



Public Consultation on the review of the EU copyright rules

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The Nexa Center for Internet for Internet & Society at Turin's Polytechnic University (Department of Automatic and Informatics, DAUIN), is an independent research center, focusing on interdisciplinary analysis of the Internet and of its impact on society. It was created in 2003 and has coordinated various EU thematic networks (including Communia and Lapsi). Understanding the Internet, its limitations and potential, is an indispensable course of action to ensure economic, technical, scientific, cultural and social development for the years to come; where possible, from any standpoint.

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I. Rights and the functioning of the Single Market

A. Why is it not possible to access many online content services from anywhere in Europe?

1. [In particular if you are an end user/consumer:] Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?

YES

NO

X NO OPINION

2. [In particular if you are a service provider:] Have you faced problems when seeking to provide online services across borders in the EU?

YES

NO

X NO OPINION

3. [In particular if you are a right holder or a collective management organisation:] How often are you asked to grant multi-territorial licences? Please indicate, if possible, the number of requests per year and provide examples indicating the Member State, the sector and the type of content concerned.

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4. If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?

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5. [In particular if you are a right holder or a collective management organisation:] Are there reasons why, even in cases where you hold all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on a service provider (in order, for instance, to ensure that access to certain content is not possible in certain European countries)?

YES

NO

X NO OPINION



6. [In particular if you are e.g. a broadcaster or a service provider:] **Are there reasons why, even in cases where you have acquired all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on the service recipient (in order for instance, to redirect the consumer to a different website than the one he is trying to access)?**

- YES – Please explain by giving examples
 NO

X NO OPINION

7. **Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?**

- YES – Please explain
 NO – Please explain

X NO OPINION

B. **Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?**

1. The act of “making available”

8. **Is the scope of the “making available” right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?**

- YES

X NO – Making a work available to the public includes various acts: 1) uploading a file onto a server; 2) making this file accessible to the public; 3) therefore allowing a discrete transmission of the file to every single member of the public who wants to access such work; 4) through streaming or obtaining a permanent copy (i.e. downloading). Because it is not clear which of these acts triggers the making available right and where the act can be localized, said right needs to be specified especially when the exploitation occurs cross-border.



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It is worth noting that a single EU Copyright Title as advocated below would solve the above-mentioned problem.

Under the current rules, the notion of making available would require a transmission (i.e., a technical act of emission or transfer) which gives rise to the potential reception of the work by the public (see Art. 3 Information Society Directive 2001/29; Recital 23 of 2001/29; Travaux Preparatoires of 2001/29 - Commission Proposal COM (97) 628 Final, 25; Case C-306/05 SGAE v. Rafael Hoteles).

With regards to the definition of “to the public”, the ECJ has already adopted the “targeting approach” and has stated that, if a prior form of communication has previously occurred, then the public must be a new public (Case C- 306/05 SGAE; joined Cases C-403/08 and C-429/08 Football Association Premiere League and Others; Case C-466/12 Svensson).

Additionally, the territorial reach of making available would include the “country of origin” which means that the making available right occurs in the Member State in which the content is uploaded or the service provider is established.

Therefore, the ECJ is the best entity to further clarify this approach, using as a basis, existing provisions and case law. A legislative intervention (other than the adoption of a single EU Copyright Title) might on the contrary, risk to be too rigid in view of future technological developments (e.g. unanticipated evolutions of cloud computing).

NO OPINION

9. [In particular if you are a right holder:] Could a clarification of the territorial scope of the “making available” right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief)?

X YES – A clarification on the territorial scope of the making available right may become important from the licensing and enforcement perspectives.

From the licensing viewpoint, the individual or the company acquiring the rights to make the work available online (i.e., via streaming or downloading) would want to know if their rights would need to be obtained: 1) in every Member State where the work could be accessed, 2) where the public could be targeted, and/or 3) where the upload could take place. They would also



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want to know the territorial scope in situations of territorial fragmentation, where rights are granted to different parties in different territories. Furthermore, rightholders would want to know what the applicable law is.

The same applies considering the enforcement perspective; in fact, rightholders would want to know if they could initiate an enforcement action in every Member State where the public is targeted, where the content is accessible, or in the country of origin, and whether these jurisdictional links are alternative or cumulative.

Additionally, a clarification of the territorial scope of the making available right might have an effect on:

1. The authorship and ownership of a work because currently there is no EU harmonisation on this matter and different Member State laws could be applied (for example, the different Member States' rules on collective works or works made in the course of employment).
2. Remuneration because the rightholder could receive a remuneration for the exploitation that occurs in every Member State where the public is targeted, where the content is accessible, or only in the country of origin.

NO

NO OPINION

2. Two rights involved in a single act of exploitation

10. [In particular if you a service provider or a right holder:] Does the application of two rights to a single act of economic exploitation in the online environment (e.g. a download) create problems for you?

X YES - The cumulative application of the reproduction right and of the making available right to the same process could have the following consequences: 1) more difficulties for the individual or company who wants to obtain the relevant rights because the two rights may not necessarily be held by the same entity, 2) more parties in cases of infringement and too many duplications of a single infringement¹, and 3) more transaction costs.

¹ As an example of the problems deriving from the application of two rights to a single economic act, consider the following situation: In Italy, where there is no broadband connection usable for streaming services of in-store music, the service provider has to reproduce the single music file on the client's computer for the public performance. This reproduction is just a technical mean of the public performance for the client and does not have an economic value as such. Nevertheless, the rightholder can claim a licence for this technical reproduction which is similar to the ephemeral reproduction in streaming. Recently, an Italian service provider was fined for not only the copies he had on his server but



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Therefore, any overlaps in the application of the reproduction right, the making available right, and the communication right should be avoided to the extent possible.

