Free Movement of Information - the Principle and its Practical Implications, Especially with a View to Current Developments in EU Information and Communications Law and Policy

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1 Introduction

In an earlier article in this journal I explored the principle of free flow of information within the copyright system[1]. The focus of this article will be on the principle of free flow of information as a general principle in information and communication law and as a guiding principle for regulation in this field.

I will claim that the principle of free flow of information is a recognized and important principle (in Nordic law and even more so in EU law) underlying the regulation of information and communication law, including intellectual property law.

In addition I will explore how this principle could be applied when analyzing certain important flagship initiatives included in the Digital Agenda, the EU's current work plan for the information society and some other current domestic policy issues. By doing this, I will not try to claim that the principle of free flow of information is the only way to perceive policy questions, but only try to explain how it helps to perceive the similarities in policy questions between different issues such as for instance copyright and personal data protection.

2 Informational Rights and the Free Movement of Information

2.1 Information Law and Informational Rights

Information law is usually perceived as the corpus of general principles dealing with *information processing*[2], *information markets, information infrastructure and communication.*[3] *Benkler* has divided information law into regulation of the physical layer (infrastructure), logical layer (code) and content[4].

The legal system includes several layers of rights. At the top level are the *fundamental rights* (or human rights) protected in the constitution. One can also address *institutional rights*, like the right to data privacy as expressed in the data privacy legislation or authors' rights as expressed in the copyright act. A "right" that has not yet been institutionalised may occur in the legal system as a *protected interest or principle*. This also explains the evolution of the system of rights, where new fundamental rights arise over time.

Human rights are the cornerstones of today's legal regimes in the western democracies.

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1 For the sake of simplicity I will in the following talk about information law meaning the whole corpus of information and communication law.

2 This covers the use of information throughout its life cycle. The concept of information life cycle has been used in connection with rules on processing of personal data in

3 Tuomas Pöysti, *ICT and legal principles: Sources and Paradigm of Information Law*, Scandinavian Studies in Law, vol 47, 2004, at 560.

4 Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, New York University Law Review, April 2001.

The importance of fundamental rights as a practical matter has increased in Finland after the renewal of the constitution in 1999[5]. Also in Sweden the importance of the fundamental rights increased after the incorporation of the European Convention of Human Rights (ECHR) in Swedish law in 1995[6]. In the EU, the Charter of Fundamental Rights of the European Union (EU Charter) was signed in 2000 and later introduced into European primary law through the Lisbon Treaty, which entered into force in December 2009[7]. The practical impact of fundamental rights has increased with the advent of the principle of horizontal application (Drittwirkung)[8] of fundamental rights[9].

As a general rule, fundamental rights are considered to express basic values. In cases of conflicts between fundamental rights they need to be weighed and balanced. This means that they are rather to be considered as principles. As far as possible, fundamental rights shall be accommodated so that the core essence of the right or freedom is left untouched.

2.2 Informational Rights at Constitutional Level

A natural starting point for any endeavour to grasp the set of rules related to information law would therefore be to start in the fundamental rights recognized in the national constitutions, EU law and international conventions[10]. The most important fundamental informational rights are the *freedom of expression and freedom to form an opinion*, *freedom of thought and belief*, *right to informational self-determination* and *respect for correspondence* and the *right to own intellectual property*.

Freedom of expression and freedom to form an opinion has been expressed in Article 19 in the Universal Declaration on Human Rights (UDHR) which states that " Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

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5 This was preceded by the accession of Finland to the European Convention on Human Rights. In Sweden, a bill regarding the reform of the constitution is currently pending. Regeringens proposition 2009/10:80. The new constitution is due to enter into force in 2011, if accepted by the parliament to be elected in the autumn of 2010.

6 SOU 2008/125, at 396.h

7 The Charter makes sure European Union regulations and directives do not contradict the European Convention on Human Rights, which is ratified by all EU Member States, and makes it possible for the EU to accede the European Convention of Human Rights. The Charter is legally binding for the member states, except for those countries (UK and Poland) that has opted out from it. The Charter is applicable only on EU law, and does therefore not as such outstrip national provisions on fundamental rights.

8 Fundamental rights are therefore not only seen as protecting citizens from the power of the state, but require in addition the states to assure that violations of fundamental rights between private parties do not occur.

9 The Drittwirkung doctrine was first developed by German courts and later accepted by the European Court of Human Rights.

10 European Convention on Human Rights (ECHR, 1950) and the Universal Declaration on Human Rights (UDHR, 1948).

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Article 10 or ECHR includes similar language but continues with a limitation of this freedom: "This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Similarly, article 11 in the EU Charter refers to the right to hold opinions and to receive and impart information and ideas, and adds that the freedom and pluralism of the media shall be respected.

Freedom of opinion and expression is in fact supplemented by the right to participate in society, especially the right to vote and the freedom of assembly and association. In the EU Charter, the right to education (article 14) and the freedom of art and sciences (article 13) may be seen as complementary to the freedom of expression.

In connection with the freedom of expression, it should be noted that in the Swedish constitution (Yttrandefrihetsgrundlagen 1991:1469, kapitel 2) the right to *anonymity* is safeguarded. It seems to be quite rare that the right to anonymity is directly referred to at constitutional level.

The *freedom of thought and belief* (or freedom of conscience and religion) is expressed in article 18 of the UDHR; "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Similar language is used in article 9 of the ECHR, which is adding a limitation to this right based on *ordre public* in a similar fashion as in article 8 on freedom of expression. Article 10 of the EU Charter corresponds by and large to the provision in UDHR, adding only that the right to conscientious objection is recognised. The freedom of the arts and sciences[11] complements the freedom of thought and the freedom of expression.

The right to informational self-determination and protection of correspondence is expressed in article 12 of the UDHR, according to which "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Article 8 of the ECHR protects the right to private life and correspondence. Article 7 of the EU Charter protects the right to private life and correspondence, whereas article 8 makes direct reference to the protection of personal data;

> "1. Everyone has the right to the protection of personal data concerning him or her.

11 Article 13 in the EU Charter.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority."

The right to be informed[12] has been expressed in the EU Charter in connection with worker's right to information and consultation within the undertaking (article 27), the right to be heard before any individual measure which would affect him or her adversely is taken (by the administration) and the right to write to the institutions of the Union in one of the languages of the Treaties and to have an answer in the same language (article 41) and the right of access to documents of the institutions, bodies, offices and agencies of the Union (article 42)[13].

The right to own intellectual property[14] is recognized *expressis verbis* only in article 17 of the EU Charter, which deals with the right to property. Usually the right to own intellectual property has been considered to be a part of the general protection of property, recognized also in the other human rights instruments. However, one could say that the protection of intellectual property has close connections also to freedom of expression and the right to informational self-determination. It is, however, rare that intellectual property rights are expressed in constitutions. Nevertheless, it is clear that intellectual property rights are institutionalised rights recognised by the legal system.

Generally speaking informational rights and freedoms implies that people have the right to get hold of information freely, that they may freely hold opinions and communicate their opinions in private or public to other people. In addition increased emphasis is given to the right of informational self-determination and the exclusive right to information that is commercially valuable as well as the right to access to communication facilities[15].

2.3 The Principle of Free Movement of Information

In my understanding, the principle of free movement of information is not an informational right, but a general principle underlying much of the information law legislation. One can have a right to freedom of expression, but not a right to free movement of information. However, this doesn't mean that the principle of free movement of information would be totally unconnected to fundamental

12 Regarding the right to be informed, one might have added in the EU Charter the right of consumers to be informed on the qualities of goods and services. Ins

13 In the Finnish constitution, the right to access of official documents is linked to the provision on the freedom of expression.

14 This right can also be expressed more generally as an *exclusive right to commercially valuable content*. This would include i.e. the right to trade secrets and domain names.

