Eduardo Daniel Leonardo dos Santos

Bypassing Copyright Exceptions

Three examples from Portugal

Dissertation to obtain a Master's Degree in Law,
in the speciality of Law and Technology

Supervisor:

Dr. Giulia Priora, Assistant Professor at NOVA School of Law, Lisbon

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Eduardo Santos

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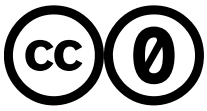
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Le livre, comme livre, appartient à l'auteur, mais comme pensée, il appartient — le mot n'est pas trop vaste — au genre humain. Toutes les intelligences y ont droit. Si l'un des deux droits, le droit de l'écrivain et le droit de l'esprit humain, devait être sacrifié, ce serait, certes, le droit de l'écrivain, car l'intérêt public est notre préoccupation unique, et tous, je le déclare, doivent passer avant nous. (Marques nombreuses d'approbation). Mais, je viens de le dire, ce sacrifice n'est pas nécessaire.

- Victor Hugo, Congrès Littéraire International, 1878.

O Direito Intelectual também não é neutro. Ou serve o conhecimento e a cultura ou está a ser afastado das razões e raízes fundamentais que estão na base da sua implantação.

- J. Oliveira Ascensão, Propriedade Intelectual e Internet, 2003.

To my family.

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Finally, thank you to NOVA School of Law, for the striking difference.

List of Abbreviations

AD EDIT	AD EDIT – Associação de Editores de Partituras e Compositores (Association of Sheet Music Publishers and Composers)
AGECOP	Associação para a Gestão da Cópia Privada (Association for the Management of Private Copying
COP	Contractual Override Prevention (clause)
CJEU	Court of Justice of the European Union
CMO	Collective Management Organization
DRM	Digital Rights Management
EU	European Union
IGAC	Inspecção Geral das Actividades Culturais (General Inspectorate for Cultural Activities)
TPM	Technological Protection Measure(s)
WIPO	World Intellectual Property Organization

Legislation

CDADC	Código do Direito de Autor e dos Direitos Conexos (*Portuguese Copyright and Related Rights Code*)
CDSM Directive	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
IPR Enforcement Directive	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights
InfoSoc Directive	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
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty

Abstract

Copyright law aims to balance the exclusive rights of rightholders with exceptions and limitations that serve the public interest by ensuring access to knowledge, culture, education, and innovation. However, beneficiaries of copyright exceptions often face restrictions that prevent them from making use of exceptions. This dissertation examines three cases in Portugal where copyright exceptions are bypassed through contractual, legal, or technological means.

The first case focuses on contractual override prevention (COP), specifically Article 75(5) of the Portuguese Copyright Code, a provision that ensures copyright exceptions cannot be overridden by contracts. Despite Portugal being considered a maximalist country in copyright law, this clause offers strong protection. However, its real-world effectiveness is questioned in light of the AGECOP protocols, which appear to conflict with the COP clause.

The second case concerns technological bypassing through Technological Protection Measures (TPMs). While TPMs are designed to prevent unauthorized uses, they also restrict lawful uses under copyright exceptions. Portugal reformed its TPM regime in 2017, introducing a more flexible system, but concerns persist regarding its compatibility with the InfoSoc Directive, raising concerns about the EU framework's effectiveness in safeguarding copyright exceptions.

The third case explores a legal bypass involving sheet music. A newly created collective management organization sought to impose licensing fees on music schools and philharmonic bands, claiming that sheet music is exempt from all copyright exceptions. This interpretation, supported by an IGAC opinion, does not align with national or EU law, and lead to legislative proposals in the Parliament. A closer examination suggests that this stance may stem from a misinterpretation of CJEU case law, demonstrating how legal interpretation can erode copyright exceptions.

These cases highlight that copyright exceptions, while legally established, may not always be accessible in practice. The study concludes that ensuring the effective exercise of copyright exceptions requires more than robust legislation; strong enforcement mechanisms are needed to prevent their bypass through contracts, legal interpretations, or technological measures. While these issues arise within a Portuguese context, they offer valuable insights for EU copyright law, identifying weaknesses in the current framework and proposing solutions for reform.

Resumo

O Direito de Autor (DA) procura equilibrar direitos exclusivos dos titulares com utilizações livres que servem o interesse público, garantindo o acesso ao conhecimento, à cultura, à educação e à inovação. Contudo, beneficiários de utilizações frequentemente enfrentam restrições ao seu exercício. A presente dissertação analisa três casos em Portugal onde utilizações livres são contornadas por meios contratuais, jurídicos ou tecnológicos.

O primeiro caso foca-se na prevenção de afastamento contratual (COP), especificamente no Art. 75.º n.º5 do Código do Direito de Autor, que impede que utilizações livres sejam afastadas por contrato. Apesar de Portugal ser considerado um país maximalista em matéria de DA, este oferece uma forte proteção. No entanto, a sua efetividade prática é questionável à luz dos protocolos da AGECOP, que parecem conflituantes com a cláusula COP.

O segundo caso examina o contorno tecnológico através do uso de Medidas de Proteção Tecnológica (TPMs). Embora as TPMs sejam concebidas para impedir utilizações não autorizadas, acabam também por restringir utilizações legítimas. Em 2017, Portugal reformou o seu regime de TPMs, adotando um sistema mais flexível, mas existem preocupações quanto à sua compatibilidade com a Diretiva InfoSoc, levantando questões sobre a eficácia do quadro jurídico europeu na proteção das utilizações livres.

O terceiro caso explora um contorno jurídico relativo a partituras musicais. Uma nova entidade de gestão coletiva tentou impor taxas de licenciamento a escolas de música e bandas filarmónicas, alegando que as partituras estão excluídas das utilizações livres. Esta interpretação, apoiada num parecer do IGAC, não é conforme a lei nacional ou da UE, e levou a propostas legislativas no Parlamento. A análise sugere que esta posição pode resultar de uma má interpretação da jurisprudência do TJUE, o que demonstra como a interpretação pode enfraquecer as utilizações livres.

Estes casos demonstram que, embora as utilizações livres estejam legalmente estabelecidas, nem sempre são acessíveis. O estudo conclui que garantir o exercício efetivo das utilizações livres exige mais do que legislação robusta; são necessários mecanismos de aplicação eficazes para impedir que essas exceções sejam contornadas por contratos, interpretações jurídicas ou barreiras tecnológicas. Embora estas questões surjam num contexto português, oferecem contributos valiosos para o DA da UE, revelando fragilidades no quadro atual e propondo soluções.

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Introduction

At its core, Copyright Law seeks to balance two fundamental and often conflicting interests: the exclusive rights of rightholders and the copyright exceptions and limitations that allow users to use copyrighted works in ways that serve the public interest. Copyright exceptions and limitations ensure that the law does not unduly restrict access to knowledge, including culture, education and innovation.

However, beneficiaries of copyright exceptions are often restricted or prevented from making use of them. This dissertation analyzes three cases where copyright exceptions are eroded by contractual, legal, or technological bypassing.

The idea for this research emerged during my work with Knowledge Rights 21, an initiative focused on various copyright-related topics, including contractual override prevention (COP) provisions, which ensure that copyright exceptions cannot be prevented or restricted by contracts. However, I would not be focusing on this issue directly as National Coordinator for Portugal, since Portugal already has an exemplary COP – Article 75(5) of the CDADC. In fact, I learned, Portugal was among the few countries in the world providing a general contract override clause in its law. My initial reaction to this was one of surprise, for three reasons. First, I expected more countries to have a similar general provision in their copyright law, as such a safeguard seemed both reasonable and necessary. Second, Portugal is typically considered a maximalist country in copyright law, meaning its legislation tends to favour rightholders over beneficiaries of copyright exceptions or the public interest behind the existence of those exceptions. A strong COP clause seemed at odds with this tradition, prompting me to explore its origins. Third, I was aware of at least one case – the AGECOP protocols – that appeared to be incompatible with Article 75(5). These observations led me to investigate not just the legal basis for the Portuguese COP clause but also its real-world application.

While conducting this research, another copyright controversy emerged in Portugal – and no one could have guessed that it would be around sheet music, a rather niche and overlooked topic. The creation of a new collective management organization (CMO) for sheet music authors and publishers led to efforts to impose licensing fees on music schools, philharmonic bands, and similar institutions. Many of these organizations play a major social role in communities around the country, and argued that such fees could threaten their very existence. A further look into the legal dimensions of the problem revealed that it seemed to result from a misinterpretation of the law. An opinion issued by IGAC,[1] the public body responsible for copyright enforcement in Portugal, stated that sheet music was exempt from all copyright exceptions and limitations. This interpretation did not align with either the CDADC or the InfoSoc Directive, but the new CMO relied on this opinion to justify its licensing efforts. In response, two legislative bills were introduced in Parliament, both based on the assumption that sheet music was entirely outside the scope of copyright exceptions. Although not explicitly stated, a closer analysis suggested that this assumption might have stemmed from a misinterpretation of CJEU case law, making it a legal issue worth investigating.

At this point, parallels with contractual override and the AGECOP protocols became clear. In both cases, copyright exceptions were present in the law but were either restricted or rendered ineffective in practice. The sheet music case was particularly significant because, while copyright exceptions were not being overridden by contracts, they were being nullified by legal interpretation.

This led to the expansion of the research scope. Contractual override was a form of preventing or restricting copyright exceptions through contracts, but the sheet music case demonstrated that copyright exceptions could equally be eroded by legal interpretation. In both cases, copyright exceptions were being bypassed. While it was

1 Inspecção Geral das Actividades Culturais (General Inspectorate for Cultural Activities). IGAC is the public body specialised in copyright and related rights. Reporting directly to the Ministry of Culture, it holds several competences related to copyright and related rights, including inspection and supervision roles. Its operation is defined by Regulatory Decree no. 43/2012, of 25th May.

not clear whether such misinterpretation had a judicial, civil or administrative origin, it resulted from the general application of the law – a legal bypass.

From here, a next and final addition to the research scope was evident: Technological Protection Measures (TPMs). TPMs are designed to restrict user actions through the use of technology, which is intended to stop unlawful uses but equally prevents the exercise of legally granted copyright exceptions – a technological bypass. Recognizing this issue, Portugal revised its TPM regime in 2017, adopting a more flexible system. However, questions remain regarding its compatibility with the InfoSoc Directive. A deeper examination of this legislative process could shed light on the shortcomings of the EU copyright framework and potential reforms for the future.

Thus, this thesis examines three forms of bypassing of copyright exception in Portugal:

- Contractual override (COP clause and AGECOP protocols).
- Technological bypass (TPMs and their legal framework).
- Legal bypass (sheet music case).

Each of these cases offers valuable insights, not only for Portuguese copyright law but also for the broader EU and international copyright landscape.

Writing a thesis in English about the Portuguese copyright legal regime presents its challenges. First and foremost, Portugal follows the continental *Droit d'auteur* tradition, which differs from the Anglo-Saxon Copyright system. While both traditions have converged in recent decades, significant conceptual distinctions remain. In this thesis, "copyright" is used in its broader sense, covering both Copyright and *Droit d'auteur* legal traditions.

Another important linguistic distinction arises from the terminology used in Portuguese law. The term "exception" is not commonly used to refer to copyright exceptions in Portugal, either in the law or in the traditional doctrine. Instead, the traditional doctrine considers exclusive rights themselves an exception to the general

rule of free use of information.[2] The argument is simple: in the absence of exclusive rights set in law, freedom of information is the rule. Authors endorsing of this opinion are not convinced otherwise by the continuing expansion of the scope of the exclusive rights, as, at a conceptual level, what constitutes a general rule is not viewed as being dependent on a quantitive analysis, rather on the logic and justifications of the entire copyright legal system. I agree with this view. Yet, for the sake of clarity and simplicity, I use the term "copyright exceptions" in English throughout this dissertation, including in it exceptions and limitations. However, when translating Portuguese legal texts, I preserve the literal expression of "free uses" (“utilizações livres”), which in turn introduces another layer of complexity. The word "free" in English is polysemous, leading to potential misunderstandings. This issue is well known in the Free Software movement, which has long struggled to distinguish between "free" as in freedom and "free" as in gratis. In line with their widely used clarification: «you should think of “free” as in “free speech”, not as in “free beer”».[3]

The chapters follow a chronological order, reflecting the different legal and legislative processes examined. Given the unique nature of each case, different methodologies are applied in each chapter, with contextual information provided as necessary.

Chapter I is divided in two parts. The first part constitutes a more in-depth look into the Portuguese COP clause, Article 75(5) of the CDADC. An historical and teleological analysis is provided, as well as a literal analysis. A parallel is drawn between the concept of “normal exploitation”, used by three-step test[4] to limit the effect that exceptions may have on exclusive rights of rightholders, with the concept of “normal

2 Following in the footsteps of Oliveira Ascensão, José Alberto Vieira, *Direito de autor: dogmática básica*, Manuais Universitários (Coimbra: Almedina, 2020), 354–58; Alberto de Sá e. Mello, *Manual de direito de autor e direitos conexos*, 3a ed. reformulada, actualizada e ampliada (Coimbra: Almedina, 2019), 238ff.

3 ‘What Is Free Software? - GNU Project’, Free Software Foundation, accessed 10 March 2025, https://www.gnu.org/philosophy/free-sw.html.en.

4 Article 9(2) of the Berne Convention; Article 13 of the TRIPS Agreement; Article 10 of the WIPO Copyright Treaty; Article 5(5) of the InfoSoc Directive; Article 75(4) of the CDADC.

exercise", used in by the Portuguese legislator to limit the effects of contracts on copyright exceptions. In the second part, three similar contracts celebrated by AGECOP with a municipality, a higher education institution, and the Portuguese Bar Association, concerning their library and reprography services, are analysed. Several features and effects of these contracts which are incompatible with the Portuguese COP clause are highlighted. It concludes that a COP clause is an essential but insufficient tool to ensure the exercise of copyright exceptions. For the real-world effectiveness of the legal protection, enforcement mechanisms must be provided.

Chapter II focuses on the 2017 legislative amendment to TPMs. In this context, it presents the legal background on the use of TPMs, in International and EU Law. A special focus is given to the origins of the Portuguese legislative amendments, including the social pressure made by the public, earlier unsuccessful initiatives, and testimonies given in the Parliament, including a parliamentary speech and audiences of stakeholders, which provide important contextual information for the legislative options then taken by the legislator. Then, the legislative amendments to the CDADC are analysed, as well as their compatibility with the InfoSoc directive. It is concluded that the InfoSoc Directive regime has proven unworkable and that the EU law should be reformed in this regard. In this light, the Portuguese model could serve as a valuable reference for future legislative developments.

