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Cross-border Copyfight

European libraries re-thinking the InfoSoc Directive

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Abstract
This master's thesis focuses on the argumentation of library organisations and European national libraries in their contributions to the European Commission's public consultation on the review of the EU copyright rules. This study aims to explain how the debate around copyright limitations and exceptions is constructed in library stakeholders' contributions. The construction is explained through argumentation analysis and a theoretical framework of the relations between structural, instrumental, and discursive power.

The main findings are that library stakeholders in general are strongly supportive of a EU copyright reform, arguing that democratic values as well as the EU Single Market would benefit. There are also library stakeholders who argue against legislative change, either suggesting extended collective licences, or arguing that the Member States' sovereignity is more important than a pan-European copyright legislation. Furthermore, many library stakeholders propose either a general ”fair use” exception in EU copyright law, or adding several specific exceptions, e.g. for text and data mining, e-lending, publicly funded research openly available, and that contracts and technical protection measures cannot override limitations and exceptions. National libraries and library organisations from the Central and Eastern European Member States' are more supportive of a copyright reform than their Western European counterparts. They do not mention licences as a possible solution. In general, the library stakeholders agree that the interoperability, exchange and cooperation in activities and projects involving several EU Member States suffers from the current copyright legislation.

Abstract (sv)
I den här masteruppsatsen utreds argumentationen som används av biblioteksorganisationer och europeiska nationalbibliotek i deras svar på Europeiska kommissionens samråd rörande en granskning av EU:s upphovsrätt. Studien ämnar besvara frågan om hur debatten kring inskränkningar och undantag i upphovsrätten konstrueras i biblioteksintressenternas samrådssvar. För att besvara denna fråga används argumentationsanalys, samt ett teoretiskt ramverk bestående av relationerna mellan strukturell, instrumentell och diskursiv makt.

Resultatet av analysen är att biblioteksintressenterna generellt sett stöttar en reform av EU:s upphovsrätt, med argumenten att både demokratiska värden och EU:s inre marknad gagnas av detta. Andra biblioteksintressenter argumenterar mot en upphovsrättsreform och föreslår i stället kollektiva avtalslicenslösningar, eller så argumenterar de att medlemsländernas suveränitet är viktigare än en sameuropeisk lagstiftning. Dessutom föreslår många biblioteksintressenter antingen ett allmänt ”fair use”-undantag i EU:s upphovsrätt, eller att flera specifika undantag ska läggas till, t.ex. för text- och data-mining, e-bokslån, offentligt finansierad forskning ska publiceras öppet, och att kontrakt och tekniska skyddsåtgärder inte kan upphäva inskränkningar och undantag. Nationalbibliotek och biblioteksorganisationer från central- och östeuropeiska medlemsländer stöttar en upphovsrättsreform i större utsträckning än sina västeuropeiska motsvarigheter. De nämner inte alls licenser som en möjlig lösning. Överlag instämmer biblioteksintressenterna i att interoperabilitet, utbyte och samarbete i aktiviteter och projekt som involverar flera medlemsländer lider av upphovsrättens nuvarande skick.

Ämnesord
upphovsrätt, upphovsrätt i eu, bibliotek och upphovsrätt, infosoc-direktivet, bibliotek, informationspolitik, avtalslicenser

Key words
copyright, eu copyright, libraries and copyright, infosoc directive, libraries, information policy, collective rights management

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Abbreviations

BL	British Library
BnF	Bibliothèque nationale de France
CJEU	European Court of Justice
CLM	IFLA's Committee on Copyright and Legal Matters
CMO	Collective Management Organisation
Commission, the	The European Commission
DMCA	Digital Millenium Copyright Act
DRM	Digital Rights Management
EBLIDA	European Bureau of Library, Information and Documentation Associations
EP	European Parliament
EU	European Union
IFLA	International Federation of Library Associations
IP	Intellectual Property
IVIR	Instituut voor Informatierecht (Amsterdam)
KB	Kungliga biblioteket
LERU	League of European Research Universiites
LIBER	Association of European Research Libraries
LIS	Library and information science
MEP	Member of the European Parliament
NGO	Non Governmental Organisation
NSK	Nacionalna i sveučilišna knjižnica u Zagrebu (National and University Library in Zagreb, Croatia)
NUK	Narodna in univerzitetna knjižnica (National and University Library of Slovenia)
STKS	Suomeen Tieteellinen Kirjastoseura (Finnish Research Library Association)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
USA	United States of America
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation

WPPT	WIPO Performances and Phonograms Treaty
FIBEP	Fédération Internationale des Bureaux d'Extraits de Presse
GRUR	Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V.
IFLA	International Federation of Library Associations
IP	Intellectual Property
IVIR	Instituut voor Informatierecht (Amsterdam)
LERU	League of European Research Universiites
LIBER	Association of European Research Libraries
LIS	Library and information science
MEP	Member of the European Parliament
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STKS	Suomeen Tieteellinen Kirjastoseura (Finnish Research Library Association)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
USA	United States of America
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation

Introduction

The making and sharing of information and culture have never before been as easy as it is today – technically. Legally, it is more complicated: copyright, in its various forms, restricts the making and sharing of information and culture in the digital environment.

Tom Pettitt, a folklorist and literature scholar, has introduced an interesting notion of digital authorship, ownership, and collaboration: the Gutenberg Parenthesis, ”a cultural realm where it is felt that cultural products (including stage plays and student essays) should be original, independent, autonomous compositions -- the individual achievement and the individual property of those who create them.”[1] This paradigm is also recognised in the Foucauldian notion of *author*, symbolising a ”privileged moment of individualisation in the history of ideas, knowledge, literature, philosophy, and the science”.[2]

The Gutenberg Parenthesis, in its name, implies that the paradigm is related to the possibility to mass-produce cultural products with help from the printing press, whereas a digital media culture instead provides the possibility of sampling, remixing, borrowing, reshaping, appropriating, and recontextualising, indefinitely. Foucault writes that the function of the author ”does not affect all discourses in the same way at all times and in all types of civilization.”[3]

The notion of cultural products being original and autonomous compositions can be related to copyright, which appears in its first form in the 18th century. As suggested by Pettitt, we might be at the end of the Gutenberg paranthesis, en route to something different, where *author* is re-defined. We might therefore ask ourselves: if the Gutenberg Parenthesis is coming to an end, and is going to be replaced by digital media, what will this mean for copyright? Will printed works and copyright diminish simultaneously, or will copyright transform into something which correlates with today's methods of producing and re-producing cultural works?

These are interesting and complicated issues, far too vast to examine in a master's thesis. However, the principal questions give an echo in the current copyright debate. As a librarian with work experience from Sweden, Finland, and Belgium, I have come to know some of the different library copyright practices in

[1] Pettitt, “Before the Gutenberg Parenthesis: Elizabethan-American Compatibilities.” p. 2
[2] Foucault, “What Is an Author?” p. 205
[3] Foucault, “What Is an Author?” p. 216

effect in different EU Member States. At the same time, libraries (perhaps especially academic libraries) face the same issues: with an international exchange of information happening daily over the internet, both librarians and legislators have a hard time keeping up with and adapting to these circumstances. The information society's impact on copyright is a debate relevant to librarians, especially as a major part of the world's libraries are public institutions with the duty to provide the public with information and culture.

A vast amount of copyright research is naturally done by scholars of law, though interdisciplinary studies of copyright are increasing, e.g. within the fields of economics, anthropology, cultural studies, etc.[4] Copyright has also been studied within the field of archive, library, and museum studies (ALM), for example by Joumana Boustany, Michael Fraser, Magdalena Granholm, and Kevin L. Smith. Since ALM in itself is a interdisciplinary field, these studies range from a cultural historical persceptive on ownership and authorship and the library's societal role, to practical questions such as how libraries work with copyright related issues and how they mediate copyright knowledge to users. Evidence suggests we are in a continuous need of more interdisciplinary research to fully understand copyright, the social importance of which grows together with the information society.

Aim and objectives

Currently we are in the middle of a political process regarding EU copyright legislation: In a public consultation (hereinafter *copyright consultation*) concerning the *Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*[5] (hereinafter the *InfoSoc Directive*), issued by the European Commission (hereinafter *the Commission*), libraries, legislators, and other stakeholders have had the opportunity to *define the problems with current copyright legislation* and to *propose changes to the copyright legislation which could solve these problems*.

A EU directive obliges the Member States to bring their laws into conformity with its requirements by a particular date, but leaves to each Member State's discretion some flexibility in achieving that goal. Article 5 of the InfoSoc Directive lists limitations and exceptions to copyright, i.e. activities users can do without fear of violating copyright.[6] These are especially important to libraries because they regulate e.g. photocopying, lending, and archiving of works in their possession. If none of the limitations and exceptions apply, it is still possible to use a copyrighted

[4] Hemmungs Wirtén, "Litteraturens lag." p. 9-10
[5] The full title of the InfoSoc Directive is *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.*
[6] Harvard Law School, Berkman Center for Law and Society, and eIFL.net, *Copyright for Librarians*. p. 14

work if you have a licence from the copyright holder. Most countries have a compulsory licencing system for specific types of works. This means copyright holders are required to permit certain uses of their works, as long as the user pays a fee set by a government agency or court, and similar collecting administration systems are becoming more common.[7]

A set of questions within the consultation deals with the limitations and exceptions in the InfoSoc Directive: the different implementations in the Member States have an impact on how information can be shared cross-border and therefore this is an interesting detail to investigate closely. The material used in this thesis is a selection of consultation contributions to questions concerning limitations and exceptions in the InfoSoc Directive (mainly questions 21-27 of the copyright consultation).

The aim is to analyse which positions library-related stakeholders[8] present in their consultation contributions regarding limitations and exceptions, and which arguments they use to support this position. By doing this I hope to shed some light how this specific group of stakeholders propose to resolve potential issues with the current limitations and exceptions in EU copyright. In conclusion, the objective of this thesis is to answer this question:

- How is the debate around copyright limitations and exceptions constructed in the library stakeholders' contributions to the copyright consultation?

Background

To make a backdrop for this study I will first define *copyright*, then recount for the historical development of copyright from the 1710 Statute of Anne, to the 2015 EU copyright policy debate, with strong emphasis on the latter.

What is copyright?

Copyright protects original works in the field of literature and the arts – in short, creations of the mind. Performing artists, phonogram and film producers, and broadcasting organisations are protected by so-called related or neighbouring rights. The latter can be seen as copyright in the broader sense, while the first means copyright in the narrow sense. Not all national copyright legislations make a distinction between these two.[9]

Copyright (and intellectual property (IP) conventions in general) is governed by the principle of territoriality: copyright is not universal, but are limited to the

[7] Harvard Law School, Berkman Center for Law and Society, and eIFL.net, *Copyright for Librarians*. p. 15
[8] Mainly national libraries and library organisations.
[9] Kur and Dreier, *European Intellectual Property Law*. p. 241

territory of the state which have granted these rights. The reason is that, in the beginning, only a few number of states granted legal protection for intellectual property, and states with no opinion or who explicitly decided against this option, did not want the foreign IP legislation to be extended to their own territory. Today IP rights, to some extent, are recognised in most states and the national IP legislation is fine-tuned to that state's particular economic, innovative, creative, and consumptive needs, which differ between industrialised, newly industrialised, and developing countries.[10]

According to German law professors Annette Kur and Thomas Dreier, who have written a comprehensive overview of European IP legislation, today's national copyright legislations are quite similar in structure and generally consists of these parts:

- a definition of protected subject-matter;
- the condition for protection;
- rules on first ownership and subsequent transfers of title;
- moral rights and exclusive economic rights as well as limitations and exceptions thereto;
- rules on copyright contracts;
- provisions on the term of protection;
- and remedies against infringement.[11]

A brief history of copyright

The exclusive printing rights or privileges given to printers and publishers by national authorities sprung from a ”governmental concern with the need to control a new means of disseminating information which was at once full of promise and danger do the established order.”[12] At this time the status of the 'author' was small; first of all, most printed books were old or classical text, and secondly, authors received their livelihood from wealthy and aristocratic patrons, rather than through sales. However, a couple of centuries after the introduction of the printing press this changed, and the position of authors was altered. Through an Act of 1709 ('Act of Anne'), the United Kingdom (UK) granted to authors a short period of statutory protection for their works. The proposal came mainly from the London Company of Stationers (i.e. publishers). The first continental country with a similar act seems to have been Denmark, which in 1741 passed an ordinance as a measure to protect the investment made by a person (author or not) in the production of a printed book. The first explicit recognition in Europe of the rights of authors can be found in the French revolutionary laws of 1791 and 1793:

[10] Kur and Dreier, *European Intellectual Property Law*. p. 13
[11] Kur and Dreier, *European Intellectual Property Law*. p. 242
[12] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*. p. 4

> Art. 1. Authors of writings of all kinds, composers of music, painters and designers who make engravings or drawings, shall enjoy during their entire life the exclusive right to sell, prepare for sale, and distribute their works in the territory of the Republic […].[13]

International copyright relations developed during the 19th century due to the increase of unauthorised reproduction and use of foreign works. Ricketson and Ginsburg notes that most countries did not regard this as unfair or immoral; in some countries ”it was considered an honourable practice, contributing to the spread of learning and enlightenment to the local populace.”[14] All the same, several bilateral agreements between European countries were entered into during the 19th century. National measures were also taken: in 1852, France extended their *droit d'auteur* protection to all works published abroad, without any requirement of protection of French works in those countries. The philosophical basis was that author's rights should not be restricted by nationality or geographical boundaries.[15]

The bilateral agreements differed a lot from each other, but there were particular recurring provisions concerning these parts:

- persons protected (e.g. did the author need to be a national of the contracting states, or was it the publication's nationality that mattered?);
- works protected (e.g. the definitions of 'literary, artistic, and scientific works');
- the principle of national treatment (e.g. foreign authors were entitled to the same protection as national authors);
- translation rights;
- restrictions on reproduction rights;
- duration of protection;
- internal policing powers (e.g. the right of states to practice censorship or laws regarding defamation or national security on foreign works published in their country);
- formalities (e.g. German law required that the author's name was indicated at the beginning of the work);
- and general comments.

