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ARTICLE

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Abstract In 2013, the European Commission initiated a public consultation on the EU copyright review. Since the participation of the Central Eastern European (CEE) countries in the consultation was rather weak, it is questionable whether the results of the consultation and a subsequently leaked draft Impact Assessment sufficiently reflect the interests of the CEE countries. This article examines the relevance of the Impact Assessment from the perspective of three selected CEE countries, Latvia, Lithuania and Poland. It concludes, first, that some problems identified in the draft Impact Assessment are of little practical relevance in the focus countries. Second, it identifies copyright issues that are important in the selected CEE countries, such as territorial segmentation of online markets, exceptions for libraries, private copy levies, remuneration of authors and performers, and copyright enforcement online. It further suggests some considerations to be taken into account when searching for solutions that would accommodate the interests of the region.

Keywords Copyright · European Union · Central Eastern Europe · Digital libraries · Private copy levy · Enforcement

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1 Introduction

In international intellectual property (IP) policy debates, the interests of developing countries have been actively discussed in recent years.[1] In this sense, one may ask whether a similar problem exists inside the European Union (EU). The EU consists of a number of "old" Member States largely located in Western Europe and a number of more recent Member States geographically located in Central-Eastern Europe (CEE).[2] Despite the political efforts to create a single common market, these two regions inside the EU have at least a few differences that may matter in IP policymaking. Most of the CEE countries are small markets with their own local languages and largely local creative industries; they share a common recent political history (i.e. the Soviet regime), which significantly impacted (postponed) the development of IP laws in these countries, as compared to developments in IP laws in Western EU Member States. The economies of the CEE countries are generally still weaker than those in Western EU Member States, even if a significant economic growth could be seen in most CEE countries.

These and other cultural, historical and economic differences suggest that the CEE countries may have to some extent different interests in IP policymaking from those of Western EU Member States. For instance, they may wish to favour development-orientated policies, such as a broader access to educational and research materials. They may prefer protecting the interests of their comparatively weaker local creative markets and local artists, rather than unconditionally supporting EU-wide competition in creative industries. Also, with a relatively shorter IP and its enforcement history, they may be reluctant towards overly strict IP enforcement measures.

The question addressed in this article is whether and what special needs and interests CEE countries have in the area of EU copyright policymaking. More specifically, this paper asks whether the needs of CEE countries are properly addressed in the newly commenced discussions on the EU copyright review, and whether there are CEE-specific considerations that need to be taken into account when proceeding with this initiative.

On December 2013, the European Commission announced a public consultation on the Review of the EU copyright rules[3] and received over 11,000 responses from different stakeholders. However, citizens and organizations from the CEE countries

[1] *See*, *e.g.* Carlos M. Correa, Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options (Zed Books 2010). This issue has been *inter alia* addressed via the WIPO Development Agenda, *see* http://www.wipo.int/ip-development/en/agenda/ which led to the recent Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, adopted in Marrakesh, on 27 June 2013.

[2] CEE countries, according to the OECD definition, cover 11 EU Member States (Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic, Slovenia, Estonia, Latvia, Lithuania, and Albania, a non-EU state. The population of all CEE countries (except Albania) constitutes 104,063 million out of 504,456 million in all EU countries (20.6 %).

[3] Public consultation paper available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.

have contributed little to the Commission's consultation.[4] Whatever the reasons may be for such a passive participation,[5] this raises a concern whether the interests of these countries are sufficiently represented in subsequent policy documents drafted by the European Commission, in particular the draft Impact Assessment on the modernisation of the EU copyright *acquis*.[6]

For this purpose, I will first take a short look at the situation of the digital creative markets in the selected CEE countries, and to what extent their situation differs from the EU average. Then, after a short introduction to the content of the draft Impact Assessment, I will analyse whether the problems identified in this document are relevant for the focus CEE countries and what solutions could be more suitable for these EU Member States.

This research focuses on three selected CEE countries, Lithuania, Latvia and Poland. These countries have been chosen since they share similar recent history (they all experienced a communist regime and joined the EU in 2004). On the other hand, their market sizes and economic growth levels are rather different. This, as we will see, influences different economic situation in creative markets and, respectively, different legal developments on certain issues.

2 Online Copyright Markets in the Selected CEE Countries

As a starting point, it is worth noting that copyright industries are rather strong and constitute a significant part of the national markets in the selected CEE countries, which is higher than an international and an EU average.[7] However, with regard to information society and e-commerce services, Lithuania, Latvia and Poland are still working to reach the EU average. Whereas the number of individuals using the Internet and the number of households that have Internet access at home in these countries is rather close to the EU average standard,[8] the e-commerce levels are still lower.[9] At the

[4] *E.g.*, among 503 replies from registered stakeholders, there were essentially no replies from Lithuania and Latvia, and only 12 replies from Poland.

[5] They may include a lack of experience in participating in the EU policymaking procedures; a relatively weak civil society and its insufficient participation in democratic decision-making; a misperceived lack of relevance of EU policies on the EU Member States, etc.

[6] The draft Impact Assessment was leaked early 2014 and is available at http://statewatch.org/news/2014/may/eu-draft-impact-assessment-copyright-acquis.pdf (last visited 5 December 2014). The official version of the document has not yet been published as of the date of submission of this paper for publication.

[7] In 2008, in Lithuania, copyright industries constituted 5.4 % GDP, in Latvia – 5.59 %, with an international average of 5.18 %. *See* WIPO Studies on the economic contribution of the copyright industries 2014. An overview, available at http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2012.pdf; in EU, cultural sector constitutes 2.6 % GDP, *see* Report to the European Parliament of 17 February 2014 on private copying levies (2013/2114(INI)), Sec 1.

[8] In 2013, the population using the Internet in the 28 EU Member States was 72 %, in Lithuania – 65 %, in Latvia – 70 %, and in Poland – 61 %; the percentage of households who have Internet access at home in the 28 EU Member States was 79 %, in Lithuania – 65 %, Latvia – 72 %, and Poland – 72 %; *see* Eurostat, Information Society Statistics http://epp.eurostat.ec.europa.eu/portal/page/portal/information_society/data/main_tables.

[9] In 2013, the percentage of individuals having ordered or bought goods or services for private use over the Internet in the 28 EU Member States was 38 %, in Lithuania – 19 %, Latvia – 21 %, Poland – 23 %, *see* Eurostat, *id*.

same time, the consumption of the creative content online is above the EU average in Lithuania and Latvia, but they are lower in Poland.[10] On the other hand, the number of individuals *paying* for online audio-visual content in all analysed countries is slightly lower than the EU average.[11]

As a result, the statistics imply that citizens in the analysed CEE countries, as in the rest of the EU, broadly access and use creative content online. However, they less frequently use legitimate e-commerce services (e.g. based on advertising revenues), and even more seldom access e-services where payment for access to the content is requested.

2.1 Music

A large part of music content online in the analysed CEE countries, as in the rest of Europe, is still accessed from illegal sources. Consumers in Lithuania, Latvia and Poland download or stream illegal content from the Internet more often than the average EU consumer.[12] However, a number of them are also paying for copyright-protected content from lawful online sources.[13]

Poland is doing better on both aspects than Lithuania or Latvia. The number of users downloading or streaming from illegal sources in Poland (10 %) is smallest among the analysed countries and is very close to the European average (9 %), while a number of those acquiring material from legal sources (28 %) is much higher even in comparison with the EU standard (19 %). This is likely to be related to a number of legal digital music services available in the focus markets. In small markets like Lithuania and Latvia, there are still very few legitimate online music services (six services) whereas in Poland the number is five times higher (30 services).[14] Still, the number of legal services is, for instance, far from that in the UK where there are more than 70 legal digital music services.[15]

[10] In 2008, individuals using the Internet for downloading computer or video games in the 28 EU Member States constituted 9 %, in Lithuania – 12 %, Latvia – 13 %, Poland – 7 %. The number of individuals using the Internet for downloading, listening to or watching music and/or films in the 28 EU Member States constituted 27 %, in Lithuania – 32 %, Latvia – 33 %, and Poland 21 %, *see* Eurostat, *id*.

[11] According to Eurostat, the EU28 average was 5 %, Lithuania – 3 %, Latvia – 4 %, and Poland – 2 %, *see* Eurostat, *id*. For more about the e-music sector in Poland *see* TOMO Group report on the operation of electronic music content market in Poland, available at http://www.prawoautorskie.gov.pl/media/Raport_z_badania_rynku_muzycznego.pdf (in Polish).

[12] The number of consumers that acknowledged downloading or streaming from illegal source in Lithuania was 16 %, in Latvia – 20 %, in Poland – 10 %, while the EU average was 9 %, *see* OHIM study The European Citizens and Intellectual Property: Perception, Awareness and Behaviour, p. 61, available at https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf.

[13] The number of consumers that acknowledged paying for legal content was rather different in the analysed countries: Lithuania – 12 %, in Latvia – 20 %, in Poland – 28 %, EU average – 19 %, *see* OHIM study, *id*., p. 61.

[14] *See* IFPI Digital Music Report 2014, available at http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf, p. 45.

[15] *See* IBF International Consulting, Study on Digital Content Products in the EU, p. 46, available at http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf.