15 The right to access to information facilities is in fact realised through rules on universal access, network access rules, free competition of communication services, radio frequency policy and interoperability.

informational rights such as the freedom of expression. The principle of free movement of information includes values based on the informational rights and freedoms described above[16]. In my understanding the principle of free movement of information is comparable to the four basic freedoms underlying EU law, i.e. the free movement of goods, services, capital and persons[17].

The free movement of information is an important legal meta norm or meta principle, which governs the legal interpretation and argumentation, and helps solving normative collisions. It is therefore not primarily a rule of positive law that is directly applicable but a principle governing the interpretation of norms and weighing of rights applicable in a particular situations. To the extent it can be applied as a principle governing the interpretation in a particular case it can be said to be a principle for *teleological interpretation* striving at optimizing free flow (or free movement) of information.

Despite its value basis *the principle of free movement of information reveals an instrumentalist view of information*; it is the end result that counts. Information is an item that may, but need not necessarily be a prerequisite for obtaining knowledge. It may, but need not necessarily have a commercial value or be part of a decision making process. It is thus recognized that information may have different functions in different relationships and processes. Consequently no fundamental distinction is made between different types of content: a copyrighted musical work can be equally important as an object of freedom of expression as a news article.

The principle of free movement of information is also rooted in the drive for *efficiency*;

The rights and their implementation should be *optimized*, with due regard to the costs. Hence in my understanding the principle of free movement of information is comparable to the optimization standard within data security legislation, where the techniques available, the associated costs, the quality, quantity and age of the data, as well as the significance of the processing to the protection of privacy shall be taken into account when carrying out the data security measures[18]. Generally speaking the principle of free movement of information concerns legal institutions and structures safeguarding efficient information flows and the efficient utilization of information resources.

The relationship between the exclusive right to commercially valuable information and the principle of free movemeht of information needs a few words of explanation. In my understanding patent law and copyright law is

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16 For a more thorough explanation of the value basis for the free flow of information as I understand it, see Viveca Still, *On the Theoretical Foundations of the Principle of Free Flow of Information as Applied to Copyright*. Scandinavian Studies in Law, vol 47/2004, at 203-221.

17 See infra for a description of the evolution of the EU policy on a single information area

18 See Finnish Personal Data Act (523/1999), section 32. Similar provisions are to be found in the Act on the Protection of Privacy in Electronic Communications (516/2004) and the Act on the Openness of Government Activities (621/1999). The data security optimization standard was first introduced in Finnish law through the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

actually based on the principle of free movement of information[19]. In patent law, an exclusive right to exploit a patented invention is given to the patent holder in exchange for access to information explaining the invention. The very idea of patent law is to give inventors an incentive to reveal their inventions in exchange for an exclusive right to commercially exploit them. This mechanism is intended to speed up innovation and progress in society and add to the economic growth and wellbeing of society.

In the same way copyright is intended to offer incentives for authors to come forward with and publish their works. In exchange the authors are assured the exclusive rights to commercial exploitation of their works for a certain time and the respect for their moral rights. Copyright offers a private market for cultural expressions and hence also is an institution designed to enhance freedom of expression, as it makes it possible to make and publish works without public funding or private patrons and as a consequence without interference on the content of the work.[20]

Both copyright and patent rights can be regarded as prerequisites for a functioning private information market, because it provides a mechanism for trading information and minimizes the distortion of competition caused by free riding[21].

Having said this, it is still clear that intellectual property rights imply a certain right to control the use of information and that there is (an increasing) tension with the free movement of information. *Chalton* has found that although intellectual property does not create a property right to information *per se*, it has

19 To this effect, see also Peter Drahos, *A Philosophy of Intellectual Property,* Dartmouth Publishing Company 1996, who considers that even though information should be accessible to everyone it is possible to give somebody a right to control the information over a certain period of time. Also MacKaay underlines the need to assure the distribution of works in order to distribute the ideas contained in them. Ejan MacKaay, *Economic View of Information law* in: Willem F. Korthals Altes and others (eds.) Information Law Towards the 21st Century (Deventer\Boston 1992).

20 Riis does not seem to share this view. He suggests that information on inventions could easily be collected by a government agency other than the Patent Office. He does not explain what incentives private corporations would have to reveal such information was it not for a trade off, where they receive a clear benefit. Neither does he think that copyright is promoting the distribution of information contained in protected works. Thomas Riis, *Enerettigheder och vederlagsreddigheder - Håndhævelse af immaterialrettigheder i økonomisk perspektiv*, Jurist- og Økonomforbundets Forlag 2005, at 39-49. Of course he is right in the sense that it is highly questionable whether patent law or copyright law is a prerequisite for inventions and creative works to be made. This is a question that goes to the core of patent right and copyright; if it is believed that they do not give incentives for creative and inventive work (and the distribution of inventions and works), the whole institution is superfluous. I would still claim that it is generally accepted that patent law and copyright gives incentives to engage in inventive and creative work for distribution to the public.

21 Free riding means the distortion of competition that follows from the fact that it is expensive to create content, but cheap to reproduce it. Without institutions like copyright or patent rights it would be impossible for those who create content or invention, to demand compensation for such use in order to cover the costs of invention or creation, i.e. the sunk costs.

developed intellectual property in a manner that provides the holder an increasing power to control content.

He also notes that the problem in many respects is the overlapping opportunities to govern information through various legal instruments such as patents, copyrights, and protection of business secrets[22]. This overlapping and progressively increasing control is further enhanced by private ordering through technical protection measures and contracts[23].

In copyright, the tenses between the exclusive right of the author and the free movement of information has been alleviated i.e. through doctrines such as the idea-expression dichotomy, according to which the exclusive right may pertain to the expression only, not to the ideas contained in an expression. Another similar doctrine is the copyright exhaustion or first use-doctrine, which makes it lawful to distribute copies of the work once it has lawfully been put on the market.

However, it seems that changes in (EU) law has decreased the applicability of the idea-expression dichotomy, for instance through a decreasing originality-requirement, the extension of copyright to databases[24] and the provisions that there shall be no exhaustion to the communication to the public right or copies made as a result of such communication to the public[25].

Therefore, just because of the mere existence of a doctrine excluding ideas from the protection of copyright one can not say that there is no potential conflict between copyright and the free movement of information and even less so because of the above mentioned evolution of copyright law[26]. The distinction between idea and expression is also quite superficial, as any expression (which can be protected by copyright) includes ideas[27], and therefore restrictions on distribution of the expressions necessarily also affects the distribution of the ideas at least in a qualitative sense. The digital environment, where a

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22 Simon Chalton, *Protection of Information in Computer Programs and Databases*, Copyright World, Nov. 2001, at 12-17

23 Having stated this, I still don't claim that private ordering and the use of technical measures should be used. Quite to the contrary; there is every reason to promote private ordering.

24 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

25 *See* article 3 of directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. 29th recital to the directive explains that "The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder.

26 Rosemary Coombe, *Left out on the Information Highway*. Oregon Law Review, vol 75,1996, at 237-247.

27 See also Per Nordell, *Rätten till det visuella,* GOTAB 1997, at 195 and Jon Bing, *Handel med informasjon i åpne nett, for eksempel Internet* in Rätten till information som en mänsklig rättighet. Föredrag vid XI nordiska mötet i rättsinfomratik 24-28.11.1995. Ed. Ahti Saarenpää & Makku Suksi. (Institutet för mänskliga rättigheter vid Åbo Akademi och Institutet för rättsinformatik vid Lapplands universitet, Åbo och Rovaniemi 1997) at 115.

reproduction is an inevitable step in each instance of communication, increases this problem[28].

There are both practical and normative barriers to free movement of information. The *practical barriers* include direct or indirect costs to obtain and use information. Some information may be considered so important that they have to be provided free of charge or to a price not exceeding the costs of production. Indirect costs of access to information can for instance consist of the difficulties in finding the relevant information among large quantities of information. Practical barriers may also consist of physical and logical barriers to information dissemination. Natural barriers may include limited access to media, logistical problems and long distances. There is a logical barrier to access to information if the information is in an incompatible format or in a language one does not understand.