In Chapter III, the ongoing present debate on sheet music is presented, together with the details collected from the interventions of the main stakeholders in the public debate. The position of IGAC is criticized, and an opinion on the matter is provided. A potential CJEU case law is identified and analysed as a possible explanation for the positions assumed by IGAC and the sheet music CMO. The relevant part of the judgement is critiqued and refuted. Further information is provided on the ongoing legislative processes.

Finally, it concludes that a key common factor in these cases is the need to assess how legal solutions are interpreted and implemented in practice. The balancing of interests in copyright law is not merely an abstract legislative goal but a real-world

necessity. Discussions on copyright exceptions, limitations, or fair use within a given legal framework, and the advantages and disadvantages of each, must be grounded in an evaluation of their practical effectiveness. Just as important as the legal nature of copyright exceptions and their internal or external limits is whether their intended solutions are truly realized – whether beneficiaries can effectively exercise the copyright exceptions provided, in practice.

This research contributes to the broader debate on copyright exceptions in the EU. While these issues arise in a local context, they are embedded within the wider legal framework of EU law. As such, they provide valuable insights into the limitations of the EU copyright exception regime and opportunities for improvement. Moreover, it demonstrates that ensuring the practical exercise of copyright exceptions requires more than just well-crafted legislation. Effective enforcement mechanisms are essential to prevent these exceptions from being legally, technologically, or contractually bypassed.

Chapter I – Contractual Bypass: The Portuguese Contractual Override Prevention Clause

Contractual override of copyright exceptions occurs when private agreements restrict beneficiaries from exercising copyright exceptions. This can affect not only the contracting parties but also third parties who, for various reasons, find themselves unable to benefit from these exceptions due to contractual terms. To prevent this, legal provisions can ensure that contracts cannot override copyright exceptions. For example, the CDSM Directive[5] introduced three new exceptions in EU Law[6] for which there is a contractual override prevention clause in Article 7(1), stating: "any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable."

Portugal is one of the few countries in the world benefiting from a general contractual override prevention clause in its copyright legislation. I.e., a clause which applies to all or at least a very large range of copyright exceptions. According to copyright policy advisor Jonathan Band, only 11 countries in the world have such a clause in their national legislations, with Portugal, Belgium, Ireland, and Germany being the only ones in the European Union.[7]

5 'Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC' (2019), https://eur-lex.europa.eu/eli/dir/2019/790/oj/eng.

6 Articles 3, 5 and 6: text and data mining for scientific research, digital and cross-border teaching, and preservation of cultural heritage.

7 The other countris being: Cook Islands, Kuwait, Moldova, Montenegro, Nigeria, Singapore and the United Kingdom. On the other hand, a targeted approach is more common. Jonathan Band, 'Protecting User Rights Against Contract Override', *Joint PIJIP/TLS Research Paper Series*, 1 May 2023, 2–3, https://digitalcommons.wcl.american.edu/research/97.

1.1. Historical and teleological analysis

Portuguese lawmakers do not seem to have made explicit the reasons that justified the proposal and adoption of a general prohibition of contractual override of copyright exceptions. The provision incorporated into the CDADC in 2004 through Law 50/2004,[8] which implemented the EU InfoSoc Directive of 2001.[9] In the Parliament, a law proposal[10] was first presented by the Government, in parallel with another bill[11] regarding the regulation of Digital Rights Management (DRM), presented by a party. Both statutes followed a single legislative procedure, culminating in a parliamentary decree,[12] before being enacted into law.

The decision to prohibit contractual override of copyright exceptions in Portuguese law through a general clause appears to have emerged in a vacuum or, at least, in the absence of significant debate. The provision that would later become Article 75(5) of the CDADC was already present, *ipsis verbis* and with the same numbering, in the Government's initial proposal. Throughout the legislative process, none of the participants, including lawmakers and stakeholders who submitted opinions to the Parliament, addressed the issue, either in support of or opposition to the provision. Furthermore, this policy choice is not justified in the recitals of the Government's law proposal or in any of the subsequent legislative documents. Nor was it mentioned during parliamentary discussions, according to the available transcripts.[13]

8 'Lei n.º 50/2004, de 24 de Agosto', Diário da República n.º 199/2004 § Série I-A (2004), https://diariodarepublica.pt/dr/detalhe/lei/50-2004-479605.

9 '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', OJ L § (2001), http://data.europa.eu/eli/dir/2001/29/oj/eng.

10 'Proposta de Lei 108/IX/2 (Governo)' (2004), http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=20077.

11 'Projeto de Lei 414/IX/2' (2004), http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=20146.

12 'Decreto da Assembleia da República 195/IX' (2004), http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheDiplomaAprovado.aspx?BID=5454.

13 The documents mentioned in this paragraph are accessible through the links provided in the previous notes.

Interpreting the silence of lawmakers and stakeholders on this issue presents a challenge. One aspect worth noting is that rightholders' representatives, who extensively criticized the legislative proposals, including the smallest details thereof,[14] raised no objections to this provision. One possible explanation is that, for the stakeholders involved at the time, the concept of contract override prevention was perceived as both reasonable and expected. This assumption follows a logical reasoning: if exceptions to exclusive rights are established, defined, and delimited by law, and if that law determines which uses fall outside the scope of those exclusive rights,[15] then allowing contracts to alter this delimitation could defeat the purpose the legislator had when defining each exception, often in detailed and precise terms. Contractual interference could disrupt the legal balance carefully set by the law. In other words, lawmakers might have considered that the "fair balance of rights and interests"[16] between rightholders and users could be compromised.

Even without historical records clarifying the legislator's reasoning, the provision itself can still be examined to infer its intended legal rationale.

1.2 Literal analysis

Article 75(5) CDADC reads the following:

> Any contractual clause aimed at eliminating or preventing the normal exercise by the beneficiaries of the uses set out in paragraphs 1, 2 and 3 of this article [i.e. the list of copyright exceptions and limitations and their conditions of applicability] shall be null and void, without prejudice to the

14 Such as the lack of access controls to libraries, regarding an exception allowing the use on their premises of dedicated electronic terminals to consultation of works; or wanting to ban reproduction from non-original reproductions – See the opinion by Sociedade Portuguesa de Autores.

15 Regardless of whether they represent a hole in the cheese slice or are outside of the slice, to use Boyle's popular metaphor.

16 See Recital 31.

> possibility of the parties freely agreeing on the respective forms of exercise, namely with regard to the amounts of equitable remuneration.[17]

Although the Portuguese contractual override prevention clause is formulated as a single sentence, several elements merit closer examination.

a. "Any contractual clause"

The first and most evident aspect is the breadth of its scope, which is wide as possible. The provision applies to any sort of contractual clause, irrespective of the type of contract, its form, scope, or nature, without *a priori* exclusions.

b. "aimed at eliminating or preventing"

This section concerns the intent behind contractual provisions that hinder a copyright exception. A strictly literal interpretation could limit its application to cases where such an effect is actually intended, potentially creating loopholes where a provision produces this effect as an indirect consequence of another contractual objective. This would greatly weaken the provision and transform it into a strange rule, as beneficiaries of copyright exceptions are not often part in contracts aimed to erode them, and if they were, they would likely have no negotiation power.

However, the wording, specifically the use of "eliminating" and "preventing", suggests a broader scope. "Eliminating" appears to cover cases where the primary intent of the provision is to revoke the exception, while "preventing" extends to situations where the exercise of an exception is obstructed for any reason. In either case, it is important to note that the intent applies to the specific contractual provision that generates the effect, rather than the overall purpose of the contract.

c. "the normal exercise"

17 Own translation.

It is unusual to encounter such a concept in the context of copyright exceptions. A similar expression appears in the second step of the well-known three-step test but serves the opposite purpose: to limit the effect that exceptions may have on exclusive rights of rightholders.

Article 9 (2) of the Berne Convention[18] states:

> (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a **normal exploitation** of the work and does not unreasonably prejudice the legitimate interests of the author.

With a similar wording, Article 13 of the TRIPS Agreement[19] provides:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a **normal exploitation** of the work and do not unreasonably prejudice the legitimate interests of the right holder.

In the same sense, Article 5(5) EU of the InfoSoc Directive and Article 75(4) of the Portuguese CDADC refer to the “normal exploitation” in their respective incorporations of the three-step test, as a means of ensuring that copyright holders' rights and legitimate interests are protected.

Opposite to this, Article 75 of the Portuguese CDADC introduces a semantically highly similar notion of “normal exercise” not to safeguard exclusive rights, but rather to protect the application of copyright exceptions. And to protect them precisely against contracts, which, more often than not, are signed by or made in the interest of rightholders.

18 ‘Berne Convention for the Protection of Literary and Artistic Works’ (1886), https://www.wipo.int/treaties/en/ip/berne/index.html.

19 ‘Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)’, accessed 20 March 2025, https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

Construing the choice of this term by the Portuguese legislator is a challenging task due to the absence of legislative history or explanatory documents on this specific point. In the absence of supporting or relevant case law, it does not seem reasonable to attribute such a specific wording to the legislator's random creative spontaneity. The provision could have simply referred to the "exercise of copyright exceptions", or a similar wording. It thus seems utterly needed to draw the rationale underlying the wording of the legal provision.

Both in the Berne Convention and TRIPS Agreement, the second step of the three-step test is directly related to the economic exploitation of copyrighted works in the market. i.e. the financial interest of the rightholders,[20] which it aims to safeguard. In this light, "normal exploitation" serves a practicable and flexible concept that acknowledges the diversity and mutability of business models associated with the exercise of exclusive rights. Rather than protecting specific business models or those prevailing at a particular moment in time, it aims to safeguard them globally and dynamically, recognizing that market potential and business models evolve rapidly, by indirectly referring to the practices of each sector of commercial activity.

In this light, and in my view, the reference to a "normal exercise by the beneficiaries" of copyright exceptions, in Article 75(5), plays a similar role. But instead of limiting the effects of exceptions on exclusive rights, it limits the effects of contractual rights (including the exercise of any exclusive rights) on exceptions. As such, the contractual override prevention clause inverts the usual relationship between copyright exclusive rights and copyright exceptions. Which is to say that it inverts as well the traditional relationship between rightholders and beneficiaries of exceptions in copyright law.

It is understandable why the legislator would follow a similar thought process for "normal exploitation" and "normal exercise", drawing a parallel – perhaps without even realizing it. Exceptions also represent diverse realities. They are considerably different

20 In a similar role to the fourth factor of the US fair use defence: "the effect of the use on the potential market".

from each other, in the sense that their existence is justified on different grounds, the goals pursued also differ, and so do the beneficiaries of each exception. Setting a practical standard on how exceptions are enjoyed by their users provides the needed flexibility to accommodate those diverse realities.

But what consequences can be drawn for the legal interpretation of Article 75 (5)?

The concept of normal exercise, as I understand it, in this context, sets as an evaluation criterion. It demands from the interpreter of the law, to establish whether a given contractual clause is infringing, to first determine how any relevant copyright exception can be enjoyed, in practice, by its beneficiaries. This is not a quantitative threshold, where "normal" would mean "usual", "regular" or "common", and where only those uses of exceptions which could reach a certain degree of regularity or "normality" would be recognized. Instead, it is a flexible criterion aimed to accommodate a wide range of uses of copyright exceptions.

For example: can a contract between a CMO and a library restrict the number of pages that can be copied by the users of the library? As demonstrated in the next section, the answer must be negative. Assuming that the private copy exception allows users to make personal copies under such a legal basis, the contract cannot override the exercise of that exception. As copying pages from library books is deemed a normal exercise of the private copy exception by its beneficiaries, the override prevention clause applies even if the beneficiaries are not a contractual party.

Similarly, the resort to the concept of "normal exercise" parameter can be interpreted as broadening the protection of copyright exceptions, deeming relevant not only contractual clauses straightly aimed to eliminate or prevent the exercise of exceptions, but also encompassing provisions that negatively affect their use. In other words, by incorporating the concept of "normal exercise" and the evaluative framework it entails, the legislator effectively lowered the threshold of interference needed to trigger the nullification effect of the article.

Finally, this approach allows for the consideration of non-obvious or unforeseen effects that contracts may have on copyright exceptions. Even if unintended, any contractual provision that hinders the normal exercise of a copyright exception must be deemed null and void.

In this sense, "normal exercise" appears to be a practical rather than theoretical criterion, primarily aimed at ensuring the effective use of copyright exceptions, which would otherwise be subject to restrictive interpretations.

d. "by beneficiaries"

The term "beneficiaries" of copyright exceptions refers to individuals or entities legally entitled to exercise these exceptions, such as students, researchers, libraries, educational institutions, and other users explicitly recognized in the law.

Moreover, this wording clarifies that the contractual override prevention clause extends protection beyond the contracting parties, safeguarding third parties whose ability to benefit from copyright exceptions could be restricted by a contract. For instance, a contract between a library and a publisher (or a CMO) that prohibits library users from photocopying books or imposes limitations on the number of pages that may be copied for private use would fall within the scope of this provision.

e. of copyright exceptions [provided in Article 75 of the CDADC]

Rather than engaging in theoretical debates over the limits of copyright exceptions or weighing the competing interests associated with each, the Portuguese legislator adopted a clear-cut approach: resolving conflicts between contracts and exceptions by granting absolute precedence to the exercise of copyright exceptions – all of those article 75 provides – over the private interests underlying contracts. This approach offers a simpler and more effective solution, avoiding the complexity that alternative frameworks would inevitably entail. At the same time, this legislative choice can also be understood as an implicit assumption that copyright exceptions, given the strictly defined scope and conditions that shape them, inherently embody the balance and

fairness which would be necessary for such weighting. In other words, all the required balancing of interests already conducted when each exception was legislated and enacted. It does not need to be repeated. Consequently, if an exception is established in law, it must be protected as such, and its exercise by beneficiaries must be guaranteed.

As demonstrated in the next section, this provision also extends to related rights.

f. "without prejudice to the possibility of the parties freely agreeing on the respective forms of exercise, namely with regard to the amounts of equitable remuneration"

This provision appears to align with solutions such as those envisioned in Article 6(4) of the InfoSoc Directive, which allows for "agreements between rightholders and other parties concerned" regarding the application of technological protection measures – a topic explored in detail in the next Chapter.

The key question is whether such agreements can be applied beyond the specific situations provided for by law. The article seems to permit this, provided that the agreement does not restrict the scope of the copyright exception itself. The phrase "form of exercise" suggests that these agreements are intended solely to facilitate the practical application of copyright exceptions, offering some degree of flexibility. Notably, the article identifies the determination of compensation amounts as an example of a permissible subject for such agreements. In turn, the expression "of the parties agreeing" clarifies that this provision applies only to beneficiaries of copyright exceptions who are directly involved in the agreement. Consequently, such contracts, even only relating to the form of exercise, are not binding on beneficiaries who are not party to the agreement.