The lack of legal content services and, accordingly, the slower development of e-commerce in Lithuania and Latvia could have at least two reasons. First, local businesses, when creating local e-commerce services, have reported difficulties in licensing rights for foreign copyright content. For instance, Lithuania's largest telecommunications company TEO was intending to create a platform that would offer legal Lithuanian and foreign music for the Lithuanian audience.[16] They acquired rights to the entire Lithuanian repertoire. However, foreign right holders refused to grant licenses at reasonable prices, presumably due to piracy threats. As a result, the TEO initiative was abandoned since local content was not sufficient to attract audiences and generate sufficient advertising revenues.[17]

A second problem is that many foreign online service providers tend to avoid small European markets such as Lithuania or Latvia. A recent study for the Commission correctly pointed out that consumers in a number of smaller CEE markets, including Lithuania and Latvia, would have access to fewer online services.[18] Many online service providers avoid smaller markets where costs still outweigh expected profits.[19] For instance, Microsoft's websites addressed to particular markets such as Cyprus, Estonia, Lithuania, Latvia and Malta only offer games.[20] Furthermore, a number of service providers enter such markets with a significant delay. For instance, Spotify opened its website in 2008 but it started offering its services in Lithuanian and Latvian markets only in 2013.

At the same time, there is a shared concern in the focus CEE countries that their online markets could soon be dominated by international major online service providers. This would make it even more difficult for local SMEs to run their online services. Also, it is questionable whether major providers will be willing to embrace local content or, rather, if they will focus on the marketing of the most profitable mainstream English-language content. If the latter scenario prevails, this may threaten cultural diversity in the region and across the EU.[21]

2.2 Audio-Visual

The situation in the audio-visual sector in the online environment does not appear to be better. Revenues from DVD sales and rentals are dramatically low in Lithuania,

[16] *See* "Myliumuzika.ltportalaskurslietuviškosmuzikosateitį", available at http://zebra.15min.lt/lt/foto/albumas/Myliumuzika-lt-portalas-kurs-lietuviskos-muzikos-ateiti.html#95836 (in Lithuanian).

[17] At the moment a new Lithuanian online service PAKARTOK is being launched by collective management societies of Lithuania, which will offer a Lithuanian music repertoire only. It is to be seen to what extent this national initiative offering only national content will be successful.

[18] *See* European Commission, Impact Assessment, Brussels, 11 July 2012, SWD(2012) 204 final, p. 159.

[19] *See* IBF International Consulting, Study on Digital Content Products in the EU, p. 43 http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf.

[20] *Id.*

[21] For more concerns on this issue, *see* Response by the Government of the Republic of Poland to the European Commission's Consultation on the review of EU copyright law (Polish Government submission), p. 7, available at http://www.prawoautorskie.gov.pl/media/KSE_2014-03-05_-_Odp__Rzadu_RP_na_konsultacje_KE_-_przeglad_prawa_autorskiego.pdf (in Polish).

Latvia and Poland and are declining further.[22] Consumers have moved online and are widely accessing audio-visual content on illegal online platforms. One of the reasons for the illegal use is that few legal video-on-demand services are accessible in the analysed countries.[23] These platforms, unlike the music sector, are not yet well established, have not proven to be highly successful and are not well known by consumers. Accordingly, legal purchase or rental of movies and TV series online is still low.[24]

2.3 E-Books

The e-book market is still a small market across the EU. Its market share within the single EU countries is estimated at not more than 1–3 % of the book market, and often somewhat less.[25] In Lithuania, around 1000 commercial e-book titles had been released by mid-2013 and are available via several legal platforms (Skaitykle, knygos, 100knygu).[26] In Poland, there were between 25,000 and 30,000 e-book titles by mid-2013 distributed on several platforms (e.g. Legimi, Virtulo, Nexto).[27] At the same time, some publishers are still reluctant to offer a newly published book in an e-version, mainly because of piracy threats. In all analysed markets there are several illegal online e-book platforms (in Lithuania, e.g. el-knygos.eu, elknygos.lt). However, due to generally declining demand in books and due to a continuing lack of popularity of e-readers in Lithuania and Latvia, the online piracy problem is not as widespread as in the case of musical or audio-visual works.

Overall, a brief look at the creative markets in the selected CEE countries has demonstrated that in some areas they are keeping in pace with the European average (e.g. Internet access and consumption of creative content). On the other hand, they are still lagging behind in other areas (e.g. the number of legitimate e-services and, respectively, consumption of such services). Also, despite historical similarities

[22] *E.g.*, in Poland, the number of retail DVD units sold has decreased 3.3 % from 2011 to 2012. DVD rental transactions have decreased 16.8 % between 2011 and 2012. *See* International Video Federation, European Video Yearbook 2013, pp. 13–14, available at http://www.ivf-video.org/new/public/media/EU_Overview2013.pdf.

[23] There are only four legitimate video-on-demand services in Lithuania, three in Latvia, and 18 in Poland, *see* European Audiovisual Observatory MAVISE database, available at http://www.obs.coe.int/-/more-than-3-000-on-demand-services-in-europe?redirect=http%3A%2F%2Fpubli.obs.coe.int%2Fen%2Fweb%2Fobs-portal%2Fpress%2Findividual-press-releases%2F2013%3Fp_p_id%3D101_INSTANCE_AboWabb2yPCc%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_pos%3D2%26p_p_col_count%3D3#p_101_INSTANCE_AboWabb2yPCc.

[24] However, legal purchasing is rapidly growing. For instance, in Poland, consumer expenditure increased from 0.13 to 0.4 million euros from 2010 to 2011, which counts as a 21,380 % increase per year. TV video-on-demand increased by 32.80 % during the same period. *See* International Video Federation, European Yearbook 2012, available at http://www.ivf-video.org.

[25] Study on the Digital Content Products in the EU, p. 24, available at http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf.

[26] The Global e-Book Report, p. 48. Note: the figures concern commercial e-book titles only; no reliable statistics on academic e-titles have been found.

[27] In 2013, the Polish e-book market was estimated to be worth $37 million in downloads; *see* The Global e-Book Report, p. 48.

between the analysed countries, the creative market situation online in smaller markets (Lithuania, Latvia) is quite different from the one in larger markets (Poland).

3 The Upcoming EU Copyright Review

The European Commission began discussing its intentions to initiate the EU copyright review at the end of 2013.[28] The public consultation on the Review of the EU copyright rules[29] was announced in December 2013 and the draft Impact Assessment on the Modernisation of the EU Copyright *acquis* was leaked to the public in April 2014.[30] Despite intentions to finalize and officially release these policy documents by August 2014, the agreement as to preferable policy solutions has not been reached inside the Commission, and the official version has not been made available as of the date of submission of this article.[31]

In its draft Impact Assessment, the Commission considers the situation of creative markets online across the EU and highlights several main problems. It refers, first, to the territoriality issue and the definition and overlap of the right of reproduction and the right of making available in the online environment. Secondly, the Commission makes a brave step and reopens the discussion on the exceptions and limitations in the digital market. Some of the exceptions are arguably technologically out dated, some new uses are not addressed by the exceptions (such as user generated content), and the list of exceptions provided under the current EU law is inflexible.[32] Third, the Commission continues the discussion on rights ownership, licensing and mass digitization of cultural heritage, which has been in focus during recent years and has been addressed *inter alia* by the Orphan Works Directive.[33] Furthermore, the Commission picks up one new topic on the EU agenda, namely remuneration of authors and performers. And last but not the least, the problem of copyright enforcement online is given some attention by discussing possibilities of further harmonization in this area.[34]

[28] This idea was presented by the European Commission in the informal discussion with the Member States on The Challenges of Copyright Modernisation Process, 7–8 October 2013, Vilnius.

[29] Available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf.

[30] *See* http://statewatch.org/news/2014/may/eu-draft-impact-assessment-copyright-acquis.pdf (last visited 5 December 2014).

[31] Instead, a draft Digital Market Strategy for Europe was leaked in April 2015, available at http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/Digital-Single-Market-Strategy.pdf.

[32] The problematic nature of exceptions under the Information Society Directive has been extensively discussed in the literature, *see*, *e.g.*, Guibault (2010) and Leistner (2011).

[33] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, 27 October 2012, OJ L 299/5 (Orphan Works Directive). For a background discussion on orphan works issue *see* Van Gompel (2007).

[34] A good overview of Commission's views on a possible EU copyright reform could be found in Martin-Prat (2014).

4 A Perspective from the CEE Countries

The next question is to what extent the problems identified in the Commission's draft Impact Assessment are of relevance in such CEE countries as Lithuania, Latvia or Poland? In case the issues indicated are to a certain extent relevant, what considerations should be taken into account when searching for solutions to these problems that would suit CEE countries?

To start with the first question, a number of issues identified in the draft Impact Assessment are currently of little *practical* relevance in the analysed CEE markets. For instance, the scope of rights online (digital reproduction and the making available right) and their potential overlap does not seem to be a significant problem in practice. Although online use is subject to these two separate rights, in the analysed CEE countries they are both administered by the same collective societies or by right holders individually. Therefore, this problem does not arise in practice. As a second example, it is true that the exhaustion of online rights in respect of creative content is not yet fully solved at the EU level.[35] However, the use of legitimate downloading services, such as iTunes, is not widespread in the analysed CEE countries. Therefore, resale of legally acquired content is not a common practice, and the question of exhaustion of rights is currently of little concern. In contrast, exceptions and limitations to copyright are generally of higher importance in the CEE countries. However, the discussion on exceptions in relation to such novel practices as user-generated content or text and data mining, which is currently quite topical in some EU Member States,[36] is not yet ripe in the analyzed countries. Right holders are little concerned about the non-commercial use of their works in user-generated content; it remains to be seen whether such practices will earn general acceptance among the right holders. There are no reported concerns among the right holders or commercial users with regard to text and data mining activities either. Similarly, e-lending is an emerging topic in copyright law debates.[37] However, since there are still very few e-lending practices in libraries in the focus countries, the discussion on the adaptation of the lending right to the online environment is also almost non-existent.