The *normative barriers* to free movement of information can also be direct or indirect.

Direct normative barriers include rules on secrecy and censorship. Among the indirect normative barriers is legal uncertainty. In copyright, legal uncertainty may be caused for instance by the problems to assess whether content exceeds the originality-threshold and is therefore protected or by difficulties to assess who owns the copyright[29].

The point is that we need to assess *what* the effects of the norms are on the free movement of information as well as *when* there are reasons to keep up or make new barriers to the free movement of information. *Taking into consideration the importance of information in society, the free movement of information should be promoted unless there are specific reasons to preserve barriers to the free flow of information*.

As a consequence of taking the principle of free movement of information into consideration, the legislator needs to assess how legal institutions should be drafted in order to optimize the free movement of information. It is not sure that only because protection of personal data or copyright has been seen as a prerequisite for the free circulation of that information, more stringent rules on personal data protection or copyright will increasingly facilitate free movement of information. Quite to the contrary; a fair balance between different interests should be accommodated and the need to take into consideration the real world circumstances can not be underestimated[30].

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28 See also Rosemary J. Coombe, *Left out on the Information Highway*, Oregon Law Review, vol 75/1996, at 237-247.

29 There are no stipulations in the Nordic copyright acts on ownership of copyright of works created within an employment relationship. However, there is a rather diffuse general rule put forward in legal doctrine stating that the rights to a work are transferred to the employer for use within the normal course of business of the employer. This rule makes it very unclear to what extent a transfer of ownership really has happened and what rights the employer and the employee has to works created within employment relationships.

30 At a more principled level, see John Searles, *The Construction of Social Re*ality, Allen Lane, The Penguin Press 1995.

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3 The Free Flow of Information and the Common Information Area within EU Law and Policy

3.1 Information Society Programmes from Bangemann to the Digital Agenda

The political rhetoric is not indifferent. It forms the way law is perceived and interpreted and may in the long run be refined to legal principles. In particular, it forms part of and affects the narrative underlying law[31].

It amazes me how early on the concept of *single* or *common information area* was coined. Already in 1984, that is well before the advent of the world wide web, the European Community adopted a programme aiming at establishing a common information area[32]. Already then it was recognized, that information had worldwide become one of the prime factors in economic activity, and that the effective use of information is one of the essential ingredients of economic growth and competitiveness. Furthermore it was thought that the European integration process was becoming increasingly dependent on the effective flow of information within and between all Member States. The programme also refers to the growing complexity of information needs for business and political decision-making, for scientific and technical development, for the professional, cultural, social and economic choices of individuals and groups of people, and therefore there was an increasing need to develop advanced solutions for a flexible and transparent specialized information market at Community level. Many of the details of the programme still feel topical, such as issues concerning the creation of user-friendly billing and payment systems and copyright licensing, to mention but a few.

The Bangemann Report, completed in 1994, set out the first modern information society strategy for Europe. The viewpoint in the Bangemann report was that the information society was to be brought about relying on market mechanisms. In practice, that would mean developing a common regulatory approach to bring forth a competitive, Europe-wide, market for information services.

The most important initiatives in the operational programme were to continue the liberalization of the telecom sector, increase interoperability and interconnection (and standardisation in relation to that) and provide access to all to an affordable price. In addition, emphasis was put on developing the data privacy and security legislation and the adequate protection of intellectual property rights. Also media diversity and a functioning competition framework were emphasised.[33]

In the Council Resolution of 27 November 1995 on the industrial aspects for the European

31 Bert van Roermund, *Law, narrative and reality: an essay in intercepting politics*. Kluwer Academic 1997.

32 Council decision of 27 November 1984 adopting a Community programme for the development of the specialized information market in Europe (84/567/EEC).

33 Bangemann Report, 26.5.1994, available at "ec.europa.eu/archives/ISPO/infosoc/backg/bangeman.html".

Union in the development of the information society[34], endorsing the Bangemann report, the focus was set on economic growth and competitiveness of the industry, especially the content and service industry and the IT sector.

The European Commission launched the eEurope initiative in 2000 with the aim of accelerating Europe's transition towards a knowledge based economy and to realize the potential benefits of higher growth, more jobs and better access for all citizens to the new services of the information age.

The first phase of eEurope was the eEurope 2002 Action Plan which focused on exploiting the advantages offered by the Internet and which was especially focused on increasing connectivity. It comprised a total of 64 targets to be achieved by end 2002. The majority of those were successfully completed and in June 2002 the European Council launched a second phase, eEurope 2005 Action Plan, which focused on exploiting broadband technologies to deliver online services in both the public and private sector. eEurope provided a policy framework within which existing expenditure, such as the 6th Framework programme for research, the eTEN or the Structural Funds, could be better focused.

At the Spring Council in March 2005, Member States deemed it to be essential to build a fully inclusive Information Society, based on widespread use of information and communication technologies (ICT) in public services, SMEs and households. To that end, the new initiative for the following five years was to focus on ICT research and innovation, content industry development, security of networks and information, as well as convergence and interoperability in order to establish *a seamless information area*[35].

In the i2010 strategy the *Single European Information Space*, promoting open and competitive internal market for information society and media, was to be completed. In addition, there was an effort to strengthen innovation and investment in ICT. It also emphasized the need to build and inclusive European information society. In practice, much emphasis was put on the aim to offer affordable and secure high bandwidth communications, rich and diverse content and digital services.

Under i2010's Single European Information Space pillar, the Commission combined regulatory and other instruments to create a modern, market-oriented regulatory framework for the digital economy.

In the current Digital Agenda, which forms part of the EU2020 Strategy, emphasis is put on developing the digital single market; increase trust and security; develop fast and ultra fast internet access; research and innovation in ICT and enhancing digital literacy; skills and inclusion; as well as a number of ICT-enabled benefits for EU society.

The core of the EU information society policy during the past decades seem to have centered around building up the *infrastructure* (mobile, broadband, radio spectrum, standardization, information security etc), working for *sustainable*

34 OJ C 341, 19.12.1995, p. 5–7.

35 Council resolution of 27 November 1995 on the industrial aspects for the European Union in the development of the information society.

growth and EU's competitive advantage through the use of ICT, as well as providing for *security* (i.e. data security and protection of privacy and personal data) *inclusive society* and a functioning *internal market* to the benefit of consumers. Emphasis has as well been put on *eGovernment* initiatives, providing for functioning inter-governmental networks, increasing transparency and efficient public services. Also the *use of ICT for other societal purposes*, such as eHealth, is important initiatives. The efficient use of *public sector information*, policies aiming at maintaining *cultural diversity* and creation of *rich content* has also been priorities. All in all, the European information society policy has maintained a strong focus on technology, but issues such as trust and security, economic and environmental sustainability and the social dimension has gained in importance.

Considering the current state of affairs within the EU, the telecommunication policies (deregulation, universal access, and net neutrality), protection of privacy and personal data, service provider responsibility for content, access to public sector information and copyright seems to be of special interest.

3.2 Telecommunications policy providing the basic possibilities for free flow of information

3.2.1 Liberalisation and universal access

Telecommunication networks and services are the backbone of Europe's information society. The first phase[36] of Community policy-making focused on establishing common technical development. Since 1987 a second policy phase saw liberalisation as the main focus and culminated with the liberalization of all telecommunications services and networks by 1 January 1998.

The 1990 Framework Directive[37] established the principle of Open Network Provision. It essentially harmonised open access to public telecommunication networks and was later further developed into the Universal Service Principle[38].