1.3 Related Rights

Regarding the scope of the exceptions covered by Article 75(5), while its breadth justifies its classification as a general contractual override clause, the provision

explicitly limits its application to the exceptions listed in paragraphs 1, 2 and 3 of the same article. At a first glance, this could suggest the exclusion of related rights from its scope, as well as the exclusion of copyright exceptions found in ad hoc laws outside the CDADC. However, as will be demonstrated, this is not the case.

A strict interpretation of Article 75(5) could arguably find support in the historical evolution of the CDADC, as the related rights regime predates the contractual override prevention provision.[21] One could reason that, had the legislator intended to include related rights within the scope of Article 75(5), it would have drafted a more inclusive provision rather than one explicitly limited to the exceptions under Article 75. However, legal interpretation must consider the systemic nature of the legal framework. The CDADC, in particular, has its own specificities, starting with the fact that it is a code which regulates two different sets of rights: copyright for authors and related rights for non-authors, the latter established for different reasons and objectives. However, the CDADC should be approached by the legal interpreter as a whole, although sometimes complex, coherent and coordinated whole. The legislator opted for a systematic organization where related rights were added to the CDADC in a different title: Tittle III of the CDADC.[22] However, given the parallel legal structures of copyright and related rights, as both need to provide legal solutions to comparable legal questions, incorporating similar provisions without unnecessary repetition is a common legislative technique. Without it, the legal text could easily become unnecessarily repetitive and lengthy. As such, in the Title dedicated to related rights, the legislator often resorts to general remissions to the copyright regime.

Article 189 of the CDADC governs exceptions and limitations to related rights. While it contains a more limited set of exceptions (six in total) than Article 75, the distinction is largely formal rather than substantive.

21 When enacted in 1985, the CDADC already regulated related rights, whereas Article 75(5) was introduced later as a result of the implementation of the InfoSoc Directive in 2004. 'Decreto-Lei n.º 63/85, de 14 de Março', Diário da República § (1985), https://diariodarepublica.pt/dr/detalhe/decreto-lei/63-1985-326921; Lei n.º 50/2004, de 24 de Agosto.

22 Which is appropriate, given the very different nature of such rights.

- Article 189(1)(f) explicitly extends copyright exceptions to related rights by covering "other cases in which the use of the work is lawful without the author's consent."[23]
- Article 189(3) reinforces this by referring back to the copyright exceptions regime, stating that "the provisions of articles 75 and 76 shall apply to neighbouring rights, in all that is compatible with the nature of these rights."

Thus, while Title III does not contain an explicit contractual override prevention clause, the general remission to Articles 75 and 76 raises the key question: Is the contractual override prevention of Article 75(5) "compatible with the nature" of related rights?

In my understanding, related rights offer no substantial difference to copyright regarding eventual conflicts between a contract and the exercise of an exception. Both arts. 75 and 189 offer similar exception regimes, grounded in the same policy rationale – that, in certain situations, exceptions must prevail over exclusive rights to ensure public interest objectives. As demonstrated, the regime differences seem merely formal, not substantive. If article 75(5) ensures that copyright exceptions cannot be overridden by contract, there is no logical justification for allowing related rights exceptions to be subject to contractual restrictions. In fact, the nature of related rights, which can more linked to economic logics and the protection of investments in the production and distribution of works,[24] arguably reinforces the need for contractual override prevention. Limiting related rights exceptions through contracts would, in effect, expand the scope of related rights beyond that of copyright-exclusive rights, creating an inconsistency within the legal framework.

23 This raises legitimate questions regarding the interpretation of the exceptions explicitly provided in Article 189(1), which presents a notably laconic – and therefore less comprehensive – legal text compared to the equivalent provisions under Article 75. However, this issue falls outside the scope of the present analysis.

24 Vieira, *Direito de autor,* 455.

Therefore, a systematic interpretation of the CDADC, considering its legislative structure, techniques, and coherence, leads to the inevitable conclusion that the contractual override prevention clause of Article 75(5) fully applies to related rights.

1.4 Findings

In light of the above considerations, Band's classification of Article 75(5) of the CDADC as a general contractual override prevention clause seems accurate. Several arguments support this classification, particularly regarding the scope and breadth of the provision.

More broadly, the interpretation of Article 75(5) reflects an implicit assumption by the Portuguese legislator, whether conscious or not, that the exercise of any copyright exception is akin to the exercise of rights or, at the very least, deserves similar treatment. This does not imply an official legal or scientific position by the legislator on the nature of copyright exceptions – a topic beyond the scope of this work. Rather, it suggests a practical recognition that, for a contractual override prevention clause to be effective and provide legal certainty, it must treat copyright exceptions as rights or at least grant them a micro-legal framework that affords them a level of practical protection identical to exclusive rights. Without such safeguards, copyright exceptions remain vulnerable to restrictive interpretations that can erode their intended effect. In this sense, contractual override prevention clauses serve as a mechanism to strengthen and empower copyright exceptions.

It would be worth further exploring the potential implications, for copyright law, of such a pragmatic approach to copyright exceptions. Could establishing "normal exercise" – from the perspective of users – of copyright exception as a guiding criterion of its application help balancing the copyright system? Perhaps, under this perspective, copyright law would recognize that a school publishing a student's school work on its website should be a perfectly "normal exercise" of the education exception.[25] Or

25 CJEU, Case C-161/17 - Judgment of the Court (Second Chamber) of 7 August 2018 Land Nordrhein-Westfalen v Dirk Renckhoff (8 July 2018).

perhaps it would stop excluding from the parody exception parodies that are widely acknowledged by society as works of parody.[26]

1.5 Contractual override prevention in practice: The AGECOP protocols

AGECOP[27] is an association comprising all the collective managing organizations (CMOs) in the country that represent authors, artists, performers, phonogram producers, videogram producers, and publishers. Under the Law No. 62/98,[28] commonly referred to as the "Law of the Private Copy Levy", AGECOP is responsible for the collection, management and distribution of compensation established under Article 82 of the CDADC. This article does not expressly define which copyright exceptions it is intended to compensate for.[29] Its heading merely states: "Compensation due for the reproduction or recording of works". Similarly, the Law of the Private Copy Levy refers back to Article 82 of the CDADC, stating that it: "regulates the provision of Article 82". Despite AGECOP's name, this levy appears to compensate not only the private copying exception but also the reprography exception.[30]

26 The case 'Avô Cantigas' in Portugal, Maria Catarina Videira Louro, 'A paródia e os direitos de propriedade intelectual' (masterThesis, 2018), 62, https://repositorio.ulisboa.pt/handle/10451/37496?mode=full; Or the case 'Robber Hotzenplotz', in Austria, Rainer Schultes, 'The Robber's Hat Has Been Robbed – Austrian Supreme Court Affirms Copyright Infringing Editing - Not an Admissible Parody.', Kluwer Copyright Blog, 21 October 2024, https://copyrightblog.kluweriplaw.com/2024/10/21/the-robbers-hat-has-been-robbed-austrian-supreme-court-affirms-copyright-infringing-editing-not-an-admissible-parody/.

27 AGECOP – Associação para a Gestão da Cópia Privada (Association for the Management of Private Copying) - https://www.agecop.pt/

28 'Lei n.º 62/98, de 1 de setembro', Diário da República § (1998), https://diariodarepublica.pt/dr/detalhe/lei/62-1998-566628.

29 Noting that, initially, the scope covered all copyright exceptions. However, under the influence of EU law, it was later restricted to the exceptions for private use and reprography, Pereira, Alexandre Dias, 'Compensação Equitativa Pela Reprodução Para Uso Privado No Direito de Autor Português e Da União Europeia (Copyright Levies)', in *Direito Da Propriedade Intelectual & Novas Tecnologias: Estudos*, by Alexandre Dias Pereira, 1a. edição (Coimbra: Gestlegal, 2019), 192–99.

30 The compensation provided in Article 3 of Law No. 62/98 expressly mentions to be intended to compensate the private copy exception. In turn, the compensation provided in Article 2 seems to constitute a compensation for the reprography exception.

Over the years, in accordance with the Law of Private Copy Levy,[31] AGECOP has entered into agreements – which it calls "Protocols" – with numerous public and private entities to enforce the payment of compensation for the reproduction of works. However, as will be demonstrated below, financial remuneration does not appear to be the primary objective of these agreements. These protocols take the form of standard form contracts, with only minor variations between them.

The following section analyses the key provisions of these contracts. This analysis is based on three publicly available protocols, concluded between AGECOP and the following entities:

1. The Municipality of Arouca, concerning the Arouca Municipal Library.[32]
2. The Portuguese Bar Association, concerning its library services.[33]
3. The Polytechnic Institute of Beja (IPBeja), a public higher education institution, concerning its reprography services.[34]

Legal analysis

The protocols under review share significant similarities. The Arouca Municipality protocol pertains to the Arouca Municipal Library, while the Bar Association protocol applies to its library services. The IPBeja protocol relates to its reprography service, which is explicitly framed within the contract as an activity intended for profit.

Nature of the contract

31 Article 3(3).

32 'Protocolos, Contratos Interadministrativos e Contratos Programa - Câmara Municipal de Arouca', accessed 10 March 2025, https://www.cm-arouca.pt/municipio/documentacao/protocolos-contratos-interadministrativos-e-contratos-programa/.

33 'Ordem Dos Advogados - A Biblioteca - Notícias Breves > Biblioteca - Assinatura de Protocolo Entre a OA e a AGECOP, Relativo à Cópia Privada', accessed 14 February 2025, https://www.oa.pt/cd/Conteudos/Artigos/detalhe_artigo.aspx?sidc=58102&idc=58473&idsc=58478&ida=59498.

34 'IPBeja - Repositório de Documentos Do IPBeja', accessed 17 March 2025, https://www.ipbeja.pt/RepositorioDocumentosOficiais/Lists/Protocolos/DispForm.aspx?ID=246.

Article 1 of these protocols defines them as licences that allow the respective entities and their users to make reproductions using the reproduction equipment provided by the entity. The activity covered by these licences – the reproduction of works – is characterized as private use, meaning that the resulting reproductions must be "exclusively for private use, for purposes of study and research."

This conflation of the reprography exception and the private use exception is a recurring issue. While these two exceptions can overlap, their distinction has been further blurred in Portugal due to the transposition of the InfoSoc Directive, which added a "for exclusively private purposes" condition to the reprography exception.[35] In the recitals of the protocols, the private nature of these reproductions is cited as the justification for imposing page limits on copying.

Limits on the number of pages that can be reproduced

According to Clause 1 of the protocols, the reproduction of works by the library or its users, using the library's reproduction equipment, is subject to the following restrictions:

1. It cannot exceed 10% of the total work.
2. For works other than periodicals, it also must not exceed 30 pages in total.
3. Each reproduction request is limited to a maximum of three works.

These restrictions are not imposed by law, neither by the reprography exception nor by the private copy exception under the CDADC.

Additionally, the scope of this prohibition is not limited to the library's collection, it rather concerns to any use of the library's reproduction equipment. As a result, users are prohibited from making private copies of works they own using the library's equipment. This disproportionately affects users who lack the financial means to make the necessary copies at home, including low-income individuals and students who rely on public library services (or even reprography shops). Consequently, these restrictions

35 This topic is returned to in Chapter III.

undermine the social function of libraries, which is to provide accessible public services to the community.[36]

Limits on the purpose of the reproduction

The same article specifies that reproductions made by the library or its users must be "exclusively for private use" and cannot be used for "public communication or commercialization."

While the intent of this provision may not have been to restrict other copyright exceptions, its literal interpretation could effectively contractually limit the application of other exceptions benefiting libraries and users. This could include, for example, using the library's equipment to make copies of parts of a work to be used in a classroom setting, under the exception for teaching. An copyright exception which, on the one hand, could entail distributing copies of parts of works to students, and, on the other, to do so above the limits of number of pages reproduced allowed in the protocol.[37]

Exempted subject matter

Article 2 explicitly prohibits the reproduction of certain types of works, including:

- Single-use works, such as schoolbooks,
- Photographs and graphic works incorporated into other works,
- Covers of phonograms and videograms.

These restrictions further limit the application of copyright exceptions, as none of these prohibitions are imposed by law. Works such as schoolbooks, books with

36 In this context, the idea of third places, defined by Oldenburg as informal gathering spaces essential for community life, social interaction, and democracy, was influential in conceptualizing libraries as dynamic community spaces rather than mere repositories for books. Ray Oldenburg, *The Great Good Place: Cafés, Coffee Shops, Bookstores, Bars, Hair Salons, and Other Hangouts at the Heart of a Community* (Cambridge (Mass.): Da Capo Press, 1999).

37 The Portuguese exception for education only allows the use of parts of a work, without explicit limits. This is not required by the InfoSoc Directive. Cf. Article 5(3)(a) of the InfoSoc Directive, with Article 57(2)(e) of the CDADC.

incorporated images, and phonogram or videogram covers remain copyright-protected materials to which exceptions should still apply.

Assumption of civil and criminal liability

Article 1(3) holds the library fully liable, both civilly and criminally, for copies made in excess of the stated limits, provided they were made with the knowledge or participation of library employees.

The assumption of contractual liability is problematic, as it establishes liability in situations where reproductions would be lawful under copyright law. The assumption of criminal liability is unexplainable, as it violates fundamental principles of Criminal Law, rendering it unenforceable.

Compensation

The protocols provide some information on the compensation amounts due at the time they were signed. The amounts appear relatively insignificant:

- Municipality of Arouca (Public Library): €7.62 per year (2006-2007).
- Portuguese Bar Association (Library): €96.14 per year (2006-2007).
- Polytechnic Institute of Beja (Reprography Service, 2006-2012): Ranging from €40.18 to €67.55 year.

Although this study does not focus on financial aspects, the low compensation amounts suggest that AGECOP's primary motivation in enforcing these protocols was not financial gain. While AGECOP does not determine the remuneration scheme or compensation values, the amount paid by the Arouca Library over one year is so minimal that it does not even cover the cost of drafting the contract itself.

Legal basis for the compensation

As stated in the Protocol's recitals, the compensation scheme (3% of the sale price of digital and analogue copies) is derived from Article 3(2) of the Law of the Private

Copy Levy, which implements Article 82 of the CDADC. However, this requires further scrutiny.

In 2004, Law No. 50/2004[38] amended Article 3(2) of Law No. 62/98, clarifying that compensation established in the article applies only to commercial activities. Since then, the article explicitly states that compensation is due "whenever the use is habitual and to serve the public through the practice of commercial acts". Libraries do not engage in commercial activity, do not seek profit, and are not regulated by the Commercial Code. As such, while the compensation amounts may be small, the obligation to pay them under these protocols lacks a valid legal basis.

Findings

As demonstrated, these protocols violate multiple legal provisions. In the context of contractual override, they explicitly restrict copyright exceptions and limitations as enshrined in Article 75 of the CDADC and are therefore invalid under Article 5(5) of the same legal framework.