Should the CEE countries be concerned about the Commission's intentions to harmonize, at the EU-level, issues that are yet of little practical importance in their local markets? On the one hand, one could argue that despite the lack of political discussions or legal proceedings these issues still exist and need to be resolved. For instance, although right holders have not legally complained against user-generated

[35] The CJEU decision C-128/11 *Usedsoft* gave a limited answer in respect to software, but not other copyright subject matter. For a comment on *Usedsoft see* Stothers (2012). A German district court has interpreted CJEU *Usedsoft* decision as not applying to other subject matter such as e-books, *see VBZ*, Case I ZR 129/08, commented in Schulze (2014).

[36] *E.g.* the text and data mining question is rather extensively discussed in the UK; *see* Hargreaves Review of Intellectual Property and Growth, or Digital Opportunity – A review of Intellectual Property and Growth (2011), p. 4, available at https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth; *also* Kretschmer et al. (2014), at 550–551; with regard to user-generated content, even in UK the needs of the market are not yet clear and are rapidly evolving, *see* Martin Kretschmer et al., *id*., at 551.

[37] *See*, *e.g.* Dusollier (2014).

content, one could argue that the uncertainty as to its legal status is a concern for users; this presumably affects what users do with the creative content online. Lack of users' voices on this issue might merely be caused by the fact that users are less organized in these countries and often do not have organizations representing their voice in political discussions. Second, some issues, even if not yet ripe, could be addressed now instead of waiting until they become problematic in everyday practice. For instance, exhaustion of rights with respect to the content acquired online, legal status of text and data mining activities and e-lending in libraries could be regulated in advance. The EU could follow the suggestions from more progressive EU Member States that have already encountered these problems in practice. If lawmakers propose a well-balanced solution that suits the economic needs of the CEE markets, this would allow preparation of the legal ground for the development of these activities in the near future.

On the other hand, several risks should be kept in mind when harmonizing at the EU level the issues that are not yet ripe in the CEE countries. First, this may impede the democratic lawmaking processes. Political discussions on issues that are not perceived by stakeholders as of utmost importance would attract little attention and participation by them. Second, if politicians devote their time and resources to discussion of problems that are of little relevance in practice rather than focusing on the pressing issues, this may decrease trust among stakeholders in legislative process and political system in general. Also, it may be unreasonable to devote public resources to legislate on less relevant issues when there are more immediate concerns. Third, rules adopted during such political processes are unlikely to be highly respected by stakeholders and accepted by society members; they may remain black-letter rules hardly ever enforceable in practice. Furthermore, this additional layer of rules would add to the complexity of national copyright laws. In addition, the ineffectiveness of rules is likely to contribute to even less trust in the copyright law system in general. And last but not the least, when these issues become ripe in local CEE markets, the pre-existing EU harmonization will prevent searching for local solutions that meet the interests of local stakeholders as well as reflect the local political, cultural and economic situation of a particular country. In such a situation the courts of the CEE countries will have to apply laws that were drafted according to the interests of the more developed Western EU Member States and their stakeholders. Therefore, the harmonization of copyright issues that are currently of little relevance in the CEE countries should be undertaken, if at all, with great caution and leaving sufficient flexibilities to accommodate the still emerging needs of the CEE countries.

Another group of issues identified in the draft Impact Assessment are of higher relevance to the ECC countries. The following sections will focus on five selected problems, namely: territoriality of services (Sect. 4.1), exceptions for libraries and mass digitization (Sect. 4.2), the private copy exception (Sect. 4.3), remuneration for authors and performers (Sect. 4.4), and enforcement of copyright online (Sect. 4.5).

4.1 Territorial Segmentation of Online Services

As the first problem, the Commission discusses territoriality of copyright and problems that it causes. According to the Commission, territoriality of national copyright laws, together with contractual territorial restrictions, arguably lead to the territorial licensing of digital content and territorial segmentation of EU digital market.[38]

As indicated in the previous section,[39] territorial segmentation of online content services is a clearly felt problem in such markets as Lithuania and Latvia. Many providers avoid smaller markets or enter these markets with a significant delay. Meanwhile local online service providers face difficulties in licensing foreign content for local platforms. Fewer legal services arguably influence higher piracy levels.[40]

The question is what causes such territorial segmentation of online content services and what measures could be undertaken to deal with this problem. One potential reason could be a difficulty for the online service providers to get territorial copyright licenses for each State separately. According to the Commission's study, online service providers are not willing to invest in markets where the incremental cost of obtaining additional licences outweighs expected income.[41] Secondly, online service providers may need to adjust their business to local cultural needs (e.g. local language).[42] However, it is questionable whether these are the reasons that led to the territorial segmentation of some online services. For instance, Spotify did not delay entry into the Lithuanian market because of the need to clear territorial rights. As for Lithuanian right holders, Spotify would get worldwide online rights directly from authors, performers or record producers and there was no need to approach territorially functioning collective societies in Lithuania. Neither was it delayed because of the time needed to translate service into local languages.[43] Rather, Spotify initially restricted their services in numerous European countries because their users were not served with local advertisements. It took time to arrange advertisements for local audiences and in this way insure that revenue is generated for free streaming of music.[44] Similarly, it is doubtful whether Microsoft is offering only a limited range of services to Lithuania and Latvia because of the

[38] Draft Impact Assessment paras. 3.1.1–3.1.2.

[39] *See supra* section 2.

[40] For more on the implications of evasion of geolocation tools by users *see*, *e.g.* Marketa Trimble, The Territoriality Referendum, January 2014, available at http://ssrn.com/abstract=2496067 (WIPO Journal, forthcoming); Trimble (2012).

[41] European Commission Staff Working document, Brussels, 11 July 2012, SWD(2012) 204 final, p. 159.

[42] Different cultural needs (including the language barrier) was one of the reasons why pan-European TV idea did not materialize, *see* Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (COM/2002/0430 final).

[43] Spotify services in Lithuania and Latvia are offered in English.

[44] "Spotify restricts access in some European countries", posted on 8 September 2009, available at http://gigaom.com/2009/09/08/419-spotify-restricts-access-in-some-european-countries/.

territorial nature of national copyright laws.[45] As the Polish government in its submission for public consultation notes, territorial differentiation of online services depend not so much on the territorial nature of copyright but rather on business and marketing strategies of online service providers in different creative sectors. As was pointed out during the stakeholder consultation in Poland, marketing strategies depend on varying national laws on competition, tax applied to cross-border electronic payments, limited access to broadband Internet, high costs of roaming data and large scale infringement of IP rights.[46]

Therefore, although the territorial segmentation of online services is a real problem in the CEE countries, its reasons and potential solutions need careful consideration. Copyright law measures (such as clarification of the definition of the making available right) may to some extent be helpful but are unlikely to lead to a significant decrease of the problem. If making available is defined as taking place in the country of upload, this may facilitate the EU-wide licensing of the content. However, this would not remove other commercial reasons to limit service territorially (local advertising rules, etc.).[47] Also, its relationship with "targeting" or "access" doctrines recently established in the Court of Justice of the European Union's (CJEU) jurisprudence[48] would need to be clarified. As an alternative measure, a prohibition of geographical segmentation of e-commerce services in the EU may be discussed.[49] This measure may have both positive and negative effects in the CEE countries. It may oblige some online service providers to open up their services to smaller CEE markets and in this way increase the number of available e-commerce services in these countries. On the other hand, this would make the establishment of small local e-commerce services in CEE countries even more difficult. For instance, if a Lithuanian company wished to establish a local video-on-demand website, they would not be able to offer this service for the Lithuanian public only but would have to make it available EU-wide. This would mean that instead of Lithuania-limited royalty fees, they would need to pay EU-wide licensing fees, which they may not be able to afford. Therefore, further in-depth discussions are needed to find a well-balanced solution to this problem.

[45] *See* IBF International Consulting, Study on Digital Content Products in the EU, p. 43 http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf.

[46] Response by the Government of the Republic of Poland to the European Commission's Consultation on the review of EU copyright law, p. 7, available at http://www.prawoautorskie.gov.pl/media/KSE_2014-03-05_-_Odp__Rzadu_RP_na_konsultacje_KE_-_przeglad_prawa_autorskiego.pdf (in Polish).

[47] Compare with the limited effects of the emission theory as adopted in the Cable and Satellite directive, *see* Commission Report COM/2002/0430 final, supra note 42.

[48] *See* CJEU C-173/11 *Football Dacato v. Sportradar GmbH* (suggesting "targeting approach"); CJEU C-170/12 *Pinckney v. Mediatech* (suggesting "access approach"). These cases concern jurisdiction rules; however, the substantial scope of the making available right and jurisdictional questions are closely related.

[49] *See* suggestion in Draft Impact Assessment, para. 5.5.1, p. 66.

