



# **(Adaptations to) Copyright in the Digital Age – EU Perspective**

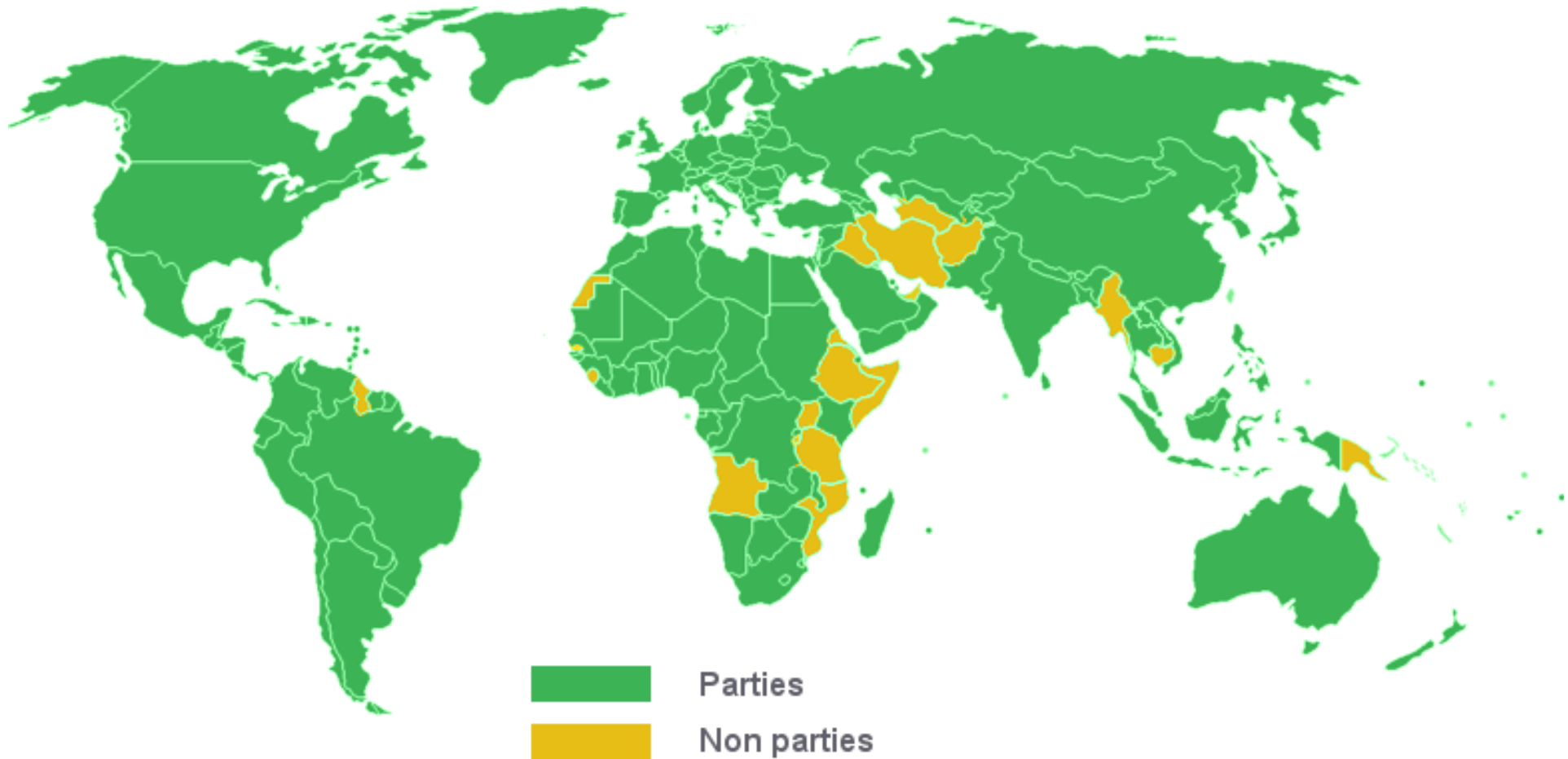
**Prof. Dr. Marie-Christine Janssens**



# Berne Convention

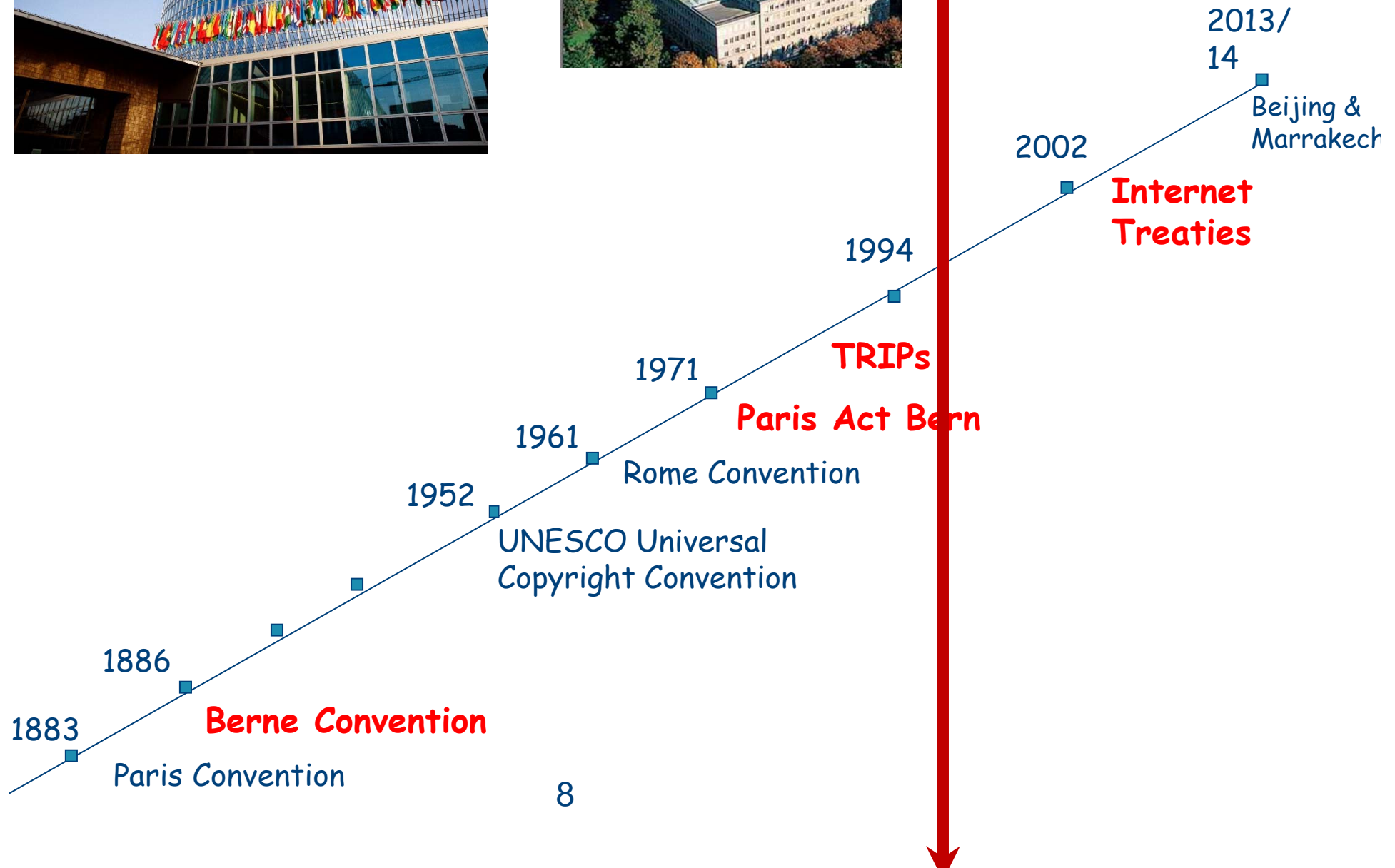
(‘mother’ of copyright treaties)

7



2015 : 168 countries

KU LEUVEN



# Minimum Economic Rights



**Reproduction**



**Communication  
to the public**

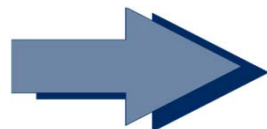
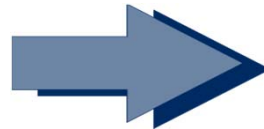
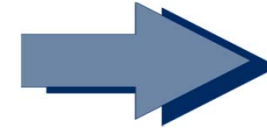
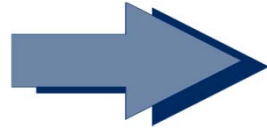


**Distribution**

**Resale right**



# Past – Copyright - present





# copyright@internet



*Everything you  
know about  
copyright is  
wrong*



John P. Barlow 1994

# *International prevailing attitude*



- ❑ Copyright is not dead
- ❑ Copyright will survive this new challenge as it did in the past
- ❑ Only question of readjustment/adaptation/interpretation
  - Cf. : Gurry (WIPO) 2011 : “Copyright system must ‘adapt or perish’”

# Copyright & Technological challenges

## Reproduction Right

- Grammophone,
- Photocopymachine