This list of the regular components in bilateral agreements is similar, but not identical, to the list of components of current EU Member States' copyright (cf. the previous chapter *What is copyright?*).

International copyright

International endeavours to create a cross-border compliant copyright resulted in 1886 in the *Berne convention for the protection of literary and artistic works*

[13] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*. p. 6
[14] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*. p. 19
[15] Ricketson and Ginsburg, *International Copyright and Neighbouring Rights*. p. 22

(hereinafter *the Berne Convention*). Eva Hemmungs Wirtén writes in *Cosmopolitan Copyright* that ”the Berne Convention results from negotiation between legal systems, between copyright and *droit d'auteur*, between civil law and common-law traditions.”[16] In common law countries (e.g. the UK), judicial cases are regarded as the most important source of law, and even though legislation on exceptions in copyright exist, the interpretation of the legislation is up to judges (who will likely abide by precedents set by higher courts). By contrast, in civil law systems (e.g. France), legislation is designed to cover all eventualities and judges have a more limited role of applying the law to the case in hand. These legal traditions, especially the dichotomy of *copyright* and *droit d'auteur*, is still apparent in the discussion on copyright, and in national copyright legislation.

Consistent with Article 17 of the 1886 Berne Convention, periodic revisions of the Berne Convention have occurred in 1896, 1908, 1928, 1948, 1967, and 1971. Post 1971 the contracting parties have not been able to agree upon further changes; needed adjustments has rather been encunciated in separate agreements, such as the WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT), both created in 1996 and ratified in 2002.[17]

The Berne Convention is however still an important document, and is now administered by the World Intellectual Property Organization (WIPO), one of the 17 specialised agencies[18] of the United Nations. Not all of the world's states are members of the Berne union; in March 2015 the total number of contracting parties were 168.[19] Being a contracting party means that the states need to include three criteria in their national copyright legislation: rights holders from other contracting parties shall have the same IP protection as national rights holders, the national legislation needs to provide a certain minimum protection for copyrighted works, and there shall be no formal requirements for the protection to be valid.

Since the EU Member States have signed the Berne Convention, its requirements is the basis of the harmonised EU copyright legislation, and the next section treats copyright from a European Union perspective.

Copyright legislation in Europe

As previously stated, copyright legislation is based on a principle of territoriality and is therefore most often of a national character. The exception is when IP rights

[16] Hemmungs Wirtén, *Cosmopolitan Copyright*. p. 11
[17] Broms, *Biblioteken och juridiken*. p. 88
[18] Autonomous organisations linked to the UN through special agreements. They specialise in different areas, other examples are WHO (World Health Organisation), UNESCO (UN Educational, Scientific and Cultural Organisation), and UPU (Universal Postal Union). For a complete list see “The UN in Brief: The Specialized Agencies.”
[19] “WIPO-Administered Treaties.” http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15. Accessed 2015-03-24.

are created which take effect throughout a particular region, e.g. the EU. Kur and Dreier writes:

> The main reason why copyright […] came into the focus of EU law only at a relatively late stage probably is that due to language barriers and Member States' differing cultural traditions trans-border exploitation of copyrighted works was for a long time not of major economic importance. This, however, changed with the advent both of new subject matter such as computer programs and databases, […] and of new communication technologies such as cable, satellite and, most notably, the internet.[20]

The importance of copyright for the European market can be viewed in the report from *United Nations Conference on trade and development*:[21] based on numbers from 2013, 11 of the leading 15 exporters of royalties and licence fees are EU Member States.[22] The EU has adopted eight copyright directives.[23] However, the EU is still without a community-wide copyright (the directives only state minimum and maximum requirements for IP rights), and each and the same work is protected by different laws in each of the EU Member States.[24] The implementation of the directives in national legislation has not led to a full harmonisation and currently it is the European Court of Justice (CJEU) who contributes most to further harmonisation between the Member States' copyright legislations by interpreting the existing directives. The recent rise in the number of copyright cases referred to the CJEU by national courts is expected to continue in the years to come.[25]

In 2007, the Instituut vor Informatierecht in Amsterdam (IVIR) published a study on the implementation and effect in Member States' legislations of the InfoSoc Directive which concluded that the InfoSoc Directive did not live up to its expected potential.[26] A green paper[27] on *Copyright in the Knowledge Economy* was then published by the Commission (Barroso I) in 2008. The green paper raised

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[20] Kur and Dreier, *European Intellectual Property Law*. p. 243

[21] United Nations Conference on trade and development, *UNCTAD Handbook of Statistics 2014 = Manuel de Statistiques de La CNUCED 2014*. See table 5.2 *Exports and imports of services by service category: Royalties and License Fees*. p. 262-263.

[22] The EU Member States among the 15 leading exporters of developed economies, listed in descending order (% of total national export): The Netherlands (23,5), Germany (6,3), United Kingdom (4,4), France (5,0), Sweden (8,0), Ireland (4,2), Italy (3,5), Finland (12,5), Belgium (3,1), Denmark (3,4), and Spain (0,7).

[23] These are: Computer Programs Directive (2009/24/EC); Rental and Lending Directive (2006/115/EC); Satellite and Cable Directive (93/83/EEC); Term Directive (2006/116/EC); Database Directive (96/6/EC); Resale Right Directive (2001/84/EC); InfoSoc Directive (2001/29/EC); and Collective Management of Copyright Directive (2014/26/EC).

[24] Kur and Dreier, *European Intellectual Property Law*. p. 243

[25] Kur and Dreier, *European Intellectual Property Law*. p. 246

[26] Instituut voor Informatierecht (Amsterdam), European Commission., and Directorate-General for the Internal Market., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certains Aspects of Copyright and Related Rights in the Information Society*.
pp. 165-168.

[27] Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite all interested parties to participate in a consultation process.

questions concerning scientific and scholarly publishing, and the role of libraries and researchers (e.g. ”Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?”[28]), and made statements questioning the legal certainty of the InfoSoc Directive: ”Different treatment of the same act in different Member States may lead to legal uncertainty with regard to what is permitted under the exception, especially when teaching and research are carried out within a transnational framework.”[29]

Although this publication expressed the departing commission's ambitions to review many aspects of the InfoSoc Directive, the next commission (Barroso II) did not follow up on this as expected by the previous commission. In May 2011 the Commission adopted a strategy on IPR, which disregarded the green paper notion that the exceptions in the InfoSoc Directive needed evaluation, and instead suggested ”innovative licensing solutions”.[30] In December 2012 the Commission initiated *Licences for Europe,* a solution which would require no legislative change. However, involved stakeholders from the research sector withdrew in protest from the *Licences for Europe* development process after six months.[31] In December 2013 the Commission issued a public consultation on the review of EU copyright rules in 2013, with the objective to gather input from all stakeholders on the review of the EU copyright rules.

Since the consultation was issued, many things has happened in the process: the copyright consultation was open between 5 December 2013 and 5 March 2014; in February 2014, commissioner Michel Barnier tweeted that we might expect the Commission to present a White Paper[32] before the summer;[33] on April 11 2014 the Commission made part of the responses[34] available; in July 2014 the Commission's report of the responses to the consultation was published; in June 2014 a White Paper draft leaked; and in June 2015 we can expect the European Parliament to vote on a draft report on the implementation of the InfoSoc Directive.[35]

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[28] European Commission, “Green Paper on Copyright in the Knowledge Economy. COM(2008) 466 Final.” p. 12

[29] European Commission, “Green Paper on Copyright in the Knowledge Economy. COM(2008) 466 Final.” p. 17

[30] European Commission, “A Single Market for Intellectual Property Rights. COM(2011) 287 Final.” p. 13

[31] ”Stakeholders representing the research sector, SMEs and open access publishers withdraw from Licences for Europe”. http://libereurope.eu/blog/2013/05/24/stakeholders-representing-the-research-sector-smes-and-open-access-publishers-withdraw-from-licences-for-europe/. Accessed 2015-04-01.

[32] White Papers are documents published by the European Commission if it believes a new policy is needed, explaining what it thinks this policy should be. In some cases White Papers follow a Green Paper.

[33] ”Michel Barnier on Twitter: ’#Droit d’ #auteur: Commission présentera LivreBlanc avant l’été. Identifier solutions sur base de problèmes là où il y en a, s’il y en a.’” https://twitter.com/MichelBarnier/status/430618637121359872. Accessed 2015-04-02.

[34] Responses from those who asked to remain anonymous were not published.

[35] Reda, ”Draft Report (2014/2256(INI))”. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-546.580+02+DOC+PDF+V0//EN. Accessed 2015-

Limitations and exceptions

Limitations and exceptions to exclusive rights play a greater role in copyright legislation than in any other IP legislation.[36] They enable the use of works (and other subject-matter), without obtaining authorisation from the rightholders, for certain purposes and to a certain extent. The terms *limitations* and *exceptions* are used differently (or not at all) in the Berne Convention, the Rome Convention[37], TRIPS, WCT, WPPT. Therefore, the only certain statement we can make regarding limitations and exceptions is that they cover ”all kinds of free uses, *non-voluntary licences*, as well as other possible limitations (such as subjecting the right to *obligatory collective management*).”[38] To determine whether or not an exception or a limitation is permissible under the international norms on copyright and related rights the *three-step test* is applied. The original provision of the three-step test is in the Berne Convention and aims to make sure that the exception or limitation

> (i) may only cover certain special cases; (ii) must not conflict with a normal exploitation of the works or objects of related rights (in fact, the rights in works and objects of related rights); and (iii) must not unreasonably prejudice the legitimate interests of the rights of owners of rights.[39]

These three steps are repeated in the almost exact same wording in the InfoSoc Directive Article 5(5):

> The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.[40]

Examples of exceptions to the rights of copyright holders are the 'fair use' doctrine in the US copyright legislation, and fair dealing in common law countries (e.g. the UK, Canada, South Africa). The civil law countries' (a majority of the world's countries, e.g. continental Europe) solution to the fair use exception is a number of specific limitations and exceptions (i.e. expressed in the actual legislation).

Of the eight European copyright directives, limitations and exceptions are listed in the following:

Database Directive (96/6/EC)	Art. 6. 1-3.
Computer Programs Directive (2009/24/EC)	Art. 5 1-3.

04-02.

[36] Kur and Dreier, *European Intellectual Property Law*. p. 243

[37] *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* from 1961. Accepted by BIRPI (*Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle*), a predecessor of WIPO.

[38] World Intellectual Property Organization, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*. p. 287

[39] World Intellectual Property Organization, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*. p. 313

[40] “InfoSoc Directive (2001/29/EC).” Article 5(5)

Rental and Lending Directive (2006/115/EC)	Art. 10 1-3.
InfoSoc Directive (2001/29/EC)	Art. 5 1-5.

The limitations and exceptions in the EU copyright directives are drawn up in respect to international law[41] and while they are exhaustive (no other exceptions can be added to legislation by EU Member States), they are often optional,[42] which means Member States are free to reflect as many or few of them in their national legislation as they wish. This is problematic when an act that is covered by an exception in Member State A may still require the authorisation of the rightholder in Member State B. The exceptions in the InfoSoc Directive, where 20 out of 21 are optional, were based on existing national exceptions. In their Green Paper on Knowledge Economy from 2008 the Commission also says that even if the exceptions are adopted at the national level, the Member States have often formulated exceptions narrower than those permitted.[43]

Why copyright matters to libraries

A library is historically a place to keep the business, legal, historical, and religious records of a civilisation. Libraries have changed over the course of history: from clay tablets in a Babylonian temple to manuscripts in medieval Europe; to the public libraries of the 19th century; to the information resource and service that does not even require a building. However, their cultural role has been consistent: to acquire or provide access to books, periodicals, and other media that meet the educational, recreational, and information needs of their users.[44]

Laura Gasaway states in an article about libraries and copyright from 2000 that ”[l]ibrarians share many values with creators and publishers of copyrighted works, but their interests and values sometimes conflict.”[45] From this, we can conclude that the conflict is not new. The library as an entity is transforming from something purely physical to something physical *and* digital.

The social responsibility of libraries is reflected in their relation to copyright: copyright legislation almost always include exceptions specifically concerning libraries;[46] IFLA's Committee on Copyright and other Legal Matters (CLM) keeps

[41] The Berne Convention, TRIPS, WPPT, and WCT.
[42] The mandatory limitations and exceptions are: all in the Computer Programs Directive; all in the Database Directive; all in the Orphan Works Directive; and Article 5(1) in the InfoSoc Directive.
[43] European Commission, “Green Paper on Copyright in the Knowledge Economy. COM(2008) 466 Final.” p. 3
[44] “Library -- Britannica Online Encyclopedia.” http://academic.eb.com/Ebchecked/topic/339421/library. Accessed 2015-04-02.
[45] Gasaway, “Values Conflict in the Digital Environment.” p. 115
[46] According to the WIPO *Study on Copyright Limitations and Exceptions for Libraries and Archives* 128 out of 149 countries has at least one statutory library exception in their copyright law.

watch on the activities of WIPO and represents IFLA at key WIPO meetings[47]; library organisation EBLIDA lists ”copyright & licensing, culture & education” as key information society issues in Europe;[48] and 28% of the contributions from institutional users to the copyright consultation were from library stakeholders. As social institutions with a mission to collect and provide information, library stakeholders must closely follow the development of the information society.

[47] “IFLA -- Committee on Copyright and Other Legal Matters (CLM).” http://www.ifla.org/clm. Accessed 2015-04-02.
[48] “About Eblida - European Bureau of Library Information and Documentation Associations (EBLIDA).” http://www.eblida.org/about-eblida/. Accessed 2015-04-02.

Previous research

Copyright is one of the legislative areas which has developed the most during recent years, and research has increased concurrently with this development. A lot of research is done on the topic from various angles and perspectives, and it is near impossible to create an overview that takes everything into account. I will therefore focus on three key areas which I find relevant to this study: copyright in the EU today, the application of limitations and exceptions, and libraries and copyright.

