TrustCoM

Deliverable

17

Appendix C

Access rights management from a legal perspective

WP9 Legal Issues

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TrustCoM

A trust and Contract Management framework enabling secure collaborative business processing in on-demand created, self-managed, scalable, and highly dynamic Virtual Organisations

SIXTH FRAMEWORK PROGRAMME

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1 Introduction

The present study focuses on identifying the ***legal basis*** for granting or denying access to certain content, as well as the ***implications*** of the legal characterization of the access rights on the liability of the parties involved. The findings of the legal analysis will be afterwards tailored to the specificity of the TrustCoM AS E-Learning scenario, by identifying and discussing instances involving risks for the VO participants in relation to access rights throughout the life cycle of the VO.

The study will discuss and explain the legal rules that come into play when decisions need to be made regarding the proper design of access control technologies, the required level of protection that needs to be insured or the rights that might be claimed when circumvention occurs. Considering that according to the scenario, the decisions regarding access are automated, the study will underline what policies should be in place and who should be the actor to approve those policies.

Access to the learning content is the most important feature of the e-learning course. The economic viability of the service provided as well as the reputation of the actors involved depend on the smooth clearance of access rights and on the effective protection against unauthorised access to the learning resources. At least two moments in the EN's functioning will involve decisions regarding access to content:

1. Once the LCP's consent to join the EN, they should have the agreed learning resources available at any time on the agreed contractual terms.
2. Once the end-user chooses one of the recommended learning paths, the content which is part of the path should be made available to him at any time within a certain specified timeframe, in the specified order. No other content should be available to him.

The complexity of the scenario in this regard comes first of all from the inexistence of direct contractual relations (that is direct access clearance) between the rightholder (beneficiary of access authorisation rights) and the end-user (beneficiary of a right to obtain access to certain resources). The access is mediated by the Metacampus portal that acts as a gate between the two parties. There are at least two possible interpretations regarding the involvement of the Portal Operator:

1. The EN agreement includes a non-exclusive **license** of the right to authorise the access to learning resources, with a conditional clause stating that the access authorisation rights with regard to a certain content are transferred from the LCPs to the PO if that content is selected to be part of the learning path. In this case, the LCPs would not have the right to impose additional access limitations once access has been granted at the PO level (but the same content available online could be subject to different access conditions for users accessing the resources directly, outside and independent of the Metacampus framework).

2. The EN Agreement provides that the exclusive right to authorize the access to certain content belongs to the existing rightholder (LCP), so the access clearance takes place at LCP level. While at the Portal level the selection of authorized users takes place (through the assignment of a learning path to be followed), the conditions regarding access are set and checked by the LCPs according to their policies. The price paid for the personalized on-line course could thus reflect the different conditions imposed by different LCPs and would justify why the Private Policies of the LCPs take precedence over the EN Agreement.

Some comments regarding the legal concepts used need to be made first.

De facto, in the online environment it has become easier than in the physical world for an interested party to control the access to certain content and to determine the conditions in which someone else can perceive the work in an intelligible form. In addition, the rightholder can impose limitations regarding the temporal availability or the uses that can be made with the work once access has been obtained. A hardcopy of a novel for example, once bought, can be read, borrowed, sold, destroyed or copied partially (for private use). The online copy of the same novel however can be perceived only after fulfilling on each and every occasion when access is sought, the conditions imposed by the right holder: payment of a fee, satisfying the terms of a click-through license, authentication. The right holder is therefore able, if he desires and if he finds it beneficial, to be permanently in control of the number of times and the purposes for which the protected item is accessed. The exercise of this **power** is enabled through a combination of licensing schemes and technological measures: as long as the terms of the license are not agreed by the person wishing to gain access, technological measures prevent the access. This on the spot enforcement of the contractual terms is possible regardless of any statutory copyright limitations. However, with broader societal interests in mind, such as public access to information, freedom of expression, consumer privacy, this power should and needs to be backed up by an existing **right** recognised by law and enforceable or defendable in front of the competent judicial authorities. Arguably, this right should balance the two components of the access right: the right to restrict access and the right to obtain access to a protected content. When the balance is not present, we are either in a situation of lack of right or in the situation of an abusive exercise of an existing right.

According to the copyright rules, the author of a copyrighted work is the only person entitled to divulge that work (that is, to make it accessible to some or to all the members of the public). Sometimes this is recognized as part of he author's moral rights, other times it can be regarded as part of the economic rights of the author. This doctrinal discussion[1] is outside the scope of the present discussion. We would rather analyse if a right to control subsequent individual acts of access to a work that had been brought to the attention of the public with the knowledge and the consent of the author can be said to exist. If the answer is affirmative, then the scope of such right should be determined.

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[1] For more details, see J. A. L. Sterling, *World copyright law*, Sweet & Maxwell, London 2003, page 340.

Two factors contribute to the difficulty of identifying and analyzing the applicable legal rules. First of all, the existing legislation does not provide expressly for an “access right”, using instead related terms like “the right of making available to the public” or “conditional access”. They will be explained in the corresponding sections of this study. Secondly, the role of the European Directives, to which the analysis is circumscribed, is to harmonize national laws and to set objectives but without providing the means to attain them. Therefore national implementations of the Directives might differ within certain limits and as a consequence, the scope of the access rights has to be determined in practice in each individual case depending on jurisdiction and applicable law.

Due to the fact that the legislation itself does not provide a universally agreed definition of the access rights, we will define for the purpose of this study the **right to control access** as the possibility recognized by law to a right holder to make use of certain technological mechanisms in order to restrict access to an environment by unauthorized persons, to set and to impose conditions of access (to the protected environment) on the interested persons (registration, reputation, payment of a fee) and to seek remedy in court for infringements even in the absence of a contractual clause recognizing the two above mentioned prerogatives. Note that the rightholder is not forced to make use of all its rights (that is, an access authorization right would exist even in case the author does not make use of technological measures), it is enough that they are guaranteed by law.