In our view:

1. Preliminary acts of reproduction (upstream reproductions) should be considered free or subject to an implied license, as they are necessary for making available the work (Zweckübertragung theory).
2. Downstream temporary reproductions on RAM storage for personal use of the work are similarly free because they are exempted by the mandatory exception provided in Art. 5.1 b) InfoSoc. Directive. Whereas, permanent reproductions made by the final user needs to be specifically authorized unless an implied licence could be affirmed under the circumstances of the case (relying again on the Zweckübertragung theory).

If judicial clarification is not forthcoming, legislative action would be required.

NO

NO OPINION

3. Linking and browsing

11. *Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?*

YES

X NO – Hyperlinking must not be subjected to the authorisation of the rightholder and it should not be considered an act of communication to the public for the following reasons:

1. It does not involve a transmission, and
2. It is not directed to a new public (see above answer to Question 8).

We believe that providing a link (hyperlink or deep-link) is equivalent, in general, to providing information on the location of a page that the user can decide to access or not access. Providing information on the place where the

also for the copies of the same songs reproduced on his clients' computers. In addition to criminal penalties for copyright infringement, Art. 174 bis of Law 22 April 1941, n. 633 introduced an administrative penalty not less than €103,00 for every infringement or reproduction without distinguishing whether the reproduction has any economic value or is just a technical mean to engage in a public performance. As a consequence of this law, the service provider was fined €43.828.354,00 for the technical reproduction of 1,531 music files on 300 clients' computers, irrespective that the remuneration for the performance had been paid.



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source is located is different from transmitting the work available in the source. Therefore, it cannot infringe copyright, even though willful inducement of third parties' infringement and cooperation with it may trigger indirect or contributory liability.

Linking is a form of "citation to the copyright works" and the ability to cite/hyperlink is a key feature of the way the Internet operates (T. APLYN, Copyright Law in the Digital Society, Oxford, Hart, 2005).

The recent ECJ decision in Svensson (C 466/12) ruled that a hyperlink is a form of communication but it cannot be considered communication to the public if a new public is not involved. Nonetheless, the Court did not clarify whether the act of communication necessarily has to involve a transmission (see above answer to Question 8) and did not consider the case in which the hyperlink addresses the user to a manifestly illegal source.

As far as framing is concerned, the question of whether frames should be qualified as communication to the public is currently pending before the ECJ in the case Bestwater International (C-348/13). Therefore it is suitable to wait for the decision.

NO OPINION

12. Should the viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

YES

X NO – Temporary reproduction should be covered by a mandatory exception (see G. Guglielmetti, Riproduzione e riproduzione temporanea, in AIDA, 2002, p. 38; M. Ricolfi, Comunicazione al pubblico e distribuzione, in AIDA, 2002, p. 68).

As explained by the U.K. Supreme Court on 17 April 2013 in the Meltwater case, the copies in cache memory or on the screen are considered "...the automatic result of browsing the Internet... it requires no human intervention other than the decision to access the relevant web-page... its deletion is equally the automatic result of the lapse of time coupled with the continuing use of the browser."

The opposite interpretation would allow Internet users to be susceptible to liability if they merely browsed the Internet and ended up on a page which contained works protected by copyright.



NO OPINION

4. Download to own digital content

13. [In particular if you are an end user/consumer:] **Have you faced restrictions when trying to resell digital files that you have purchased (e.g. mp3 file, e-book)?**

X YES –The most common online platforms that sell digital files do not actually give the consumer an ownership on the content but instead, just gives a long term licence for personal use². Therefore, rights licensed by the rightholder to the online platform can have contractual limits or (in some cases) restrictions deriving from Digital Rights Management which usually does not provide the opportunity to legally resell the obtained digital files.

Nonetheless, we think that this type of contractual restriction has to be removed. The principle codified in Art. 4.2 Computer Program Directive should be introduced in the InfoSoc Directive. Additionally, the ECJ's decision in Oracle v. Used-Soft (C-128/11) should be applied generally and not only to computer programs especially considering the principle of equality and non-discrimination in technology.

If a limitation or exception is mandatory, then technical protection measures and DRM should be made ineffective by the legal tools designed in such a way as to take into account the total failure by Art. 6 InfoSoc Directive to deal with the issue. Prompt redress mechanism backed by monetary penalties should be established.

NO

NO OPINION

14. [In particular if you are a right holder or a service provider:] **What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.**

² For example, Apple's iTunes Terms of Service states "You agree that the iTunes Products are provided to you by way of a licence only. You understand that the Service and certain iTunes Products include a security framework using technology that protects digital information and limits your use of iTunes Products to certain usage rules ('Security Framework') established by iTunes and its licensors and that, whether or not iTunes Products are limited by security technology, you shall use iTunes Products in compliance with the applicable usage rules established by iTunes and its licensors ('Usage Rules'), and that any other use of the iTunes Products may constitute a copyright infringement."



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C. *Registration of works and other subject matter – is it a good idea?*

15. *Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?*

YES

NO

NO OPINION

16. *What would be the possible advantages of such a system?*

First, we make a few clarifications of our view on the subject.