Copyright in the EU today

In the recent years researchers (predominately legal scholars) have studied the copyright situation in the EU, often discussing it in relation to the internet and the information society. Peter Jay Smith writes that the EU ”use a variety of venues— global, regional, plurilateral, bilateral— to shape and impose their norms of IP rights”,[49] a thought which we might find support for in the happenings described in the background (*Developments in EU Copyright Politics 2007-2015*). One of these venues was the multinational treaty ACTA (Anti-Counterfeiting Trade Agreement), which was the subject of huge debate in 2012.[50] Baraliuc et al. writes about the copyright discussion in the EU post ACTA. Their discussion mainly concerns directive 2004/48/EC on the enforcement of IP rights, and not the copyright legislation per se, and they draw the conclusion that ”even apart from ACTA, it is important to take a stand on how to square fundamental rights with

[49] Smith, “Speaking for Freedom, Normalizing the Net?” p. 424

[50] ACTA aimed at ”completing and sharpening the range of legal instruments to enforce intellectual property rights”. It was negotiated during a very opaque process, its presumed impact on a free and open internet caused popular disagreement. 22 Member States signed the agreement, but to be enacted it had to be ratified by the EP. The MEP Kader Arif decided to stand down as rapporteur (Reporter, ”European Parliament rapporteur quits in Acta protest” http://www.bbc.com/news/technology-16757142. Accessed 2015-04-03) and based on the recommendation by new rapporteur MEP David Martin, which concluded that even though ”global coordination of IP protection is vital” the EP ”cannot guarantee adequate protection for citizens' rights in the future under ACTA” the EP rejected ACTA on 4 July 2012. (Committee on International Trade, ”Recommendation on ACTA” http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2012-0204+0+DOC+XML+V0//EN. Accessed on 2015-04-03)

online copyright enforcement."[51] Smith also discusses ACTA and its consequences for the information society. He writes that "[ACTA has] intensified the concern over the growing imbalance between owners, primarily corporate, and users of copyright that has been evident since the 1994 World Trade Organization agreement Trade Related Aspects of Intellectual Property Rights (TRIPS). This growing imbalance has led to widespread global resistance and demands that the Internet and knowledge remain free, in the public domain, and accessible to the maximum number of people."[52]

In an article on how the CJEU has developed EU copyright, Thomas Dreier estimates that the CJEU in the future will adress "issues where Community law, and in particular the text of the Directives, still leaves room for interpretation."[53] He furthermore suggests that the CJEU might have need of a special department to deal with the increasing number of IP cases. Dreier speculates that the protection of consumers might gain momentum in the area of copyright.[54]

In Peter Jakobsson's dissertation in media and communication studies he discusses what he names the *openness industry*, a concept he explains like "the key element is the high value placed on single individuals in the creation of economic value; but in contrast to how the copyright industries are thought to be dependent on 'authors', the openness industry relies on the 'entrepreneur'".[55] With the aim to explore how the idea of increased competition through a "less extensive copyright adjustment" is received and treated by EU policy makers, he devotes a chapter to studying limitations and exceptions in relation to the market. He finds that the Commission argues that copyright limitations and exceptions should be adjusted to fit for the business models of the openness industry.[56]

An archival perspective is given by Magdalena Granholm in her master's thesis from 2014: *Archived but not available: a study about copyright, extended collective licenses and the process of making digitalised archives available.* In the study she examines Nordic collective licences as tools when digitising and making available archival material. She points out that they on the one hand save time for archives, as they do not need to consult each individual rights holder, but that collective licencing on the other hand means detailed agreements that smaller archival institutions might not have judicial capacity to negotiate to their advantage. Furthermore, collective licences mean no clarifying court judgments concerning the vague copyright legislation, since this is regulated in licence agreements. This causes problems when working with orphan works, deciding the

[51] Baraliuc, Depreeuw, and Gutwirth, "Copyright Enforcement in the Digital Age." p. 94
[52] Smith, "Speaking for Freedom, Normalizing the Net?" p. 424
[53] Dreier, "Role of the CJEU for the Development of Copyright in the European Communities, The". pp. 217-218
[54] Dreier, "Role of the CJEU for the Development of Copyright in the European Communities, The". p. 222
[55] Jakobsson, *Öppenhetsindustrin*. p. 5 (Abstract)
[56] Jakobsson, *Öppenhetsindustrin*. p. 163

originality of works, and the discrimination between archive and library material.[57]

The Commission's studies on the application of limitations and exceptions

Article 12 of the InfoSoc Directive stipulates that the Commission every three years shall submit a report on the application of the directive, and the report should ”examine in particular the application of Articles 5, 6, and 8 in the light of the development of the digital market.”[58] These reports, written by independent researchers, indicate potential problems and questions that have risen in regard to limitations and exceptions.

One of them, the previously mentioned IVIR study from 2007, concludes the provisions on limitations and exceptions has not led to the sought-after harmonisation between Member States. It states that the provisions in the InfoSoc Directive are phrased in ”broad and categorical terms” and that the lack of mandatory limitations results in ”a mosaic of exceptions and limitations that vary from Member State to Member State, which might seriously impede the establishment of cross-border online content services.”[59] Concerning limitations, they emphasise the consequences for both the market and the users, ”the scope of limitations in the digital networked environment has [forced] users to negotiate the conditions of use of protected works with every single rights holder, for every territory involved. This clearly raises transaction costs.”[60]

Trialle et al. have written another extensive review of the application of the InfoSoc Directive. One chapter of their report focuses on the limitations and exceptions to copyright and related rights for libraries, research, and teaching uses.[61] In the introduction they conclude that, even in 2013, ”none of [the initiatives taken by the Commission] have revised the exceptions of the directive 2001/29 so far.”[62] They discuss some of the exceptions that especially concerns libaries, e.g. 5(2) c),[63] and finds that ”current needs of preservation are not permitted by the exception” and that the ”diverse implementation of the exception in the Member States [...] creates a fragmented scene for a European agenda of digitization of cultural heritage.”[64] They emphasise that even though the reproduction undertaken by libraries do not have a immediate cross-border dimension, the lack of

[57] Granholm, *Arkiverad men inte tillgängliggjord*. pp. 29-33, 52-53.
[58] “InfoSoc Directive (2001/29/EC).” Article 12
[59] Instituut voor Informatierecht (Amsterdam), European Commission., and Directorate-General for the Internal Market., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certains Aspects of Copyright and Related Rights in the Information Society*. p. 166
[60] Instituut voor Informatierecht (Amsterdam), European Commission., and Directorate-General for the Internal Market., *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certains Aspects of Copyright and Related Rights in the Information Society*. p. 167
[61] Triaille et al., *Study on the Application of Directive 2001*. pp. 243-415
[62] Cf. *Copyright in the EU today*
[63] Reproduction which is not for direct or indirect economic or commercial advantage.
[64] Triaille et al., *Study on the Application of Directive 2001*. p. 284

harmonisation create difficulties for libraries collaborating in European projects, and they conclude that ”[t]he most daring solution to increase harmonization would be to make some exceptions in the list of article 5 of the directive compulsory.”[65] Regarding all the exceptions discussed in the 2013 report they write that a ”difficulty brought by the digital development is the blurring of boundaries of each exception.”[66] For example they write that ”large-scale digitization projects ultimately aim at the making available of the collection, […] the making available for consultation is increasingly requested to apply at distance and online; and the lending is shifting to cover the online transmission of digital items. The exception-by-exception reasoning, which is the model of the InfoSoc Directive, might not be relevant anymore.”[67] In a digital library, what is a loan, and what is access? An example of how the borders between analogue and digital loans, and analogue and digital access sometimes blur, is a recent CJEU case, a publisher brought proceedings for copyright infringement to a German university: the Technische Universität Darmstadt had digitised a (physical) work in their collections and made it available to users – both for direct consultation (restricted to one user at a time) and download – and the publisher demanded that they purchased the same title as an e-book and delete their digital copy. The CJEU's interpretation of the exception[68] was that the university indeed could digitise a work and make it available via electronic reading posts within the library premises (i.e. ”designated terminals”), but that they could not make it available for users to download.[69]

To summarise, the limitations and exceptions have met critique in the Commission's reports on the application of the InfoSoc Directive: they are not particularly well adapted to the information society, and they need to be changed from status quo, and become either clearer, mandatory, or extinct.

Libraries and copyright

A search of Library and Information Science Abstracts (LISA) reveals that over 4,584 scholarly (peer-reviewed) articles have been published on the subject of copyright, and 1,104 of these have been published since 2010. One of the articles was written by Tony Horava in 2010: he has done a study on copyright communication in Canadian libraries and emphasises that ”[t]he advent of the Internet and digital communication technologies have radically altered the social

[65] Triaille et al., *Study on the Application of Directive 2001*. p. 300
[66] Triaille et al., *Study on the Application of Directive 2001*. p. 403
[67] Triaille et al., *Study on the Application of Directive 2001*. p. 403
[68] InfoSoc Directive, Article 5. 3 (n) ”*use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections*”
[69] CJEU, “Judgment of the Court (Fourth Chamber), 11th September 2014, C.J.E.U., C - 117/13, Technische Universität Darmstadt.”

and cultural landscape",[70] making copyright affect us in a more direct way than before. He writes:

> Our era is often seen as the third revolution in cultural communication—the first being the development of written language and the second being the invention of the printing press—and copyright legislation needs to respond to the transformative impact of digital content and information technology on the ways in which intellectual works are used.[71]

He discusses how the earlier dualities in the copyright discourse, such as performer/audience, broadcaster/viewer, sender/receiver, and producer/consumer, are losing their relevance as discrete categories, and that this leads to a critical challenge for copyright education by academic librarians, who in his view "have an educational and ethical responsibility to engage with this issue."[72] His findings suggest that Canadian academic libraries handle copyright education in a big variation of ways, which very much depend on available resources, expertise, and how the institution prioritise copyright issues. He also finds librarians are frustrated by the current state of Canadian copyright legislation, especially concerning the lack of clarity on the issue of "fair dealing".[73]

A group of European researchers, representing Bulgaria, Turkey, Croatia, and France, has done a multinational study on copyright literacy competencies of LIS professionals.[74] At the European Conference on Information Literacy, held in Dubrovnik, Croatia on 20-23 October 2014 they presented the project, and the conclusion of their findings is that "the level of knowledge and the awareness of respondents (managers and specialists responsible for information services in cultural institutions) regarding copyright issues are far from being satisfactory."[75] In total, they had 622 responding LIS professionals to the survey, and the vast majority were in favour of including copyright-related issues in LIS education. The plan is to conduct the same study in nine more countries: seven European countries, Mexico and the US.

A library perspective on limitations and exceptions

Trevor Cook writes that "[s]ome EU Member States, unhappy at the inflexibility of their respective approaches to this issue are now starting to explore to what extent they can move towards a 'fair use' approach."[76] He writes that many see this as a better way to accommodate technological developments and new business models. An interesting fact is that only a handful of the CJEU cases heard in recent years

[70] Horava, "Copyright Communication in Canadian Academic Libraries." p. 2
[71] Horava, "Copyright Communication in Canadian Academic Libraries." p. 3
[72] Horava, "Copyright Communication in Canadian Academic Libraries." p. 4
[73] Horava, "Copyright Communication in Canadian Academic Libraries." p. 30
[74] Boustany et al., "A Multinational Study on Copyright Literacy Competencies of LIS Professionals."
[75] Boustany et al., "A Multinational Study on Copyright Literacy Competencies of LIS Professionals." p. 21
[76] Cook, "Exceptions and Limitations in European Union Copyright Law." p. 243

concerns Article 5 (which regulates the limitations and exceptions) of the InfoSoc Directive.[77] Cook further suggests many EU Member States' legislations might move towards a more permissive copyright in their implementation of the InfoSoc Directive. He states ”Europe may never have 'fair use', but is likely to move towards something that approximates it more closely in practice.”[78]

To compare, here is also a US perspective on libraries and copyright: Librarian Kevin L. Smith makes suggestions for changes in the US copyright legislation that would make the law more useful for libraries (especially academic libraries). He writes that fair use ”is not a problem [in itself], although the judicial understanding and interpretation of fair use is often problematic”[79] and this is the reason he wishes to expand the exceptions listed in the US Digital Millenium Copyright Act (DMCA). Timothy K. Armstrong also discusses the need for further exceptions in US legislation, arguing that judges from ”both sides [i.e. in a copyright case] have overstated the support they may plausibly draw from the literal text of the statute”,[80] and concludes courts should develop fair circumvention exceptions to the DMCA, based on existing copyright principles of fair use.

On fair use in higher education Cummings and Gunnells write that instiutions needs to conduct fair use analysis on a daily basis; the complexities of applying fair use are magnified when the information activities are conducted on the internet, since it allows every user to be a potential publisher and allows access of a work by the entire world. They suggest the solution that institutions should write internal policies regarding use of copyrighted works.[81]

Licences – a threat to public interest?

Many contributions to the copyright consultation mention licencing solutions to copyright issues. As mentioned in the background, *Licences for Europe* was an earlier attempt by the Commission to resolve the copyright issue. Thus, research on licencing copyrighted works is a relevant perspective.