In the AS e-learning scenario, we will focus on the actors involved in granting access to the learning resources, the permitted actions in accordance with these access rights, as well as their limitations. Therefore, the provisions setting the legal framework for access rights will be examined through the lens of the 3 parameters set above. In the scenario, what is referred to as “protected environment” in the definition is the learning resources that the Learning Content Providers make available within the VO and that are ultimately included in the Learning path.

2 A legal perspective on access rights

The existing EU legislation envisages the right to control access in a double perspective:

On the one side, restricting / conditioning the access is seen as a means through which the right holder's **intellectual property interests** in the protected item are safeguarded. The protected work might be a copyrighted work, a database worthy of protection under sui-generis rights, a patented invention and so on. In this case, the right-holder's asset is the work, and the legitimacy of restricting access can be said to derive from the IP rights over the work. The WIPO Copyright Treaty, the EC COPYRIGHT Directive or the Database Directive reflect this perspective.

On the other side, restricting/ conditioning the access is seen as a means through which the **remuneration interest** arising from the use of an access control mechanism is safeguarded. The protected asset is, in this case, the information society service whose economic viability (remuneration) depends on the use of an access control technology. For example, the e-learning service provider has a remuneration interest in providing paid e-learning services, as well as customer tailored learning paths. The legitimacy of the access restriction derives from the fact that the content to which access is sought is part of a service in its own right, a service whose main feature is its dependency on conditional access. Who owns IP rights over the works that constitute the content of the service offered, or if IP rights are included at all is not relevant in this context. This perspective is reflected in the Conditional Access Directive.

The complexity of such a framework including two complementary layers of protection is revealed when the two types of access controls are not sufficiently orchestrated: if access to the service is granted while access to one particular IP protected content which is part of the service is restricted. The liability scenarios that come into play in this context will prove relevant to the TrustCom AS scenario.

In the following section, the provisions of the relevant legal instruments will be analyzed.

3 WIPO Copyright Treaty (20.12.1996)

Adopted in December 1996, the WIPO Copyright Treaty aims at emphasizing the "outstanding significance of copyright protection as an incentive for literary and artistic creation" in the context of the "development and convergence of information and communication technologies". Therefore, in addition to the general rights available to the author of a copyrightable work[2] (or to the subsequent right-holder) according to the Berne Convention[3], the WIPO Treaty expressly recognized for the first time the author's right to "make available to the public", as part of the right of communicating the work to the public.

Article 8 of the Treaty gives to the author the exclusive right of authorizing the ***making available to the public*** of his work "in such a way that members of the public may access these works from a place and at a time individually chosen by them". The provision is rather broad; therefore the signatory states can choose how to "translate" this provision when ratifying the Treaty[4].

Considering that the WIPO Copyright Treaty aimed at accommodating the copyright rules with the realities of digital environment, the author is now given the right to authorize individual acts of access by members of the public ("*at a time and from a place individually chosen by them*"). Up until that point, in what concerns the public's access to a work, the author had only the right of first publication, and in the offline environment exhausted his rights over a copy of the work once he agreed to communicate it to the public. That translated in the fact that no authorization was required from the author if the same copy of the work was resold and no remuneration interest could be claimed.

Although the access to a work and use of a copy of the work are two different activities, these activities are difficult to analyze separately. Access is sought and granted for specified purposes, and non-compliance with the terms of use in the "user agreement" can justify a subsequent denial of access, even though the access to the online work has been initially lawful.

According to Article 11 of the WIPO Treaty, the author can use "effective technological measures" in connection with the exercise of his rights:

"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or

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[2] The conditions in which a work is eligible for copyright protection are outside the scope of this study.

[3] That is: the exclusive rights to authorize the translation, adaptation, public performance, communication of the public and reproduction of the work.

[4] For explanations regarding the access rights in the Digital Millennium Copyright Act (US), see Jane C Ginsburg, Access to copyrighted works in the Digital Millennium Copyright Act, in Severine Dusollier (coord.), "Copyright: a right to control access to works?", Cahier du CRID n°18, Bruylant, 2000

the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law".

Considering the two Articles mentioned above, we need to ask two questions:

1. Can the author claim the right to control and to authorize the user's access to a work made available online?
2. To what extent do the technological protection measures, used by the authors to control access to the copyrighted work, enjoy legal protection?

The answer to the first question is given by Article 8 of the WIPO Copyright Treaty itself. It should be pointed out that the Article makes reference to the right of "making available" the **work** itself, and not "a copy of the work". As long as the work is incorporated into a material support, the author can authorize and control, due to its "distribution rights" the number of persons who will have access to a copy of the work, at least on the primary market, and claim his remuneration in accordance. This would be impossible when the work is made available on-line, since the work itself can be accessed by to a huge number of users at the same time, regardless of national boundaries. Hence, the overall price paid by the user for buying a copy of the work transforms into "pay –per-view remuneration for obtaining the right to access the work itself[5].

The second question, dealing ultimately with the extent of the author's access control rights, is subject to frequent doctrinal debates.

Following a literal interpretation of Article 11, the technological protection measures must fulfill two criteria in order to be protected against circumvention:

a) to be "used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention". Access control mechanisms could be said to fulfill this requirement.
b) to enable the authors to effectively restrict acts, in respect of their works, which they did not authorize or that are not permitted by law.

If these criteria are fulfilled, the State is required to prohibit the circumvention of the technological measures put in place by the author[6]. The expression "restrict acts…which they did not authorize OR that are not permitted by law" would seem to indicate that the legal protection of technological measures is not guaranteed when a copyright infringement does not result following the circumvention. The infringement would not occur when the activity engaged in after the circumvention is permitted, for example by law.

