6) of the Dutch Copyright Act encompasses rebroadcasting of a work incorporated in a radio or television programme by the same broadcasting organisation within the scope of communication to the public. Section 2 of the Finnish Copyright Act, through a broadly articulated provision, considers broadcasting in the context of the right of communication to the public; it further holds that communication to the public encompasses the act of communicating a work by wire or wireless means, including communication in a manner that members of the public may access these works from a place and at a time individually chosen by them. Similarly, the French Copyright Act covers broadcasting right in the context of the right to representation.²¹² Article L122-2 of the French Copyright Act holds that the representation of a work consists of the communication of the work to the public by any means, including transmission of a work by broadcasting, by television broadcasting, and by means of satellite. Last but not least, Article 20(2) of the Spanish Copyright Act also considers the broadcasting right in the context of the right of communication to the public. Indeed, Article 20(2)(d) holds that the broadcasting of works to the

²¹² French Copyright Act, Art. L122-1.



public via satellite, under the control and responsibility of the broadcasting organisation, and via program-carrying signals intended for reception by the public into an uninterrupted chain of communication from the satellite, is considered communication to the public.

Reproduction right. The reproduction right is harmonised in the EU through Article 2 of the InfoSoc Directive, which holds that the EU Member States should ensure the exclusive right ‘to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part for authors, of their works; for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of the first fixations of films, in respect of the original and copies of their films; for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.’

The EU provision offers a more comprehensive legal regulation compared to Article 9(1) of the Berne Convention, which recognises the author’s exclusive right to authorise the reproduction of their works ‘in any manner or form’, which, according to Article 9(3) therein, encompasses sound and visual recordings. Likewise, Articles 7 and 11 of the WIPO Performers and Phonograms Treaty²¹³ (hereinafter ‘WPPT’) recognise the reproduction right of, respectively, performers and phonogram producers. Article 14 of the TRIPs Agreement also recognises the right of phonogram producers to authorise the direct and indirect reproduction of their phonograms.

The acts that fall under the reproduction right according to Article 2 of the InfoSoc Directive are implemented in the national copyright regimes of Article 15(1) of the Austrian Copyright Act, Article 12(1)(1°) of the Dutch Copyright Act, Section 2 of the Finnish Copyright Act, Article 3(1)(a) of the Greek Copyright Act, and Article 18 of the Spanish Copyright Act by closely following the letter of the EU provision, if not *verbatim*. However, nuances exist in the Copyright Acts of Austria, Finland, France, and the Netherlands. Whereas the Dutch Copyright Act consists of only the act of reproduction ‘in whole and in part’, the other Member States’ Copyright Acts further detail the acts encapsulated by the reproduction right. For instance, Article 12(2) of the Austrian Copyright Act explicates that audio and audiovisual recordings of the recitation or performance of a work are also considered reproduction, while Article 12(4) of the Act extends the reproduction to the execution of the plans and designs of works of fine art. The latter has also been encompassed in the context of

²¹³ World Intellectual Property Organization (WIPO), WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) UNTS 2186 (p. 203).



reproduction by Article L122-3 of the French Copyright Act. Additionally, the French provision articulates the act of reproduction as ‘material fixation of a work’, by any means, for the indirect communication of the work to the public, especially by means of ‘printing, drawing, engraving, photography, moulding and any process of graphic and plastic arts, mechanical, cinematographic or magnetic recording.’ Section 2 of the Finnish Copyright Act states that transferring a work to a different medium or device is also considered an act of reproduction.

Rights communication to the public and making available to the public. Article 3 of the InfoSoc Directive harmonises the right of communication to the public of works and the right of making available to the public of other subject-matter across the EU. Article 3(1) of the InfoSoc Directive is dedicated to the right of communication to the public; it holds that the authors should be provided with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. Article 3(2) of the Directive regulates the right of making available to the public, by adapting the same legal formulation to performers for the fixations of their performances; phonogram producers for their phonograms; the producers for the first fixations of films for the original and copies of their films; and, to broadcasting organisations for fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

As opposed to the EU copyright framework, the international and regional legal instruments hold piecemeal regulations concerning the rights of communication to the public and making available to the public. For instance, Article V of the Universal Copyright Convention²¹⁴ (hereinafter ‘UCC’), through a broadly articulated provision, indicates that copyright encompasses the author’s exclusive right to publish their works, along with translations thereof. Article 11(1)(II) of the Berne Convention provides a legal regulation regarding the exclusive rights of authors of dramatic, dramatico-musical and musical works; in this framework, it holds that the authors of such works have the exclusive right to authorise any communication to the public of the performance of their works. Article 11^{ter}(1)(II) of the Berne Convention, likewise, holds that authors of literary works shall enjoy the exclusive right of authorising any communication to the public of the recitation of their works. Along the same lines,

²¹⁴ United Nations Educational, Scientific and Cultural Organization (UNESCO), Universal Copyright Convention (as revised at Paris on 24 July 1971) (adopted 24 July 1971, entered into force 10 July 1974) UNTS 943 (p. 178).



Article 8 of the WIPO Copyright Treaty²¹⁵ (hereinafter ‘WCT’) holds a provision regarding the rights of the authors of literary and artistic works; in so doing, it formulates these rights, which were embraced by the EU copyright *acquis*, as follows: ‘the exclusive right of [authors to authorise] any communication to the public of their works, by wire or wireless means, including the making available to the public in such a way that members of the public may access these works from a place and at a time individually chosen by them.’ Additionally, Articles 10 and 14 of the WPPT recognise the right of making available to the public of performers of their fixed performances and of phonogram producers of their phonograms.

In addition to the UNESCO and WIPO legal frameworks, Article 14(3) of the WTO-administered TRIPs Agreement recognises, in addition to Articles 11 and *11ter* of the Berne Convention,²¹⁶ the exclusive right of broadcasting organisations of communication to the public television broadcasts. Along the same lines, the communication to the public right of broadcasting organisations is also encompassed within Article 1(1)(c) of the CoE’s European Convention on the Protection of Television Broadcasts.

The right to communication to the public, as defined in Article 3(1) of the InfoSoc Directive, is implemented in Article 18(1) of the Austrian Copyright Act, Section 2(1) of the Finnish Copyright Act, Article 3(1)(h) of the Greek Copyright Act, and Article 20(2)(g) of the Spanish Copyright Act *verbatim*.

Regarding the right of making available to the public, the essence of the right of communication to the public is extended to the objects of related rights,²¹⁷ hence implementing Article 3(2) of the InfoSoc Directive by remaining loyal to the essence of the EU provision. The only exception to this is the Austrian Copyright Act, which does not provide any legal regulations on the related rights of film producers, hence the related rights on the first fixations of films.

²¹⁵ World Intellectual Property Organization (WIPO), WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) UNTS 2186 (p. 121).

²¹⁶ See: *Infra* Footnote 209.

²¹⁷ Austrian Copyright Act, Art. 68(1)(1) (for performances), Art. 74(1) (for photographs), Art. 76(1) (for phonograms), Art. 76a(1) (for broadcasts); Dutch Neighbouring Rights Act, Art. 2(1)(d) (for performances), Art. 6(1)(c) (for phonograms), Art. 7a(1)(c) (for the first fixations of films), Art. 8(1) paras. (c) and (d) (for broadcasts); Finnish Copyright Act, Sec. 45 (for performances), Sec. 46 (for phonograms), Sec. 46a (for the first fixations of films), Sec. 48 (for broadcasts); French Copyright Act, Art. L212-3(I) (for performances), Art. L213-1 (for phonograms), Art. L215-1 (for the first fixations of films), Art. L216-1 (for broadcasts); Greek Copyright Act, Art. 46(2) (for performances), Art. 47(1) (for phonograms and first fixations of films), Art. 48(1) (for broadcasts); Spanish Copyright Act, Art. 108 (for performances), Art. 116 (for phonograms), Art. 122 (for first fixations of films), Art. 126(1) (for broadcasts).



Distribution right. Article 4 of the InfoSoc Directive and Article 9 of the RLD are dedicated to the distribution right, respectively, over works and objects of related rights. Indeed, Article 4(1) of the InfoSoc Directive harmonises the distribution right across Europe by stating that authors shall have the exclusive right to authorise or prohibit any form of distribution of their original works and their copies to the public by sale or otherwise. Article 4(2) of the Directive holds that the distribution right as such shall not be exhausted within the EU, except where the first sale or other transfer of ownership in the Community of that work is made by the rightholder or with their consent.

Along the same lines, Article 9(1) of the RLD harmonises the distribution right, which is articulated as ‘making available to the public by sale or otherwise’, of performers, in respect of fixations of their performances; of phonogram producers, in respect of their phonograms; of film producers, in respect of the original and copies of the first fixation of their films; and of broadcasting organisations, in respect of fixations of their broadcasts. Subsequently, Article 9(4) of the Directive acknowledges that, as an economic right, the distribution right can be transferred, assigned or subject to the granting of contractual licences.

The letter of Article 4 of the InfoSoc Directive finds *verbatim* correspondence in Article 16(1) of the Austrian Copyright Act and Article 3(1)(d) of the Greek Copyright Act. Yet, the Austrian Act acknowledges the publication, display, exhibition or any similar disclosure of a formerly unpublished work also as ‘distribution’.²¹⁸

Article 12(1)(2°) of the Dutch Copyright Act encompasses distribution in the context of the exclusive right to make available to the public and communication to the public.

Article 19 of the Spanish Copyright Act, while holding a provision that is similar to that of the EU provision, articulates the distribution right as ‘making available to the public the original and copies of the work *in a tangible medium*’ and through means such as sale, rental, lending or any other similar way.

Rental and lending rights. Rental and lending rights are harmonised across Europe with Article 3 of the RLD. The provision encompasses not only the right of the author in respect of the original and copies of his work, but also the rights of the performer in respect of fixations of their performance, the phonogram producer in respect of their phonograms, and the producer of the first fixation of a film in respect of the original and copies of their films. The rental and lending rights concerning

²¹⁸ Austrian Copyright Act, Art. 16(2).



buildings and works of applied art are excluded from the scope of the provision and the RLD. The provision neither defines nor sets the scope of acts that fall under the rental and lending right. Instead, Article 3(3) of the RLD merely clarifies that these rights can be transferred, assigned or subject to the granting of contractual licences.

The same provision contains essential regulations for the European AV sector and the EFI. Indeed, Article 3(4) of the RLD provides a legal presumption that holds that the film production contract concluded between performers, individually or collectively, with a film producer, would lead to the transfer of the performers' exclusive rental right to the film producers, unless otherwise agreed by the parties in the contract. According to Article 3(6) of the RLD, for applying this legal presumption, performers shall be provided with equitable remuneration. Whereas this presumption applies only to performers, Article 3(5) of the Directive gives the Member States the discretion to introduce a similar presumption concerning the rental right of authors, also subject to the equitable remuneration requirement.

The rental right has also been regulated within the international legal instruments, namely the WCT, WPPT and the TRIPs Agreement. Article 7(2) of the WCT secures the exclusive rental right of the authors of computer programs, cinematographic works, and works embodied in phonograms concerning the originals and copies of their works. It shall be emphasised, with respect to the audiovisual/cinematographic works, that Article 7(2)(ii) of the WCT clarifies that the exclusive rental right of the author does not extend to commercial rental that has led to widespread copying of such works materially impairing the exclusive right of reproduction. WPPT, on the other hand, secures the rental right of performers and phonogram producers through Articles 9 and 13.

Article 11 of the TRIPs Agreement also provides a similar regulation. Yet, the scope of the WTO provision does not extend to works embodied in phonograms, while heirs of the computer programs and cinematographic works are mentioned among the beneficiaries of the rental right.

Rental and lending rights are included among the economic rights within the Copyright Acts of the Member States studied herein. The relevant provisions, in addition to implementing the letter of the EU provision by closely following the letter of the law, if not *verbatim*, define the concepts 'rental' and 'lending'.

Indeed, Article 16a(3) of the Austrian Copyright Act, Article 12(2) of the Dutch Copyright Act, Article 3(1)(e) of the Greek Copyright Act, and Article 19 paragraphs (3) and (4) of the Spanish Copyright Act define rental as the temporary transfer of the use for commercial purposes, while



defining lending as the temporary transfer of use for non-commercial purposes by a publicly accessible institution, such as CHIs. Along the same lines, Article 16a(5) of the Austrian Copyright Act, Section 2(3) of the Finnish Copyright Act, Article 12(1)(3°) of the Dutch Copyright Act, Article 3(1)(e) of the Greek Copyright Act, and Article 19(1) of the Spanish Copyright Act implement the rental and lending rights as regulated within the RLD.

Right to translation, adaptation and/or other modifications. The EU copyright *acquis* has not explicitly regulated the exclusive right to translation, adaptation or any other modification. However, both the UCC and the Berne Convention have encompassed this right by adopting similar provisions.

To begin with, Article V(1) of the UCC covers only translations, stating that the author's copyright encapsulates the exclusive right to make, publish, and authorise the making and publication of translations of a work.

Article 8 of the Berne Convention, through a more detailed regulation, entitles the authors of literary and artistic works to the exclusive right to make and authorise the translation of their works during the term of protection that applies to their original works. In addition to this, Article 12 of the Berne Convention grants the authors of literary and artistic works the exclusive right to authorise adaptations, arrangements, and other alterations of their works. Additionally, it excludes the works that are part of an immovable object from the scope of the distribution right that applies to works of fine art.²¹⁹

The exclusive right to make and authorise the translation as well as the adaptation and modification of a work has been enshrined in Section 2 of the Finnish Act, Article 3(1)(b) of the Greek Copyright Act, and Article 21(1) of the Spanish Copyright Act. Additionally, Article 13 of the Dutch Copyright Act acknowledges 'translation' of a work and 'adaptation' or 'modification' of a work as forms of reproduction, hence encompassing these rights in the context of the exclusive economic right of reproduction. Nevertheless, the Austrian Copyright Act does not consist of a similar economic right.

Related rights: Film producer's rights. With the exception of Austria, the EU Member States studied herein have introduced legal regulations in their national copyright regimes regarding the related rights of film producers.

²¹⁹ Ibid, Art. 16(4).



Article 7a(1) of the Dutch Neighbouring Rights Act grants the film producer with the exclusive right to authorise the reproduction, sale, rental, lending, distribution or otherwise bringing into circulation a first fixation of a film or a reproduction thereof, or the importing, offering or having in stock for those purposes; and making available to the public a first fixation of a film or a reproduction thereof.

Section 46a of the Finnish Copyright Act holds that the producer of a film or any other device on which moving images are recorded has the exclusive right to authorise the reproduction, distribution, and making available to the public of their fixations of films.

Similarly, Article L215-1 of the French Copyright Act holds that the film producer, either a natural or legal person, has the exclusive right to authorise the reproduction, making available to the public by sale, exchange or rental, or communication to the public of their fixations of film.

Along the same lines, Article 47(2) of the Greek Copyright Act indicates that film producers have the exclusive right to authorise the reproduction, distribution, rental and lending, making available to the public, import, broadcast and rebroadcast their fixations of films.

Finally, the Spanish Copyright Act, through its Articles 121 to 123, entitles the film producer with the exclusive right to authorise the reproduction, making available to the public, and distribution of their fixations. Additionally, and different from the regulations available in the other Member States' copyright regimes, the Spanish Copyright Act, through its Article 124, grants the film producer also the right to exploit any photographs taken during the production process of the fixation of film.

Special rights concerning audiovisual/cinematographic works. Article 14 of the Berne Convention holds a special provision regarding the rights of the authors of audiovisual/cinematographic works. It grants the authors of these types of works the exclusive rights of authorising 'the cinematographic adaptation and reproduction of (...) [their] works, and the distribution of the works thus adapted or reproduced'²²⁰, as well as 'the public performance and communication to the public by wire of the works thus adapted or reproduced.'²²¹ Regarding the adaptation of a cinematographic production, which derived from a literary or artistic work, into any other artistic form, the authorisation of the authors of the original work shall be sought.²²²

²²⁰ Berne Convention for the Protection of Literary and Artistic Works (n 102), Art. 14(1)(i).

²²¹ Ibid, Art. 14(1)(ii).

²²² Ibid, Art. 14(2).



While similar regulations are not present in the EU copyright *acquis*, only the Austrian Copyright Act contains special provisions dedicated to the authors of audiovisual/cinematographic works. Article 38(1) of the Austrian Copyright Act provides a legal regulation that transfers the rights of persons who contribute to the production of a film and acquire copyright to the film producer, in order to entitle the film producer to use the work, including its translations, adaptations and other variations. The prior transfer of these rights by the author to third parties does not prevent them from transferring these rights to the film producer.

Whereas the regulation within Article 38(1) of the Austrian Copyright Act applies to copyright-protected works produced during film production, copyright over existing works used in the production of the audiovisual/cinematographic work (e.g., books, screenplay, music, photographs) remains unaffected.

Regardless of the rights being transferred to the film producer via Article 38(1) of the Austrian Copyright Act, the film producer and the film author are each entitled to half of the film author's statutory remuneration claims, unless they are indispensable.

Moral rights. The EU copyright *acquis* does not consist of any legal regulations regarding the moral rights vested in copyright. In fact, the moral rights have been regulated only at the international level and within Article 6*bis* of the Berne Convention. Article 6*bis*(1) of the Berne Convention explicates that the author's moral rights exist independently of their economic rights and endure even after the transfer of economic rights by the author to third parties. These moral rights comprise the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work, which would be prejudicial to their honour or reputation. According to Article 6*bis*(2) of the Berne Convention, the moral rights of the author shall endure at least until the expiry of the economic rights, including the legal protection provided for economic rights after the death of the author. In this case, the moral rights of the deceased author shall be exercised by the persons or institutions authorised by the legislation of the country where protection is claimed. The same provision acknowledges the discretion of the signatory parties, whose legislation (at the moment of their ratification of or accession to the Berne Convention) did not provide postmortem legal protection, to hold that some moral rights may cease after the author's death. Finally, Article 6*bis*(3) of the Berne Convention leaves the regulation of the redress mechanism to safeguard moral rights to the signatory parties where protection is claimed.



