

Libraries and limitations in a digital context. Controlled Digital Lending in Spain¹

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Libraries, archives and museums play a **fundamental role** in enabling access to culture and the promotion of science and research.

To this end, copyright laws have traditionally set **limits on libraries, museums and archives**, authorising certain work exploitation actions that do not require the authorisation of the rightholders. The limitations set forth in Art.37 of the Consolidated Text of the Spanish Intellectual Property Law (hereinafter, TRLPI) are testament to the mission fulfilled by these institutions and ensure (should ensure) that the exercise of copyright and associated rights does not become an impediment to the fulfilment of such public interest functions.

In Spanish law, **libraries benefit from several limitations set forth in Art.37 TRLPI**. Specifically, a limit on reproduction for research and preservation purposes; another on public lending; and, lastly, one on making works available to the public via dedicated terminals located in their premises. All such provisions have been designed for a context of traditional libraries that are physically locatable and accessible. As expected, digital technologies have had a decisive influence on the operation of libraries, which wish to continue providing their public service in a digital world as well as in the traditional analogue form. This has proven not only to be desirable, but necessary, in light of the situation brought about by the recent pandemic.

Over the years, publishers have been gradually expanding the granting of licences for digital format publications. The licensed markets are, as ever, the natural and most efficient model for the exploitation of works and other subject matter. In fact,

¹ English translation of the report published by FESABID in 2023, originally titled "Bibliotecas y límites en el contexto digital. El préstamo digital controlado en España" with ISBN 978-84-939694-6-2. This work is licensed under Attribution-NonCommercial-NoDerivatives 4.0 International



² The author wishes to thank *Ciro Llueca* and the *Libraries and Intellectual Property group* at FESABID for their valuable comments and contributions to this report.

the evolution of digital exploitation formats is actually exceeding the demand for **“licensed” digital copies** (e-books, databases and streaming of musical and audiovisual content) and, consequently reducing the need for libraries to seek the protection of legal limitations. Specifically, and to a certain extent, “licensed” exploitation formats have transformed (indeed, undermined) the role of libraries in the provision of the public interest lending services allocated to them, thus endangering the delicate balance of interests sought by the legal limitations.

On the other hand, despite the growing amount of content in a digital format, libraries are not always able to afford the **licensing prices** charged by the copyright holders. Libraries are often obliged to “purchase” (namely, to obtain access licences) to large “packaged” publishers’ catalogues, instead of being able to choose access to specific works only.

In the face of this technological and market evolution, the challenge lies in deciding **how digital exploitation formats fit into the purview of the legal limitations afforded to libraries**. Questions like: to what extent are libraries obliged to acquire new copies or access digital content licences and how far can they seek protection from the limitations and exceptions set forth in the law when scanning and lending digital format works? How far do such limitations impact lending: can a copy made for preservation purposes pursuant to Art. 37.1 TRLPI be made available to the public via specialised terminals under said Article?

Libraries, archives and museums must be able to use digital technologies for actions of preservation of works and other subject matter of their institutional collections; they should be able to offer users document delivery services (DDS) for obtaining copies for research purposes and delivery thereof in digital format to the requesting user; they must also be able to extend the public lending of works in their catalogue to include those in digital format (i.e. e-books) and make them available to the public via specialised terminals located in their premises. All the foregoing must be provided within the **framework of existing limitations established in every national intellectual property law**. The interpretation and application of such limitations must be in line with the goal of enabling libraries, museums and archives to fulfil their public mission of promoting research, education and access to culture by the public.

The path is not proving to be an easy one. On the one hand, because the **national limitations in place lack uniformity and are designed for a context of traditional libraries, that are physically locatable and accessible** and which, when applied to digital formats, generate uncertainty and even a certain aversion to risk by the institutions responsible. On the other hand, the implementation of **technological protection measures (TPM)**, to control access and the reproduction of works and other subject matter, drastically restricts – both *de facto* and *de iure*- the scope of the limitations legally set forth for libraries, museums and archives, calling into question the feasibility of fulfilling their public service role.

For libraries, archives and museums to **continue to fulfil their public service role**, their activity cannot be left exclusively in the hands of the private sector and of the copyright holders. **The legal limitations must continue to establish the necessary balance of interests within the new digital market context.** These limitations need to allow such institutions to carry out their activity also in a digital format, in an efficient manner and without contravening the normal exploitation of works and other subject matter as well as without harming the interests of their copyright holders. Specifically, controlled digital lending, subject to the pertaining compensation, provides a viable solution to the granting of digital content licences.

At this time of technological transformation and market transition, the various EU countries have been reviewing and adapting the scope of their national limitations with the discretion afforded by the different Directives of the EU acquis and, particularly, that of CJEU case-law, which interprets them in a uniform manner throughout the EU. Spain should be no different.

This is, precisely, the **purpose of this report**: on the one hand, to analyse the legal provisions set out in the national law for libraries, archives and museums and interpret them under the light of international and EU law; and, on the other, to identify the changes to be made to the national law to adapt it to this new technological and market context, thus ensuring that the institutions are able to continue to fulfil their public service mission.

To this end, this report has been divided into four chapters: a first approach to the limitations system set forth in Art.37 TRLPI and how it fits in with the EU harmonisation framework and, specifically, with CJEU case-law (I); an analysis of the limit for research and preservation purposes set forth in Art.37.1 TRLPI (II); an analysis of the public lending limit and approach to controlled digital lending in Art.37.2 TRLPI (III); completing the report with a number of reflections and conclusions (IV).

I. National limitations and their harmonisation in the EU

The right of access to information (Art. 20 of the Spanish Constitution-SC) and that of access to culture (Art. 44 SC) are established as the main justifications of the **limitations set forth in Art.37 TRLPI** for libraries, museums and archives. Public interest thus becomes a limit: certain acts of exploitation can be carried out by such institutions without copyright holders' right to object- particularly, in some cases- when a right to compensation or remuneration in return has been recognised.

This is what the limitations are all about: a legal authorisation for certain acts of exploitation, an exception to the power of "authorising or forbidding" acts of exploitation granted exclusively to the copyright holder.

Art.37 TRLPI limitations and exceptions, as is the case with many other national limitations, have been directly shaped by the EU legislation harmonisation process. Specifically, there have been three directives with the most impact: the Directive on rental and lending rights (DAP, 1992 and 2006),³ the Directive on copyright in the information society (DDASI, 2001))⁴ and, more recently, the DDAMUD (2019).⁵

Article 37. Reproduction, lending and consultation by means of specialised terminal in Specific Establishments.

1. The copyright holders may not object to reproductions of works where they are made without economic advantage by museums, libraries, record libraries, film libraries, newspaper libraries or archives which are publicly owned or form part of institutions of a cultural or scientific nature, provided the reproduction is carried out solely for research or preservation purposes.

2. Likewise, museums, archives, libraries, newspaper libraries, record libraries or film libraries in public ownership or pertaining to institutions of general cultural, scientific or educational interest not trading for profit, or to teaching institutions integrated in the Spanish educational system, shall not require the licence of the copyright holders or to pay remuneration to them for the loans that they make.

The owners of these institutions shall remunerate the authors for the loans made in the amount to be set by Royal Decree. Remuneration shall be paid via the copyright collection societies.

When the Municipalities are publicly-owned institutions, the remuneration shall be paid by the Provincial Government. In the absence thereof, the remuneration shall be paid by the Administration responsible for such functions.

Publicly-owned institutions providing their services in municipalities with less than 5000 inhabitants shall be exempt from this obligation, as well as libraries of teaching institutions forming part of the Spanish educational system.

El Royal Decree setting the amount shall also lay down the collaboration mechanisms between the State, the Autonomous Communities and the local corporations in order to comply with the obligations of remuneration affecting publicly-owned establishments.

3. The author's licence shall not be required for the communication of a work or making it available to specific persons for research purposes when carried out through a closed and internal network via dedicated terminals installed for such purposes on the premises of the institutions mentioned in the preceding Paragraph and provided such works appear in the institution's own collection and are not the object of licensing or purchase conditions. All the foregoing without prejudice to the author's right to an equitable remuneration.

³ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
<https://www.boe.es/buscar/doc.php?id=DOUE-L-2006-82664>

⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2002, on the harmonisation of certain aspects of copyright and related rights in the information society.
<https://www.boe.es/buscar/doc.php?id=DOUE-L-2001-81549>

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. <https://www.boe.es/doue/2019/130/L00092-00125.pdf>

The interpretation and application of these limitations shall be subject to the **three step rule** set forth in Art.40bis TRLPI and in Art.5.4 DDASI (2001):

Art.40bis TRLPI: The articles of this Chapter shall not be construed so that their implementation causes unreasonable prejudice to the author's legitimate interests or adversely affects the normal exploitation of the works to which they refer.

Art.5.4 DDASI (2001): The exceptions and limitations ... shall only apply in certain specific cases that do not conflict with the normal exploitation of the work or service and do not unreasonably harm the legitimate interests of the copyright holder.⁶

This hermeneutical rule suggests a “restrictive” interpretation of the scope of the limitations, to avoid the invalidation of the rights of exploitation granted by the law to authors and copyright holders. However, as we shall see, this is not the only criterion guiding the interpretation and application of the limitations.

Furthermore, these limitations may be seen as “displaced” by the implementation of **technological protection measures (TPM)**, when a technological measure should prevent the performance of acts that have been expressly permitted by the law (under the corresponding limit). The DDASI (2001) established a system (interface) to ensure that at least certain limitations (among them, those discussed herein) would be assured when applying technological measures, but it also agreed that this system (interface) would not be applicable when the content (works and other subject matter) had been accessible via an online contract (online licence).⁷ With the legitimate aim of encouraging the development of new digital markets, the efficacy of the legally established limitations was restricted (perhaps excessively?) although in actual fact such limitations will be overruled by the TPMs established by the rights holders.

In order to rebalance the system and ensure that the limitations continue to fulfil their public interest goals in a digital context as well, the CJEU has been making a continuous interpretation effort well beyond the harmonisation set out in the Directives' regulatory text.

Specifically, the most relevant aspect has been the concept of “**the autonomy of European Union Law**” according to which, the CJEU (as opposed to the Member States) is responsible for interpreting and establishing, **in a uniform manner throughout the EU**, the meaning and scope of any provisions contained in a Directive that do not directly refer to the legislation of a Member State and for which there is no definition within the Directive itself. Therefore, the CJEU has provided

⁶ The fact that Art.40bis TRLPI only sets forth two of the three steps is due to it having been drafted prior to the definition of the rule in Art.5.4 DDASI (2001). Art.40bis TRLPI specifically stems from Law 5/1998, of 6 March, implementing Directive 96/9/EC of 11 March 1996, on the legal protection of databases, where Art. 6.3 stated this rule *verbatim* with only two steps, with regard to the interpretation of the specific limitations set forth in paragraphs 1 and 2 of Art.6, thus rendering unnecessary the reference to the first step (clearly directed to the national lawmakers when introducing new limitations).

⁷ See Art.6.4 DDASI (2001) and Art.161.1(f) TRLPI.

definitions for, among concepts, “work”, “originality”, “public”, “reproduction”, “equitable remuneration”, “equitable compensation”, “parody” and “public lending”.

In the absence of a definition of a concept in a Directive, the CJEU defines its meaning by applying typical interpretation criteria, such as:

- ✓ Principle of restrictive interpretation of the limitations and exceptions, in application of the three step rule set forth in Art.5.4 DDASI; but confirming that this is not the only applicable criterion.⁸
- ✓ Principle of proportionality or “fair balance” between the author’s rights and interests and other rights or public interest.⁹
- ✓ Principle of teleology (the provision must help to meet the intended goals thereof).¹⁰
- ✓ Principle of conforming interpretation (EC provisions must be interpreted in accordance with international law and national provisions must be interpreted in accordance with community law).¹¹
- ✓ The usual meaning of the term and the context of which it forms part.¹²

The interpretation of the scope of the limitations must therefore be made “in accordance with its usual meaning in ordinary language, also taking into account the

⁸ See, for instance, CJEU ruling of 4.10.2011, *Football Association Premier League et al* (C 403/08 and C 429/08), EU:C:2011:631, # 162-163: “According to case law, the requirements just listed must be subject to strict interpretation, since article 5, paragraph 1 of said Directive, constitutes an exception to the general rule established therein and which requires the copyright holder to authorise any reproduction made of a protected proprietary work (aforementioned Infopaq International ruling, paragraphs 56 and 57). However, the interpretation of such requirements must allow for the safeguarding of the effectiveness of the exception thus established and respect its purpose as set out, specifically, in the thirty-first whereas clause of the Directive on copyright and the Common Position (EC) 48/2000, of 28 September 2000, approved by the Council with a view to adopting said Directive (DO C 344, p. 1).”

⁹ See CJEU ruling of 3.09.2014, *Deckmyn v. Vandersteen* (C-201/13), ECLI: EU:C:2014:2132, # 26: “they aim to maintain a «fair balance» between the rights and interests of the authors, on the one hand, and those of the users of protected services, on the other”. See also CJEU ruling of 21.10.2010, *Padawan v. SGAE* (C-467/08), EU:C:2010:620, #43; CJEU ruling of 1.11.2011, *Painer v. Standard VerlagsGmbH et al*, (C 145/10), EU:C:2011:798, #132.