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[5] for the same conclusion, see also: Séverine Dussolier, *Incidences et réalités d'un droit de contrôler l'accès aux oeuvres en droit européen*, in Le droit d'auteur : vers un contrôle de l'accès à l'information, Cahier du CRID n° 18, Bruylant, 2000 ; Jon Bing, *Intellectual property exclusive access rights and some policy implications* .

[6] While the provisions of the WIPO Copyright Treaty are interesting to analyze as a first expression of an access control right, it offers little practical support. EU nationals are not entitled to rely on the WCT. First, the WCT-treaty has not been ratified by the EU-Member States yet. Secondly, the WCT can only be invoked where the Member State concerned recognizes its direct effect. Thirdly, this Treaty will only apply to so-called "international" situations. See *inter alia* : A. and J.H. LUCAS, « Traité de la propriété littéraire et artistiqué » , Litec, Paris, 2001, p. 857-862, n°1049-1055.

As long as the law does not require the prior authorization of the author for certain acts, can the technological measures put in place by the author be circumvented in order to engage in those acts? In the offline world, legal access to the copyrighted work is a precondition for any of the permitted uses involving that work (you are not allowed to steal a book in order to quote it for illustration in teaching and research). Is the situation different when the desired work is made available online by its author and protected against illegal access? Professor Hugenholtz seems to think so[7]. It may be possible for the national legislation of a certain country not to sanction a particular act of circumvention as an infringement of IP rights (but other remedies may be available, such as, for example, a contractual breech, or an action claiming the remuneration rights involved in providing conditional access to the work). The inclusion of technological protection within a Copyright Treaty is therefore misleading, since it automatically connects the act of circumvention to a subsequent copyright infringement. Or as we know it, copyright infringement does not occur in certain exempted situations, even though the act is not authorized by the author.

According to a different interpretation of the Treaty, Article 11 gives the authors a distinct right to be protected against circumvention of access control technological measures. The protection would extend in this case to any act of circumvention, irrespective whether a copyright infringement subsequently took place. In support of this idea, copyright owners point out the difficulties in ensuring a fair use of their work in the digital environment once the control over access is lost. Access and reproduction are interconnected in the online environment to a great extent, so that reproduction can either be enable access (temporary RAM reproduction of a work), or it can follow from it (permanent reproduction can follow the access).

However, while it is true that technology allows on the spot, instant enforcement of the existing rights, the technological protection measures used in this context are mere tools technically upholding existing rights without representing the legal basis for new rights (that is, the legitimacy of protection against circumvention comes not from the use of technological protection measures, but from existing rights over the protected work).

In order to ensure the legitimacy of their use, technological protection measures need to be designed to distinguish between the lawful and the unlawful uses of a certain protected content, and incorporate the legal rules in their design. Otherwise, allowing a technological fence over and above the existing legal rules would result in an imbalance between the IP interests of the author and the public's right to information and would in fact deny all value to the statutory copyright limitations, replacing them with a private management of the access rights based only on more or less equitable agreements between end-users and right holders.

It should be remembered that copyright is not there to provide a monopoly on ideas, but to ensure creative incentive by affording a time-limited protection on certain expression of those ideas. Once the period of protection has elapsed,

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[7] P.Berndt Hugenholtz, *COPYRIGHT, CONTRACT AND TECHNOLOGY What will remain of the Public Domain* , in _Severine Dusollier (coord.), "Copyright: a right to control access to works?", Cahier du CRID n°18, Bruylant, 2000, page 82.

according to the existing copyright rules, the work becomes public domain and should be freely available.

4 Copyright Directive (2001/29/EC)

Enacted in 2001, Directive 2001/29/EC "on the harmonization of certain aspects of copyright and related rights in the information society" aims to "to promote learning and culture by protecting works and other subject matter while permitting exceptions and limitations in the public interest for education and teaching"[8]. Therefore, more than the international instrument analyzed above, it seeks to provide guidance for the Member States, among others, regarding the rights of the author of a copyrighted work to authorize the "making available to the public" of their works, the limits within which they can make use of technological protection measures to safeguard their rights and the obligations that the States have in ensuring that the listed copyright limitations are in practice given effect.

4.1 Beneficiaries of access authorization rights:

Similar to the WIPO Copyright Treaty, the EC COPYRIGHT Directive aims at protecting the interests of the author of a copyrightable work or of the subsequent right holder (the legal or natural person that could, following an agreement with the author, receive some of the author's exclusive rights. A publishing house is one such subsequent rightholder.) According to recital 25 of the EC COPYRIGHT Directive, "*It should be made clear that all rightholders recognized by this Directive should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them*".

4.2 Permitted acts for the author/ rightholder:

According to Article 3(1) of the EC COPYRIGHT Directive,

> "Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them".

The Directive points out expressly that the right of making available to the public "shall not be exhausted by any act of communication to the public or making available to the public" (Article 3(3)).

[8] Recital 14

Some guidance as to the meaning of these legal norms has been provided within the text of the Recitals of the Directive. Further explanations have been provided in the literature.

First of all, the meaning of the right of "making available to the public" is similar to the one in the WIPO Copyright Treaty, with a special emphasis on the fact that it is the end-user that chooses the time and the place where the requested material will be communicated.[9] The end-user is actively involved in the transmission, it can be said that he is the initiator of hat transmission, as opposed to being just a recipient. This feature individualizes this right from the more traditional right of authorizing the "communication to the public" of his work, defined in Recital 23 as *"covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts."*

The second point to be made, is that the making available right, is not exhausted once an initial authorization is granted. Making an intellectual work available on-line on-demand represents a service and not a distribution of material copies of the work, and the conditions imposed by the rightholder for the availability of that service have to be fulfilled on every occasion. "*Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorization where the copyright or related right so provides.*"(Recital 29 of the Directive)

According to Recital 27 of the EC COPYRIGHT Directive, "The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive." In the context of the TrustCOM AS scenario, this provision exempts the provider of the Enterprise Network infrastructure from the duty to require the authorization of the LCPs for the provision of the means through which their work is made available. This obligation will however exist for the Metacampus Portal Operator that contractually mediates all interactions between the end-user and the rightholders (LCPs).