- Videorecorder
- Software



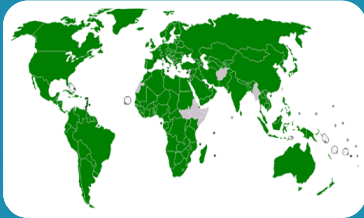
## Public Communication Right

- Radio
- TV
- Cable
- Satellite,





# Adapting the regulatory framework



## I. International

- WIPO : Diplomatic Conference (December 1996)  
→ WCT and WPPT (“Internet Treaties”)



## II. European Union

- [Database directive (March 1996)]
- Copyright Directive of 22 May, 2001
- 2001 ..... ?.....2015

# EU Copyright Regulatory Framework : challenges



# Difficulties to harmonize

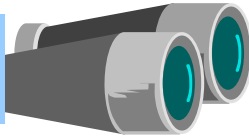
## Divergent interests between

- Copyright and Droit d'auteur tradition
- Importer countries (users' interests) & exporter countries (rightowners' interests)

## EU Competence issues

- Goal : Tighten economic links and foster economic prosperity
- © roots in culture & in national traditions
- Legal base?
  - **Legal base ?**
  - First legal instruments → Provisions on free movement of goods
  - Currently → TFEU (art. 114 & 118))

# EU harmonization



# Review of the past

## Harmonisation initiated in 1988

- Green Paper (many to follow)