¹⁰ See CJEU ruling of 3.09.2014, *Deckmyn v. Vandersteen* (C-201/13), ECLI:EU:C:2014:2132, # 23; CJEU ruling of 4.10.2011, *Football Association Premier League et al* (C 403/08 & C 429/08), EU:C:2011:631, # 163.

¹¹ See CJEU ruling of 29.01.2008, *Promusicae v. Telefónica* (C-275/06) ECLI:EU:C:2008:54; CJEU ruling of 1.12.2011, *Painer v. Standard VerlagsGmbH*; (C-145/10) ECLI:EU:C:2011:798; CJEU ruling of 4.10.2011, *Football Association Premier League et al* (C 403/08 and C 429/08) EU:C:2011:631; CJEU ruling of 7.12.2006, *SGAE v. Rafael Hoteles* (C-306/05) ECLI:EU:C:2006:764.

¹² See, for instance, CJEU ruling of 3.09.2014, *Deckmyn v. Vandersteen* (C-201/13), ECLI:EU:C:2014:2132 #21: “It cannot be concluded from either the usual meaning of the term «parody» in ordinary language, or... from the text of article 5, paragraph 3, letter k) of Directive 2001/29 that this concept is subject to the requirements mentioned by the referring jurisdictional body in its second question, which refers to the need for parody to have its own original character, beyond the existence of perceptible differences with regard to the parodied original work, its effect on the original parodied work or the mention of the source of the parodied work” and # 24: “Therefore, the fact that article 5, paragraph 3, letter k) of Directive 2001/29 constitutes an exception should not lead to the narrowing of the scope of application of this provision through requirements, such as those listed in paragraph 21 of this ruling, that cannot be concluded from the usual meaning of the term «parody» in ordinary language, or from the text of said provision.”

context in which it is used and the objectives sought by the legislation of which it forms part.”¹³ The CJEU also takes the opportunity to weigh up conflicting interest, particularly when weighing up the protection of copyright versus that of other fundamental rights, such as freedom of expression, intimacy and access to culture.¹⁴

II. Acts of reproduction for conservation and research purposes (Art.37.1 TRLPI)

The 1987 Intellectual Property Law set forth the limitation for research purposes, as follows:

Article 37

The copyright holders may not object to reproductions of works where they are made without economic advantage by museums, libraries, record libraries, film libraries, newspaper libraries or archives which are publicly owned or form part of institutions of a cultural or scientific nature, provided the reproduction is carried out solely for research or preservation purposes.

The TRLPI of 1996 turned it into Art.37.1 (by introducing in paragraph 2 the limitation on public lending added by Law 43/1994, on transposition of EC Directive 92/100 on rental and lending) but without modifying the text. It was not until the passing of Law 23/2006 on transposition of the DDASI directive (2001) that the purposes of preservation were added to Art.37.1 TRLPI (also adding the third paragraph on dedicated terminals).

1. The double limitation of Art.37.1 TRLPI

In accordance with Art.37.1 TRLPI:

1. The copyright holders may not object to reproductions of works where they are made without economic advantage by museums, libraries, record libraries, film libraries, newspaper libraries or archives which are publicly owned or form part of institutions of a cultural or scientific nature, provided the reproduction is carried out solely for research or preservation purposes.

This article is echoed in Art. 5.2. (c) DDASI (2001):

2. The Member States may establish exceptions or limitations to the right of reproduction set forth in article 2 in the following cases:

*c) in relation to **specific acts of reproduction** carried out by libraries, teaching establishments or museums open to the public, or by archives, that do not seek to obtain a direct or indirect economic or commercial benefit;*

¹³ See for instance, CJEU ruling of 3.09.2014, *Deckmyn v. Vandersteen* (C-201/13) ECLI:EU:C:2014:2132, # 19: “see in this regard, the ruling Diakité, C 285/12, EU:C:2014:39, paragraph 27 and cited case law.”

¹⁴ In general, see GOTZEN.

a) Of protected works and other subject matter

The making of copies (acts of reproduction) of **all manner of works** is authorised: books and journals, periodicals, works of art, audiovisual and musical works, etc. By extension (Art.132 TRLPI),¹⁵ this legal authorisation also includes the use of **protected subject matter** as set out in Book II, such as mere photographs, phonograms and audiovisual recordings.

Such works and other subject matter must be **deposited** in the beneficiary entities or form part of their collection.

Computer programs and DBs have specific limitations with regard to the “legitimate user” (Art.100 & Art.34 TRLPI). Although this is debatable,¹⁶ nothing prevents them from also benefiting from Art.37.1 TRLPI. For example, Art.34.2b) TRLPI already allows copies used in teaching and scientific research for illustration purposes; but nothing would prevent copies being made of a data base for preservation purposes. Likewise, and in addition to the security copies allowed under Art.100.2 TRLPI and copies made for the purposes of interoperability and reverse engineering or decompiling (Art.100.3 & 4 TRLPI), nothing would prevent a copy being made of computer programs for research purposes under Art.37.1 TRLPI.

The **requirement of prior disclosure** also gives one food for thought. In principle, and since these are works included in a library catalogue, it is logical to assume that these have been lawfully disclosed and, therefore, the requirement of prior disclosure of any works and other subject matter that could be reproduced for research and preservation purposes would appear logical. However, the concept becomes blurred when dealing with works and other subject matter available in “music libraries, film libraries, newspaper libraries or archives”: supposedly many of them are unpublished works or other subject matter that have not been previously disclosed. In such cases, it would make no sense to exclude them from the scope of Art.37.1 TRLPI, as this would be tantamount to drastically restricting the opportunities for research and even the need of preservation they deserve.¹⁷ If not required by the law, it should equally not be required by its interpretation.

Indeed, it is very possible that some of the works and other subject matter being reproduced for preservation or research purposes are “**orphan works**”. 2012/28/EU, of 25 October, on certain permitted uses of orphan works, allows libraries, museums

¹⁵ Article 132 TRLPI: “*Subsidiary application of the provisions of Book I. The provisions contained in article 6.1, section 2 of chapter III, of Title II and in chapter II of Title II, except as established in the second paragraph of the second point of article 37, both in Book I of this Law, shall be applied, alternatively and where relevant, to the other intellectual property rights regulated in this Book.*”

¹⁶ Against it, LOPEZ MAZA, *op.cit.*, 729: “Insofar as this type of works is subject to a special limitations system, that set forth in article 37.1 LPI shall not be of application”.

¹⁷ For instance, Sec.43 Copyright Act of the UK allows the copying of undisclosed works following a prior statement, to be made by the requesting party, that it will be exclusively used for private study or research purposes. On the other hand, other authors favour the requirement for prior disclosure for the limit of Art.37.1 TRLPI: see LOPEZ MAZA, *op.cit.*, p.720

and public archives to digitise and make publicly available on the Internet any “orphan works” – of an indeterminate or uncontactable author – in their collections after having performed a “diligent search” and unable to locate the rights holder, and safeguarding the possibility that the author may appear at any time and put an end to said disclosure. This was transposed in **Art.37bis TRLPI** by Law 21/2014.

Nevertheless, Art.37bis TRLPI does in no way affect the scope of Art.37.1 TRLPI: the fact that a work or material can be classified as orphaned for the purposes of the former does not prevent it from being reproduced for the purposes of the latter. In fact, performing an unsuccessful diligent search (or its registration in the EUIPO) is not necessary in order to make copies of orphan works for preservation or research purposes pursuant to Art.37.1 TRLPI.

b) Acts of reproduction in any format or medium.

Reproduction can be carried out in any **format or medium**, largely depending on the type of work in question; for instance, a photocopy, or a scan or digital copy.¹⁸ Insofar as it does not entail the transformation of the work or material, scanning is a mere act of reproduction.

Once again, if not differentiated by the law, it should not be differentiated by its interpretation, thus accepting reproduction in any format, provided this is respectful of the three step rule (Art.40bis TRLPI).

No mention is made regarding **who must make the copy**. It could be made by the staff of the beneficiary institution or else directly by the researcher using the equipment made available by the entity for this purpose. Here it will be important to distinguish between copies made pursuant to this limit and those made pursuant to the limit on private copies subject to compensation (Arts.31.2 & 25 TRLPI), and even from the so-called “public copy” which requires the pertaining licence.¹⁹

Formally, Art.37.1 TRLPI *only* allows the making of copies (acts of reproduction) of works. Despite not making a formal mention, this limit is understood to also extend to the delivery of the copy made to the researcher, whether on-the-spot or sent by fax or by post. This is the result of having applied the principle of teleological interpretation: use an interpretation that allows, in each case, the purpose of the limit to be fulfilled.

¹⁸ See for instance, CARBAJO CASCON, p.170: “it shall include all reproduction techniques available at the various beneficiary institutions (i.e. reprographic, photographic, microfilm, mechanical, digital, etc.)”.

¹⁹ For example, if the researcher takes the work out on loan (or obtains it from another establishment) and makes a copy using his or her own means, this will be deemed to be a private copy for the purposes of Art.31.2 TRLPI; on the contrary, if the copy is made via a photocopying service, this would be deemed to be a licensed “public copy”. See the licences offered by CEDRO for libraries and reprography establishments, among others: <https://www.cedro.org/usuarios/licencias-de-derechos-de-autor/licencia-anual/instituciones/bibliotecas-y-centros-de-documentacion> ; <https://www.cedro.org/usuarios/licencias-de-derechos-de-autor/licencia-anual/empresas/establecimientos-reprograficos>

Less peaceful is the issue of whether the copy made in accordance with this provision can be delivered to the researcher in digital format, for instance, via electronic mail. This is what is known as **DDS: document delivery service**, provided by most libraries with the advent of digital technologies.

The technology is divided on this issue: some believe that the sending of copies of a work via electronic mail is not covered;²⁰ whereas others believe that it is.²¹ In practice, several reasons lead us to favour the second interpretation, **in favour of permitting the DDS under Art.37.1 TRLPI**:

Firstly, the principle of **technological neutrality**. If the scope of the limitation also allows for delivery to the researcher in analogue format, on-the-spot or by mail, this should also be allowed in digital format: for the interpretation of the limitation (covering both the rights of reproduction and distribution) to have the same scope in any format. Insofar as the purposes of the research justify reproduction in any format, it does not make sense to allow copies in digital format to be made but only allow delivery thereof to the researcher in the case of copies in analogue format.

In accordance with Art.5.4 DDASI (2001) Member States may apply these same exceptions or limitations established for the right of reproduction (Arts.5.2 & 5.3 DDASI) to the right of distribution (defined in Art.4 DDASI, Art.19 TRLPI)²² “to the extent justified by the purpose of the authorised act of reproduction.” A **teleological interpretation** of the limitation (to meet the purpose thereof) therefore justifies that the copy made for research purposes should reach whoever has requested it.

Once the “delivery” of the copy to the research has been admitted under Art.37.1 TRLPI, there would be no need to resort to any other justification. However, one might alternatively call into question whether sending a copy by fax, post or even electronic mail can be qualified as an act of distribution to the “public”, given the **meaning of “public”** defined by the CJEU,²³ insofar as it is “**indeterminate and substantial**”:

- Indeterminate, in the sense of “people in general” who may potentially have access to the work, as opposed to “individuals belonging to a private group” (for instance, related family members, or communication made within a household domain) including “successive public” (for instance, successive occupants of hotel rooms);

²⁰ See GARROTE (2019), *op.cit.*, pp.447: by classifying it as an act of public communication to the extent that it makes it publicly available, it falls outside of the scope of the limit; LOPEZ MAZA, *op.cit.*, pp. 720: it understands that it includes the sending by fax or post but not by digital means.

²¹ See CARBAJO CASCÓN, *op.cit.*, p.188

²² Art.4 DDASI (2001) defines the right of distribution as “the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.” This right shall be exhausted in the Community ... [when] the first sale or other transfer of ownership of that object is made by the rightholder or with his consent“.

²³ See CJEU (8.2.2000) *EGEDA v. HOASA*, C-293/98; CJEU (7.12.2006) *SGAE v. Rafael Hoteles*, C-306/05; CJEU (15.03.2012) *SCF v. Del Corso*, C-135/10; CJEU (15.03.2012) *PPL v. Ireland*, C-162/10; CJEU (23.02.2016) *Reha Training* C-117/15.

- substantial, in the sense of including “a considerable number of people” as opposed to a “small or insignificant number”. To make a copy for a specific researcher does not quite fit in with this definition of public.

Libraries must of course take precautions when carrying out the DDS under this limitation: for example, ensuring that this digital copy shall not be made available to other researchers, as this would pertain to the scope of the right to public disclosure, in terms of making it available (Art.20.2(i) TRLPI) – an act of exploitation that would clearly fall outside to the scope of the limitation. If the copy made for research or preservation purposes were to be subsequently made available to the public (of an indeterminate and substantial public) via the Internet, this is precisely what Whereas clause 40 of the DDASI seeks to prohibit: “Such an exception or limitation should not cover uses made in the contract of online delivery or protected works or other subject matter”.