Under Portuguese copyright law, private copies can constitute total reproductions, and there can be more than one private copy per person.[39] These factors are central to the private copy levy system, which is based on the presumption of possible harm to rightholders. The rationale behind the levy is that private copies, particularly because they can constitute complete reproductions, can in some cases substitute the need to purchase additional originals.[40] Similarly, under Portuguese law, reproductions made

38 Lei n.º 50/2004, de 24 de Agosto.

39 Vieira, *Direito de autor*, 371–72.

40 On the relationship between the compensation and the possible harm, Recital 5 of the InfoSoc Directive states: "When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question". Additionally, para. 38-42 CJEU, Case C-467/08 - Judgment of the Court (Third Chamber) of 21 October 2010. Padawan SL v Sociedad General de Autores y Editores de España (SGAE). (21 October 2010).

under the reprography exception are not subject to quantitative or qualitative restrictions imposed by law.[41]

Regardless of their contractual wording, these protocols do not and cannot constitute a licence for the exercise of copyright exceptions, as exceptions by definition do not require authorization from rightholders. They represent acts expressly permitted by law, rendering any issued licence legally irrelevant.

The contractual override protection (COP) clause under Article 75(5) of the CDADC explicitly nullifies contractual provisions that restrict the exercise of copyright exceptions. Yet, despite this clear legal safeguard, these protocols have remained in force for years.

As demonstrated earlier, financial compensation does not appear to be the primary motivation behind these agreements. Nevertheless, while the fees imposed on libraries and other entities are fairly low, these protocols impose additional administrative obligations, requiring libraries to demonstrate and report to AGECOP the number of copies made using their reproduction equipment, as well as allowing inspections.[42]

Although the financial burden on libraries is minimal, the primary advantage of these protocols lies in their ability to institutionalize restrictive practices that benefit rightholders and the industry. This is largely achieved by exploiting the asymmetry of power and knowledge, both in general legal understanding and in the specific complexities of copyright law, between rightholders, institutions signing the agreements, and end users who rely on copyright exceptions.

Through these contracts, AGECOP effectively dictates operational rules for libraries and reprography shops, restricting the exercise of copyright exceptions while simultaneously benefiting from the compensation system designed to offset for such exceptions. The protocols require institutions that sign them “to place a document drawn up by AGECOP in a visible place in the establishment, setting out the terms of

41 Article 75(2)(a) of the CDADC
42 Article 3(6) and Article 5.

this licence and the rights and obligations of users with regard to copies of works they make or order".[43] Thereby reinforcing the misleading perception of the legal validity.

Beyond their formal content, these protocols help entrench the misconception that the exercise of copyright exceptions requires a licence, effectively positioning AGECOP, in this case, as the granting authority through these agreements.

The reference to criminal liability within these protocols appears to serve no purpose other than to intimidate institutions into compliance with AGECOP's imposed rules. By implying potential legal consequences for non-compliance, these provisions exert psychological pressure on institutions, ensuring adherence even in cases where such liability is legally unfounded.

This section does not aim to provide a comprehensive assessment of the broader state of AGECOP's protocols in Portugal. It is important to acknowledge that the analysed protocols are relatively outdated, and further research is needed to determine how many similar agreements remain in force, the amounts currently paid, and the extent to which libraries and reprography services continue to enforce them.

However, the technological evolution of reproduction methods has mitigated some of the issues arising from these protocols. The widespread availability of smartphones and digital scanning devices now allows users to make reproductions independently, without relying on library or reprography equipment. Notably, Law No. 39/2019,[44] enacted in 2019, explicitly authorized the use of personal digital devices in libraries for the reproduction of works. This law does not impose quantitative or qualitative limits on such reproductions, although it restricts reproductions, made by users with such devices, for the purposes of private use alone.[45]

43 Article 4(f).

44 'Lei n.º 31/2019, de 3 de Maio' (2019), https://diariodarepublica.pt/dr/detalhe/lei/31-2019-122217197.

45 See Article 7. Despite timely warnings to lawmakers. D3 - Defesa dos Direitos Digitais, 'Contributo para Projecto de Lei 865/XIII [utilização de dispositivos digitais em bibliotecas]', 24 May 2018, https://direitosdigitais.pt/noticias/54-contributo-para-projecto-de-lei-865-xiii-utilizacao-de-dispositivos-digitais-em-bibliotecas.

Rather, the purpose of this section is to present a clear, wide-spread and years long situation where the COP clause was not enforced in any way.

More than a mere historical record, this situation provides critical insight into the practical challenges of enforcing contractual override protections. It illustrates that having a strong contractual override clause in legislation is insufficient on its own.

While having a contractual override prevention clauses in the law is essential to ensure the free exercise of copyright exceptions, legal provisions alone are not enough. In an area marked by severe power imbalances, where the public interest is frequently overlooked, the State must take an active role in guaranteeing the real-world effectiveness of legal protections. This requires active enforcement mechanisms, ensuring that contractual override protections are not merely theoretical guarantees but are applied and respected in practice.

Chapter II – Technological Bypass: The 2017 Legislative Amendment on Technological Protection Measures

2.1 TPM as a technological bypass of copyright exceptions

Technological Protection Measures (TPMs) are mechanisms that enable rightholders to control, prevent or restrict certain actions by consumers of digital products through technological means.[46] These measures can take various forms,[47] such as copy prevention mechanisms on DVDs, or in some video streaming services on the Internet.[48] The term Digital Rights Management (DRM) is often used interchangeably,[49] particularly in industry discourse and public discussions.

TPMs gained prominence as digital content distribution expanded, presenting both challenges and opportunities for rightholders. Unlike analogue goods, digital goods could be reproduced at near-zero marginal cost, distributed on a large scale at minimal expense, simultaneously accessed by multiple users, and effortlessly shared.

46 The definitions may vary, but they are generally broad. Article 6(3) of the InfoSoc Directive, for example, defines a technological measure as "any technology, device or component" that, "in the normal course of its operation, is designed to prevent or restrict" unauthorized acts.

47 Identifying four possible technical methods of controlling the use of the work (preventing the modification of the work, preventing or restricting certain uses, imposing a maximum number of uses or only controlling simple access to the work), Ana Ramalho, 'Análise Económica da Proteção das Medidas Tecnológicas no Direito de Autor: Uma Visão Portuguesa', in *Direito da Comunicação Social e Liberdade de Expressão*, vol. 3, 2011, 111–12, https://www.ivir.nl/publications/analise-economica-da-protecao-das-medidas-tecnologicas-no-direito-de-autor-uma-visao-portuguesa/.

48 In 2017, DRM was integrated into web standards by the World Wide Web Consortium (W3C), as an official recommendation for HTML5. 'Over Many Objections, W3C Approves DRM for HTML5', Ars Technica, 10 July 2017, https://arstechnica.com/information-technology/2017/07/over-many-objections-w3c-approves-drm-for-html5/.

49 While DRM generally implies a digital restriction imposed by software, TPM seems a more neutral term that can encompass any technological measure. Moreover, the term "digital rights" in this context does not align with its most common meaning, nor does "management" seems to accurately reflect the nature of these measures and the control they enable.

Furthermore, new digital technologies enabled users to produce exact reproductions, unlike previous methods, which only permitted lower-quality analogue copies. Consequently, ensuring that only paying consumers have access to such goods poses a significant challenge. From an economic perspective: in absence of restrictions, digital goods – i.e. information – are characterized as non-scarce, non-rivalrous, and non-excludable. TPMs function as mechanisms to artificially impose scarcity in the digital world, seeking to replicate the constraints inherent to analogue media.[50]

A fundamental issue with TPMs is that, while presented as intended to prevent unlawful uses, such as the unauthorized reproductions of copyrighted works, they also restrict lawful uses, including those permitted under copyright exceptions. The same technology that prevents a copy meant for unauthorized distribution also prevents a private copy, which would be legally permissible. In this sense, TPMs function as a technological bypass to copyright exceptions, restricting uses that would otherwise be accessible in the absence of such measures. However, these technological restrictions can themselves be bypassed – while one technology may prevent copying, another can circumvent the first.[51] In this respect, TPMs do not strictly constitute an instance of "Code is Law":[52] without legal protection, their effectiveness would be significantly diminished, as they lack technological efficacy.[53] Consequently, TPMs represent not only a technological bypass to copyright exceptions but also a legal bypass, contingent on whether the law prohibits such circumvention or establishes a balanced regulatory framework.

50 Miguel Afonso Caetano, 'Cultura P2P: Uma análise sociológica comparativa das redes e dos sites de partilha online de músicas, filmes e livros eletrónicos em Portugal e no Brasil' (doctoralThesis, 2016), 97, https://repositorio.iscte-iul.pt/handle/10071/12456.

51 The technical possibility of bypassing a TPM, even if relatively simple, should not overshadow the fact that it may remain inaccessible to many. Barriers such as limited access, lack of awareness, insufficient technical expertise, or uncertainty regarding the legality of the act can prevents individuals from bypassing TPMs.

52 A reference to Lawrence Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999).

53 As evidenced by the fact that their implementation has failed to prevent unauthorized distribution on the Internet. In fact, it may have even had counterproductive effects. Rajiv K. Sinha, Fernando S. Machado, and Collin Sellman, 'Don't Think Twice, It's All Right: Music Piracy and Pricing in a DRM-Free Environment', *Journal of Marketing* 74, no. 2 (March 2010): 51, https://doi.org/10.1509/jmkg.74.2.40.

The overreach of TPMs has frequently faced doctrinal criticism,[54] as well as public resistance[55] and for reasons that extend beyond copyright exceptions. They can pose privacy risks[56] and security threats,[57] and they raise concerns about the control companies exert over users' purchased content.[58] Notably, TPM have facilitated remote deletion of previously acquired digital content, whether due to licensing changes,[59] or the shutdown of online services.[60] Additionally, TPMs can obstruct the right to repair,

54 Attributing this overreach to relentless legislative intervention in recent years, which has disrupted the balance of copyright law in favour of rightsholders while the public interest was almost always forgotten and not taken in consideration, José Alberto Coelho Vieira, Direito de autor: dogmática básica, Manuais Universitários (Coimbra: Almedina, 2020), 380ff.

55 For example, the Free Software Foundation has actively opposed DRM, referring to it as 'Digital Restrictions Management' to emphasize its restrictive nature. Free Software Foundation, 'Digital Restrictions Management and Treacherous Computing', accessed 12 March 2025, https://www.fsf.org/campaigns/drm.html; Richard Stallman, 'Opposing Digital Rights Mismanagement - GNU Project', accessed 12 March 2025, https://www.gnu.org/philosophy/opposing-drm.html.

56 Sean Gallagher, 'Adobe's e-Book Reader Sends Your Reading Logs Back to Adobe—in Plain Text [Updated]', Ars Technica, 7 October 2014, https://arstechnica.com/information-technology/2014/10/adobes-e-book-reader-sends-your-reading-logs-back-to-adobe-in-plain-text/.

57 In 2005, the Sony BMG Rootkit Incident arose when Sony's DRM software secretly installed a software on users' computers to prevent CD copying, collecting user data without consent and making systems vulnerable to malware. Deirdre Mulligan and Aaron Perzanowski, 'The Magnificence of the Disaster: Reconstructing the Sony BMG Rootkit Incident', *Articles*, 1 January 2007, https://repository.law.umich.edu/articles/2616.

58 Brad Stone, 'Amazon Erases Orwell Books From Kindle', *The New York Times*, 18 July 2009, sec. Technology, https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html.

59 Eduardo Medina, 'PlayStation Will Delete Purchased Discovery Shows', *The New York Times*, 6 December 2023, sec. Technology, https://www.nytimes.com/2023/12/06/technology/sony-playstation-discovery-shows-removal.html.

60 Michal Addady, 'Microsoft Will Kill Its Zune Music Service in November', Fortune, 16 September 2015, https://fortune.com/2015/09/16/microsoft-zune-music/; Nate Anderson, 'DRM Still Sucks: Yahoo Music Going Dark, Taking Keys with It', Ars Technica, 24 July 2008, https://arstechnica.com/uncategorized/2008/07/drm-still-sucks-yahoo-music-going-dark-taking-keys-with-it/.

affecting cars,[61] trains,[62] tractors,[63] wheelchairs,[64] medical devices[65] and other goods. Furthermore, they can present competition challenges by restricting users' ability to purchase supplies from alternative vendors.[66] As they prevent the usability of materials, TPMs are also a challenge for the preservation of works, with negative effects for cultural preservation, research and innovation.[67] Finally, when applied to non-copyrightable works, works in the public domain, or works made available under open licences, they impose unwarranted restrictions on access to materials that should remain freely available. These examples further reinforce debates on consumer rights and digital ownership.

This chapter analyses the legal framework governing TPMs and the approach adopted under Portuguese law, with particular emphasis on the 2017 legislative amendments to the CDADC concerning TPMs.

61 Mike Scarcella, 'Tesla Hit with "right to Repair" Antitrust Class Actions', *Reuters*, 15 March 2023, sec. Legal, https://www.reuters.com/legal/tesla-hit-with-right-repair-antitrust-class-actions-2023-03-15/.

62 Jason Koebler, 'Polish Hackers Repaired Trains the Manufacturer Artificially Bricked. Now The Train Company Is Threatening Them', 404 Media, 13 December 2023, https://www.404media.co/polish-hackers-repaired-trains-the-manufacturer-artificially-bricked-now-the-train-company-is-threatening-them/.

63 Matthew Gault and Jason Koebler, 'John Deere Hit With Class Action Lawsuit for Alleged Tractor Repair Monopoly', *VICE* (blog), 13 January 2022, https://www.vice.com/en/article/john-deere-hit-with-class-action-lawsuit-for-alleged-tractor-repair-monopoly/.

64 Cory Doctorow, 'When DRM Comes For Your Wheelchair', Electronic Frontier Foundation, 7 June 2022, https://www.eff.org/deeplinks/2022/06/when-drm-comes-your-wheelchair.

65 Jason Koebler, 'Why Repair Techs Are Hacking Ventilators With DIY Dongles From Poland', *VICE* (blog), 9 July 2020, https://www.vice.com/en/article/why-repair-techs-are-hacking-ventilators-with-diy-dongles-from-poland/.

66 Cory Doctorow, 'The Worst Timeline: A Printer Company Is Putting DRM in Paper Now', Electronic Frontier Foundation, 15 February 2022, https://www.eff.org/deeplinks/2022/02/worst-timeline-printer-company-putting-drm-paper-now; Sean Hollister, 'HP Has Found an Exciting New Way to DRM Your Printer!', The Verge, 25 May 2023, https://www.theverge.com/2023/5/25/23736811/hp-plus-printer-ink-drm-firmware-update-cant-cancel.