A third point to be made refers to the possibility recognized to the author, to make use of technological measures "designed to prevent or restrict acts not authorized by the rightholders of any copyright, rights related to copyright or the *sui generic* right in databases" (Recitals 47 and 48 and Article 6(3)). In the wording of the Directive, any technology, device or component that in the normal course of its operation has the function mentioned above (effectively restricting acts not authorized by the rightholder) is worthy of legal protection according to Article 6(3). The efficiency of the device is measured by its ability to achieve the protection objective. The definition is clearly circular, attempting to explain a notion through itself. Since no supplementary conditions are imposed by the legislator, we could say that there is a presumption of efficiency and the burden of proving the obvious inefficiency lies in the party committing the circumvention. Access control as well as protection processes such as encryption, scrambling or other transformation of the

[9] See also Recital 25 quoted above.

work, or copy control mechanisms are provided by the European legislator as examples of technological devices.

The directive provides for a twofold protection of the technological measures:

a) through a general anti-circumvention prohibition (Article 6(1));

b) through prohibiting the import, manufacture distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices that circumvent effective technological measures. (Article 6(2))

In addition to the requirements already present in the WIPO Copyright Treaty, the European legislator imposes an intentional condition: the circumvention is to be sanctioned only when the person concerned "knew or had reasonable grounds to know that he/she is pursuing that objective". Given the presumption of effectiveness of the technological protection measures, this supplementary condition excludes from the scope of protection bluntly inefficient measures that can be circumvented unintentionally.

Given the definition provided for access control rights in the introductory part of this study, we can claim that the rightholder has, according to the EC COPYRIGHT Directive, the right to control access to the protected content. However this right is not unlimited.

4.3 Limitations and exceptions to the access authorisation rights

The scope of the right holder's right to control access is limited through the provisions of Article 5(3) stating the circumstances in which the prior authorization of the rightholder is not necessary for the exercise of the rights of reproduction, communication to the public or making available to the public. Additional limitations derive from the constraints that can be imposed through compulsory licenses on the rightholders making use of technological measures in order to safeguard their rights.

4.3.1 Article 5(3)

Article 5(3) provides an ***exhaustive list of circumstances*** in which the prior authorization of the rightholder is not required in order to reproduce, communicate or make a work available to the public. This means that the Member States would not be allowed to provide for any exemptions other than those enumerated in Article 5. The EU Commission's approach on the matter differs from the one taken at international level through the WIPO Copyright Treaty, but can be regarded as a justified effort to achieve harmonization of the exemptions, as well as of the conditions of their application, and strengthen the Internal Market. However the national courts will decide if in a particular situation an infringement took place or if an exception or limitation is applicable. The wording of the applicable national laws implementing the Directive is to be taken into account.

In the context of the e-learning scenario, two of these exceptions prove relevant:

1. use for the sole purpose of illustration for teaching or scientific research (Article 5 al3 (a));
2. use by communication or making available, for the purpose of research or private study, to individual members of the public (art 5 al. 3 (n)).

1. The **illustration for teaching and scientific research** exception requires only that the source, including the author's name is indicated.

The exception appears to refer more to the exclusive right of the author to authorize the reproduction of the work, than to the making available right. The exception also presupposes that the work has been previously made accessible to the public in a legal manner.

In the AS scenario for example, the exception allows that the learning path include not only the generic title, but also short descriptions of the contents for illustration purposes enabling thus a more informed decision of the end-user.

However, questions may arise as to the applicability of the exception when an access control technological measure put in place by the rightholder is circumvented in order to get access to the work and to use it for illustration in teaching and scientific research. If accessing a work made available online for teaching purposes from a place and at a time individually chosen by the end-user is not among the acts that have to be authorized by the author in the first place, then the access control mechanisms are not protected against circumvention. A copyright infringement didn't take place either, since the exception applies. Few remedies are available for the rightholder in this case (see Appendix B).

2. The second relevant exception, making available to individual members of the public for **research or private study**: *"Use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections";*

The direct beneficiaries of this exemption are the publicly accessible libraries, educational establishments or museums, or archives that provide access to end-users to their collections on a non-commercial basis, and only indirectly the end users concerned. As it has been pointed out in the literature[10], the exception included in the final form of the Directive extends the "library privileges" that have long been granted in the analogue world to such non-profit educational institutions to the "digital document delivery"[11].

> *"Document delivery can best be described as the supply of copies of documents on demand to individual customers and users. Document supply*

[10] Lucie Guibault, "Discussion paper on the question of Exceptions to and limitations on copyright and neighboring rights in the digital era", available at http://www.ivir.nl/publications/guibault/final-report.html#2.3

[11] idem, para.4 (3).

> *is offered by a wide range of service providers: libraries (public, private, university), scientific institutions and laboratories, commercial document suppliers, host organizations, publishers, database publishers, subscription agents, and the like. In the framework of an electronic document delivery service, documents are selected by end users from bibliographic databases, ordered electronically, scanned or copied from existing digital files, transmitted through digital networks and subsequently downloaded"*

The initial proposal of the Directive[12] in Article 5, al.2(c) recognized only an exception "in respect of specific acts of reproduction made by establishments accessible to the public, which are not for direct or indirect economic or commercial advantage". In this context, these institutions would have to obtain licenses from copyright holders if they wanted to make on-line material available to the public.