As for the **permitted length of the copy**, and despite Art.37.1 TRLPI not having established any restriction in this regard, the length of a copy must be “in line with the purpose sought”.²⁴ In the case of preservation, this purpose shall permit the reproduction of the entire work or material. In the case of research, the length shall be determined (and justified) according to requirements. In any event, the type of work or material must always be taken into consideration along with Art.40bis TRLPI (three step rule) which will lead us to conclude that, for instance, the copy of a magazine article or a chapter of a book is permitted for research purposes, but not of the entire book or all of the articles in the magazine; or that the entire copy of an artistic work is permitted... to the extent required to carry out the research and meet the three step rule.

c) For research or preservation purposes.

Reproduction must be made “exclusively for research or preservation purposes”. Once again, the lawmakers have elected to apply a more restrictive definition than that set forth in Art.5.2.c) DDASI (2001) which simply refers to “**specific acts of reproduction** ... which are not for direct or indirect commercial or economic advantage”. The purposes of research and preservation are clearly “specific acts” and, depending on the more or less restrictive interpretation made of such terms, the scope of the limitation may vary substantially.

Three criteria can be of assistance with this: the teleological criterion, the conforming interpretation criterion and that of restrictive interpretation (three step rule).

²⁴ This equity criterion is applied both in international law (i.e., Art.10.3 Berne Convention, for the limitations on citation and teaching) as community law (i.e. Art.5.4 DDASI: “to the extent justified by the purpose of the authorised act of reproduction” to extend the right of reproduction to that of distribution; Art.5.3b) people with a disability; Art.5.3c) for communication purposes; Art.5.3.d) quotations; Art.5.3.f) public speeches; Art.5.3.j) catalogues) and, as a last resort the underlying three step rule (Art.40bis TRLPI y Art.5.5 DDASI) which must be applied to all limitations.

i. Research purposes

Under an exclusively restrictive interpretation (three step rule), only scientists and researchers (whether university professors or doctoral students, insofar as they carry out research activities) could be understood to be subject to this limitation; to the exclusion of journalists, attorneys or university students.²⁵ In our opinion, a restrictive interpretation of the scope of the limitation to those carrying out research as a professional activity,²⁶ is contrary to the public interest sought with this limitation and the very mission and social function of the entities benefiting therefrom.

For this reason, we support a teleological interpretation of the limitation “for research purposes” that allows for the “safeguarding of the effectiveness of the established exception and respect its purpose.”²⁷

Moreover, a “conforming” interpretation would even lead us to surpass the formal research purposes requirement, since the limitation Art.5.3.c) DDASI (2001) only refers to “specific acts of reproduction ...” Hence, for instance, in the *Deckmyn* case, the CJEU defined the concept of parody according to the “usual meaning of parody in everyday language” (#24) and “to the purpose sought by [the limitation] (#25)”.²⁸ And once defined, it concluded that since this is an “autonomous concept in community law”, the national law must adhere to this definition and cannot apply more restrictive criteria (in this specific case, removing the requirement that the resulting work must in turn be an original work, as had been set forth in the parody limitation in Belgian law).²⁹

In fact, in the *Darmstadt* case,³⁰ the CJEU admitted that under the preservation limitation of Art.5.2.c DDASI (2001) “specific acts of reproduction” may be performed in order to render effective another limitation: making it available via dedicated terminals in Art.5.3.n DDASI (2001). It is not concerned with bringing about “the digitisation of all of its collections”, but instead the “digitisation of some of its

²⁵ See LOPEZ MAZA, *op.cit.* p.724: “only copies made by duly accredited researchers may fall hereunder”.

²⁶ See MARTIN SALAMANCA, *op.cit.* p.348: “there is no reason to consider research as an activity that is exclusive to those who perform it as a professional activity.”

²⁷ See CJEU ruling of 3.09.2014, *Deckmyn v. Vandersteen* (C-201/13), ECLI:EU:C:2014:2132 # 23: “The interpretation of the concept of parody must, in any event, enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed.” See also CJEU ruling of 21.10.2010, *Padawan v. SGAE* (C-467/08), EU:C:2010:620, #43; CJEU ruling of 1.11.2011, *Painer v. Standard VerlagsGmbH et al*, (C 145/10), EU:C:2011:798, #132.

²⁸ See CJEU ruling of 3.09.2014, *Deckmyn v. Vandersteen* (C-201/13), ECLI:EU:C:2014:2132 # 25: “freedom of expression that parody is an appropriate way to express an opinion. ”.

²⁹ See CJEU ruling of 3.09.2014, *Deckmyn v. Vandersteen* (C-201/13), ECLI:EU:C:2014:2132 # 33: “The concept of ‘parody’, within the meaning of that provision, is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work..”

³⁰ See CJEU ruling of 11.11.2014, *Technische Universität Darmstadt v. Ulmer* (C-117/13) ECLI:EU:C:2014:2196, # 45-46.

works...” in order to make possible other limitations. We shall have the opportunity to analyse this case in chapter III.3.b).

Another issue altogether is the difficulty, or even the impossibility, of controlling the existence of such a research purpose. In fact, we agree with MARTIN SALAMANCA regarding the “expendability”³¹ of controlling this purpose and to assume it as integrated (and met) within the scope already defined through the identification of the entities benefiting from this limitation: since all of them, in the final analysis, fulfil a function of public interest by enabling access to the content in their possession. In other words: to fulfil the effectiveness and objective of the limitation, we could presume that any person requesting a copy of a work or material deposited therein, does so for the purposes of research.

And to conclude, the concept of “purposes of research” must be interpreted as also including teaching purposes. Not only because it is allowed by the limitation set forth in Art.5.2c) DDASI (since it does not pre-establish specific objectives) and because research and teaching are so closely related that in practice it would not be possible to differentiate between the copies made, but also for reasons of consistency with the teaching limitations set forth in Art.32.3 and 4 TRLPI as well as the entities listed in other paragraphs of Art.37 TRLPI.³²

ii. *Preservation purposes*

The first draft of Art.37.1 appearing in the IPL of 1987 only included research purposes; preservation purposes were added by Law 23/2006, transposing the DDASI.

Once again, the interpretation of the scope of this concept must take into account, on the one hand, the **safeguarding of the effectiveness and purpose of the limitation (teleological principle)**: that beneficiary entities may fulfil their objective of preserving and enabling public access to cultural heritage; and may also achieve a “**fair balance**” between the interests of the author and those of the public;³³ and finally and naturally, respect for the **three step rule** (Art.40bis TRLPI, Art.5.4 DDASI (2001)).

As a result of this balance of interests, there are some who support the establishment of cumulative requirements to determine the scope of the preservation copies permitted under Art.37.1 TRLPI. Requirements such as the following are being put forward:

- That the copy in the hands of the beneficiary entity is damaged or at risk of being damaged;

³¹ See MARTIN SALAMANCA, *op.cit.*, p.349.

³² We shall revisit this subject in the next paragraph, when analysing beneficiary entities.

³³ See CJEU ruling of 3.09.2014, *Deckmyn v. Vandersteen* (C-201/13), ECLI:EU:C:2014:2132, # 26; CJEU ruling of 21.10.2010, *Padawan v. SGAE* (C-467/08), EU:C:2010:620, #43; CJEU ruling of 1.11.2011, *Painer v. Standard VerlagsGmbH et al*, (C 145/10), EU:C:2011:798, #132.

- That the entity is not able to acquire a new copy in the market (due to being too expensive or discontinued);
- That the entity has no other copies or does not have them in any other format (for instance, hardcopy and digital).³⁴

The aim is to restrict the limitation to cases of single copies where the acquisition of new copies is difficult. This can easily be applied to works and other subject matter deposited in heritage museum-libraries or archives (usually manuscripts or only surviving copies of works or other subject matter), but less so with regard to works and other subject matter in libraries, music libraries or film libraries, whose copies can be easily purchased in the market.

However, we believe this interpretation to be excessively restrictive, and not in accordance with the *acquis communautaire* (specifically, the Art.6 DDAMUD, 2019) nor respects the doctrine of the CJEU (specifically, the ruling in the *Darmstadt* case).

The CJEU has expressly rejected this restrictive interpretation (and the demand for such requirements) in the *Darmstadt* case,³⁵ where it confirms that the university library is able to make digital format copies (using a scanner) of printed works in its catalogue (and even make them publicly available via dedicated terminals - ex Art.37.3 TRLPI), even when there are e-books (digital format copies) in the market of such works made public by the publisher. The library is not obliged to acquire new copies in digital format in the market and allowed - under the national limitation (ex Art.5.2.c DDASI, 2001) – to scan the printed copy. Moreover, the CJEU admitted such scanning (under the preservation limitation) when necessary to carry out other legitimate uses, such as the subsequent availability thereof via dedicated terminals (under the limitation of dedicated terminals set forth in Art.5.3.n DDASI, 2001):

44 Those establishments are recognised as having such a right pursuant to Article 5(2)(c) of Directive 2001/29, provided that ‘specific acts of reproduction’ are involved.

45 That condition of specificity must be understood as meaning that, as a general rule, the establishments in question may not digitise their entire collections.

46 However, that condition is, in principle, observed where the digitisation of some of the works of a collection is necessary for the purpose of the ‘use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals’, as provided in Article 5(3)(n) of Directive 2001/29.

³⁴ See LOPEZ MAZA, *op.cit.*, p.724.

³⁵ See CJEU ruling of 11.11.2014, *Technische Universität Darmstadt v. Ulmer* (C-117/13) ECLI:EU:C:2014:2196.

Furthermore, the purpose of preservation has been enhanced by the **new uniform and mandatory limitation set forth Art.6 DDAMUD (2019)**.³⁶ This limitation shall be subject to analysis in subchapter (3). For the time being, suffice it to mention that both Art.6 and whereas clause 27 of this DAMUD Directive confirm that copies for preservation purposes can be made “in any format or medium”, “at any point in the life of the work or any other subject matter” and that “technological obsolescence” or “degradation” are not required to make it possible, but rather, examples of such preservation. In addition, whereas clause 27 expressly allows copies to be made as permitted by other limitations; as the CJEU had previously concluded in the *Darmstadt* case.

Whereas Clause 27:

Member States should, therefore, be required to provide for an exception to permit cultural heritage institutions to reproduce works and other subject matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports or to insure such works and other subject matter. Such an exception should allow the making of copies by the appropriate preservation tool, means or technology, in any format or medium, in the required number, at any point in the life of a work or other subject matter and to the extent required for preservation purposes. Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for in Union law.

An in-depth analysis of this new limitation is included in subchapter (3). For the time being, we conclude in favour of a teleological and balanced interpretation, instead of an exclusively restrictive one, of the limitation for preservation purposes to enable the flexible making of copies when justified by the legitimate purpose pursued and public interest fulfilled by the beneficiary institutions.

d) Beneficiary institutions.

Art.37.1 TRLPI mentions two types of **beneficiary institutions**: the “museums, libraries, music libraries, film libraries, newspaper libraries or archives” that are

- *Publicly owned*
- *Or integrated into cultural or scientific institutions*

This therefore includes, both beneficiary institutions (museums, libraries, music libraries, film libraries, newspaper libraries or archives) that are publicly owned (by the State, Autonomous Communities, Local Administration, etc.), as well as privately owned institutions that “are integrated into cultural or scientific institutions”. This

³⁶ Directive 2019/790/UE, of 17 April 2019, on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC.

means that the limitation may benefit private institutions dedicated to safekeeping and archiving of cultural objects, when these are publicly accessible (not private collections), carry out a cultural or scientific communication activity and meet all other criteria set out in the precept.

It is important to bear in mind that Art.5.2.c DDASI (2001) refers more generously to “*libraries, teaching institutions or museums accessible to the public, or by archives*”, not insisting that beneficiary institutions should be publicly owned. Moreover, under the new uniform limitation of Art.6 DDAMUD, the scope for the beneficiary institutions to make preservation copies is generously broadened with the definition of Art.2.3 DDAMUD:

“cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution;”

Therefore, insofar as the new preservation limitation of Art.6 DDAMUD does not make a distinction between publicly and privately owned institutions, the current distinction (excessively complex and restrictive) of Art.37.1 TRLPI needs to be reviewed in order to adapt it to the new established limitation (in a uniform and mandatory manner) in Art.6 DDAMUD. See subchapter (3).

In short, the relevance and scope of the limitation is due more to the public interest fulfilled by these institutions (access to culture and information) than to whether the institutions are publicly or privately owned.

It is particularly odd that the national lawmakers have persisted in **excluding teaching institutions** from the scope of Art.37.1 TRLPI, which can only be understood under the restriction of the limitation for research and preservation purposes. The exclusion of teaching institutions (at any level and both publicly and privately owned) equally clashes with all other limitations set forth for illustration purposes in teaching in Art.32.3 and 4 TRLPI: from where will teachers and professors obtain the works to be used in teaching, if not from the libraries of their own institutions and others?³⁷ It would appear that the Spanish lawmakers had had the chance to adopt a broader formal drafting of this limitation, both when processing the IPL of 1987 and Law 23/2006 of transposition of the DDASI³⁸ but failed to do so.

