



DE WOLF & PARTNERS

**The rights of making available to
the public and reproduction &
territoriality in the InfoSoc Directive**

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- **Introduction to the Study**
- Making available, reproduction and territoriality

- Study on the application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society
 - Study commissioned by the European Commission
 - Publication in December 2013; March 2014; (forthcoming: June 2014) available at:
http://ec.europa.eu/internal_market/copyright/studies/index_en.htm
 - Reports by De Wolf & Partners, with assistance of CRIDS
 - Central question: has the application of the Information Society Directive led to the creation of a digital single market?
 - Or should copyright be further harmonised to achieve this objective?

- Exclusive rights
 - The right of making available to the public and its localisation
 - The reproduction right in relation to making available right (forthcoming)
 - The right of retransmission by cable in digital networks
- Exceptions in the digital environment
 - Exceptions for libraries, research and teaching uses
 - Uses for the benefit of people with a disability
 - User generated content (“UGC”)
 - Press review exception
 - Text and Data Mining (TDM)

Recent initiatives of the European Commission

- Licences for Europe (Commissioners Barnier, Kroes and Vassiliou)
- Studies on various legal and economic aspects
- Public consultation
- CRM directive adopted
- Impact assessment (expected)
- White paper (expected)

- Introduction to the Study
- **Making available, reproduction and territoriality**
 - **Current situation**
 - Alternative localisation criteria

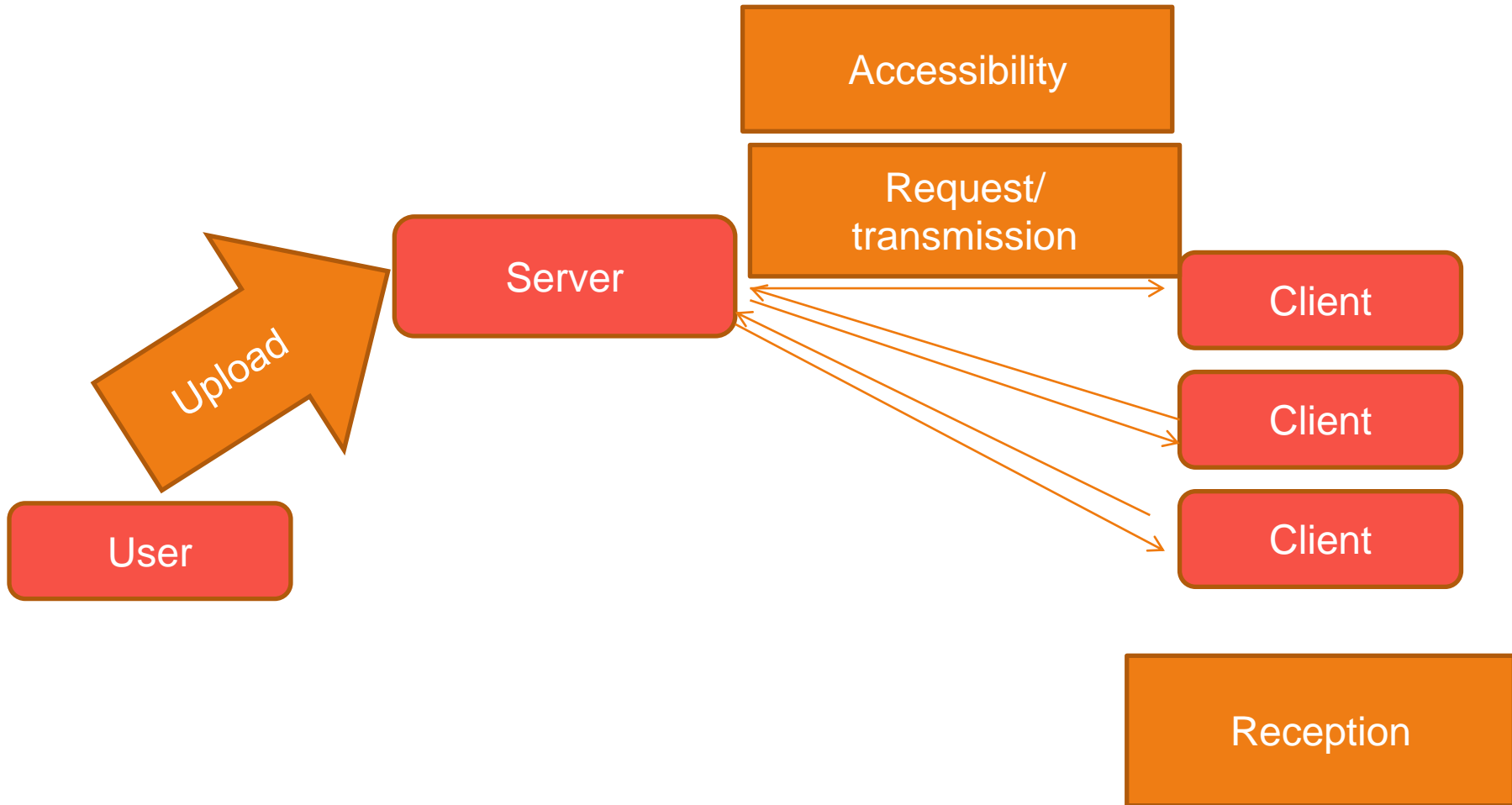


- Cross-border exploitation of protected works online
 - Making available right
 - Reproduction right
 - Territoriality of copyright
- ⇒ Clear rights for making the work accessible per Member State?