Despite the lack of EU harmonisation in this field, all the EU Member States studied herein acknowledge the author's moral rights and provide legal protection to authors, which align with Article 6*bis* of the *Berne Convention* to varying extents. For instance, Article 19 of the Austrian Copyright Act acknowledges the unwaivable right of the author to claim authorship of their work; this right prevails after the author's death and can be exercised by the person to whom copyright is transferred. In a similar vein, Article 20 of the Austrian Copyright Act regulates the author's right to attribution, while also clarifying that adaptation of an original work or the reproduction of a work of fine art shall not give the impression of constituting an original work by means of attribution to the author of the original work. Also, Article 21 of the Austrian Copyright Act regulates the author's right to object to any distortion, mutilation or modification of a work that has been made available to the public or reproduced for distribution. The prohibited acts in this regard consist of making any abbreviations within or additions to the work, modifications of the work, changes to the title or the author of the work. The same provision provides two exceptions to this moral right of the author. On the one hand, the acts permitted by the law are excluded from the scope of the author's moral right. On the other hand, persons authorised to use the work are permitted to make any changes to the work as long as the nature of the use requires such changes and they comply with fair practices in the field.

Section 3 of the Finnish Copyright Act, while encompassing the same moral rights as Article 6*bis* of the *Berne Convention*, explicitly indicates that the author can waive these rights only with respect to the nature of the use and to the extent necessitated by such use. Article L121-1 of the French Copyright Act, as another example, fully complies with the *Berne Convention*, while also mentioning that the moral rights can be exercised by the author's heirs upon their death or assigned to a third party by the author's testament. Article L121-5 of the French Act adapts the aforementioned moral rights to the cinematographic works; it holds that once a cinematographic work is completed, the matrix of the fixation of the film cannot be destroyed. Nor can any changes be made to the fixation, or the fixation can be transformed into another format, unless the authors of the work authorise such acts.

Article 4 of the Greek Act, in addition to the moral rights encompassed within Article 6*bis* of the *Berne Convention*, introduces several other rights. It acknowledges the author's right to determine the time, place and means of the publication of their work; the right to attribution, including the indication of their pseudonym on the work or the publication of the work anonymously; the right to access to their work even if the physical ownership of the work is transferred to third parties.



Additionally, especially for literary and artistic works, it recognises the author's right to revoke a contract, which requires the transfer of economic rights, if such an action is deemed necessary to protect their reputation and personality. Yet, to exercise this right, the author shall pay the damages such a revocation might cause to the other contracting party.

Similar to the Greek Copyright Act, Article 25 of the Dutch Copyright Act also complies with the Berne Convention, while also acknowledging the author's right to publish their work under a pseudonym or anonymously. It is worth noting that the Dutch Copyright Act also allows the author to waive their moral rights. Aside from this general provision, Article 45c of the Dutch Copyright Act is dedicated to cinematographic works. It holds that the authors of a cinematographic work, in addition to the moral rights enshrined in Article 25 of the Act, have the right to object to the inclusion of their name on the work, as long as it is justified, and the rights to claim the insertion of their name in the cinematographic work and the display of such credits along with the work.

Article 14 of the Spanish Copyright Act formulates moral rights as unwaivable and inalienable. Regarding the scope of the rights, the Spanish Act adopts the same approach as the Greek Copyright Act and provides the same set of rights encompassed therein.

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The multi-level mapping of the economic, moral and related rights is attached as **Annex no. 3**.

4.2.3 Selected Exceptions and Limitations to Copyright and Related Rights

The EU copyright *acquis* consists of multiple E&Ls to copyright and related rights²²³ that can be employed by the actors involved in the European AV sector and the EFI to ease the film production process. Prior to explaining these E&Ls in detail, it is essential to highlight that the E&Ls encompassed within the InfoSoc Directive and the CDSMD are subject to the three-step test, while Recital 20 of the OWD also refers to the three-step test with respect to the application of the E&Ls encompassed therein.

²²³ It shall be noted that the E&Ls to copyright encompassed within this sub-section of the report have been extended to various related rights by the EU Member States studied herein. See: Austrian Copyright Act, Art. 71(6) (for performances), Art. 74(7) (for photographs), Art. 76(6) (for phonograms), Art. 76a(5) (for broadcasts); Dutch Related Rights Act, Art. 10; Finnish Copyright Act, Sec. 45(7) (for performances), Sec. 46(3) (for phonograms), Sec. 46a(3) (for first fixations of films), Sec. 48(3) (for broadcasts), Sec. 49a(3) (for photographs); Greek Copyright Act, Art. 52; Italian Copyright Act, Art. 71-decies; Spanish Copyright Act, Art. 132. The French Copyright Act, on the other hand, includes several provisions that adapt the copyright exceptions to the objects of related rights. See: French Copyright Act, Artt. L211-3 (for exception for temporary reproduction, quotation, uses of public speeches and lectures), L219-4 (exception for caricature, parody and pastiche).



The three-step test is a legal tool, which is inherent in the international and supranational copyright instruments, that helps balance the public interest in access to and use of legally protected content against the private interest of copyright and related rights whose works or other subject-matter are in use without their prior authorisation. This test was first introduced by the Berne Convention, as revised in 1967. Article 9(2) of the Berne Convention formulated the three-step test as the permission to use legally protected works ‘in certain special cases, provided that such (...) [use] does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’ The same test has been encompassed within Article 10(2) of the WCT as well as Article 13 of the TRIPs Agreement.

The three-step test has been implemented in the EU copyright *acquis* with the InfoSoc Directive in 2001. Article 5(5) of the InfoSoc Directive, which adopts the Berne Convention’s three-step test *verbatim*, states that all E&Ls provided within Article 5 of the Directive shall be applied in compliance with the three-step test. Along the same lines, Article 7(2) of the CDSMD requires the application of Article 5(5) of the InfoSoc Directive, hence the three-step test, to the E&Ls introduced within the CDSMD. It is also worth noting that, among the EU Member States studied herein, only the Greek, Italian and Spanish Copyright Acts hold a legal provision dedicated to the three-step test, all of which implement the letter of the EU law *verbatim*.²²⁴

Temporary reproduction. Article 5(1) of the InfoSoc Directive, which is dedicated to easing the acts of temporary reproduction, constitutes the only mandatory E&L to copyright introduced to the EU copyright *acquis* through the InfoSoc Directive.

The E&L enshrined in Article 5(1) of the InfoSoc Directive encompasses authorial works, performances, phonograms, first fixations of films, and broadcasts; therefore, it provides an exception to the reproduction right of authors, performers, phonogram producers, film producers, and broadcasting organisations.²²⁵

It holds that temporary acts of reproduction, which are transient or incidental, and which are an integral and essential part of a technological process, for the sole purpose of enabling a transmission in a network between third parties by an intermediary, or for a lawful use of a work or other-subject

²²⁴ See: Greek Copyright Act, Art. 28C; Italian Copyright Act, Art. 71-*nonies*; Spanish Copyright Act, Art. 40*bis*.

²²⁵ See: Directive 2001/29/EC (n 13), Art. 2(1).



matter. The act of reproduction as such can be made by any means and in any form, in whole or in part.²²⁶ Nevertheless, it shall not have any independent economic significance.

The E&L for temporary reproduction has not been covered by international and regional legal instruments. However, a comparative analysis of the Copyright Acts of the selected EU Member States reveals that Article 5(1) of the InfoSoc Directive has been implemented, most often even *verbatim*, into the national copyright framework of these States.²²⁷

Ephemeral recording. Article 5(2)(d) of the InfoSoc Directive is addressed to broadcasting organisations, and it provides an optional E&L to the reproduction right of authors of copyright-protected authorial works to facilitate the operation of the broadcasting activities.

The provision allows broadcasting organisations to make ephemeral recordings of works, as long as such acts are carried out by their own means and for their own broadcasts. It also enables the preservation of such recordings in official archives if they have an exceptional documentary character.

The scope of the E&L for ephemeral recording encompassed within the InfoSoc Directive for authorial works has been extended by the RLD. Indeed, Article 10(1)(c) of the RLD provides an exception to the fixation, broadcasting, communication to the public, and distribution rights of authors on the original and copies of their work, of performers on the fixation of their performances of phonogram producers on their phonograms, and of producers of the first fixation of films on the original and copies the film.²²⁸ Accordingly, the provision permits broadcasting organisations to ephemerally fixate a work or other subject-matter by means of their own facilities and for their own broadcasts, in compliance with the three-step test.²²⁹

The EU provision is well aligned with the WIPO-administered copyright instruments, while going beyond that of the CoE. Indeed, the ephemeral recording exception, as articulated in the EU provisions, is also encompassed within Article 11*bis*(3) of the Berne Convention, which provides an exception to in-copyright works, and Article 15(1)(c) of the Rome Convention, which extends the Berne Convention's regulation to performances, phonograms and broadcasts. Whereas there are no

²²⁶ Ibid.

²²⁷ See: Austrian Copyright Act, Art. 41a; Dutch Copyright Act, Art. 17b; Finnish Copyright Act, Sec.11a; French Copyright Act, Art. L122-5; Greek Copyright Act, Art. 28B; Italian Copyright Act, Art. 68-*bis*; Spanish Copyright Act, Art. 31.

²²⁸ Directive 2006/115/EC (n 14), Artt. 7, 8, 9.

²²⁹ Ibid, Art. 10(3).



significant differences between the EU and the WIPO provisions, the CoE's European Agreement on the Protection of Television Broadcasts provides a similar, yet narrowly defined, exception. Article 3(2)(b) of the CoE Convention encourages the contracting parties to introduce an exception merely for *television* broadcasts to permit 'the making of ephemeral fixations of television broadcasts by a broadcasting organisation by means of its own facilities and for its own broadcasts'. Nevertheless, the CoE provision does not mention with respect to the preservation of such recordings.

The E&L for ephemeral recording, as enshrined in Article 5(2)(d) of the InfoSoc Directive and Article 10(1)(c) of the RLD, has been implemented in the Finnish, Italian and Spanish Copyright Acts, all of which depart from the letter of the EU provision. For instance, Section 25f of the Finnish Act permits the retransmission of an in-copyright work by a broadcasting organisation only if the work is incorporated in a radio or television broadcast which is being simultaneously broadcast and without being subject to any alterations. Besides, this exception applies to satellite broadcasting only if the satellite broadcasting takes place simultaneously with the broadcasting of the same organisation on the terrestrial network. Furthermore, the Finnish Copyright Act allows the broadcasting organisation to reproduce the work, to be used in their own broadcasts, for a maximum of four times a year, while uses exceeding this limit are subject to licenses.

Article 55 of the Italian Copyright Act, while closely following the letter of the EU provision, requires the destruction of the ephemeral recordings after the completion of the transmission process. The preservation of such recordings is allowed only if the recordings have an exceptional documentary character and are to be used for non-commercial purposes. Therefore, while remaining loyal to the soul of the EU provision, the Italian Copyright Act slightly narrows down the flexibility of the EU provision.

Finally, Article 36(3) of the Spanish Copyright Act, while remaining silent on the possibility of preserving ephemeral recordings, regulates the act of ephemeral recording as an integral aspect of the transfer of the right to communication to the public from the author/initial rightsholder to the broadcasting organisation. It holds that 'the transfer of the right for communication to the public of a work, when carried out through broadcasting, authorises the broadcasting organisation to reproduce the work by its own means and for its own wireless broadcasts, in order to carry out their own broadcasts, however, only once'. That said, the Spanish legislator has not only opted for the regulation of the transfer of rights, rather than introducing an exception to the exclusive rights, but also introduced a quantitative limit to the performance of such acts of reproduction.



Incidental inclusion. Yet another optional E&L is the one for incidental inclusion enshrined in Article 5(3)(i) of the InfoSoc Directive. This provision provides an exception to the author's, performers', phonogram producers', film producers', and broadcasting organisations' rights to reproduction, making available to the public and communication to the public.

While there are no international and regional legal instruments containing such an E&L to copyright and related rights to provide a comparator to the EU provision, the national implementation of the EU provision in the national copyright regimes of the selected EU Member States varies greatly.

Among the Member States studied herein, only the Austrian, Dutch and Finnish Copyright Acts hold a provision concerning the incidental inclusion exception. Article 42e of the Austrian Copyright Act provides an exception also to the broadcasting right, as long as the work is used incidentally. It also requires the indication of the source of the work in use. Article 16a of the Dutch Copyright Act permits the incorporation of a literary, scientific or artistic work in another work, if the inclusion of the works mentioned earlier is incidental and constitutes a minor part of the work in which they are incorporated. Finally, Section 25 of the Finnish Copyright Act, instead of introducing a broadly articulated exception as the EU provision, provides a regulation strictly limited to artistic works; it articulates this regulation as an extension of the transfer of exclusive rights, instead of an exception to the exclusive rights. This provision permits the inclusion of a copy of an artistic work in a photograph, film, or television programme; however, only if the inclusion constitutes a minor part of the work in which it is incorporated and if the rights over the artistic work have been lawfully transferred.

Quotation. Article 5(3)(d) of the InfoSoc Directive, also formulated as an optional E&L to copyright and related rights, is dedicated to quotation. The provision permits quotations from a work or other subject matter lawfully made available to the public. The act of quotation, however, shall be addressed for purposes such as criticism or review. Furthermore, quotations as such shall be accompanied by the indication of the author's name and the source of the work or other subject-matter, unless this is impossible. Last, the uses for quotation shall be in accordance with fair practice and should not go beyond the extent required by the purpose.

The E&L for quotation within Article 5(3)(d) of the InfoSoc Directive has been secured for user-generated online content through Article 17(7) of the CDSMD. This provision requires the EU Member States to ensure that when users upload and make available content on online content-



sharing platforms, they can benefit from the E&Ls for quotation, criticism, review, along with the uses for the purpose of caricature, parody or pastiche.

The quotation exception has also been regulated within the Berne Convention in a more flexible manner than that of the EU legislator. Article 10 of the Berne Convention permits quotations from works that have been lawfully made available to the public, in compliance with fair practices and to the extent justified by the purpose of quotation. Unlike the EU provision, the WIPO provision does not restrict such purpose to criticism or review. It further holds that quotations as such shall be complemented by the indication of the source and the author's name if it appears in the work in use.

The national transposition of the quotation exception highly varies from one Member State to another. To begin with, Article 42f of the Austrian Copyright Act offers a detailed exception with a non-exhaustive list of examples of quotation. This provision allows the reproduction, distribution, broadcast, making available to the public, and the use for public lectures, performances and demonstrations of an in-copyright work in the context of quotation. Similar to the EU provision, the extent of the use shall be justified by the purpose of use, whereas no limitations have been introduced to the purpose of quotation. In this regard, the Austrian provision permits, for instance, the quotation of a work in a scientific work, of a work of fine art in a scientific work, only to explain the content therein, and individual passages of literary and musical works in new works.

Section 22 of the Finnish Copyright Act implemented the WIPO provision without explicitly requiring the indication of the source and the author's name. Article L122-3 of the French Copyright Act transposed the EU provision almost *verbatim*; however, it extended the purposes of quotation beyond criticism and review to educational, scientific, informative and polemical purposes. Article 70 of the Italian Copyright Act also follows the letter of the EU provision. Nevertheless, it explicitly mentions that the quotations as such shall not prejudice the commercial exploitation of the work by its rightsholders. Additionally, it holds that quotations made for teaching or research shall serve the sole purpose of illustration of teaching and research and be driven by non-commercial purposes.

Article 15a of the Dutch Copyright Act provides a detailed exception for quotation, blending the EU provision with the WIPO provision and adding further information. It implements the EU provision without necessarily restricting the purposes of use to criticism or review. Instead, it provides a non-exhaustive list of examples, such as announcements, criticism, review, scientific explanations, and other similar expressions. While requiring the indication of the source and name of the author, it also highlights the respect for the author's moral rights of the work that is quoted. To



ensure the legitimacy of the use of the work, the provision not only requires compliance with fair practices but also refers to the amount of the work that is in use to decide on this aspect. Last but not least, it clarifies that the quotation of the work in a language other than the original language of the work also falls under the scope of this provision. Similarly, while adopting the EU provision, Article 19 of the Greek Copyright Act also blends some aspects of the WIPO provision and adds the ‘compliance with fair practices’ to the criteria listed therein.

Article 32 of the Spanish Copyright Act, on the other hand, while remaining loyal to the EU provision, restricts quotation only for teaching and research purposes.

As to Article 17(7) of the CDSMD, all the EU Member States studied herein have implemented the national copyright regimes by closely following the letter of the EU provision, if not implemented *verbatim*.²³⁰

Use of public speeches and lectures. Also formulated as an optional E&L, Article 5(3)(f) of the InfoSoc Directive provides an exception to the right to reproduction, making available or communication to the public, for the use of political speeches as well as extracts of public lectures or similar works or other subject-matter, to the extent justified by the informatory purpose. The permitted acts shall be accompanied by the indication of the source, including the author’s name, except when this is impossible.

This exception is encompassed within Article 2*bis* of the Berne Convention, with which the EU provision is aligned. Whereas Article 2*bis*(1) of the Convention leaves the discretion to the use, wholly or in part, of political speeches and speeches delivered in the course of legal proceedings to the contracting parties; Article 2*bis*(2) requires the adoption of an exception for the use of lectures, addresses and other works of similar nature that are delivered in the public. The latter requires the reproduction of such works by press, broadcast, communication to the public by wire and making such works available to the public. The provision leaves the conditions of such uses to the discretion of the contracting parties yet holds that such uses shall be justified by the informatory purpose.

Except for the Greek and Dutch Copyright Acts, the E&L for the use of public speeches and lectures has been transposed to the national copyright frameworks of the EU Member States studied herein. The national implementation of the exception shows nuances from one State to another.

²³⁰ Austrian Copyright Act, Art. 42f(2); Dutch Copyright Act, Art. 19(5); Finnish Copyright Act, Sec. 55e; French Copyright Act, Artt. L137-4, L219-4; Greek Copyright Act, Art. 66F(8); Italian Copyright Act, Art. 102-*nonies*; Spanish Copyright Act, Art. 73(8).



Article 43 of the Austrian Act, while complying with the EU provision, states that the audio recordings of such public deliberations are excluded from the scope of this exception. Section 25c of the Finnish Copyright Act extends the scope of the EU provision to expressions in writing as long as such expressions are presented publicly. However, a written public statement that comprises evidence or serves a similar purpose can be used only to explain or report the case or the matter at hand, and the extent of the use shall be justified by the purpose of the explanation as such. Article L122-5(3)(c) of the French Copyright Act, while extending the scope of the public deliberations through providing non-exhaustive examples, limits the use of such speeches by means of the press and broadcasting. Along the same lines, Article 66(1) of the Italian Copyright Act also encompasses a broader spectrum of public deliberations. Whereas it closely follows the norm set by the EU provision, it requires indicating the place and place of the speech, in addition to the author's name, if possible. Besides, among the permitted acts of reproduction, it stresses the uses in electronic format. Last, Article 33(2) of the Spanish Act covers a broad spectrum of public deliberations, except for parliamentary deliberations and other State bodies, only if such works are in use for the exclusive purpose of reporting current events, as opposed to the broadly articulated 'informatory purposes' concept adopted by the EU provision.