## Result is

- strong “acquis”
- changed national © environment
- far from complete

## Step-by- step approach

- 8 vertical directives
- 1 horizontal directive



# InfoSoc Directive 2001

Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society





# *Content Directive*

## **Scope exclusive rights (art. 2, 3, 4)**

- **Reproduction right**
- **Public communication right**
- **Distribution right (& exhaustion principle)**

## **exhaustive list of exceptions (art. 5)**

- **1 Mandatory RR**
- **5 Optional RR**
- **15 Optional all economic rights**

## **Protection technological measures (art. 6, 7)**

- **Effective technological measures**
- **Electronic rights-management information**

## Teaching & Research (art. 5.3.a)

“use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved”

# Exceptions in the EU

## 50-shades of covered uses

**EU/EEA teaching provisions are hardly homogeneous. It shouldn't be like that.**

Limitations and exceptions to copyright vary wildly inside the EU/EEA. We can compare one of the most restrictive countries with one of the most permissive.



**ESTONIA**  
permissive

vs.



**FRANCE**  
restrictive

A teacher in **Estonia** can do all of the following within an educational context:

Quote works to any justified extent

Compile works of any nature

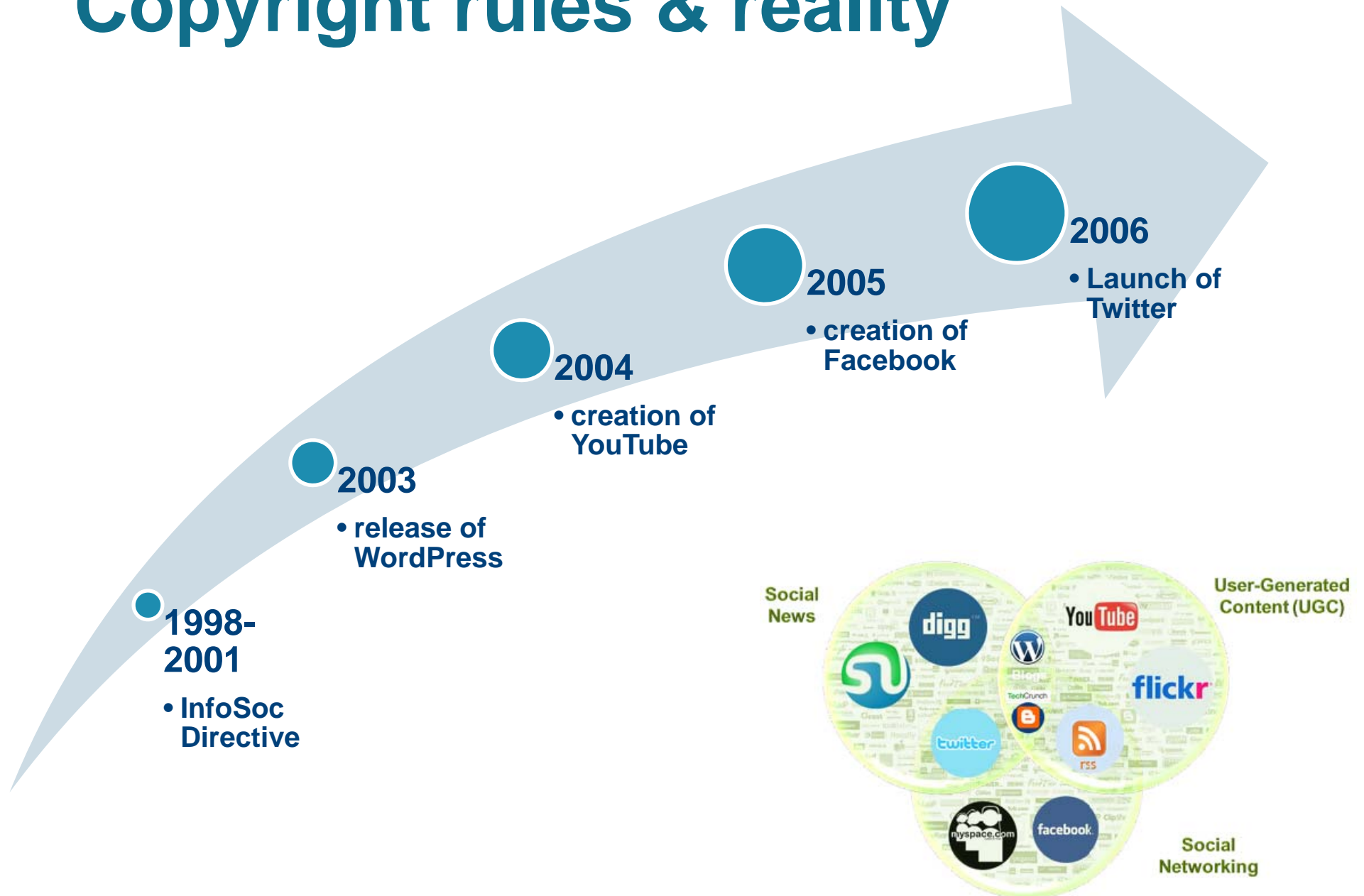
Translate and adapt entire works

(in face-to-face or online teaching environments and for free)

While a teacher in **France** is not allowed to do any of these things!