The “no formalities” rule to avoid discrimination against foreigners set forth in the Berne Convention is no longer supported by its original rationale. Today, registration does not need to be a cumbersome formality to be repeated in each country. Instead, ideally the requirement could be met by a single registration in a global online digital registry either administered by WIPO or by distributed systems. In the intermediate stage, the first step could be to establish an EU-wide registration system which could either be unitary or bring together EU Member States’ registries. This European system could trigger a process of regulatory competition; encourage other non EU-members to join or to set up their own systems; and in the medium term, a reform of Berne rules might follow. Research on private registries undertaken by WIPO has shown that the cost for setting up and maintaining virtual registries are low and are bound to decrease. On the contrary, a failure to keep registers may entail enormous costs including clearance costs and recurrent non-availability of orphan and out of print works. Therefore, we think that the time has come to set up a global or EU-wide online system for the registration of works. In this perspective, we support the idea that registration in an online registry should be established and made optional and available to those who wish to claim a “stronger” protection of their work; meaning they wish to reserve the rights necessary to commercially exploit their works (under the current paradigm which could be called “Copyright 1.0” or the “all rights reserved” paradigm).

On the other hand, if no registration is made, then the so-called “Copyright 2.0” would apply and create a mitigated exclusivity granting creators a



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limited set of rights including the right to attribution. Adopting this solution, which links online registration of works to their copyright status, would entail additional benefits from the ones already mentioned earlier.

In this model, Copyright 1.0 would survive and be put on a firm footing. Meaning creators and businesses could explicitly choose by means of a low-cost registration to retain the right to commercially exploit the works they own in an exclusive position, while at the same time, put third parties in a position to ascertain rightholders' willingness to claim protection by consulting the register. Creators should opt-in for Copyright 1.0 at the time of the original release of their work; otherwise the new Copyright 2.0 would operate as a default set of provisions. This online registration system might evolve in time by incorporating a requirement that all transactions (assignments, licenses, collateralization etc.) concerning digitally recorded works are recorded in the same register. It is also possible to envisage that all future deeds concerning Copyright 1.0 works are declared effective only if and from the moment they are recorded. If this is the case, then the road would finally be opened to make copyrighted works available as collateral for outside financing. This would be a remarkable step forward. At the moment, the balance sheets of EU corporations are no longer formed mainly by material assets (plants, machinery, inventory, etc.). Instead, many major assets are intangible. For many corporations, databases, software and copyright actually form a large part of their assets. In the media and content industry, intangible assets may well exceed over 90% of the overall book value of all assets. Research carried out across the legal systems of various EU countries in this area (see A. Tosato, Security Interests over Intellectual Property, in J. Int. Property Law and Practice, 2011, 93 ss.; P. Auteri, Il pegno del diritto di autore: costituzione e opponibilità nei confronti dei terzi, in AIDA 2009, 129 ff.; C. Woeste, Immateriale Güterrechte als Kreditsicherheit im deutschen und US-amerikanischen Recht, Universitätsverlag Rasch, Osnabrück, 2002) has shown that the major hurdle to using copyright assets as collateral for outside financing is the unavailability of a comprehensive and secure system of registration of all transactions over copyrighted works.

Corresponding and possibly larger benefits would accrue in the Copyright 2.0 sector. Everyday the internet incorporates several billions of new works. We are most familiar with Blogs, Facebook, and Twitter posts. Additionally, each of us have probably made available over the internet one or more e-mails, WhatsApp messages, web content, or other materials which would attract copyright protection even if we are not interested in it. In fact, we resent the limitations in dissemination which the current copyright status imposes on them. Now, the creation of online registries would enable the simultaneous (and "voluntary") liberalization of all works standing outside of the registries. Moreover, creators who wish to disseminate their work



without any obstacle, except (as already pointed out) limit duties as to the correct attribution of the work to the author, could simply omit to register the work, thereby signaling that the work is freely re-usable.

Scholars and interested professionals, who have recently discussed similar proposals (including Copyright 2.0), also suggested that creators, who opt for online registration which triggers old Copyright 1.0, should be required to indicate the reference of the registration in any publication/release of the work to facilitate the identification of the regime to which the work is subjected to. The ultimate goal of this approach is not to displace old copyright, which seems to be alive and well in many situations, but to add to the menu a second possibility: Copyright 2.0, which would be better tailored to accommodate the production and distribution of works prevailing in the current digital environment.

The advantages created by such a system would be numerous:

1. Greatly reduce transaction costs because licensing activity would be limited to works which have been registered.
2. Enhance dissemination of works.
3. Reduce controversies, in regard to the works, as there would be much more certainty on the regime of each work and on the identity of rightholders.
4. Altogether solve the problem of orphan works which are already addressed in a stop-gap fashion by Dir. 2012/28/EU.
5. Create a huge quasi-commons consisting of Copyright 2.0 works available for education, scientific research, data analytics.

17. What would be the possible disadvantages of such a system?

The possible costs for registration. In this respect, the experience with private copyright registers shows that a global online registration service should be supplied at a minimal cost.

In any case, it can be important to underline that no inconsistency problems with the Bern Convention regime are at stake. In fact, even before a revision of the Berne Convention, a registration requirement adopted at the EU level would be perfectly in line with the current international copyright provision. That is, if it were not a pre-condition for regular copyright enforcement but only for selected, if crucial, enforcement modalities (e.g. protection of Technical Protection Measures and Digital Rights Management) standing to sue ISPs. See Stef van Gompel, Formalities in Copyright Law: An Analysis of



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Their History, Rationales, and Possible Future, Alphen aan den Rijn, Kluwer Law International, 2011.

- 18. What incentives for registration by rightholders could be envisaged?**
1. Copyright 1.0, the “all right reserved” paradigm, would apply.
 2. The possibility to obtain a registered title which could be effective against any third party.
 3. Intangible copyright 1.0 assets could be offered as collateral in order to obtain financing (see above incentive #2)
 4. Registrants would obtain publicity through the registration and dissemination of their works and therefore create more certainty on the information of rights and on the identity of rightholders.
 5. Creators would also be easily identified which could enhance their potential to obtain business through the exposure of their work at a global level.