Freedom of panorama. Article 5(3)(h) of the InfoSoc Directive is dedicated to an optional copyright E&L known as the 'freedom of panorama'. The provision enables the reproduction, making available and communication to the public of works made to be permanently located in public places, such as works of architecture or sculpture. It shall be noted that these two examples provided in the provision are not exhaustive but rather exemplary.

While the exception of the freedom of panorama lacks a blueprint in the international legal instruments, it is included in the national copyright regimes of all the EU Member States except for Italy. Nevertheless, the national implementation of the freedom of panorama exception can be deemed the most legally fragmented provision across Europe.

Article 54(1)(5) of the Austrian Copyright Act applies only to architectural works and works of fine art made to be permanently located in public places. Nevertheless, certain acts of reproduction are excluded from the scope of the permitted acts herein, such as the reproduction of sculptures by means of sculptures and of architectural works by means of architectural works, and the reproduction of paintings or graphic arts for public display. Section 25a of the Finnish Act permits the reproduction of only artistic and architectural works, and only in pictorial form. Nevertheless, if such a



reproduction becomes the central motif of a new work, then the latter work shall not be used for commercial purposes. In a similar manner, L122-5(11) of the French Copyright Act restricts the scope of the exception to architectural works and sculptures. It further restricts the reproduction of such works by legal persons, while also requiring the act of reproduction to be performed merely for non-commercial purposes. As opposed to the French Copyright Act, Article 26 of the Greek Copyright Act grants the freedom of panorama merely to mass media, while also restricting the scope of the subject-matter to architectural works, works of fine art, photographs, and works of applied art. Article 18 of the Dutch Copyright Act specifies that the freedom of panorama applies to architectural works, drawings, paintings, buildings, sculptures, lithographs, engravings and other similar works, designs, sketches and plastic works relating to architecture, geography, topography or other sciences. Different from the other national legal implementation strategies, the Dutch legislator opted to restrict the reproduction of more than one work of the same author in a compilation to be prepared through this exception. Last, Article 35(2) of the Spanish Copyright Act, while closely resembling the EU provision, indicates that the form of dissemination of the reproduced work can be performed through paintings, drawings, photographs and audiovisual media.

Caricature, parody, pastiche. Article 5(3)(k) of the InfoSoc Directive holds an optional E&L to the right of reproduction and communication to the public for the purpose of parody, caricature, and pastiche. The provision, while broadly articulated, does not define parody, caricature or pastiche. Neither does it introduce any other criteria for permissible uses of copyright-protected work in this regard.

Just like the E&L for quotation within Article 5(3)(d) of the InfoSoc Directive, this exception has also been secured for user-generated online content through Article 17(7) of the CDSMD. As already mentioned above, Article 17(7) of the CDSMD requires the EU Member States to ensure that when users upload and make available content on online content-sharing platforms, they can benefit from the E&Ls for quotation, criticism, review, as well as those for the purpose or caricature, parody or pastiche.

The parody exception, also lacking an international blueprint, is an example of significant legal fragmentation across Europe. For instance, the Austrian Copyright Act does not hold a provision dedicated to the parody exception, whereas the legal regulation enshrined in Article 17(7) of the CDSMD finds correspondence in Article 42f of the Austrian Copyright Act, hence securing the use of parody exception in the digital space. Section 23a of the Finnish Copyright Act and Article L122-



5(4) of the French Copyright Act hold a broadly articulated parody exception by stating that a lawfully published work can be used for the purposes of caricature, parody and pastiche. Article 18 of the Dutch Copyright Act also has a similar approach, yet it also states that fair practices shall be taken into account for uses that fall under this exception. On the other hand, the Spanish Copyright Act regulates parody and pastiche in different provisions. Whereas Article 39 of the Spanish Copyright Act introduces a legal regulation for parody, by excluding parodic uses of an original work from the scope of transformative uses. Nevertheless, it holds that such parodic uses shall not cause confusion with the original work or damage the author or the original work. Article 70 of the Spanish Copyright Act adapts the same rule to pastiche, while also defining pastiche as ‘taking certain characteristic elements of the work of an artist and combining them, in such a way that they give the impression of being an independent creation’.

It should also be noted that the Greek and Italian Copyright Acts do not have a parody exception at all.

As to Article 17(7) of the CDSMD, all the EU Member States studied herein have implemented the national copyright regimes by closely following the letter of the EU provision, if not implemented *verbatim*.²³¹

Preservation of cultural heritage. The EU copyright *acquis* consists of two legal provisions essential to preserving works and other subject-matter that constitute a part of cultural heritage.

On the one hand, Article 5(2)(c) of the InfoSoc Directive holds an optional E&Ls to enable the 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. Although this provision is not explicitly tailored for the preservation of cultural heritage, it has provided a legal basis for the conservation activities of CHIs.

On the other hand, Article 6 of the CDSMD provides a mandatory E&L, which allows a broader spectrum of CHIs—publicly accessible libraries or museums, archives and film and audio heritage institutions²³²—to make copies of any works or other subject-matter, works covered by the press publishers’ right, databases and computer programs that are permanently in their collections. The act

²³¹ Austrian Copyright Act, Art. 42f(2); Dutch Copyright Act, Art. 19(5); Finnish Copyright Act, Sec. 55e; French Copyright Act, Artt. L137-4, L219-4; Greek Copyright Act, Art. 66F(8); Italian Copyright Act, Art. 102-*nonies*; Spanish Copyright Act, Art. 73(8).

²³² Directive (EU) 2019/790 (n 16), Art. 2(3).



of reproduction in this regard can be in any format or medium; however, it shall be performed for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for preservation purposes.

No similar E&Ls have been introduced by international or regional legal institutions that are addressed to preserve cultural heritage, yet it also extends the provision to galleries as well.

Legal fragmentation is possible to a certain extent in the national implementation of the InfoSoc Directive and the CDSMD's provisions, as some Member States have implemented Article 6 of the CDSMD *verbatim*, while some others either adopted broadly articulated or detailed legal provisions.

For instance, Article 6 of the CDSMD has been implemented in Article 42(7) of the Austrian Copyright Act. The same provision also encompasses additional regulations for publicly accessible galleries and permits them to reproduce the works in their collections for preservation purposes and to the extent necessary for this purpose, as long as such acts are not driven by any direct or indirect economic or commercial purpose. In this regard, galleries are allowed to replace the original works with reproductions and exhibit or lend such reproductions under the same terms and conditions. The same rule applies to previously unpublished works and out-of-commerce works.

The Finnish Copyright Act contains two provisions regarding the preservation of cultural heritage, addressed separately to archives, libraries, museums, and audiovisual heritage institutions. Section 16 of the Act permits publicly accessible libraries, archives and museums to reproduce works, for several non-commercial purposes, such as preservation of the cultural heritage assets, technical restoration, management and organisation of the conservation activities, to supplement a copy of an incomplete work or the missing parts of a work that has been published in several parts unless it can be obtained through normal channels of commerce. This provision has been extended to audiovisual heritage institutions by Section 16c(1) of the Act. The Greek Copyright Act has a similar approach to the matter, as it holds three provisions concerning the preservation of cultural heritage. While Article 22A of the (almost) *verbatim* implementation of Article 6 of the CDSMD, Article 22 of the Greek Copyright Act is allocated to public (or, non-profit) libraries and archives. This provision allows the reproduction of the works in the collections of these institutions for preservation purposes and to transfer such copies to other public (or, non-profit) libraries and archives. Finally, Article 23 of the Greek Copyright Act provides an exception for cinematographic works essential for the national cultural heritage. This provision permits the reproduction of such cinematographic works to be preserved in the National Cinematographic Archive in cases where the economic rightsholders of



the work ‘abusively withhold consent for the reproduction’ of the work. Whereas remuneration of the rightsholders is not required in this case, the act of reproduction can be performed based on the Minister of Culture, upon the opinion of the Cinematography Advisory Council.

Article L122-5(8) of the French Act, as opposed to the Austrian and Finnish Copyright Acts, has a broadly articulated exception that permits the reproduction, communication and making available to the public of in-copyright works for preservation purposes, as long as no economic purposes are pursued.

Article 16n of the Dutch Copyright Act and Article 69 of the Spanish Copyright Act implemented Article 6 of the CDSMD by closely following the letter of the EU provision.

Use of orphan works. The OWD focuses on the needs of a broad spectrum of CHIs—specifically publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations—established in any EU Member States. The Directive introduces a mandatory E&L to copyright and related rights to facilitate the digital reproduction of orphan works, communication of such works to the public, and to make such works available to the public by the abovementioned CHIs to support their public-interest missions.²³³

In this context, Article 1(2) of the OWD sets the scope of the regulations introduced within the Directive, and it states that the Directive applies to works protected by copyright or related rights, and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State. These works and other subject-matter consist of:

- works published in the form of books, journals, newspapers, magazines, or other writings contained in the collections of publicly accessible libraries, educational establishments, or museums as well as in the collections of archives or of film or audio heritage institutions.²³⁴
- Audiovisual/cinematographic works and phonograms contained in the collections of publicly accessible libraries, educational establishments, or museums, as well as in the collections of archives or of film or audio heritage institutions;²³⁵ and

²³³ Directive 2012/28/EU (n 15), Art. 1.

²³⁴ Ibid, Art. 1(2)(a).

²³⁵ Ibid, Art. 1(2)(b).



- Audiovisual/cinematographic works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 are contained in their archives.²³⁶

Article 1(3) of the OWD extends the scope of the Directive by encompassing the works and phonograms which have never been published or broadcast, but which have been made publicly accessible by the abovementioned CHIs with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses of their works.²³⁷ Article 1(4) of the OWD further adds that works and other protected subject-matter that are embedded or incorporated in or constitute an integral part of the works or phonograms referred to in paragraphs (2) and (3) also fall into the scope of the Directive. Nevertheless, it shall be highlighted that, as clarified within Article 2(5) of the OWD, anonymous or pseudonymous works do not fall within the scope of ‘orphan works’ merely because of the lack of a clear indication of the identity of their authors.

Subsequently, Article 2(1) of the OWD defines the ‘orphan work’ concept. It holds that a work or a phonogram shall be considered orphan if none of the rightholders is identified or, even if one or more of them is identified, none is located despite a diligent search.

The concept of ‘diligent search’ and its requirements are encompassed within Article 3 of the OWD. According to this provision, prior to the use of the work or phonogram, the aforementioned CHIs shall conduct a diligent search in good faith for each work or other protected subject-matter by consulting the appropriate sources for the categories involved, as determined by each Member State in consultation with rightholders and users. A diligent search as such shall be carried out in the EU Member State where the work has been first published or, in the absence of publication, first broadcast. In the case of audiovisual/cinematographic works, whose producer has their headquarters or habitual residence in a Member State, the diligent search shall be carried out therein. As to works and phonograms which have never been published or broadcast but made publicly available by CHIs with the rightholder’s consent, the diligent search shall be carried out in the Member State where the CHI that made the work or phonogram publicly accessible is established. The same provision

²³⁶ Ibid, Art. 1(2)(c).

²³⁷ This regulation applies only to works and phonograms which have been deposited to the collections of the aforementioned CHIs before 29 October 2014.



also holds that the sources from other States should be consulted if there is evidence to suggest that relevant information on rightholders is to be found therein.²³⁸

In addition to the diligent search requirement, Article 3(5) of the OWD requires the EU Member States to take the necessary legal measures to ensure that CHIs that benefit from the exception provided within the OWD maintain records of their diligent search. This information shall be complemented by the following:

- results of the diligent searches carried out to declare the work ‘orphan’,
- the use of orphan works made by the CHIs,
- any change of the orphan status of works/phonograms used by the organisation, and
- relevant contact information of the CHI.

It is worth noting that the OWD applies when there is more than one rightholder and not all have been identified or located despite a diligent search. In this case, the work or phonogram can still be used through the OWD if the identified rightholder(s) approve the reproduction and making available to the public of the work or phonogram regarding the rights they hold.²³⁹ The exception within the OWD would, therefore, apply to unidentified and non-located rightholders.²⁴⁰

Building upon this groundwork, Article 6 of the OWD states that the EU Member States shall introduce an E&L to the right of reproduction and making available to the public in favour of the aforementioned CHIs, in order to enable them to use orphan works in the following ways:

- to make them available to the public by wire or wireless means, including the making available to the public of the orphan works in such a way that members of the public may access them from a place and at a time individually chosen by them,²⁴¹ and
- to reproduce orphan works directly or indirectly, temporarily or permanently, by any means and in any form, in whole or in part,²⁴² for the purposes of digitisation, making available, indexing, cataloguing, preservation, or restoration.

As indicated in Article 6(2) of the OWD, the aforementioned CHIs shall perform these permitted acts to achieve aims related to their public-interest missions, particularly the preservation of,

²³⁸ Directive 2012/28/EU (n 15), Art. 3(4).

²³⁹ Ibid, Art. 2(2).

²⁴⁰ Ibid, Art. 2(4).

²⁴¹ See: Directive 2001/29/EC (n 13), Art. 3.

²⁴² See: Ibid, Art. 2.



restoration of, and provision of cultural and educational access to works and phonograms contained in their collections.

The Directive does not single out the opportunity to generate revenues through the permitted acts. Yet, it holds that even if CHIs may generate revenues from such uses, it shall be used to cover the costs incurred to digitise and make available to the public orphan works.²⁴³ Also acknowledging the costs of the digitisation process, Article 6(4) of the OWD enables public-private partnerships to pursue CHI's public interest missions.

According to Article 6(3) of the OWD, once granted the opportunity to use an orphan work, the CHIs should indicate the names of identified authors and other rightsholders in any use of an orphan work to guarantee the interests of the rightsholders and to maintain a fair balance between the interests of rightsholders and the public. In this regard, Article 6(5) of the OWD requires the EU Member States to provide fair compensation for rightsholders, in case the 'orphan' status of a work or other subject-matter terminates as mentioned in Article 5 of the OWD. The Member States hold the discretion to regulate the terms and conditions of the payment of such fair compensation, and the amount of compensation shall be determined by the law of the Member State in which the CHI using the orphan work is established.

Finally, Article 4 of the OWD introduces a provision to ensure the recognition of 'orphan work' status across the EU, to enhance legal clarity and the smooth functioning of the internal market. Therefore, a work or phonogram deemed as an orphan work in a Member State shall be considered an orphan work in all Member States and may be used and accessed per this Directive in all Member States, in compliance with the Directive. To facilitate this, the OWD introduces mechanisms to share information on the diligent search and the declaration of orphan works across Europe. In this regard, the EU Member States are requested to forward the information received by CHIs under Article 5 of the OWD to the European Union Intellectual Property Organisation, which manages a single publicly accessible online database on orphan works, namely 'Orphanet'.

²⁴³ Directive 2012/28/EU (n 15).



While there are no blueprints for the use of orphan works in the international and regional legal instruments, the provisions of the OWD have been implemented in all the EU Member States studied herein. The national regulations closely follow the EU provisions, if not implemented *verbatim*.²⁴⁴

Use of out-of-commerce works. Article 8(2) of the CDSMD is dedicated to facilitating the use of out-of-commerce work by CHIs. This provision provides a mandatory E&L which would enable the reproduction of out-of-commerce works and make such works available to the public for non-commercial purposes. The exception introduced herein applies only to the out-of-commerce works permanently held in the collections of the beneficiary CHIs.

In this context, Article 8(5) of the CDSMD states that a work is deemed to be ‘out-of-commerce’ when it can be presumed in good faith that the whole work or other subject-matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public. Yet, as clarified within Article 8(3) of the CDSMD, the exception provided herein does not apply to out-of-commerce works and other subject-matter that fall under the mandate of a CMO, hence can be licensed by the CMO.

Whereas the provision sets the general requirements, the EU Member States are allowed to introduce other requirements, such as a cut-off date, to determine whether works and other subject-matter can be used under this E&L. Nevertheless, the requirements to be introduced by the Member States shall not extend beyond what is necessary and reasonable.

Yet, Article 8(7) of the CDSMD excludes the following works and other subject-matter from the scope of the exception provided herein:

- works or other subject matter, other than audiovisual/cinematographic works, first published or, in the absence of publication, first broadcast in a third country,
- audiovisual/cinematographic works whose producers have their headquarters or habitual residence in a third country; or
- works or other subject-matter of third country nationals, where, after a reasonable effort, no Member State or third country could be determined under the two other options mentioned above.

²⁴⁴ See: Austrian Copyright Act, Art. 56e; Dutch Copyright Act, Artt. 16o-17; Finnish Copyright Act, Sec. 16f, the Finnish Act on the Use of Orphan Works (764/2013); French Copyright Act, Art. L113-10, *ibid*, Artt. L135-1 to 135-7; Greek Copyright Act, Art. 27A; Italian Copyright Act, Artt. 69-bis-69-quinquies; Spanish Copyright Act, Art. 37bis.



These permitted acts shall be accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.²⁴⁵ Additionally, the works or other subject-matter that are being used by this exception shall be made available on non-commercial websites.²⁴⁶

As Article 8(4) of the CDSMD requires, the rightsholders of out-of-commerce works can easily and effectively exclude their works or other subject matter from the application of the E&L at any time, including when a license has been concluded or the work is in use.

Out-of-commerce works have not been encompassed within the international and regional legal instruments. Yet, Article 8(2) of the CDSMD has been implemented in all the EU Member States studied herein. The national regulations closely follow the EU provisions, if not implemented *verbatim*.²⁴⁷

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The multi-level mapping of the E&Ls to copyright and related rights that are directly related to the operation of the EFI is attached as **Annex no. 4**.

4.2.4 Term of Legal Protection and the Public Domain

Term of legal protection. The legal norms regarding the term of legal protection are one of the leading indicators that contour the borders of the public domain, given that works and other subject-matter whose copyright or related rights protection has lapsed fall into the public domain, hence become available, in principle, to be used without the authorisation and remuneration of their authors or creators. Indeed, the authorial works (e.g., books, stories, scripts, poems), whether single- or joint-authored, audiovisual/cinematographic works, musical works, photographs and other material feed into the public domain upon the expiry of their term of legal protection. Such works and subject-matter provide an abundance of materials for creative industries, especially for documentary filmmakers, that can be used, in whole or in part, to create new works.

On the supranational level, the Term Directive regulates the term of legal protection in the EU. On the international level, the UNESCO-administered UCC, the WIPO-administered treaties—mainly, Berne Convention for authorial works, and the Rome Convention, WPPT, and WCT for the

²⁴⁵ Directive (EU) 2019/790 (n 16), Art. 7(2)(a).