The 1990 directive was developed in the mid-1990s[39] to adapt to the evolving competitive environment and together with further Directives on Interconnection[40] and Licensing[41] made up the '1998 package' of legislation

36 This would cover the years from 1984 to 1987.

37 Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision. OJ L 192, 24.7.1990

38 Council Resolution of 7 February 1994 on universal service principles in the tele-communications sector.

39 Council Resolution of 22 December 1994 on the principles and timetable for the liberalization of telecommunications infrastructures. OJ C 379 , 31/12/1994, p 4-5. Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets. Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services.

40 Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP).

which established the basis for the full opening of EU telecoms markets on 1 January 1998.

The 1998 package was primarily designed to manage the transition from monopoly to competition. However, from the point of view of free flow of information its effects where considerable, as it aimed at providing access to telecommunication services to all at reasonable prices.

Community telecommunications policy has to a large extent continued to build the infrastructure of the information society, first and foremost building up new and more powerful telecommunication networks and media technologies. Emphasis has also been put on the building up a framework for information security in the EU.

Deregulation in the field of telecommunications has proceeded well. A continuous concern is the continuous lack of radio frequencies, which leads to a continuous need for regulation in this particular field.

Under the EU's Universal Service Directive of 2002, universal service means that citizens must be able to connect to the public phone network at a fixed location and access public phone services for voice and data communications with functional access to the Internet. The Directive also requires that consumers have access to directory enquiry services and directories, public payphones and special measures if they are disabled. Today, the request for a consumer's right to broadband has increased.

The universal service obligation is a prerequisite for the free flow of information, because without access to telecommunication services one may not efficiently get access to the information flow. This again, has been considered increasingly important[42]. In Finland, the Communications Market Act provides as from 1 July 2010[43] that everyone shall have the right to broadband of at least 1 megabit[44]. The aim is to ensure a connection speed of 100 megabits by 2015[45].

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41 Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services.

42 At a general level, the principle of universal access has been expanded to cover also Internet access, see directive 2009/136/EC amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcment of consumer protections laws, article 1.

43 Law 331/2009, amending the Communications Market Act.

44 The connection speed to be provided as a minimum is prescribed through the decree of the Ministry of Transport and Communications on the minimum rate of a functional Internet access as a universal service, nr 732/2009.

45 Valtioneuvoston periaatepäätös. Kansallinen toimintasuunnitelma tietoyhteiskunnan infrastruktuurin parantamiseksi. 4.12.2008. (Government decision-in-principle to improve the infrastructure of the information society 4.12.2008)

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3.2.2 Net neutrality

Network or net neutrality is about the question of whether legislation guaranteeing a neutral network to all users should be enacted. It is also about who gets to hold the power to control the information moving in information networks.[46]

In the US, discussions on net neutrality emerged after a case in 2005, when a broadband company Madison River Communications, was accused of blocking its customers from accessing a popular VoIP service. Another example often referred to is the Goodmail e-mail certification system which, for a fee, guarantees that an e-mail sent by their customer gets through all filters. A third case is the Comcast case, where the company limited the bandwidth of BitTorrent without the consent of its customers.

Network neutrality is the principle that all Internet traffic should be treated equally. Net neutrality may be affected at the level of *application*, *source* or *content* of the packets or the sender's *willingness to pay*[47].

Opponents of net neutrality have pointed out that prioritisation of bandwidth is necessary in order to reduce congestion. It is also claimed to provide efficiency and decreasing overall prices to consumers. They claim that there is no reason why all internet traffic ought to be treated equal, as bandwidth use also varies. In the case of usage of peer-to-peer networks it has been claimed that 5 % of end-users generates more than 50 % of all Internet traffic[48], and therefore ISP's have a need to discriminate against use of peer-to-peer technologies in order to provide for a sufficient quality of service for other end-users. Alternatively a higher price needs to be charged in order to avoid congestion. The problem is that apparently this is difficult to do in a transparent and foreseeable way[49]. Yoo tries to show that the evolution of Internet's topology has changed the situation so that discrimination is a natural feature of Internet architecture and as a matter of fact inevitable for good network management[50].

In addition one branch of the debate take into consideration that there should be no obligation not to discriminate harmful or illegal content. Opponents also point out that many big companies make use of broadband without paying the investment in the telecommunication infrastructure, and therefore they have a righteous claim for compensation from these companies.

Proponents of net neutrality, on the other hand, claim that being served on a "first come first served" basis is the customary way for treating data packages. Making discrimination possible would give very much power to the owner of "the last mile" (telecommunication companies), and could therefore distort

46 Lauri Rintamäki, *Network neutrality: Anticompetitive issus in Internet Legislation*. Helsinki Law Journal 2008, at 175-189.

47 Christopher S. Yoo, *Innovations in the Internet's Architecture That Challenge the Status Quo*. Journal on Telecommunications & High Technology Law, vol 8/2010, at 80.

48 Ibidem, at 91.

49 Ibidem at 94, describing the possibility of metered pricing.

50 Ibidem.

competition to the detriment of the consumer. Net neutrality has also been associated with freedom of expression[51].

The principle of net neutrality became a fiercely debated issue during the negotiations of the so called Telecom package in 2009, not the least because of the so called "three-strikes-and-out"-initiative in France. The directive 2009/136/EC of 25 November 2009, amending the existing regulatory framework for electronic communications networks and services, includes some important principles in favour of net neutrality.

As a general rule directive 2009/136/EC enunciates that a competitive market should ensure that end-users enjoy the quality of service they require. However, it recognises that in particular cases it may be necessary to ensure that public communications networks attain minimum quality levels so as to prevent degradation of service, the blocking of access and the slowing of traffic over networks. Therefore it allows operators to use procedures to measure and shape traffic on networks. However, those procedures should be subject to scrutiny by the national regulatory authorities and users should be fully informed of any limiting conditions imposed on the use of electronic communications services by the service and/or network provider.

In addition, the directive stresses that end-users should be able to decide what content they want to send and receive, and which services, applications, hardware and software they want to use for such purposes. National regulatory authorities may also impose minimum quality of service requirements in order to ensure that services and applications dependent on the network are delivered at a minimum quality standard.

According to the 15th progress report on the single European electronic communications market the report says with reference to the French Hadopi law that "the newly adopted regulatory framework deals with measures taken by Member States regarding end-users' access to or use of communications services and applications. It requires in particular that the persons concerned by any such measures are entitled to a prior fair and impartial procedure, including the right to be heard, and have a right to an effective and timely judicial review".[52]

In December 2009 the Commission made the following declaration on net neutrality (2009/C 308/02):

> 'The Commission attaches high importance to preserving the open and neutral character of the Internet, taking full account of the will of the co-legislators now to enshrine net neutrality as a policy objective and regulatory principle to be promoted by national regulatory authorities (1), alongside the strengthening of related transparency requirements (2) and the creation of safeguard powers for national regulatory authorities to prevent the degradation of services and the hindering or slowing down of traffic over public networks (3). The Commission

51 Marvin Ammori *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, Federal Communications Law Journal*,* March, 2009.

52 Commission staff working document - accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions progress report on the single european electronic communications market (15th REPORT) {COM(2010) 253}

> will monitor closely the implementation of these provisions in the Member States, introducing a particular focus on how the “net freedoms” of European citizens are being safeguarded in its annual Progress Report to the European Parliament and the Council. In the meantime, the Commission will monitor the impact of market and technological developments on “net freedoms” reporting to the European Parliament and the Council before the end of 2010 on whether additional guidance is required, and will invoke its existing competition law powers to deal with any anti-competitive practices that may emerge.’

In June 2010, the European Commission launched a public consultation on net neutrality. The Commission tries to find out the scope of the possible problems related to traffic shaping. It will be interesting to see what the results of the consultation are, as traffic shaping is difficult to detect and internet service providers may not be willing to reveal their management practices, especially if they may be suspected of having an adverse impact on competition (which is not allowed under Directive 2009/136/EC).