Source: Creative Commons, 'Open Educational Resources Policy in Europe'

# Copyright rules & reality



# (Further) Harmonization of copyright law by CJEU



## Phase of legislative intervention

Embedded in 9 directives

## Phase of creative interpretation

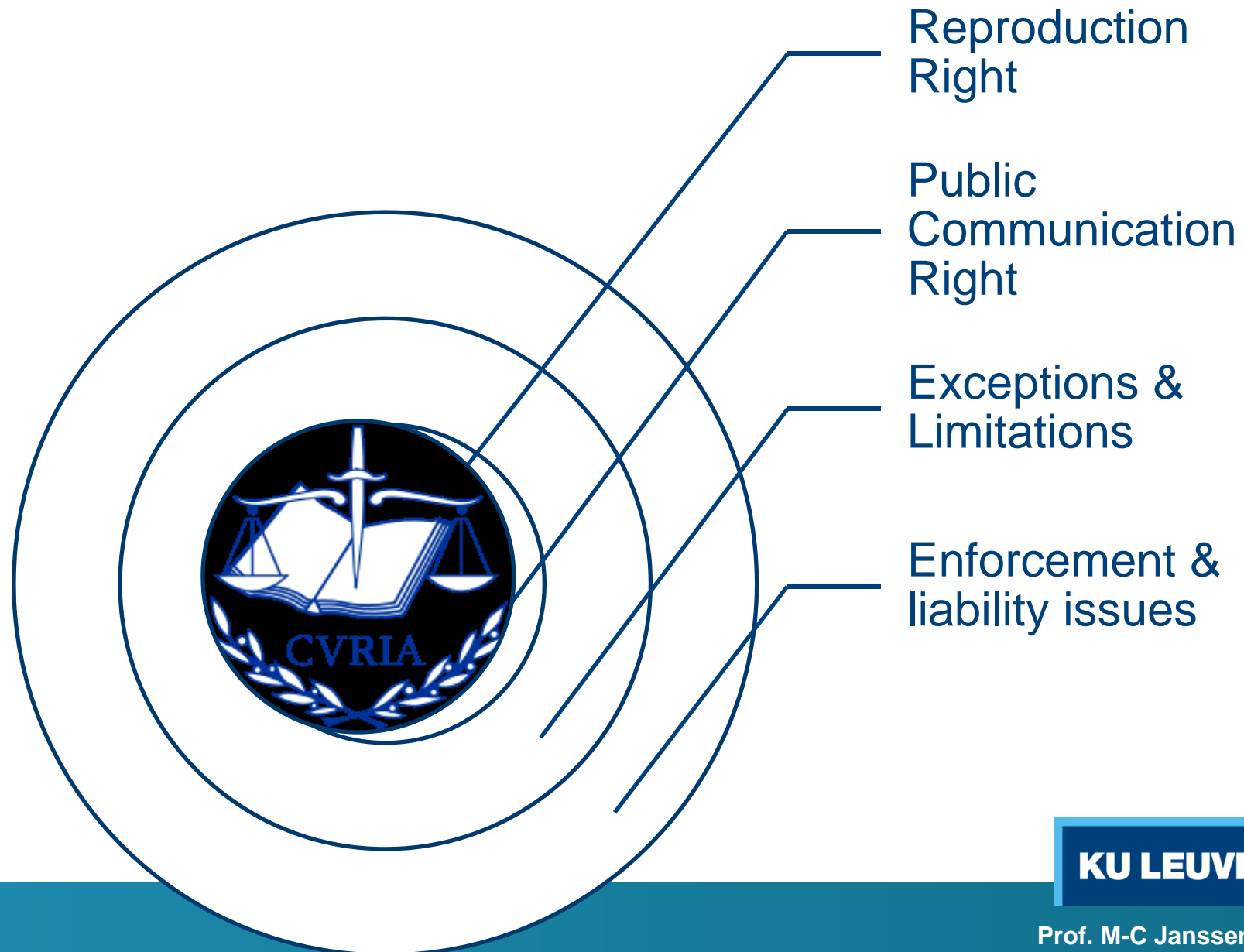
Judges (and AG-s) of Luxembourg rule on major copyright issues

- Notion of the work & originality
- Scope of exclusive rights and exceptions
- Related issues

+ significant rise in number of cases in recent years



# Referrals on digital issues



# **‘Toolkit’ to answer prejudicial questions**



**(1) Establishing ‘Community notions → Requirement of unity of the EU order and its coherence’ (infra)**



**(2) In light of the objectives pursued by the directives (Principal purpose is to establish a high level of protection Rightowners)**



**(3) In a manner that is consistent with international law (Berne, Rome, WCT...)**



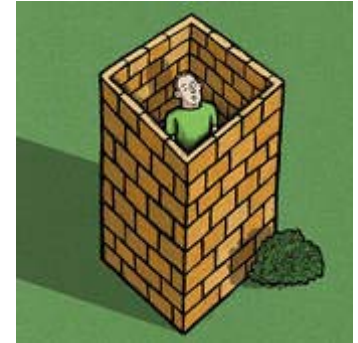
**(4) Balance copyright in accordance with the general principles of EU Law (infra)**

# (1) COMMUNITY NOTIONS

## ‘autonomous & uniform’ interpretation

- ❑ The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the MS for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community
  
- ❑ In particular, but not only, notions of InfoSoc Directive, such as
  - Originality, Reproduction right (art. 2), Public communication right (art. 3), Distribution right & exhaustion (art. 4.1) & ‘sale’ (art. 4.2), Temporary reproductions (art. 5.1) and other exceptions of art. 5, Fair compensation for exceptions (Private copying, Lending right)