²⁴⁶ Ibid, Art. 7(2)(b).

²⁴⁷ See: Austrian Copyright Act, Art. 56f; Dutch Copyright Act, Art. 18c; Finnish Copyright Act, Sec. 16h; French Copyright Act, Art. L125-5-5; Greek Copyright Act, Art. 27B; Italian Copyright Act, Artt. 102-*undecies* to 102-*quaterdecies*; Spanish Copyright Act, Art. 71(4).



objects of related rights—and the WTO-administered TRIPs Agreement offer detailed legal regulations.

Authorial works. Article 1(1) of the Term Directive introduces the general rule about the term of copyright protection by stating that the economic rights of an author shall last during the lifetime of the author and an additional 70 years after their death, irrespective of the date when the work is lawfully made available to the public.

In cases in which the work in question is published in volumes, parts, instalments, issues or episodes, Article 1(5) of the Directive would apply; in these cases, the term of legal protection shall run for each item separately from the date when the item is lawfully made available to the public.

Furthermore, Article 1(6) of the Directive states that if the term of protection is not calculated from the death of the author of the work and if the work has not been lawfully made available to the public within 70 years from their creation, then the term of legal protection shall terminate.

To harmonise the calculation of the legal term of protection, Article 8 of the Directive states that the terms set therein shall be calculated from the first day of January of the year following the event giving rise to them.

The term of legal protection set within the Term Directive complies with the system envisioned within the WIPO framework. Yet, it slightly departs from the UNESCO and the WTO frameworks, mainly because the EU regime, in compliance with Article 5(2) of the Berne Convention, does not impose any formalities (e.g., copyright registration) for the enjoyment and exercise of copyright. Therefore, it centralises natural persons, as the authors of works, while setting the terms of legal protection, rather than taking indicators, such as registration date, as a reference point for calculating such terms.

That said, Article IV(2) of the UCC, in principle, envisions legal protection for the author's lifetime and a minimum of 25 years post-mortem. The same provision states that, in contracting parties where the term of protection is not calculated based on the lifetime of a natural person (such as the US, where there is a copyright registration system instead), the term of legal protection shall be computed from the date of the first publication or the date of the registration before publication. In either case, the term of legal protection shall not be less than 25 years. This provision also holds that if the legislation of a contracting party grants two or more successive terms or protection, the duration of the first term shall not be less than 25 years from the first publication or registration of the work.



As to the Berne Convention, Article 7(1) introduces the minimum standards²⁴⁸ for copyright protection for authorial works. It holds that this term shall last during the author's lifetime and 50 years after their death. The term protection as such shall run from the death of the author; however, it shall begin on the first of January of the year following the author's death.

Finally, the TRIPs Agreement complies with the Berne Convention's system,²⁴⁹ while Article 12 of the TRIPs Agreement incorporates the UCC's regulation with slight modification. It holds that in cases where the term of legal protection is calculated on a basis other than the lifetime of the author, the term of legal protection shall not be less than 50 years from the date of the end of the calendar year in which the work is lawfully published, or failing such lawful publication, at least 50 years from the end of the calendar year in which the work was made. Yet, works of applied art and photographs are excluded from the scope of this regulation.

The comparative analysis of the selected EU Member States' copyright laws demonstrates harmony in the term of legal protection granted to authorial works, as Article 60(1) of the Austrian Copyright Act, Section 43 of the Finnish Copyright Act, Article L123-1 of the French Copyright Act, Article 29(1) of the Greek Copyright Act, Article 37(1) of the Dutch Copyright Act and Article 26 of the Spanish Copyright Act transposed Article 1(1) of the Term Directive. Likewise, the calculation of the post-mortem term is in harmony with Article 8 of the Term Directive, given that the Austrian²⁵⁰, Finnish, French, Greek, Dutch, and Spanish²⁵¹ Copyright Acts embrace the principle introduced to compute the term of protection from the first day of January of the year that follows the year of the author's death.

It shall be noted that the legal regulation enshrined in Article 1(5) of the Term Directive for works published in parts has been transposed, and almost *verbatim*, to Article 63 of the Austrian Copyright Act, Article 31(2) of the Greek Copyright Act and Article 29 of the Spanish Copyright Act. Nevertheless, the Finnish, French, Greek and Dutch Copyright Acts have no general legal regulation for works published in parts. Yet, the Finnish²⁵² and Dutch²⁵³ Copyright Acts contain such a provision only for anonymous and pseudonymous works.

²⁴⁸ Berne Convention for the Protection of Literary and Artistic Works (n 102), Art. 7(6).

²⁴⁹ Article 9(1) of the TRIPs Agreement holds that the signatory parties to the Agreement shall comply with Articles 1 through 21 of the Berne Convention, which encompasses the term of copyright protection, and the Appendix thereto.

²⁵⁰ Austrian Copyright Act, Art. 64.

²⁵¹ Spanish Copyright Act, Art. 30.

²⁵² See: Finnish Copyright Act, Sec. 44.

²⁵³ See: Dutch Copyright Act, Art. 41.



Joint-authored works. Whereas the general rule enshrined in Article 1(1) of the Term Directive takes single-authored works as a reference point, Article 1(2) adjusts this rule to joint-authored works. It holds that, in case of joint-authored works, the term of legal protection, envisioned as the lifetime of the author and 70 years post-mortem, shall be calculated from the death of the last surviving author. The method to calculate the term of legal protection, which is enshrined in Article 8 of the Directive, applies to this rule as well.

The EU legislator's approach is the same as the WIPO's approach to the matter. Indeed, Article 7*bis* of the Berne Convention also refers to the last surviving author to calculate the term of legal protection for a joint-authored work. The reference made within this provision to the general rule enshrined in Article 7 clarifies that the regulation in paragraph (5) therein also applies to this case; therefore, the term of protection of a joint-authored work shall also be deemed to begin on the first day of January of the year following the death of the last surviving author.

Although the Austrian Copyright Act does not contain a specific provision for joint-authored works, the EU standard regarding the duration of protection for joint-authored works has been incorporated into Section 43 of the Finnish Copyright Act, Article 30(1) of the Greek Copyright Act, Article 37(2) of the Dutch Copyright Act, and Article 28(3) of the Spanish Act. All national provisions also comply with the calculation method outlined in Article 8 of the Term Directive.²⁵⁴

Collective works. Article 1(4) of the Term Directive aims to standardise the term of legal protection and its calculation for collective works. It addresses the EU Member States, which provide particular provisions on copyright in collective works. The Directive does not define the concept of 'collective works'. Nevertheless, Article 2(5) of the Berne Convention sheds light upon this concept, given that it refers to 'collections' among the legally protected works and defines this concept as '[c]ollections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections'.

Article 1(4) of the Term Directive holds that, in cases where the authors of the collective are identified on the version of the work that is made available to the public, the main rule within the paragraphs (1) (i.e., term of legal protection for single-authored works) and (2) (i.e., term of legal protection for joint-authored works) would apply. Otherwise, the term of legal protection provided

²⁵⁴ See: Spanish Copyright Act, Art. 30.



for collective works shall be 70 years and run from when the work is lawfully made available to the public.

Among the EU Member States analysed herein, only Article L123-3 of the French Copyright Act and Article 28(2) of the Spanish Copyright Act correspond to the EU provision for collective works. The Spanish Copyright Act remained loyal to the EU provision. On the other hand, the French Copyright Act slightly departs from the EU provision. It states that the term of legal protection for collective works lasts 70 years from the first day of January of the calendar year following the year the work was published. The date of publication is determined by any means of proof under common law, and in particular by legal deposit. If the collective work is published in parts, then the 70-year period of legal protection begins on the first day of January of the calendar year following the date each item was published. By introducing a new criterion, the French provision transposes a variation of Article 1(6) of the Term Directive. It holds that collective works published within 70 years after their creation are eligible for legal protection. However, if a collective work is made available to the public by the rightsholder upon the expiry of 70 years after its creation, the person who makes the work available to the public enjoys an exclusive right of 25 years from the first day of January of the calendar year following that of publication.

Anonymous and pseudonymous works. Yet another category of authorial works encompassed within the Term Directive is the anonymous and pseudonymous works. Article 1(3) of the Term Directive holds that, as a principle, the term of legal protection for anonymous and pseudonymous works lasts 70 years from when the work is lawfully made available to the public. However, if the pseudonym adopted by the author leaves no doubt regarding their identity, or if the author reveals their identity within 70 years of the time the work is lawfully made available to the public, then the general rule enshrined in Article 1(1) would apply. As the identity of the author of the work is identified in this latter case, the term of legal protection would last during the lifetime of the author and 70 years post-mortem. It shall be noted that the calculation method in Article 8 of the Term Directive also applies here.

The term of legal protection of anonymous and pseudonymous works is also regulated within Article 7(3) of the Berne Convention. This provision closely resonated with the EU provision. Yet, aligned with the general standards adopted within the Berne Convention, Article 7(3) of the Berne Convention requires a 50-year protection for this category of works. Additionally, and departing from the EU provision, it states that the Berne Union members are not required to provide legal protection



for this category of works ‘if it is reasonable to presume that their author has been dead for fifty years’.

The national legal regimes of the EU Member States vary from one EU Member State to another in several nuances. Article 61 of the Austrian Copyright Act, while closely resembling the EU provision, holds that such works made available to the public within 70 years upon publication would be protected up to 70 years after publication. As indicated in Article 64, this term shall be calculated from the calendar year that follows the event that is taken as a reference to calculate the term of legal protection. Furthermore, paragraph (3) of the same provision clarifies that not only the author themselves is entitled to reveal their identity but also their heirs or the rightsholders of the work, upon the death of the author.

Section 44 of the Finnish Copyright Act and Article 27 of the Spanish Copyright Act, while also closely following the letter of the EU provision, extend legal protection to unpublished anonymous and pseudonymous works. They provide 70 years of protection starting from the year that follows the one in which the work is created. Additionally, the Finnish Copyright Act and Article 41 of the Dutch Copyright Act explicitly state that works published in parts shall be deemed separate works.

Regarding the French approach, Article L123-3 of the French Copyright Act, which pertains to collective works, also covers anonymous and pseudonymous works. However, the French legislator introduces some notable differences from the standard norms set by the European legislator. Firstly, the French provision refers to means of proof, including legal deposit, to establish the publication date. Secondly, it adds a new criterion: only anonymous and pseudonymous works published within 70 years of their creation are eligible for legal protection. Nevertheless, if an anonymous or pseudonymous work is made available to the public by the rightsholder after 70 years from its creation, the person who makes the work available enjoys an exclusive right of 25 years starting from the first day of January of the year following its first publication.

Article 31 of the Greek Copyright Act and Article 38 of the Dutch Copyright Act transposed the EU provision by remaining loyal to its letter. Yet, both legislators, as well as the Spanish legislator,²⁵⁵ followed a similar approach to that of the Austrian and French legislators and started the term of protection on the first day of January of the year following the year in which the event that is essential for the term of protection occurs.

²⁵⁵ See: Spanish Copyright Act, Art. 30.



Audiovisual/cinematographic works. The term of legal protection for audiovisual/cinematographic works is regulated within Article 2(2) of the Term Directive. This provision, without necessarily discriminating between audiovisual works from cinematographic works, grants 70 years of legal protection to these types of works after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work. The method to calculate the term of protection enshrined in Article 8 also applies herein.

The standard set at the international level significantly differs from that at the EU level. Article 7(2) of the Berne Convention holds that the term of protection for cinematographic works shall expire 50 years after the work has been made available to the public with the author's consent, or, failing such an event within 50 years from the making of such a work, 50 years after the making.

The EU provision has been embraced by the EU Member States studied herein. Article 62 of the Austrian Copyright Act, Article L123-2 of the French Copyright Act, Article 40 of the Dutch Copyright Act, and Article 31(3) of the Greek Copyright Act transposed the EU rule *verbatim*. Section 43 of the Finnish Copyright Act and Article 28(1) of the Spanish Act subject cinematographic works to the general rule envisioned for joint-authored works. Both provisions provide legal protection that would last during the lifespan of the authors and 70 years post-mortem protection, which shall start from the death of the last surviving author.

Musical works. Article 1(7) of the Term Directive sets the legal protection term for musical works that combine musical composition with lyrics. According to this provision, 'the term of protection of a musical composition with words shall expire 70 years after the death of the last of the following persons to survive, whether or not those persons are designated as co-authors: the author of the lyrics and the composer of the musical composition, provided that both contributions were specifically created for the respective musical composition with words.' Article 8 of the Directive applies to the calculation of the term of legal protection of musical works as well.

Article 60(2) of the Austrian Copyright Act, Article 40a of the Dutch Copyright Act, Section 43 of the Finnish Copyright Act, Article 30(2) of the Greek Copyright Act, and Article 28(1) of the Spanish Copyright Act adopted the EU rule as is. Except for the Dutch Copyright Act, all the other provisions require the creation of the lyrics and the musical composition specifically to create a musical work with lyrics. The French Copyright Act, however, does not contain a provision dedicated



to musical works *per se*; therefore, musical works are subject to the general rules on the term of protection depending on whether they are individual or joint-authored works.

Photographs. Article 6 of the Term Directive is dedicated to *original* photographs that are their authors' own intellectual creation. As clarified by the provision, no other criteria are sought to determine the originality of a photograph and consider it a 'work' eligible for copyright protection. While aiming at harmonising the term of copyright protection for original photographs, the provision acknowledges the EU Member States' discretion to grant legal protection to *non-original* photographs as well.

Article 6 of the Term Directive states that original photographs shall be protected as works and be subject to the same legal protection regime as authorial works enshrined in Article 1 of the Directive. Therefore, the rules explained above for authorial works, joint-authored works, collective works, and anonymous and pseudonymous works also apply to original photographs. Accordingly, the terms therein shall be calculated from the first day of January of the year following the event that gives rise to them (e.g., making available to the public, creating the work). Likewise, in the case of original photographs for which the term of protection is not calculated from the death of the author or authors and which have not been lawfully made available to the public within 70 years from their creation, the protection shall terminate.

The EU provision is compliant with the international framework. Article 7(4) of the Berne Convention, while giving the Union members the discretion to provide copyright protection to original photographs as artistic works, requires a minimum of 25 years of legal protection for such works, which shall start from the making of the work. The UCC envisions even a lower standard for the legal protection of original photographs. Article IV(3) of the UCC, just like the Berne Convention, recognises the contracting parties' margin of discretion to extend copyright protection to photographs. Yet, it also holds that, in countries where photographs are protected as artistic works, the term of legal protection shall not be less than 10 years.

Just like the different levels of protection envisioned for original photographs across the international and supranational law, the EU Member States' approaches to the term of copyright protection for original photographs vary. Amongst the EU Member States covered herein, the Austrian, Finnish, and Spanish Copyright Acts are the only ones with special provisions regulating the term of legal protection for photographs. Article 74(6) of the Austrian Act grants 50 years of legal protection, starting from the first day of January of the calendar year that follows the year in which



the photograph was published. Article 49a of the Finnish Act adopts the same approach; however, instead of publication date, it takes the date on which the photograph was taken as a reference to calculate the term of legal protection.

It shall be noted that, according to the Austrian Copyright Act,²⁵⁶ the Finnish Copyright Act,²⁵⁷ the Greek Copyright Act,²⁵⁸ the French Copyright Act,²⁵⁹ the Dutch Copyright Act,²⁶⁰ and the Spanish Copyright Act,²⁶¹ *original* photographs are subject to the general rules concerning copyright.

Last but not least, including the term of legal protection, it is worth noting that Article 128 of the Spanish Act introduces a norm for *non-original* photographs and subject-matter produced in a similar manner. It grants 25 years of legal protection to non-original photographs and other similar subject-matter, which starts from January 1 of the year that follows the year in which the photograph or the other reproduction was taken.

Unpublished or posthumous works. Last but not least, the Term Directive also regulates the term of legal protection for previously unpublished works. According to Article 4, anyone who, after the expiry of the copyright protection, publishes a previously unpublished work for the first time or lawfully communicates to the public a previously unpublished work, benefits from a protection equivalent to the economic rights of the author. The term of protection of these economic rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public. The general rule for calculating the term of legal protection within Article 8 of the Directive also applies herein.

Article 76b of the Austrian Copyright Act, Article 45o of the Dutch Copyright Act, Section 44a of the Finnish Copyright Act, and Article 51a of the Greek Copyright Act have implemented Article 4 of the Term Directive by remaining loyal to the EU provision.

Article 45o of the Dutch Copyright Act, while transposing the EU norm, extends this provision to works which have not been protected by copyright only if the authors of such works died more

²⁵⁶ Austrian Copyright Act, Art. 3(1).

²⁵⁷ Finnish Copyright Act, Sec. 1.

²⁵⁸ Greek Copyright Act, Art. 2(1).

²⁵⁹ 'Photographic works' and works produced through a process analogous to photography are listed among original works within the French Copyright Act. See: French Copyright Act, Art. L112-2(9°).

²⁶⁰ Dutch Copyright Act, Art. 10(1)(9°).

²⁶¹ 'Photographic works' and works produced through a process analogous to photography are listed among original works within the Spanish Copyright Act. See: Spanish Copyright Act, Art. 10(1)(h).



than 70 years ago. In a similar vein, Article L123-4 of the French Copyright Act and Article 27 of the Spanish Copyright Act contain provisions specifically addressed to posthumous works.

While applying Article 4 of the Term Directive to posthumous works, the French Copyright Act holds that the economic rights vested in the posthumous works belong to the author's successors if the work is disclosed during the term of copyright over the course of copyright protection. Yet, if the disclosure is made after the expiry of this period, the person, either the successor of the author or those authorised to exploit the work, who published the work, is granted the economic rights. In this case, the term of protection would be 25 years from the first of January of the year that follows the year of publication. Additionally, the same provision holds that posthumous works must be published separately, except in cases where they are only a fragment of a previously published work. They may only be included with previously published works by the same author if the author's beneficiaries still enjoy the right of exploitation over them.

The Spanish Copyright Act, on the other hand, grants 70 years of legal protection to previously unpublished works from the date of their creation unless the term of protection is computed based on the time of death of the author.

Works and other subject-matter that are excluded from legal protection. The public domain in general, and particularly legal norms on the works and other subject-matter excluded from the scope of copyright protection, have remained in the periphery of the EU copyright *acquis*.²⁶² In other words, the existing EU copyright framework does not hold any legal provisions aimed at establishing a uniform perception of the concept of ‘public domain’ or harmonising the national copyright regimes of the EU Member States to standardise the works and other subject-matter allocated to the public domain.