4.2 Library Exceptions and Mass Digitization

Another set of problems is related to library collections, mass digitization projects and identification of right holders. It has been highlighted as one of the most important topics for review by commentators[50] and has attracted special attention from the Commission.[51] Firstly, the Commission refers to several problems related to exceptions and limitations that are relevant in the focus EU Member States. Namely, national reservation exceptions greatly vary inside the EU, and in some Member States they are very restrictive. The exception on digital consultation in physical library premises, as adopted in the Information Society Directive,[52] arguably misses the opportunities offered by current online technologies. Secondly, mass digitization projects raise problems of clearing the rights. Although several efforts have been made in the field,[53] numerous problems remain unresolved.[54]

4.2.1 Preservation Exception

The problems identified by the Commission are to a certain extent valid in the focus CEE countries. First, preservation exceptions for libraries in some of the analysed CEE countries are rather restrictive. For instance, the preservation exception in Lithuania covers only "works" and does not cover related right objects; reproduction is possible only if a work was lost or damaged (i.e. format shifting or digitization for future preservation purposes is not possible); reproduction is possible only if a work cannot be acquired in any other way (e.g. it should be out of commerce); multiple reproduction acts are possible only if they are not related to each other.[55] A similarly narrow preservation provision exists under the Latvian copyright law.[56] Such restrictive exceptions are little used by libraries in practice. These narrow exceptions do not satisfy libraries' wishes to digitize their collections on a large scale. Also, these exceptions seem not to cover "digital archiving"

[50] *See*, *e.g.* Westkamp (2014).

[51] The Commission has ordered two studies on the issues of exceptions, namely, Charles River Associates, Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU, October 2013; Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU. Analysis of specific policy options, May 2014, available at http://ec.europa.eu/internal_market/copyright/studies/index_en.htm.

[52] 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, *OJL* 167, 22/06/2001 p. 10–19.

[53] *E.g.* Orphan Works Directive; Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, signed by stakeholders on 20 September 2011, available at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf.

[54] Draft Impact Assessment, 3.4, p. 42.

[55] Article 23 of Law on Authors' Rights and Related Rights (Lithuania), No. VIII-1185, adopted on 18 May 1999, last amended on 15 May 2014.

[56] Article 23(1) of Copyright Law (Latvia), last amended on 31 March 2011.

activities whereby libraries make copies of online content for future preservation purposes.[57] In contrast, in Poland, the preservation exception is more general and allows libraries and archives to "make or mandate making copies of published works in order to supplement them, maintain or protect one's own collections".[58] In practice, this allows Polish libraries to digitize their collection for preservation purposes. However, it could be questioned whether such a broad exception is compatible with the "special cases" requirement found under the Information Society Directive.[59]

Interestingly, the recent CJEU jurisprudence has to some extent facilitated the digitization of works by libraries. In the *Darmstadt* decision,[60] the CJEU confirmed that the on-site consultation exception (to be discussed below) allows libraries to also digitize copyrighted materials with the purpose of making them available for consultation on on-site terminals in libraries. One could argue that, if works could be digitized for on-site consultation purpose, the digital copies could be retained for preservation purposes as well. Importantly, the on-site consultation exception in the EU Information Society Directive does not contain any limitations as to how many titles could be made accessible for on-site consultation. This seems to allow libraries to digitize extensive numbers of books with the purpose of making them accessible on-site and, at the same time, preserving them in a digital format. On the other hand, the CJEU has indicated in the *Darmstadt* decision that this on-site consultation exception, as a general rule, is not supposed to allow digitization of "entire collections".[61] Also, a number of digital copies made for on-site consultation may be insufficient to meet preservation goals. In addition, these copies cannot be used for replacement if the original work is lost or damaged. Therefore, by allowing libraries to digitize works for making them accessible on-site, the *Darmstadt* decision also indirectly enables preservation of these works in a digital format. However, it remains questionable to what extent this decision opens the doors to mass digitization projects and broader preservation activities.

[57] For instance, such digital preservation of digital-borne online content is being done by Lithuanian E-Resources Archive without a clear legal basis and is made available via on-site terminals in the National Library of Lithuania, *see* http://www.lnb.lt/katalogai/lietuvos-e-istekliu-archyvas.

[58] Article 28(2), Law No. 83 of 4 February 1994 on Copyright and Neighbouring Rights (Poland), last amended on 21 October 2010, available at http://www.wipo.org.

[59] *See* Information Society Directive, Art. 5(2)(c) (allows reproductions "in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage"); on the contrary, some authors seem to argue that preservation exception allows (mass)digitization for preservation purposes as long as this does not lead to digital delivery, *see* Guibault (2010), para. 27.

[60] CJEU Case C-117/13 *Technische Universität Darmstadt v. Eugen Ulmer KG.*

[61] CJEU C-117/13 *Darmstadt*, para. 45 ("That condition of specificity must be understood as meaning that, as a general rule, the establishments in question may not digitise their entire collections").

With regard to the possible solutions, the preservation exception needs to be broadened to at least explicitly enable mass digitization for preservation purposes.[62] Digitization for preservation purposes would be compatible with the three-step test (Art. 5(5) of the Information Society Directive). In particular, it would not prejudice the interests of right holders, as long as the works are not made publicly available and do not compete with copies of works that are in-commerce. Second, recent economic studies show that a more extensive digital preservation exception would be justified on economic grounds.[63] Third, CEE libraries' collections are more sensitive in the sense that they contain local works that are hardly (if at all) available in libraries of other countries; therefore, preservation of these works that contribute to the cultural diversity of the EU becomes an even more important task. At the same time, libraries in the CEE countries generally enjoy less public funding than libraries in more prosperous Western European countries. Therefore, if an exception for digital preservation is not granted, they are unlikely to be able to afford the license fees paid to right holders for digital preservation of their works.

4.2.2 On-Site Consultation Exception

The exception for on-site consultation in libraries is more problematic. All analysed CEE countries have implemented this exception in their national laws, however, in a different scope. In Lithuania, a very limited exception allows reproduction and making available for on-site consultation in libraries, museums and archives only if the works are out of commerce and if right holders have not prohibited such use; institutions are not allowed to make available more copies than they have in their collections; the e-copies have to be protected by effective technical protection measures; and finally, the exception applies only to works published or made available after the exception came into force in 2012.[64] As a result, if publishers do not want their works to be accessed on-site in libraries, it is sufficient to indicate such prohibition on each new title and the exception becomes ineffective.[65] In contrast, Latvian Copyright Law is much more flexible. It allows making works available in a range of libraries for on-site consultation by natural persons for scientific research and self-education purposes; a secured network should be ensured and the number of users should be calculated in order to

[62] *See* the similar proposal by The Wittem Group (2011), Art. 5.3(1)(c). Such a proposal also goes in line with more general suggestions to apply exceptions in a more flexible way or introduce legislative mechanisms to expand the scope of exceptions, *see*, *e.g.* European Copyright Society, Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 *Deckmyn*, available at http://www.create.ac.uk/european-copyright-society-limitations-and-exceptions-as-key-elements-of-the-legal-framework-for-copyright-in-the-european-union-opinion-on-the-judgment-of-the-cjeu-in-case-c-20113-deckmyn/; Matthias Leistner, op. cit. pp. 417–442.

[63] CRA, Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU Private copying, p. 3, available at http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf.

[64] Authors' and Related Rights Act (Lithuania), Art. 22(3).

[65] The issue of private ordering in copyright law has been recently broadly discussed *inter alia* at the WIPO, *see* Davies (2013).

determine the remuneration due for such uses.[66] This exception is not limited to out-of-commerce works and seems to cover all works. Similarly, Polish copyright law contains a very general provision that allows libraries making their collections available for research or learning purposes through information technology system terminals located at the premises of those entities; Polish law contains no further restrictions.[67]

As the Commission correctly acknowledges, the on-site consultation exception, whatever its scope under national laws, does not allow libraries to make use of the potential that new technologies have brought.[68] As a general matter, users are not interested in accessing digital content in library terminals.[69] At the same time, when discussing the possible extension of the on-site consultation exception, one should keep in mind different legitimate interests that are at stake. On the one hand, libraries do wish to embrace new technological developments and meet the demand of consumers to read content online or on electronic devices. In this way libraries are following their mission to ensure broad access to cultural materials and education of public. Users would also have an interest in accessing all types of old and new books online and for a minimum library fee. On the other hand, publishers would reasonably see online access to library collections as a threat to their established and newly emerging business models. For instance, if in-commerce books are (almost for free) available on a library website, readers will be unwilling to buy them from bookshops. If out-of-commerce books are made available online, publishers would arguably lose the possibility to re-publish them in the future or offer a digitized version since they would not be able to compete with libraries' essentially free-of-charge online services. There is a threat that if the book is once made available online, it cannot be removed from there. Furthermore, even if some readers would still prefer buying hard copies of the books, losing a number of readers who opt for an e-version on a library's site would cause some loss for publishers. These threats are even more significant in the smaller CEE markets, such as Lithuania or Latvia, where publishers have to compete for a small number of readers speaking a local language and where even slight loss in a number of readers may significantly impact the local publishing businesses. Meanwhile, authors of literary works in these countries are generally poorly remunerated and they do not wish to miss out on the potential revenues from online uses. The clash of these interests has already led to very restrictive on-site consultation exceptions in some jurisdictions (Lithuania) and need to be taken seriously.

Legal commentators seem to agree that, differently from the preservation exception, the on-site consultation exception is more complicated. If the on-site consultation exception is broadened to allow off-site (online) consultation, it has to

[66] Copyright Law (Latvia), Art. 23(2)–(4).

[67] Act on Copyright and Related Rights (Poland), Art. 28(3).

[68] For more about libraries' functions in information society *see* Afori (2013).