## (4) Proportionality rule : The CJEU removes copyright from its island



### □ Balancing copyright :

#### Proportionality as guiding principle

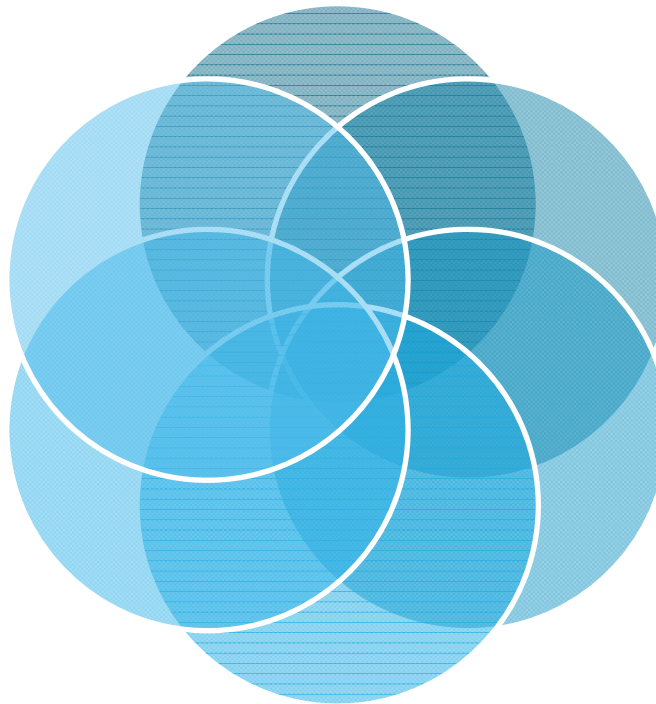
- *“there is . . . nothing whatsoever in the wording of [the Fundamental Rights Charter] or in the Court's case-law to suggest that (an IP) right is inviolable and must for that reason be absolutely protected”*
- Courts need to apply a balancing test and take into account other fundamental rights and principles
  - ✓ EU Charter of Fundamental Rights

**Rightholders' intellectual property rights**

**Right to privacy and dataprotection**

**Freedom of undertaking (incl. Right ISP to conduct its business)**

**Freedom of expression**

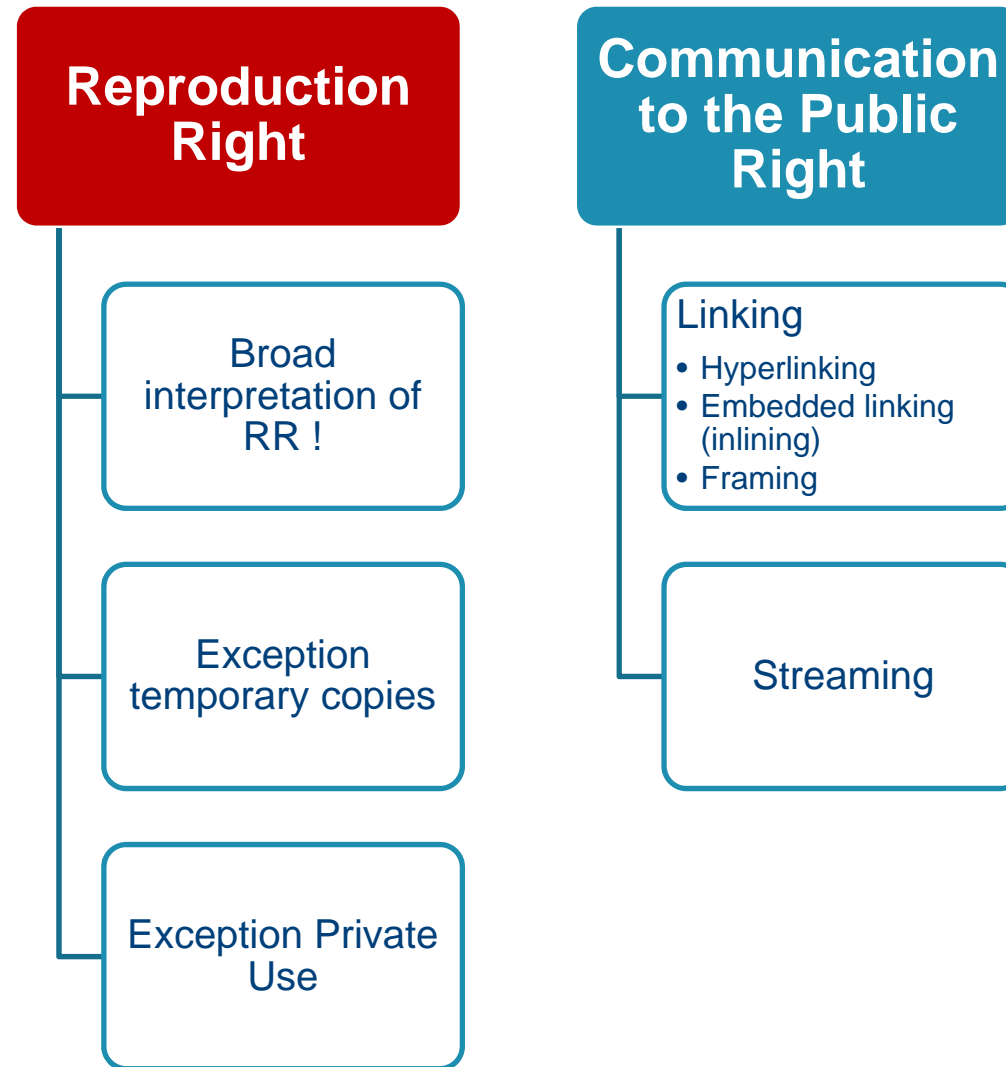


...