D. How to improve the use and interoperability of identifiers

- 19. What should be the role of the EU in promoting the adoption of identifiers in the content sector, and in promoting the development and interoperability of rights ownership and permissions databases?**

The adoption of identifiers could improve transparency in the management of authors' rights. Collecting societies would play a key role in this process. Since the EU currently does not have legislation on collective management, the first step is to put in place an appropriate legal framework according to the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licence of Rights in Musical Works for Online Uses in the Internal Market. Pursuant to this proposal, each Member State would need to ensure that the collecting societies established in their territory comply with the requirements provided in Art. 22.2 including the adoption of interoperable and shared identifiers. However, to the extent identifiers contain metadata on licensing terms and economic conditions, they should be subject to close antitrust scrutiny to avoid anticompetitive and abusive practices.



E. Term of protection – is it appropriate?

20. Are the current terms of copyright protection still appropriate in the digital environment?

YES

NO – It should be shorter.

Economists have criticized the overlong term of copyright protection and particularly “re-troactive” extensions, which of course cannot incentivize dead creators to create. The present duration of rights withdraws the works from the public domain for an excessive period of time at the exclusive benefit of the rightholder, which in fact tend to be businesses rather than creators, without real advantages for the creators, the artists, or the performers.

For works of utilitarian nature, including software and databases, 70 (or 50) years after the death of the creator(s) is without doubt an excessive term.

It is true that the current rules cannot be changed without renegotiating the Berne Convention. This is a good reason to conceive the current European exercise as a stepping stone towards a more extensive recasting of copyright law: Berne II is long overdue. In the meantime, the EU should discourage any TRIPs-plus agreements which entail the extension of the term beyond the mandated 50-plus years. It is also true that the shortcomings of the present system would be greatly decreased by the adoption of a Copyright 2.0 approach, which enables the majority of protected work to be subject to a more open regime. This is a good reason to direct a Berne II revision in the direction of a dual regime, contemplating a Copyright 2.0 option.

NO OPINION

II. Limitations and exceptions in the Single Market

21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?



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X YES –The optional character of Art. 5 InfoSoc Directive, specifically paragraphs 2 and 3, has prevented the substantial harmonisation of Member States' limitations and exceptions in copyright.

- NO
- NO OPINION

22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?

X YES –Yes, to a large degree. One reason is to make sure that harmonisation is effective. There are also reasons on the merits which are advanced to support making certain limitations and exceptions mandatory. One reason is discussed below in our answer to Question 24. Another reason refers to file sharing. It is often argued that file sharing allows free and easy spreading within society of a larger diversity of contents; that legalising file sharing of copyrighted works could foster cultural diversity and freedom of expression. In this perspective, file sharing for private use of copyrighted works should be allowed with payment of a levy. Such exception should be mandatory and harmonized at the EU level. Sharing of copyrighted works within a circle of family and friends should also be allowed without payment of a levy.

If a limitation or exception is mandatory, then technical protection measures and DRM should be made ineffective by legal tools designed in such a way as to take into account the total failure by Art. 6 InfoSoc Directive to deal with the issue. Prompt redress mechanism backed by monetary penalties should be established.

- NO
- NO OPINION

23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.

See above answer to Question 22.

24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

X YES –It has been noted that traditional, civil law “closed lists” of exceptions and limitations could be complemented well by a U.S. style open-ended fair use clause. In this situation, the matter would be settled when a situation



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defined in the closed list occurs. However, when this is not the situation, the U.S. style open-ended fair use would set in. It is argued that this approach would combine the benefits of certainty and flexibility. It is further argued that this would greatly enhance downstream innovation and creativity which is needed due to the fast rate of change which prevails in media services and technologies.

- NO
- NO OPINION

25. If yes, what would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.

See above answer to Question 24.

26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?

X YES -The Orphan Works Directive has shown that it is possible to adopt a "country of origin" approach to limitations and exceptions, and that in this limited regard, territoriality may be overcome. This approach should be extended and duplicated in all fields in which a digital driven-network exists or is possible in the foreseeable future.

- NO
- NO OPINION

27. In the event that limitations and exceptions established at national level were to have cross-border effect, how should the question of "fair compensation" be addressed, when such compensation is part of the exception? (e.g. who pays whom, where?)

Collective rights management organisations were created to deal with this kind of issue. The rate should be set on the basis of the "footprint" of the use under the exception; collected centrally (at the country of origin identified under the Orphan Works Directive) and redistributed to rightholders not from the country of origin (if any).



A. *Access to content in libraries and archives*

1. Preservation and archiving

28. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?

(b) [In particular if you are a right holder:] Have you experienced problems with the use by libraries, educational establishments, museum or archives of the preservation exception?

X YES

1. Digitization.

Libraries and archives have almost been entirely prevented from digitizing their collections by current copyright legislation. Generally, they are not allowed to make digital copies of protected materials hosted in their collections although public libraries and archives can make digital copies of phonograms, cinematographic, or audio-visual works and moving images. This exemption is clearly ineffective. On the one side, it does not allow the digitization of protected materials (such as books and photographic works) which are no less in danger of getting lost due to their characteristics (e.g. perishable or obsolescent media) or to their intensive use. On the other side, the exception covers only the making of one copy (which is clearly not enough). As a matter of fact, digital preservation typically requires multiple acts of reproduction, either for the sake of format-shifting, backing-up, updating, migrating, or merging the databases of the library or archive.