Current situation

- Making available to the public: “(...), in such a way that members of the public may access them from a place and at a time individually chosen by them” (art. 3 InfoSoc Dir)
- **Scope** of the making available right
 - Availability of a work
 - A public having access
 - On demand

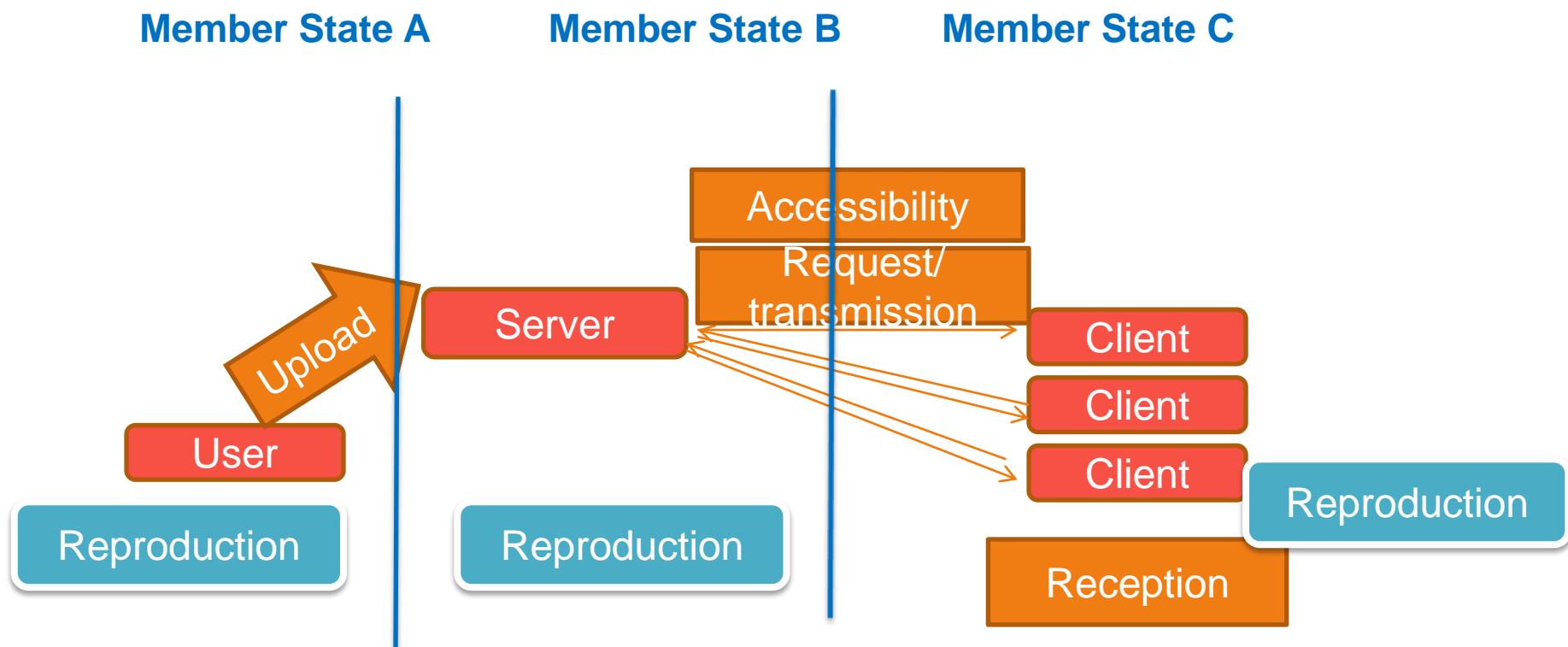
Act of “making available”



Scope

- Definition of the making available right?
 1. Act of upload
 2. Accessibility
 3. Exploitation
 4. Reception
- Uncertainty regarding the material acts covered by the making available right.
- No harmonisation so far

Territoriality principle



→ The uncertainty regarding the definition of the making available right causes uncertainty regarding its territorial reach.

Difficulties

- Existence of an infringement (per Member State)
- Fragmentation of authorship or ownership
 - Different Member State, different author
 - Cross-border exploitation with consent of several owners
- Private international law
 - Jurisdiction
 - Applicable law
- Accumulation with reproduction right
 - Exception for temporary acts of reproduction
 - Private copy

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- Making available takes place in one single Member State
 - Effects beyond the Member State
 - Regardless of exploitation
 - Regardless of accessibility
- Localisation
 - Act of upload
 - Establishment

- **Advantages**
 - Facilitating cross-border licences
 - One protected act
 - One right holder (author/derived right holder)
 - One applicable law
- **Disadvantages**
 - Risk of undermining exploitation
 - Right of other owners (fragmented rights)
 - Location shopping
 - No impact on the choice of jurisdiction
 - Reproductions in other Member States!

- Making available where the exploitation of the work takes place
- “Exploitation”
 - “Targeted public”
 - Cf. CJEU decisions in Sportradar, Pammer/Hotel Alpenhof, eBay, Donner
- Localisation
 - One Member State
 - Some Member States
 - All Member States

- **Advantages**
 - In line with CJEU decisions
 - Intention and efforts of the content provider
 - Rule out “mere accessibility”
 - Flexible notion
 - Evolution of “mere accessibility” to “exploitation”
 - Integration with reproduction right
- **Disadvantages**
 - No “solution” for existing bottlenecks:
 - Acts in several Member States
 - Authors, right owners
 - International private law (jurisdiction, applicable law)

- Existing impediments to the “digital single market”
- Options
 - Status quo
 - Further harmonisation
 - “Country of origin”
- Policy matter
 - Established interests in various sectors
- What is next?
 - New European Commission

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