**Rights of customers to receive information**



# Case Law CJEU & Internet





C-302/10 (data capture)

if the duration of the reproduction is automated and limited to what is necessary for the proper completion of the technological process



C-403/08 & C-429/08

Temporary and transient acts of reproduction in the memory of a satellite decoder and a television set to enable the broadcasts transmitted to be received



C-360/13

"Reproduction of copyright protected content on users' screens and **cached** on users' computers while **web-browsing** - without downloading - does not infringe copyright"

# Private copy exception

## Art. 5(2) (b)

❑ in respect of reproductions on any medium *made by a natural person for private use* and for ends that are neither directly nor indirectly commercial, *on condition that the rightholders receive fair compensation* which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned’.

❑ E.g.

- ✓ format-shifting (CD → MP3 player)
- ✓ time-shifting
- ✓ Making back-up copies
- ✓ Downloading content from internet



# CJEU 10 April 2014, Case C-435/12 ACI Adam



**The private copying exception  
may only apply to reproductions  
from lawful sources  
*(implications for levy systems!)***

# Case Law CJEU & Internet

## Reproduction Right

Exception  
temporary copies

Exception Private  
Use

## Communication to the Public Right

### Linking

- Hyperlinking
- Embedded linking (inlining)
- Framing

Streaming



# CJEU 13 February 2014, C-466/12

## ❑ A communication to the public?

Legal concept includes two cumulative criteria **YES**

- an ‘act of communication’ of a work
  - ✓ must be construed broadly (to ensure high level of protection)
  - ✓ In casu: a website with clickable links to protected works affords users direct access to those works (= ‘made available’ – art. 3)
- the communication of that work to a ‘public’
  - ✓ an indeterminate number of potential recipients + a fairly large number of persons

# CJEU 13 February 2014, C-466/12

## ❑ However → settled case-law → a ‘new’ public

NO

- i.e. at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public
  - ✓ Hence : not linking to content from illegal source
- In casu :no new public
  - ✓ because the public targeted by the initial communication consisted of all potential visitors to the site concerned,
  - ✓ also given that access to the works on that site was not subject to any restrictive measures

## ❑ MS are not allowed to give an interpretation to article 3 that would include such communications

- Autonomous interpretation

# CJEU 13 February 2014, C-466/12

## ❑ Also in case of embedded linking

- Such a finding would also apply in a case where Internet users click on the link at issue and the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site
- i.e. framing is OK

## ❑ But not in a case where a clickable link makes it possible for users of the site on which that link appears

- to *circumvent restrictions* put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only
- To access the work while it is *no longer available* to the public on the site on which it was initially communicated



Hypertext linking (& framing) → Svensson



Streaming → iTV Broadcasting C-607/11

- Live streaming of TV channels **constitutes an act of communication to the public** Given that the making of works available through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication
- Each of those two transmissions must be authorised individually and separately by the authors concerned



Embedding by framing technology → Bestwater C-348/13 (= Order)

- embedding videos (in casu 2 min. commercial) which are freely available on, for example (as was the case here) YouTube, does not constitute an infringement of the right of communication/making available to the public
- if no new public or no use of specific technical means different from that used for the initial communication