In light thereof and *a priori*, one might conclude that only academic libraries (that is, universities and research centres) are able to benefit from Art.37.1 TRLPI, to the detriment of schools and professional collegiate libraries.³⁹ In our opinion, a flexible interpretation of such research purposes would allow the inclusion of such libraries as beneficiaries of this limitation as well, particularly when making copies for

³⁷ In other words, the limitations set in Arts.5.3a) and 5.2c) DDASI are “better integrated” than those in Arts.32.3 ad 4 and 37.1 TRLPI.

³⁸ See for instance, CARBAJO CASCON, *op.cit.* p.171.

³⁹ See LOPEZ MAZA, *op.cit.* p.721-722.

preservation purposes (since the new limitation of Art.6 DDAMUD refers to any “library... accessible to the public”, without making any distinction between them),⁴⁰ but also for the purposes of research by students and professionals in general.⁴¹ Nevertheless, it will be hard for this limitation to be extended to libraries or archives of (privately owned) organisations that are not of public access, such as law firms, architects’ studios or production businesses.⁴²

In other words, **the libraries in teaching centres and universities, both of private and public ownership**, would perfectly adapt to the framework of community law. This means that, although teaching institutions may not be formally identified, libraries in schools, institutes or private universities may also benefit from the limitation; as well as libraries of privately owned research centres.

e) Non-commercial purpose

In any event, copies made in accordance with Art.37.1 TRLPI must be made **“for a non-commercial purpose.”**

Here, in accordance with the principle of “conforming” interpretation, and to understand the meaning of the absence of “economic purpose”, it is important to refer to Whereas Clause 42 DDASI (although referring to limitations for education and research purposes of Art.5.3a DDASI) sets forth that:

“...the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect...”⁴³

Therefore, commercial purpose must refer to the obtaining of an economic or commercial advantage directly from the copy made (whether for preservation or research purposes), rather than to the public or private nature of the institution that makes it. Otherwise, privately owned entities “integrated in institutions of a cultural or scientific nature” would not be included and, on the other hand, it could be wrongly inferred that publicly owned beneficiary institutions are able to charge money for such copies.

However, there is no lucrative purpose when the beneficiary institution charges a fee to cover costs incurred in obtaining the copies, or which include the expenses incurred in operating the service.

⁴⁰ See Art.2.3 DDAMUD which defines “institution responsible for cultural heritage”.

⁴¹ In favour of a broad interpretation of the institutions benefiting from the limitation, in the sense of including all manner of centres or institutions that carry out a cultural promotion or dissemination activity, see RODRIGUEZ TAPIA / BONDIA ROMAN, *op.cit.* p.187-188; CARBAJO CASCON, *op.cit.* p.169; MARTIN SALAMANCA, *op.cit.* pp. 345-346.

⁴² CEDRO offers licences to laboratories, law firms, training companies and businesses in general: <https://www.cedro.org/usuarios/licencias-de-derechos-de-autor/licencia-anual/empresas>

⁴³This is repeated in Whereas Clause 20 DDAMUD (2019), regarding the limitation of Art.5 DDAMUD on the use of works and other subject matter for digital and cross-border education activities.

Naturally, the use of the copy obtained for economic purposes by the researcher or institution is likewise not protected by Art.37.1 TRLPI.

f) No compensation.

The copies made under Art.37.1 TRLPI do not require the payment of any compensation whatsoever to authors or rightholders. Similarly, it is not required under Art.5.2.c DDASI (2001) although it does allow it. See Whereas Clause 36 DDASI (2001):

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

In this context, the non-requirement of compensation is easily explained insofar as such copies are made for no commercial purpose and in these "specific" cases such as research and preservation. The national lawmakers understand that the acts permitted under Art.37.1 TRLPI do not conflict with the ordinary exploitation of the work nor cause unfair prejudice to the legitimate interests of its author (Art.40bis TRLPI). This does not mean that the prejudice caused by the copies made for research or preservation purposes is "minimal" and, therefore, the charging of compensation does not apply,⁴⁴ but rather that, in light of the public interest justifying the limitation (the preservation and access to culture and information), the prejudice that might be caused to the author is not considered "unfair".

Naturally, the absence of compensation also requires, indirectly, a very precise interpretation of the scope of the acts of reproduction that fall under this limitation.

In fact, the restrictive interpretation (in accordance with the three step rule) is that which ensures that the copies made by self-service (via the use of equipment situated in the library or archive, in return for a fee and managed by a photocopying business)⁴⁵ are not subject to the limitation of Art.37.1 TRLPI or of that of private reproduction (Art.31.2 TRLPI), but instead subject to the need for a licence-managed by the pertaining management body, CEDRO.⁴⁶

⁴⁴ As explained in Whereas Clause 35 DDASI (2001): "(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. 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. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise."

⁴⁵ See MARTIN SALAMANCA, *op.cit.* p.351. See CARBAJO CASCON, *op.cit.* p. 176.

⁴⁶ See the different licences offered by CEDRO in its website:
<https://www.cedro.org/usuarios/licencias-de-derechos-de-autor>

Far more forceful, the new uniform and mandatory limits for preservation purposes of Art.6 DDAMUD (2019) prohibits the charging of any compensation whatsoever, believing that the potential prejudice for the rightholders that might arise from this exception would be minimal.⁴⁷ This is due to having been construed as an “exception” rather than a “limitation”. This is possibly the first Directive that makes a clear distinction between the exception and limitation according to the possibility or otherwise of charging compensation.

2. Technological protection measures (TPM).

Another technical aspect with regard to limitations is that which affects its relationship with technological measures: “any technique, device or component which, in its ordinary working order, is designed to prevent or restrict acts referring to protected works or other subject matter, without the authorisation from the rightholder” (Art. 196.3 TRLPI).

On the one hand, the implementation of technological measures is necessary to enable the development of new markets for exploitation of works and other subject matter in digital formats. On the other, such technological measures can de facto utterly block the access and reproduction of such works and other subject matter, rendering the cases permitted under the legally established exceptions unfeasible.

With the transposition of the DDASI (2001) and, indirectly, of the WIPO Internet Treaties (1996), the protection of technological measures and rights management (TPM and DRM) was introduced in the national legislation (Art. 160 TRLPI). The interface between the TPMs, which enable the control of access and copying of protected works and other subject matter, and their limitation, is governed by Art.161 TRLPI (ex Art.6.4 DDASI, 2001). This is clearly a highly inadequate relationship.

In principle, technological measures (both for controlling access and controlling copying) are subject to the limitations set forth in the intellectual property law, except in the case of protected content obtained online under a licence. As set forth in Art.197.5 TLRPI (ex Art.6.4(4) DDASI, 2001), when the works and other subject matter are made available to the public on the Internet in accordance to contractual agreement, the contractual terms shall prevail over any legally established limitation.⁴⁸

However, the law aims to safeguard some of the limitations against the danger posed by the use of technological measures; the limitation for preservation and

⁴⁷ This is explained in Whereas Clause 17, although referring to the “exception” of data and text mining for research purposes set forth in Art.3 DDAMUD.

⁴⁸ The aim is to support the development of business models on the Internet. However, in practice one might end up violating the fragile balance of interests pursued by the lawmakers through the definition of the limitations.

research purposes (Art.37.1 TRLPI, ex Art.5.2.c DDASI, 2001) is among these limitations that we could call “guaranteed” or “privileged”.⁴⁹

To ensure the effectiveness of these “guaranteed” limitations against technological measures, the rightholders shall be responsible for setting the conditions to make possible for the users to benefit from the uses permitted by law without their authorisation (limitations); in the absence thereof, the State must adopt the necessary measures to ensure that such permitted uses become a reality (Art. 197.1 TRLPI). The TRLPI merely states that the beneficiaries (including user and consumer associations) may request from the courts any required countermeasures when carrying out legally authorised acts of exploitation (art. 197.2 TRLPI).

In any event, the protection of the technological measurements should not exceed the scope of protection set forth in the law. Thus, for instance, once a work is in the public domain (and no copyright protected), the avoidance of an access or copying technological control measure would not constitute an infringement.⁵⁰ Likewise, although nothing prohibits the use of technological measures to control the access or copying of unprotected content, their avoidance would not constitute an infringement; but this is a very controversial issue, since protected and unprotected works can often form part of one same product.

At this stage one might ask: Could a library “avoid” a TPM to exercise an act of exploitation authorised by the limitation for preservation and research purposes? In principle, the answer is yes (unless it relates to content obtained under licensing). In fact, at least with regard to copying for preservation purposes, Art.7 DDAMUD formally permits the avoidance of a technological measure that would prevent it from happening, as we shall see later on in subchapter (3).

In actuality, the beneficiary institution will not always be in a position to avoid a TPM, possibly due to lacking sufficient technical knowledge to do so.

3. Art.6 DDAMUD: new limitation for the preservation of cultural heritage.

Directive 2019/790, of 17 April 2019, on copyright and related rights in the digital single market (DDAMUD) has been subject to transposition by RDL 24/2021, of 2 November (Arts.68 to 80), the validation of which is being processed as an ordinary law and not expected to suffer much of a change.

The DDAMUD establishes four limitations of a mandatory nature for Member States: the mining of text and data (Art.3-4), cross-border education (Art.5), preservation of cultural heritage (Art.6) and use of out-of-commerce works (Art.8-10).

⁴⁹ See Art.161.1(f) TRLPI.

⁵⁰ See GARROTE (2017), *op.cit.* p.2231.

Specifically, Art.6 DDAMUD (2019) obliges Member States to establish an *exception* for institutions responsible for cultural heritage to make copies of the works and other subject matter permanently included in their collections, in any format or medium, for the purpose of preserving such works and other subject matter and to the extent necessary for said preservation.

Article 6 Preservation of cultural heritage

*Member States shall provide for an **exception** to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 15(1) of this Directive, in order to allow **cultural heritage institutions** to make **copies** of any **works or other subject matter that are permanently in their collections**, in **any format or medium**, for purposes of preservation of such works or other subject matter and **to the extent necessary** for such preservation.*

As we have had the opportunity to mention earlier, this “exception” refers to the right of **reproduction** of all manner of works and other subject matter, including computer programs and data bases, as well as the *sui generis* right over the data base by the legitimate user thereof.⁵¹

The beneficiaries of this exception are the “**cultural heritage institutions**” as defined in Art.2.3 DDAMUD (2019) very broadly, for the simple reason of being **accessible to the public**:

« ‘cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution;
;

This definition is *verbatim* in Art.66.2 RDL which, interestingly, also adds the following:

National libraries and national archives are also understood as included and, with regard to their archives and libraries accessible to the public, teaching institutions, research bodies and radio broadcasting bodies of the public sector.

This addition is surprising and inefficient. Firstly because the failure to mention anything regarding the public or private ownership of such institutions leads us to conclude that both public and privately owned libraries and archives are able to benefit from this new uniform limitation, provided they are accessible to the public. Therefore, publicly accessible libraries and archives in “teaching institutions, research bodies and public sector broadcasting bodies” are already included in the uniform definition of Art.2.3 DDAMUD. In other words, with this addition, the national lawmakers will not be able to discriminate “libraries and archives...” of the private sector (assuming this was the intention), since the definition of the Directive (clear

⁵¹ It is also applicable to the new connected right granted by Art.15 DDAMUD to press publishers, for the online use of press publications.

and direct) shall prevail over any opposite interpretation that might arise from the addition contained in Art.66.2 RDL.

The preserved **works or other subject matter** must remain “permanently” in the collections of the beneficiary institutions. Copies made for preservation purposes may be made “in any format and any medium” (therefore including digitisation), “to the extent necessary” for their preservation (thus also including the full digitisation of a work).

As **examples** of this preservation, Whereas Clause 27 DDAMUD (2019) sets forth: “for example to address technological obsolescence or the degradation of original supports or to insure such works and other subject matter.”

This uniform exception *does not require* compensation; in fact, **it does not permit any compensation whatsoever**. The DDAMUD (2019) clearly distinguishes between an “exception” and a “limitation”, in terms of the possibility of requiring compensation on the part of the Member States. Therefore, the limitations of Art. 3 and 6 are “exceptions”, which do not allow them to be subject to any compensation whatsoever (in the understanding that the harm caused to the rightholders is minimal);⁵² whereas the limitations of Art.4 and 5 are established as “exceptions or limitations” leaving their specification in the hands of the national legislator. Until then, previous Directives had generically referred to “exceptions or limitations”,⁵³ but in the DDAMUD, which establishes limitations that are uniform for the whole of the EU, it has been obliged to be more specific.

This exception has been implemented in the national legislation in Art.69 RDL 24/2021, which reads as follows:

Article 69. Preservation of cultural heritage.

1. Cultural heritage institutions may make, without the authorisation of the holders of the intellectual property rights, reproductions of the works or other subject matter that are **permanently in their collections**, using adequate preservation tools, means or technologies, in **any format or medium, in the necessary amount and at any point of the life** of a work or other subject matter, and **to the extent necessary** for preservation purposes.
2. Cultural heritage institutions may **resort to third parties** to act in their behalf and under their responsibility, including those established in other Member States, for the execution of any reproductions they are lawfully authorised to carry out.
3. Notwithstanding what is set forth in the legal regulation on provisional reproductions and private copying, the authorisation of the author of a **data base** that is protected and disclosed will not be necessary to make its reproduction, when made

⁵² This is explained in Whereas Clause 17, referring to the “exception” in the mining of text and data for research purposes set forth in Art.3 DDAMUD (2019): *In view of the nature and scope of the exception, which is limited to entities carrying out scientific research, any potential harm created to rightholders through this exception would be minimal. Member States should, therefore, not provide for compensation for rightholders as regards uses under the text and data mining exceptions introduced by this Directive.*

⁵³ See for instance, Art.5 DDASI (2001) referring at all times to “exceptions and limitations”.

for the purposes of preservation of the cultural heritage in accordance with article 37 of the consolidated text of the Intellectual Property Law.