2. Archiving and preserving digital-born copies.

For the same reason, libraries and archives are prevented from effectively managing their collections of digital-born copies of protected works. As already mentioned, the law allows them to make only one digital copy of works and protected materials that fall into specific categories; outside such limits, libraries and archives cannot simply make another digital copy lawfully. As a consequence, they cannot transfer a database (or the visual or textual materials contained therein) or a multimedia work from a DVD to the hard-disk containing the entire digital collection of the institution. Moreover, making additional copies for the purpose of format-shifting would amount to making new, infringing copies.

3. Acquisition versus access.



Libraries, particularly academic ones, are increasingly investing part of their budget in digital subscriptions. By doing so, they obtain a right to access a database for a limited period of time instead of a permanent copy of books, journals, and other sources of information. Sometimes they are forced to do so because of the sky-rocketing prices of books and journals or the non-availability of a paper substitute. However, in the long run this practice is likely to produce adverse effects on one of the functions traditionally performed by such institutions, namely harvesting copies of works, preserving our cultural heritage, and passing information on to future generations.

Sometimes this effect can be mitigated when a service provider assumes a contractual obligation to guarantee a permanent access to all or some of the information contained in its database. However, problems may still arise. For example, if the service provider becomes bankrupt, it is very likely that the dissolution of his enterprise would also take away the right of the library to remotely access its account. Given the above, a far better solution would be to make permanent copies of the pieces of information obtained through such services (i.e. individual works, not the entire database) and archive them as a part of the collection owned by the library. However, none of the existing exceptions to copyright seem to apply and, at any rate, they would most probably be displaced by contractual terms forbidding such activities.

4. Open access.

Since 2004 the Conference of Italian Universities has promoted the Berlin declaration on Open Access among its members and today more than 70 Italian universities have already adhered. As a result, many of these universities have set up a digital, online repository to collect the scientific works of their researchers. Furthermore, some institutions have enacted regulations to provide strong incentives for the researchers who consent to making their works available online, free of charge, through an open access academic archive.

It is too soon to assess the full outcome of such initiatives as their implementation has only just started. However, a few problems have already emerged. Building a repository and setting up an open access archive requires the cooperation of both the researcher and the publisher. In particular, the former should do two things: 1) evaluate if the contracts he has already signed would allow him to upload his works in the academic repository (i.e. without making them publicly accessible) or, eventually, make his works available to the public through the open access archive of his university (with or without a licence which would make his works re-usable and not just freely accessible); and 2) ensure the publishing of his new works under contractual terms and conditions which give him such freedom.



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The first task is not an easy one since very often the publishing agreement is not in writing or does not clearly state which rights are transferred or licensed by the author. Even though this uncertainty could possibly be solved by relying on rules and principles contained in our copyright law, it is very likely that the researcher (and his university) will not take the chance of violating the rights transferred or licensed to the publisher. As a consequence, the academic open access archive (and the public interest justifying its creation) suffers an unwarranted deprivation.

If one looks at the second task, more reasons of concern arise. The market for academic publications is getting more and more concentrated since almost all major national publishers have been absorbed within very few multinational companies or groups. As a matter of fact, these multinational companies control the most prominent journals and series of books, which in turn allows them to determine unilaterally terms and conditions of publishing agreements offered to researchers and universities. Frequently, these contracts buy-out all copyrights in the would-be-published works, therefore giving the publisher the last word about if and when the works will be uploaded in the academic repositories and, eventually, made available to the public free of charge. Accordingly, researchers and universities are forced to depend on the cooperation of their publishers, who have been far from enthusiastic. After being invited to declare their "open access policy" (the conditions that they would like to see applied to works published on their journals or books series), the majority of publishers have either remained silent or declared the conditions which are too restrictive, requiring long terms embargoes if not prohibiting entirely such re-uses.

5. Consultation services.

If libraries are not allowed to digitize their own collections (no. 1, 2 and 3), then they are also prevented from organizing their services in a modern way. Firstly, they cannot take advantage of the exception for on-site, digital consultation services (Art. 5[3][n] InfoSoc Directive): if the content is not available, it does not make sense to put dedicated terminals in the libraries. Secondly, they cannot offer printing services (i.e. printing – to paper or to .pdf files – a digital copy of the book), even though printing has the same effect as photocopying but does not damage the original. Thirdly, they cannot reply to inter-library loan requests by simply sending a digital copy instead being forced to waste time and resources with mail services instead. Fourthly, they cannot lend digital copies (hosted by a physical support – like a CD or DVD or e-book reader) of fragile or rare originals.

6. Participation to European networks.



The aforementioned constraints have another side effect which is particularly odious for institutions like universities and public research centres that are used traditionally for openness and participation in wide, international networks. Being incapable of digitizing their own collections, Italian libraries and archives are prevented from cooperating with other European cultural institutions and share the costs of building digital repositories which, sooner or later, could be made accessible to the public as a source of information or as an instrument to elaborate new information (i.e. for big data analysis).

- NO
- NO OPINION

29. If there are problems, how would they best be solved?

The problems that were mentioned in our answer to Question 28 can best be solved through a legislative reform of the InfoSoc Directive.

It is true that some of the problems are caused by Italian law and could be solved locally to take advantage of the freedom given to national legislators, through Art. 5(2)(c) InfoSoc Directive, which allows Member States to exempt specific acts of reproduction made by archives and publicly accessible libraries. However, there are uncertainties on the exact meaning of this rule, particularly in respect to what a "specific act of reproduction" may be and as to the purposes of the reproductions that could be exempted. Moreover, reforming Italian copyright law would neither solve the problem on the lack of harmonisation (confirmed recently by the Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society, commissioned by the EU Commission and published in 2013, at 272 ff.) which prevents partnerships and joint initiatives among European institutions (e.g. universities or research centres), nor does it introduce any new exemptions beyond the exhaustive lists of Art. 5 InfoSoc Directive.