A public legislation that does not keep up with modern times will instead force other solutions; it was not until the development of computer software that the use of ”private legislation” began to take off. Elizabeth Winston writes about licencing vis-à-vis selling intellectual property and says licencing has become a way to circumvent public legislation and replace it with private legislation. She writes: ”Such circumvention gives intellectual property owners the potential to acquire rights, monopolistic in nature, that can be used to influence the market and hinder competition” and discusses how licencing shifts the balance of protecting the public

[77] Cook, “Exceptions and Limitations in European Union Copyright Law.” p. 244
[78] Cook, “Exceptions and Limitations in European Union Copyright Law.” p. 245
[79] Smith, “Copyright Renewal for Libraries.” p. 7
[80] Armstrong, *Fair Circumvention*. Abstract.
[81] Cummings and Gunnells, “Copyright and Fair Use in Higher Education.” pp. 1287-1288

interest to protecting the IP owner's interest.[82]

Michael Fraser writes that publishers who think the current copyright legislation do not effectively protect IP rights, have turned to licencing in order to protect their interests. This has instead created difficulties, due to the pricing, volume, and extent of the licence agreements.[83] The Nordic countries in the EU apply something called extended collective licencing, which is characterised by a voluntary transfer, by the rightholders, of their rights to a collecting society (CMOs) for the licencing of the use of their works. The CMOs then make contracts with users, and these licencing agreements might be extended, by legislation, to all rightholders of certain categories of works, except where the law provides for a opt-out system for authors. Triaille et al. notes that ”[t]his solution is typical to Nordic countries and may not be transposed easily in other legal traditions that could not be adapted to welcome such a foreign transplant.”[84]

Stacey L. Bowers writes a chapter on licence agreements in the book *Academic Librarianship in the 21st century*, contemplating the fact that libraries are sometimes faced with an inability to provide access to information, due to the terms and conditions of licence agreements. To change these circumstances, she calls on libraries to begin making changes to the terms of the licence agreements that they enter into for electronic content.[85] She writes: ”Libraries must persevere in their efforts to provide access to electronic resources for all their patrons. If not, access will continue to become more and more limited and huge segments of the population will be unable to access much needed resources and knowledge.”[86]

[82] Winston, “Why Sell What You Can License - Contracting around Statutory Protection of Intellectual Property.” p. 101
[83] Fraser, “Intellectual Property and Digital Libraries.” pp. 182-183
[84] Triaille et al., *Study on the Application of Directive 2001*. pp. 305-306
[85] Bowers, “The Impact of License Agreements on Access to Information: A Challenge for Academic Libraries.” p. 14
[86] Bowers, “The Impact of License Agreements on Access to Information: A Challenge for Academic Libraries.” p. 16

Methodology and theoretical framework

This section will present the primary source material, as well as the methodology and theoretical framework used to analyse the primary source material.

Primary source material

This study focuses on contributions to the copyright consultation and compares them with the Commission's report on the contributions. The consultation itself is a document with 80 questions, distributed over seven main areas: *Rights and functioning of the Single Market; Limitations and Exceptions in the Single Market; Private copying and reprography; Fair renumeration of authors and performers; Respect for rights; A single EU Copyright Title;* and *Other issues*.

The respondent is, in the beginning of the document, required to select its type of respondent, and can choose from:

1. End user/consumer (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student) OR Representative of end users/consumers
2. Institutional user (e.g. school, university, research centre, library, archive) OR Representative of institutional users
3. Author/Performer OR Representative of authors/performers Publisher/Producer/Broadcaster OR Representative of publishers/producers/broadcasters (right holders)
4. Intermediary/Distributor/Other service provider (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry) OR Representative of intermediaries/distributors /other service providers (service providers)
5. Collective Management Organisation
6. Public authority
7. Member State
8. Other

These categories are closely, but not directly, reflected in the Commission's presentation of all contributions to the consultation.[87] The downloadable zip-files containing all contributions in document and pdf formats, are divided into the following folders:

1. Authorities,
2. Authors,
3. CMO's (Collective Management Organizations)
4. Institutional Users,
5. Others,
6. Publishers,
7. Service Providers,
8. Users.

Institutional users is the category where we can find most of the contributions from libraries and library organisations, where they make up 28 % of the contributions,[88] but I think we must take note of that this organisation of stakeholders is not fail-safe, e.g. the *National Library of Germany* regards itself as a *service provider*, while the Swedish counterpart, the National Library of Sweden, regards itself as an *institutional user*.[89] Furthermore, we can find contributions from individual librarians in both the categories *institutional users* and *users*.

I have chosen, first of all, to look at contributions from the European national libraries; not all have responded, but those who have are expected to represent national library interests in their contributions. Secondly, I have chosen to study contributions from library organisations (or similar joint ventures) on a European or international level; these organisations presumably have specific interests in cross-border copyright, and organisations often have an explicit political agenda, something which individual institutions might lack due to dependency issues. Thirdly, I have chosen to look at contributions where the responses regarding limitations and exceptions were particularly interesting in relation to the choice of contributions mentioned previously.

Part III of the public consultation document, questions 21-61, deals with limitations and exceptions in the EU Single Market. First, questions 21-27 are general questions on limitations and exceptions. Questions 28-61 are divided under subheadings; for this study subheading A (questions 28-41) is most relevant, since it concerns *Access to content in libraries and archives*. However, the responses to these questions are on a quite detailed level, so I will focus on the responses to questions 21-27.

[87] Accessible at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm
[88] A total of 84 contributions from libraries and library organisations are found in this category.
[89] As seen in the Commission's sorting of consultation contributions.

Power relations in the legislative process

An underlying theory in my analysis is a perspective of power dimensions in the legislative process. As Foucault notes in his essay on governmentality ”there are three fundamental types of government, each of which relates to a particular science or discipline: the art of self-government, connected with morality; the art of properly governing a family, which belongs to economy; and finally the science of ruling the state, which concerns politics.”[90] The three definitions of power I use in this thesis are: instrumental power; discursive power; and structural power. The same theoretical power perspective is used by Peter Jay Smith in a study on copyright in the information society,[91] Smith was inspired by a study on global climate change negotiations, which is why I have turned to this initial source as well. They describe the theory like this:

> ”More specifically, our analysis is based on power elite or instrumentalist theories (Mills 1967; Domhoff 1990; Miliband 1969), structural dependence theories (Block 1987; Offe 1984; Poulantzas 1978), and cultural/discursive theories of the state (Foucault 1977; Habermas 1984; Hall et al. 1978). These theories are relevant to the question at hand because, in their fundamentals, they seek to explain how business influences politics within a capitalist system.”[92]

As demonstrated in the quote above, Levy and Egan combine several theories to view impact factors in a policy debate from different stakeholders' views. The instrumentalist perspective emphasises how businesses and states interact via a network of relationships; according to structural dependence theories the state enjoys a degree of autonomy from business power, but are at the same time structurally dependent on the private sector profitability; and the discursive theories the ideological and symbolic aspects of power. Smith uses this theoretical framework to analyse copyright from a broad perspective. I will, however, apply this to the consultation contributions, and discuss how the stakeholders' power situations might affect the contributions.

I think a power perspective is an interesting view on this case; the EU political centre, Brussels, is thick with lobbyists, and a Guardian article from May 2014 estimates 75 % of European legislation is influenced by lobbyists.[93] An indication that this might actually be a factor in EU legislation is MEP Julia Reda's[94] ”legislative footprint”, where she lists meetings requested (and meetings taken) by category of stakeholders. The timeline in her blog post[95] shows an increase in

[90] Foucault, “Governmentality.” p. 91
[91] Smith, “Speaking for Freedom, Normalizing the Net?” pp. 423-427
[92] Levy and Egan, “Corporate Political Action in the Global Polity.” p. 140
[93] Traynor, “30,000 Lobbyists and Counting.” http://www.theguardian.com/world/2014/may/08/lobbyists-european-parliament-brussels-corporate. Accessed 2015-04-06.
[94] MEP Julia Reda: Germany, Piratenpartei Deutschland, Greens/EFA. The Legal Affairs Committee's (JURI) rapporteur on the evalutation of the InfoSoc Directive.
[95] Reda, “Report.”

meeting requests after 10 November 2014 (the date she was appointed rapporteur). She writes: ”Most requests came from publishers, distributors, collective rights organizations, service providers and intermediaries (57% altogether), while it was more difficult to get directly to the group most often referred to in public debate: The authors.” Libraries are not mentioned in particular by Reda, but the meetings she took with institutional users (as previously mentioned, libraries are majorly represented in this group) were Europeana, EBLIDA, FIBEP[96], Communia/Kennisland[97], GRUR[98]. We might note that all except GRUR are international organisations working for a specific cause.

Even though we've concluded copyright legislation is largely bound by territory, I want to take note of Foucault's definition of *government*:

> [T]he definition of government in no way refers to territory. One governs things. But what does this mean? I do not think this is a matter of opposing things to men, but rather of showing that what government has to do with is not territory, but rather a sort of complex composed of men and things.[99]

This doesn't change the territorial nature of copyright per se, but it does explain that the power dimensions which will be discussed in detail below are not bound by the same territorial restrictions. This is something we need to keep in mind.

Structural power

Structural power is ”the influence that states and corporations have over the formulation of proposals, agendas, and norms governing IPR”[100]. This can be compared with Foucault's government type that is ”the science of ruling the state, which concerns politics”. One example of structural power is the influence over disciplinary power; dominant states and transnational corporations are able to reward, punish, and influence weaker states, whether it is by improving access to the markets of the dominant states, or investments and job opportunities provided by corporations. In comparison with the list of stakeholder categories, we might say that e.g. *Public authorities*, *Member States*, *Institutional users* and *Service providers* are stakeholders who possess some kind of structural power.

Instrumental power

An example of instrumental power is forum shifting, a process by which ”a negotiating agenda is moved from one venue or organization to another friendly

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https://juliareda.eu/2015/01/report-eu-copyright-rules-maladapted-to-the-web/. Accessed 2015-04-06.

[96] *Fédération Internationale des Bureaux d'Extraits de Presse*.

[97] *The European Thematic Network on the Digital Public Domain*

[98] *Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht e.V.*

[99] Foucault, “Governmentality.” p. 93

[100] Smith, “Speaking for Freedom, Normalizing the Net?” p. 424

venue or organization, often, but not always, due to increased resistance."[101] Drahos describes the process of forum-shifting of IP discussion as "a strategy in which the US and EU shift the standard-setting agenda from fora in which they are encountering difficulties to those fora where they are likely to succeed" and states that "the basic reason for forum-shifting is that it increases the forum-shifter's chances of victory."[102] Examples of stakeholders who possess instrumental power are *Member States* and *Service providers*, who have the economic and/or political capital to choose where these questions are discussed.

Discursive power

Discursive power is the power to construct a discursive hegemony; Patricia Loughlan examines the metaphors of intellectual property in a legal discourse. She writes: "Because the boundaries of intellectual property protection are never finally fixed, those boundaries are always a matter of contested political choice in which persuasion and rhetoric [...] can have substantive effect."[103] Weissman writes in 1996 on the pharmaceutical industry, the Third World, and IP rights that "[t]he piracy metaphor effectively changed a policy debate into an absolutist moral drama. Theft is simply wrong."[104] Clearly, this metaphor has been transferred to the copyright discourse and it has also been used by those in favour of a restricted copyright, e.g. the Pirate Bay (torrent site), the Pirate Party (political party), perhaps in an attempt to make 'piracy' less dramatic.

On the other hand, other conceptions of copyright are also introduced into the debate. Loughlan notes that "those who support restricted intellectual property rights in favour of more expansive public access to creative works do also themselves make significant rhetorical use of metaphor, in particular, the metaphor of the 'commons'."[105] Patrik Larsson, from Lund University, has recently done a study on conceptual metaphors used by American and French file-sharers to conceptualise copyright in a digital society, and arrives at the conclusion that "the American file-sharers are more inclined to speak of the 'market', 'government' and the 'industry', and the French file-sharers are more inclined to speak of the 'artists' and their remuneration."[106]

The American lawyer Lawrence Lessig writes "the debate [about copyright] has become so polarized and so binary that the choice seems a choice just between property and anarchy," but also adds "[t]here are those who believe in all rights reserved, those who believe in no rights at all, but there are also many who believe

[101] Smith, "Speaking for Freedom, Normalizing the Net?" p. 426
[102] Drahos, "Securing the Future of Intellectual Property." p. 55
[103] Loughlan, "Pirates, Parasites, Reapers, Sowers, Fruits, Foxes ... The Metaphors of Intellectual Property." p. 213
[104] Weissman, "A Long, Strange Trips." p. 1088
[105] Loughlan, "Pirates, Parasites, Reapers, Sowers, Fruits, Foxes ... The Metaphors of Intellectual Property." p. 213
[106] Larsson, "Conceptions of Copyright in a Digital Context. A Comparison between French and American File-Sharers." p. 100

that some rights should be controlled but not all,"[107] referring to the Creative Commons licences, which "give everyone from individual creators to large companies and institutions a simple, standardized way to grant copyright permissions to their creative work"[108]

I can conclude that the discourse set around the copyright discussion is evidently influenced by national-cultural dimensions, as well as economic-governmental dimensions, which means that all stakeholders have discursive power to some extent.

Argumentation theory

The methodology I am using is argumentation analysis based on Björnssons, Kihlboms and Ullholms *Argumentationsanalys* (2009).[109] The book is originally in Swedish, but here the terminology is translated to English.

The structure of an argument includes the components *thesis* (T), *pro*-argument (P) and *contra*-argument (C). An argument put forward to defend or reject a thesis is valued according to its *conclusive power*. The conclusive power is a combination of the argument's *tenability* and *relevance*. The tenability of an argument is relative to a person's previous knowledge (e.g. the argument *The paper newspaper will disappear entirely within ten years* can seem reasonable to some people, but not to others). The tenability of arguments can be affected by the fact that many of us lack the specialist knowledge needed to value certain arguments; other arguments are affected by their temporary nature (they might sound reasonable, but if they are predicting a future event the tenability is hard to confirm); and in all cases we must weigh in the motives and the background of the person/organisation behind the argument. We must also note the difference between *factual* and *normative* arguments. It is not a binary scale; on one end we have factual arguments (something that has happened, is happening, or will happen for certain) and on the other end normative arguments (based on a valuation of if a fact coming true is desirable). The *relevance* of an argument simply means that it has to be relevant to the thesis; referring to cases on patent law in India might not be very useful when debating copyright in the EU.[110] A good argument needs strong tenability *and* relevance.

[107] Lessig, "The Creative Commons." p. 10
[108] "About The Licenses - Creative Commons." https://creativecommons.org/licenses/?lang=en. Accessed 2015-04-06.
[109] Björnsson, Kihlbom, and Ullholm, *Argumentationsanalys*.
[110] Or it might be, but you'd have to explain why.