4. The legitimate user of a data base, irrespective of the manner this may have been disclosed, may, without requiring the authorisation from the manufacturer of said data base, reproduce a substantial share of the contents thereof, when for the purposes of preservation of the cultural heritage in accordance with article 37 of the consolidated text of the Intellectual Property Law.

Art.69 RDL therefore not only transposes the text of Art.6 DDAMUD but also that of Whereas Clauses 27 to 29, except for the following aspects:

- Whereas Clause 29 DDAMUD (2019) which defines when a work or other subject matter is **permanently in the collection** of a cultural heritage institutions:

... when copies of such works or other subject matter are owned or permanently held by that institution, for example as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements..

- The final part of Whereas Clause 27 confirms the possibility of combining limitations:

Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for in Union law.

Both Whereas Clauses are important with regard to achieving a uniform application of this limitation throughout the EU, as the Directive intends, and therefore, despite not having been formally transposed in Art.69 RDL (and Art.66 RDL) they must affect the interpretation of such an exception. Perhaps the inclusion of the explanation contained in Whereas Clause 29 was deemed unnecessary, in the belief that “permanently” is sufficiently explicit; but the final part of Whereas Clause 27 is particularly relevant (and very much debatable by the doctrine, rightholders and beneficiaries of the limitations) and, therefore, its formal transposition would have been advisable in order to prevent more doubts arising on the issue: **it is possible to combine limitations.**⁵⁴

In any event, and in light of the close relationship with Art.37.1 TRLPI and at least from a legislative technique perspective, the amendment of Art.37.1 TRLPI (at least with regard to preservation) would have been desirable, instead of having transposed it separately in Art.69 RDL. Meanwhile, until both provisions do not come together, identifying the scope of each one will be difficult, particularly taking into account that the range of entities benefiting from Art.69 RDL is broader than that in Art.37.1 TRLPI.

⁵⁴ Thus confirming the conclusion already put forward by the CJEU in the *Darmstadt* (2014) case and which we shall be examining later.

In light thereof, and in accordance with the principle of conforming interpretation, Art.6 DDAMUD (2019) shall not only directly impact the interpretation of the limitation of Art.37.1 TRLPI but in fact, in the event of discrepancies, it will prevail over it.

Interestingly, the transposition of Art.6 (and other limitations) also fails to make any mention whatsoever of the two paragraphs of Art.7 DDAMUD, in the sense of “any contractual provision to contravening the exception being inapplicable” and regarding the application of the special protection of this limitation against the TPMs (referring to Art.6.4 DDASI, 2001). Likewise, no mention is made on its subjection to the three step rule. This is concerning insofar as this Art.66 RDL is not integrated (at least for the time being) into the TRLPI and, therefore, neither Art. 40bis TRLPI nor Art.197 TRLPI would be of application (as these are applicable to the limitation of Art.37.1 TRLPI).

In fact, Art 197 TRLPI has not been modified by the implementation of the DDAMUD, which means that the new mandatory limitations set forth in the DDAMUD are not deemed as included (at least for the time being) among the specially protected limitations in the absence of measures that have been voluntarily adopted by the rightholder to ensure that the TPMs do not prevent benefiting from such limitations. It is our understanding that a correct implementation of Art.7.2 DDAMUD requires the formal amendment of Art.197 TRLPI, as well as the integration of these limitations in the TRLPI.

But even more concerning is the fact that Art.7.1 DDAMUD (2019) has not yet been formally implemented to safeguard the preservation limitation against possible contractual clauses that might prevent such preservation copies from being made. This would be the very first time that a statement of this magnitude, which already exists in some other national legislation within the EU, would be reflected in our national legislation to confirm that the limitations are provisions of a public nature (*iuris et de iure*), and not pertaining to the rightholders.

Let's hope that the parliamentary process that has begun with the validation of the RDL will help to correct such imbalances. Specifically:

- To unify the limitation of Art.37.1 TRLPI (at least, with regard to preservation) with the uniform (and mandatory) limitation of Art.6 DDAMUD (implemented in Art.69 RDL), specifically by broadening the scope of the beneficiary institutions;
- To safeguard the uniform limitation for preservation purposes, with the scope set forth in Art.6 DDAMUD, against “any contractual provision to the contrary” as required by Art.7.1 DDAMUD;
- To formally include the uniform limitations of the DDAMUD (specifically, its Art.6) among the specially protected limitations of Art.197 TRLPI, as required by Art.7.2 DDAMUD;

- To remove any doubts regarding the fact that the new uniform limitation for preservation (currently in Art.69 RDL) is also subject to the three step rule (Art.40bis TRLPI);
- To formally establish the possibility of combining limitations, as set out in Whereas Clause 27 DDASI;

III. Public lending acts (Art.37.2 TRLPI)

The definition of **public lending right** is included as a modality of the right of distribution in Art.19.4 TRLPI:

Lending is understood as making available the original and copies of a work for use for a limited period of time for no direct or indirect economic or commercial advantage, provided this loan is made through establishments accessible to the public.

... Excluded from the concept of lending are the operations mentioned in the second point of paragraph 3 and those which take place between establishments accessible to the public.

Excluded, therefore, from the definition of public lending right are the inter-library loans and also, with regard to paragraph 3 of Art.19 TRLPI (on rental), “the making available work for the purposes of exhibition, public communication from audio or audiovisual recordings, even fragments of one or the other, and any made for consultation on site”.

The definition of public lending right has been harmonised by Art.1.3 Directive 92/100/EC, of 19 November 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property. Currently, Art.2.3 Directive 2006/115/CE of the European Parliament and of the Council, of 12 December 2006, on rental right and lending right and on certain rights related to copyright in the field of intellectual property [hereinafter DAP].

Once an exclusive public lending right has been recognised for authors and holders of related to an exclusive public lending right, within the framework of the exclusive distribution right, the DAP offered Member States the possibility of establishing “exceptions” thereto, provided at least the authors obtain remuneration.⁵⁵ And they were even allowed to replace this exclusive right with a simple right to remuneration in the case of holders of related rights (audio recordings, films and computer programs).

⁵⁵ At present, the joint reference made to exception and remuneration appears contradictory, since when we speak of limitations we are referring to a “compensation” and, as has been clarified in the DDAMUD (2019) the “exception” is not subject to compensation, as opposed to the “limitations”, which are. However, we maintain the original terminology of the DAP 1992, also maintained in the DAP 2006, to avoid confusion.

Article 6

Derogation from the exclusive public lending right

1. *Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.*
2. *Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.*
3. *Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.*

1. Limitation of Art.37.2 TRLPI

In Spanish law, the **public lending limitation** is set forth in Art.37.2 TRLPI:

Likewise, museums, archives, libraries, newspaper libraries, record libraries or film libraries in public ownership or pertaining to institutions of general cultural, scientific or educational interest not trading for profit, or to teaching institutions integrated in the Spanish educational system, shall not require the licence of the copyright holders or to pay remuneration to them for the loans that they make.

The owners of these institutions shall remunerate the authors for the loans made in the amount to be set by Royal Decree. Remuneration shall be paid via the copyright collection societies.

When the Municipalities are publicly-owned institutions, the remuneration shall be paid by the Provincial Government. In the absence thereof, the remuneration shall be paid by the Administration responsible for such functions.

Publicly-owned institutions providing their services in municipalities with less than 5000 inhabitants shall be exempt from this obligation, as well as libraries of teaching institutions forming part of the Spanish educational system.

El Royal Decree setting the amount shall also lay down the collaboration mechanisms between the State, the Autonomous Communities and the local corporations in order to comply with the obligations of remuneration affecting publicly-owned establishments.

Art.1.2 DDASI (2001) expressly safeguards what is set forth in DAP (1992).⁵⁶ Specifically, Whereas Clause 40 DDASI (2001) confirmed the validity of the public lending limitation, despite not having been included in the list of limitations and exceptions set out in its Art.5:

*This Directive should be without prejudice to the Member States' option to **derogate from the exclusive public lending right** in accordance with Article 5 of Directive*

⁵⁶ See Art.1.2 DDASI (2001): "... this Directive shall **leave intact and in no way affect** existing community provisions relating to: ...b) rental right, lending right and certain rights related to copyright in the field of intellectual property;"

92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

As we shall see, it was precisely this safeguard of Art.1.2 DDASI (2001) that allowed the CJEU to include controlled digital lending (CDL) within the public lending limits, as we shall confirm in subchapter (2) below.

a) On protected works and other subject matter

Public lending limit is thus defined by its very characteristics:

- It allows the use (of works and other subject matter) for a limited period of time,
- That this is done for no direct or indirect economic or commercial advantage,
- By establishments accessible to the public,
- And subject to remuneration payable, at least, to the authors.

As is the case with the previous limitation, the public lending limit is also applicable to **all manner of works and other subject matter** protected by the Intellectual Property Law.

In this case, such works and other subject matter are not required to form part of the collections of the beneficiary entities. Inter-library lending is excluded from the public lending right and therefore exempt from the payment of any remuneration whatsoever.

In accordance with Art.6 DAP, Member States may decide against granting an exclusive lending right for phonograms, audiovisual recordings and computer programs, whose authors may only benefit from a simple remuneration right.⁵⁷ The Spanish lawmakers have not elected to do this and have recognised the exclusive public lending right as part of the exclusive distribution right, for all authors and rightholders, for all manner of works and other subject matter. An exclusive right which it has then gone on to subject to the limit of Art.37.2 TRLPI and the ensuing remuneration for authors.

b) Beneficiary institutions

It goes without saying that public lending can only be applied to publicly accessible establishments (Art.19.4 TRLPI). However, not all establishments open to the public are able to benefit from the limit set forth in Art.37.2 TRLPI.

Specifically, the public lending limit of Art.37.2 TRLPI is granted to three types of **“museums, archives, libraries, newspaper libraries, record libraries or film libraries”**:

⁵⁷ In this case, they should introduce, at least for authors, a remuneration. (Art.6.2 DAP 2006/115/CE).

- Publicly owned;
- Pertaining to institutions of general cultural, scientific or educational interest *not trading for profit*,⁵⁸
- That they pertain to *teaching institutions integrated in the Spanish educational system*.

Therefore, unlike the text of Art.37.1 TRLPI, the public lending limit is formally established in favour of libraries pertaining to institutions *of an educational interest not trading for profit*, or pertaining to *teaching institutions integrated in the Spanish educational system*. This would thus not benefit, in principle, libraries of privately-owned centres or academies not integrated within the Spanish educational system.⁵⁹

In the face of such an excessively restrictive and formalist interpretation, there is room to argue in favour – as we did with Art.37.1 TRLPI and for the same reasons – of a broader interpretation of the institutions benefiting from this limitation.⁶⁰

The harmonised concept in favour of which the public lending limit is set out refers to “establishments accessible to the public” (ex Art.6 DAP), rather than to the public or private ownership thereof. Therefore, the list of institutions included Art.37.2 TRLPI must be interpreted in the light (and in accordance with) Art.6 DAP.

c) No economic benefit

The absence of a profit-seeking purpose is a requirement of the very definition of public lending right as set forth in Art.19.4 TRLPI:

*Lending means the making available of originals and copies with a view to use for a limited time neither **direct nor indirect economic or commercial benefit**, providing that such lending is effected through establishments accessible to the public.*

The expenses incurred in operating lending services can be passed on to the members of the public who borrow the work or other subject matter, charging a fee; but this does not mean that an economic benefit is pursued or the undermining of its

⁵⁸ Although the text appears to refer only to institutions of an “educational” nature, the requirement of not trading for profit must be demanded to any of the institutions benefiting from the limit, and in the same way as we have explained in the previous limit: in the sense of not obtaining a direct or indirect economic or commercial advantage from the lending activity, and less so with regard to the public or private nature of the beneficiary institution (as the text of Art.37.2 TRLPI would appear to suggest).

⁵⁹ See LOPEZ MAZA, *op.cit.* p.731.

⁶⁰ See MARTIN SALAMANCA, *op.cit.* p.357-358 in favour of the “non-restrictive nature of the precept, the pursuit of the purpose of the rule, listing any institution whose functions include the lending of protected materials, irrespective of whether or not this is a main function”. See CARBAJO CASCÓN, *op.cit.* p.181: “it would appear that the lawmakers are not looking to list, specifically and restrictedly, the centres that would benefit from the exception; on the contrary, it seems to offer the most open and broadest possible description of the institutions and establishments open to the public which ordinarily carry out functions of deposit and dissemination of culture, provided they do so for no economic advantage (Art.19.4.II TRLPI) and regardless of which materials constitute the main purpose of their activity”.

public lending classification. In no case, however, can this remuneration be considered a necessary expense to be passed on to the public.