Additionally, there are issues (e.g. relating to open access) which are comparatively new and, therefore, not taken into account by the InfoSoc Directive. While it may be argued again that some of them can be solved by national legislators, actually, it does not seem wise to allow national laws to go their own way since this would curtail the ability of the EU to realize some of its core policies (see, Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society, commissioned by the EU Commission and published in 2013, at 285).



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30. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?

1. Digital libraries and archives.

Art. 5(2)(c) InfoSoc Directive should be clarified, extended, and made mandatory.

Firstly, archives and public accessible libraries should be allowed to make all digital copies necessary to digitize and preserve their collection of works, including works acquired through digital subscription services and digital harvesting.

Secondly, they should be authorized to use such digital copies to perform their traditional services, namely 1) providing access on site, 2) lending individual copies, 3) allowing their patrons to make private copies, and iv) sending copies to other libraries upon request (inter-library lending).

Thirdly, they should be allowed to provide additional services, namely access to their digital collections for data mining purposes.

Fourthly, they should be allowed to distribute digital copies of their works to archives and publicly accessible libraries which already possess an analog copy of the same works (thereby sharing the costs of digitization, in a way which maximizes societal benefits).

Lastly, they should be allowed to make available online works which are already out of print or out of commerce, subject to the payment of an equitable compensation to the rightholders (see, below answer to Question 40).

2. Open access.

Open access policies may have a chance to reach their goal only if the law takes care of protecting researchers against buy-out contracts increasingly offered by major scientific publishers. To this end, a viable solution could be to give researchers who have assigned or licensed the exclusive right to publish their scientific works, the unwaivable right to make such works available to the public through academic open access archives when a reasonable period of time (i.e., 6 or 12 months) has lapsed from their publication by the assignee or licensee.

Additionally, it could be expressly stated that a contract assigning or licensing exclusive rights in a scientific work which has been created in the fulfilment of a publicly-funded research project is null and void, given that



such work should be made available to the public according to open access principles (for example, the rules governing Horizon 2020).

31. If your view is that a different solution is needed, what would it be?

//

2. Off-premises access to library collections

32. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to negotiate agreements with rights holders that enable you to provide remote access, including across borders, to your collections (or parts thereof) for purposes of research and private study?

(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to consult, including across borders, works and other subject-matter held in the collections of institutions such as universities and national libraries when you are not on the premises of the institutions in question?

(c) [In particular if you are a right holder:] Have you negotiated agreements with institutional users that enable those institutions to provide remote access, including across borders, to the works or other subject-matter in their collections, for purposes of research and private study?

Generally speaking, Italian libraries have not invested in extensive digitization projects and, therefore, have not accumulated enough experience with the application of the exemption for on-site consultation through digital means. As already mentioned, this may be due to the absence of a reasonable exemption covering the digitization of analog collections. In this regards, it should be added that the wording of Art. 5(3)(n) InfoSoc Directive, which refers only to the "communication or making available" without expressly allowing the digitization that would make them possible, has not helped.

Being prevented from using the exemption, Italian libraries have, thus far, relied almost entirely on subscription services sometimes covering both on-site and remote consultation.

Generally speaking, publishers have been collaborative and, when requested, have allowed remote access. However, some issues have still arisen. Firstly, remote access has been made available (frequently, though not always) with spatial limitations, typically only to registered users



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connected to the institution's network (e.g. within the university's premises and not from home). Secondly, it has also proved difficult to provide access to former members of the institution's staff who continue to collaborate even after their retirement or to temporary users (e.g. external researchers participating to specific projects) after the end of their contractual relationship.

33. If there are problems, how would they best be solved?

Art. 5(3)(n) InfoSoc Directive should be amended to clearly state that libraries, museums, and archives can: 1) digitize their collections; 2) make them available for consultation to their patrons: all of them (if consultation takes place on-site) or registered users only (if consultation takes place off-site); 3) who are allowed to use to this end their own devices; and 4) to print or save excerpts for offline, off-site consultation.

Additionally, it should be clarified that the exception cannot be contracted out in purchasing or licensing agreements, even if they relate to analog or digital copies of the work.

34. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?

//

35. If your view is that a different solution is needed, what would it be?

//

3. E – lending

36. (a) [In particular if you are a library:] Have you experienced specific problems when trying to negotiate agreements to enable the electronic lending (e-lending), including across borders, of books or other materials held in your collection?

(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to borrow books or other materials electronically (e-lending), including across borders, from institutions such as public libraries?

(c) [In particular if you are a right holder:] Have you negotiated agreements with libraries to enable them to lend books or other materials electronically, including across borders?



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X YES -In Italy, e-lending has so far proved quite unsuccessful. The reason lies in the widespread, though disputable (see, Case C-128/11 Usedsoft), idea that digital distribution does not lead to the exhaustion of IP rights in the distributed copy coupled by the belief that such copies cannot be lent to the public at the same conditions applicable to loans of tangible copies (i.e. payment of an equitable remuneration or, in certain special cases, free of charge: see, Directive 1992/100/EEC). This, in turn, has led to the necessity of negotiating complicated licensing agreements with publishers and service providers (or "aggregators") instead of simply acquiring a certain number of digital copies for each work and making them temporarily available to the end users (e.g. through online services or distributing new files that can be used for a limited period of time). Moreover, publishers and service provider have been negotiating such agreements from a relatively strong position which allows them to impose licensing terms that appear quite unreasonable for several reasons.