67 Kristofer Erickson and Felix Rodriguez Perez, 'Technological Protection Measures and Digital Preservation: Evidence from Video Games' (Zenodo, 14 November 2024), 8, https://doi.org/10.5281/zenodo.14165368.

2.2 TPM in International and EU Copyright Law

As discussed above, TPMs gained prominence with the expansion of the digital content distribution. Consequently, the Berne Convention, originally adopted in 1886 and last modified in 1979, does not specifically address technology measures. While TPMs may be relevant in the context of obligations arising from the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994), particularly in relation to Part III on the enforcement of intellectual property rights, TRIPS does not explicitly refer to technological measures. The term "technological protection measures" was first explicitly introduced in international copyright law in the 1996 WIPO Copyright Treaty[68] (WCT), specifically in Article 11:[69]

> Article 11 - Obligations concerning Technological Measures
>
> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

The WCT introduces the key concepts of "adequate legal protection" and "effective technological measures". In 1998, the USA adopted 17 U.S. Code § 1201, implementing the prohibition of TPM circumvention.[70] In 2001, the InfoSoc Directive introduced the same concepts in EU law. In a very similar construction, its Article 6(1) of the InfoSoc Directive reads:

68 'WIPO Copyright Treaty (WCT)', accessed 20 March 2025, https://www.wipo.int/treaties/en/ip/wct/index.html.

69 In relation to performers or producers of phonograms, Article 18 of the WIPO Performances and Phonograms Treaty (1996) provides an equivalent clause.

70 Enacted in 1998, as part of the Digital Millennium Copyright Act (DMCA). '17 U.S. Code § 1201 - Circumvention of Copyright Protection Systems | U.S. Code | US Law | LII / Legal Information Institute', accessed 12 March 2025, https://www.law.cornell.edu/uscode/text/17/1201.

> Article 6 - Obligations as to technological measures
>
> 1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

Essentially, Article 6 of InfoSoc Directive requires Member States to implement adequate legal protection against circumvention of effective technological measures. Paragraph 3 defines "technological measures" as "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts (...)" not authorised by the rightholder or by law. Technological measures are considered "effective" when the use of a work is "controlled by the rightholders through application of an access control or protection process (…) which achieves the protection objective". As examples, the directive expressly mentions "encryption, scrambling or other transformation of the work (…) or a copy control mechanism". Finally, paragraph 4 addresses the necessary balance in copyright law, requiring Member-States to "take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation (...) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work".[71] These provisions are particularly relevant to the analysis of the Portuguese legislative amendment. In this context, and considering the solutions adopted under Portuguese law, I will refer to the rightholders' obligation to provide the means that enable the use of copyright exceptions as the "deposit system".[72]

71 For the sake of simplification and to focus on the most relevant aspects of this analysis, certain wording of Article 6 has been omitted, particularly references to other subject matter and databases. Additionally, paragraph 4 restricts its application to specific exceptions and limitations – a point that will be revisited – while on-demand services are fully excluded. For a comprehensive understanding of the regime, a full reading of the article is recommended.

72 For an overview on the different ways countries implemented this obligation, Anthony Rosborough, 'Technological Protection Measures & the Law: Impacts on Research, Education & Preservation' (Zenodo, 25 November 2024), 50, https://doi.org/10.5281/zenodo.14172278.

In 2004, the IPR Enforcement Directive addressed TPMs only in Recital 29,[73] and solely in the context of the industry's role in the "fight against piracy and counterfeiting". The only explicit concern of the directive regarding TPMs though related to competition within the internal market, sating that they "should not be misused to protect markets and prevent parallel imports".

Marrakesh Treaty (2013)[74] introduced a more direct approach, specifically addressing the need to ensure that beneficiaries are not prevented from exercising the exceptions and limitations it provides. Article 7 requires contracting states to ensure that the "adequate legal protection and effective legal remedies against the circumvention of effective technological measures" in their national law do not prevent the permitted uses under the Treaty.

Finally, the CDSM Directive (2019), the most significant revision of EU copyright law since the InfoSoc Directive, did not introduce substantive overall changes to the existing framework regarding TPMs. Recital 7 reaffirms the support for the deposit system as a form of balancing "the protection and the effective exercise of the rights granted to authors" with the need to ensure that "the use of technological measures does not prevent the enjoyment of the exceptions and limitations" provided in the law.

More importantly, the CDSM Directive introduced four new exceptions, with a similar concern for ensuring that users can actually benefit from them. Articles 3 to 6 introduce exceptions for text and data mining, digital and cross-border teaching, and preservation of cultural heritage. Article 7(1) protects these exceptions – apart from Article 4[75] – from contractual override, while Article 7(2) extends the first, third and

73 Adopting the term "technical protection measures" instead of "technological protection measures". An unusual deviation that, in my view, carries no substantive difference, particularly in the context of a Recital.

74 'Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (WIPO)' (2013), https://www.wipo.int/treaties/en/ip/marrakesh/index.html.

75 Unlike Article 3, which concerns text and data mining for scientific research, Article 4 establishes a similar exception but applies to a general audience. A key distinction, however, is that Article 4 permits rightholders to opt out by expressly reserving such uses "in an appropriate manner". Consequently, excluding Article 3 from the contractual

fifth subparagraphs of Article 6(4) of the InfoSoc Directive to those new exceptions, thereby incorporating them into the deposit system regime of the InfoSoc Directive.[76]

While the CDSM Directive maintains the legal deposit regime, which, as discussed below, is far from practicable, it is still significant that two of the most important copyright acts in the last 20 years have expressly addressed the need to protect new copyright exceptions from the overreach of TPMs. This represents a legislative response to the technological bypass of copyright exceptions.

2.3 Portuguese Law: legislative background

The InfoSoc Directive was transposed into Portuguese law in 2004 through Law No. 50/2004.[77] Regarding TPMs, the Portuguese transposition largely followed the InfoSoc Directive framework. Article 217 ensured the protection against circumvention of effective technological measures and provided its definition, albeit subjecting the use of TPMs to the condition of being "expressly authorised by its intellectual creator".[78] On the other hand, Article 221 transposed the deposit system established in Article 6(4) of the InfoSoc Directive. Notably, the article already provided that TPMs should not "must not constitute an obstacle to the normal exercise" of some, enumerated, copyright exceptions. Under Portuguese law, rightholders were required to make a legal deposit of

override prevention clause in Article 7(1) aligns with its opt-out regime.

76 *A contrario*, the second and fourth subparagraphs do not apply. The second subparagraph pertains to a different exception, private use, and therefore does not naturally apply. However, the absence of the fourth subparagraph, which concerns on-demand services, directly contradicts the final part of Recital 7, which states: "In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC, including where works and other subject matter are made available to the public through on-demand services." In other words, this recital announces an intention of including on-demand services within the deposit system, while the actual legal text maintains the InfoSoc regime, which excludes them.

77 Lei n.º 50/2004, de 24 de Agosto.

78 Rejecting the view that this norm could establish a new right for intellectual creators to control access to their intellectual works, Dário Moura Vicente, 'Direito de Autor e medidas tecnológicas de protecção', in *Propriedade Intelectual: estudos vários* (Lisboa: Associação Académica da Faculdade de Direito de Lisboa Editora, 2018), 91; Similarly, Ramalho, 'Análise Económica da Proteção das Medidas Tecnológicas no Direito de Autor', 114.

the means necessary to benefit from legally permissible uses with the General Inspectorate for Cultural Activities (IGAC). However, the law did not establish any penalties for rightholders who failed to comply with this obligation. In contrast, the circumvention was (and remains) a criminal offence under Article 218, punishable by up to a year of imprisonment or a fine of up to 100 days. In cases where rightholders failed to fulfil their obligation, beneficiaries of copyright exceptions could submit their case to an arbitration centre, with the possibility of judicial review by a second-instance court. Nevertheless, as described below, this deposit system never functioned in practice.[79]

The issue was never fully settled in Portugal, with anti-DRM[80] activists maintaining a public pressure campaign since 2007.[81] As early as 2008, activists publicly denounced[82] attempts to obtain from IGAC the necessary to neutralize the DRM of a DVD to be able to use it – not even a strict matter of copyright exceptions, which were nonetheless equally prevented in result – on GNU/Linux operative systems.[83] The case seemed particularly striking from a public perception perspective, as it illustrated how the simple act of neutralizing DRM to play a legally purchased DVD on an alternative operative system – something that should by default and in no way be prevented by DRM – was classified as a criminal offence punishable by fines or even imprisonment. This approach goes beyond the requirements of the InfoSoc Directive, which mandates "adequate legal protection" for TPMs but does not require criminal penalties. IGAC, which seemed unaware of the legal deposit system four years after it had been

79 As Fazio sharply puts it: 'a complete logical and legal absurdity, there can be no other qualification for this legal solution'. Iracema Fazio, 'A cópia privada : o uso privado e o download de obra protegida' (doctoralThesis, 2014), 419, https://repositorio.ulisboa.pt/handle/10451/15446.

80 In public discussions in Portugal, including parliamentary debates, "DRM" was the most commonly used term to refer to TPMs in general.

81 'DRM Portugal', accessed 27 February 2025, https://drm-pt.info/.

82 Paula Simões, 'As Minhas Aventuras No Reino Da IGAC', *Paula Simões' Blog* (blog), 25 September 2008, https://paulasimoesblog.wordpress.com/2008/09/25/as-minhas-aventuras-no-reino-da-igac/.

83 Recital 48 of the InfoSoc Directive clarifies that legal protection should apply only to TPMs that do not interfere with "the normal operation of electronic equipment." In this light, this case should not qualify as a legally protected TPM. However, Portuguese law does not offer such a safeguard.

established, was initially unable to provide a clear response and instead suggested that consumers use on-demand services or return the product for a refund.[84]

Those efforts and public pressure made over many years[85] eventually led lawmakers to address the issue, bringing the matter to the Portuguese Parliament for discussion.

The 2017 legislative reform was preceded by an earlier attempt a few years prior. In 2013, within a span of approximately two months, Projeto de Lei 406/XII/2[86] and Projeto de Lei 423/XII/2[87] were introduced in the Parliament by two different parties. Both legislative initiatives sought to ensure the rights[88] of users of copyright exceptions, in light of the technological restrictions imposed by DRM. The key point address in these proposals was the deposit mechanism established in the law. The latter proposal explicitly stated that "the corresponding legal deposits are not made and IGAC does not provide the actual means for the user to request this service".[89] Later, in a plenary debate, a Member of the Parliament (MP) from another party revealed that his party had inquired with IGAC regarding the number of legal deposits made by rightholders and the number of neutralization requests submitted by the users. According to IGAC's response, he stated, since 2009 only one deposit had been made, and only one request had been submitted by a user. The MP's remarks at the time reflected the growing concerns among lawmakers, already in 2013, stating in the Parliament: "These numbers demonstrate an objective truth: the current law does not serve its purpose".[90]

84 Paula Simões, 'As Minhas Aventuras No Reino Da IGAC – II', *Paula Simões' Blog* (blog), 11 July 2008, https://paulasimoesblog.wordpress.com/2008/10/07/as-minhas-aventuras-no-reino-da-igac-ii/.

85 Paula Simões and Marcos Marado, 'How We Fixed DRM in Portugal (and so Can You) - FSFE', FSFE - Free Software Foundation Europe, accessed 27 February 2025, https://fsfe.org/news/2019/news-20191113-01.html.

86 'Projeto de Lei 406/XII/2 (BE)' (2013), http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=37676.

87 'Projeto de Lei 423/XII/2 (PCP)' (2013), http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=37773.

88 Both initiatives notably referred to copyright exceptions as "rights". They also followed the legal tradition in terminology, using "free uses" instead of "exceptions."

89 Projeto de Lei 423/XII/2 (PCP), 1.

90 Seufert, Michael, *Intervenção do Deputado Michael Seufert (CDS-PP)*, XII Legislatura, Sessão Legislativa 02, 2013,

These initiatives were ultimately unsuccessfully. The legislative process was conducted jointly with a government proposal for the transposition of Directive 2011/77/EU[91] and eventually resulted into law[92]. However, the proposed amendments concerning DRM were rejected in the Parliament. Despite this setback, the underlying issue had been identified and remained unresolved. The malfunctioning of the deposit scheme had been clearly identified, highlighting a regulatory gap that continued to hinder the effective exercise of copyright exceptions. Given the persistence of this issue and the continued pressure from activists, it was only a matter of time before a renewed legislative effort would follow.

Three years later, in April 2016, a very similar legislative initiative was introduced in the Parliament, Projeto de Lei 151/XIII/1.[93] Within the legislative process, two key depositions in the Parliament are particularly noteworthy, both given by representatives associations representing a wide range of rightholders and industry.

A representative from FEVIP[94] and MAPINET[95] stated:

> "In reality, to this day, there are no technological measures, apart from one exception(...), there is not a single mechanism [deposited], today. Companies

http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheIntervencao.aspx?BID=190214 min. 1:38.

91 'Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 Amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights' (2011), https://eur-lex.europa.eu/eli/dir/2011/77/oj/eng.

92 'Lei n.º 82/2013, de 6 de dezembro.', Diário da República § (2013), https://diariodarepublica.pt/dr/analise-juridica/lei/82-2013-484122.

93 'Projeto de Lei 151/XIII/1 (BE)' (2016), http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=40177.

94 FEVIP - Associação Portuguesa de Defesa de Obras Audiovisuais (*Portuguese Association for the Defence of Audiovisual Works*), an association that represents video and video game publishing and distribution companies, cinema distribution and pay-TV distribution.

95 MAPINET – Movimento Cívico Anti Pirataria na Internet (*Civic Movement Against Internet Piracy*), an association comprising multiple entities, including AUDIOGEST and FEVIP, as well as other industry associations including from press publishers and from book publishers, two television channels, one Internet service provider, and the CMO for cinematographic and audiovisual producers, GEDIPE.

> have given up on technological measures – [today,] DVDs can be opened [i.e. have their DRM bypassed], CDs can be opened, everything can be opened, without having to use IGAC's key deposit".[96]

Similarly, a representative from AudioGest[97] and AFP[98] confirmed the information and went even further:

> (…) I am not going to dodge the real question: there is nothing deposited there. (…) In music, there is not. In music, I know there is not. I know! (…) There is not because there is not. It is over, we have given up on it. (...)
>
> We are not the ones who have control over these measures. This is not under the control of the Portuguese [representatives of the multinational companies]. They do not exist because they do not work. But if they worked, does anyone believe that some multinational [company] (…) would put the decryption code here, in Portugal, in a public register that anyone could access, for the world? [If so], Honourable Members, we are very naive. [These companies] would rather stop selling in Portugal. (…)
>
> I would not be able to solve this problem. No matter how many times I could ask my members to deposit it. It is not worth it, there are much bigger interests here than ours.[99]

Essentially, rightholders and industry representatives openly admitted in the Parliament that they were not complying with the law and had no intention of doing so. They further argued that compliance was unfeasible due to the lack of access to the

96 Audio recording, *Audiência Parlamentar Nº 2-GT-RJPDIEDU-XIII*, Grupo de Trabalho - Apreciação dos Projetos de Lei 124/XIII/1.ª - PCP e 151/XIII/1.ª - BE, 2016, min 41:50, http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheAudiencia.aspx?BID=102409.