Structure of a schematic overview of arguments

T	thesis
P_1	pro-argument 1
C_1P_1	contra-argument 1 against pro-argument 1
C_2P_1	contra-argument 2 against pro-argument 1
P_2	pro-argument 2
P_1P_2	pro-argument 1 supporting pro-argument 2
C_1	contra-argument 1
P_1C_1	pro-argument 1 supporting contra-argument 1

This table gives a clear structure of how different arguments are met. The number of pro- and contra-arguments does not affect the tenability of any of the arguments. I will use the argument maps to keep track of the main discussion in the consultation contributions, and then elaborate on the potential motives or reasons for these contributions in relation to the theoretical framework.

Study: Libraries on limitations and exceptions

This part of the thesis is divided into two sections, each dealing with the argumentations pro and contra a reform of the InfoSoc Directive. Both of these main positions have several pro and contra arguments connected to them, and these will be treated in each section. Arguments sometimes overlap between the both positions, due to them involving basic concepts such as the three-step test, licences, citizens' rights, and the Single Market, but as the structure of the chapter suggests, the re-occuring arguments are explained in the contexts of the different positions, and they will be analysed from that viewpoint.

A reform of the InfoSoc Directive is not required

The first position is that no change is needed in the InfoSoc Directive. Even though libraries experience problems concerning copyright, they do not necessarily see EU legislation as the solution. A schematic overview of this position will be followed by a more thorough analysis of the respondents' arguments.

Schematic overview of arguments contra a reform of the InfoSoc Directive

T	A reform of the InfoSoc Directive is not required
P_1	The importance of the Member States' sovereignity
P_2	Legislative processes cannot keep up with technological development
P_3	Extended collective licencing instead of legislation
P_1P_3	It works well in Member State A
P_2P_3	Sets a balance between collective licencors and other collective actors (e.g. public institutions such as libraries)
C_1P_3	Lack of legal clarity for Member States vis-à-vis non-members
P_4	The CJEU can decide
C_1P_4	Not all stakeholders have the economic resources for a CJEU process

The importance of the Member States' sovereignity

Bibliothèque nationale de France (BnF) considers the optionality of limitations and exceptions as guaranteeing the sovereignity of the Member States and that the exceptions which apply is an internal issue for each Member State to decide.[111] The *National Library of Norway*, though not a national library of a Member State, acknowledges problems with the territoriality of copyright, but agrees with BnF, writing that ”If the exceptions are made mandatory, a higher level of harmonisation is probably needed. Our opinion on the implementation of the exceptions is however that the member states should be able to decide which exceptions that may be implemented in their national law, i.e. the same solution as today.”[112] As a country outside the EU, but with a lot of cooperation with the Member States (especially the Nordic countries), it is interesting to note that they value the sovereignity of the Member States with regards to limitations and exceptions. This is especially noteworthy as they go on to suggest extending the scope of some of the exceptions.[113]

As BnF is the national library of the second largest EU Member State,[114] it is plausible that they have the instrumental power to negotiate e.g. advantageous licence agreements. As previously mentioned, France is one of the top copyright producers, so we can also weigh in the possibility that the most important information needs of BnF is largely satisfied by the national market. As a powerful Member State, France is also an actor with structural power, which might indicate that BnF relies on national copyright legislation, and not EU copyright legislation. In their contribution, BnF stresses that they are not a lending library.[115] Therefore it is natural that arguments concerning citizens' right to information are not mentioned in their contribution. This can be compared with the British Library (BL) which is ”proud to report” that their collection of 19th century British books online are visited by around half a million times a day from people all over the world.[116]

Compared with the early French copyright legislation that was based on the philosophical notion that author's rights should not be restricted by nationality or geographical boundaries,[117] the BnF's position is not surprising; the author is in the centre of the French *droit d'auteur*, while the questions of the copyright consultation is centred round a Single Market perspective. Where the EU copyright is more concerned with fair compensation to authors than their moral

[111] “Public Consultation Contribution: Bibliothèque Nationale de France.” Q 21-22
[112] “Public Consultation Contribution: The National Library of Norway.” Q 22
[113] ”Online access to the collections can be made possible by extending the scope of the exception in article 5(3)” Q 41; ”Copyright Directive article 5(3)n could be broadened so that institutions can make their collections available on-line for scientific and educational purposes without restriction to on-site terminals.” Q 33
[114] In terms of the number of MEPs.
[115] “Public Consultation Contribution: Bibliothèque Nationale de France.” Q 36
[116] “Public Consultation Contribution: British Library.” Q 40
[117] Cf. *A brief history of copyright*

rights, despite the legal traditions in Europe, it serves as an indicator that the notion of *the author* (cf. *Introduction*) weakens, and gives place for *the entrepreneur's* right to make a living from his/hers intellectual creations. The replies of BnF can be interpreted as an expression of conservatism.

Slow legislative processes and licencing solutions

The slowness of the legislative process is an issue which gives rise to different arguments from different libraries - it is used both in favour and against a reform. The *Royal Library of Denmark* sees the following problems with harmonising limitations and exceptions further: ”the catalogue [is] exhaustive which is not very flexible compared with the swift technological development and the innovation frequency.”[118] On the other hand, the *National Library of Romania* uses the exact same reason, ”the slow pace of legislative change as compared to rapid advancements in technology”, to argue for more flexibility in the limitations and exceptions framework.[119]

Here, I find a discrepancy in the view of the structural power of the legislative system. On the one hand, the slowness of the system is used to argue for other solutions (the Royal Library of Denmark is a strong supporter of licencing solutions[120]), but on the other hand, there's the opinion that a flexible legislation removes the slowness obstacle (the National Library of Romania promotes a EU 'fair use' exception[121]), i.e. that a flexible directive will increase its instrumental power in a fastly advancing technological society.

In both of these cases, the decisions regarding flexibility would land either on the contracting parts of a licence agreement, or the CJEU or the national courts; either actors with instrumental power, able to withhold access to information if terms cannot be negotiated, or actors with structural power, who can apply their disciplinary power to enforce their decisions. The CJEU as a judicial authority guarantees transparency and equal treatment to all Member States, while licence agreements (which Elizabeth Winston refers to as ”private legislation”[122]) do not necessary form in the same transparent procedure, there might be a conflict of interest between Member States with different prerequistites. If Member State A mainly exports copyrighted works, while Member State B mainly imports copyrighted works, it is reasonable to assume that they will have different economic opportunities in the Single Market.

As pointed out in the chapter on previous research, it is especially the Nordic countries that apply a system of extended collective licencing, which according to

[118] “Public Consultation Contribution: The Royal Library.” Q 22
[119] “Public Consultation Contribution: National Library of Romania.” Q 24
[120] “Public Consultation Contribution: The Royal Library.” Q 25
[121] “Public Consultation Contribution: National Library of Romania.” Q 25
[122] Cf. *Previous research*

Triaille's report might not be easily transposed to other legal traditions.[123] Nevertheless, e.g. the *Royal Library of Denmark* propose this as an alternative to mandatory exceptions, writing: ”the Nordic Model of extended collective licensing (concerning ECL in Denmark, Sweden, Norway, Finland, Iceland) offers a very flexible solution, which has proved generally efficient and adaptive.”[124] However, the Royal Library of Denmark acknowledges a problem with territorial restrictions, and write: ”It is a problem that extended collective licensing is limited to that country's territory as long as the EU does not implement a mutual recognition of such agreements.”[125]

On the other hand, in reply to the question if some exceptions should be made mandatory, they write that ”[it] in general is important to secure that copyright exceptions cannot be overridden by contracts or technological protection measures.”[126] This raises questions in regard to Elizabeth Winston's argumentation that licences is a way to make ”private legislation”, instead of public. If exceptions are not mandatory, how are they supposed to be prevented from being overridden by contracts? In which way do contracts and the extended collective licencing differ? This is ground for a discursive conflict between Member States' different views on valid contracting parts: who has the mandate to make a licence agreement not overrideable by the law?

The Royal Library of Denmark further writes: ”The need for harmonisation especially relates to cross-border recognition of extended collective licensing.” However, commercial actors from Member States who do not apply a system of extended collective licencing are not fond of this potential development, and make as good use of their instrumental power as possible to prevent this. E.g. the *Federation of European Publishers*[127] writes:

> Licensed solutions are acceptable in closed networks of schools, universities or libraries, but if exceptions allowed uses involving communicating content on the internet (having potentially wide cross-border effects), it would be difficult, if not impossible, to compensate in a fair and balanced manner. It should also be remembered that Member States also have very distinct and separate systems for fair compensation, for example levies, which are not present in other Member States – and are unlikely ever to be introduced.[128]

The *National Library of Spain* comments that the territoriality of limitations and exceptions “leads to lack of harmonisation, misinterpretation and/or gaps of legislation. This results in a weakness position for those which are poorly advised (in legal terms), in general this is the position cultural institutions have.”[129] As a

[123] Triaille m.fl., *Study on the Application of Directive 2001*. p. 305-306
[124] “Public Consultation Contribution: The Royal Library.” Q 25
[125] “Public Consultation Contribution: The Royal Library.” Q 21
[126] “Public Consultation Contribution: The Royal Library.” Q 22
[127] The Federation of European Publishers (FEP) represents 28 national associations of book and learned journal publishers of the European Union and of the European Economic Area.
[128] “Public Consultation Contribution: Federation of European Publishers.” Q 27
[129] “Public Consultation Contribution: National Library of Spain.” Q 26

solution to this they recommend a single international voice for right management collective associations, so to ease cross-border management. In regards to compensation to this entity, they think cultural institutions should have a privileged role, and have the right to lower fees of compensations in order to reassure access.[130] In 2010 Spain was shaken by corruption charges against their largest CMO, *Sociedad General de Autores y Editores*.[131] This may have caused the national library to suggest an international CMO, rather than relying on agreements between CMO's at a national level.

The *National Library of the Netherlands* lifts the question concerning how extended collective licencing can be arranged on an EU level, and if so, how it would affect non-Members of the EU:

> Whereas Extended Collective Licensing exists in law in the UK (primary legislation), Finland, Sweden, Denmark, Norway and Czech Republic, its legal validity cross-borders given the inclusion of non-members' works could benefit from further legal clarification.[132]

The National Library of the Netherlands also writes about the emerging legal mechanisms in France and Germany to facilitate mass digitisation, and are concerned about the legal clarities concerning cross-border aspects (both EU and non-EU) within these mechanisms as well.[133]

The sovereignity of the Member State is apparent in the discussion of licences, and at the moment new legislation on extended collective licencing etc. is developed on a national basis. To merge these national licencing systems into a European wide framework might be hard. As mentioned above, the BnF believes limitations and exceptions are internal questions for each Member State, but if it is unlikely that the Member States will agree on a certain set of exceptions, how is it more likely that they will find a way to negotiate extended collective licencing agreements? Extended collective licencing could be described as a way of forum-shifting (instrumental power), where the issue of information availability is decided by organisations, rather than legislators. A problem with this course of action might be that what would be gained in speed, would be lost in transparency.

An important point which might be reflected in the opinions is the state of corruption in the EU, as the perceived level of corruption in different Member States vary within the EU. Based on expert opinions from around the world, a poor score in Transparency International's *Corruption Perception Index 2014* "is likely a sign of widespread bribery, lack of punishment for corruption and public institutions that don't respond to citizens' needs."[134] While Scandinavia places itself among the least corrupt EU countries, countries in central and eastern Europe

[130] "Public Consultation Contribution: National Library of Spain." Q 27
[131] "SGAE-Gate. Spanish Collecting Society Facing Corruption | Kluwer Copyright Blog."
[132] "Public Consultation Contribution: Koninklijke Bibliotheek." Q 2
[133] "Public Consultation Contribution: Koninklijke Bibliotheek." Q 2
[134] "Corruption Perceptions Index 2014." p. 3

score low in the index.[135] The average European score is 66/100,[136] and the different states of corruption in the EU might be a reason respondents from some Member States, e.g. the National Library of Romania, argues for a harmonised EU legislation.

A reform of the InfoSoc Directive is required

This position is supported by both the stakeholders who want some of the exceptions in the list to be mandatory, as well as those who want all exceptions to be mandatory. The reasons vary: some claim EU citizens' equal rights as the motivational factor; others press on that fact that it is an international strategic decision for the EU Single Market.

Schematic overview of arguments pro a reform of the InfoSoc Directive

T	A reform of the InfoSoc Directive is needed
P_1	Some or all limitations and exceptions should be mandatory
P_1P_1	All EU citizens have the same right to information and culture
P_2P_1	It's a strategic decision for the EU Single Market
P_3P_1	Simplifies cross-border cooperation - today partners in different Member States operate under different conditions
P_2	There is an obvious problem with today's legislation, but it's hard to solve
P_3	The system should be easy for users to understand
P_4	Specific exceptions should be added
P_5	EU copyright needs a 'fair use' concept

EU citizens' equal right to information and culture

”Open, broad and equal right for cultural and scientific information is important for all the EU citizens.”[137] This philosophy, as phrased by the *Finnish Research Library Association* (STKS), is the foundation of a discourse which disregards economic and political motives as compared to the right to information for all citizens.