Fearing the loss of control over the number of copies being distributed, many publishers do not licence genuine e-lending rights. Instead, they offer (directly or through intermediaries) libraries services which, in turn, can be passed on to end users, allowing them access to a website where the works are hosted and/or download a copy protected by a DRM. By doing so, they tend to offer a pay-per-access service which is expensive (too expensive for many libraries) without being efficient. Firstly, it is the publisher (and not the library) who decides which books can be "lent". Accordingly, the publisher can also exclude some categories of books (e.g. course books, which are more remunerative if sold in hard copies) including newly released titles or books which are not faring well on the market. Moreover, the publisher can use DRMs which do not allow private copying (or do not leave the user free to copy every part of a book) and other fair uses (e.g. copy and paste of text and other materials for discussion purposes) or make the content accessible only through some devices and not others.

If available, genuine licensing agreements are not satisfying either. Despite the fact that "producing" an additional digital copy of a work entails marginal costs tending to zero and, as a consequence, "selling" that digital copy produces growing marginal earnings, publishers tend to apply prices that are modelled along the lines of those usual in the analogue era, therefore reproducing in the digital environment is a scarcity which is entirely artificial. This is also true for e-lending services which are licensed under conditions that make lending unreasonably expensive despite the same work simultaneously being available to multiple users. As a consequence, libraries are forced to keep long waiting lists even if this does not make sense in the digital era. On top of that, licensing agreements may provide further limitations that make e-lending even less attractive. They may relate to the



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characteristics of the digital copies supplied by the publisher, which frequently do not adopt the most refined and compatible standards (e.g. ePub) and contain DRMs blocking all or some fair uses (including those related to people with disabilities).

One last remark relates to the relationship between e-lending and the preservation of library collections. If one combines the increasing substitution of the purchase of books and journals with the subscription to digital information services (see, above answer to Question 28), on the one hand, is the replacement of consultation and lending services with e-lending services managed by publishers or aggregators, on the other hand, it becomes clear that, in the digital age, libraries lose control over their collections and will be unable to perform their traditional function of harvesting and preserving works that express our cultural heritage.

- NO
- NO OPINION

37. *If there are problems, how would they best be solved?*

Three different approaches could be proposed.

One solution is to build on the concept of digital distribution and apply to digital copies a regime modelled on property, therefore, allowing the owner of a digital copy to perform all acts of reproduction which are necessary to fully enjoy and dispose of that copy. This, in turn, would permit to regulate e-lending just like its analogue predecessor—namely, providing for equitable remuneration and, in special cases, exempting some public institutions from payment. It goes without saying that such freedom would be limited to the number of copies owned by the library, therefore, leaving room for licensing agreements if the library needed to overcome such limitation.

Another potential solution could be to introduce a new exemption for e-lending of digital copies of works provided that the service is offered by a publicly accessible library (including academic libraries) without any indirect economic or commercial advantage and subject to the payment of an equitable remuneration to the relevant categories of rightholders. If fears arise that such an exemption would run afoul of the three-step test, it could be added that the number of simultaneous accesses to a single work should not exceed the number of copies of the same work lawfully acquired by the library. As a consequence, this solution would also leave some residual space for voluntary licenses.



A far less attractive solution is the recourse to a memorandum of understandings between representatives of the publishers and representatives of libraries (or of academic libraries alone, for example) establishing standard conditions for individual contracts. The experience made with out of print works, at least in Italy, does not appear encouraging. However, if this was the only viable option, the memorandum should cover at least the issue of catalogues that may be lent, the characteristics of digital goods (format and DRMs) made available to the public, and the requirement of applying prices affordable for libraries wishing to offer such a service.

The following two questions are relevant both to this point (n° 3) and the previous one (n° 2).

38. [In particular if you are an institutional user:] What differences do you see in the management of physical and online collections, including providing access to your subscribers? What problems have you encountered?

There are a lot of differences, some of which have already been mentioned in the replies to the previous questions. For this issue, two different situations should be considered: 1) online collections “owned” by a library; 2) online collections “owned” by publishers or service providers and licensed to a library.

Managing online collections owned by the institution itself is obviously easier. However, it is not like dealing with a physical collection because it poses at least the problems already mentioned in the replies relating to preservation and archiving, off-premises access, and e-lending.

Things get even more difficult when online collections are owned by someone else who licences them to the library. In such cases, the first issue relates to the contractual conditions applied by service providers, who frequently offer their entire collection and not individual works or categories of works while charging additional fees for each and every additional service made available (e.g. document delivery) or simply denying some of them (e.g. inter-library loans). Another important issue is the “volatility” of online collections: both their availability and preservation depends on the existence of the service provider and on the continuing payment of licensing fees. If one of the two conditions fails, the online collection vanishes, no matter how much money was invested into it by the library. Thirdly, management is made difficult by the fact that control on content, type of files, uses allowed and performed, and the data and statistics rests solely in the hands of the service provider and not in the hands of the



library. Fourthly, libraries would have to perform a lot of back office work as online services are not always stable.

39. [In particular if you are a right holder:] **What difference do you see between libraries' traditional activities such as on-premises consultation or public lending and activities such as off-premises (online, at a distance) consultation and e-lending? What problems have you encountered?**

//

4. Mass digitisation

40. [In particular if you are an institutional user, engaging or wanting to engage in mass digitisation projects, a right holder, a collective management organisation:] **Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?**

X YES – To the best of our knowledge, the 2011 Memorandum of Understandings on out-of-print works has not been used in Italy, thus far, as a basis for new initiatives in this field. The only digitization projects undertaken by Italian institutions in the last years relate to works and documents that are already out-of-copyright. It is, therefore, impossible to provide feedback based on this practice.