97 AUDIOGEST – Associação para a Gestão e Distribuição de Direitos (*Association for the Management and Distribution of Rights*), a collective rights management organisation for phonographic producers.

98 AFP – Associação Fonográfica Portuguesa (*Portuguese Phonographic Association*), an association of the phonographic industry.

99 *Audiência Parlamentar Nº 2-GT-RJPDIEDU-XIII*, min. 47:44.

required keys or neutralizing mechanisms by the representations in Portugal of the multinational distribution companies, and even speculated that such companies could withdraw from the Portuguese market rather than abiding by the law.

The testimonies given in Parliament could only reinforce the prevailing conviction among lawmakers that the law was failing to achieve its intended purpose. The solution envisioned by the InfoSoc Directive – a deposit system designed to enable beneficiaries of copyright exceptions to exercise them – was proved ineffective, both for users and for rightholders. These findings presumably helped to secure the parliamentary majority required to successfully amend the CDADC this time, and influenced the legislative choices that followed. As a result, in June 2017, Law No. 36/2017 entered into force.[100]

2.4 Law No. 36/2017 – TPM amendments

Law No. 36/2017 was a surgical amendment to the CDADC, focused entirely on the TPM regime and modifying only two provisions: Articles 217 and 221 of the CDADC.

To begin with, the definition of effective technological measures was modified. Article 217(2) now states: "'technological measures' means any technique, device or component which, in the normal course of its operation, are used to prevent or restrict acts relating to protected works, performances and productions, other than free uses (…)". The phrase "other than free uses" constitutes the new addition.

This change implies, on one hand, that legal protection for TPMs is now explicitly limited to those technological measures used to prevent or restrict acts other than copyright exceptions, thereby narrowing the scope originally provided by the InfoSoc Directive. This could give rise to interpretative challenges as TPMs, in principle, are mainly intended to prevent or restrict unauthorized unlawful acts, yet they also inherently affect copyright exceptions. Thus, an interpretation focusing primarily on the subjective intention of rightholders by implementing TPMs would result in little

100 'Lei n.º 36/2017, de 2 de Junho' (2017), https://diariodarepublica.pt/dr/detalhe/lei/36-2017-107458719.

substantive change to the existing framework. Conversely, the provision could be construed as granting legal protection to TPMs only if they are used[101] exclusively to prevent or restrict unlawful uses while simultaneously allowing the exercise of copyright exceptions – a condition that, in practice, no TPM is likely to meet. This interpretation is reinforced by one of the amendments to Article 221, which strengthened the wording of its first paragraph. Previously, it stated that "effective technological measures should not constitute an obstacle to the normal exercise by beneficiaries of free uses"; it now mandates that they "must not", reinforcing the obligation.

Other amendments to Article 221 further helped to clarify this issue. The third paragraph now provides:

> "The legal protection granted by this Code does not cover situations in which it is found, as a result of an omission of conduct, that an effective measure of a technological nature prevents or restricts the use or the free use of a work by a beneficiary who legally has access to the protected good, or that it has been applied without the authorisation of the rightholder of copyright or related rights".

A key consequence of this change is that when a TPM prevents the use of a work by someone who has legal access to it, the measure no longer benefits from legal protection and may be neutralized by the user. Although rightholders still have the option to deposit the means to neutralize DRM with IGAC to avoid the effects of this norm, it is now known that this obligation is never fulfilled in practice.

As a result, the previously mentioned case of DVDs with DRM that prevents them from being played on alternative operative systems clearly falls within the scope of this provision ("prevents (…) the use or the free use"), thereby making DRM neutralization for this purpose legally permissible.[102] The same applies to copyright exceptions. For

101 The original term from InfoSoc, "designed to (…)" would also raise the same question.

102 In this specific case, which does not involve the application of a copyright exception, it can be argued that Article 6 of the InfoSoc Directive already permitted it, at least if interpreted

example, it allows users to break the DRM of e-books bought at Amazon which use DRM to prevent them from being directly read on non-Kindle devices,[103] like Kobo e-readers.[104]

In the context of copyright exceptions, these modifications carry significant implications and help elucidate the amendment to Article 217. If a rightholder fails to comply with the deposit obligation of a copyrighted work distributed with TPM, the result is that the corresponding TPM loses its legal protection in situations where it prevents or restricts the exercise of a copyright exception by the user. Consequently, users are permitted to neutralize TPMs when the exercise of a copyright exception is obstructed by a TPM for which the means to neutralize it are unavailable. Given that the legal deposit system is not utilized, beneficiaries of copyright exceptions, in practice, are always entitled to neutralize TPMs for such purposes.

The last part of this amendment states that TPMs may also be neutralized in cases where they have been applied without authorization of rightholders of copyright or related rights. However, this provision must be interpreted in light of Article 217(4), which also requires express authorization from the intellectual creator. These provisions seem to intend to create a disincentive for the routine or default use of TPMs by publishers, as they effectively mandate prior authorization before such measures can be applied to goods and services. Additionally, it could have implications for infringement cases, as it might require rightholders to demonstrate that such authorizations given – explicitly, in the case of the intellectual creator. Perhaps with only theoretical application, it could also serve as a mechanism for intellectual creators to publicly authorize the neutralization of TPMs implemented without their consent – for example, those applied by publishers on their own initiative.

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in light of Recital 48, which states: “without, however, preventing the normal operation of electronic equipment”.

103 This incompatibility results in the first place from Amazon’s proprietary formats, such as AZW, AZW3, or KFX, which cannot be adopted by other e-readers.

104 ‘Add Non-Protected PDF and ePub Files to Your Kobo eReader Using Your Computer’, Rakuten Kobo, accessed 11 March 2025, https://help.kobo.com/hc/en-us/articles/360024775093-Add-non-protected-PDF-and-ePub-files-to-your-Kobo-eReader-using-your-computer.

Furthermore, the provision's scope was extended to cover all exceptions provided under the CDADC. Accordingly, paragraph 8 of Article 221 was revoked. This provision had previously allowed rightholders to implement measures to limit the number of reproductions made by users under the private use exception.[105] These changes go beyond the scope established by Article 6(4) of InfoSoc Directive.

Finally, paragraph 2 now explicitly prohibits the application of TPMs to:

- Works in the public domain,
- New editions of public domain works,
- Works published by public organizations or which benefit from public funding.

These amendments reflect a clear policy shift toward ensuring that TPMs do not impede public access to freely available cultural and scientific works.

In 2023, the implementation of the CDSM Directive further revoked the paragraphs regarding an arbitration and judicial review by a second-instance court.

Findings

Overall, the Portuguese approach in the 2017 legislative amendments to the TPM regime stems from the recognition that the deposit system originated from the InfoSoc directive is ineffective and non-functional for both users and rightholders.[106] These amendments made the regime more accessible and easy to follow for the average citizen: if the intended use is lawful under a copyright exception enshrined in the law, users may neutralize or bypass TPMs. However, these changes raise questions regarding their compatibility with the InfoSoc Directive, as the revised regime diverges from the Directive's provisions – particularly by covering all CDADC copyright exceptions while removing the special regime for private copying established in the second paragraph of Article 6(4), and by restricting the legal definition and legal protection of TPMs.

105 Article 6(4) second subparagraph of the InfoSoc Directive.
106 As José Alberto Viera bluntly states about the deposit system: 'The nonsense is total'. Vieira, *Direito de autor,* 383.

Moreover, the coherence of the revised regime could be questioned. For example, the legal protection granted to TPMs depends on the user's intent, resulting in a paradoxical situation where the same TPM could simultaneously enjoy legal protection or be unprotected, depending on the specific circumstances of each case. Similarly, the means enabling users to neutralize TPMs to benefit from copyright exceptions are precisely those whose manufacture, importation, distribution, sale, or rental remain prohibited by law.[107]

One might attempt to defend the revised definition of "technical measures" through similar reasoning previously applied to Portuguese law, but now extended to the InfoSoc Directive itself,[108] coupled with a creative doctrinal interpretation of "adequate legal protection". It could even be argued that the obligation in Article 6(4) for Member States to ensure that rightholders provide access to the means necessary to benefit from copyright exceptions is mandatory[109] but does not preclude the introduction of additional measures.

Nevertheless, the key takeaway from the Portuguese experience is a clear recognition that the solution embodied in the InfoSoc Directive is fundamentally flawed and inadequate in fulfilling its intended objectives. The existing regime in the EU fails to deliver any balance regarding the practical exercise of copyright exceptions.[110] Thus, it necessitates reconsideration and reform.

In contrast, the Portuguese approach offers a preferable, pragmatic model that achieves the needed regulatory balance. This approach may serve as a valuable reference for future legislative developments within the European Union.[111]

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107 Article 6(2) of the InfoSoc Directive and Article 219 CDADC.

108 This implies a strict interpretation of the phrase 'designed to' in Article 6(3) of the InfoSoc Directive.

109 "Member States (...) shall take appropriate measures"

110 Vieira, *Direito de autor*, 380ff.

111 The Portuguese regime fully complies with Article 11 of the WIPO Copyright Treaty (WCT), which requires States to provide adequate legal protection for TPMs but only to the extent that they restrict acts not authorized by rightholders "or permitted by law". By diverging from this, the InfoSoc Directive introduced an unnecessary legal complication. The solution seems simple and straightforward: revert to the WCT formula.

The shortcoming of the Portuguese regime, however, lies in the continued criminalization of unauthorized circumvention under Article 218, which provides penalties of up to one year of imprisonment or a fine of up to 100 days. This severe approach is neither mandated by the InfoSoc Directive nor required by any international treaty. Indeed, such criminalization appears unnecessarily severe, especially when contrasted with U.S. law, which, despite its well-known provisions criminalizing DRM circumvention, limits criminal penalties specifically to acts committed for commercial advantage or private financial gain.[112] The Portuguese law does not incorporate such limitations, thereby imposing criminal liability even in cases where there is no commercial intent or financial gain.[113] This overly broad approach raises concerns about proportionality[114] and unconstitutionality.[115]

A balanced reform within the EU framework would require introducing greater flexibility into the TPM regime, addressing the rigidity of the current legal framework. The US model provides a notable example in this regard: every three years, the Library of Congress, through the Copyright Office, conducts a rulemaking procedure to evaluate and adjust exemptions to § 1201's anti-circumvention rules.[116] This model demonstrates how a flexible system can better achieve the essential balance of interests that copyright law seeks to uphold.

However, the Portuguese model offers a simpler and more effective solution. The fact that nearly eight years after its implementation there has been no reports of

112 '17 U.S. Code § 1204 - Criminal Offenses and Penalties | U.S. Code | US Law | LII / Legal Information Institute', accessed 13 March 2025, https://www.law.cornell.edu/uscode/text/17/1204.

113 An additional issue arises from the fact that the law does not define "neutralization". Would a mere bypass qualify? On the varying interpretations of 'neutralization' (in the context of Article 11 of the WCT, Fazio, 'A cópia privada', 395.

114 Vicente, 'Direito de Autor e medidas tecnológicas de protecção', 94.

115 Arguing that the use of DRM that prevents the exercise of copyright exceptions is unlawful, and that the provisions in the CDADC imposing criminal and civil liability on users who bypass DRM to exercise copyright exceptions are unconstitutional, Vieira, *Direito de autor*, 383–85; Considering the possibility of direct action, Mariana Mourão Reis, 'Compensação Equitativa por Cópia Privada Digital' (2015), 20, https://estudogeral.uc.pt/handle/10316/34901.

116 'Rulemaking Proceedings Under Section 1201 of Title 17 | U.S. Copyright Office', accessed 13 March 2025, https://www.copyright.gov/1201/.

rightholders raising concerns over potential abuses of the circumvention rules suggests that initial fears about widespread misuse were unfounded.[117] It appears that both rightholders and beneficiaries of copyright exceptions in Portugal are satisfied with the regime, preferring a system with built-in flexibility rather than one that relies on third parties to introduce such flexibility.

Just as TPMs have failed to prevent the unauthorized online distribution of copyrighted works, their circumvention for legal purposes does not appear to cause additional harm. Unlawful distribution, particularly over the Internet, is already a widespread reality, and most commercially significant works are readily available to those who seek them. As such, imposing restrictions on legitimate acquisitions of digital goods by limiting users' ability to exercise copyright exceptions does nothing to mitigate the harm caused by unauthorized distribution. On the contrary, it creates a paradoxical situation where works obtained through unauthorized channels can become more appealing than lawfully accessed ones, as the former are free from the restrictions imposed by technological measures.

* *

Whether intentionally or not, TPMs significantly restrict beneficiaries from effectively exercising copyright exceptions. In this sense, they function as a technological bypass to copyright exceptions. However, the effectiveness of this bypass is largely contingent on the legal framework in place. It is therefore paramount that the legal framework strikes an appropriate balance between the rightholders' interest in

117 The EU's legislative intervention in the InfoSoc Directive is justified by the potential direct negative impacts of copyright exceptions on the functioning of the internal market for copyright and related rights, as stated in Recital 31 of the InfoSoc Directive. Recital 47, specifically on TPMs, is also clear: "In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures". As a result, if TPMs are found to have no significant effect on the market, the necessity – even the legitimacy – of EU legal intervention comes into question.

enforcing their exclusive rights and the broader public interests underpinning copyright exceptions.

Chapter III – Legal Bypass: Sheet Music as Exempted Subject Matter

3.1 A new CMO for sheet music.

Following the late transposition[118] of the 2019 Copyright in the Digital Single Market Directive, only completed in June 2023, after infringement procedures from the European Commission and referral to the CJUE,[119] few could have anticipated that the next significant debate in Portuguese copyright law would be related to music sheet, a rather niche subject only briefly mentioned in the law.

However, In November 2023, a new collective management organization (CMO) was founded in Portugal. AD EDIT – Associação de Editores de Partituras e Compositores (Association of Sheet Music Publishers and Composers) was created to represent publishers and composers of sheet music, the first organization of its kind in the country. An unusual partnership between publishers and authors, which seems justified by the narrow goal of this CMO, who was created for a specific market niche.[120] In their mission and objectives statement, AD EDIT asserts its intention to "ensure effective protection of the rights of composers and publishers of their works with regard to the unauthorised reproduction of sheet music".[121] The website further explains that they intend to grant licences for the reproduction of sheet music, which they claim to require prior authorisation from the rightholders "in all cases".