The promotion of information and culture to all EU citizens is stated by *European Bureau of Library, Information and Documentation Associations*

[135] “Corruption Perceptions Index 2014.” pp. 4-5, 9
[136] Denmark has the highest score, 92/100; the lowest scoring Member States are Bulgaria, Greece, Italy, and Romania, 43/100.
[137] “Public Consultation Contribution: The Finnish Research Library Association (STKS).” Q 21

(EBLIDA) as the main mission of libraries,[138] and this is reflected in many of the libraries' contributions. *The National Library of Finland* advocates that at least the exceptions for research and education should be made mandatory. In a general discussion on limitations and exceptions they also write that the voluntary exceptions causes problems; all EU citizens should have equal right and access to information and culture.[139] They do not want any of the existing limitations or exceptions to be removed. *The National and University Library of Slovenia* (NUK) argue for the same thing, that ”similar organizations and citizens should be able to enjoy the same exceptions in all member states,”[140] and the *Library Association of Ireland* also discusses how European citizens should have the same rights regarding access to information and culture regardless of which country they live in, comparing it to the fact that ”[r]ights holders benefit from harmonised protection and enforcement measures, but the same standardisation of rights does not apply for libraries and their users.”[141] Compared to Smith's statement on the intensified concern over the imbalance between owners and users of copyright, this recognition by the library association is going towards the demand that ”the Internet and knowledge remain free, in the public domain, and accessible to the maximum number of people.”[142]

The *National Library of Wales* writes that the public mission of collecting, preserving, and giving access to knowledge can be better fulfilled if they use the opportunities offered by digital technologies, for collaborative activities and extended services to remote users – for this to be done ”it is essential that they are supported by an up-to-date and robust framework of exceptions and limitations.”[143] In UK copyright legislation limitations and exceptions were recently extended to match the InfoSoc Directive better, and the National Library of Wales point out that had the limitations and exceptions been mandatory, ”these changes would have been introduced in UK copyright law more than a decade ago.”[144] The *National Library of the Czech Republic* also promotes mandatory exceptions, and exemplifies them from an end-user as well as a library point of view: ”An obvious example is the exception for making reproductions for your own personal use, making copies of libraries, archives, educational facilities for archiving and preservation, for making a copy of replacing lost or damaged specimen.”[145]

The notion that all citizens should have equal access to culture and information

[138] “Public Consultation Contribution: EBLIDA.” Q 21
[139] ”Euroopan kansalaisilla tulee olla samat oikeudet päästä tietoon ja kulttuurin.”“Public consultation contribution: The National Library of Finland.” Q 21
[140] “Public Consultation Contribution: Narodna in Univerzitetna Knjižnica.” Q 21
[141] “Public Consultation Contribution: Library Association of Ireland.” Q 21
[142] Smith, “Speaking for Freedom, Normalizing the Net?”
[143] “Public Consultation Contribution: The National Library of Wales.” Q 21
[144] “Public Consultation Contribution: The National Library of Wales.” Q 21
[145] ”Zjevným příkladem je výjimka pro zhotovení rozmnoženiny pro vlastní osobní potřebu, zhotovení rozmnoženiny knihovnou, archivem, školským zařízením pro účely archivace a uchování, pro zhotovení kopie nahrazující ztracený či poškozený exemplář.” ”Public Consultation reply: Národní knihovna České republiky”. Q 22

also stretches outside the EU. E.g. the STKS writes: ”EU – rather the whole world – should be considered similarly. At the present the citizens do not have the same rights in all the member states.”[146] This quote draws on morality to motivate actors with structural power, and the *National Library of Austria* also connects moral reasons, the fundamental rights in democracies, with mandatory exceptions, and reviews the scope of the exceptions in detail:

> [I]t does not seem reasonable e.g. why the exception for citation purposes, education and research, preservation, caricature etc. needs to be optional – certainly it may be supposed that these rights are fundamental for European democracies.[147]

With regards to this, they think one should ”look critically [at] national laws that [… are] not compatible with the underlying principles of this standard”, stating that ”it simply does not seem fair that [...] the legitimacy of using a copyright protected work differs from Member state to Member state...”[148] In relation to the arguments concerning ”fundamental rights in democracies”, it is interesting to note that the moral right of users is a main point in the argument, rather than the moral right of the author.

EBLIDA agrees on the full harmonisation, writing: ”All exceptions should be made mandatory for all EU countries, especially those for research and education, public-mission institutions, and disability, because they protect fundamental rights. There is no obvious reason to have only one mandatory exception.”[149] A worldwide perspective is given by NUK when they make a comparison between the Google books project in the US and Europe:

> [I]n Europe, Google and the libraries are only digitising out-of-copyright works, while in the U.S. the project also includes in-copyright titles. As a result, citizens of the U.S. have better access to their recent (20th century) culture than European citizens. More generally users all over world have better access to US culture than to European culture.[150]

I interpret this as a discursive argument where Europe is portrayed as intellectually poor due to its copyright restrictions. A picture drawn where the US are ahead of Europe is a striking comparison, as the economic situation (especially regarding export and import of copyrighted works) in the US is similar to the EU. We can compare this with the multilateral agreement ACTA, which was signed by the US, several Member States in the EU, as well as other states (of both *developed* and *developing and transition economies*) on the UNCTAD top lists of importers[151] and

[146] “Public Consultation Contribution: The Finnish Research Library Association (STKS).” Q 26
[147] “Public Consultation Contribution: Österreichische Nationalbibliothek.” Q 22
[148] “Public Consultation Contribution: Österreichische Nationalbibliothek.” Q 22
[149] “Public Consultation Contribution: EBLIDA.” Q 22
[150] “Public Consultation Contribution: Narodna in Univerzitetna Knjižnica.” Q 24
[151] Australia, Canada, Japan, Singapore, and South Korea.

exporters[152] of royalties and licence fees (plus two more[153]).[154] This argumentation implies that if the US legislation allows for digitising in-copyright works, EU legislation should allow for the same.

Benefits for the European Single Market

Another argument brought up by library stakeholders is that a harmonised EU copyright benefits the European Single Market. The *National Library of Romania* wants exceptions related to education, learning and access to knowledge to be mandatory and they ask for ”a harmonised approach” to ”reduce legal uncertainty and to promote the circulation of knowledge in the single market.”[155] NUK also uses the market as an argument, claiming that the closed and limited list of limitations and exceptions ”is not in keeping with the rapid pace of technological innovation that shapes how we interact with copyright protected works” and that this ”imposes restrictions on innovative business models--and as a result economic growth.”[156] It also connects the market arguments with the needs of users, writing: ”The European free market should be harmonized in this area, to enable legal certainty and thus make it possible for users of copyrighted works to use them under the same conditions in different countries of the EU.”[157]

In EBLIDA's response to question 27, it introduces the notion that ”[t]he concept of fair compensation should include that in some cases a fair compensation can also be no compensation. For uses that pass the three-step test, that is the case.”[158] This means that any compensation schemes with a legal basis should be based only on uses where there is clear evidence that it ”harms” the author’s economic rights. Noting EBLIDA's quotation marks around *harms*, I interpret its answer as trying to question the norms of the market discourse. In relation to this possible disadvantage (i.e. no compensation) to rights holders, the *Library Association of Latvia* says it ”believe[s] that the added flexibility of the copyright should have enough advantages to offset the potential shortcomings and ultimately make the European copyright system fitter for innovation and increase the competitiveness of European business, research and culture.”[159]

The *Association of European Research Libraries* (LIBER) brings up the aforementioned US Google books case in relation to the EU to stress that ”without an open ended exception, significant market distortion between Europe and [other]

[152] Canada, Japan, Mexico, Singapore, and South Korea.
[153] Morocco and New Zealand.
[154] United Nations Conference on trade and development, *UNCTAD Handbook of Statistics 2014 = Manuel de Statistiques de La CNUCED 2014*. pp. 262-263.
[155] “Public Consultation Contribution: National Library of Romania.” Q 21-22
[156] “Public Consultation Contribution: Narodna in Univerzitetna Knjižnica.” Q 21
[157] “Public Consultation Contribution: Narodna in Univerzitetna Knjižnica.” Q 26
[158] ”In the event that limitations and exceptions established at national level were to have cross-border effect, how should the question of “fair compensation” be addressed, when such compensation is part of the exception?” “Public Consultation Contribution: EBLIDA.” Q 27
[159] “Public Consultation Contribution: Library Association of Latvia.” Q 25

countries could occur […], potentially impacting on the research and development capacity of European countries."[160] So, besides the moral disadvantages of being "behind" the US, there is also economic disadvantage. The *International Federation of Library Associations* (IFLA) observes that "libraries, and therefore the research sector, in the US undertaking mass digitization projects [...] are increasingly moving ahead of their EU counterparts, with the benefit of a flexible exception."[161] As the EU wants to compete within the knowledge economy[162] this is a potential danger.

NUK provides a logical argumentation on the origin of the different exceptions, saying that the non-interference with normal exploitation do not unreasonably prejudice rights holders, and since this is considered when drafting the exceptions, making exceptions mandatory should have no negative effect on rights holders.[163] *League of European Research Universities* (LERU) takes this discussion down to a practical level, emphasising that the cost is high both for administrative and legal work, as well as the research itself when researchers may be charged for accessing the data for text and data mining purposes, "resulting in extra money to be added to the research budget and flowing to private parties."[164] For universities to have an equal role with other actors in the knowledge economy LERU requests that "[a]ll exceptions regarding research and education should be mandatory at Member State level and not overridable by private contract. Harmonisation is required for the Internal Market to function in a stable environment."[165] LERU also lifts an interesting argument on the direction of the information society, in relation to copyright, academia, and the market:

> In an era where there is a move to openness, the direction of travel is for there to be more sharing, not an expectation of greater remuneration. Therefore it is to be hoped that exceptions do not emphasise the role of cross-border compensation. For academic use, the principle should be that compensation should not be expected. For commercial use, mechanisms would need to be created (perhaps at national level) to ensure that rights holders or collecting societies were reimbursed.[166]

Yet another argument concerning the Single Market is that institutions such as libraries actually deliver an economic value. EBLIDA references a press release of the BL which shows that "[t]he economic value that the library delivers is now almost five times its costs, representing a return on investment of 5:1". Providing a

[160] "Public Consultation Contribution: LIBER." Q 25
[161] "Public Consultation Contribution: IFLA." Q 23-25
[162] European Commission, "Green Paper on Copyright in the Knowledge Economy. COM(2008) 466 Final."
[163] "Public Consultation Contribution: Narodna in Univerzitetna Knjižnica." Q 22
[164] "Public Consultation Contribution: The League of European Research Universities (LERU)." Q 23
[165] "Public Consultation Contribution: The League of European Research Universities (LERU)." Q 22
[166] "Public Consultation Contribution: The League of European Research Universities (LERU)." Q 27

proof ”that libraries, archives and information services have an important role to play in boosting the economy” opens up for an interesting discussion, not so easily disregarded by philosophical arguments on knowledge values.[167] EBLIDA concludes that ”[a] competitive market can only innovate by relying on well-educated and informed citizens and consistent investment in libraries, archives and information services. This generates a good return on investment and stimulates the economy.”[168]

Academic responsibilities and European cooperation

The National Library of Germany suggests that some exceptions should be mandatory concerning certain privileged institutions, like national libraries.[169] The National Library of the Netherlands emphasises that research libraries (a category that sometimes include national libraries) can and do supply research articles cross-border to individuals for their own non-commercial education and research purposes. It stresses that this is a ”very important part of the scholarly communication cycle given that not every individual or individual library can purchase everything.”[170] It continues:

> If the Information Society Directive had direct effect in the single market this activity would clearly be lawful, however due to differences in member state implementation of private copying/research exceptions whether this activity is lawful across borders or not is currently unclear due to the differing nature of limitations and exceptions in the European Union.[171]

Research libraries have problems knowing if the fulfilment of their mission is actually legal, which creates uncertainty. They could follow Cummings and Gunnells' recommendation (cf. *Previous research*), and create policies which, to some extent, provides security (in the sense that there is a concrete framework to relate to) but this method is not failsafe. Considering the libraries' lack of structural power this is a big problem; libraries will rather enter into licence agreements than risk legislative processes, and this is a huge cost to libraries – a cost which affects e.g. the number of employed librarians, opening hours etc.

The *National Library of Scotland* writes that the lack of consistency of limitations and exceptions in the EU ”is acutely problematic. Such an environment generates a fundamental lack of clarity and consistency across the Union. This is damaging and restrictive to the cultural heritage and knowledge sectors in particular. Libraries face unnecessary and complex uncertainties when dealing with, for example, cross-border research projects within the EU. Allowing exceptions to

[167] “Public Consultation Contribution: EBLIDA.” Q 24
[168] “Public Consultation Contribution: EBLIDA.” Q 24
[169] ”Zudem sollten [...] verbindliche Schrankenregelungen für privilegierte Institutionen wie Nationalbibliotheken eingeführt werden.” “Public consultation contribution: Deutsche Nationalbibliothek.” Q 25
[170] “Public Consultation Contribution: Koninklijke Bibliotheek.” Q 2
[171] “Public Consultation Contribution: Koninklijke Bibliotheek.” Q 2

be optional for member states is harmful to the growth of research, education, society, and integration in Europe."[172] The Library Association of Latvia stresses that even if an exception is implemented in a national legislation, it might be implemented in drastically different ways, and it warns that this creates "a dangerous situation that in some Member States the common European cultural heritage is taken better care of than in the others; in turn, discrepancies between possibilities to make available the digitised works in different Member States creates a distorted overall view on the common European cultural heritage."[173]

This in turn brings up the issue of European cooperation in e.g. digitisation of our common cultural heritage. The *National and University Library in Zagreb* (NSK) writes that "[h]armonisation is necessary, so that all EU Member States work within the same legal framework [… limitations and exceptions] hinder interoperability, exchange and cooperation in activities and projects involving several EU Member States."[174] EBLIDA writes some concrete examples of discrepancies in Member States' legislation:

> [T]he UK is the only Member State without a private copying exception, so an act that is legal in Spain or the Netherland suddenly becomes a criminal offence in the UK. Finland hardly has a parody exception, so a work considered legal in Germany could be infringing copyright in Finland.[175]

From a research perspective, this means that researchers have difficulties working together and sharing knowledge across borders, and the *Library Association of Ireland* says the different implementations of exceptions are undermining effective collaboration between EU Member States.[176] The National Library of the Netherlands puts this in relation to the relatively new but increasing work with digital preservation, and exemplifies with the cooperation between the states in the Baltic region: "[because of digital preservation's] immature nature combined with limited budgets […] even amongst the larger member states, it is only natural that countries like those in the Baltic region explore a shared international preservation infrastructure."[177]

What they are referring to is probably the Estonian-Latvian-Russian project *E-Archive*, a joint project with the mission to "maintain the historical and cultural heritage of transborder territory accumulated in the archives of Estonia, Latvia and Russia as well as to provide the residents of the three countries with free access to this heritage."[178] Central and Eastern European countries have a more recently entwined history than the West European countries, making it more important for

[172] "Public Consultation Contribution: National Library of Scotland." Q 21
[173] "Public Consultation Contribution: Library Association of Latvia." Q 21
[174] "Public Consultation Contribution: National and University Library in Zagreb." Q 21-22
[175] "Public Consultation Contribution: EBLIDA." Q 26
[176] "Public Consultation Contribution: Library Association of Ireland." Q 21
[177] "Public Consultation Contribution: Koninklijke Bibliotheek." Q 2
[178] "About Project - E-Archive."

their cultural heritage institutions to treat recent cultural history within the same context, even though the borders drawn in the early 1990's at the moment hinders this because of copyright legislation. Considering the earlier discussion on the level of corruption in Central and Eastern Europe, it is interesting to see how cultural institutions have faith in the structural power of governmental bodies, when it comes to allowing for cross-border cultural projects and information sharing.