The final text of the directive refers however to "use by communication or making available, for the purpose of research or private study", so it can be inferred that such licenses need not be obtained. However two supplementary conditions have been introduced:

a) the access is obtained from dedicated terminals *on the premises* of publicly accessible libraries, educational establishments or museums, or archives, and

b) if the accessed work is contained in their collections and is not subject to purchase or licensing terms.

Another relevant issue is the non-commercial nature of the making available activity. According to Recital 42 of the Directive, "When applying the exception or limitation for noncommercial educational and scientific research purposes, **including distance learning**, the non-commercial nature of the activity in question should be determined by that activity as such. **The organizational structure and the means of funding of the establishment concerned are not the decisive factors in this respect."**(Emphasis added).

One last provision that deserves our attention in this context is Recital 44 stating that "When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. **Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter" (**Emphasis added**)**

[12] European Commission, Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 10 December 1997, COM(97) 628, Official Journal C108/6 of 7 April 1998, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/c_108/c_10819980407en00060013.pdf .

4.3.2 Other limitations

Another set of limitations to the access control rights refer to the compulsory licenses that can be imposed on the rightholders making use of technological measures in order to safeguard their rights. Although the Directive protects the rightholders that have chosen to apply technological measures in order to protect their rights, if these measures do not allow a recipient of an exception to benefit from it, in implementing the Directive, the Member states are supposed to make sure such exceptions are possible. Article 6(4) of the Directive makes reference among others, to the beneficiary of the first of the two exceptions analyzed above, that is, illustration for teaching or scientific research (Article 5 al3 (a)).

The provision encourages interested parties, such as rights holders, to take "voluntary measures" in order to ensure that users can benefit from certain exceptions to copyright law. As Bernt Hugenholtz pointed out[13], the nature of such voluntary measures as envisaged by the European legislator is uncertain: it could refer to technical protection measures that automatically respond to eligible users, or to individual or collective agreements between the rightholder and interested parties.

Due to the significant imbalance between the negotiating positions of the rightholder and the end-users, delegating to private parties the responsibility of safeguarding the public interest does not seem to be a wise choice. Moreover, as long as no guidance is provided as to the circumstances in which the state's intervention is required or is abusive, different national implementations may occur.

If no agreement is reached between the interested parties, Article 6 al. 4 par. 1 requires Member States to take "appropriate measures" to ensure that right holders "make available to the beneficiary of an exception or limitation provided for in national law the **means of benefiting** from that exception or limitation**, to the extent necessary** to benefit from that exception or limitation and, where that beneficiary has **legal access** to the protected work or subject-matter concerned."(Emphasis added).

However, Article 6 al. 4 par. 4 provides an exclusion from this requirement for state intervention for "works or other subject-matter **made available** to the public on **agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them**." Since the e-learning resources that are part of the learning path in the TrustCom AS Scenario by their very nature allow members of the public to access works from a place and at a time individually chosen by them, paragraph 4 will be applicable instead of paragraph 1, thus leaving the responsibility of negotiating the terms of the license agreement to the parties involved (LCPs, Portal Operator). Basically, according to the exception in Article 6(4) paragraph 4, once the right-holder makes

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[13] Bernt Hugenholtz, "Why the Copyright Directive is Unimportant, and Possibly Invalid"(2000), available at:

http://64.233.183.104/search?q=cache:skVvyluDfBIJ:www.ivir.nl/publications/hugenholtz/opinion-EIPR.html+What,+for+example,+to+make+of+article+6.4+(1),+a+provision+that+is+presumably+intended+to&hl=en

available to the public a work by imposing certain terms to a user requesting access, the Member States cannot intervene with more favorable conditions.

“Technical standards are within the control of the designer and so confer upon the designer the power to govern behavior with regard to that system. In the case of rights management systems, copyright owners determine the rules that are embedded into the technological controls. By implementing technical constraints on access to and use of digital information, a copyright owner can effectively supersede the rules of intellectual property law”.[14]

[14] “Technical protection measures [electronic resource]. Part II. The legal protection of TPMs”, available at: http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/protection_e.pdf

5 Database Directive (96/9/EC)

Whereas the Berne Convention provided for protection only for “collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations (…)”[15], the collection of mere data into databases was left outside the scope of the Convention. Moreover, the Convention was only applicable in countries that recognized the direct effect of international instruments, otherwise the interested parties were supposed to wait for the entry into effect of the laws transposing the Convention into the national legislation.

5.1 Beneficiaries[16] of access authorization rights:

Considering that “the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently (recital 7); ”, the Database Directive aims at “safeguarding the position of **makers** of databases against misappropriation of the results of the financial and professional investment made in obtaining and collecting the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;” (Recital 39)

5.2 Permitted acts for the author/ rightholder:

The term *database* is defined in Article 1(2) as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means” and is considered to include “literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data”; It covers also collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed”[17].

In order to understand the structure of rights that protect databases in the European legislation, a basic distinction should be made between the contents of the database and its structural elements (the way the contents are selected from possible others, arranged, categorized, the search words or manner to access the various elements).

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[15] Article 2, paragraph 5 of the Berne Convention.

[16] to use a more precise terminology, the creator of a copyrightable database is referred to as “the author” of that database, whereas the person investing in gathering and structuring data into a non-copyrightable database is referred to as the “maker” of that database

[17] Recital 17, Directive 96/9/EC

The content may or may not be protected by copyright, depending on whether or not the general copyright criteria apply. Regardless of the contents (copyrightable works or non-copyrightable data, information), the manner in which the database is structured can be subject to one of the following two types of IP protection:

- **Copyright**, if, according to Article 3(1) of the Directive, "by reason of the selection or arrangement of their contents, constitutes the author's own intellectual creation".
- **Sui-generis right**, if, according to Article 7(1), the maker of a database shows that "there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents", but without the structural characteristics of the database to be so "original" so as the database to qualify for copyright protection.

It becomes obvious that what the Directive strives to protect is the database itself as intellectual creation, regardless of the contents it gathers.