118 'Decreto-Lei n.º 47/2023, de 19 de Junho', Diário da República § (2023), https://diariodarepublica.pt/dr/detalhe/decreto-lei/47-2023-214524782.

119 European Commission, '11 Member States referred to the Court of Justice of the EU', Press release, 17 February 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_704.

120 Composers, as authors, could already be represented by SPA (Sociedade Portuguesa de Autores), the CMO for authors, in Portugal.

121 AD EDIT, 'Adedit.pt', accessed 18 January 2025, https://adedit.pt/.

This claim warrants closer examination, particularly concerning the applicability of copyright exceptions. It appears that AD EDIT operates under the assumption that sheet music is subject to a distinct copyright regime that precludes the use of copyright exceptions by their beneficiaries. Such a bold assertion should immediately prompt critical questions, even among those newly acquainted with copyright law. However, as it demonstrated further below, the origins of this claim ultimately originate elsewhere.

In the Frequently Asked Questions (FAQs) section of the website,[122] answering the question "Are there any exceptions in the law to the ban on reproducing sheet music?", AD EDIT recognizes the applicability of a single copyright exception: the exception in benefit of the persons who are blind, visually impaired or otherwise print-disabled.[123] It further adds a note regarding private use, stating:

> "Although not constituting an exception to the law, the AD EDIT regulation that defines the fees payable for licensing the reproduction of sheet music stipulates that in the case of the reproduction of excerpts of sheet music for exclusive private use, it is not necessary to obtain a licence, as long as there is no purpose of obtaining an economic or commercial advantage".

In other words, in AD EDIT's view, private use is not considered a valid exception applicable to sheet music, although in practice users still enjoy the privilege of not paying for such use thanks to an internal regulation of the organization. The FAQs further contain other peculiar claims, such as the assertion that even the reproduction of sheet music containing public domain works requires a licence, or that a performance within a school setting also requires a licence. In a public information session organised by AD EDIT,[124] it was further explained that, authors and publishers of sheet music in Portugal are currently unable to receive revenue from the country's private copy levy

122 AD EDIT, 'FAQs – Adedit.pt', accessed 18 January 2025, https://adedit.pt/#faq.
123 Articles 82.º-A, 82.º-B e 82.º-C of the CDADC, originated from the Marrakesh Treaty.
124 The session took place online, via Zoom, on December 8th, 2024, as announced in Facebook profile of AD EDIT: https://www.facebook.com/permalink.php?story_fbid=122130273170494051&id=61564821555749

system. This is allegedly because AGECOP,[125] the organization responsible for collecting and distributing these funds, considers sheet music to be excluded from the private copying exception.

What is the legal basis for the AD EDIT's claim that copyright exceptions (apart from one exception and one "privilege" – not considered as an exception) are not applicable to sheet music? AD EDIT relies on a single norm of the CDADC: Article 75(2)(a). This is the only cited norm, mentioned across different sections of the website, other than the general criminal norm punishing copyright infringement (Article 195 CDADC).

However, an additional and highly authoritative source supports this claim. An opinion[126] issued by IGAC, the General Inspectorate for Cultural Activities, is prominently referenced on AD EDIT's website, which even displays a large image of the one-page document.

3.2 IGAC's communication on sheet music

Dated September 24, 2024, and signed by the General Inspector, the director of IGAC, the document is titled "Use of Sheet Music in Artistic Performances or School Settings". In its second paragraph, it can be read:

> The reproduction of sheet music, as a protected work, does not include free uses[127] and, as such, requires the express consent of the author/composer or their representative/holder of the reproduction rights of the work, as follows from the exception provided for in Article 75(2)(a) of the CDADC.

125 AGECOP – Associação para a Gestão da Cópia Privada (Association for the Management of Private Copying) - https://www.agecop.pt/

126 IGAC, 'Comunicação Circular - Utilização de Partituras Em Espetáculos de Natureza Artística Ou Em Ambiente Escolar', 24 September 2024, https://www.igac.gov.pt/documents/20121/578814/Circular+Utiliza%C3%A7%C3%A3o+de+Partituras.pdf/ec3e4238-3fbf-e604-19ff-c32e3ab4bb73?t=1727213851026.

127 As mentioned in the Introduction, the Portuguese doctrinal and legislative traditional, copyright exceptions and limitations are called "free uses" (Cf. art 75 CDADC).

It thus seems clear that a main public authority on copyright in Portugal concurs and endorses the interpretation that the Portuguese law exempts sheet music from the application of copyright exceptions, thereby requiring authorisation for any cases of reproduction. Like AD EDIT, their interpretation relies exclusively on Article 75(2)(a) CDADC, without further legal justification. Given that AD EDIT was founded approximately one year before this opinion and no relevant news can be found prior to the date of IGAC's opinion,[128] it appears that this opinion from the General Inspectorate may have been instrumental in enabling AD EDIT to initiate its revenue collecting efforts, which subsequently sparked public controversy.

However, the interpretation that copyright exceptions do not apply in general when the subject matter concerns sheet music finds no support in the law.

3.2 Sheet music and copyright exceptions in the Portuguese law

Article 75(2)(a) of the CDADC stems from the transposition of the reprography and the private copy exceptions, originally derived from Articles 5(2)(a) and 5(2)(b) of the InfoSoc Directive. These exceptions were merged into a single sentence, leading to the possibly confusing wording that follows:

> 2 - The following uses of the work are lawful without the author's consent:
>
> a) The reproduction of the work, for exclusively private purposes, on paper or similar support, carried out using any type of photographic technique or process with similar results, with the exception of sheet music, as well as reproduction in any medium carried out by a natural person for private use and without direct or indirect commercial purposes;

Notwithstanding the longer and somewhat complex phrase, the article kept a clear division between the regime of the reprography exception, in the first part of the paragraph, and the regime of the private copy, in the second part (starting with "as well

128 According to a Google search for "AD EDIT, filtered to news published in such time frame.

as"). Sheet music is clearly excluded only from the first part, not from the second, following a similar formula to the InfoSoc Directive.

There was a legislative deviation by the Portuguese legislators from the InfoSoc Directive, in this regard. While Article 5(2)(a) of the InfoSoc Directive does not impose an "exclusively private purpose" requirement, Portuguese law does, which leads to interpretative difficulties. For instance, regarding print shops, which are predominantly commercial enterprises. Even if the requirement would be interpreted as applying only to clients (and not to the print shops themselves, which would be acting on behalf of their clients), legal ambiguities persist regarding certain legal uses. For example, under the education exception of Article 5(2)(f) of the CDADC, a teacher is allowed to make copies for classroom use. However, if the teacher decides to resort to the services of a print shop to make those copies, this does not meet the "exclusively private purpose" requirement demanded by the text of Portuguese reprography exception. Nonetheless, a thorough examination of this matter exceeds the focus of the present study.

Thus, a textual analysis of Article 75(2)(a) of the CDADC provides no basis for the claim that sheet music is excluded from the private copy exception set forth in the same provision as the reprography exception, nor for the broader assertion that it is exempt from all other copyright exceptions. The rationale for such an interpretation must therefore lie elsewhere.

3.4 A possible explanation: Case C-572/13, Hewlett-Packard v. Reprobel

Although neither AD EDIT nor IGAC cite any case law to substantiate their interpretation, a 2015 judgement from the Court of Justice of the European Union (CJUE) offers relevant insight into this issue. In *Case C-572/13 - Hewlett-Packard v. Reprobel*,[129] the CJUE addressed several questions regarding Belgium's private copy

129 CJEU, Case C-572/13 - Judgment of the Court (Fourth Chamber) of 12 November 2015, Hewlett-Packard Belgium SPRL v Reprobel SCRL. Request for a preliminary ruling from the Cour d'appel de Bruxelles (CJEU 11 December 2015).

levy regime at the time, referred by the Court of Appeal of Brussels. One of the questions concerned sheet music, and was framed as follows:

> Must Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 be interpreted as authorising the Member States to introduce an undifferentiated system for recovering the fair compensation due to rightholders in the form of a lump-sum and an amount for each copy made, which, implicitly but indisputably, covers in part the copying of sheet music and counterfeit reproductions?'

Essentially, in this specific question, the Belgium courted asked the CJEU whether the private copy levy in Belgium, due to the way it was designed, could include compensation for the reproduction of sheet music as well as compensation for reproductions made from an unlawful source. In its ruling, the CJEU held that neither is possible.

> Article 5(2)(a) and Article 5(2)(b) of Directive 2001/29 preclude, in principle, national legislation, such as that at issue in the main proceedings, which introduces an undifferentiated system for recovering fair compensation which also covers the copying of sheet music, and preclude such legislation which introduces an undifferentiated system for recovering fair compensation which also covers counterfeit reproductions made from unlawful sources.[130]

Regarding reproductions from unlawful sources, the CJUE's decision reaffirmed the same position it held the year before in Case *C-435/12, ACI Adam and Others v Stichting de Thuiskopie (2014).* When it comes to sheet music, the Court started by stating that sheet music is explicitly excluded from the scope of the reprography exception, and "cannot, therefore, be taken into consideration when calculating fair compensation in the context of that exception".[131] However, the Court extended this same understanding to the private copy exception as well.

130 Third point of the operative part of the judgement.
131 CJEU, *Case C-572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL* paragraph 55.

At the core of the issue is the fact that the scope of the provisions of these two exceptions can overlap, in cases of analogue reproduction made by natural persons for private use and for ends that are neither directly nor indirectly commercial.[132] In other words, a photocopy made by a natural person with no commercial purposes falls within the scopes of the reprography exception and the private copy exception. As such, the Court argues, cases of reproduction by natural persons for private use with no commercial ends (private copies) must also not be compensated. Therefore, it concludes, the exclusion of sheet music from the reprography exception must, in principle, be extended to the private copy exception. Otherwise, the Court adds, "the joint or parallel application of the private copying exception and of the reprography exception by Member States would risk being inconsistent".[133]

The Court then continues its legal reasoning, apparently expanding the application of the same interpretation to other copyright exceptions:

> 53 Indeed, were the reproduction of sheet music to be authorised in the context of one of those exceptions and prohibited in the context of the other, the legal situation in the Member State concerned would be contradictory and would make it possible for the prohibition on authorising the reproduction of sheet music to be circumvented.
>
> 54 Under those conditions, the exclusion of sheet music set out in Article 5(2)(a) of Directive 2001/29 must be understood as being intended not only to limit the scope of the reprography exception but also to introduce a special regime for that category of protected subject-matter, prohibiting, in principle, the reproduction thereof without rightholders' authorisation.

132 In contrast, there is no overlap in cases of reproduction by users who are not natural persons, as well as in cases of reproduction by natural persons for a use other than private use or for commercial purposes. Those are only possible under the reprography exception. See par. 33 and 34 of the judgement.

133 CJEU, *Case C-572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL* paragraph 52.

In other words: to prevent users from bypassing the exclusion of sheet music from the reprography exception by resorting instead to the private use exception, the Court argues that sheet music must likewise be excluded from the private use exception. Consequently, the Court contends that if sheet music cannot be reproduced under the private copy levies system – which exists to compensate the potential harm such reproduction may inflict to authors – then the authors of sheet music should not be entitled to such compensation. Moreover, the Court appears to extend this reasoning further, possibly applying it to all copyright exceptions, at least in principle. The CJUE seems to interpret Article 5(2)(a) as a general rule applicable to any copyright exception to the exclusive right of reproduction, finding on it a "special regime" for the specific subject-matter of sheet music. In practice, this means that, for sheet music, the specific regime of Article 5(2)(a) would override, in this regard, the regimes of all the other copyright exceptions. The Court adds however one safeguard, in the following paragraph, related to Recital 35 of InfoSoc Directive, which states that "in certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise". In this regard, the Court argues that "in certain limited and isolated situations, the unauthorised reproduction of sheet music made in the context of the private copying exception may, in a situation where the harm which that reproduction is likely to cause to rightholders is minimal, be regarded as compatible with the special regime".

Numerous arguments can be made to challenge this reasoning, as it appears to be both conceptually flawed and poorly justified. Notably, the Court addresses this critical issue in merely four brief paragraphs, offering, *en passant*, an impactful judicial interpretation that diverges from the literal wording of the law, possibly without fully considering its implications. Furthermore, the Court approaches the matter from the perspective framed by Belgium's court question, which concerns remuneration and the structure of private copy levy schemes, rather than directly addressing the scope of copyright exceptions themselves. This framing seems to have influenced the Court's reasoning. Consequently, this matter warrants rigorous examination.

First and foremost, Article 5 of the InfoSoc Directive establishes a closed list of copyright exceptions applicable only in specific cases. Each copyright exception is governed by a meticulously tailored regime with a narrowly defined scope. These regimes impose various restrictions on permissible uses, including limitations related to subject matter, intended purpose, quantity, form, medium, technology, beneficiaries, the existence of any compensation obligation, among other conditions. Had the EU legislator intended to exclude sheet music from the private copy exception – or any other exception – it would have done so explicitly. While legal interpretation is not confined solely to the literal text, there is no indication within the InfoSoc Directive that the legislator intended to establish a distinct regime under Article 5(2)(a) rather than treating it as just another copyright exception. The fact that copyright exceptions are governed by different conditions should not be construed as a legislative omission that necessitates an analogical or expansive interpretation of the law. Adapting the venerable Latin maxim: "*Ubi lex distinguit, ibi nos distinguere debemus*".[134] It might have been more prudent to adhere to the presumption that lawmakers acted with due knowledge and intention. Or, as Article 9(3) of the Portuguese Civil Code better phrases it: “the interpreter shall assume that the legislator has enshrined the right solutions and has been able to express his thoughts in appropriate terms”.

It is essential to address the substance of the Court’s argument, as several contentions can be raised to demonstrate its flawed nature. The Court begins by asserting that there is an overlap between the reprography and private use exceptions; however, it acknowledges that such an overlap is only partial, occurring solely in cases of analogue reproductions made by natural persons for non-commercial purposes. The analogue requirement – defined by the law as “on paper or any similar medium” – is highly significant in this context. Although paper copies still exist, their relevance has diminished in an era where the digitization of knowledge permeates all sectors of society and personal life. As a result, the private copy exception is now predominantly applied to digital reproductions rather than analogue ones. Even though empirical evidence may be lacking, common experience suggests that digital copying is the

134 "Where the law distinguishes, we must distinguish".

prevailing practice.[135] Consequently, the Court's broad and sweeping interpretative approach appears to be based on a minor use case while justified by a possible overlap of the two exceptions which is only partial.