The issue of digital preservation is also brought up by the *National Library of Austria*, who writes: ”cooperation in digital preservation networks and joint digital preservation research projects is hampered as partners face challenges due to different legislation concerning preservation copies.”[179] The *British Library* (BL) write that the ”perhaps […] most obvious solution would be to increase legal harmonisation across EU member states, which in turn suggests that they may have to be mandatory in order to achieve harmonisation.”[180] In response to question 2 they write: ”[W]e would raise the issue that often the laws are crafted around one organisation preserving its own collection. This is not feasible and does not reflect modern day digital preservation practice where mirror servers/multiple copies of items need to be run, and different aspects of the end to end digital preservation process will have to be carried out by experts who may or may not even be in the same country.”[181] The context of the BL's "significant collections” is also discussed with the point being that collections from several different national libraries ”make historical and logical sense to bring together as one whole, rather than to sit as fragmented parts across different infrastructures across the EU.”[182]

The BL stresses the structural power of the Commission, when it discusses why legislation regarding mass digitisation is not yet in place, even though it has been on the agenda for a long time:

> Despite this being a focus of much Commission activity [...] there are still only a handful of countries that have laws in place to facilitate mass digitisation. /.../ [G]iven that our collection is very multinational in nature, and communication to the public involves all jurisdictions globally we think it important to develop legal mechanisms, to allow cross-border legal access to the fruits of not only digital library projects, but mass digitisation public-private partnerships also.[183]

An interesting background to the BL's argumentation is that the UK copyright legislation was changed on June 1 2014, and in the new legislation several limitations and exceptions of the InfoSoc Directive were implemented.[184] This change in UK copyright was heavily influenced by the so-called ”Hargreaves report”, *Digital Opportunity: a review of Intellectual Property and Growth*, from

[179] “Public Consultation Contribution: Österreichische Nationalbibliothek.” Q 26
[180] “Public Consultation Contribution: British Library.” Q 22
[181] “Public Consultation Contribution: British Library.” Q 2
[182] “Public Consultation Contribution: British Library.” Q 2
[183] “Public Consultation Contribution: British Library.” Q 2
[184] “Changes to Copyright Law - News Stories - GOV.UK.”

2011, in which Ian Hargreaves (currently Professor of Digital Economy, Cardiff University) writes: ”In the UK, exceptions have failed to keep up with technological and social change, leading to widespread consequences. Technology has expanded the potential for communication, research, learning and access to resources, but out of date rules mean this potential is not fully realised. The UK’s world class universities – a sector of strategic importance to future growth, both as source of skilled people and knowledge – find this on a daily basis.”[185]

Hargreaves writes, together with co-author of the previously mentioned 2007 IVIR study,[186] P. Bernt Hugenholtz (professor of copyright law, University of Amsterdam), in a contribution to the copyright consultation, that they opt for a ”core set” of mandatory limitations and exceptions, ”while allowing the Member States flexibility in applying other L&E’s depending on social-cultural circumstances, or in response to unforeseen technological change.” To the ”core set” mandatory exceptions they would like to add ”those that reflect fundamental information rights and freedoms (e.g. for quotation, new reporting, parody, information location, research and data mining, user-generated content), and those that have an immediate impact on the workings of the Single Market (e.g. private copying and archiving).”[187] Thus they argue for the same changes in the InfoSoc directive as has been done in UK legislation, and this argumentation has strong parallells to that of the BL. The structural power of the EU vis-à-vis the UK might be problematic for the British stakeholders, as an EU legislation could possibly mean a step backward from the recent changes in UK copyright.

An easy-to-use system for users

”The list was written in 2001! This was well before YouTube and Facebook were created.”[188] This is how the STKS comments the list of exceptions, referring to the exceptions as narrow, specific and technologically outdated. A consequence of this is that the everyday habits of online users would be considered illegal in some Member States: linking to copyrighted content in a blog; creating a meme of a copyrighted picture; adding existing songs or footage to a video – these actions could all create issues for the user that posted them.

”As [the exceptions included in the InfoSoc Directive] were only brought in after carefully balancing the considerations of rights holders, end users and the common good,”[189] the Library Association of Ireland thinks they should be mandatory in all Member States. As an example it writes that there is currently no

[185] Hargreaves, *Digital Opportunity: Review of Intellectual Property and Growth*. p. 41
[186] Instituut voor Informatierecht (Amsterdam), European Commission., and Directorate-General for the Internal Market., *Study on the Implementation and Effect in Member States’ Laws of Directive 2001/29/EC on the Harmonisation of Certains Aspects of Copyright and Related Rights in the Information Society*.
[187] “Public Consultation Contribution: Hargreaves & Hugenholtz.” Q 25
[188] “Public Consultation Contribution: The Finnish Research Library Association (STKS).” Q 24
[189] “Public Consultation Contribution: Library Association of Ireland.” Q 22

exemption for format shifting in Irish legislation, although most people consider it an entitlement to convert music they have bought from CD to MP3 format. Although many library stakeholders focus on the libraries' information needs in their contributions, some of them bring up the end-user – i.e. the individual library user. The Library Association of Ireland asks for recognition for ”[t]he critical role that libraries play in the preservation and dissemination of cultural heritage, in educating users about copyright issues, and in serving as an intermediary between users and rights holders.”[190]

NUK takes up the problems that arise for the end-user when information is shared cross-border, but legislation is not: ”It is confusing to end-users when one use is covered by an exception to copyright in one jurisdiction but the same use is prohibited in another country.”[191] The fact that internet (at least at the moment) knows no borders when it comes to communicating and sharing information between Europeans (and indeed citizens from the whole world) is of course a threat to institutions who are used to having control over the information flows (namely actors with structural and instrumental power). The STKS writes on citizens' actions on the internet that ”[f]or citizens to express themselves online it is necessary that they can use copyright protected material that others have created as part of their own expressions (think remixes and so called user generated content).”[192]

That a research library association bring up end user activities such as remixes and user generated content, even though it is quite far from their main mission (”to promote the role of libraries in research and education”[193]) is quite remarkable. It is a recognition of a changing culture around us, one which is not necessarily bound by the power relations that make up the theoretical framework for this thesis. As an example, around 20 % of the Swedish population have been filesharing at least once a year 2009–2014,[194] even though actors with structural *and* instrumental power have made an aggressive campaign to promote the ”pirate discourse”.[195] Carolyn Guertin comments on citizens' online expressions in the foreword of *Digital Prohibition: Piracy and Authorship in New Media Art* that: ”as digital technologies make it easier and easier to organize demonstrations, they are also facilitating a new model of creativity based on the ascendant model of production in the Twenty-first century: the remix.”[196] Could it be that the ”commons discourse”[197] is starting to take place in the legislative process, and that stakeholders promoting digital rights and free information have a say in the

[190] “Public Consultation Contribution: Library Association of Ireland.” Q 23
[191] “Public Consultation Contribution: Narodna in Univerzitetna Knjižnica.” Q 26
[192] “Public Consultation Contribution: The Finnish Research Library Association (STKS).” Q 23
[193] “Suomen Tieteellinen Kirjastoseura.”
[194] Findahl, *Svenskarna och internet 2014*. p. 36
[195] As mentioned in the earlier chapter on *Power relations in the legislative process.*
[196] Guertin, *Digital Prohibition*. p. xi
[197] Cf. *Power relations in the legislative process*.

legislative process? STKS is either way not acting within the framework set up by actors with structural power.

The National Library of the Czech Republic writes that in everyday activities, the problems with use of foreign copyrighted works are neglected by the users as they are not aware of the problems. Thus there is a possibility of legal action, which objectively, from a librarianship point of view, as a whole (on national or European level) creates a state of legal uncertainity.[198]

The call for ”fair use” vs. the potential burdens for CJEU

In many contributions the need for a European ”fair use” exception is called for, similar to the ”fair use” clause in US legislation. This argument has strong parallells to the aforementioned analysis by Trevor Cook that EU copyright legislation might head in this direction,[199] but on the other hand does not problematise that the ”fair use” concept in US legislation is so broad that it sometimes is hard to define, and therefore another kind of insecurity for libraries,[200] especially when dealing with digital media, where there might not yet be a clear precedent.

A lot of the library stakeholders see a European fair use exception as a solution to the perceived problems of EU copyright: ”[b]uilt-in flexibility in the form of a fair use provision based on the US model would be a more direct (and preferred) way of introducing flexibility”[201]; ”moving towards a more flexible exceptions framework, namely implementation of a US-style ‘fair use’ principle [...] has clear benefits”[202]; ”a European adoption of 'fair use' rules is desirable”[203]; ”since the digital environment changes quickly more flexibility is necessary (e.g. implementation of 'fair-use')”[204]; ”The best approach would necessarily be a mix of approaches, as a build-in flexibility in form of a fair-use or fair dealing provision would necessarily lead to a case law of interpretation”[205]; ”A fair use provision would provide the flexibility to accommodate new technologies and allow for innovative ways of creating and transforming works”[206]; ”to list any new specific exceptions that will take into account any new development in years to come wouldn’t prove to be useful. The list should therefore be combined with more general principles like 'fair

198 "V každodenních činnostech se na teritoriální omezení platnosti právních ustanovení předmětů ochrany zahraničního původu ohled často nebere, neboť pracovníci si nejsou tohoto problému vědomi, avšak ve skutečnosti není možnost právního postupu vyloučena, což objektivně, z pohledu knihovnictví jako celku (v národním či evropském měřítku) vytváří stav právní nejsitoty." “Public consultation contribution: Národní knihovna České republiky.” Q 26
199 Cook, “Exceptions and Limitations in European Union Copyright Law.” p. 243
200 Cummings and Gunnells, “Copyright and Fair Use in Higher Education.”
201 “Public Consultation Contribution: The National Library of Wales.” Q 25
202 “Public Consultation Contribution: National Library of Scotland.” Q 24
203 ”Die europaweite Einführung von „Fair-Use“-Regeln ist wünschenswert.” “Public consultation contribution: Deutsche Nationalbibliothek.” Q 25
204 “Public Consultation Contribution: National and University Library in Zagreb.” Q 24
205 “Public Consultation Contribution: Österreichische Nationalbibliothek.” Q 25
206 “Public Consultation Contribution: Library Association of Ireland.” Q 24

use' or 'similar use'"[207]; "the United States, Israel, Singapore and South Korea have an exception known as fair use. [...] A similar law is just one possible solution to the current situation in Europe"[208]; and "Europe would benefit from such a flexible concept [i.e. fair use], that can adapt as technology changes. It would also ensure that copyright focuses on what it should, instead of, for example, making it illegal for teachers to share PowerPoint presentations with copyrighted material on websites or by e-mail"[209].

One problem addressed with a fair use concept is the potential increase in litigation. The National Library of Austria however writes:

> While critics might argue that this will in turn create a situation of increasing legal uncertainty, it must be said that neither is this argument backed up by objective evidence (e.g. that copyright court cases in Europe outnumber similar court cases in the U.S.), nor does the present situation that mainly relies on prohibiting non-predefined uses result in clearcut legal situations, while the missing flexibility is undoubtedly an obstacle to innovation, the development of new business models and creative re-use.[210]

The National Library of Wales considers the possible loss in litigation costs is outweighed by the fact that fair use "would [...] enable businesses to seize opportunities created by new technologies more quickly."[211] The Library Association of Latvia recognises "that a fair dealing provision at the same time could somewhat lessen the legal certainty for rightholders and also introduce an additional burden to the courts."[212] However – as mentioned in the discussion of benefits for the Single Market – they think that this possibility is outweighed by the advantages it will bring for innovation and competititiveness of European business, research, and culture. Once again we might turn to an interesting fact mentioned in the chapter on *Previous research*: only a handful of the CJEU cases heard in recent years concerns limitations and exceptions of the InfoSoc Directive.[213] If the number of copyright cases increase, it is important to recognise the potential effect this could have on libraries, who might lack the funds to go through litigation processes.

The National Library of Romania does not consider interpretation either by national courts or the CJEU as useful solutions, neither does it believe in periodic revisions. Instead it would recommend a fair use or fair dealing provision as "a test that can be applied to any activity that uses a copyright work to see if it undermines the legitimate interests of a rightsholder or not."[214] Using "fair use" as an effective solution is problematic, because the outcome will always be dependent

[207] "Public Consultation Contribution: EBLIDA." Q 23
[208] "Public Consultation Contribution: LIBER." Q 25
[209] "Public Consultation Contribution: The Finnish Research Library Association (STKS)." Q 24
[210] "Public Consultation Contribution: Österreichische Nationalbibliothek." Q 25
[211] "Public Consultation Contribution: The National Library of Wales." Q 25
[212] "Public Consultation Contribution: Library Association of Latvia." Q 25
[213] Cook, "Exceptions and Limitations in European Union Copyright Law." p. 244
[214] "Public Consultation Contribution: National Library of Romania." Q 25

on interpretation. Many researchers[215] have pointed out that ”fair use” in the US is difficult to interpret by libraries and that this sometimes leads to a ”better safe than sorry” approach – resulting in less sharing of information and knowledge by libraries.[216]

A solution where the legislators can add new exceptions is a more transparent process for institutional users and end-users. A downside is the slowness of the process, but from a power perspective this solution is better since it allows actors that primarily have discursive power to be a part of the process.