Along the same lines as the supranational normative framework, the international legal framework—comprising the WIPO-administered Berne Convention, the WTO-administered TRIPs Agreement, and the UNESCO-administered UCC—does not offer detailed guidance on the matter either. Still, the international norms inherent in the Berne Convention, TRIPs Agreement, and UCC influenced the EU Member States’ national copyright legislation.

To begin with, Article 2 of the Berne Convention, which aims to codify works eligible for copyright protection, provides certain guidelines for the Berne Union Members. Article 2(2) of the

²⁶² See in general: Dusollier (n 194).



Convention states that Union members have the discretion to determine whether ‘fixation’ is a criterion for eligibility for copyright protection. Therefore, this provision indicates that intellectual works not fixed in a material form can be excluded from copyright protection. Similarly, several other provisions of the Berne Convention recognise the discretion of Union members to determine the legal status of specific categories of works or other subject-matter. For example, Article 2(4) of the Convention, instead of establishing a mandatory rule to define the boundaries of the public domain, states that the allocation of ‘official texts of a legislative, administrative and legal nature, and [the] official translations of such texts’ is a matter for national legislation. Similarly, Article 2*bis*(1) states that the legal status of ‘political speeches and speeches delivered in the course of legal proceedings’ shall be determined by national legislation. Lastly, Article 2(8) of the Convention stipulates that copyright protection does not extend to ‘news of the day’ or to ‘miscellaneous facts having the character of mere items of press information’.

Besides the WIPO framework, Article 2 of the UCC and Article 9(2) of the TRIPs Agreement codify a fundamental principle of copyright law by adopting the same letter of law: the idea-expression dichotomy.²⁶³ In fact, these provisions clarify that ‘copyright protection extends to expressions and not to ideas’. Additionally, they specify that ‘procedures, methods of operation or mathematical concepts as such’ are also excluded from the scope of copyright protection.

The WIPO norms mentioned above have been incorporated into the national laws of the EU Member States, with the mere exception of the French Copyright Act, which lacks any provisions related to the public domain. The subject-matter covered by Article 2(4) of the Berne Convention (i.e., official texts and translations) has also been excluded from copyright protection through Article 7(1) of the Austrian Copyright Act, Section 9 of the Finnish Copyright Act, Article 5 of the Italian Copyright Act, Article 11 of the Dutch Copyright Act, and Article 13 of the Spanish Copyright Act. While these provisions are of little relevance to the European AV sector and the EFI in producing, distributing, or preserving European audiovisual or cinematographic works, it is noteworthy that Article 2 of the Greek Copyright Act also excludes certain expressions. The Greek Act—in addition to implementing Article 2(4) of the Berne Convention, Article 2 of the UCC, and Article 9(2) of the TRIPs Agreement—excludes expressions of folklore, which could otherwise serve as rich subject matter for cinematographic content, from copyright protection.

²⁶³ Ibid, 23.



Non-original reproductions of works of visual art are in the public domain. Throughout the EU’s copyright history, Article 14 of the CDSMD, introduced only in 2019, constitutes the only legal provision inherent in the EU copyright framework that addresses the protection of the public domain while explicitly referring to the concept. Still, it should be noted that the EC’s original Proposal for the CDSMD did not contain any provisions for the public domain.²⁶⁴ Furthermore, Article 14 of the CDSMD was initially envisioned as complementary to Article 6 of the CDSMD, which is dedicated to preserving cultural heritage.²⁶⁵ It aimed to prevent the public domain from shrinking by ensuring that faithful reproductions of public domain works would not evoke legal protection by copyright or related rights.²⁶⁶ Nevertheless, in the final version of the Directive, Article 14 of the CDSMD is regulated as a stand-alone provision.²⁶⁷

Article 14 of the CDSMD focuses on works of visual art—a legal concept that has not been used within any EU copyright directives or regulations—whose term of protection has expired and entered the public domain.²⁶⁸ It holds that ‘any material resulting from an act of reproduction’ of such a work shall not be protected by copyright or related rights, unless the material resulting from the act of reproduction constitutes an original work or subject-matter, eligible for legal protection.

While this provision would support the internal activities of CHIs, including the film and audiovisual heritage institutions, the terminology used in Article 14 of the CDSMD (i.e., works of visual art) and the interplay of this provision with different modes of digital reproduction are yet to be clarified at the EU level. Nevertheless, a glance at the national copyright regimes of the selected EU Member States does not shed any light on the national legislators’ interpretation of this provision. Indeed, among the EU Member States this report studies, Article 14 of the CDSMD has been transposed only to the Greek and Spanish Copyright Acts. Whereas Article 31A(1) of the Greek Copyright Act implements the letter of the EU law *verbatim*, Article 41 of the Spanish Copyright Act holds the essence of the EU norm, albeit with a significant difference in its formulation. The first paragraph of the Spanish provision explicates that the expiration of the economic right vested in a work would result in the transfer of the work to the public domain. The second paragraph holds that

²⁶⁴ Eleonora Rosati, *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press 2021), 240.

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*, 241.

²⁶⁸ *Ibid.*, 242.



D3.3. Policy recommendations

anyone can use public domain works as long as the author's moral rights, specifically their authorship and the integrity of the work, are respected. As opposed to the EU norm, Article 41 of the Spanish Copyright Act serves to declare the legitimate uses of public domain works in general, whilst safeguarding the moral rights of the author rather than protecting the borders of the public domain, as was the goal of Article 14 of the CDSMD.

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The multi-level mapping of the legal norms on the term of legal protection and the norms contouring the public domain is attached as **Annex no. 5 and 6**.



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4.3 Media Law and Access to European Works

Media law, especially the legal norms dedicated to enabling and enhancing access to and discoverability of European cultural content, is yet another legal area key to assessing and advancing the competitiveness of the European AV sector and the EFI. In fact, the legal norms addressed to guarantee the broadcasting or online availability of European audiovisual/cinematographic content and to facilitate access to such content, have been adopted by the EU policymaker and legislator to shield the European AV sector and the EU's Single Market from the harmful effects of economic globalisation and the digitisation of the distribution and exhibition of audiovisual/cinematographic content. Revolving around the notion of the 'prominence of European works', these norms are pivotal to ensure the competitiveness of the European audiovisual/cinematographic works against non-European cultural content within the EU.

Given the global reach of their root cause, primarily that of economic globalisation, the Union's strategies regarding the prominence of European audiovisual/cinematographic works have stemmed from the global trade talks and impacted the international norm-setting forums, such as the UN and the WTO, yet have also been inserted in the EU directives and regulations. Indeed, the global trade talks, dominated by the US, have witnessed the promotion of liberalisation of transatlantic trade of goods and services, including audiovisual/cinematographic works.²⁶⁹ Whereas the cultural value of audiovisual/cinematographic content, as well as the roles attributed to such content by the Continental European States, have not only paved the way for political tensions during the global

²⁶⁹ See, in general: Bert de Witte, 'Trade in Culture: International Legal Regimes and EU Constitutional Values' in Gráinne de Búrca and Allen J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing 2001) 237–256; Caroline Pauwels and Jan Loisen, 'The WTO and the Audiovisual Sector Economic Free Trade vs Cultural Horse Trading?' (2003) 18 *European Journal of Communication* 291, 291–313; Patrick A. Messerlin and Emmanuel Cocq, 'Preparing Negotiations in Services: EC Audiovisual in the Doha Round' in Patrick A. Messerlin, Stephen E. Siwek and Emmanuel Cocq (eds), *The Audiovisual Services Sector in the GATS Negotiations* (AEI Press 2004) 32–53; Christoph B. Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?' (2006) 9 *Journal of International Economic Law* 553; Michael Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006) 9 *Journal of International Economic Law* 515; Rostam J. Neuwirth, "'United in Divergency": A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (2006) 66 *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* 819; E. H. Chiang, 'The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: A Look at the Convention and Its Potential Impact on the American Movie Industry Note' (2007) 6 *Washington University Global Studies Law Review* 379; Petar Mitric, 'The European Co-production Treaties: A Short History and a Possible Typology: Policy and Practice' (2018) 63–82.



trade talks but also the proliferation of ‘cultural diversity’ as a concept and a principle that guides the international trade of cultural goods and services.²⁷⁰

The ‘screen quotas’, which allocated a specific fragment of television broadcasts’ transmission time to European works, were borne out of this reality. Initially introduced by the TVWFD, screen quotas were adapted to the shifting market trends, particularly with the digitisation of cinematographic distribution and exhibition in the 1990s and resulted in the adoption of ‘catalogue quotas’ tailored for the VoD platforms, in order to secure a specific portion of the catalogues of VoD platforms to European works. While the catalogue quotas are accompanied by other measures to ensure the prominence of European works, the EU legislator has also introduced other legislation to secure European consumers’ uninterrupted access to such content. Therefore, the novelties introduced by economic globalisation, digitisation of the European AV sector and the EFI, the platformisation phenomenon, and the shift in market trends and consumer behaviour toward digital consumption of audiovisual/cinematographic works have intertwined the EU policies on cultural diversity with the regulatory framework concerning media law.

The literature on the contextual background and the codification of measures to promote cultural diversity has already been reviewed and analysed within another project deliverable of WP3, namely ‘EU law and governance and the promotion of the EFI in the international scene’²⁷¹. Therefore, to avoid repetition, the remainder of this report focuses on the scholarly literature on the level of harmonisation achieved within the EU or the prevailing legal fragmentation across the EU Member States on legal matters related to the ease of access to European audiovisual/cinematographic works and the public’s enjoyment of diverse cultural content.

Published under the auspices of the EAO in 2024, Sophie Valais’s report, ‘Curtains up on regulation and support measures for the cinema exhibition sector’²⁷², is one of the very few examples of legal scholarship that elaborates on the EU norms aimed at facilitating access to audiovisual/cinematographic content distributed and exhibited by digital means. Evident from its title, Valais’s report explores the commercialisation of audiovisual/cinematographic content by positing this topic at the centre of the European market trends and inclinations, EU policies aimed at promoting cultural diversity, competition law, copyright law, media law, and the regulatory

²⁷⁰ Ibid.

²⁷¹ Psychogiopoulou et al. (n 27).

²⁷² Sophie Valais, ‘Curtains up on Regulation and Support Measures for the Cinema Exhibition Sector’ [2024] IRIS.



frameworks on State aid and funding schemes for the distribution and exhibition of European audiovisual/cinematographic content. Amongst this broad spectrum of legal aspects, Valais also looks at the intersection of media law with copyright, particularly to explain the ways in which the EU legislator introduced exceptions to the territoriality of copyright and its implications on consumers' access to digital cultural content, as well as the legal norms, specifically content quotas, enshrined in the AVMSD to maintain cultural diversity whilst ensuring consumers' access to European audiovisual/cinematographic content.

In this regard, Valais explains that the territoriality of copyright—or, in other words, the discretion of national legislators to regulate the national copyright regime in their country, however in compliance with the international and supranational legal norms—paves the way for the conclusion of licensing agreements, on a territorial basis, with multiple licensees based in and intending to exploit the licensed work in different States.²⁷³ Yet, Valais notes that the EU legislator has taken steps to eliminate the barriers to the free circulation of audiovisual/cinematographic works within the Single Market. She refers to and briefly explains the aims and objectives of three legal instruments in this regard: Regulation (EU) 2017/1128²⁷⁴ (hereinafter 'Portability Regulation'), Directive (EU) 2019/789²⁷⁵, and Regulation (EU) 2018/302²⁷⁶ (hereinafter 'Geo-blocking Regulation').²⁷⁷

As to the content quotas, Valais explains that the cross-national analysis of the cultural and legal landscapes of the EU Member States confirms that allocating a certain percentage of the broadcasting organisations' transmission time to the exhibition of European audiovisual/cinematographic content would play an essential role in safeguarding and promoting cultural diversity within the EU.²⁷⁸ Nevertheless, it is also reported that the content quotas encapsulated in the AVMSD fall short in

²⁷³ Ibid, 26.

²⁷⁴ Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L 168/1.

²⁷⁵ Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC [2019] OJ L 130/82.

²⁷⁶ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or establishment within the internal market and amending Regulations (EC) No. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L 60 I/1.

²⁷⁷ Valais (n 272), 27.

²⁷⁸ Ibid, 21.



achieving this goal.²⁷⁹ Besides, Valais reports that Spain is the only EU Member State with legal norms introducing content quotas, however, for the theatrical exhibition of audiovisual/cinematographic works rather than the television broadcasting or digital exploitation.²⁸⁰

Whereas Valais's report does not reflect on the 'screen and catalogue quotas' divide or the legal norms concerning the catalogue quotas tailored for VoD platforms, the journal article penned by Dahne R. Idiz, Kristina Irion, Joris Ebberts and Rens Vliegenhart, entitled 'European Audiovisual Media Policy in the Age of Global Video on Demand Services: A Case Study of Netflix in the Netherlands'²⁸¹, concentrates merely on the catalogue quotas introduced by the AVMSD in 2018 for the VoD platforms. Indeed, the AVMSD holds the VoD platforms responsible for the promotion of the production and distribution of European works, hence taking part in the promotion of cultural diversity within the EU.²⁸² To achieve this goal, Article 18 of the AVMSD provides a three-tiered regulation, which comprises the allocation of 30% of the content catalogue to European works, to ensure the prominence of European works, and a financial contribution to the production of such works. Idiz et al. draw attention to the potential of these tools to promote European works and cultural diversity, given that the catalogue quotas and the prominence requirements are *compulsory* measures that are based on the 'country of origin' principle, whereas the financial contribution *option* extends to the VoD platforms operating in a country even if they are established in other countries.²⁸³

Yet, the authors address the potential pitfalls of the measures mentioned above. To begin with, the catalogue quotas are criticised for risking obtaining licenses of 'old or cheap content' merely to meet the quota rather than promoting the production or exhibition of European content.²⁸⁴ Likewise, the lack of any restrictions on the nature of the content that is subject to such quotas has been another matter of debate, given that certain VoD platforms tend to promote their own 'original' content (such as 'Netflix Originals') at the expense of other content produced by third parties.²⁸⁵ Along the same lines, the quotas risk excluding non-national European content, as the quotas might be allocated only to national European content.²⁸⁶ As to the requirement concerning the prominence of European

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Daphne R Idiz and others, 'European Audiovisual Media Policy in the Age of Global Video on Demand Services: A Case Study of Netflix in the Netherlands' (2021) 12 Journal of Digital Media & Policy 425.

²⁸² Directive 2010/13/EU (n 12), Rec. 69.

²⁸³ Idiz et al. (n 281), 430.

²⁸⁴ Ibid, 431-432.

²⁸⁵ Ibid, 432.

²⁸⁶ Ibid.



works, the authors highlight the opacity of the notion of ‘prominence’ and the hardship in implementing it in the VoD platforms, given that these online platforms often rely on automated recommender systems that curate and promote content based on the user’s profile.²⁸⁷ Finally, regarding the optional financial contributions, the authors stress that the market actors’ preferences vary significantly from direct investment into the production of European content to levies payable to a fund. Despite the scepticism about the ways in which EU Member States can oblige the global market players to invest in European works, it is underlined that the independence of European film producers shall not be compromised for such financial opportunities.²⁸⁸

Nevertheless, Idiz et al. argue that the cultural diversity policy tools employed by the EU policymaker and legislator, such as content quotas, do not necessarily correspond with the realities of the VoD platforms and the digital distribution and exhibition of audiovisual/cinematographic content.²⁸⁹ Furthermore, they claim that ‘the diversity of supply does not necessarily lead to exposure diversity’²⁹⁰, especially in cases that involve user autonomy. Therefore, the authors conclude that the key to promoting cultural diversity lies in enhancing dialogues between local film producers and global VoD platforms, which shall be complemented by measures to secure producers' independence and ensure transparency concerning content performance data.²⁹¹

As highlighted in the literature, media law, and especially the norms enabling and enhancing access to European audiovisual/cinematographic content, is advertently and inextricably linked to the EU policymaker’s cultural diversity policies, if not the primary legal area in which cultural diversity policies are implemented. Bearing this fact in mind, the remainder of this sub-section maps the legal norms inherent in the EU media framework that regulate access to audiovisual/cinematographic works and the screen and quotas to ensure the diversity of cultural content across Europe.

4.3.1 Screen and Catalogue Quotas

The AVMSD contains legal provisions addressed to broadcasting organisations and media service providers of on-demand audiovisual media services whose services are intended for the reception of

²⁸⁷ Ibid, 432-433.

²⁸⁸ Ibid, 435.

²⁸⁹ Ibid, 426.

²⁹⁰ Ibid.

²⁹¹ Ibid, 427.



the audience in an EU Member State, in order to ensure the competitiveness of European works within the EU by providing the diversity and availability of European content to audiences in the EU. These provisions apply to all media services transmitted by media service providers established in an EU Member State,²⁹² as well as those, even if not established in an EU Member State,²⁹³ ‘that use a satellite up-link situated in [a] Member State’²⁹⁴ or ‘use the satellite capacity appertaining to that Member State.’²⁹⁵ The audiovisual media services ‘intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States’²⁹⁶ are excluded from the scope of the AVMSD, hence these provisions.

In this context, Article 1(1)(n) of the AVMSD defines the concept ‘European works’. According to this provision, ‘European works’ cumulatively encompass works originating in the EU Member States, the works co-produced within the co-production agreements concluded between the EU and third countries, as well as the works originating in other States that are signatory parties to the CoE’s European Convention on Transfrontier Television²⁹⁷, however, under special conditions.²⁹⁸ Indeed, in the latter case, the work should be made with authors and workers residing in one or more EU Member States or the signatory party to the aforementioned CoE Convention, as long as one or more producers are established in these countries, the production of the work is supervised by one or more producers established in these countries, or ‘the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.’²⁹⁹ In addition to these, the works that do not fall under one of these categories but are ‘produced within the framework of bilateral co-production agreements concluded between Member States and third countries’ are also considered ‘European works’, if ‘the co-producers from the Union supply a majority share of the total cost of production and that the

²⁹² Directive 2010/13/EU (n 12), Art. 2 paras. (1) and (2).

²⁹³ Ibid, Artt. 2(2)(b), 2(4).

²⁹⁴ Ibid, Art. 2(4)(a).

²⁹⁵ Ibid, Art. 2(4)(b).

²⁹⁶ Ibid, Art. 2(6).

²⁹⁷ Council of Europe, European Convention on Transfrontier Television (adopted 5 May 1989, entered into force 1 January 1993) ETS No. 132.

²⁹⁸ Directive 2010/13/EU (n 12), Art. 1(n).