The extent to which the creator of the database has the right to control the access to the database depends on which of the two types of IP protection apply:

5.2.1 Database as a whole is protected by copyright

In case the database as a whole is protected by **copyright**, most of the issues analyzed in the previous section apply as well here. The author of the database has the right to authorize, among other, according to Article 5(d), "any communication, display or performance to the public" (emphasis added). According to Recital 31, "copyright protection of databases includes making databases available by means other than the distribution of copies". The words "display", as well as "making available" clearly suggest the faculty to permit or to deny access to the database to potential users. The access control doesn't necessarily involve the use of technological measures, but does not exclude it either.

Another common provision refers to the fact that access control rights in case of online databases are not exhausted once the database was made available once. "Every on-line service is in fact an act which will have to be subject to authorization where the copyright so provides" (Recital 33).

5.2.2 The right to prevent extraction and/or re-utilization

According to Article 7(1) of the Directive, the maker of the Database has the **right to prevent "extraction and/or re-utilization** of the whole or of a **substantial** part, evaluated qualitatively and/or quantitatively, of the contents of that database".

Although not expressly included within the prerogatives of the author, the database maker's right to control who accesses the database and more importantly, how the database is used once access is obtained, can be inferred from the definitions given to the terms "extraction" and "re-utilization". By having the exclusive right to authorize certain uses of the database, the rightholder is indirectly entitled to set the dividing line between the "lawful" and "unlawful" access to it. Depending on the legal provisions or the terms of the agreement, the rightholder's granting or denying

access (therefore allowing certain uses and rejecting others) to the protected environment will be legally qualified either as an abuse, or a normal exercise of IP rights.

Article 7(2) (a) of the Database Directive defines "extraction" as the "permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form". It can be inferred that perceiving an online database in an intelligible form (which, arguably, is what access means in the common sense of the word) involves at least temporary transfer of all or a substantial part of the contents of a database in the RAM memory of the computer. Moreover, Recital 44 states expressly that "when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder". This authorization is regardless of the possible authorized uses that can be made with that database.

Article 7(3) (b) of the Database Directive defines "re-utilization" as "**any form of making available** to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by **on- line or other forms of transmission"** (emphasis added). Again, the maker or the database (or the subsequent right holder[18]) has the prerogative to authorize or not the on-line transmission of the database.

It is important to notice that both definitions make reference to "all or substantial parts of the database, evaluated quantitatively and qualitatively".

Once the database was made available "in any way" to the public by the maker or with his knowledge, he will not be entitled to prevent a **lawful user** from "extracting and/or re-utilizing **insubstantial** parts of its contents, evaluated qualitatively and/or quantitatively, **for any purposes** whatsoever" (Article 8(1) of the Database Directive).

The maker of the database will however be able to claim his rights against "**repeated and systematic extraction and/or re-utilization of insubstantial parts** of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database" (Article 7(5)).

These provisions may be expressed more synthetically in 3 rules:

1. The maker of the database authorizes the acts of extraction or re-utilization of the entire or a substantial part of the database. User access to an online database can be included in the definition of these rights.

[18] That is, the person to whom this right has been assigned through a license.

2. Once the maker of the database made it available on/offline, he cannot prevent a lawful user to extract or re-utilize insubstantial parts of the database "for any purpose".
3. The maker of the database can oppose repeated extraction or re-utilization of insubstantial parts of the database (as it may be the case in some particular cases in the TrustCom eLearning scenario) when these acts unreasonably prejudice its legitimate interests or involve acts which conflict with a normal exploitation of that database.

Since the distinction between "substantial" and "insubstantial" is rather unclear *in abstracto*, the European Court of Justice was called to interpret it[19]. The Court (Grand Chamber) ruled that:

- The terms "extraction" and "re-utilization" as defined in Article 7 of Directive 96/9 must be interpreted as referring to "any unauthorized act of appropriation and distribution to the public of the whole or a part of the contents of a database. Those terms do not imply direct access to the database concerned". Therefore, an infringement of the right would be held if the unauthorized extraction or reutilization was done without "direct access", through an intermediary subscription service. It could possibly be held that the eLearning service provided in the TrustCoM scenario could qualify as such a subscription service. However, this would only be relevant in the case of an unauthorised extraction or reutilization. The directive does not require that the definition of extraction involve the concept of taking away. All that is required is that a substantial part of the contents be transferred (more or less permanently) to a new medium.
- The expression 'substantial part, evaluated … **quantitatively**, of the contents of [a] database' in Article 7 of Directive 96/9 refers to "the volume of data extracted from the database and/or re-utilized and must be assessed in relation to the total volume of the contents of the database". The expression 'substantial part, evaluated **qualitatively** … of the contents of [a] database' refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilization, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database. Any part which does not fulfill the definition of a substantial part, evaluated **both** quantitatively and qualitatively, falls within the definition of an **insubstantial part** of the contents of a database.

[19] See: http://curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79958890C19020203&doc=T&ouvert=T&seance=ARRET&where=() for the full text of the ECJ's ruling in Case C-203/02.

- The prohibition for "repeated extraction and re-utilization" refers to unauthorized acts of extraction or re-utilization the **cumulative effect** of which is to reconstitute and/or make available to the public, without the authorization of the maker of the database, the whole or a substantial part of the contents of that database and thereby seriously prejudice the investment by the maker.

It is still be a matter for the national courts to decide on a case by case basis if the repeated extraction and re-utilization needs to be made by the same user in order to constitute a serious prejudice to the investment, or it is possible for the rightholder to claim that a serious prejudice resulted as an aggregated effect of repeated extractions or reutilizations from users accessing the database through the same intermediate service (For example by blocking the possibility for independent users to access the learning resources on terms more beneficial than the ones negotiated as a whole with Metacampus, thus causing the LCP a significant decrease in revenue).