[69] For this reason, barely any digital material is made accessible via on-site terminals in Lithuanian libraries. In the M. Mažvydas National Library of Lithuania, on-site terminals are mainly used to access content of the Electronic Resources Archive.

be tied with certain remuneration mechanisms.[70] Some commentators suggest that a broader on-site consultation exception could be allowed with the condition that it is restricted to mimic ordinary lending and right holders are remunerated via a public lending right.[71] Others express a more cautious approach with respect to allowing access to digitized material over the Internet or even over a closed-network of research libraries.[72]

A compromise solution could be based on a "functional equivalence" principle.[73] In the area of copyright law, it could be defined as requiring that analogue or digital uses should be treated equally as long as they lead to functionally equivalent results. In particular, as long as accessibility of works via a library's website and borrowing hard copies from library premises lead to the equivalent effects, they should deserve the same, technologically neutral legal treatment. Let us assume that a digitized work is made accessible over a library's website in a restricted manner: the number of copies that can be simultaneously accessed is limited to the number of hard copies that library has in their collection; the duration and times of access is limited to the time period for which the book can be normally borrowed; after the termination of an e-loan the copy of the book is deleted from the device, etc. In such a case, e-lending would be functionally equivalent to the offline lending and should not be subject to additional licenses. Accordingly, the lending right, as introduced by the EU Rental and Lending Directive,[74] could be extended at least to functionally equivalent e-lending practices and should apply non-discriminatively to paper-based and digitized books. This would enable libraries to make use of contemporary technologies, contribute to users' digital literacy skills and would not prejudice the economic interests of right holders more than in the case of the ordinary library lending of hard copies in libraries.[75] The CJEU seems to have followed a similar approach in its recent *Darmstadt* decision. It found that the on-site consultation exception under the German Copyright Act complies with the three-step test since it *inter alia* prohibits libraries from making available, via dedicated terminals, more copies of works than the number of copies that libraries have in an analogue format.[76] The goal of such a restriction is to ensure that the on-site access to works leads to results that are similar or equivalent to those with analogue lending and, thus, does not further prejudice the interests of the right holders.

[70] *E.g.* the Wittem group suggests that educational uses should be allowed without permission but upon payment of remuneration to the right holders, *see* Wittem Group (2011), Art. 5.3(2)(b).

[71] *E.g.* Dusollier (2014).

[72] *E.g.* CRA, Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU Private copying, available at http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf, pp. 22–29.

[73] It is related to a broadly accepted "technological neutrality" principle, for more see Synodinou (2012).

[74] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *OJ L* 376, 27 December 2006, pp. 28–35.

[75] Compare with a similar proposal in Dusollier *supra* note 71, at 213–229.

[76] CJEU C-117/13 – *Darmstadt*, para. 48.

4.2.3 *Extended Collective Licensing*

When the effects of e-lending extends beyond ordinary library lending, and remuneration on the basis of the lending right is inadequate to compensate such uses, additional remuneration models need to be considered. An extended collective licensing model, as proposed under the Memorandum of Understanding (MOU),[77] seems to be quite an acceptable solution from the perspective of the focus CEE countries.[78] It would allow libraries to make digitized content available online upon payment of a licensing fee for a collecting society, and the license would cover works of members and non-members of a respective collecting society. On the other hand, it remains questionable whether this remuneration-based model would be widely used in the CEE countries due to financial constraints that libraries in CEE countries often face. Public funds might be too limited to afford licensing fees. However, having such an option open would be useful.

Several challenges would need to be addressed to make this model effective. First, the EU legislator would need to give cross-border effect to national extended collective licensing schemes.[79] For instance, if a library in Lithuania acquires an extended collective license for making out-of-commerce works available online, this license should have EU-wide effects. Here, an additional question arises as to whether libraries should be obliged to make their digitized contents available EU-wide or could limit them to one or several territories. EU-wide access to library collections certainly would contribute to the exchange of cultural materials and should be generally encouraged. The problem that local libraries may face is the high rates that they would have to pay to collecting societies for EU-wide licenses. Such rates may be even less affordable to libraries from the CEE countries.[80] One option would be to permit libraries to provide territorially-based e-lending services and, accordingly, pay territorially-based (smaller) licensing fees. As another option, lawmakers could encourage EU-wide access but ensure that license fees should be proportionate to the amount and scale of an actual use, rather than depending merely on the geographical reach of service.

Furthermore, the voluntary nature of the MOU, a lack of strong push for such a model in local markets, and a lack of constructive dialog between stakeholders (libraries and publishers) on the issue are the hurdles that may hamper the voluntary implementation of the extended collective licensing model in the practice in the CEE countries. In order to make the model effective in the CEE countries, an imperative legislative action may be needed.

In addition, the MOU addresses only literary works and leaves musical, audio-visual, photographic and other categories of works intact. There is a clear need for

[77] *See supra* note 53.

[78] Advantages and disadvantages of it, as compared with other solutions, have been broadly discussed in the literature and do not need to be repeated here, *see*, *e.g.* Johan Axhamn, LucieGuibault, "Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?" available at http://www.ivir.nl, (8 February 2012), Amsterdam Law School Research Paper No. 2012-22, available at SSRN: http://ssrn.com/abstract=2001347.

[79] *See* Draft Impact Assessment, p. 42. para. 3.4.

[80] Compare with a similar problem that small online service providers would face if obliged to provide EU-wide e-commerce services, *see supra* section 4.1.

measures enabling the digitization and making available of these categories of works.[81] However, the lack of well-established collective management systems for these categories of works may make it difficult to implement a similar collective licensing model for these works. Therefore, alternative remuneration models may need to be considered.

4.3 Private Copy Exception

The private copy exception ("private levy") has been extensively discussed at the EU level in recent years.[82] A number of issues relating to private levies have been addressed in CJEU decisions.[83] As one of the numerous issues related to the private copy levies, the draft Impact Assessment highlights the problem of "double dipping". It arises when consumers are requested to pay twice for the same content, e.g. by paying a license fee for a download and then paying a "private levy" for the device (CD, USB, computer hard drive) on which they are downloading the content. The second problem mentioned in the draft Impact Assessment is the divergence of objects on which levies are imposed and the greatly differing levels of tariffs across the EU. According to the Commission, this raises the costs of operation of pan-European entities manufacturing and distributing products subject to levies on multiple territories. Thirdly, private copying levies must not be imposed on goods that are acquired by persons other than natural persons for purposes clearly unrelated to private copying, i.e. "professional users" such as public administration, businesses, SMEs, etc.[84] The question here is whether these problems exist in the focus CEE countries.

4.3.1 Double-Dipping

In the analysed CEE jurisdictions double-dipping does not seem to be a major issue at this point of time, and it is to be seen whether it will become a real problem.[85] Accessing copyright content via legitimate services (either with or without an

[81] These categories of works (though belonging to public domain) form a core of the current Europeana collection to which CEE countries actively contribute, *see* http://www.europeana.eu. In order to enable the growth of the Europeana, an immediate action allowing the digitization of in-copyright music, films and photos is needed.

[82] The Commission's stakeholder consultation 2006–2008 led to no tangible results; for a response on this consultation *see*, *e.g.* von Lewinski (2007). 2011–2013 Stakeholder dialogue on private copying and reprography levies resulted in Recommendations Resulting from the Mediation on Private Copying and Reprography Levies, Brussels, 31 January 2013, (Vittorino recommendations), available at http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf; for the most recent discussions in doctrine *see*, *e.g.* Lucas-Schloetter (2013); Karapapa (2013).

[83] *See*, *e.g.* C-467/08 – *Padawan v. SGAE*; C-462/09 – *Stichting de Thuiskopie v. opus GMBH*; C-457/11 – *VG Wort*; C-521/11 – *Amazon*, C-463/12 – *Copydan Båndkopi*.

[84] Draft Impact Assessment, pp. 111–112n.

[85] One of the examples where "double-dipping" could appear are cloud-based "digital locker" services where a user can make a personal copy of a content, pay a fee for this service and at the same time pay a levy on a device in which the copy is made; for more discussion on such cloud-based services and private copy exception *see* Senftleben (2013), at 91–92.

access fee) is not widespread in the analysed CEE countries yet, nor is it common in the rest of Europe.[86] Therefore, differentiating or reducing the amount of compensation because of relatively few double-dipping cases would lead to unreasonably large legal and administrative efforts. At the same time, a number of legitimate online services and consumer expenditure on legal services has been rapidly growing;[87] therefore, the problem may become more relevant in the near future. On the other hand, access-based models have been recently gaining popularity (e.g. YouTube, Spotify), and it remains to be seen what role downloading will play in consumer practice in the near future. Some consumer surveys still show that most consumers prefer acquiring their own copy of the work to mere streaming.[88] Therefore, from the perspective of the CEE countries, it would be currently meaningful to observe the developments in the digital market. If the double-dipping issue proves to be a significant problem, EU-level legislative solutions could be discussed.[89]

4.3.2 Divergent Media, Tariffs and Reimbursement Rules

The analysed CEE jurisdictions differ significantly on the regulation and effectiveness of private levy systems. Lithuania has an elaborated private levy system that has been updated in 2012 and since then has been functioning reasonably well. Revenues from private levy reached €3.5 million (€1.2/capita) in 2013.[90] Currently, Lithuanian laws[91] contain an extensive updated list of devices that are subject to a private levy and tariffs that ordinarily amount to 3 % of the price of the device at stake. As recommended in the Vittorino report, a levy is being paid by the retailers. Laws provide an *ex post* reimbursement scheme in case the media is bought for non-private use, for export purposes or for use by persons with disabilities.[92] Consumers are also informed regarding the levy paid for devices they buy.