One can say that the European legislator has strived for a balanced approach, where as a general principle net neutrality is promulgated but at the same time acknowledging that in certain circumstances there might be reason to deviate from the principle. From the point of view of the principle of free flow of information this seems like a viable solution, where freedom to communicate and access services on the internet is the basic principle, and any deviations from that principle can be accepted if it is absolutely necessary for the overall functioning of the network. The approach taken by the European legislator is to ban shaping of traffic that would affect a competitive market, which is to provide users with a wide choice of content, applications and services[53]. As shown by Yoo, discrimination of data packages may also be seen as normal practice, and may even under certain circumstances be seen as beneficial for end-users[54]. However, as discrimination involves strong elements of power, it would be wise to continue monitoring this field.

3.3 Protecting Privacy and Personal Data and Free Flow of Information

Protecting privacy and personal data has been a very important policy area in EU law.

In the preface of directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, reference is

53 Sluijs, comparing US and EU policies against net neutrality, criticizes the European "wait-and-see-stance", while at the same time advising US policy makers to pay close attention to the developments in Europe and especially to focus on workable competition. Jasper P. Sluijs, *Network Neutrality Between False Positives and False Negatives: Introducing a European Approach to American Broadband Markets*. Federal Communications Law Journal, vol 77/2010, 77-117.

54 Yoo, op cit.

made to the need to harmonize the level of protection of personal data in order to overcome obstacles to the free flow of information between member states[55].

According to article 1 of the directive, member states shall neither restrict nor prohibit the free flow of personal data between member states for reasons connected with the protection of privacy and personal data. However, the idea that protection of personal data is connected to the need to assure the free flow of data was encompassed already in the OECD principles from 1980[56].

According to article 9 of the directive, Member States are to provide for exemptions or derogations from the protection of personal data for purposes related to freedom of expression.

In the current policy debate about privacy it has been claimed that privacy will never be what it was because of the possibilities to trace what web pages people visit, what content we consume and where people move[57]. In addition, the evolution of the social media means that data subjects reveal personal information to the audience on a large scale. As an example it can be problematic that views expressed years earlier can still be traced and examined for instance by prospective employers. Some have claimed, that one ought to accept that there is no longer data privacy and even asked whether one should rethink strict privacy policy taking into account that it "might not only be infeasible to administer, but also inconvenient to live with"[58].

In the current policy discussion at EU level emphasis has been put on the effective enforcement of protection of personal data through application of the principle of "Privacy by Design", dissuasive sanctions against breaches of protection of personal data and increased responsibilities for network operators and service providers, including an obligation to notify breaches of personal data security.

The principle of "Privacy by Design" means that privacy has to be built into new technologies, therefore underlining the importance of technological design for the fulfilment of privacy rights. As a matter of fact, compared to the use of privacy-enhancing technologies, privacy by design implies a deeper involvement into privacy and implies that privacy has to be adopted also as a basic element in business strategies.[59]

An important concern in the field of privacy is the global dimension; privacy can not efficiently be imposed through EU rules only. However, to the extent

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55 This is repeated in directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector

56 Recommendation of the Council concerning guidelines governing the protection of privacy and transborder flows of personal data (23 September 1980).

57 The extensive use of RFID, surveillance cameras as well as mobile localisation tools has been used as examples of technologies able to trace movement in physical space.

58 Marc Langheinrich, *Privacy by Design - Principles of Privacy-Aware Ubiquitous Systems*, 2001.

59 See Ann Cavoukian, Scott Taylor and Martin E. Abrams, Privacy by Design, essential for organizational accountability and strong business practices. *IDIS* vol 3, 2010, at 405-413. Bergkamp has reminded that free flow of interest may also be in the interest of consumers or private persons.

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possible the EU has tried to assure that EU citizens will be protected. Therefore companies and organisations within the EU may not transfer personal data to companies or organisations in third countries unless there is a guarantee that the data will receive the same level of protection as in the EU. Protection can be at a country level - if the country's laws offer equal protection - or at a company level where a multinational company produces and documents its internal controls on personal data. Previously, the EU-US Safe Harbour Arrangement[60] and Commission Decisions providing for basic privacy standards, has decreased barriers of free flow between the continents of information that includes personal data[61]. However, the fact remains that EU can not effectively prevent its citizens from engaging with foreign companies not obliged by the EU rules or agreements implementing sufficiently high standards of privacy protection.

3.4 Access to Public Sector Information

Access to public sector information was traditionally more seen as a transparency issue. Later on in the 1990's the awareness of the economic value of public sector information increased. One of the first steps was directive 90/313/EEC on the freedom of access to information on the environment. The object of the Directive was to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which such information should be made available[62].

The breakthrough for the thinking of Public Sector Information (PSI) came with the Green paper on public sector information[63], published in 1999. There, public sector information was seen as an information asset with a dual function; providing citizens with information is a prerequisite for a functioning democracy and a functioning internal market, especially with a view to the needs of SME's. At the same time, information was seen as assets, which could be exploited commercially.

The Directive 2003/98/EC on the re-use of public sector information has as its objective to establish an internal market and ensure that competition is not distorted. It sets out harmonised rules and practices relating to the exploitation of public sector information. The directive emphasises on one hand that the right to knowledge is a basic principle of democracy and on the other that PSI is an

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60 Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441). 2000/520/EC, OJ L 215 , 25/08/2000 P. 7 - 47.

61 Commission decision of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council, revising earlier decisions (2001 and 2005) on the subject.

62 Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, article 1.

63 Public sector information: A key resource for Europe. Green paper on public sector information in the information society. COM(1998)585.

important primary material for digital content products and services and will become an even more important content resource with the development of wireless content services. The directive sets out as a general principle that Member Stats shall ensure that PSI is re-usable for commercial and non-commercial purposes to a reasonable cost, not to exceed the production and disseminations costs plus a reasonable return on investment. The directive provides that conditions on the re-use of documents may be imposed, but they may not unnecessarily restrict possibilities for re-use or restrict competition.

The PSI may be said to form one of the cornerstones and main areas of application in practice of the principle of free flow of information. It neatly combines thinking of information markets with both commercial and non-commercial demand[64].

The review of directive 2003/98/EC points out a number of battles going on between PSI holders and re-users, and among re-users themselves. One of the most fundamental tensions is the question of price: should public sector bodies request payment, and what would be the optimal price, taking into consideration on the one hand the idea of providing efficient access to public sector information and providing at the same time incentives for the productive re-use of the information and on the other hand the cost incurred by the public sector in gathering and disseminating the information. As pointed out in the review of directive 2003/98/EC, the free and gratis access to geographical information may be more profitable to society than charging for the information. The problem is that the increased tax revenues may not gain the agency that changes its pricing strategy. In addition, one must keep in mind that collecting and making available the information is subsidized by society and may not be cheap or even a by-product of other tasks laid down in law. As a last point, a strategy that involves the possibility that the return for the "investment" may leak to foreign countries is not incentivising for domestic information production.

One of the issues dealt with in the review of directive 2003/98/EC is the question of whether the field of application of the directive should be extended to encompass public resources available in archives, museums, libraries and other similar public institutions or produced as a result of publicly funded research. Many people think that the results of publicly funded research should be freely available. What is special for these institutions is that much of their resources are copyright protected and the copyright may belong to third parties[65]. These institutions may, however, have an important interest in making those resources available, since making available information to the public can be seen as their primary task.