**Liability  
intermediaries**

**(internet service  
providers)**

## Offering content

**Direct  
liability**

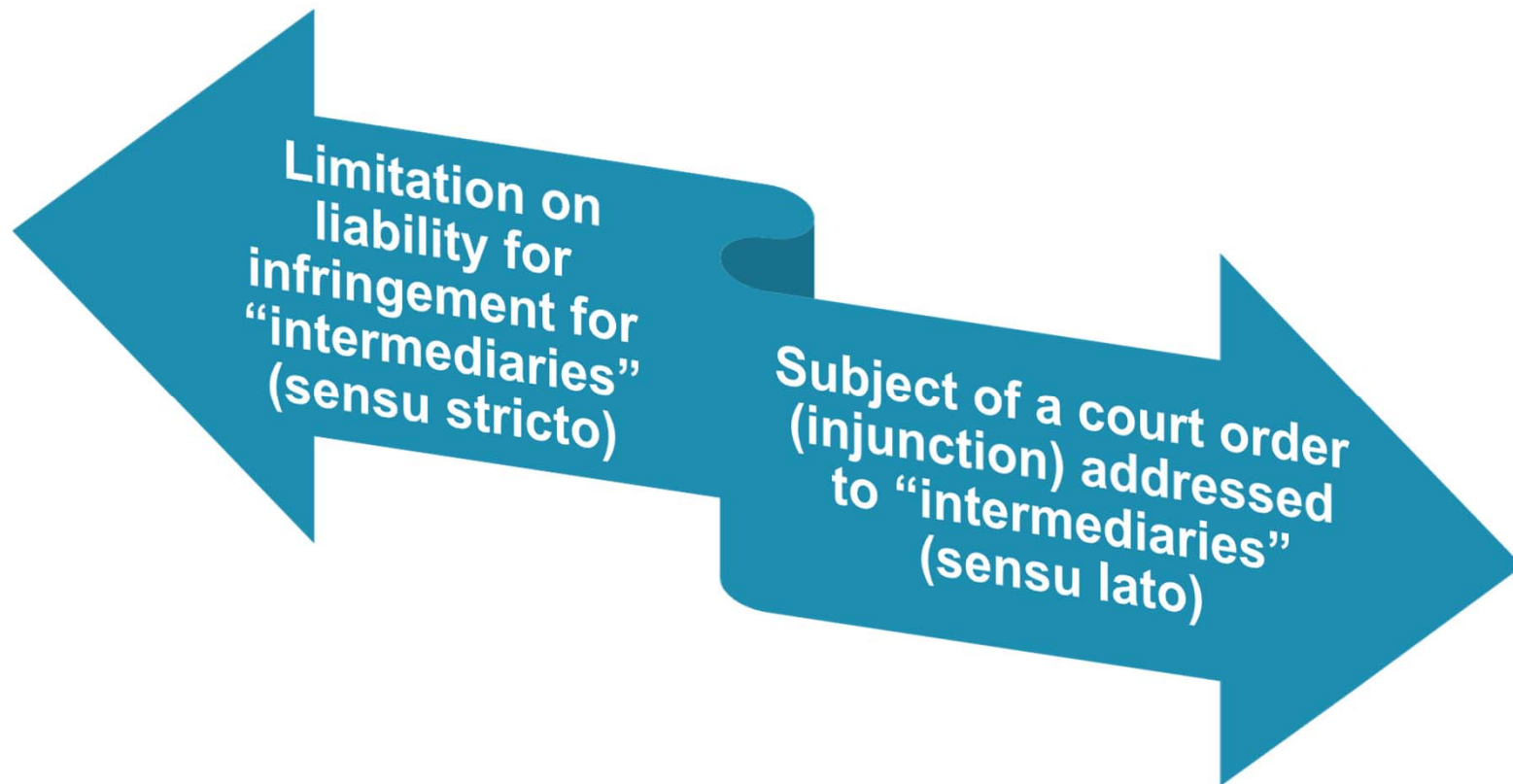
## Not offering content

### Indirect liability

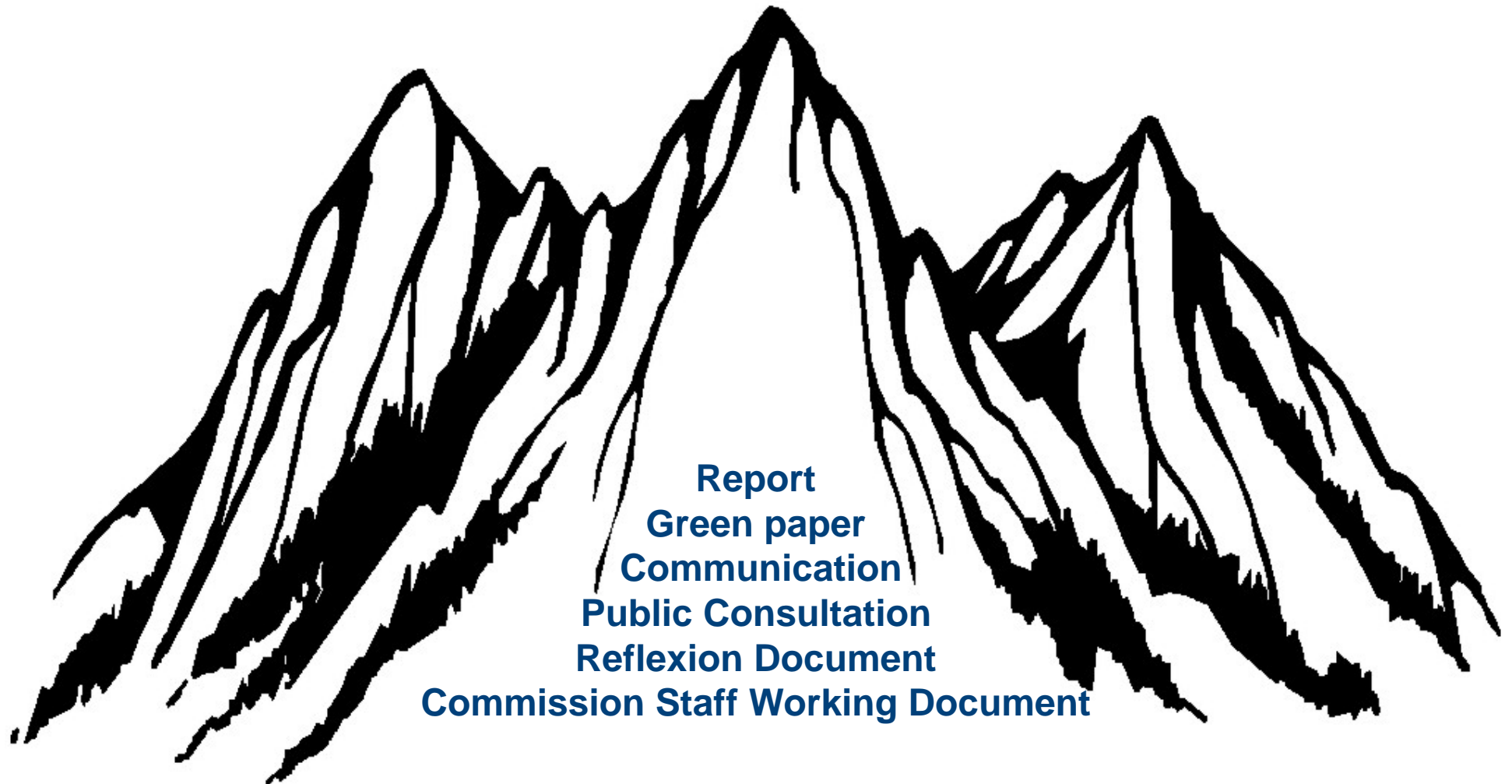
- ISP in sense of E-commerce Directive (& safe harbour)
- Other ISP