In Latvia, in contrast, laws provide a rather short list of devices for which a levy is to be paid and relatively low tariffs apply.[93] The collected levy is several times

[86] As indicated earlier, OHIM study showed that, e.g., the number of individuals paying for online audio-visual content was: EU28 – 5 %, Lithuania – 3 %, Latvia – 4 %, Poland – 2 %, *see supra* note 13. Note: the true number of individuals downloading from legal but free-of-charge websites is likely to be higher.

[87] *See supra* section 2.

[88] In Poland, the TOMO Group Report on the Audit of the Music Market showed that only 11 % of consumers have been using streaming services to access musical content online, available at http://www.prawoautorskie.gov.pl/media/Raport_z_badania_rynku_muzycznego.pdf.

[89] Some guidance on this issue has been provided by the CJEU. In the *Copydan* case the CJEU clarified that Member States can make the actual level of compensation dependent on whether or not TPMs are applied that ensure that users are paying for the content they are accessing (e.g. iTunes), *see* C-463/12 – *Copydan Båndkopi*, para. 72.

[90] *See* the Report by AGATA, the responsible collective society, available at http://www.lrkm.lt/index.php?3187143515#Kompensacinis_atlyginimas (reprographic reproduction excluded).

[91] *See* Government of the Republic of Lithuania Decree of 13 June 2012 No. 699, para. 4.

[92] *Id.*, paras. 6, 24–31.

[93] *See* Copyright Law (Latvia) and Government of the Republic of Latvia Decree of 10 May 2005 No. 321.

lower than in Lithuania.[94] The inefficiency of the private levy system is due to restrictive national legislation. The Latvian Copyright Act envisages that a private levy could be collected only for copies made from legal sources. As copying from illegal sources still prevails in Latvia, right holders have failed to negotiate higher tariffs for private copying. With regard to undue payments, Latvian law provides reimbursement mechanisms in case media is bought for non-private purposes.

In Poland the situation is even worse. Under the current Polish copyright laws,[95] the list of products to which the levy applies is largely outdated; updates are currently being discussed by the Polish government. Overall revenues from private levy per person, in comparison with Lithuania and Latvia, are lowest and constitute only €0.04/capita.[96] The law does not envisage special reimbursement schemes for media bought for professional purposes.[97]

As a result, private levy systems and their scope and effectiveness in the focus CEE countries diverge significantly. One could argue that EU legislative intervention is needed because such a situation causes disadvantages for the EU-wide providers of devices for which a levy is paid and creates obstacles for an efficient functioning of a common market in this area. On the other hand, the Information Society Directive provides Member States with the discretion to apply copy levies or not. In such a case, Member States should also be left with the discretion to determine the scope of a levy system and how it functions.[98] In other words, Member States are free to choose whether and to which extent they would like to use levy systems as a tool to support local creative industries. Thus, if the Latvian and Polish governments give the national private levy system less priority than Lithuanian government does, then they should generally be free to do so.[99] Thus, the compromise between common market needs and Member State discretion over local cultural policies needs to be remained when harmonizing an EU private levy system. One way to address this issue is to provide an EU-level non-binding recommendation that would summarize best practices in copy levy systems in various Member States and serve as guidelines in updating national rules in EU Member States. Such a non-binding recommendation could also be a venue to address emerging issues related to the private levy, such as the double-dipping problem discussed above. The proposed solution to the double-dipping problem should take into account the evolving nature of online businesses as well as leave

[94] It has been decreasing and constitutes only €0.10/per capita, *see* WIPO International Survey on Private Copying 2013, table 6, available at http://www.wipo.int/edocs/pubdocs/en/copyright/1037/wipo_pub_1037_2013.pdf.

[95] Law on Copyright and Neighbouring Rights (Poland); Regulations of Minister of Culture of 2 June 2003 and 15 December 2008.

[96] WIPO International Survey on Private Copying 2013, table 6.

[97] *See* WIPO International Survey on Private Copying 2013, p. 111; to the contrary, Commission Impact Assessment, table A6.

[98] The CJEU has confirmed this assumption in the *Copydan* decision in respect of "minimum harm" criteria, *see* C-463/12 – *Copydan Båndkopi*, para. 59.

[99] On the other hand, it may appear that some governments would like to have a well-functioning system but lack better guidance on this. *E.g.* both the Latvian and Polish governments have been or are working on the updates to the system but the negotiation process is complicated and slow.

space for Member States to legally react to different developments in their local creative markets.

4.3.3 *Usefulness of the Private Levy Systems in the Digital Environment and Threats to It*

In addition, it has been frequently questioned whether the private levy system may be adjusted to the online environment or, rather, needs to be gradually "phased-out".[100] It is submitted here that despite the deficiencies of levy systems in some countries, it is too early to consider the option of phasing out the levies in the near future.[101] An updated and successfully functioning copy levy system in Lithuania is an example how copy levies can serve the interests of right holders facing the challenges of the digital environment and at the same time do not prejudice the economic interests of users or information technology industries. Firstly, revenues that right holders in Lithuania (as in other CEE countries) collect from legitimate online services are still negligent. Therefore, revenues collected via the private levy system in Lithuania are the most significant (but not the only) source of revenue for authors and other right holders for digital uses of their products. Second, several sociological surveys carried out in Lithuania in 2008, 2010 and 2013 have repeatedly confirmed that the levy system in Lithuania does not detrimentally affect the interests of users. Despite the vast updates in the levy system in 2012 which included new products and increased tarriffs, consumers' purchasing power has not been significantly affected.[102] Third, the study has also shown that the recent update of the levy system, where new digital devices were added to the levy system, did not have noticeable negative impacts on information technology industries either.[103]

In this context, the recent CJEU jurisprudence that threatens the existing levy system raises serious concerns. In its decision *ACI Adam*,[104] the CJEU has stated that the amount of the levy payable for making private copies of a protected work may not take unlawful reproductions into account.[105] This in essence means that the private levy can be paid only for copies acquired from legal sources. This restriction had been suggested by some academics[106] and had been implemented in some

[100] Vittorino recommendations, *supra* note 82, p. 2.

[101] This has been acknowledged in the Vittorino recommendations, *supra* note 82, as well as in the studies carried out in Lithuania. Report on the results of the implementation of the compensation mechanism for private copying 2003; Implementation of the European Parliament and Council Directive 2001/29/EC in Lithuania. Economic and legal analysis of provisions concerning compensation for private copying of audio and audio-visual works, Final report 2013 (Lithuanian Study on Private Levy 2013), available at http://www.lrkm.lt/go.php/lit/Autoriu-teises (in Lithuanian), p. 63.

[102] According to the 2013 Study, 52 % of consumers stated that the number of blank media that they purchase has not changed in the last 12 months, while 14 % bought even more; *see* Lithuanian Study on Private Levy 2013, pp. 38–39.

[103] The Lithuanian Study on Private Levy 2013, p. 63.

[104] C-435/12 – *ACI Adam BV and Others v. Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopievergoeding*.

[105] This has been reconfirmed in C-463/12 – *Copydan Båndkopi*, para. 79.

[106] The Wittem Group (2011), Art. 5.3(2)(a).

national laws.[107] On the one hand, it may seem rather logical not to allow making *legal* copies from *illegal* sources. Such restriction is seen as desirable by some commentators because of the enormous economic damage caused by downloading works via the Internet.[108] On the other hand, from a pragmatic point of view, the decision raises serious threats to the private levy systems in a number of countries that do not distinguish between legal and illegal sources.

Firstly, such interpretation would leave right holders without significant compensation for online uses. A large part of copies made online are from unauthorised sources, and paying remuneration only for copies from legal sources would mean a significant decrease of royalties received by right holders. In order to get remuneration for copies from illegal sources, right holders theoretically would now have to prosecute users in order to get damages for illegal copying. However, prosecuting consumers has proven to be ineffective and little justified as long as consumers do not have sufficient access to legal online services.[109] As long as this market failure persists, the private levy system temporarily solves the problem by ensuring at least minimum compensation ("minimum damages") for illegal copying that is being carried out online. Eliminating this possibility would undermine what is (still) often the single source of online income for right holders. Secondly, prohibiting a private levy for copies from illegal source will neither stop online privacy, nor facilitate emergence or functioning of legal services online. Neither this would increase sales offline. Thus, it will in no way improve the situation of right holders. Thirdly, such solution increases the danger of the "double-dipping" problem highlighted in the draft Impact Assessment. When content is legally made available online, parties have a chance to agree on the fee for each copy; technological measures allow controlling the number of copies that each user accesses or downloads and differentiating the fee accordingly. Applying a private levy for such legitimate copies creates a double-dipping problem, since the user has to pay twice for the same content. Alternatively, if the user was allowed to download the content for free, then the law requiring payment for the download to the content (via levy) contradicts the licensing conditions set by the right holder that allow free copying for private purposes. Finally, the CJEU decision creates a problem of how to determine whether the device for which the levy applies will be used to make copies from a legal or illegal source. The impossibility of differentiating the situation is likely to lead to the decrease of private levy tariffs in general. Keeping in mind that private copying is still constantly increasing,[110] the decrease of compensation for right holders does not seem to be a reasonable solution. Thus, by limiting the scope of private copy exception, the interests of right holders are harmed, rather than protected.[111]

[107] German Copyright Act, Art. 53(1).