5.3 Limitations and exceptions to the access control rights

Again, the scope of the database creator's access control rights and the acts that are circumscribed to the "normal exploitation" of the database depends on the type of protection that is applicable:

5.3.1 Databases protected by copyright

One specific and compulsory limitation to the database author's right to restrict individual access to the database is stated in Article 6(1) of the Database Directive:

"The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is **necessary for the purposes of access to the contents** of the databases **and normal use of the contents** by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part".

The provision is supplemented by Recital 34, explaining that "*once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution,* ***that lawful user must be able to access and use the database for the purposes and in the way set out in the agreement*** *with the rightholder,* ***even if such access and use necessitate performance of otherwise restricted acts***;"

Moreover, according to Article 15 of the Directive, any contractual or otherwise derogation or restriction to the above mentioned provisions is null and void.

According to the above mentioned provisions, although the creator of the database is the only one entitled to grant authorizations for the "*temporary or permanent reproduction by any means and in any form, in whole or in part*" of the database (Article 5(a)) as well as for "**any** form of distribution to the public of the database or of copies thereof" (Article 5(a)), once he agreed to give access to an end-user to the database for a certain period, he cannot at a later stage revoke these rights due to an "authorized reproduction" occurring in the context of access. That clause, even agreed by the end-user, could not be enforceable in court.

Similarly, the agreement with the database copyright owner could not include clauses by which the rightholder reserves the right to modify unilaterally the conditions regarding access (for example to introduce an access control mechanism and claim supplementary remuneration from the users that still wish to have access). Circumventing such an access control mechanism would probably be not be punishable if the user proved that his authorization was still active during that particular time frame due to a prior agreement.

According to the Directive, the Member States may introduce additional limitations from the database copyright owner's rights, among others, *"where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved*" (Article 6(b)); Partial and temporary access (for example through deep-linking) to the contents of a database without the prior authorization of the rightholder, when done for "illustration for teaching or scientific research", would not probably be sanctioned in court.

5.3.2 Databases protected by sui-generis rights:

The database directive leaves it up to the Member States to limit the database maker's sui generic rights by providing for exceptions among others, in case where, the extraction or a substantial part of the contents of the database by a **lawful user** is done "for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by **the non-commercial purpose to be achieved**" (Article 9(b)). With regard to the notion of "lawful user", it is interesting to notice that the French implementation of the Directive[20], translates it by "the person who has a legitimate access" to the database[21], thus underlining the strong interdependency between "access" and "use".

According to Recital 51 of the Directive, where the Member States avail themselves of the option to permit a lawful user to extract a substantial part of the contents of a database for the purposes of illustration for teaching or scientific research, the

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[20] Available at : http://www.copyrightfrance.com/hypertext/le_3_4.htm.

[21] "la personne qui y a licitement accès "

Member States may limit that permission **to certain categories of teaching or scientific research institutions**. This provision may prove significant for the TrustCoM AS scenario, since the way that the services provided by the Metacampus are qualified according to the applicable law (in many cases the law of the end-user) may determine the legal qualification of the end-user's activities, hence his "lawful" or "unlawful" access.

6 Conditional Access Directive (Directive 98/84/EC)

In the beginning of the analysis we pointed out the two different approaches taken by the European legislator towards access control rights. On the one hand, the holder of IP rights over a copyrighted work can make use of access control technologies in order to guarantee what he regards as the most suitable exploitation of his rights. He has therefore not only the right to decide when his work will be introduced to the public, but also the terms and the beneficiaries of subsequent access to the work. IP rights in his creation legitimize this behaviour, within the above mentioned limits.

However, other interests then IP can justify the application of an access control technology. An increasing number of services are offered on the basis of conditional access. Regardless of the content they include, the economic viability of these services depends on the users' willingness to pay a certain fee in order to benefit from them (similar to the activity of cinemas, theaters in the analogue world). The restriction on access is therefore not grounded on monopoly rights over an intellectual creation but on the need to ensure adequate payment for a service "in its own right" to a great extent dependant on technology and therefore threatened by the commercialization of "illicit" devices which give unauthorized access to potential users of the service.

According to Heide[22], the service provider's right to control access emanates from the recognition of property rights in an infrastructure used to control access.

6.1 Beneficiaries of access authorization rights.

The Directive is written as an act prohibiting the trafficking in illicit devices[23] rather than an act establishing prerogatives for a certain rightholder. However, the person entitled to control access to the protected service can be inferred from the provisions of Article 5(2) dealing with sanctions and remedies for the prohibited acts and establishing the obligation for the Member States to "take the necessary measures to ensure that **providers of protected services whose interests are affected** by an infringing activity as specified in Article 4, carried out on their territory, have access to appropriate remedies" (emphasis added).

[22] Thomas Heide, "Access Control and Innovation under the Emerging EU Electronic Commerce Framework", Berkley Technology Lay Journal Vol. 15, No. 3, Fall 2000, available also at:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=263974

[23] According to Article 2(e) of the Directive, (e) illicit device shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorization of the service provider;

Therefore, the interests of other categories of interested parties, though indirectly entailing partial remuneration from the controlled provision of access (such as copyright owners) remain distinct and outside of the scope of the Directive.

According to Article 2(a) of the Conditional Access Directive, the scope of protection extends to three categories of services, as long as they are provided "against remuneration and on the basis of conditional access":

1. television broadcasting;
2. radio broadcasting;
3. information society services.

In addition, the provision of conditional access to any of the three services, when ensured by a different provider as a service in its own right is also within the scope of the notion of "protected service".

We will refer only to the third category of services due to the specificity of the AS e-learning scenario. Information society services are all those "provided at a distance, by electronic means and on the individual request of a service receiver"[24]. As mentioned in the Explanatory Memorandum of the Conditional Access Directive[25], a growing number of new services are being established on (or evolving towards) a "conditional access" model[26].