The copyright issues have to be dealt with though. What comes to publicly funded research, and taking into consideration that the publishing landscape for

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64 For a proper view of the theory of information markets, with a special view on the development of the European information area, see Tuomas Pöysti, *Tehokkuus, informaatio ja eurooppalainen oikeusalue*, Forum Iuris 1999

65 In the Nordic countries, copyright to research papers and books produced as a result of research has been considered belonging to the researcher. The universities have not been engaged in publishing the papers. The situation is however changing, as open access, open source and creative commons is increasingly favoured.

scientific works have changed tremendously, it would be possible to enact a legal framework either stating that copyright to publicly funded research shall be transferred to the employer by law, or that the employer shall have a permanent and transferrable non-exclusive right to use such works. As to libraries, museums and archives, the current initiatives on national digital libraries points at serious problems. There is no doubt that these institutions own large information resources that from a cultural, educational and research point of view is extremely valuable. However, taking into consideration how expensive digitisation is, there is no point in wasting public money into digitisation, if the content can not be made available to the public. This again requires the copyright issue to be dealt with, either through extended collective licenses, private-public partnerships or some other means.

3.5 Broadcasting and Copyright Policy

Broadcasting and copyright is closely intertwined in the EU regulatory framework[66].

The Audiovisual Media Service Directive[67] (AV Media Directive) points out the growing importance of audiovisual media services *for societies and for democracy, in particular by ensuring freedom of information, diversity of opinion and media pluralism*. The directive also makes reference to the need to preserve on *pluralism and freedom of televised information and of the information sector as a whole* and on establishing *a single information area.*

The so called Infosoc-directive (Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society) does not make reference to a Single European Information Area, but acknowledges the importance of copyright in the information society, points out the need to balance copyright with other fundamental rights and shows a strong commitment to the internal market[68].

As a matter of fact, the most important question today is whether the low level of actual harmonisation of copyright law poses obstacles to the internal market, and therefore also to the information flow within the EU.

Copyright regulation at an EU level has proceeded step by step through narrowly formulated directives, aiming at a harmonised level of protection of authors and other rights holders. However, as pointed out by the Commission, only the (economical) rights have been harmonised, not copyright exceptions[69]. In addition, moral rights have not been harmonised. The idea of a harmonised framework for copyright has been put forward in several documents by the

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66 This applies also to the national context.

67 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)(codified version).

68 One reason to this may of course be the fact that copyright is dealt with by DG Internal Market, whereas information society issues otherwise are dealt with by DG INFSO. Therefore the policy priorities may differ.

69 Creative Conent in a Digital Single Market: Challenges for the Future. Reclection Document of DG INFSO and DG MARKT, 22 october 2009.

Commission lately[70]. However, it is not clear that a profound harmonisation is feasible at this stage[71].

Another issue is the question of the fragmented licensing market. EU has been looking into the licensing market for some time, following complaints that it is so difficult to get licenses to provide services accessible from all member states. The issue is difficult, as licensing arrangements, including the institutional aspects such as whether licensing is effected through a Collective Management Organisation, are not generally regulated but arise as a result of market developments. Especially the music market has been considered problematic. One reason is the sheer number of rightsholders to recorded music; On the one hand we have authors, composers and arrangers, on the other performers and producers. In practice, users will have to deal with several CMO's in each country in order to license one piece of recorded music. Another thing that raises transaction costs from the part of the user is that CMO's by and large operate under a territorial licensing regime. Through reciprocal agreements CMO's have been able to provide access to a worldwide repertoire, but at the access level the repertoire has to be licensed country by country.

In order to achieve the aim of one-stop-shops one could impose a regime, whereby each CMO shall have the right to license services established in that country and the use by the service provider would be evaluated in accordance with the *country of origin principle*. The country of origin principle has previously been used in the Audiovisual Media Directive and the Satellite and Cable directive 93/83/EEC[72] and provides for a rule of point of attachment. In other words, the country of origin principle within the AV Media Directive and the Satellite and Cable Directive is a jurisdictional principle, which provides for that the copyright relevant act shall be deemed to happen in the country of uplink or supply. The suggestion would therefore be to enlarge the country of origin principle to cover services provided on Internet.

Opponents to a country of origin principle would probably claim that such a principle would lead to companies establishing activities in the country where it can get copyrighted works the cheapest, thus leading to a downward spiral of the music licensing price. This may of course be true, unless one puts certain obligations on the part of CMO's reciprocal agreements. A principle according to which each CMO shall have to right to establish conditions regarding the price of its own repertoire for the right of making available to the public would

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70 See the Reflection Document on Creative Content in a Digital Single Market referred to above and the Monti Report (Mario Monti, *A New Stratey for the Single Market. At the Service of Europe's Economy and Society. Report to the Presiden of th European Commission* José Manuel Barroso, 9 May 2010).

71 A noteworthy inititiave in this respect is th so calle Wittem project, where distinguished law professors from several European countries has made a proposal for a European Copyright Code (April, 2010, available at “www.copyrightcode.eu”). The act, however, only covers authors rights, leaving aside neighbouring rights. Therefore, it can not be regarded as sufficient.

72 Council directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

be designed to overcome this problem and would assure licensing levels that correspond to the general price level in the country from which the repertoire originates[73].

In the audiovisual sector, the licensing landscape looks very different. Here, traditionally producers of audiovisual works make sure through contracts that they own all rights to the works. Collective management exists by and large only for broadcast retransmission purposes. As all rights are concentrated to the producer they may themselves decide how to license, and therefore there is no big problem of getting the rights as such. In this market, local distributors have a role in the licensing chain. The most common problem in this area seems to be unclear contracts, where the licensing rights of the distributor or the conditions of the license may be unclear. In the audiovisual sector, the market seems to have more natural restrictions in the sense that each linguistic and cultural area have their own specificities, which makes Europe a naturally dispersed market area.

The Commission has, however, pointed out that the territorially restricted release windows fragment the markets. From the point of view of consumers, it seems unfair to them that they may not watch the same episodes at the same time as in a neighbouring country. The Finnish TV-retransmission company TV-kaista is engaged in retransmitting Finnish free-to-air-channels over the Internet. An important part of its users live abroad, where they would not have access to Finnish television without such a service. From a broadcaster view it would be impossible to get licenses for pan-European transmission, as the licensing fees would be prohibitive[74]. In this market, one solution might be to *prohibit territorial licensing at the level of consumers*. This principle could perhaps be advance through a rule prescribing that every consumer shall have the right to choose which service to use on the internal market and that any licensing practices adversely affecting this right of the consumer shall be null and void.

One of the initiatives in the EU Digital Agenda is a proposal for a framework directive for copyright management[75]. The idea as far as I understand would be to establish principles of good governance and transparency for CMO's. In my

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73 The acceptance of the country of origin principle is already implied in the arrangements done voluntarily within the music sector. According to the Finnish Composers CMO Teosto other European CMO's may license on-line rights to the repertoare represented by Teosto provided that they have enough know-how and ability to license also outside of the domestic sphere, that the price level is sufficient from the perspective of finnish rights holders, and that the CMO makes sure that disbursement corresponds to the use. Kirsti Sipilä, CEO of Teosto at a public hearing on the Digital Agenda in Helsinki on August 19, 2010. Sipilä also talked about the Pan European Portal, which has been established in order to provide for seamles European-wide licensing. However, the Pan European Portal covers only author's rights, not neighbouring rights.

74 In this market, license fees normally depends on the potencical coverage, i.e. for Finland implying an audience of 5 million. Increasing the territorial area should in fact only add a few thousand people, but because of the territorial licensing structure the enhabitants of all relevant countries would count - even though in practice the audience would not substantially increase.

75 According to the schedule set by the Commission, the proposal would be published by the end of 2010.

opinion, such a rule set should also include provisions on right to access to rightholder information, and by preference also establish a principle that rights transfers should be registered. Such a set of principles would seem to be a good start for establishing the basic infrastructure for the European internal licensing market at least from the outset.

Having a set of principles regarding collective management of rights should, however, not imply that collective rights management is preferred over individual licensing. Collective Management of rights has always been viewed with suspicion from competition law experts. It has been allowed because it reduces transaction costs to the benefit of the consumers. However, the licensing environment is developing, and therefore a certain level of vigilance towards anticompetitive licensing practices, be it within individual licensing or collective licensing frameworks, is necessary.