[108] Geiger (2008), 602.

[109] As mentioned earlier, in Latvia and Lithuania there are few established legal music and video-on-demand services that could meet the demand of online content by users.

[110] A consumer survey in Lithuania from 2013 has shown that copying for private purposes from 2010 to 2013 increased 22 %; *see* Lithuanian Study on Private Levy 2013, p. 38.

[111] For more criticisms of this CJEU decision *see* Quintais (2015).

In conclusion, keeping in mind that private copying is currently a prevailing practice in CEE countries and is constantly growing, it is too early to abandon the private levy system. Rather, it should be adjusted to the needs of the online environment, as for instance has been done in Lithuania. Also, since it is currently the main (if not the only) source of compensation that right holders get for online uses, it should not be unreasonably restricted. A narrow construction of the private copy exception, as suggested by the CJEU, raises serious threats to the efficient national private levy systems and needs to be seriously re-examined by EU policymakers.

4.4 Remuneration for Authors and Performers

Another issue that the Commission has identified is that authors and performers are not adequately remunerated in particular, but not solely as regards online exploitations.[112] In recent decades, adequate remuneration of authors and performers has been increasingly addressed in doctrine, legislation and court practice in a number of EU Member States.[113] The Commission highlights that national traditions in remunerating authors and performers are very different. In different sectors, authors and performers after transferring their rights to publishers and producers may have different guarantees remaining.

The problem is very alive in the focus CEE countries. There are a few legal measures to ensure fair remuneration levels for authors and performers. Under the Copyright Act of Lithuania, there are a few restrictions regarding transfer of rights for future uses or for all future works, as well as restrictions regarding the formal requirements and contents of copyright contracts.[114] However, these provisions are seldom applied or enforced in practice. Also, some legal safeguards available in other jurisdictions are not available under the Lithuanian law. For instance, when authors and performers transfer their rights to producers or publishers, their transfer is irrevocable. Furthermore, the latter is normally free to transfer these rights to any third parties, without informing or acquiring consent from the authors. There are no special rules on the termination of contracts, revision of contracts or rights reversion. There are no rules relating to non-use of works, unforeseen circumstances or bankruptcy of the rights' assignee. Remuneration is negotiated individually by authors and performers; there are no collective bargaining agreements, and author associations do not normally help or mediate in negotiations. Remuneration is normally paid as a lump sum and there are no best-seller provisions in case the work becomes successful. There are no legal mechanisms related to imbalances in bargaining power. Doctrines available in other European jurisdictions such as "undue influence", "unconscionability" or "restraint of trade" have not yet been applied in copyright law practice.

[112] *See* Draft Impact Assessment 3.5, p. 42–43 and Annex M.

[113] For developments in Germany, Gutsche (2003); Italy: Peukert (2004); France: Chiou (2013); Poland: Pek (2007).

[114] *See* Authors' and Related Rights Act (Lithuania), Arts. 38(3); 40(2)–(3).

A slightly better situation could be found under copyright law in Poland. The Polish Copyright Act contains a number of limitations with regard to the transfer of rights for future works or in respect of future modes of exploitations, as well as a "best seller" provision.[115] It also allows the author to terminate the contract in several cases, namely when the publisher fails to comply with a contractual duty to disseminate the work or in the case of "important artistic interests".[116] However, many of these provisions are rarely applied and enforced in practice. Also, there are no model contracts negotiated by industry representatives and broadly accepted in creative industries; trade unions do not play any significant role in facilitating negotiations between authors and publishers or producers either. The scope of transfer and remuneration is negotiated on an individual basis. The Polish Copyright Act provides several unwaivable rights to remuneration;[117] however, it does not provide any rules on the calculation of remuneration.

Keeping this in mind, the EU-wide discussion on the remuneration of authors and performers is highly welcomed. The identification and exchange of good practices in applying author-protective provisions in different EU Member States would be a useful exercise. The dialog with stakeholders and Member States to review in practice the different national approaches to the transfer of rights and remuneration of authors and performers should also be encouraged.

4.5 Enforcement of Copyright Online

The last issue to be addressed here is the enforcement of copyright online. This issue has been recently much discussed both at the EU[118] and international[119] levels. Various enforcement issues have also been addressed by the CJEU, such as a disclosure of IP addresses in civil copyright infringement proceedings,[120] website operators' duty to monitor and filter illegal content online,[121] Internet service providers' duty to block foreign illegal websites,[122] as well as jurisdiction questions in online copyright infringement cases.[123] In seeking a more efficient and balanced enforcement of IP rights, the draft Impact Assessment identifies the following three problems: identification of infringers and preservation of evidence in online infringements; involvement of the intermediary in stopping the infringement; and an

[115] *See* Copyright and Related Rights Act (Poland), Arts. 41(3)–(4), 44.

[116] *See* Copyright and Related Rights Act (Poland), Arts. 57, 56(1).

[117] *See* Copyright and Related Rights Act (Poland), Arts. 43–45.

[118] *See* the recent Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan, COM(2014) 392/2.

[119] *E.g.* the negotiation of Anti-Counterfeiting Trade Agreement (ACTA) and its rejection by European Parliament in 2012; for more on ACTA *see* Roffe and Seuba (2015).

[120] CJEU C-276/06 – *Promusicae*.

[121] CJEU C-70/10 – *SABAM*; for a comment *see* Kulk (2012); for trade mark infringements, *see* C-324/09 – *L'Oreal*.

[122] CJEU C-314/12 – *Telekabel*.

[123] CJEU C-170/12 – *Pinckney*, C-441/13 – *Hejduk*.

insufficient relief in copyright cases. Since each of these issues would deserve a separate paper, only several general remarks could be made here.

As a general matter, piracy and a lack of efficient enforcement are acknowledged problems in the focus CEE countries. For instance, a recent study in Poland shows that 7.5 million Poles are regularly watching audio-visual content on the Internet from illegal sources. In turn, the report refers to PLN 500–700 million (€120–170 million) as an estimated loss in 2013 that is caused by the piracy of video content.[124] Meanwhile, an OHIM study on users' behaviour online shows that users in Lithuania and Latvia access illegal content online several times more frequently than in Poland.[125]

With regard to the enforcement system, problems indicated by the Commission are largely true in the analysed CEE countries. First, identification of infringers and preservation of evidence in online cases has proven to be a challenging task. In Lithuania, courts have rejected requests to disclose the identities behind IP addresses referring to the protection of personal data.[126] Generally, courts have dismissed cases that were brought against individual file-sharers on various grounds.[127] This may show the general reluctance of courts to enforce copyright laws against individual users. Secondly, it is true that intermediaries have not been sufficiently involved in the termination of infringements. The notice and takedown procedures, as set under the E-commerce directive, are transposed into Lithuanian laws[128] but are not functioning in practice.[129] There has been a discussion on the possibility of filtering and blocking illegal sites by intermediaries. However, both regulatory authorities and intermediaries agreed that this would require immense investments that small or medium-size telecommunication companies in Lithuania cannot afford. This rationale was confirmed in a case dealing with foreign online gambling sites offering unauthorised gambling services to Lithuanian customers. In this case a first instance court ordered all Lithuanian intermediaries to block several foreign online gambling sites that offer unauthorized services to Lithuanian

[124] *See* the Analysis of the impact of piracy of video content on the economy in Poland, conference report prepared by PwC on behalf of the Association of Polish SIGNAL Report (in Polish), available at http://www.pwc.pl/pl_PL/pl/publikacje/piractwo/analiza_wplywu_zjawiska_piractwa_tresci_wideo_na_gospodarke_w_polsce_raport_pwc.pdf.

[125] *Supra* note 15.

[126] *See* Vilnius District Court, civil case No. 2S-1416-302/2012. In 2012 the German company Digiprotect Gesellschaft zum Schutz Digitaler Medien mbH requested court to disclose identities of several individuals with the purpose of initiating proceedings against them for illegal file sharing. The Vilnius District Court rejected the request stating that revealing such data to private company would be contrary to the personal data protection laws, and this data can only be collected by the pre-trial investigation officers.

[127] *E.g.* in 2009 an individual user S.B. was accused of illegal downloading of Microsoft Windows 7 and making this software publicly available on the Internet for non-commercial purposes using the Bit Torrent protocol. The case was dismissed due to procedural violations, *see* Supreme Administrative Court of Lithuania, administrative case No. N62-902/2011.

[128] *See* the Government of the Republic of Lithuania Decree No. 881 of 22 August 2007.

[129] *E.g.* it was tried once by the collective society AGATA; however, after being requested to provide numerous evidence (on ownership of rights and others), AGATA abandoned the initiative.

customers.[130] However, intermediaries declined to comply with the decision and in their appeal against the order argued that such blocking is technically impossible and economically not feasible. Following similar arguments, the court eventually cancelled this blocking requirement.[131] With regard to judicial relief in online cases, there are signs in Lithuanian court practice that quite substantial relief can be granted if the case is pursued in the courts. In a so-called *Linkomanija* case, Microsoft claimed that a popular Lithuanian file-sharing BitTorrent website Linkomanija illegally made available Microsoft software. The first instance court ordered the operator to close down the website entirely and granted LTL 120,000 (€34,782) damages.[132] At appeal, parties settled. In Latvia, no significant online copyright enforcement cases have been identified.