The notion of "**conditional access**" is defined in Article 2(b) as "any technical measure and/or arrangement **whereby access** to the protected service in an intelligible form **is made conditional** upon prior individual authorization". Similarly, Article 2(c) defines "**conditional access device**" as "any equipment or software designed or adapted to give access to a protected service in an intelligible form".

What can be noticed from the above mentioned definition is that, as opposed to the EC COPYRIGHT Directive, the legal protection of the conditional access devices is not made conditional on the "efficiency" of the device, so that, arguably, smaller service providers which are not financially able to support the costs of a sophisticated equipment, could be protected as well.

It can also be inferred from the legal text that only those "technical measures or equipments" that restrict the access to the service are within the scope of the legal protection. Bearing in mind that the Directive aims at safeguarding only the remuneration interest of the service provider (excluding other interest that the

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[24] The Conditional Access Directive excludes from the definition of "Information Society services" any service provided in the physical presence of the provider and the recipient, or having material content (including "offline" services such as the distribution of CD-ROMs and software on floppy-diskette). The definition also excludes any service lacking an interactive element

[25] "Communication from the Commission to the European Parliament, the Council and the economic and social committee concerning the Legal Protection of Services based on, or consisting of, Conditional Access" COM 97/356;

[26] Examples could include online banking, distance learning, stockbrokers, travel agents and health care services, interactive entertainment (video-on-demand and video games), online information services, electronic databases, electronic retailing, electronic newspapers.

author might have), the "prior individual authorization" should ensure the due payment for the service[27].

6.2 Restricted acts

Article 4 of the Directive[28] prohibits a series of preparatory activities (such as manufacture, import, distribution, sale, rental), that facilitate the circumvention of conditional access devices. Therefore, the illicit access to the services provided on conditional access is not directly prohibited. Written as an anti-piracy act, the Directive makes illegal only the trafficking in illicit devices, conditioning the application of sanctions to the "commercial purpose" had in mind when committing the prohibited acts. Therefore, the manufacture for private use of a device that allows access without payment to a conditional access service is outside the scope of the Directive. Similarly, downloading software that enables illegal access without payment for private use is not an activity situated within the coordinated field of the Directive. However, Recital (21) states expressly that the national provisions prohibiting the private possession of illicit devices will still be applicable, therefore are not to be considered legal once the Directive is transposed into national laws.

As it can be seen, the rightholder relies on a different rights structure than the one guaranteed by copyright. Since property rights can be enforced against anyone, without exception[29], the Directive establishes a legally enforceable duty of non-interference with the granting of conditional access, by prohibiting without limitation, certain commercial activities involving illegal devices. Therefore, it guarantees a much higher level of protection then the one recognized to the author by copyright rules. Moreover, the service providers are not bound by any provision regarding how drastic conditions of access they may impose. Of course, rules pertaining to unfair competition law still apply.

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[27] According to the Explanatory Memorandum, "this is because the subject of legal protection is not the technology as such, but the legitimate interest served by the technology (remuneration of a service): similar techniques may serve different interests (e.g. confidentiality of private communications), that will remain outside the scope of the Directive."

[28] Article 4, Infringing activities:

Member States shall prohibit on their territory all of the following activities:

(a) the manufacture, import, distribution, sale, rental or possession for commercial purposes of illicit devices;

(b) the installation, maintenance or replacement for commercial purposes of an illicit device;

(c) the use of commercial communications to promote illicit devices "

[29] the public authorities intervention for security or public interest reasons are not considered here, I'm only referring to interactions between private persons.

7 Synthesis

This Annex C of Deliverable 17 has discussed the relevant European legislation in order to assess the existence of a right to control the individual access to protected content, the scope of this right and its possible limitations.

Our findings are synthesized in the following table. For details, reference should be made to the corresponding sections above.

LEGAL BASIS	Description	LEGAL INSTRUMENTS
IP rights	Can be invoked by the author or the subsequent rightholder; The right to restrict access is based on IP rights (copyright, sui generis rights) over the protected work; Subject to express exceptions; Can involve the use of technological measures;	WIPO Copyright Treaty Directive 98/84/EC Directive 96/9/EC Directive 2001/29/EC
Conditional access service	Can be invoked only by the service provider of the conditional access service; The right to restrict access emanates from the economical value of the service provided on conditional access; The content of the service is irrelevant; Circumvention of access control technology is not subject to exceptions	Directive 98/84/EC

Table 1: Legal basis for access control rights

Although in theory there is a clear distinction between the legal bases justifying the access restriction in the two cases, concrete circumstances might make the distinction less obvious. With respect to the AS scenario, we pointed out in the introduction that the Metacampus Portal Operator can be regarded either as a rightholder and a service provider at the same time, or simply as a service provider, the IP rights over the learning content, which would belong to the LCPs. Therefore, the Portal Operator’s right to restrict access (and claim legal protection) can be grounded on different legal provisions:

1. Since he is providing a conditional access service (the e-learning courses), he could invoke the provisions of the Conditional Access Directive. Depending on the national implementation of the Directive, he could claim economic compensations and damages for breach of service provision contract entered into with the end-user. But at the same title, the circumvention could be regarded as a copyright

infringement, since the license agreement with the LCP transferred also some of the economic rights that pertain to the author of a copyrighted work, that is, the right to authorize the making available to the public of the work, reproduction, or distribution rights.

Following a risk analysis, the Metacampus Portal Operator could choose to take one of the two courses of action, or both (provided the applicable law permits this).

2. If the Metacampus Portal Operator is only providing conditional access to the e-learning course, without having any IP rights transferred to him, then he can only claim damages following circumvention. Separately, the interested LCP can start legal proceedings against the infringer of IP rights, if the conditions are fulfilled.