Requested new exceptions in the InfoSoc Directive

While many of the contributions include requests for mandatory exceptions concerning education and research, some specific non-existent exceptions are brought up by several stakeholders. I will here present a list of specific exceptions that library stakeholders frequently request in their contributions, which presumably originates from actual incidents:

- Contracts and technical protection measures cannot override limitations and exceptions
- E-lending
- Text and data mining
- Publicly funded research openly available

The national libraries of Wales and Romania as well as LIBER and IFLA writes out specifically that contracts and technical protection measures should not be able to override limitations and exceptions.[217] LIBER writes that ”[w]ithout such an exception the harmonisation of exceptions is pointless.”[218] IFLA similarly comments this with: ”any new or updated exceptions to respond to the realities and opportunities of the digital environment would be effectively useless.”[219] The right to e-lend is another desired exception, and the National Library of Romania as well as LIBER wants this exception to reflect the same conditions as are applied to analogue lending.[220]

The national libraries of Wales and Romania, the Library Association of Ireland, and LIBER want exceptions for text and data mining[221] – the first and the

[215] Cf. Horava, Kevin L. Smith, Armstrong, and Cummings and Gunnells, in the chapter *Previous research*.
[216] Weiler, “Fair Use in the Twenty-First Century: A Librarian’s Perspective.” p. 53
[217] “Public Consultation Contribution: The National Library of Wales.” Q 23; “Public Consultation Contribution: National Library of Romania.” Q 23; “Public Consultation Contribution: LIBER.” Q 23; “Public Consultation Contribution: IFLA.” Q 23-25.
[218] “Public Consultation Contribution: LIBER.” Q 23
[219] “Public Consultation Contribution: IFLA.” Q 23-25
[220] “Public Consultation Contribution: National Library of Romania.” Q 23;
[221] “Public Consultation Contribution: The National Library of Wales.” Q 23; “Public Consultation Contribution: National Library of Romania.” Q 23; “Public Consultation

latter specify that they want this to apply for both commercial and non-commercial purposes, LIBER with the argument that ”[k]nowledge transfer is now at the heart of what research universities do. The lines between what is non-commercial and potentially-commercial research are blurred. Any attempt at definition will limit the impact of research activities.”[222]

The national libraries of Spain, Croatia, and Wales, and LIBER, want an exception for digital preservation: the right to reproduce a work for preservation purposes more than once, in multiple formats.[223] This discussion is closely related to the Library Association of Ireland's arguments on format shifting for end-users (cf. the chapter *An easy-to-use system for users*): it concerns the right to re-produce a work for personal or institutional uses. LIBER broaden this to ”an exception for preservation networks between institutions” which they find important because of the digital preservation infrastructure: ”Digital preservation is a costly exercise involving massive investment in technology, infrastructure and skills. Storage costs are not decreasing in line with the growth of digital information. The only way to ensure that our cultural heritage remains accessible in the future is to reduce duplication of effort and share infrastructure.”[224] The National Library of Wales emphasises the possibilities of mass digitisation of orphan works *without* diligent search for each individual rights holder. (Article 3 of the Orphan Works Directive[225] currently demands that a diligent search is carried out for each work or other protected subject-matter, which effectively means that the burden of proof lies with the libraries, and not with the right holder of the work. Either libraries spend massive resources on finding rights holders, or they accept liability for potential lawsuits if they have digitised presumed orphan works whose right holder showed up.)

On the issue of publicly (and charity-funded) research published open access (specifically mentioned by the National Library of Wales[226] and LIBER) LIBER conclude that ”open access will play an integral role in driving research excellence globally. Copyright law should not hinder its progress.”[227] Parallells can be drawn between open access and the discussion on ”the author” and ”the commons” - if the status of the author is declining, what will an ”author” be? If economic capital is the core of the copyright debate, it is reasonable to have a discussion on what rights the public has to a work when it has been publicly funded. Will economic investment be considered more important than the intellectual investment of the

Contribution: Library Association of Ireland.” Q 23.
222 “Public Consultation Contribution: LIBER.” Q 23
223 “Public Consultation Contribution: National Library of Spain.” Q 23; “Public Consultation Contribution: National and University Library in Zagreb.” Q 23; “Public Consultation Contribution: The National Library of Wales.” Q 23; “Public Consultation Contribution: LIBER.” Q 23.
224 “Public Consultation Contribution: LIBER.” Q 23
225 “Orphan Works Directive (2012/28/EU).”
226 “Public Consultation Contribution: The National Library of Wales.” Q 23
227 “Public Consultation Contribution: LIBER.” Q 23

author (or is it already)?

Contra argument: how to solve a complicated problem?

The *National Library of Sweden* (KB) writes that on one hand, research projects which involves researchers and/or material from several Member States are affected by the limitations and exceptions; on the other hand KB does not necessarily agree that the exceptions should be made mandatory,[228] claiming this could possibly cause companies to not develop or distribute services useful for libraries because of the mandatory exceptions making them unprofitable (however, it provides no concrete example of this).[229] It is interesting to point out that KB in this case takes other stakeholders into consideration; stressing its own lack of instrumental power, and that it itself lack the set of skills to develop and distribute library service. KB's view is consistent with what Granholm writes in her thesis: ”The institutions are keen on their good reputation and would, in all respects, sometimes a little too many, do the right thing in relation to the rights holders.”[230] It is noteworthy that the rights of rights holders is internationally harmonised, while user rights are not harmonised at all. Considering this, it is even more noteworthy that KB accommodates the rights holders in its reply, while the users' rights already are at a disadvantage.

[228] Expect for exceptions allowing for blind people to take part of culture and information, which is particularly mentioned in the library's contribution. “Public consultation contribution: Kungl. biblioteket.” Q 22

[229] “Public consultation contribution: Kungl. biblioteket.” Q 23.

[230] ”Institutionerna är måna om sitt goda anseende och vill i alla hänseenden, ibland lite för många, göra rätt för sig i förhållande till upphovsmännen.” Granholm, *Arkiverad men inte tillgängliggjord*. p. 32

Conclusions

”It's not enough for creators and their industry to love free speech. We have to learn to share it, too.”[231] Cory Doctorow reflects on the ideals and the actions of a modern day democracy in a digital society, bringing up the important of not just talking about values, but also living up to them.

The aim of this thesis was to analyse which positions library-related stakeholders presented in their contributions to the Commissions copyright consultation regarding limitations and exceptions in the InfoSoc Directive, and which arguments they used to support this position. The library stakeholders presented many proposals for resolving potential issues with the EU copyright.

A fair use exception in the InfoSoc Directive is glorified by many national libraries as a law that will change the circumstances the European libraries work with for the better. Considering the previous research mentioned on fair use as a complicated, uncertain tool to work with, evidence suggest fair use would not at all be a obvious solution to the problems libraries face. However, what the wish for a fair use exception reflects is the libraries' needs for flexible solutions. Fair use is not a perfect solution – but it is regarded as better than status quo, and perhaps the argument is also based on the balance of probability – a head-over-heels reform of the InfoSoc Directive is not plausible, but a step-by-step revision of the European copyright legislation might be conceivable. The fact that libraries construct arguments around the Single Market also indicates that a step-by-step approach to achieving a copyright reform is seen as a better method than call for a ”European wide library commons”.

The need for mandatory exceptions is another conclusion from this study: according to the library stakeholders this would have a positive effect on both the economy and the society as a whole. Sharing information across borders, often via the internet, is now an everyday phenomenon, and the legislation should reflect societal norms, rather than restricting them. The library stakeholders have an interesting discussion on democratic values, innovation, and European cooperation, and how these aspects are at a risk with the current legislative framework. It's not just about choosing a copyright legislation, it's about choosing the society we want.

[2 3 1] Doctorow, *Information Doesn't Want to Be Free*. p. 157

Reflections on the methodology

The power perspective – structural, instrumental, discursive – was a useful tool for the analysis of the library stakeholders' consultation contributions. However, as the primary material was narrowed down to the set of contributions used in this thesis, the most apparent examples – e.g. the argumentation of IT industries, CMO's, and governments – were not compared to the library stakeholders' positions, making it less clear how their views actually differ. Nevertheless, the power perspective helped show some interesting points, for example the fact that libraries legitimise their arguments with Single Market comparisons might indicate that they, in their argumentation, want to ally themselves with the IT industries; *the mission of libraries* is not a powerful argumentation, its discursive power is weak when compared to the structural and instrumental power of other stakeholders. It is also necessary to acknowledge that national libraries are dependent on governmental bodies since they are publicly funded institutions. A too radical view could be viewed as biting the hand that feeds them.

The argumentation analysis was particularly useful when discerning the different positions of the stakeholders when sorting the content of the primary material. However, as a schematic analytic tool it fell a bit short of its purpose as the analysis was better presented in flowing text.

What is an author?

Recalling the Foucauldian *author* concept and the Gutenberg parenthesis from the *Introduction* chapter, modern technology does not only bring competition concerning the cheap digital copy de-valuing sales prospects; there is also the question about *robot authors*, i.e. the authors behind computer generated books, which are becoming increasingly common in online book stores. Rasmus Fleischer describes the phenomenon at length in *Biblioteket*, writing that the content of these non-fiction books certainly can be correct, but that the lack of editorial work is, at times, overly apparent. Even so, libraries still purchase these titles for their collections and some of them have also defended the acquisitions with the users' demand of books on the topic in question.[232] Is a robot author an author? Does it have any moral rights? And if the robot author doesn't, who holds the copyright to the title in question – the programmer? The provider of the big data that the robot author based its book on?

The person who programmed the robot – i.e. the person with the instrumental power to create the work – can be compared with publishers in the era of the Statute of Anne. The power to produce and distribute intellectual and cultural works is central to the economic aspect of copyright. The notions of automatic copying and automatic authoring do not seem at home within the Gutenberg parenthesis, indicating that we indeed are in a paradigm shift – the concept of both

[2 3 2] Fleischer, *Biblioteket*. p. 9

the author and the publisher is blurring, as well as the line between producer and consumer.

What is a copy?

It is not only the concept of author that needs re-thinking. A copy is now created when a user logs on to the internet. The power of the web cache in fact makes EU citizens who use the internet on a regular basis recidivists, since copyright infringement is unavoidable when using the internet. *How* is explained briefly in an article by Miquel Peguera:

> It is hardly a novelty to note that the Internet conflicts with copyright—or at least with an idea of copyright based on rights holders' absolute control over copying in any manner of form. […] The way data packets travel through the net is by means of temporary reproductions made at the different gateways connecting the networks. In addition, end hosts are able to display the information received only by storing it in memory devices of different degrees of stability. Moreover, proxy caches, mirrors and content delivery networks replicate the contents in order to make them more accessible to final users. In a way, the whole operation of the Internet relies on the possibility of copying.[233]

Copyright is not adjusted to the information society, be it regarding visiting web pages or making interlibrary loans. Cory Doctorow writes that there still is a place for copyright in this age, but that when every device functions by copying all the time, copyright's job cannot be to ”regulate copying”. He stresses the impossibility of the situation by stating that ”in the twenty-first century, copying isn't a problem. In the twenty-first century, copying is a *fact*. You can't and won't solve copying.”[234]

Transparency and language

The transparency of the EU is not just about making documents available for download online, it is also a matter of communicating the information in all 24 official EU languages.[235] The copyright consultation was only available from the Commission's website in English and the contributions suggest that this had an impact on the thoroughness of the replies. The consultation document was translated into Czech by the Czech Department of Culture,[236] and this presumably led to more contributions (and more thorough contributions) from Czech stakeholders. Another evidence suggesting language inhibits the respondent is the fact that the Finnish national library at first responds in English – the same language as the consultation document – but after a few questions switches to Finnish, resulting in longer replies.[237]

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[233] Peguera, *Copyright Issues Regarding Google Images and Google Cache*. p. 165

[234] Doctorow, *Information Doesn't Want to Be Free*. pp. 131-132

[235] “Official Languages of the EU - European Commission.”

[236] ”Ministerstvo kultury”, http://www.mkcr.cz/assets/autorske-pravo/Consultation-document_cesky_1.pdf Accessed 2015-05-06.

[237] N.b. the length of the reply does *not only* increase due to the complex morphology of the Finnish language, but the content of the replies *is* more substantial.

Even in your native language, discussing legislative text without being a legal expert can be a challenge; discussing your national copyright legislation in a foreign language in a EU consultation document is most likely even harder. The use of English as a lingua franca in a European context and its impact on democratic procedures (e.g. public consultations) would be interesting to investigate further.

Summary

In this thesis I analyse and discuss the argumentation of library organisations and European national libraries in their contributions to the European Commission's public consultation on the review of the EU copyright rules. By a close-reading of their contributions I examine how the debate around copyright limitations and exceptions is constructed.

In the background chapter, I present an overview of the history of international copyright legislation, with emphasis on the development of European copyright in the recent years. The history of copyright and the different legal traditions that copyright stems from is important to consider when analysing the contributions, since it is likely that the legal savoir-faire of the library stakeholders is characterised by national legal norms.

The chapter on previous research gives an overview of copyright research, especially in the ALM field, and is focused on the areas of European copyright, copyright in relation to libraries, and research covering limitations and exceptions specifically.

The two main positions of library stakeholders is pro or contra a reform of the InfoSoc Directive. To help structure the library stakeholders' arguments for the positions they take argumentation analysis is used, as well as a theoretical framework of the relations between structural, instrumental, and discursive power.

The findings of the analysis is that there are library stakeholders who are strongly supportive of a EU copyright reform, arguing that democratic values as well as the EU Single Market would benefit from this. There are also library stakeholders who argue against legislative change, either suggesting extended collective licencing agreements, or arguing the Member States' sovereignity is more important than pan-European legislation. Furthermore, many library stakeholders propose either a general ”fair use” exception in EU copyright law, or adding several specific exceptions, e.g. for text and data mining, e-lending, publicly funded research openly available, and that contracts and technical protection measures cannot override limitations and exceptions. National libraries and library organisations from the Central and Eastern European Member States' are more supportive of a copyright reform than their Western European counterparts, while they do not mention licencing solutions at all. In general, library stakeholders agree that the interoperability, exchange and cooperation in activities and projects

involving several EU Member States suffers from the current copyright legislation.

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