Art.19.4 TRLPI:

It shall be understood that there is no direct or indirect economic or commercial benefit when lending carried out by an establishment accessible to the public gives rise to the payment of a charge not exceeding that necessary to cover its operating costs. This amount shall not include, in full or in part, the amount of remuneration payable to the intellectual property rightholders in accordance with what is set forth in article 37.2.

d) Subject to remuneration (compensation)

The public lending limit must be subject to the payment of remuneration, at least to the authors (Art.6.1 DAP). Beyond this, the decision of whether to also remunerate the holders of related rights and the publishers is left in the hands of the Member States. In this regard, the Spanish lawmakers have elected to grant a remuneration right to performing artists and producers for the rental of their recordings (Art.109.4 TRLPI). And, by express exclusion of Art.132 TRLPI, the remuneration set forth in Art.37.2 TRLPI shall not be of application of holders of related rights.

Initially, according to the IPL of 1987, the Spanish lending limit did not require any remuneration whatsoever. It was in the wake of the CJEU conviction⁶¹ for the incorrect transposition of the DAP, that remuneration was introduced. Originally, through a provisional system established by Law 10/2007, of 22 June, on reading, books and libraries (incorporated as 20th Transitory Provision TRLPI),⁶² and subsequently via RD 624/2014, of 18 July,⁶³ consisting of: 0.004€ per number of works loaned per year + 0.005€ per number of enrolled users who have used the lending service during the year.

The CJEU has also had the opportunity to weigh in on this issue.⁶⁴ In accordance with the CJEU ruling in the *WEVA* case,⁶⁵ the public lending remuneration cannot be calculated on the basis of a lump sum, but determined in proportion to the number of

⁶¹ See CJEU ruling of 26.10.2006, *Commission CE v. Kingdom of Spain* (C-36/05) ECLI:EU:C:2006:672

⁶² The remuneration set forth in Additional Provision of Law 10/2007 was of 0.2 € per copy of work acquired for public lending purposes in such establishments.

⁶³ RD 624/2014 established, in turn, a provisional system applicable until January 2016: 0.16 € per copy of works acquired per year + 0.005 € per number of users who have used the lending service in the year. <https://www.boe.es/boe/dias/2014/08/01/pdfs/BOE-A-2014-8275.pdf>

⁶⁴ Despite opting to maintain, in deference to its origin in the DAP, the term “remuneration”, insofar as it involves a limitation on an exclusive right, it would be more appropriate (at least at this time) to speak of compensation. The term makes a difference. In accordance with community acquis, and particularly CJEU case law, if this were compensation it would have to be fair and take into consideration the harm caused by the legally established limitation.

⁶⁵ See CJEU ruling of 30.06.2011, *VEWA v. Belgische Staat* (C-271/10) ECLI:EU:C:2011:442. In this case, a Belgian royal decree of 2004 set forth a lump sum of 1 euro per person legally of each of 0.5 euros per minor enrolled in lending institutions, provided they had borrowed least once during said period. The CJEU considered that these lump sums were not in accordance with the «equitable remuneration» required for lending or rental.

items made available to the public, so that the large public lending establishments make a more substantial contribution to authors' remuneration than the smaller establishments.

It is worth highlighting that the CJEU identifies as a relevant act, for the purposes of determining this remuneration, the making available to the public copies through lending rather than focusing on the actual loan made of the works or other subject matter. It will thus be necessary to interpret the calculation criteria set forth in RD 624/2014 in the light of this case law, in regards to applying 0.004 € to the number of works "made available to the public for public lending" (rather than on the basis of the number of works loaned per year, as set forth in Art.7.1 RD 624/2014).

Exceptionally, the following establishments are exempt from paying this remuneration (Art.37.2 TRLPI):

- Publicly owned establishments providing service in municipalities of fewer than 5000 inhabitants,
- Libraries in teaching institutions integrated in the Spanish educational system,
- As well as loans made to people with disability, for no economic advantage (see Art.31 bis.2 TRLPI)

As set forth in Art.19.4 TRLPI,⁶⁶ the remuneration shall not extend to (insofar as it is "excluded from the concept of lending") the so-called "inter-library lending" (lending carried out between publicly accessible establishments), or to the operations mentioned in Art.19.3 TRLPI (regarding rental), that is: "the making available for the purposes of display, communication to the public by means of phonograms or audiovisual recordings, including excerpts of either, and making available for on-the-spot consultation".

However, there is no mention of entities pertaining to non-profit general institutions of a cultural, scientific or educational nature ... which usually will be privately owned: the law does not determine who must pay the remuneration, or whether they are excluded from payment thereof.

This is a remuneration right subject to mandatory collective regulation, thus presumably of a non-transferable and inalienable nature. Naturally, the author may wish to waive his right to be paid, but the management bodies will be authorised to charge the remuneration.

i. Who collects this remuneration?

In accordance with Art.37.2 TRLPI, the authors of works subject to public lending are entitled to collect this remuneration; however, by express exclusion of Art.132

⁶⁶ See Whereas Clause 10 DAP 2006/115/EC.

TRLPI,⁶⁷ the holders of related rights: producers, performing artists and producers, takers of mere photographs, etc., are not entitled thereto.

To reverse the CJEU ruling in the *Reprobel* case,⁶⁸ Art.16 of the DAMUD Directive now allows national laws to grant to the publishers a share of the equitable compensation earmarked for the authors for uses of a work made under a limitation.

Article 16. Claims to fair compensation

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right.

The first paragraph shall be without prejudice to existing and future arrangements in Member States concerning public lending rights.

This naturally refers to private copy compensation (Art.5.2.b DDASI, 2001) along with the reprography limitation (Art.5.2.a DDASI, 2001) precisely generated by the *Reprobel* case, but also to other possible fair compensation amounts set forth for other limits. The national lawmakers could thus broaden public lending remuneration to include the publishers. For the time being, Spanish legislation does not establish that authors and publishers must share the public lending compensation; therefore, this is collected only by the authors (of all manner of works loaned to the public).

In any event, the distribution of this amount among the authors entitled to public lending compensation must be “objective, proportional and publicly disclosed” (Art.8.2 RD 624/2014).

ii. Who are the payers of this remuneration?

The public lending remuneration must be paid by the Administration to which the public lending beneficiary institution pertains, that is, the “State, the Autonomous Communities and local corporations”. It is not the user who is obliged to pay this remuneration and, contrary to what happens with private copy remuneration, this compensation cannot be passed on as an expense.

Art.37.2 TRLPI sets forth that “the owners of these institutions”, that is, the “State, the Autonomous Communities and the local corporations”, who shall remunerate the authors and even establishes that “when the owners are Municipalities, the

⁶⁷ On the other hand, these rightholders benefit from other compensations and remuneration, such as the compensation set forth regarding private copy limits (Art.25 TRLPI) and the remuneration rights set forth in Art.108 (artists), Art.116 (phonogram producers) and Art.122 (audiovisual producers).

⁶⁸ See CJEU, ruling of 12.11.2015, *Hewlett Packard Belgium v Reprobel* (C-572/13), ECLI:EU:C:2015:750. In this case, regarding the compensation for reprography set forth in the Belgian law (ex Art.5.2.a DDASI 2001), the CJEU rejected that the national lawmakers were able to “pay a share of the equitable compensation pertaining to the rightholders to the publishers of the works created by the authors, without such publishers being obliged in any way whatsoever, to share with the authors, even indirectly, the portion of the compensation denied to them”.

remuneration shall be paid by the Provincial Government ... or by the Administration that assumes its functions”.

2. Public lending right (PLR) in comparative law

The limit of Art.37.2 TRLPI sets forth what is internationally referred to as *Public Lending Right* (PLR).⁶⁹

This is a **right of remuneration**⁷⁰ recognised by the law to rightholders but which does not grant the power to control (authorise and prohibit) the exploitation of a the work or other subject matter, but only the right to obtain remuneration for the use made thereof.

In other traditions, the public lending right can be explained by the *first sale exhaustion* principle (exhaustion of the right on the copy following the first sale): once the copy has been subject to sale on the market, the owner shall not be able to control any subsequent uses made of said copy (resale, lending, etc.), but should at least have the right to obtain remuneration.⁷¹ In this regard, this is a a remuneration right that is similar to the participation right (*droit de suite*) established for artistic works (see Art.24 TRLPI).

The idea behind the right of remuneration for public lending of books surfaced in Scandinavian countries at the beginning of the 20th century. Denmark was the first to introduce it into its national law in 1946, followed by Norway (1947) and Sweden (1954). The rental and lending Directive (1992, DAP 2006/115/EC) incorporated it into its community acquis and it currently forms part of the law of all EU and EEA countries.

At an international level, there are currently 35 countries that have public lending legal systems; in addition to the EU and the EEA, this is recognised for instance in New Zealand, Australia, Canada, Georgia, Greenland and Israel.

Beyond this common minimum basis, each country has its own regulation. There are countries where PLR only applies to authors of works written in the official languages (Denmark, Sweden and Norway). The PLR is usually managed by copyright collection (normally IFRRO), as in the case in Spain, or by a government department or body, as in the case of Australia and the UK.

⁶⁹ For more information, see <https://plrinternational.com> and its “Introductory Guide: Public Lending Right (PLR)”.

⁷⁰ In Spanish legal tradition, we should speak of a compensation set forth in return for the legal limit authorising public lending by beneficiary institutions. Given its international origin, both the Spanish law and the EU acquis continue to refer to it as a right of remuneration (not compensation) for public lending.

⁷¹ It is important not to mistake *first sale exhaustion* for the principle of exhaustion within the EU of the right of distribution in the case of a sale once the first sale of the copy has been made.

The beneficiaries can also vary depending on the law of each country. In principle, the right should benefit all manner of authors whose works may be subject to public lending: writers, illustrators, translators, photographers, and even – in some countries – the publishers. The type of libraries subject thereto may also change: only those publicly owned or also including the privately owned institutions; or only public libraries or also school and/or university libraries.

In most countries, the right is funded by the government (central or regional); in others, private libraries also contribute to the right by paying a fee (i.e., the Netherlands).

3. Controlled digital lending (CDL)

At the very beginning, it seemed impossible for libraries to lend the public works and other subject matter in digital format. This was both due to the very structure and definitions of the right exclusively pertaining to distribution and public lending, as well as to the public lending limit, referring exclusively to tangible copies.⁷²

However, the CJEU in its role as ultimate interpreter of the concepts included in the regulations designed to harmonise national intellectual property laws, has come up with the way to make it possible within the EU legal framework for libraries to lend to the public works and other subject matter not only in tangible formats but also in digital formats, while respecting the interests of authors and rightholders, specifically observing the three step rule (Art.5.5 DDASI, 2001) (Art.40bis TRLPI).

IFLA has called it “controlled digital lending” and has performed a legal and economic analysis to prove its feasibility and help libraries in the EU to implement it.⁷³

At an international level, an EBLIDA study shows that digital lending in Europe is still very limited: accounting for only 10% of the public lending carried out ⁷⁴ and with very different models in each country. Digital lending is usually carried out on digital (not scanned) publications, via the aggregators controlled by the rightholders (for instance, in France or by government agencies (for example, in “one user one copy”

⁷² Both the definition of loan initially established in Art.1 DAP (1992), currently Art.2 DAP 2006/115/EC, as that subsequently included in Art.4 DDASI (2001) and its Whereas Clause 28 refer to the “tangible medium” of the work. This is also the case in the definition of distribution right, which includes lending, in Art.19 TRLPI, and in the lending limit set forth in Art.37.2 TRLPI.

⁷³ IFLA *Position on Controlled Digital Lending* (June 2021):
https://repository.ifla.org/bitstream/123456789/1835/1/ifla_position_-_en_-_controlled_digital_lending.pdf

FESABID has translated this into Spanish: https://www.fesabid.org/wp-content/uploads/ifla_posicionamiento_prestamo_digital_controlado.pdf

⁷⁴ EBLIDA: “Handbook of Comparative E-lending Policies in European Public Libraries” (April 2023), p.15; <http://www.eblida.org/news/press-release-handbook-on-comparative-e-lending-policies-in-europe.html>

(system which, as we shall see, has been validated in the EU by the CJEU), to the “pay per loan” or licensed use with various simultaneous users.

In other jurisdictions, the viability of controlled digital lending is analysed from a different angle.

In the US, the equivalent of CDL has been analysed from the outlook of defence of fair use, in the case between the publishing house Hachette and *Internet Archive*⁷⁵ for the unauthorised use of works via the “Open Library”⁷⁶ platform. Initially, this platform made available to the public, in CDL format, digitised copies of printed works in the collections of the libraries participating in the programme. Between 24 March and 16 June 2020, in the midst of the health crisis, the project allowed simultaneous access by multiple users, not respecting the CDL which had traditionally been implemented. In first instance, a recent ruling of the Court of the South District of New York, ruled in favour of the plaintiff, concluding that there had been copyright infringement and that the defendant could not rely on the defence of fair use.⁷⁷ It is possible that this case will be head on appeal and that the judgement will be changed. In any event, it is important to bear in mind that any fair use decision is based on the specific circumstances of the case in hand.