²⁹⁹ Ibid, Art. 1(3).



production is not controlled by one or more producers established outside the territory of the Member States.’³⁰⁰

Screen quotas. Based on a broad conceptualisation of ‘European works’, the AVMSD regulates the responsibilities of the broadcasting organisations with respect to the promotion of distribution and production of television programmes that comprise European works. Article 16(1) of the AVMSD requires, where practicable and by appropriate means, the reservation of a majority proportion of broadcasting organisations’ transmission time to European works. ‘The time allotted to news, sports events, games, advertising, teletex services and teleshopping’³⁰¹ is excluded from the transmission time in this regard. The same provision gives the broadcasting organisations the discretion to comply with this provision progressively and to choose the suitable criteria to introduce such proportions by taking into account their informational, educational, cultural and entertainment purposes. Aside from the minimum bar set within Article 16(2) of the AVMSD,³⁰² the provision does not introduce any other indicators to attain the ‘majority proportion’ in question.

In addition to the above, Article 17 of the AVMSD holds a provision to support the production and distribution of independent European works. This provision provides two options to broadcasting organisations. They are required, where practicable and by appropriate means, to reserve at least 10% of their transmission time to ‘European works created by producers who are independent of broadcasters’. The criteria set in Article 16(1) for assessing the transmission time also apply herein. As an alternative to this 10% screen quota, they can opt to allocate at least 10% of their programming budget to the production of such works. Whereas these proportions are also to be achieved progressively, and by taking into account the criteria indicated in the preceding provision, Article 17 of the AVMSD requires the achievement of these proportions by designating them to ‘an adequate proportion for recent works, that is to say works transmitted within 5 years of their production’.

It should be emphasised that both Article 16 and Article 17 apply to television broadcasts that form part of a national network and are intended for audiences beyond merely local audiences.³⁰³

³⁰⁰ Ibid, Art. 1(4).

³⁰¹ Ibid, Art. 16(1).

³⁰² Article 16(2) of the AVMSD clarifies that, in cases where a broadcasting organization cannot attain the ‘majority proportion’, the time frame allocated to European works shall not be lower than the average for 1998, whereas for Greece and Portugal the year that shall be taken into account as a reference point is decided to be 1990.

³⁰³ Directive 2010/13/EU (n 12), Art. 18.



Articles 50 and 51 of the *Audiovisuelle Mediendienste-Gesetz*³⁰⁴ (hereinafter ‘Austrian Audiovisual Media Services Act’) implement Articles 16 and 17 *verbatim*. Likewise, Section 209 of the *Laki sähköisen viestinnän palveluista*³⁰⁵ (hereinafter ‘Finnish Electronic Communications Services Act’) also implements Article 16 of the AVMSD *verbatim*, whereas Section 210 of the Finnish Act increases the percentage that the AVMSD identified for the transmission of and financial contribution to independent productions from 10% to 19%.

Article 20 of the *NOMOS YΠ' APIΘM. 4779/2021 ΦΕΚ 27/Α/20-2-2021* Ενωμάτωση στην εθνική νομοθεσία της Οδηγίας (ΕΕ) 2010/13 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 10ης Μαρτίου 2010 για τον συντονισμό ορισμένων νομοθετικών, κανονιστικών και διοικητικών διατάξεων των κρατών μελών σχετικά με την παροχή υπηρεσιών οπτικοακουστικών μέσων, όπως έχει τροποποιηθεί με την Οδηγία (ΕΕ) 2018/1808 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 14ης Νοεμβρίου 2018 και άλλες διατάξεις αρμοδιότητας της Γενικής Γραμματείας Επικοινωνίας και Ενημέρωσης³⁰⁶ (hereinafter ‘Greek Law Implementing the AVMSD’), while closely following the letter of Article 16 of the AVMSD, sets the screen quotas envisioned for European works to 50%, while Article 21 of the Greek Law implements Article 17 of the AVMSD *verbatim*.

Along the same lines, Article 115(3) of the *Ley 13/2022, de 7 de julio, General de Comunicación Audiovisual* (hereinafter ‘Spanish General Law on Audiovisual Communication’) implements Article 17 *verbatim*; however, Article 115(1) thereof, while implementing Article 16 of the AVMSD, not only sets the quota limit to 50%, but also Article 115(2) thereof introduces a sub-quota for the European works in the official language of the State or the autonomous communities therein. Indeed, this latter provision holds that at least 50% of the screen quota allocated for European works within Article 115(1) of the Spanish Law should be reserved for works in Spanish or one of the other recognised languages, while a minimum of 15% of this sub-quota shall be reserved for audiovisual works in one of the official languages of the autonomous communities, taking into account their population size and reserving at least 10% for each of them.

³⁰⁴ *Audiovisuelle Mediendienste-Gesetz* (as amended by BGBl. I Nr. 150/2020).

³⁰⁵ *Laki sähköisen viestinnän palveluista* (as amended by Act 68/2018).

³⁰⁶ *NOMOS YΠ' APIΘM. 4779/2021 ΦΕΚ 27/Α/20-2-2021* Ενωμάτωση στην εθνική νομοθεσία της Οδηγίας (ΕΕ) 2010/13 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 10ης Μαρτίου 2010 για τον συντονισμό ορισμένων νομοθετικών, κανονιστικών και διοικητικών διατάξεων των κρατών μελών σχετικά με την παροχή υπηρεσιών οπτικοακουστικών μέσων, όπως έχει τροποποιηθεί με την Οδηγία (ΕΕ) 2018/1808 του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 14ης Νοεμβρίου 2018 και άλλες διατάξεις αρμοδιότητας της Γενικής Γραμματείας Επικοινωνίας και Ενημέρωσης.



Similarly, Articles 2.115(1) and 3.20(1) of the *Mediawet 2008*³⁰⁷ (hereinafter ‘Dutch Media Act’) also implement Article 16 of the AVMSD, respectively for public media services and commercial media services, by fixing the quota for European works to 50%. Additionally, Articles 2.122 and 3.24 of the Dutch Media Act introduce screen quotas for works in Dutch and Frisian that apply, respectively, for public and commercial media services. Just like the quota dedicated to European works in general, by using the same criteria to assess the transmission time, these provisions allocate, respectively, 50% and 40% of the transmission of television broadcasts transmitted by public and commercial media services to works in Dutch and Frisian. Nevertheless, the same clauses hold that these quotas can be waived under certain conditions. Regarding the screen quotas for works of independent producers, Articles 2.116 and 3.21 envision a quota of 10% of the transmission time of broadcasts.

Last but not least, Article 33 of the *Loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication* (hereinafter ‘French Law no. 86-1067’) related to freedom of communication requires the allocation of 60% of screening time, especially in prime time, to European works and the remaining 40% to works produced in French. Whereas the provision allows the departure from the quota set for the works produced in French depending on the audiovisual media service provider’s investment in the production of such content, it holds that the quota set for European works cannot be lower than 50% of the transmission time.

Catalogue quotas. Whereas the abovementioned screen quotas are tailored to the operation of the broadcasting organisations, Article 13 of the AVMSD adapts such requirements to the on-demand service providers and introduces ‘catalogue quotas’. Article 13(1) of the Directive requires media service providers of on-demand audiovisual media services to allocate at least 30% of their catalogues to European works and to ensure the prominence of those works. Yet, the provision remains silent on the interpretation of the concept ‘prominence of European works’ and the ways in which to achieve this goal.³⁰⁸ It shall also be noted that the media service providers of on-demand audiovisual

³⁰⁷ *Mediawet 2008* (as amended in 2024).

³⁰⁸ In addition to the catalogue quotas, Article 13(2) of the AVMSD introduces a norm that applies to media service providers of on-demand audiovisual services operating in an EU Member State that requires their financial contribution to the production of European works, either via direct investment in content or contribution to national funds. The provision holds that this obligation can be extended to media service providers of on-demand services that target the audience in one Member State but are established in another Member State, in a way that would be proportionate and non-discriminatory. The possibility of exemption enshrined in Article 13(6) of the AVMSD also applies to the financial contribution obligations. Whereas the legal mapping of the national transposition of this norm is out of the scope of the



media services with a low turnover or a low audience are exempt from the catalogue quotas.³⁰⁹ Besides, Article 13(6) of the AVMSD holds that the EU Member States, instead of implementing these obligations, may waive them if the operationalisation of the catalogue quotas introduced in Article 13(1) of the Directive would be ‘impracticable or unjustified by reason of the nature or theme of the audiovisual media services’.

Article 40 of the Austrian Media Services Act, Articles 2.115(2) (for public media services) and 3.29c (for commercial media services) of the Dutch Media Act, Section 209 of the Finnish Electronic Communication Services Act, and Article 17 of the Greek Law Implementing the AVMSD implement Article 13(1) of the AVMSD (almost) *verbatim*—as Article 40(1)(2) of the Austrian Act holds a mere difference from the EU provision, given that it provides a criterion that might shed light upon how to maintain the prominence of European works. Indeed, Article 40(1)(2) of the Austrian Act requires the presentation of European works within the catalogues of on-demand platforms with a clear label that distinguishes them from other content.

Article 116 of the Spanish General Law on Audiovisual Communication, while implementing Article 13(1) of the AVMSD *verbatim* within its paragraph (1), introduces a sub-quota within its paragraph (2). According to Article 116(2) of the Spanish Law, at least 50% of the catalogue quota ensured within the preceding paragraph shall be reserved for works in the State’s official language or in one of the official languages of the autonomous communities. Furthermore, in the case of providers of nationwide on-demand audiovisual services, a minimum of 40% of this sub-quota shall be allocated to one of the official languages of the autonomous communities, taking into account their population size and reserving at least 10% for each of them. Article 116(5) of the Spanish Law provides the autonomous communities with official languages to introduce additional obligations for providers of television audiovisual communication services. Along the same lines, Article 28 of the *Décret n° 2021-793 du 22 juin 2021 relatif aux services de médias audiovisuels à la demande* (hereinafter ‘French Decree No. 2021-793 related to on-demand audiovisual media services’) requires the allocation of 60% of the long-metreage cinematographic works and audiovisual works to be reserved for European works, while the remaining 40% is reserved for works produced initially in French. The same quotas apply to catch-up television services. In the cases where the on-demand

research conducted herein, it is with noting that the French Decree No. 2021-793, the Dutch Media Act, and the Spanish General Law on Audiovisual Communication hold detailed provisions on the on-demand platforms’ direct or indirect financial contribution to the production of European or national works.

³⁰⁹ Directive 2010/13/EU (n 12), Art. 13(6).



D3.3. Policy recommendations

audiovisual service providers cannot meet these quotas, they are required to invest in the production of independent works in French; nevertheless, even in this case, the quota dedicated to European works cannot be less than 50% of the aforementioned content.

*

The multi-level mapping of the legal norms on the screen and catalogue quotas is attached as **Annex no. 7**.



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4.4 Protection of Minors

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The protection of minors within the European audiovisual media landscape is underpinned by a complex interplay of legal, philosophical and social considerations, reflecting both longstanding and contemporary concerns about childhood vulnerability and the influence of media. At its core, the regulatory framework seeks to balance the fundamental right to freedom of expression, as enshrined in Article 10 of the CoE Convention for the Protection of Human Rights and Fundamental Freedoms³¹⁰ (hereinafter ‘European Convention on Human Rights’ or ‘ECHR’), with the imperative of shielding children from potentially harmful content—a tension that has historically shaped both policy and public debate.

This balance is not merely a legal question; it is deeply embedded in broader narratives about risk, responsibility and the symbolic role of media regulation in society, as well as in questions regarding children’s rights as citizens and society’s responsibility for care. Over time, the scope of protection has expanded from traditional age-based classification and content labelling to more holistic, collaborative approaches involving regulators, content providers, parents and educators, recognising that safeguarding children in an increasingly diverse and globalised media environment requires shared responsibility and robust media literacy initiatives. At the same time, the impact of audiovisual media on minors extends beyond immediate risks, influencing identity formation, socialisation processes and the development of cognitive and emotional resilience. The media’s capacity to shape perceptions, attitudes and behaviours underscores the importance of nuanced regulatory interventions that not only mitigate harm but also support positive developmental outcomes. Collectively, these dimensions highlight the evolving and multifaceted nature of child protection in the AV sector, necessitating a regulatory response that is both principled and adaptive to changing technological and cultural realities.

This section first examines the normative and historical foundations of media regulation and child protection, then analyses the evolving legal and ethical frameworks that underpin the protection of minors and finally explores the impact of audiovisual media on the identity formation and social

³¹⁰ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005.



perceptions of young audiences. Each sub-section draws on current academic debates and empirical research to provide a critical, multidimensional understanding of the principles and challenges that shape the EU media law norms on the protection of minors.

4.4.1 Foundations of Media Regulation and Child Protection Theory

Recent debates surrounding emerging information technologies and shifts in the media landscape have centred on the fundamental right to freedom of expression, particularly as it pertains to the news media. This right, enshrined in Article 10 of the ECHR, underpins democratic values, such as media pluralism and open debate by safeguarding and promoting free speech. Much of the discourse on issues, such as ‘filter bubbles’ or ‘echo chambers’, terms describing the feedback loop of repetitive types of information and repetitive forms of opinions and sources as determined by algorithmic processes, has highlighted the experience of media users, despite little examination of how the law recognises or safeguards the position of media consumers in this evolving digital environment.³¹¹

Importantly, the right to receive information operates not only as an individual entitlement, but also as a broader policy objective. This dual function is evident in the way in which numerous laws, policies and judicial decisions explicitly reference the right to receive information. The institutional application of this right is particularly notable in the context of broadcasting regulation.³¹² Amid increasing moral panics about childhood, the regulation of media assumes a symbolic role for politicians and others aiming to assert their moral authority and sense of responsibility.³¹³ This regulatory approach, which does not consider childhood as complex, developmentally diverse, and even empowering, runs the risk of being formed by patronising and restrictive principles impacting individual rights. Sometimes, rushing to respond to online dangers through excessively restrictive regulation, as some scholars argue, is justified on the argument that protecting individuals, especially children, from harm is inherently positive. This stance is reinforced through the use of child-related imagery to shape public narratives about the state of childhood,³¹⁴ frequently implying that new media realities and practices are intrinsically risky.³¹⁵ Article 10 of the ECHR affirms, ‘Everyone has

³¹¹ Eskens S., Helberger N., and Moeller J., ‘Challenged by news personalisation: Five perspectives on the right to receive information’ [2017] 9(2) *Journal of Media Law*, 259–284.

³¹² Harrison J., & Woods, L., *European broadcasting law and policy*, (Cambridge University Press, 2007), 266–289.

³¹³ Buckingham D., ‘New media, new childhoods? Children's changing cultural environment in the age of digital technology’ [2008] *An introduction to childhood studies*, 124.

³¹⁴ Holland P., ‘The child in the picture’ in *The international handbook of children, media and culture* (2008) 36–54.

³¹⁵ Staksrud E., *Children in the online world: Risk, regulation, rights* (Taylor & Francis, 2013).



the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’ However, this right is subject to a broad range of exceptions, particularly in circumstances where national security, integrity or safety may be at stake.

Building upon these foundational rights, the question of balancing freedom of expression with the imperative of child protection has become a central concern for state regulation. Although human rights and individual freedoms are central to European democracies, child protection has historically been one of the most widely accepted grounds for applying restrictions on media access and content.³¹⁶ Safeguarding freedom of expression has long been understood to occasionally require active state intervention,³¹⁷ in particular in order to ensure pluralism of information and content sources generally; to protect vulnerable demographic groups, such as minors or minorities; to ensure conditions of civility in public debates; to perform market correction avoiding over-concentration of ownership; and finally to protect related rights. These interventions are found historically in media regulation, but they are not constant or systematic, as political ideologies and positions, as well as forms of policymaking, impact the adoption of measures or not. Nonetheless, this view remains relevant today, especially when it comes to the phenomenon of platformisation, where factual or other content is consumed on a number of devices and by all ages and demographics intensively. Scholars argue that, in this case, delegating content moderation to private platforms without adequate public oversight threatens democratic discourse and necessitates regulatory involvement.³¹⁸ The digitisation of information and the rise of recommender technologies have enabled digital media platforms to personalise content distribution, raising new regulatory challenges. These systems often rely on sophisticated—and non-transparent—algorithms designed to maximise user engagement by curating content feeds that are individually tailored and highly appealing.³¹⁹

Content regulation for the aim of protecting children has been under-researched in both academic and policy literature. Although ethical considerations for restricting content, although not necessarily

³¹⁶ Lievens E., *Protecting children in the digital era: The use of alternative regulatory instruments* (Vol. 105) (Brill, 2010).

³¹⁷ Bullinger M., Freedom of expression and information: An essential element of democracy [1985] German YB Int'l L., 28, 88.

³¹⁸ Alkiviadou N., The Internet, Internet Intermediaries and Hate Speech: Freedom of Expression in Decline? [2023] SCRIPTed, 20, 243.

³¹⁹ Eskens et al. (n 311); Goldsmiths A. S., On getting carried away by the TikTok algorithm [2021] AoIR Selected Papers of Internet Research.



the right to freedom of expression, are motivated by the need to protect children,³²⁰ in current policy and law-making, explicit invocation of the ‘child protection’ rationale is relatively rare. Exceptions are in certain cases, such as anti-piracy advocacy, where references to child pornography, or better said child sexual abuse, may be used for purposes beyond genuine child protection or in cases of gambling advertising to children or finally in cases where content can be of extreme harm to children. State intervention can take the form of restricting access to media content for specific groups or altering content before publication, with broader censorship aims at the core of such practices. It is also found in other measures, such as content ratings, AV warning signals, description of warnings, and scheduling (which applies only to linear services, such as traditional use of broadcasting).

In Norway, for instance, online content is protected by freedom of expression laws, even when the material is provocative or offensive; however, this freedom is generally curtailed in cases involving the disclosure of others’ personal information and privacy rights or when the content constitutes hate speech.³²¹ Michel Foucault supports this perspective, arguing that surveillance and child protection serve as effective mechanisms for maintaining social control. The public’s acceptance of restrictions on freedom of expression for the sake of child protection can serve as an indicator of willingness to support such regulation, though the problematic nature of some of these measures, particularly concerning freedom of expression online, has already been documented.³²²

Research suggests that child protection can sometimes be used as a pretext for curtailing freedom of expression, even in countries that strongly emphasise both freedom of speech and children’s participatory rights. Nonetheless, the right of the child to be protected from potentially negative media effects and influences remains a core consideration in regulatory practice.³²³ The European audiovisual media system is characterised by a dual approach that balances universal public service with a market-oriented environment, aiming to defend democratic values and protect vulnerable groups in society.³²⁴ This balance is particularly evident in efforts to reconcile child protection with freedom of expression, though achieving equilibrium between online censorship and free speech

³²⁰ Pastorino A., *Ethical Challenges in European Parliamentary Debates with Regards to Audiovisual Sexual Risks on the Internet* (2020).