# However : no prejudice to possibility of injunction



# Where is European Legislator ?



THE SOFT MOUNTAIN



# Commissioner for the Digital Economy Günther Oettinger Nov. 2014



- ❖ Now it's time to act, to come to a formal commission proposal... I'm quite optimistic [of getting] a balanced solution between the Internet community and intellectual [property] owners.



# Recent initiatives

## Commission

- ❑ **2014: Public Consultation on the review of the EU copyright rules**
- ❑ **6 May 2015 Communication A Digital Single Market Strategy for Europe (2015), action re:**
  - (1) (lack of) cross-border access to content and its portability;
  - (2) text and data mining for non-commercial and commercial purposes alike; and
  - (3) discussion around civil enforcement and the role of internet service providers
- ❑ **Proposal for an ‘instrument’ end 2015 ?**

## Parliament

- ❑ **Report w/reform agenda – rapporteur Julia REDA**
  - **Motion for a European Parliament resolution on the implementation of Directive 2001/29/EC**
    - ✓ Very ambitious but numerous amendments
  - **Committee on Legal Affairs 16 June 2015:**
    - ✓ Adoption of amended version
  - **Plenary 9 July 2015**



**Towards a New  
Legislation on  
“Intellectual Property  
in the Digital Single  
Market” : Is there  
room for flexibility?**

## **Art. 20 Berner Convention**

- New rules “in so far as such agreements grant to authors more extensive rights than those granted by the Convention”



# The thorny problem of territoriality


- ❑ **Despite more than 25 years of harmonization copyright law in EU has remained national law**
- ❑ **Copyright protection limited to national borders of 28 Member States**
- ❑ **Partial solutions**
  - Country of origin rule (Satellite Directive)
  - Mutual recognition (Orphan Works Directive)
  - Multiterritorial licensing (2014 Directive)
- ❑ **A Long-Term Solution = Unification of EU Copyright Law**
  - Cf. Trademarks, Designs and Patents (soon)
- ❑ **Cf. Academic initiative of Copyright Code**

# EUROPEAN COPYRIGHT CODE

## Introduction

The *European Copyright Code* is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The project has its roots in an International Network Program run by three Dutch universities (Radboud University of Nijmegen, University of Amsterdam and Leiden University), and sponsored by the government-funded Dutch ITeR Program.

The aim of the Wittem Project and this Code is to promote transparency and consistency in European copyright law. The members of the Wittem Group share a concern that the process of copyright law making at the European level lacks transparency and that the voice of academia all too often remains unheard. The Group believes that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level. Nevertheless, **the Group does not take a position on the desirability as such of introducing a unified European legal framework.**

The Code was drafted by a  Drafting Committee composed of seven members. Each chapter of the Code was originally drafted by one or two members of the Drafting Committee, acting as rapporteurs. The rapporteurs for each chapter were: Prof. Quaedvlieg (Chapter 1: Works), Prof. Hugenholtz (Chapter 2: Authorship and ownership), Prof. Strowel (Chapter 3: Moral rights), Prof. Visser (Chapter 4: Economic rights) and Professors Dreier and Hilty (Chapter 5: Limitations).

Each draft Chapter, accompanied by an explanatory memorandum, was discussed in a plenary session with the members of the Wittem Advisory Board and other experts that were invited ad hoc. The proceedings of these plenary sessions were fed into the second versions of each chapter, and thereafter redacted and integrated into a final consolidated version by the Drafting Committee. Although discussions with the Advisory Board and experts have greatly influenced the final product, responsibility for the Code lies solely with the Drafting Committee.

While drafted in the form of a legislative instrument and thereby exceeding the level of detail normally associated with common principles of law, this Code is not comprehensive. It concentrates on the main elements of any codification of copyright: subject matter of copyright (Chapter 1), authorship and ownership (Chapter 2), moral rights (Chapter 3), economic rights (Chapter 4) and limitations (Chapter 5). The Code does not, for instance, treat such remuneration rights as public lending right and droit de suite, nor does it deal with the legal protection of technical measures. Also, the Code does not contain rules on copyright liability or enforcement, nor does it touch upon neighbouring (related) rights and database right.

This Code is not a recodification of EU copyright law *tabula rasa*. Since European copyright law must operate within the confines of the international commitments of the European Union and its Member

- Introduction
- Drafting Committee and  
Advisory Board
- European Copyright Code
- European Copyright Code  
(pdf)
- Contact