Moreover, in paragraph 54, the Court introduces a safeguard concerning minimal harm, drawing upon Recital 35. From the Court's perspective, sheet music is subject to a special regime which excludes it from the application of the reprography and private use exceptions, as well as, in principle, other copyright exceptions. The precise meaning and intention of the "in principle" expression, used by the Court, remains ambiguous. It is unclear whether this phrase is intended to soften the interpretation, indicating that the exclusion is not absolute, or whether it merely anticipates the minimal harm safeguard that the Court subsequently introduces. Regardless, the Court asserts that "in a situation where the harm which that reproduction is likely to cause to rightholders is minimal, [it may] be regarded as compatible with the special regime (...)".

This legal reasoning seems to suffer from a fundamental logical flaw. A subject-matter-based exclusion from copyright exceptions is inherently incompatible with the application of a minimum harm safeguard. To elaborate, it is necessary to recall that fair compensation serves as a mechanism to ensure the required "fair balance of rights and interests"[136] between authors and users of protected subject-matter, particularly in relation to copyright exceptions. It is a means of adhering to the strict limits imposed by the three-step test.[137] If a copyright exception is deemed to impose excessive harm on rightholders, this harm may be counterbalanced by an obligation to provide fair compensation. This is the case of both the reprography and private use exceptions. In turn, by its very nature, fair compensation must be determined based on the potential harm caused by these reproductions made under a copyright exception. This is expressly

135 This is not a recent development. Indeed, even in 2001, the InfoSoc Directive, in Recital 38, addressing the reproduction of audiovisual material and its impact on the internal market, asserted that "analogue private reproduction should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact."

136 See Recital 31.

137 Article 5(5) of the InfoSoc Directive. In International Law: Article 9(2) of the Berne Convention; Article 13 of the TRIPS Agreement; Article 10 of the WIPO Copyright Treaty.

reflected in the InfoSoc Directive, which states that "a valuable criterion would be the possible harm to the rightholders resulting from the act in question", and that "in certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise".[138] The issue, however, is that compensation cannot exist in relation to uses of copyright exceptions which are not admissible. Consequently, the minimal harm safeguard cannot function as a limitation on fair compensation where the copyright exception itself has been ruled out. Either a copyright exception is legally permissible, in which case an obligation to provide compensation (where required) arises and the minimal harm safeguard may apply, or a copyright exception is not legally permissible, meaning no compensation obligation is generated, and therefore, no minimal harm safeguard can be invoked. At the core of this reasoning flaw lies a fundamental confusion in the Court's approach: it conflates legal norms governing the scope of copyright exceptions with those governing the compensation mechanism applicable to such exceptions.

Furthermore, there is the issue of enforceability. By its very nature, the private use exception can hardly be supervised or inspected. Unlike other copyright exceptions, it is simply impossible for rightholders to monitor the personal reproductions that anyone can make and store at home or on a personal computer. For this reason, the compensation for any potential harm is addressed through levies imposed on products with reproduction or storage capabilities, rather than on individual reproductions made by the beneficiaries.[139] Thus, when the Court intervenes in this matter for the sake of *consistency*[140] of the application of copyright exceptions by Member States or to resolve a perceived *contradiction*[141] in the legal framework, it seems a largely theoretical pursuit which lacks tangible benefits for rightholders or users. Authors of sheet music derive no

138 Recital 35.

139 In Padawan, the Court observed that, since private users ultimately bear the cost of the levy when purchasing products, they can, in a sense, be considered indirectly liable for it. CJEU, *Case C-467/08 - Padawan* paragraph 48.

140 Paragraph 52.

141 Paragraph 53.

advantage from the case law, while facing significant disadvantages. This leads us to a critical argument regarding the discriminatory nature of the case law.

Authors of sheet music are uniquely excluded from receiving income from private copy levies – a revenue stream that, in some countries, might be significant.[142] This exclusion is based solely on the subject matter of their copyright being sheet music. From a public policy perspective, there is no compelling reason for such treatment; it is unlikely that the InfoSoc legislator intended this outcome under Article 75. Rather, it is far more probable that the legislator sought to exclude the reproduction of sheet music while simultaneously allowing its authors to benefit from the private copy levy system, by permitting in the law the private copying of sheet music. As reflected in the wording of the law. It could even be the case that the mentioned possible inconsistencies or contradictions in some cases of overlapping between the reprography and private copy exceptions were acknowledged, but deemed far less consequential than possible alternatives, such as the CJEU's interpretation in this case law.

Finally, much of the Court's interpretation, particularly its broad application of the sheet music exclusion to all copyright exceptions, derives from a non-operative part of the decision. While the Court's opinion can serve as an authoritative interpretation of the law, it is not binding and should therefore be carefully and critically assessed by Member States. Treating it as binding case law that reshapes the entire legal framework of copyright exceptions, when the subject matter is specifically sheet music, should be avoided. This does not prejudice the operative part of the decision, which establishes that national law, in principle, cannot implement legislation where compensation for the reprography and private use exceptions relies on an undifferentiated system that also covers the copying of sheet music. In this light, Member States should distinguish between compensation schemes for each exception to ensure that the reproduction of sheet music is not compensated when it is carried out by individuals under the private

142 According to data from WIPO's 2016 international survey (the most recent available), global revenues fluctuated from 598 million euros in 2007, reaching an all-time high of 796 million euros in 2014, before declining to 636 million euros in 2015. Stichting de Thuiskopie, 'International Survey on Private Copying - Law and Practice 2016', 2017, 26, https://doi.org/10.34667/tind.28987.

use exception. However, this does not preclude the compensation of non-analogue private uses or other copyright exceptions where compensation is required.

3.5 Public Controversy and Legislative Response

The beginning of AD EDIT's efforts to collect compensation for the reproduction of sheet music from philharmonic bands, musics schools, and music-related institutions sparked public controversy in Portugal.[143] This reaction was to be expected given the country's deep-rooted tradition of philharmonic bands, which play a vital social and cultural role in many regions. Representatives of philharmonic bands publicly expressed their concerns to the press,[144] stating that the licensing fees proposed by AD EDIT could threaten the very existence of numerous bands, many of whom struggle to survive financially. The issue seems to generated particular concern in the Autonomous Region of Azores, as the philharmonic tradition is especially prominent in the archipelago.[145] AD EDIT, however, refuted these claims. A fact-checking report by a press organization on the licensing costs concluded that "it can be estimated that the value reaches thousands of euros per year for some bands. However, it is not possible to quantify a specific figure, as it is variable".[146]

The controversy prompted a legislative response. The Government of the Azores urgently approved, with unanimous support in its regional parliament, a legislative

143 Jornal de Notícias, 'Utilização gratuita de partituras pelas filarmónicas debatida no Parlamento', 13 February 2025, https://www.jn.pt/8398736214/utilizacao-gratuita-de-partituras-pelas-filarmonicas-debatida-no-parlamento/.

144 Rádio TSF, '"Povo sem cultura é mais fácil de enganar." Filarmónicas admitem acabar se forem obrigadas a pagar várias vezes pelas partituras', 29 November 2024, https://www.tsf.pt/6224515960/povo-sem-cultura-e-mais-facil-de-enganar-filarmonicas-admitem-acabar-se-forem-obrigadas-a-pagar-varias-vezes-pelas-partituras/.

145 Açoriano Oriental, 'Cobrança de cópias de partituras pode levar ao fim de filarmónicas', 14 November 2024, https://www.acorianooriental.pt/noticia/cobranca-de-copias-de-partituras-pode-levar-ao-fim-de-filarmonicas-365412.

146 Poligrafo, 'Organização quer cobrar milhares de euros anuais por fotocópias de partituras a bandas filarmónicas?', 17 November 2024, https://poligrafo.sapo.pt/fact-check/organizacao-quer-cobrar-milhares-de-euros-anuais-por-fotocopias-de-partituras-a-bandas-filarmonicas/.

proposal,[147] which was subsequently submitted to the Portuguese Parliament.[148] Additionally, a political party introduced a separate legislative initiative.[149] Both initiatives propose amendments to the CDADC, aiming to explicitly clarify that sheet music falls within the private use exception – a position that directly conflicts with the previously analysed CJUE case law. At the time of writing, both proposals remained under consideration by the Culture, Communication, Youth, and Sport Committee of the Portuguese Parliament, following their approval in a first reading in plenary session.

* *

The case of sheet music in Portugal serves as an example of an eventual legal bypass of copyright exceptions. It remains uncertain whether the CJEU intended to establish the legal framework as interpreted by AD EDIT and IGAC – or at least to the extent to which they are applying it. However, in practice, the current application of the law in Portugal, as construed by the most relevant public copyright authority, effectively excludes sheet music from the scope of all copyright exceptions. This occurs despite the fact that such a restrictive regime does not explicitly follow from the letter of the law, nor has IGAC provided any additional legal justification or reasoning to support its interpretation.

For the reasons outlined in this chapter, and considering that the possible justification for this interpretation stems from a section of a CJEU judgment that is not legally binding, as it is not part of the operative part of the judgment, such interpretation should be rejected.

147 Assembleia Legislativa da Região Autónoma dos Açores, 'Anteproposta de Lei n.º 8/XIII' (2025), http://base.alra.pt:82/4DACTION/w_pesquisa_registo/3/3669.

148 'Proposta de Lei 46/XVI/1 (ALRA)' (2025), http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=314571.

149 'Projeto de Lei 361/XVI/1 (IL)' (2024), http://www.parlamento.pt:80/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=304358.

In principle, a dispute of this nature would typically be expected to lead to litigation. However, a more likely scenario is a legislative intervention to amend the law before any legal proceedings can take place. If litigation were to arise, it could provide clarity on the issue and might even prompt a request for a preliminary ruling from the CJEU to address this specific question.[150]

150 *Post-scriptum*:After this chapter was written and shortly before the submission of this dissertation, news emerged of the government's fall, which will, in principle, lead to the dissolution of Parliament and the consequent expiration of pending bills. However, given the circumstances outlined above, it is highly likely that these legislative proposals will be reintroduced in Parliament as soon as possible in the new legislative session.

Conclusions

Copyright law is fundamentally about finding a fair balance between competing interests. Exceptions and limitations play a crucial role in this balance, safeguarding broader and often diffuse interests that may conflict with the rights and interests of rightholders. However, in the process of finding that balance, the key issue is not limited to the discussion about the legal nature of copyright exceptions and limitations or fair use within a given legal framework and jurisdiction, and how they relate to exclusive rights. Rather, it is whether the objectives they pursue are effectively realized in practice – an aspect that is equally crucial yet frequently overlooked in the broader debate.

The three Portuguese examples examined illustrate how copyright exceptions and limitations can be eroded, prevented or restricted – bypassed – through technological means, contractual agreements, or legal interpretation in its application.[151] However, they also demonstrate that change is possible when there is sufficient will.

The 2017 amendments to the TPM regime serve as a reminder that TPMs function as a technological bypass to copyright exceptions and limitations, yet their impact is largely dependent on the legal balance established by the law regarding circumvention rules. The failure of the legal deposit system highlights a recurring issue: the gap between the legal framework and its real-world implications. It showcases a purely artificial balancing act, that exists only in the text of the law but fails to deliver its intended goal in practice. In contrast, the Portuguese approach offers a pragmatic model that achieves the necessary regulatory balance. Concerns about its compliance with the InfoSoc Directive stem from the fact that the Directive itself is built on theoretical assumptions that, in practice, have proven unworkable. Consequently, EU law should be reformed in this regard, and the Portuguese model could serve as a valuable reference for future legislative developments.

151 Whether in legislative or judicial contexts, or even in its application by administrative entities.

The sheet music case exemplifies the conflicting interests inherent in copyright law, highlighting the risks of failing to achieve the appropriate balance between the protection rightholders' exclusive rights and other broader cultural, educational, and social interests.[152] This case underscores how an unbalanced legal framework can have serious effects on access to knowledge and cultural participation at a national level. Here, the anticipated negative consequences became evident to stakeholders, prompting legislative attention in the pursuit of a more balanced solution. However, similar imbalances in other areas covered by copyright exceptions and limitations may not receive comparable scrutiny and remain unaddressed due to a lack of public awareness or mobilization.

Moreover, this case demonstrates that even when legal provisions appear clear, they do not necessarily prevent the bypass of copyright exceptions and limitations. Legal interpretation and practical application play a decisive role, particularly when beneficiaries of copyright exceptions, such as educators, students, and cultural institutions, lack both general legal literacy and specific knowledge of copyright law. Therefore, legal frameworks must be evaluated not only for their theoretical coherence but also for their effectiveness in real-world application and enforcement. Legal analyses disconnected from the reality of the application of the law will necessarily fall short.[153]

Similarly, the case of the Portuguese contractual override prevention clause illustrates how, even in situations where the law is considered a best-case scenario and is internationally cited as a model, its real-world impact may differ. This disparity arises from asymmetries of power and legal knowledge between rightholders and industry, on

152 Vieira, *Direito de autor,* 383.

153 In this regard, the question raised by Husovec in response to the CJEU judgment in Case C-401/19 is particularly incisive. Martin Husovec, 'Internet Filters Do Not Infringe Freedom of Expression If They Work Well. But Will They?', Euractiv, 2 May 2022, https://www.euractiv.com/section/digital/opinion/internet-filters-do-not-infringe-freedom-of-expression-if-they-work-well-but-will-they/; CJEU, Case C-401/19 - Judgment of the Court (Grand Chamber) of 26 April 2022 – Republic of Poland v European Parliament, Council of the European Union (6 March 2022).

the one side, and the users whom copyright exceptions and limitations are designed to benefit, on the other.

This raises a fundamental question: who, in practice, defends the diverse and often diffuse interests that copyright exceptions seek to protect? In Portugal, at least, such representation appears to be lacking. When copyright policy and legislation are left to be shaped by the interests of rightholders and the industry, the necessary balance becomes inherently at risk. As Oliveira Ascensão aptly observes: "It would be as if (...), when intending to implement a banking reform, the task was left to the banks themselves, or to landowners in the case of Agrarian Reform, and so on".[154]

Ultimately, the balancing of interests in copyright law is not an abstract legislative goal but a real-world necessity. The law is a tool – the means to an end. The balance must be tangible, and copyright exceptions must function effectively in practice. If legal solutions fail to achieve this, they have not fulfilled their purpose. Importantly, the balance in copyright law is not merely a matter between the private interests of rightholders against the public interest behind exceptions and limitations.[155] In copyright law, the public interest is in the balancing itself.

154 José de Oliveira Ascensão, 'Cópia Privada e "Compensação Equitativa"', *Direitos Fundamentais na Sociedade da Informação - GEDAI*, 28 July 2014, https://gedai.ufpr.br/direitos-fundamentais-na-sociedade-da-informacao/.

155 Copyright exceptions and limitations also serve private interests, including those of individual beneficiaries, such as individuals making private copies. From a broader perspective, however, they contribute to broader social interests, such as education, culture, scientific progress, and access to knowledge.

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