³²¹ Staksrud E., Olafsson K., and Milosevic T., ‘Children as crowbar? Justifying censorship on the grounds of child protection’ [2020] 38(2) *Nordic Journal of Human Rights*, 159-173.

³²² Marwick A. E., ‘To catch a predator? The MySpace moral panic’ [2008] 13(6) *First Monday*.

³²³ Livingstone, S., ‘Reframing media effects in terms of children’s rights in the digital age’ in *Children, Adolescents, and Media* (Routledge, 2018), 19-28.

³²⁴ Pastorino (n 320).



remains a significant challenge.³²⁵ Another crucial issue in audiovisual media policy concerns the tension between freedom of expression and censorship, which is often highlighted through comparisons with non-European States. Censorship is generally viewed negatively and contrasted with freedom of expression, a fundamental value of democratic societies. Nonetheless, freedom of expression is inherently linked to responsibility, as it carries the risk of disseminating anti-democratic or immoral information.

Debates often frame limits to freedom of expression in terms of human rights, while simultaneously constructing a dominant narrative of the Internet as a liberal space.³²⁶ Child protection, along with safety and well-being, is frequently cited as a justification for regulatory abstention. Conversely, some abstentions are motivated by the desire to safeguard freedom of expression from excessive control, with critics arguing that overly cautious measures can undermine civil liberties and fundamental rights through pervasive supervision. Ultimately, there is a need to develop rational principles to guide the understanding and application of rights, ensuring that rights are exercised with discernment and responsibility.³²⁷ These regulatory tensions have only been intensified by the advent of digital technologies, which have altered the landscape of audiovisual media and the risks faced by minors. The increasing involvement of minors in the digital sphere has introduced significant and complex legal and social challenges, necessitating a fundamental re-evaluation of systems designed to protect children's rights online. This rethinking must be grounded in a constitutionally informed interpretation of the intersecting rights and freedoms that arise from the evolving relationship between human and technological development.³²⁸

While the digital environment offers young people unprecedented opportunities for learning and knowledge dissemination, it also presents significant risks. Many minors lack the necessary skills to critically assess information sources, evaluate the truthfulness and reliability of online content, or fully comprehend the implications of behaviours they may emulate.³²⁹ This dynamic exposes them not only to harmful or age-inappropriate content but also to the risks associated with the collection and use of their personal data. A further concern relates to the ease with which data relating to minors

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Falch-Eriksen A., 'Professional Child Protection and the Child's Freedom of Expression' in *Professional practice in child protection and the child's right to participate* (Routledge, 2022) 31-46.

³²⁸ Colapietro C. and Iannuzzi A., 'I diritti dei minori nella società digitale tra profili di responsabilità ed esigenze di protezione' [2024] 6(2) *Rivista italiana di informatica e diritto*, 333-337.

³²⁹ Ibid.



can now be acquired, processed and utilised for machine learning and predictive profiling. Such practices expose children to commercial exploitation and potentially to cyberbullying.³³⁰

The proliferation of harmful content across the internet has fuelled various forms of public anxiety and moral panic, particularly regarding children's and youths' exposure to violent and sexual materials.³³¹ Public debate has focused on three main sexual risks facing minors online: child abuse material, grooming and online pornography.³³² These discussions are often framed by the concept of the 'risk society' as theorised by Ulrich Beck,³³³ with European media representations tending to prioritise risk, albeit in ways that reflect distinct cultural and historical contexts.³³⁴ The online accessibility of sexual risks such as pornography, child pornography and grooming has become one of the most urgent policy issues in the context of child protection on the internet. Addressing these risks has involved a multi-stakeholder approach, encompassing regulatory, self-regulatory and co-regulatory solutions.³³⁵

Public discourse, often driven by pressure groups, politicians and the media, has increasingly advocated for a protectionist stance towards children's access to online sexual content.³³⁶ The emergence of new devices and social networking platforms has also facilitated the sharing of audiovisual sexual content, including self-produced material such as 'sexting'; the online exchange of sexual content, which has been amplified by the anonymity afforded by digital platforms, distinguishing it from other forms of sexual communication via traditional media.³³⁷ Thus, the digital age has not only heightened the urgency for robust child protection measures in audiovisual media but also broadened the scope of what such protection must entail.

4.4.2 Philosophical-Legal Foundations for Protecting Minors

In an increasingly globalised world, there is a broad academic consensus regarding the fundamental issues necessary to ensure the protection of minors. Historically, the consumption of audiovisual content by children could be regulated through age-based classification and labelling of products

³³⁰ Ibid.

³³¹ Critcher C., Moral panic analysis: Past present and future [2008] 2(4) Sociology Compass, 1127-1144.

³³² McKee A., Albury K., and Lumby C., *The porn report* (Melbourne University Press, 2008).

³³³ Ulrich Beck, 1992.

³³⁴ McKee et al. (n 332).

³³⁵ O'Neill B., Staksrud E., and McLaughlin S., *Towards a better internet for children: policy pillars, players and paradoxes* (Nordicom, University of Gothenburg, 2013).

³³⁶ Pastorino (n 320).

³³⁷ Subrahmanyam K. and Smahel D., *Digital youth: The role of media in development* (New York: Springer, 2011).



consumed outside the electronic context. However, the proliferation of online access to audiovisual content now requires a rethinking of how such classifications function and what information they provide.³³⁸

The protection of minors within mass communication has long been a central concern for parents, educators and public authorities.³³⁹ Since the advent of audiovisual media, defending minors as ‘vulnerable citizens’ has become a point of consensus in society, around which both public and private resources are mobilised.³⁴⁰ A significant aspect of this protection involves the regulation of media products and the restriction of children’s exposure to content deemed harmful, which remains a cornerstone of legal systems addressing minors in audiovisual contexts.³⁴¹ Children’s indiscriminate use of various devices to access content highlights the need to expand the scope of child protection. This expansion calls for mutual collaboration among regulators, distributors, VoD services, consumers and parents’ organisations, aiming to enhance cooperation and shared understanding in safeguarding minors online.³⁴² A major issue that emerges in this context is the development of children’s skills. There is an assumption that increasing children’s digital, structural and strategic competencies will reduce their vulnerability to online risks such as cyberbullying, grooming or invasion of privacy. However, research by Sonck and de Haan indicates that acquiring these skills does not always guarantee protection from such risks.³⁴³

It is evident that new technologies, mobile devices and the internet have transformed not only the ways in which content is produced and consumed but also how individuals participate in cultural activities and interact socially. A critical question is what tools can be employed to provide effective media education for children, ensuring their protection in the digital environment. Labio-Bernal *et al.*,³⁴⁴ argue that media literacy must be a shared responsibility among parents, educational

³³⁸ Labio-Bernal A., Romero-Domínguez L. R., and García-Orta M. J., Protection of minors in the European digital audiovisual context: a necessary dialogue between parents, academy, regulators and industry [2020] (37) *Comunicação e sociedade*, 127-146; Nogales-Bocio A. I., Huaiquian-Billeke C., and Véliz-Burgos A., Child Protection, Identity Construction and Media. The Regulation of Audiovisual Content for Minors in Spain [2020] *Journal of Educational Psychology-Propósitos y Representaciones*, 8.

³³⁹ Perales A., ‘Informar para proteger: la calificación por edades de los contenidos audiovisuales en España’ in *Regulación y control sobre contenidos audiovisuales en España* (Thomson Reuters Aranzadi, 2020), 257-276.

³⁴⁰ Ibid.

³⁴¹ Nogales-Bocio et al. (n 338).

³⁴² Ibid.

³⁴³ Sonck N. and de Haan J., Safety by literacy? Rethinking the role of digital skills in improving online safety in *Minding minors wandering the Web: Regulating online child safety* (The Hague: TMC Asser Press, 2014), 89-104.

³⁴⁴ Labio-Bernal et al. (n 338).



institutions, regulatory bodies and content providers. Content providers, in particular, cannot evade their responsibility to protect vulnerable groups, including children, who are digital natives. At the same time, regulators must set limits that neither replace parental control nor place excessive burdens on content providers.³⁴⁵ Balancing the interests of underage viewers with the freedom of expression of content providers both in programming and commercial speech requires careful consideration of the special status of minors in society, as well as the role that audiovisual content plays in the upbringing and development of future citizens.³⁴⁶ As the likelihood of harmful effects is generally easier to establish than their particularly grave character, maintaining a functional television landscape is best achieved through a range of balancing mechanisms. If applied correctly, these mechanisms can make it sufficiently unlikely that minors will be exposed to inappropriate programmes. Given the significant role of internet-enabled devices in delivering both linear and non-linear services, the effectiveness of these protections will depend largely on the interplay between national policy and parental efforts to ensure a safe audiovisual environment for minors.³⁴⁷ Given the diverse means by which minors now access audiovisual content, there is a clear need for a global and comprehensive approach to child protection.

4.4.3 Media Impact on Minors: Identity Construction and Social Perceptions

The audiovisual media environment engages multiple dimensions of experience; visual, auditory, sensory, symbolic, aesthetic, emotional and rational, creating what Orozco describes as ‘a cognitive-affective-significant process.’³⁴⁸ This process is not only multimediated by other sources, but it is also distinct in its interaction with television, shaped by its medium, institutional context, technical features and language. Media, particularly television and other audiovisual content, play a significant role in fostering what Orozco terms ‘precarious or momentary identities, or “fashionable” identities.’³⁴⁹ These identities are constructed and given meaning through media exposure, reflecting the shifting and sometimes unstable nature of audience self-perception.

³⁴⁵ Ibid.

³⁴⁶ Füg O. C., Save the children: The protection of minors in the information society and the audiovisual media services directive [2008] 31 Journal of Consumer Policy, 45-61

³⁴⁷ Ibid.

³⁴⁸ Orozco Gómez G. *Televisión, audiencias y educación* (Buenos Aires: Norma, 2001), 47.

³⁴⁹ Ibid, 46.



Childhood, as Igartua Perosanz notes, is a period of heightened cognitive and affective flexibility, during which many of the attitudinal and behavioural patterns that shape society are established.³⁵⁰ The process of identity construction in childhood involves multiple agents of socialisation, with the media standing out as a particularly influential force. Television mediation strategies, such as the establishment of rules to restrict certain content, are often employed to mitigate antisocial effects, especially those linked to violence.³⁵¹ The consumption of harmful or prejudicial content can lead to imitation of negative behaviours, but it can also have broader effects, such as influencing the imagination of younger audiences or shaping their emotional development. Such exposure may ultimately alter attitudes and model values.³⁵² The narratives present in children's programming are especially influential, as the characters and stories depicted affect how children perceive reality and model their own behaviour.³⁵³ Media thus provide discursive resources that can be used to 'create truths'³⁵⁴, which become embedded in the child's identity and worldview. In children's audiovisual productions, the boundary between reality and fiction is deliberately blurred. A key issue in child psychology is that protagonists are often situated in everyday contexts but drawn into extraordinary adventures or dramatic situations. Specialists differ in their assessment of the media's role in youth identity construction. Some adopt a radical view, attributing to the media a symbolic power that can substitute for real-life experiences. Others, however, take a more measured stance, recognising the media's importance but viewing its influence as complementary to actual experiences.³⁵⁵

4.4.4 European Union Integration and Regulatory Approach

Children devote a significant amount of time to consuming diverse types of audiovisual media content on different devices.³⁵⁶ They navigate through multiple channels, including television broadcasts, video-on-demand services and the internet to access their favourite programmes, series, films and short videos. Given the acknowledgment in media effect studies that early exposure to

³⁵⁰ Igartua Perosanz J. J., *La infancia construida: efectos prosociales y antisociales de los contenidos televisivos* [2008] 6 Doca Comunicación, 179-206.

³⁵¹ Nogales-Bocio et al. (n 338).

³⁵² García J. J. M., 'Criterios de clasificación de contenidos audiovisuales para la protección de los menores. Análisis comparativo de la normativa de España, Francia, Reino Unido, Estados Unidos y Holanda' in *Infancia y televisión: políticas de protección de los menores ante los contenidos audiovisuales* (Fragua, 2009), 160-212.

³⁵³ Núñez T. and Loscertales F., *El cine de animación visto en casa: dibujos animados y TV* [2008] 31(16) Comunicar.

³⁵⁴ Carbonell J., *Educación y medios de comunicación: ¿matrimonio bien avenido?* [2005] 51 *Andalucía educativa*, 24-26.

³⁵⁵ Pindado J., *Los medios de comunicación y la construcción de la identidad adolescente* [2006] 21 *Zer*, 19; Nogales-Bocio et al. (n 338).

³⁵⁶ European Schoolnet, *How to make Europe's digital decade fit for children and young people?* European (2022).



certain other types of content may pose risks to a child's development,³⁵⁷ specific rules regarding publication and distribution such as watersheds, ratings and classifications have been incorporated into media law.³⁵⁸ These rules have been primarily targeted at traditional mass media content, such as television broadcasts and films in cinemas.³⁵⁹

There are few regulatory provisions specifically designed for the protection of children in cinematographic works and overall audiovisual content. These derive from a. The commitment to protect children's rights and b. The intention to regulate content is to protect children from harm. Children's rights are stipulated in global legal instruments to which the EU and European states are signatories.

More specifically, in the revised AVMSD, the newly introduced Article 6(a) requires Member States to ensure that audiovisual media service (hereinafter 'AVMS') providers only make available content that minors will not normally be able to hear or see if it may impair their physical, mental or moral development. To achieve this, protective measures take various forms, such as age verification systems, scheduling broadcasts at appropriate times and requiring clear visual indicators for categorised content. Content deemed most harmful to minors should be subject to the strictest measures.³⁶⁰ The effective implementation of Article 6(a) favours a co-regulatory approach, supported by the exchange of best practices on co-regulatory codes of conduct and the potential development of Union-wide codes. However, the 2019 report of the European Regulators Group for Audiovisual Media Services (hereinafter 'ERGA') notes that the protection of minors generally relies on self- and co-regulation, provided these are not used as stand-alone solutions.³⁶¹

Following the presentation of the overall framework, the following examples from specific Member States illustrate how some of these practices are put in place in practice and enforced at the national level. In Germany, for example, there exist various measures to safeguard minors from harmful content, including categorising broadcasts, scheduling content at suitable times and using technical methods to restrict or block access. In their transposition of the AVMSD, some Member

³⁵⁷ O'Neill B., Research for CULT committee: The influence of social media on the development of children and young people [2023] Policy Department for Structural and Cohesion Policies.

³⁵⁸ Lievens E., 'Children's rights and media: imperfect but inspirational' in E. Brems, E. Desmet, and W. Vandenhoe (eds), *Children's rights law in the global human rights landscape isolation, inspiration, integration?* (Routledge, 2017), 231-250.

³⁵⁹ Verdoodt V., Lievens E., and Chatzinikolaou A., The EU Approach to Safeguard Children's Rights on Video-Sharing Platforms: Jigsaw or Maze? [2023] 11(4) Media and Communication, 151-163.

³⁶⁰ EU Parliament & Council of the European Union, 2018, 83.

³⁶¹ ERGA, 2020, 5.



States, including Austria and Denmark, specifically emphasise age verification tools in national legislation. Other measures include prohibiting the broadcast of harmful content during certain hours unless accompanied by warnings or visual signs.³⁶² Different age categories are assigned specific broadcast times, with ratings displayed as pictograms or other visual identifiers. Providers of public computer networks must also ensure the use of filtering tools to block harmful content. Several Member States have introduced specific legislation to regulate the types of content. For instance, advertising for games of chance must be preceded by acoustic warnings or identified by visual symbols during their entire duration. Croatia prohibits content judged to be severely damaging to minors altogether.³⁶³ Moreover, age rating of programmes is a widely adopted measure by many Member States when transposing Article 6(a) of the AVMSD. Media service providers are responsible for classifying programmes, assigning age ratings for various minor age groups and issuing general warnings regarding harmful content. Such warnings may be given orally before a programme or displayed during part or the entire broadcast. The principle of ‘harm’ here relates to the impairment of the social and psychological development of minors. This encompasses violent, sexual or anxiety-inducing content, including realistic and detailed depictions of violence or pornographic images, from which children and young people must be protected³⁶⁴.

Considering the changing consumption of audiovisual content by children, Article 17 of the United Nations Convention on the Rights of the Child³⁶⁵ of 1989 (hereinafter ‘UNCRC’) requires states to take these developments into account and adopt tailored measures that specifically address the challenges related to harmful content on media.

The increasing implementation of artificial intelligence (hereinafter ‘AI’) in applications influences children’s development through learning and play, but poses relevant risks that may violate children’s rights,³⁶⁶ such as the extensive data collection to provide personalised content, which raises privacy concerns. To safeguard children from emerging risks, specific policies have been introduced by governmental and non-governmental institutions. Starting with the Convention

³⁶² Wukovits N. A., *Transposition of the 2018 Audiovisual Media Services Directive: Implementation in action: In-depth analysis* (Directorate-General for Parliamentary Research Services, 2022).

³⁶³ Ibid

³⁶⁴ Ibid.

³⁶⁵ United Nations, *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (p. 3).

³⁶⁶ Charisi V., Chaudron S., Di Gioia R., Vuorikari R., Escobar-Planas M., Sanchez I., Gomez E., *Artificial Intelligence and the Rights of the Child: Towards an Integrated Agenda for Research and Policy*, (Publications Office of the European Union, 2022), 7.



on the Rights of the Child (UNCRC), in March 2021 was introduced the UN CRC General Comment 25, providing guidelines regarding children's rights and how they are applied within the complexities of digital environments, elaborating on four general principles: 'Non-discrimination; Best interest of the child; Right to life survival and development; and Respect for the views of the child.'³⁶⁷ Highlighting State parties' responsibility to ensure that digital use, and all its aspects, such as design, regulation, and management, serve to protect children's well-being. Additionally, the European Union has adopted Regulation (EU) 2024/1689³⁶⁸ (hereinafter 'AI Act') in July 2024, where Article 29 prohibits any AI that exploits vulnerabilities due to age, among other factors.³⁶⁹

Moreover, initiatives related to AI and child rights were conducted by many institutions such as UNICEF, UNESCO and the CoE. The UNICEF conducted a global project, involving experts and 245 adolescents from Brazil, Chile, South Africa, Sweden and the United States. The project's objective was to examine children and their rights and how they are influenced by AI-based systems.³⁷⁰ The UNESCO published recommendations of the ethics of AI³⁷¹ and a report about AI and education, presenting the ways in which AI can be used to enhance education management, learning and assessment processes and facilitate teaching.³⁷² The CoE³⁷³ published a report, titled 'Declaration on Youth Participation in AI Governance', exploring the role of stakeholders to safeguard children from challenges related to AI in order to provide a secure framework for young people's participation.