Fair use is a defence against infringement. Born out of case law (recognised since the 19th century by the courts) it was eventually included in Sec.107 USCA of 1978. To determine whether an alleged infringement (that is: the unauthorised exploitation of a work) can rely on this defence and not be declared in breach, the court must take at least 4 factors into consideration: the purpose and nature of the use made, the nature of the work, the number and substantiality of the use and the effect of said use on the potential market of the work. The court must make a joint appraisal of these factors (along with other criteria), although none of them may be solely decisive. For example, the existence of profit does not prevent the existence of fair use from being considered; and, in reverse, not all unauthorised but non-profit can be considered fair use.

In recent rulings, several cases related to reproduction and making available to the public works and other subject matter in digital format without the prior authorisation of the rightholders have relied on the fair use defence. For instance, the activity of search engines⁷⁸ (also searchers of images shown in thumbnail format⁷⁹) which reproduce and publish protected content that is available online; the *Google Books*⁸⁰ project, which allowed Google to carry out an *en masse* scan of entire collections worldwide to subsequently allow search by content showing results with various scopes (according to whether this was content in the public domain, content belonging to publishers participating in the project of simply snippets; or the *Hathi Trust*⁸¹ case, which relied on fair use to defend the creation of a data base of the

⁷⁵ “Internet Archive” es una biblioteca digital gestionada por una organización sin ánimo de lucro dedicada a la preservación de archivos, capturas de sitios públicos de la Web, recursos multimedia y también software. https://es.wikipedia.org/wiki/Internet_Archive

⁷⁶ <https://openlibrary.org/about> The Open Library project began in 2008, with funding from the California State Library and the Kahle/Austin Foundation.

⁷⁷ See Order of 24.03.2023, *Hachette Book Group, Inc. et al v. Internet Archive et al*, (S.D.N.Y. 2023) <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2020cv04160/537900/188/>

⁷⁸ See *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007).

⁷⁹ See *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003).

⁸⁰ See *AG v. Google*, 804 F.3d 202 (2d Cir. 2015).

⁸¹ See *AG v. Hathi Trust*, 755 F.3d 87 (2d Cir. 2014).

scanned collections of the libraries, for internal use to help “locate” works and even allowing full access to the contents of the work.

In any event, what is relevant to determine the existence (or otherwise) of fair use is to take into account the specific circumstances of each case. In this scenario, and irrespective of whether or not the *Internet Archive* case is reviewed on appeal, it is important not to arrive at generalised conclusions regarding this ruling for the purposes of CDL, since its proper valuation requires distinguishing between the exceptional situation of the health crisis and the CDL that may be carried out in a “normal” context. In other words, the ruling of the *Internet Archive* case shall not serve to generically determine the viability of CDL in the US.

As we have said, in the EU, the definitive support for the viability of CDL has been provided by the CJEU, particularly in the *VOB* case and, in a more indirect manner, in the *Darmstadt* case.

a) CJEU: *Vereniging Openbare Bibliotheken v. Stichting Leenrecht* (C-174/15)

In the *VOB*⁸² case, the CJEU concluded that the public lending limit set forth in the EU legislation is of application not only to books and copies in tangible format, but to digital formats as well (such as e-books).

In this case, the Dutch government proposed a draft law to create a national digital library for the digital lending of e-books, previously licensed by the rightholders, based on the premise that digital lending is not regulated by the public lending limit set forth in Dutch law.⁸³ The *VOB* library, disagreeing with this project and interpretation, filed an appeal with the Dutch courts requesting the consideration of a preliminary ruling to the CJEU to clarify whether the concept of public lending (of the Directive) also includes public “digital” lending.

Specifically, the CJEU concluded that digital lending falls within the concept of lending rights set forth in Art. 2 of Directive 2006/115/EC and that, therefore, also falls within the public lending limit allowed by that same directive (Art. 6), provided the operation “is regarded as having essentially similar characteristics to the lending of printed works”:

1) ... must be construed as meaning that **«lending»... means the lending of a copy of a book in digital format**, when the lending is made by placing said copy on the server of a public library and enabling a user to reproduce that copy by downloading on to his/her own computer, in such a way that **the copy is made by the user during the lending period and that the copy made by the user when downloading is no longer usable after a limited period.**

⁸² See CJEU ruling of 10.11.2016, *Vereniging Openbare Bibliotheken v. Stichting Leenrecht* (C-174/15), ECLI:EU:C:2016:856.

⁸³ Both the IVIR (research centre at the University of Amsterdam) and the collection body Stichting LIRA had arrived at this conclusion.

It thus broadens the concept of digital “lending” beyond that of “traditional” distribution rights,⁸⁴ extending also to the rights of reproduction and public communication, in terms of being made available: the library may upload and make available to the public the digital copy of the work subject to lending, and the user may download it onto his/her own computer or equipment.

To this end, this digital lending must be made subject to **conditions “essentially similar”** to those of public lending of tangible formats. This is the so-called “**one copy, one user**”: lending shall only take place for a one user and “during the lending period”, after which, “the copy downloaded by that user will no longer be usable” by this user.

Since this is a loan, the **pertaining remuneration** comes into play. Here the problem lies in whether the national legislation has set forth a remuneration amount for digital lending and whether the fees established for general public lending are of application.

At first glance, this conclusion appears to fully contravene the concept of right of distribution set forth in Art.4 DDASI (2001), based on the sale of tangible copies of the work or other subject matter. However, to reach this conclusion, the CJEU argued the following:

- ✓ In first place, **it distinguished between the two**: the DAP (1992, 2006) which harmonised the digital lending right and limit and the DDASI (2001) which harmonised the public distribution right (Art.4 DDASI), arguing that although both set out to harmonise different aspects of copyright, the **DAP has a “more limited purpose” than that of the DDASI (#48)**, and Art.1.2.b DDASI “leaves intact and does not affect in any way whatsoever” the lending right provisions of the DAP (#56), the conclusion is that Art.4.2 DDASI “is not pertinent for the interpretation” of

⁸⁴ It is true that the CJEU had already made a similar interpretation, by attributing a definition of the concept of “distribution via sale” specific for computer programs, in its ruling of 03.07.2012, *UsedSoft v. Oracle* (C-128/11): “meaning that the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period” and that “in the event of the resale of a user licence entailing the resale of a copy of a computer program downloaded from the copyright holder’s website, that licence having originally been granted by that rightholder to the first acquirer for an unlimited period in return for payment of a fee intended to enable the rightholder to obtain a remuneration corresponding to the economic value of that copy of his work, the second acquirer of the licence, as well as any subsequent acquirer of it, will be able to rely on the exhaustion of the distribution right and benefit from the right of reproduction provided for in that provision”. For an analysis of this case, see MINERO ALEJANDRE, *op.cit.* p.307.

Art.6.1 DAP (#57).

- ✓ In second place, it **distinguished between the concepts of rental and lending in the DAP**, observing that the lawmakers did not necessarily intend to attribute the same meaning to the concepts of “objects” and “copies”, whether speaking of rental or lending (#36) and that the **“objects” subject to rental are not necessarily identical to those subject to lending** (#38), to conclude that “although intangible objects and non-fixed copies, such as digital copies, must be excluded from rental right, governed by Directive 2006/115, so as to avoid infringing the Agreed Statement attached to the WIPO Treaty, neither this Treaty nor this Agreed Statement are opposed to the concept of “lending” of objects established in that Directive being interpreted, as the case may be, as also including the lending of certain objects in digital format.”(#39).
- ✓ It also remarked that the preparatory work of Directive 92/100 does not support the conclusion that lending in digital format must be excluded, in all cases, (#40) and although it is a fact that the whereas clauses of the proposal for Directive 92/100 expressly mentions its intention to exclude from its scope of application “the making available via electronic data transfer” (#41)⁸⁵ it is also true that Whereas Clause 4 Directive 2006/115 “states that **the protection of copyright and related rights must adapt to the new economic realities, such as the new forms of exploitation**”, concluding that “lending made in digital format undeniably forms part of these new forms of exploitation, thus **requiring an adaptation of copyright to the new economic realities**”. (#45)
- ✓ Finally, the CJEU recalls that “although article 6, paragraph 1 of Directive 2006/115 must be **subject to strict interpretation**, insofar as it constitutes a derogation of the exclusive lending right... it is also true that the interpretation it is given must also **allow for the safeguarding of the useful effect of the exception thus established and respect its purpose**” (#50)⁸⁶ and concludes that “given the **importance of public lending of digital books, and** in order to safeguard both the useful effect of the derogation of public lending ... as the **contribution made by it to cultural promotion, no exclusion must be made in terms of** article 6, paragraph 1, of Directive 2006/115 being applied **in the event that the operation carried out by a publicly accessible library is** regarded as having essentially similar characteristics to the lending of printed works” (#51).

⁸⁵ And the CJEU goes on to add that this intention did not manage to “achieve any direct expression whatsoever” in the text of the Directive (#44), and so therefore “there is no real reason to allow for the exclusion in any circumstance of lending of digital copies and intangible objects from the scope of application of Directive 2006/115.” (#45)

⁸⁶ Here the CJEU includes “the constant case law of the Court of Justice”: ruling of 4 October 2011, *Football Association Premier League et al*, C-403/08 and C-429/08, EU:C:2011:631, paragraphs 162 and 163, and of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, #133.

Moreover, the CJEU analysed and resolved **another two questions** that were posed to it:

- To the question whether a Member State would be able to establish the condition that only **e-books lawfully sold in the EU** can be subject to digital public lending, the CJEU agreed that was possible, thus validating, in this specific case, the condition that the Dutch lawmakers sought to impose (#64-65).⁸⁷
- And, to the third question posed, the CJEU concluded that the public lending limit **cannot be laid down when the digital copies “were obtained from an unlawful source”** (#72).⁸⁸ This conclusion was reached “by analogy” to the conclusions reached in the ruling 10.04.2014, *ACI Adam* (C-435/12) regarding limits on private copying.

On the other hand, this means that (unless the national law should set forth otherwise- see reply to second question), a library may subject to digital public lending any scanned (digitised) copies of printed works, provided the digital copy has been lawfully obtained, for example, under the preservation limit of Art.37.1 TRLPI.⁸⁹

To a certain extent, this was the same conclusion reached by the CJEU in the ***Darmstadt v. Ulmer* (C-117/13) case**,⁹⁰ expressly permitting the “combination” of the limit of Art.5.2.c DDASI (2001) and the limit of Art.5.3.n DDASI (2001) to enable fulfilment of the public interest purpose pursued by such limits.

b) TJEU: Technische Universität Darmstadt v. Eugen Ulmer (C-117/13)

In this case, the university library of Darmstadt had digitised a specific book published by Ulmer, subsequently allowing access thereto from its electronic Reading terminals, within library premises. The publisher offered the library the chance to acquire a licence to obtain access and use of the e-book format of a number of handbooks published by said publisher, including the book in question. The publisher sought to prevent the university from digitising the book and making it available to the public via the reading terminals in the library.

⁸⁷ Naturally, possibility does not mean obligation: the condition imposed by the Dutch lawmakers (that only lawfully sold e-books can be subject to digital lending) does not mean that this must be applied by all other national lawmakers.

⁸⁸ For examples of unlawful copies, see MINERO ALEJANDRE, *op.cit.* p.314: downloading of pirated digital copies from websites of links or file exchange platforms, digital copies obtained after cracking technological measures”.

⁸⁹ Against this, see MINERO ALEJANDRE *op.cit.* p.329, to the extent that public digital lending may only be made on digital copies previously acquired by the library. On the other hand, it confirms the possibility of combining the limits of - Art.5.2c) and Art.5.3.n), although criticising this CJEU decision on the grounds of being “somewhat concerning”, see GARROTE (2019), *op.cit.* p.504.

⁹⁰ See CJEU, 11.11.2014, *Technische Universität Darmstadt v. Eugen Ulmer* (C-117/13) ECLI:EU:C:2014:2196

The CJEU ruled in favour of the library: although the rightholder may offer licences for the access and digital use of the work under suitable conditions, the library can resort to the exception made for dedicated terminals (Art.5.3n) DDASI), since it would otherwise be unable to fulfil its fundamental mission or promote public interest in relation to promotion of research and personal study. In other words, the existence of suitable licences in the market does not oblige the library to obtain them and to thus “waive” the benefit of the limits legally set forth in its favour. This first conclusion is relevant in and of itself, as well as benefiting other limits such as that on public lending.

Furthermore, the CJEU confirmed that previous digitisation required to make works available to the public via dedicated terminals (Art.5.3.n DDASI, 2001) could be carried out under the preservation limit (Art.5.2.c DDASI, 2001), pursuant to what is set forth in the national legislation. Therefore, if permitted by the national laws, libraries could digitise works included in their collections, when rendered necessary to make them available to users via dedicated terminals and Art.5.3.n DDASI (2001) would be rendered devoid of content. Specifically, the CJEU stated:

*Article 5(3)(n) of Directive 2001/29, read in conjunction with Article 5(2)c) of that Directive, must be interpreted to mean that it does not preclude Member States from granting to publicly accessible libraries covered by those provisions **the right to digitise the works contained in their collections, of such act of reproduction is necessary** for the purpose of making those works available to users, by means of dedicated terminals, within those establishments.*

By extension, it would also be possible to conclude that copies made for preservation purposes may subsequently become subject to public lending, by application of “essentially similar” conditions, as the CJEU concluded in the VOB case, provided the national lawmakers have not excluded it (for instance, only allowing public digital lending of previously purchased e-books) (see above).