Relevant for the evolution of the internal market is that of the application of digital rights management. Digital rights management is to a large extent used in order to reduce legal risks, facilitate licensing transactions, prevent copyright infringements and enforce copyright (or other interests of the rightholder)[76]. Mario Monti expresses in his report, that a framework for digital rights management should be established[77]. As he sees it, digital rights management only refers to activities of CMO's. In my view, emphasis should be put on the possibilities for providing a secure licensing framework for individual licensing. In fact, the advent of digital rights management systems makes it possible to handle licensing on an individual albeit automatic basis, decreasing transaction cost just like collective management and providing larger possibilities for individual licensing. This possibility should, however, be further explored before actions can be taken at a regulative level setting preferences for how licensing should be effectuated.

Digital rights management provides an efficient and secure environment for transactions with copyrighted works, increasing the right to self-determination by the author. Therefore, in my view, it is perfectly in line with the basic function of copyright, providing incentives for the author to publish his works to the benefit of the public. One of the most popular standardised licensing schemes, the Creative Commons[78], currently has no support at legislative level. The most important deficiency with regards to these schemes is that it is unclear whether they can be enforced in practice, and therefore there might be a need to establish a right on behalf of associations administering such schemes, to take legal action on behalf of the authors[79].

An ongoing issue, which has not gained much space in the Digital Agenda, is the question of enforcement of copyright. Just as with privacy protection one might claim that "one ought to accept that there is no longer [adequate protection

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76 On the features and functions of digital rights management systems, see Viveca Still, *DRM och upphovsrättens obalans*. IPR University Center 2007.

77 Monti report op cit, at 45.

78 The same goes for open source licenses.

79 Such an authorisation may, of course, also be given by contract that the author has to submit to in order to have the right to use the Creative Commons license.

of copyright]" and that "a strict [copyright] policy may not be worth pursuing taking into account that it might not only be infeasible to administer, but also inconvenient to live with"[80].

Currently, there is a strong drive for increasingly stringent copyright enforcement, as this is seen as a necessary prerequisite for a functioning market; rightsholders claim that they can not compete with piracy on a massive scale, as consumers have the ability to receive content for free through i.e. peer-to-peer networks. Many countries now look into further possibilities to make enforcement ever more efficient. The "three-strikes-and-out"-approach adopted among other by France and the UK is heavily lobbied by the music industry as a solution in other countries. In Finland, a proposal on a system obliging ISP's to pass on warning letters from copyright enforcement agencies[81] to owners of broadband subscriptions if their connection has been used for copyright infringing activities is proposed by the government this autumn. In Finland, an amendment in the Copyright Act in 2005 made it possible to suspend internet connections through a court order. The new approach with warning letters is seen as soft enforcement[82], i.e. as a practical and cost efficient "alternative" to court orders and civil or criminal procedures. There are also clear signs, especially from other countries in the EU, that information service providers or intermediaries to an increasing extent are held liable for copyright infringements by their customers[83].

At the same time there is an increasing sense, especially at the grassroots level[84], that copyright protection is too strict. It is foreseeable that the discussion on whether rightholders should actually have some responsibility of their own, protecting their property and at least expressing ownership and license conditions, might increase.

Another policy question recently analysed in Finland was whether there was reason to codify the rule regarding rights to works made within an employment relationship[85]. In the 1990's a rule on employer's right to computer programs was enacted. According to the rule, which is based on the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, the exclusive rights to the computer programme shall be deemed to be transferred to the employer, unless otherwise stated. If a computer programme has been made during the course of university research, the rights remain with the researcher.

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80 Cf Langheinrich, op cit.

81 The Copyright Information and Anti-piracy Centre (CIAPC) is currently actively investigating copyright infringements on Intenet.

82 Evidence from the US shows that 50 % of those getting a warning letter changes their behaviour.

83 In Ireland, a pub owner was deemed liable for copyright infringement made by a client at the pub using the free wireless network of the pub. In Belgium, an ISP has been obliged through a court order to filter the network in order to block peer-to-peer protocols.

84 The political climate seems to be very different in the Nordic countries. In Finland very few are questioning the reasonableness of strict copyrigt policy while in Sweden the copyright debate has been very fierce.

85 A draft proposal was submitted for public consultation in November 2009, but after an uproar among especially musicians, the Government decided not to go through with it.

As a general principle, in the Nordic countries, the employer may have a right to works made within an employment relationship, but this principle has not been codified. The construction is based on an implied license doctrine. It would seem natural, that if somebody has been employed by a company to do work, the result of which may exceed the threshold of originality therefore qualifying as a copyright protected work, the employer shall have a right to use that outcome. Without the right to use the outcome there would be no reason for the employer to pay the employee for the work he is doing.

In Finland, it is generally thought that the right may be transferred in whole or in part, depending on the circumstances. When assessing the extent to which the rights have been transferred a number of factors may be taken into consideration, among other things the purpose of the employment relationship and the tasks assigned, the habitual use of the work within the employer's field of operation and the general customary rules in that field regarding the scope of the transfer of rights. To the extent that the rights have not been transferred, the author retains the rights. As a starting point employers are usually thought to have received a non-exclusive and non-transferrable license to the work.

The problem with this general uncodified rule, except for the fact that it is known only by experts in the copyright field, is that the scope of the rights transfer is extremely vague, thus resulting in a high level of legal insecurity.

Many changes both in the copyright landscape and in the operational environment of companies have made this legal insecurity increasingly troublesome. Companies today often are subcontractors to other firms, and they need to be able to transfer or license rights to content that may be copyright protected. The provision in section 28 of the Finnish Copyright Act prohibits transfers of copyright or adaptations of the work, unless otherwise agreed. As the whole construction referred to above lies on the presumption that an implied license exists, it is thus in principle possible to claim that an agreement has been reached also within the meaning of section 28. However, in practice it is usually considered that the threshold for finding an agreement to exist under section 28 to be higher than in the case of the uncodified rule on employer's right to works made within an employment relationship[86]. Furthermore, in accordance with the requirements set out in Directive 2001/29/EC, the right to communicate a work to the public or the making available right may no longer be exhausted. As a consequence, all acts of making available requires authorisation from the author. The field of activities engaged with by companies (and also public bodies) today changes more rapidly than decades ago, hence making it difficult for the employer to track what its field of business was when a specific work was created. It is also unclear to what extent employer's may make use of modern information technology that was not available at the time the work was made.

As a matter of principle, the proposal foresees five different options for regulating the issue; the first would be a provision that states that the employer would be deemed to be the sole rightholder of the work. Alternatively there could be a provision stating that the exclusive rights to the works shall be

86 Usually it is fairly easy to show that a person has been employed. It is much more difficult to show that an agreement has been reached regarding the right to adapt the work or transfer rights to it.

considered transferred to the employer, unless otherwise agreed[87]. The third option would be that the exclusive right would remain with the employee, and the employer would not have any right whatsoever to use or otherwise dispose over the work. This option would go against the purpose of the employment relationship and was therefore not considered realistic. The fourth option would be to codify the current rule as closely as possible. However, as the rule is rather vague, this is a difficult task. The fifth option would be a rule according to which both the employer and the employee would have a non-exclusive, transferrable right to works created within employment relationship[88].

This was the option proposed by the working group drafting the bill. It seemed to be fairly close to the current legal rule, as the starting point today normally is that the employer gets a non-exclusive license to use the work. This suggestion was trying to get rid of uncertainties such as the evaluation of "habitual use by the employer", take into consideration the increased need for transferrable or sublicensable licenses, avoid rules restricting or discouraging employers to adapt their functions to modern requirements and decrease the need to keep track of what the employer's line of business is, what technology is applied or what modes of use is considered foreseen at each point in time.