Traditionally, the allocation of responsibilities to audiovisual media service providers relied on the criterion of 'editorial responsibility'. Rather than having editorial responsibility, complete control over the content they produce and distribute, like traditional broadcasters and media publishers, digital platforms determine the organisation of the stored content, including by automated means, such as displaying, tagging and sequencing videos.³⁷⁴ The case of online video-sharing platforms

³⁶⁷ UN Convention on the Rights of the Child (n 365), 2021, para.3.

³⁶⁸ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2019] OJ L 2024/1689.

³⁶⁹ European Parliament & Council of the European Union (n 360).

³⁷⁰ UNICEF, 2021

³⁷¹ Ibid

³⁷² Miao F., Holmes W., Huang R., and Zhang H., AI and Education (UNESCO, 2021).

³⁷³ Council of Europe, 2020.

³⁷⁴ Verdoodt et al. (n 359).



(hereinafter ‘VSPs’) that collect and process personal data will be classed as a data controller under Regulation (EU) 2016/679³⁷⁵ (hereinafter ‘General Data Protection Regulation’ or ‘GDPR’). This entails numerous obligations, ranging from respecting the general data protection principles (such as fairness, lawfulness, transparency, purpose limitation, and data minimisation), to allowing data subjects to exercise certain rights, to demonstrating accountability through taking technical and organisational measures throughout processing activities.³⁷⁶ The recent shifts in audiovisual consumption from television to on-demand services to VSPs have gradually been accompanied by regulatory adjustments in the EU. The EU legislator’s approach has shifted from primarily relying on self-regulation to introducing a legal framework that sets out a range of obligations for VSPs.³⁷⁷

Understanding and regulating the current landscape of the audiovisual sector is especially challenging given its dual role in EU policy as both a promoter of the public good and a driver of industry interests.³⁷⁸ This balancing act has gained new complexity in the wake of the COVID-19 pandemic, which exposed the fragility of European cultural and audiovisual sectors, particularly regarding online production and distribution.³⁷⁹ In response, the EU has intensified its strategic efforts to support and regulate these sectors.³⁸⁰

Despite a comprehensive regulatory framework, significant gaps remain in the practical implementation of child protection rules. Analysing the degree of compliance with advertising regulation related to content created by or aimed at underage people on YouTube, Pastor *et al.* found that, although there are numerous regulations concerning children’s personal data protection and safeguards against commercial content, it is still uncommon for content creators on platforms like YouTube to disclose when content is commercial in nature.³⁸¹ This highlights a persistent policy

³⁷⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 199/1.

³⁷⁶ O’Neill (n 357).

³⁷⁷ Lievens E., ‘Is self-regulation failing children and young people? Assessing the use of alternative regulatory instruments in the area of social networks’ in S. Simpson, M. Puppis, and H. van den Bulck (eds), *European media policy for the twenty-first century: Assessing the past, setting agendas for the future* (Routledge, 2016), 77-94.

³⁷⁸ Primorac J., Bilić P., and Uzelac, A., Platformisation of cultural and audio-visual sectors in the European Union: New policies for new stakeholders [2022] 13(26) *Medijske studije*, 2-9.

³⁷⁹ *Ibid.*

³⁸⁰ Evens T. and Donders K., Platform power and policy in transforming television markets [2018] 44(3) *Communications*, 355-357.

³⁸¹ Pastor E. M., Presuel R. C., and Maíllo I. S., Minors as content creators: a study of the effectiveness of advertising regulation in the United States, the United Kingdom and Spain [2022] 13(26) *Media Studies*, 48-69.



implementation gap, not only within the EU but globally. The tension between the European Parliament and the Commission further illustrates the complexities of harmonisation. While the Parliament often emphasises cultural and public interest, the Commission's policy is largely driven by economic objectives.³⁸² The increasing convergence of broadcasting and telecommunications complicates the legislative landscape, making it difficult to consider broadcasting as a self-contained regulatory area.

4.4.5 Critical Perspectives on Censorship, Freedom of Expression and Child Protection

While safeguarding minors is a central aim of EU policy, it has been argued that the current enforcement framework is inadequate.³⁸³ These shortcomings highlight the ongoing difficulty in ensuring effective protection for vulnerable users, such as children, on digital platforms. Across the EU, the requirements for obtaining valid consent from minors are not standardised, as this area is left to the discretion of individual Member States. The sheer number of relevant regulations and enforcement bodies has resulted in diminished enforcement effectiveness. The proliferation of sector-specific rules and corresponding authorities increases complexity, particularly when cross-border cooperation is required, given the considerable procedural differences between national enforcement agencies.³⁸⁴

The multitude of rules, organisations and enforcement processes contributes to the limited effectiveness of EU law, without fully accounting for the different interests at stake and the inherent risks of regulatory capture. These factors are seen as contributing to the underenforcement of EU law within the Digital Single Market.³⁸⁵ Firstly, there is a lack of consistency regarding the applicable rules and the definition of who qualifies as a minor under EU law. Secondly, the tools provided by the EU Regulation on Consumer Protection Co-operation (hereinafter 'CPC Regulation') are not always utilised to their full potential. Thirdly, overlapping areas of application and enforcement responsibilities make it challenging to identify the appropriate authorities to act when problems arise.

³⁸² Mitchell, 1998; Calligaro O. and Vlassis A., La politique européenne de la culture [2017] 56(2) *Politique européenne*, 8-28.

³⁸³ Cantero Gamito M., Do too many cooks spoil the broth? How EU law underenforcement allows TikTok's violations of minors' rights [2023] *Journal of Consumer Policy*, 281–305.

³⁸⁴ de Hert P. and Hajduk P., EU cross-regime enforcement, redundancy and interdependence. Addressing overlap of enforcement structures in the digital sphere after Meta [2024] *Technology and Regulation*, 291-308.

³⁸⁵ Cantero Gamito (n 383); de Hert & Hajduk (n 384).



Until new legislation is fully implemented, both the GDPR and EU consumer law offer specific rights and mechanisms intended to protect minors and children. However, both frameworks fail to clearly define who is considered a minor or when childhood officially ends.³⁸⁶ Article 8 of the GDPR sets out particular requirements for obtaining a child's consent in relation to information society services, specifying that data processing is lawful only if the child is at least 16 years old. This age threshold has attracted criticism regarding the practicalities of implementation and interpretation,³⁸⁷ illustrating that neither the GDPR nor EU law more broadly provides clear guidance on the definition of a minor.

Furthermore, data protection standards have often been integrated into lengthy, complex contractual and privacy policies, which can facilitate the collection and storage of large volumes of data without users being fully informed about the purposes for which their data are collected.³⁸⁸ This situation raises important questions about the enforcement of specific safeguards for minors under EU consumer, data protection and audiovisual media services law. There is also the risk that child protection arguments may be employed by politicians and policy-makers to serve ulterior motives.³⁸⁹ It is, therefore, important to consider the ways in which the public's valuation of freedom of expression compares to the perceived necessity of protecting vulnerable groups. The extent to which governments can use child protection as a justification for restricting freedom of expression and information depends on the public's willingness to sacrifice individual freedoms for the sake of protecting the vulnerable.³⁹⁰ The evidence suggests that if political actors have non transparent or autocratic agendas in promoting certain legislation, invoking child protection as a rationale or 'crowbar' may prove to be an effective strategy.

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The multi-level mapping of the legal norms concerning the protection of minors is attached as **Annex no. 8**.

³⁸⁶ Cantero Gamito (n 383).

³⁸⁷ Donovan S., 'Sharenting': The forgotten children of the GDPR [2020] 4(1) *Peace Human Rights Governance*, 35–59; Macenaite M. and Kosta E. Consent for processing children's personal data in the EU: Following in US footsteps? [2017] 26(2) *Information & Communications Technology Law*, 146–197.

³⁸⁸ Roth S. M., Data snatchers: Analyzing TikTok's collection of children's data and its compliance with modern data privacy regulations [2021] 22(1) *Journal of High Technology Law*, 1–51.

³⁸⁹ Staksrud et al. (n 321).

³⁹⁰ *Ibid*.



5 POLICY RECOMMENDATIONS

Based on the analyses provided above, the REBOOT Consortium delivers a set of policy recommendations addressed to the EU and national policymakers and legislators, as follows:

Recommendations to EU Policymakers and Legislators

1. Harmonisation of the concept of ‘authorship’ for audiovisual/cinematographic works across the EU.

Legislative interventions at the EU level to harmonise the authorship of audiovisual/cinematographic works would establish a common perception of authorship in Europe and enhance legal certainty across Europe. Furthermore, uniformity across Europe concerning the authorship of audiovisual/cinematographic works would facilitate the co-production agreements concluded between European film producers subject to different European copyright regimes while reducing the time and ancillary costs to determine the authors, rightsholders, and those entitled to exercise the economic and moral rights vested in the work in different EU Member States, as well as to tackle the contractual practices for the transfer of exploitation rights.

2. Harmonisation of the presumption of authorship of audiovisual/cinematographic works across the EU.

The EU legislator’s endeavours to further advance the IPRED’s initiative in this field and to uniform the presumption of authorship of audiovisual/cinematographic content would introduce certain advantages different from those initially envisioned by the IPRED. Whereas the IPRED is addressed to ease the exercise of the IPRs by the rightsholders of copyright-protected works, this new legislative intervention would facilitate the CCIs, market actors and the public’s creative engagement with such works. Indeed, such a uniform presumption would, on the one hand, help identify the authors of a European audiovisual/cinematographic work, whilst eliminating the complications imposed by joint-authorship. On the other hand, it would facilitate meeting specific requirements set by the E&Ls to copyright and related rights, such as indicating the names of the authors of European audiovisual/cinematographic works.



3. Introduction of incentives and financial support to national voluntary databases compiling information on the authors and rightsholders of audiovisual/cinematographic works.

Inspired by and building upon the legal scholarship developed by copyright scholars, Francisco Blázquez and Stef van Gompel, to address the legal hurdles stemming from the hardship in obtaining licenses for the reuse of copyright-protected works, it is suggested that the establishment of online and easily accessible voluntary databases compiling information on the authors and rightsholders of audiovisual/cinematographic works would be of significant help to film producers who wish to use or adapt copyright-protected works (e.g., books, scripts, music, images, photographs) to create new content. In this regard, an initiative at the EU level to map the ongoing practices at the national level would be essential. Subsequently, building frameworks to enhance expertise and skills to establish and maintain such databases, as well as allocating financial incentives and a budget to operationalise these initiatives, are worthy of consideration by the EU policymaker.

4. Conceptualisation of ‘audiovisual works’ and ‘cinematographic works’ at the EU level.

‘Audiovisual works’ and ‘cinematographic works’ are key concepts for the European AV sector and the EFI. To enhance legal clarity and accessibility of the legal terminology and regulations crucial for the European AV sector and the EFI, these concepts could be defined at the Union level, also by eliminating the discrepancies in the national copyright regimes of the EU Member States. Such a harmonisation endeavour would also benefit the co-production agreements to be concluded between film producers subject to different European copyright regimes.

5. Streamlining the concepts of ‘audiovisual works’ and ‘cinematographic works’ in line with the CoE legal framework.

The legal mapping of the international, regional and supranational legal frameworks reveals that the network of legal instruments that inform and govern the operation of the European AV sector and the EFI uses several key terms, without necessarily streamlining the meanings attributed to these terms across these different corpora of laws.



Whereas the EU copyright *acquis* lacks clear-cut definitions of audiovisual and cinematographic works, it provides a definition for the concept of ‘film’. Furthermore, audiovisual works and cinematographic works, aside from being key to the legal regulations concerning the operations of the European AV sector and the EFI, are often used interchangeably within the EU legal framework.

The CoE legal framework, on the other hand, relies on a set of concepts that partially overlap with those of the EU legal framework. The CoE legal framework acknowledges audiovisual works as an umbrella concept encompassing cinematographic works and films. Besides, the CoE framework uses concepts such as ‘television films’ and ‘moving image materials’.

Once considered that the vast majority of the EU Member States are also members of the CoE or the signatory parties of the key CoE legislation encompassed herein, clarification of the terminology in use within the EU framework, in alignment with or by reference to the CoE terminology, would enhance legal clarity across Europe.

6. Reconsideration of harmonising the moral rights of authors, including the authors of audiovisual/cinematographic works across the EU.

The European AV sector and the EFI would significantly benefit from the EU legislator’s intervention in harmonising authors’ moral rights. In the absence of an EU-wide regulation, the regulation of authors’ moral rights differs from one country to another, hence causing legal uncertainty across Europe. A cross-national analysis of the copyright regimes of the selected EU Member States reveals that there is legal fragmentation across Europe in the determination of the nature (i.e., waivable v. unwaivable), beneficiaries (i.e. natural and legal persons, heirs, assignees), and scope of moral rights. Besides, in the Member States where moral rights can be waived, the conditions for such practice vary, and the formulation of such conditions might use uncertain terminology, such as ‘fair practices’. Last but not least, several EU Member States provide moral rights tailored to the authors of audiovisual/cinematographic works. Therefore, harmonisation of these rights would benefit not only the authors of audiovisual/cinematographic works, by having a better insight into their rights in different States, but also the film producers who wish to use copyright-protected



works to produce original content or distributors who might need to modify certain aspects of the work for exploitation purposes.

7. Redefinition of screen and catalogue quotas to enhance access to and discoverability of European works based on the evidence to be collected from the stakeholders.

The screen and catalogue quotas envisioned by the AVMSD are deemed by the European AV sector and the EFI as essential tools to enable and ensure access to and discoverability of European audiovisual/cinematographic works. Nevertheless, the broad conceptualisation of ‘European works’, which does not necessarily differentiate national European works from non-national European works, as well as the opacity of the concept of the ‘prominence of European works’, hinders the efficacy of these tools. Furthermore, an overview of the selected EU Member States’ strategies in implementing the relevant provisions of the AVMSD showcases significant differentiations in setting the transmission time and catalogue percentages, with minimum indicators on the ways in which to realise the ‘prominence of European works’ in the television broadcast programmes and on-demand platforms’ catalogues. Therefore, the European AV sector and the EFI could benefit from an evidence-based reconsideration of the screen and catalogue quotas, which would reflect on their past experiences of the industry and respond to their future expectations.

Recommendations for National Policymakers and Legislators

1. Reconsideration of harmonising the related rights granted to the producers of first fixations of films.

The legal mapping conducted over a sample of EU Member States reveals that, whereas the economic rights vested in copyright are significantly harmonised across Europe, the related rights of the producers of the first fixations of films could benefit from further harmonisation efforts at the national level.

2. Reconsideration of the (further) harmonisation of the E&Ls that are essential for the European AV sector and the EFI at the national level.

The European copyright *acquis* consists of a multitude of E&L to copyright and related rights that would facilitate the production of new audiovisual/cinematographic works and the



preservation of Europe's cinematographic heritage while reducing the time and costs required for seeking authorisation from the authors and/or rightsholders of legally protected content. Whereas the cross-national and comparative analysis conducted herein is limited to a sample of EU Member States, the results of such an analysis showcase that the E&Ls for ephemeral recording, incidental inclusion, quotation, freedom of panorama, caricature, parody and pastiche, and the preservation of cultural heritage have been implemented differently across Europe. Such a fragmentation across the European legal landscape not only risks legal certainty but also paves the way for film producers' scepticism toward the legal tools inherent in the EU and national copyright regimes, especially in the case of multi-national productions. Therefore, the European AV sector and the EFI would drastically benefit from a harmonious European copyright regime, particularly a harmonious system of E&Ls to copyright and related rights.

Additionally, the exception introduced by the Greek legislator, within Article 23 of the Greek Copyright Act, to the authors' and/or rightsholders' exclusive reproduction right to ensure the preservation of cinematographic work with a significant cultural value can constitute a blueprint for other national E&L to film producers' and other co-authors' copyright.

3. Introduction of incentives and financial support to national initiatives and databases listing the works that have fallen into the public domain.

Establishing a pan-European public domain through a horizontal regulatory intervention might be a challenging task, given that such an endeavour shall be complemented by an ambitious copyright reform that unifies the originality criterion for copyright protection, term of protection, works and other subject-matter allocated to the public domain. Nevertheless, allocating the financial sources available to national authorities to establish databases, strictly of an administrative nature, would facilitate identifying and tracking the legal status of works and other subject-matter by film producers, particularly documentary filmmakers.

4. Strengthening legal enforcement over online sharing platforms.

It is essential to secure a European legislative framework that extends its scope from the current primary reliance on self-regulation to one that enables the proper enforcement and implementation of adopted regulations across the EU Member States via concrete measures,



such as the setting out of a range of obligations for online sharing platforms aimed at ensuring the accountability of the said providers and the protection of minors. These comprise transparent mechanisms for monitoring regulation implementation and providing corresponding sanctions and coercive measures for non-compliance with the regulations in force.

5. Reinforcement of AI literacy amongst youth/minors.

Children could be equipped with critical and technical skills, which enable them to develop the ability to identify deceitful AI-generated content and protect their right to privacy, while navigating an AI-driven media landscape. Although media literacy has been incorporated into compulsory education, it does not sufficiently strengthen students' competencies to meet real-world challenges, especially given the rapid technological developments and the implementation of AI. Therefore, an up-to-date media literacy, which includes AI literacy skills, needs to be implemented in compulsory education in an age-appropriate way.



6 CONCLUSION

This report, D3.3 - Policy Recommendations, presents the scientific findings of a comprehensive qualitative analysis carried out within the REBOOT project, specifically its WP3, from February 2022 to August 2025. Aligned with the overarching aims and objectives of the REBOOT project and WP3, the report critically examined EU and national policies and legal instruments governing activities across various stages of the filmmaking lifecycle, including the distribution and preservation of audiovisual and cinematographic works, to gain insight into policy and legal aspects affecting the competitiveness of the EFI within the EU's Single Market.

The report offered a comprehensive and systematic mapping and analysis of EU policy documents and legislation related to the EFI and its operations, complemented by mapping the relevant legal norms inherent in the legal instruments administered by UNESCO, WIPO, WTO, and the CoE. Building on this theoretical foundation, the report engaged in a multi-level and comparative analysis to assess the level of harmonisation and/or fragmentation within the regulatory landscape in which the EFI operates. To address the challenges posed by such legal fragmentation, it provided a series of policy recommendations for EU and national policymakers to close gaps or resolve legal fragmentation that necessitates intervention by the EU and its Member States.



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