However, the CJEU ruled in favour of the publisher’s claim that the limit of Art.5.3n) DDASI would not permit library users, who access the work in question via dedicated terminals, to print or store a digital copy (on a USB for instance), as these would constitute reproduction acts that are not necessary to fulfil the limit and, thus, not protected thereunder.

However, the CJEU stated that nothing precludes the national law from setting a limit or an exception on the right of reproduction (for instance, the limit on reprography or private copy) to enable printing or copies to be made from such dedicated terminals, thus requiring in this case that fair compensation is charged by the rightholder. In this regard, the CJEU stated:

*Article 5(3)(n) of Directive 2001/29 must be interpreted to mean that it does not extend to acts such as the printing out of works on paper or their storage on a USB stick, carried out by users from dedicated terminals installed in publicly accessible libraries covered by that provision. However, **such acts may, if appropriate, be authorised under national legislation transposing the exceptions or limitations provided for in Article 5(2)(a)***

or (b) of that directive provided that, in each individual case, the conditions laid down by those provisions are met.

c) Some final considerations

In any event, it is important to have a proper understanding of the scope and importance of these CJEU rulings.

On the one hand, to argue that the CJEU rulings in the *VOB* and *Darmstadt* cases examined here offer an alternative to licensing models, or even endanger them, is to ignore the basic grounds of the copyright protection system and limits system.

As the three step rule reminds us, no limit may be interpreted or applied such that it causes “unfair harm to the author’s legitimate interests or is detrimental to the ordinary exploitation of the works”. In other words, the CJEU is not encouraging libraries to stop obtaining licences in the market, but merely protecting them so that, beyond the market, they are able to continue to fulfil their public interest mission and enable them in certain cases to extend beyond the licensing scope. This is precisely the value of the legal limits. The backing provided by the CJEU to DCL, in terms of scanned copies of works contained in a library’s permanent collection, must not be viewed as an “alternative” to the licensing model. On the contrary, this is a guarantee so that in specific cases (and this is where the balance of interests advocated by the three step rule comes into play) libraries are able to scan (obtain digital copies) of the publications in their permanent collections and lend them to the public via “CDL” or make them available to the public via dedicated terminals, without having to previously obtain a licence – whether because it is not offered by the rightholders or because it is offered at conditions that are either not reasonable or of interest to the library (the specific case of *VOB*).

One must not forget that licensing markets are the natural means of carrying out the exploitation of works and other subject matter; and limits will never pose a danger for such markets. Libraries are the first entities interested in obtaining licences, at reasonable and affordable terms and prices, to contribute to the dissemination of culture. One must also not forget that the CDL supported by the CJEU is doubly onerous for the library: because it must obtain a digital copy through scanning and because it shall be subject to payment of compensation to the authors. Not all libraries have the financial means to meet such costs.

In summary, the validation of CDL and the combination of limits carried out by the CJEU is not intended to replace the licensing models released by rightholders in the market (which will always remain the natural and most efficient means of exploitation of works and other subject matter), but precisely to make up for the market deficiencies when they exist (bear in mind that not all publications are licensed for use in digital format) and to ensure that libraries will be able to continue to fulfil their public interest purpose, in specific cases, even when such licences do exist in the market.

Moreover, controlled digital lending (CDL) of works in the permanent collections of libraries shall require the prior negotiation between rightholders, collection entities and libraries, and the drafting of guidelines and good practices for legal certainty to the benefit of all. This requires setting aside prejudices and misconceptions regarding the limits system, understanding that the interpretations made by the CJEU in the *VOB and Darmstadt* cases do not put at risk the business models (and licensing markets) of the rightholders and accepting that the licensing models, as fundamental as they are, must co-exist in the market alongside a strong limits system. If an agreement is reached on the right conditions to carry this out, CDL (along with all other legally established limits) can benefit ALL the parties involved: authors and rightholders, libraries and the public at large.

IV. Final issues and conclusions

Having analysed the limits set forth in Articles 37.1 and .2 TRLPI, for preservation and research purposes, and public lending respectively, in light of EU law and CJEU rulings, particularly in the *Darmstadt and VOB* cases, a **few last questions arise** which we shall analyse by way of conclusion.

- Could the *Darmstadt* doctrine **extend to the digitisation of works in the permanent collection of a library** (as a necessary prior act in accordance with the preservation limit), **to make them available to the public via controlled digital lending?**

All indications clearly point to an affirmative reply to this question,⁹¹ particularly in light of Whereas Clause 27 of the DDAMUD (2019), regarding the new uniform cultural heritage preservation exception (Art.6 DDAMUD) which states:

*“Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by **other exceptions or limitations** provided for in Union law”.*

One must also remember that the preservation purposes mentioned in Whereas Clause 27 DDAMUD (2019) are simple for illustration purposes: “for example, to address technological obsolescence or the degradation of original supports, or to insure such works or other subject matter.”

- We would arrive at the same conclusion to the question of whether **an “orphan” work might be subject to public digital lending.**⁹²

⁹¹ Unless the national law should restrict controlled digital lending to copies (i.e. e-books) that have been previously sold on the market (see CJEU, *VOD*).

⁹² Although formally the entities benefiting from the orphaned work limit (Art.37bis.4 TRLPI) and those of Art.37 TRLPI are not exactly the same, most libraries, archives, museums and other entities are expected to benefit from both limits.

Taking into account that an orphan work (Art.37bis TRLPI) already enables the beneficiary entities – following a diligent search- to make them available to the public,⁹³ the question regarding public lending would only make sense (Art.37bis.7 TRLPI).⁹⁴ In our opinion, nothing would prevent the originally “orphan” work that had been digitised for preservation purposes from being subject to a controlled digital lending limit (like any other work included in the institution’s collection) despite the rightholder having put an end to its orphan status; particularly bearing in mind that this public lending would not only be done in accordance with the limit, but also in accordance with what is set forth in Art.37bis.4 TRLPI: “for no economic benefit and for the purpose of achieving the goals related to its public interest mission, in particular the preservation and restoration of the works in its collection and enabling access thereto for cultural and educational purposes.”

The same conclusion should be reached in relation to out-of-commerce works. In fact, Art.8 DDAMUD already establishes a limit that is of application in the absence of a collective agreement to make it possible, for institutions in charge of cultural heritage to carry out acts of reproduction, distribution and public communication, for non-commercial purposes, of out-of-commerce works and other subject matter in their permanent collection.

- Another type of limit “combination”, much more debatable, is whether the **sending of a copy via the documentation delivery service (SOD in Spain)** might be deemed to fall under the concept of digital public lending⁹⁵ or whether it should be maintained under the limit set forth in Art.37.1 TRLPI (for research purposes), which we supported in the previous chapter.

By way of conclusion, it still remains difficult to ascertain the effect that the *VOD* and *Darmstadt* rulings should have on the interpretation and application of the limits set forth in national laws, particularly because this will largely depend on the actions of the various stakeholders in each country.

Indeed, **the acceptance of the autonomous concepts** defined by the CJEU regarding copyright has had **highly different results according to country**. Thus, for example, “in France the courts do not always take into consideration the CJEU case law, being hard to determine whether this is due to mere custom, to a certain impertinence or deliberate resistance”. By contrast, “in Germany the courts

⁹³ Specifically, Art.37bis4 TRLPI permits: “reproducing, for the purposes of digitisation, making available to the public, indexation, cataloguing, preservation or restoration, and making available to the public, in the manner set forth in article 20.2.i) ... orphan works;”

⁹⁴ Si la obra huérfana ya está a disposición del público de forma regular en internet, no hay necesidad alguna de recurrir al límite del préstamo público.

⁹⁵ Rejecting this possibility, see MINERO ALEJANDRE, *op.cit.* p.312: “Certain practices which are currently carried out by libraries, in particular the sending a scanned work to users in ordinary pdf format, must thus fall outside the scope of application of the public lending limit, even under the extensive interpretation provided by the CJEU”.

frequently quote CJEU case law and take their rulings very much into consideration”.⁹⁶ In Spain, case law has traditionally integrated CJEU case law in the interpretation of the various concepts in Spanish law, to the extent that in some cases the Supreme Court itself has even revised its own doctrine.⁹⁷

To the extent that the decision on such issues depends on the autonomous concepts of EU law that the CJEU has defined in an “autonomous and uniform” way in these rulings,⁹⁸ these should guide (and be binding) for national case law when interpreting the concepts in the national law. Such rulings are thus expected to soon **directly permeate national case law**, at least when ruling on the scope of the concept of “public lending” in Arts.19.4(II) and Art.37.2 TRLPI, or when examining the potential “combination” of several limits and, specifically, that Art.37.1 TRLPI should allow libraries to digitise the works in their collections as a prior and essential requirement to carry out acts under such limits; for instance, making them available via dedicated terminals (Art.37.2 TRLPI) or even controlled digital (Art.37.2 TRLPI).

Interestingly, **in Spain the CJEU interpretation appears not to have decisively supported controlled digital lending under Art.37.2 TRLPI or the combination of limits under Arts.37.1 and 3 TRLPI**. This may be due, on the one hand, to a lack of knowledge of the parties involved and even to a certain aversion to the risk of being sued for infringement. On the other, to the lack of interest of the rightholders in the development of CDL, avoiding it competing against the market of direct licences offered by them.⁹⁹ Lastly, it is important to bear in mind that the natural pathway for CJEU case law is national case law and that, therefore, this acceptance will depend on other legal cases arising on these matters.

⁹⁶ See LUCAS-SCHLOETTER / LUCAS, *op.cit.* p.581.

⁹⁷ Based on the Spanish Constitutional Court case law that ruled that hotel rooms constituted a private “residence” for the purposes of the fundamental right to privacy, the Spanish Supreme Court concluded that hotel rooms were “strictly domestic areas” for the purposes of exclusion of the concept of public communication set forth in Art.20.1 TRLPI: “*Communication is not considered public when it is carried out within a strictly domestic areas that are not integrated or connected to any kind of broadcasting network*”. See Spanish Supreme Court Ruling 3175/2003, of 10.05.2003, *SGAE v. Tautiro Princess*, ECLI:ES:TS:2003:3175. It concluded that hotels were not obliged to obtain and pay a licence for hotel rooms fitted with TV and/or radio sets (although they did have to pay a licence fee for the public communication taking place in such devices in the public and communal areas of the hotel). When the CJEU, in its ruling of 7.12.2006, *SGAE v. Rafael Hoteles*, ECLI:EU:C:2006:764, concluded otherwise (that there is no distinction between public area and private rooms in a hotel in terms of public communication: the public or private nature of where the TV or radio communications are received is not relevant), the SC was obliged to revise its doctrine to align it with the CJEU interpretation. This was the case in the SCR 3246/2007 of 16.04.2007, *EGEDA v. Hotel Puente Romano*, ECLI:ES:TS:2007:3246 and other subsequent rulings.

⁹⁸ By contrast, see MINERO ALEJANDRE *op.cit.* p.315, who argues that for the CJEU ruling to be effective beyond the scope of the specific case, the actual European legislation should be modified: “if the aim is to promote the generalisation of these types of acts the current European regulations must be expressly modified in order to regulate a harmonised exception of temporary and free use of digital copies of works, carried out by libraries or similar institutions, subject, as the case may be, to fulfilment of certain requirements ...”

⁹⁹ See also <https://www.cedro.org/usuarios/prestamo>

Meanwhile, and to avoid relying only on acceptance by the law, **the regular review and updating of national law is highly recommendable**, so as to include- to the extent required – the autonomous concepts of the CJEU and the EU lawmakers. This creates greater legal certainty and advances towards the harmonisation and standardisation of copyright law in the EU single market.

To conclude:

- The interpretation and application of the national limits of Art.37 TRLPI must be made in line with the EU *acquis* and the uniform interpretation of the CJEU both of the concept of public lending, its preservation purposes and interaction with other limits, and the hermeneutical criteria applicable for the correct interpretation of national limits.
- Modification of Art.37.1 TRLPI (at least, in relation to preservation purposes) to properly implement Art.6 and Art.7 DDAMUD (2019), as well as the Whereas Clauses relating thereto, along with their integration with the transposition made by RDL 24/2021 would be highly advisable.
- Modification of Art.37.2 TRLPI to integrate the various autonomous concepts of “public lending” and, specifically, the inclusion of controlled digital lending (CJEU: VOB) would also be advisable, along with assessing the convenience of also modifying RD 624/2014 to include the pertaining remuneration payable to authors for controlled digital lending.
- The introduction in the TRLPI of the possibility of limit combinations would also be advisable, as the CJEU concluded in *Darmstadt* case and is already formally set forth in Whereas Clause 27 DDAMUD (2019) which the Spanish government preferred to not transpose in the RDL.
- Whether or not such legislative changes are made and in order to provide greater legal certainty to the benefit of all parties, the consensual adoption of guidelines and good practices would be advisable to enable libraries to carry out controlled digital lending.

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