There were a few important reasons for choosing this solution. In addition to the fact that it would increase legal security and make it clearer for both employers and employees what rights they have to works made within employment relationships, it was also seen to be a balanced solution taking into consideration both the interests of the employer and the employee. Whenever a work is created primarily for commercial exploitation, such as is the case within the media industry, the employer would in practice need the exclusive right to the work. He would then be required to negotiate a contract with the employee. On the other hand, the same goes for the employee, which was felt to be reasonable as the employer is the one making the investment into the production of the work, including paying the employees salary.

The third reason was that this solution would allow for *optimal use of the work*, and the risk that the rights to the work remain unused would be as low as possible. Of course, a transfer of the exclusive right to the employer would make sense because the employer is usually interested in making business and better equipped to commercially exploit works. However, employees feared that this would lead to employers holding large quantities of copyrighted works "hostage" as they wouldn't be interested in exploiting them actively but at the same time wouldn't be willing to give up the rights in the works either. The employees felt that the rights would be put to better work if the rights remained with the

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87 This was an option that the working group drafting the bill felt was a possible solutions, but as the starting point was to codify the current rule on rights to works made within an employment relationship, it was not considered to be a suitable proposal.

88 This default rule was to apply unless otherwise agreed or other follows from established practice in a particular field. The latter was intended to give the rule flexibility, so that established and unproblematic practice could continue. In such a case the workingroup considered that there were no such legal unsecurity that needed to be corrected. In addition, the working group considered established practice to qualify as a silent (or implied) collective agreement.

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employees, as they would have a natural interest to publish their works. The solution proposed would make sure that as a starting point neither the employer nor the employee could block use of the work[89].

One of the objections to this draft bill was that it would be very unclear who would have the right to enforce the copyright, i.e. who was the owner of the right. This would be a problem from the point of view of legal security. However, I think the current situation is at least as problematic in this respect. As a matter of fact, under the current regime both employers and employees are very unsure what rights they have to works made within employment relationships. As the employee may not breach the obligations of loyalty etcetera emanating from labour law, the employee has very limited possibilities even now to make use of the work. On the other hand, the employer's right to the work is even more unclear, especially if meaningful use implies having to sublicense or otherwise transfer rights to the work. If the proposed rule would have been accepted, it would have been difficult for either party to block use of the work.

4 Conclusions

Analysing the current policy questions within different fields of information law, one can see certain common issues arising within the different frameworks. At the deep level, establishing *trust* is a prerequisite for a functioning information market or Single (European) Information Space. However, there is no single means for establishing trust. When it comes to commercial markets, it is much a question of providing a sufficient architecture for electronic commerce, including proper consumer protection and enforcement of consumer protection.

The universal service provisions in the telecommunications regulation provides consumers with affordable *access* to the information networks[90]. Without the infrastructure, there is no access to content either. At the content level, provisions on access to government information and transparency is important. From a commercial perspective, the PSI regulation is intended to provide a usable framework encouraging re-use of government information resources for value added services. This is typically a framework designed to prevent underutilization of information resources. Within the copyright framework copyright exceptions may of course be seen as providing remedies for underutilization of information sources. However, within copyright doctrine this concept is unfamiliar, and is more often seen as protecting the interests of the public or providing for copyright balance.

At least in the privacy debate, but maybe also to some extent in the copyright debate, the discussion of the *individual responsibility* of the person to take action

89 However, because of obligations emanating from labour law, employees could actually make use of their rights only to a limited extent.

90 Of course, in practice the well developed library services and the access to computers and internet provided in libraries diminishes the digital divide at the societal level and has a signicant role in providing many people with access to information and the possibility to participate in the information society.

and use available technology in order to protect personal data or copyrighted works, is on the rise. At the same time the need for "*data protection by design*" and "*copyright by design*"[91] is increasingly emphasised. However, my sense is that "copyright by design" is more ambiguous as a concept, as it may include not only measures to protect the interests of the rightsholder but should also effectively establish the regime for "copyright *exceptions* by design". Using technology in order to protect the rights and interests of different parties can of course be seen as admitting that the legal protection of data protection and copyright may not be enforced and therefore this would be a second best strategy. And there might be some truth to it. However, I think it is more important to see this as an attempt to find *workable solutions to real world problems*. Closing down internet would be a very efficient means to solve the data protection and copyright problems we experience, but I can hardly imagine anybody seriously proposing that.

The discussions on net neutrality and the push for copyright enforcement through technological means (three-strikes-and-out or filtering or blocking requests) are both related to questions of *discrimination of content*. An interesting question is whether and on what preconditions this can be seen as censorship. At the same time, these policy questions touch upon the free flow of information at the network (or infrastructure) level.

Yet another policy area important from a free movement of information point of view is the question of the efficient use of information resources and how to establish a proper framework for the efficient use of information resources. This goes for both policies relevant for the use of public sector information and the copyright licensing markets. In both issues, the question of *price, transaction costs* and *public interests* has to be taken into consideration. Many *organisational* issues turn out to have a significant impact on the possibilities for a functioning information market. Whereas in the PSI setting the content producers do not have natural incentive for making information available[92], As a government funded activity it may also be difficult to establish whether information ought to be provided free or at a cost or even at market price. Therefore, case by case analysis needs to be done, taking into consideration the value of the information from both a public and a commercial perspective. In additions, the effect of pricing at competition and the estimated alternative return as a result of increased economic growth and employment needs to be taken account of.

Within the copyright setting it is assumed that copyright gives incentives to disseminating works to the public. So, in this setting the problem is not the lack of interest in providing the public with information in the form they want and need. Instead, problems arise as a consequence of important public interests in access to works, which requires extensive public investments in order to make that content available to the public, in situations where that content is no longer

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92 Of course, they might be obliged and are usually obliged to do so by law or they might get incentives to do so if their budget requires external financing and therefore requires them to license their information assets.

actively exploited commercially. This problem has now been taken up at EU level in the form of a regulative initiative on orphan works, possibly including out-of-print works. In these cases copyright blocks in practice the use of such works for these non-commercial purposes. As public entities can not take the risk of copyright infringement, there is a risk that content will be under-utilized.[93, 94]

Another case of underutilization follows from legal uncertainty as to copyright ownership. It was shown that the current situation implies a high lever of uncertainty as to who owns what rights to works made within employment relationships. Such uncertainty easily lead to suboptimal use of works and thereby dissemination of works. It would be important that some clear rule regarding ownership would be decided, as in the current situation it is unclear for both employers and employees what rights they own to works made within an employment relationship and therfore it is unclear to what extent they neew a specific contract[95]. A regime reducing risk of blocking behaviour and providing at least some level of certainty seemed to be an optimal solution with a view to the effective exploitation and dissemination of works.

As the policy examples mentioned above show, the principle of free flow of information is sometimes an express policy objective. Other times provisions may be seen fulfilling the basic requirements for persons to be able to take advantage of informational rights and freedoms provided in the law. Technological and organisational choices matter, as they may have either direct or indirect impact on the free flow of information. Real world constraints affect legal choices. Information ethics and the importance of ethics of information professionals can not be underestimated. In EU law, the Single European Information Space and the principle of free flow of information has received wide application, and usually the idea that restrictions on free flow of information needs specific justification is accepted. The only exception to this general approach seems to be the EU copyright regulation, where one has not yet taken note of this type of explicit argumentation in favour of the principle of free flow of information.

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93 On the concept of underutilization, see Still 2007, op cit at 217-218.

94 Copyright exemptions has usually been drafted in order to resolve issues of public interest uses vs. the legitimate interests of the author. In the Nordic countries, extended collective licensing is the primary arrangement relied on in order to make these kind of extended uses possible. However, within the current setting of uses wihtin the national digital library, of which a part is made available in the Europeana portal, CMO's have showed little interest to discuss practical solutions and possibilities for licensing.

95 The issue of contracting is probably not a problem in pratice in those fields where works are created primarily for commercial exploitation. Problems arise first and foremost in fields where works are created incidentally or is not primarily intended for commercial exploitation.

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