Polish right holders have been more active in enforcing their rights. For example, in early 2014 the Polish Filmmakers Association filed a lawsuit against Chomikuj.pl, a website which allows users to store and share with others different kinds of files. Film producers believe that infringements were carried not only by individual users but also by the website operators who did not verify the materials posted by users. Right holders are claiming for compensation from Chomikuj.pl in amount of PLN 290,000 (approx. €70,000) and seek to establish an automatic system against copyright violations. In early December 2013, the Warsaw Court of Appeal dismissed a class action lawsuit against Chomikuj.pl in another case brought by the book publishers' association.[133] Polish right holders have also tried to prosecute individual infringers and found it difficult to acquire information about the identities of individual users.[134] Currently the disclosure of identities is normally sought through criminal procedures and then the acquired information is used to initiate civil copyright infringement cases. In addition, Polish stakeholders have also started working together with the government to develop self-regulatory measures to fight piracy online. In June 2014, Internet Industry Employers Association IAB Poland, with support from the Ministry of Culture and Heritage, has undertaken an action to reduce placing ads on sites that provide illegal content on the Internet. Participants in the initiative may declare that, for the purpose of advertising online,

[130] *See* "IPT: TeismasįteisinaLietuvojeinternetocenzūrą" [English: IPT: Court legalises the censorship of the Internet], available at http://www.balsas.lt/naujiena/529771/ipt-teismas-iteisina-lietuvoje-interneto-cenzura (in Lithuanian).

[131] The decision was confirmed by the Appeal Court of Lithuania, decision of 27 December 2011. However, it is likely that Lithuanian courts will follow the recent CJEU decision C-314/12 – *UPC Telekabel Wien* and change their position in cases over blocking of foreign websites containing infringing copyright materials. This is possible as long as ISPs are not requested to *fully* block access to foreign websites (which is technically not feasible) and proportionality principle is respected (blocking being a necessary and reasonable measure to stop the infringement).

[132] Vilnius District Court, civil case No. 2-742-262/2012 – *Linkomanija*.

[133] *See* the "Bi-monthly report on copyright reform in Poland- December and January 2014", available at http://centrumcyfrowe.pl/bi-monthly-report-on-copyright-reform-in-poland-december-and-january-2014/ .

[134] *See* case II SA/Wa 1598/09 – *Wyrok WSA w Warszawie*; for more *see* Adam Ploszka, "Udostępnianieadresów IP przezwydawcówprasy w internecie. Uwaginatleorzecznictwasądówpolskich", in: D. Bychawska and Siniarska, D. Głowacka (eds.), *Wirtualne Media-Realne Problemy*, pp. 128–138 Warszawa 2014, available at https://www.academia.edu/7915984/Udostepnianie_adresow_IP_przez_wydawcow_prasy_w_internecie.Uwagi_na_tle_orzecznictwa_sadow_polskich (all in Polish).

they would use only those online services that comply with applicable laws and respect copyright and related rights.[135]

In order to address these and other enforcement problems, the European Commission is considering updating certain rules in Intellectual Property Rights Enforcement Directive (IPRED)[136] and the Information Society Directive, in particular those relating to the collection and preservation of evidence, identification of infringers, injunctive relief against intermediaries, and calculation of damages.[137] Streamlining copyright enforcement may improve the legal framework. However, it should be noted that right holders in the analysed CEE countries use rights enforcement mechanisms rather passively. One of the reasons for this could be the lack of financial resources to start and pursue the court proceedings. Even corporate right holders (publishers, producers) are often small or medium-size entities and cannot afford to invest time and money in prosecuting infringers in courts. Second, right holders realize the inefficiency of enforcement. Even if several users are punished or several websites are closed, experience shows that this does not decrease piracy levels in general. Thirdly, the court system enjoys little trust, especially among individual authors. In addition, the possibility of involving ISPs in the enforcement of copyright should be considered with caution. A duty to block foreign websites, monitor and filter illegal content may mean a too heavy financial burden for small and medium-size ISPs with smaller budgets in the CEE countries, even if it may be reasonable in Western EU countries.[138] And last but not the least, as long as the social acceptance of copyright is low, rigid enforcement measures are unlikely to lead to more respect of copyright online.[139] On the contrary, recent cases against individual persons or file sharing websites were broadly covered by the media[140] and were used to strengthen a negative attitude towards the copyright law system. Quite a negative stance towards strengthening of copyright enforcement online has also been demonstrated in protests against the Anti-Counterfeiting Trade Agreement (ACTA) that took place *inter alia* in Poland and Lithuania.

For these reasons the Commission may want to consider a set of additional measures to gradually increase social compliance with copyright laws across the EU. First of all, the copyright law needs to be adjusted to meet user needs in the digital environment. For this purpose, users need to be actively involved in these copyright policy making decisions. Second, as discussed earlier, the Commission

[135] Text of the initiative could be found at http://ogladaj-legalne.pl/app/webroot/uploaded/inicjatywa_na_rzecz_uczciwej_reklamy.pdf; for a comment *see* http://biznes.pl/magazyny/media/internet/przedsiebiorcy-internetowi-podejma-dzialania-na-rz,5640921,magazyn-detal.html (all in Polish).

[136] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (*OJ L* 157, 30 April 2004), *OJ L* 195, 2.6.2004, p. 16–25.

[137] *See* the Draft Impact Assessment 5.5.6.

[138] Such measures have been adopted in a number of national decisions, *e.g.* Supreme Court of Denmark, 27 May 2010, *IFPI v. Sonofon* (DMT2); German Federal Supreme Court, I ZR-18/11 "*Alone in the Dark*"; the three-strikes rule has been introduced in UK Digital Economy Act.

[139] *See* Hugenholtz et al., "The Recasting of Copyright and Related Rights for the Knowledge Economy". Final Report, available at http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf, p. 197–209; Geiger (2006), 373.

[140] *E.g.* the infamous *Pirate Bay* case in Sweden.

could consider measures that would facilitate legitimate online services in smaller CEE markets and remove barriers for consumers from the CEE countries to access websites in other EU Member states.[141] Availability of legitimate and affordable online services is likely to decrease piracy levels. Third, education of the public on copyright as well as a constructive dialog between right holders, service providers and consumers are indispensable for creating a mutual respect for each other's rights and interests.[142] Even though some work in this regard has already been done in the CEE, it needs to be continued and intensified. Fourth, in order to avoid costly and long in-court proceedings, out-of-court alternative dispute resolution mechanisms that are cost-effective and expedient could be discussed.[143]

5 Conclusions

It is submitted in this paper that due to the different historical, cultural and economic environment, the CEE countries have to some extent specific interests in EU copyright policymaking. The analysis of the draft Impact Assessment on the Modernisation of the EU Copyright *acquis* has shown, first, that some copyright law problems identified by the European Commission are (yet) of little practical relevance in the focus CEE countries, such as the overlap of reproduction and making available rights, exhaustion of rights online, or legal status of user generated content and text and data mining. Therefore, although the discussion on these issues and exchange of good practices should be encouraged, it is questionable whether they are ripe for the harmonization at the EU level.

On the other hand, some of the issues indicated in the draft Impact Assessment are of high relevance in the focus CEE markets. One of the most significant problems is territorial differentiation of online services across the EU. Many music and video-on-demand online services are not yet offered or delayed in such small markets as Lithuania and Latvia, which in part explains higher levels of online piracy in these countries. This problem, however, is only to a limited extent caused by the territorial nature of national copyright laws, and needs to be addressed through a complex set of measures outside the field of copyright law. A second significant issue concerns limited exceptions to libraries and mass digitization projects. In order to ensure efficient preservation of local cultural resources, libraries need a broader digital preservation exception. On-site consultation exception could also be expanded to allow online consultation of digital materials as long as the extent of consultation is functionally equivalent with the ordinary lending of hard copies. Finally, a remuneration model, such as an extended collective licensing, could be welcomed for more extensive online lending models. However, in order to make it effective, a few challenges need to be addressed, such as regulation of cross-

[141] The Commission has already announced plans to work on this issue, *see* "Geoblocking attacked from all sides", available at http://www.euractiv.com/sections/infosociety/geo-blocking-attacked-all-sides-312811.

[142] Hugenholtz et al., *supra* note 139, at p. 209.

[143] For more on alternative dispute resolution mechanisms *see* Gorbylev (2014).

border effects, voluntary nature of the system and limited subject matter that it covers.

Thirdly, the private copy levy system has been successfully upgraded in Lithuania, but not in Latvia and Poland. Despite deficiencies of the system, it currently seems to be the main (if not the only) source of revenue for online uses and, therefore, should not be abandoned at this stage. The recent CJEU decisions (*ACI Adam* and *Copydan*) that restrict the scope of the private levy exception and allow making of copies from legal sources only, threatens the viability of the private levy system and need to be reconsidered. It might seem at first glance to be quite logical not to allow making legal copies from illegal sources. However, it is questionable whether such a narrow reading of private copy exception will protect the interests of right holders, or rather further undermine their still very weak economic position in the online environment. Fourthly, the Commission's initiative to raise the question of the adequate remuneration of authors and performers should be welcomed. It could start with a general collection and exchange of good practices, leaving the consideration of legislative actions for a later stage. Finally, the Commission's concerns with regard to the enforcement of copyright online are understandable, and a streamlining of certain enforcement provisions would be welcomed. However, one should keep in mind that the use of court enforcement procedures in the focus CEE countries is relatively rare. Therefore, alternative measures encouraging compliance with copyright laws in the long term should also be considered.

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