However, if one were to reason abstractly, there would be problems with this model. For one thing, Italian law does not provide for extended collective licensing systems which seem essential for every mass digitization endeavours that cannot take advantage of an exception to copyright. Moreover, even if one day, an Italian legislator introduced an extended collective licensing system for out-of-commerce works, he would not have jurisdiction over the copyrights granted by other Member States. Therefore, it seems unlikely that any legislative measure taken at the national level could resolve the problem of cross-border dissemination of digitized out-of-commerce works. A system of mutual recognition of extended collective licenses granted by the collective management organizations of the Member States should be put in place.

NO

NO OPINION



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41. Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters' archives)?

YES

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NO

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NO OPINION

B. Teaching

42. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced specific problems when trying to use works or other subject-matter for illustration for teaching, including across borders?

(b) [In particular if you are a right holder:] Have you experienced specific problems resulting from the way in which works or other subject-matter are used for illustration for teaching, including across borders?

X YES -Problems have arisen as a consequence of three concurrent factors: 1) the inconsistencies within EU law; 2) the lack of effective harmonisation; and 3) the too restrictive approaches adopted by some national legislators (e.g. allowing only use of "parts of works" or prohibiting the making available online of teaching materials). Art. 5(3)(a) InfoSoc Directive is relatively well conceived, however, it does not apply to software and databases. Additionally, it has been implemented in very different ways by national legislators (see Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society, commissioned by the EU Commission and published in 2013, at 368 ff.). This, in turn, leads to a situation of great legal uncertainty which prevents universities from offering their courses—including distance learning courses—on a cross-border basis.

NO

NO OPINION

43. If there are problems, how would they best be solved?

Art. 5(3)(a) InfoSoc Directive should be generalized (i.e. applied to all works and other protected materials including software and databases), clarified (i.e. allowing the use of an entire work, if and to the extent needed; expressly



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covering distance learning courses; allowing uses made for teaching and learning purposes including the use by teachers but also the uses performed by the students), and made mandatory. It is true that national legislators could possibly solve some of these problems internally, particularly, those who have been too wary in implementing the InfoSoc Directive. However, it seems very unlikely that all, or at least most of them, will reform their laws any time soon. Accordingly, without action at the EU level, universities and other educational institutions would not be able to offer their online services across borders, individually or jointly through partnership agreements.

44. *What mechanisms exist in the market place to facilitate the use of content for illustration for teaching purposes? How successful are they?*

The adoption of open access policies by academic institution across the world is going to greatly enrich the repertoire of scientific works that can be accessed and reused freely for educational purposes. As already mentioned (see, above answer to Question 28), some actions should be taken at the EU level to remove or prevent potential obstacles. Moreover, free sharing of the results of publicly funded research projects should become the rule.

45. *If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under what conditions?*

//

46. *If your view is that a different solution is needed, what would it be?*

//

C. Research

47. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced specific problems when trying to use works or other subject matter in the context of research projects/activities, including across borders?

(b) [In particular if you are a right holder:] Have you experienced specific problems resulting from the way in which works or other subject-matter are used in the context of research projects/activities, including across borders?

X YES -Some of the problems are identical to those already mentioned in our answer to Question 42a.



There are, however, a few peculiarities. Copyright law can hinder research activities either by 1) restricting dissemination of copyrighted works or 2) preventing re-use of copyrighted works. On the one side, researchers may find it difficult to work on a specific subject without having full access to the prior art. On the other side, they may be prevented from sharing copyrighted works with their colleagues, or using protected materials contained in someone else's work to buttress their own assertions, or extracting data and information from existing works or databases. To remove these obstacles to the greatest possible degree, a number of initiatives should be undertaken.

- NO
- NO OPINION

48. If there are problems, how would they best be solved?

As to the problems that could be summarized as "access to knowledge" issues, it seems that a combination of actions at the EU level could be very helpful. In particular:

1. Facilitating preservation and archiving (see, above answer to Question 28);
2. Making off-site (see, above answer to Question 32a) and e-lending (see, above answer to Question 36a) services effective;
3. Protecting and enhancing open access initiatives (see, above answer to Question 28); and
4. Enabling mass-digitization (see, above answer to Question 40);

All are actions which would make existing knowledge safe and more accessible, and would also benefit the researchers.

Some of these actions would also have positive effects on the issue of re-use of protected materials for research purposes. As open access expands, the freedom of researchers to share and re-use existing works or datasets will also grow. At the same time, building huge digital libraries and archives is a crucial step towards providing researchers with raw data that could be used for automated big data analysis. Accordingly, it would be unsatisfactory if text and data mining were not expressly liberalized (see, below answer to Question 53).

49. What mechanisms exist in the Member States to facilitate the use of content for research purposes? How successful are they?



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D. Disabilities

50. (a) [In particular if you are a person with a disability or an organisation representing persons with disabilities:] **Have you experienced problems with accessibility to content, including across borders, arising from Member States' implementation of this exception?**

(b) [In particular if you are an organisation providing services for persons with disabilities:] **Have you experienced problems when distributing/communicating works published in special formats across the EU?**

(c) [In particular if you are a right holder:] **Have you experienced specific problems resulting from the application of limitations or exceptions allowing for the distribution/communication of works published in special formats, including across borders?**

YES

NO

X NO OPINION

51. **If there are problems, what could be done to improve accessibility?**

//

52. **What mechanisms exist in the market place to facilitate accessibility to content? How successful are they?**

//

E. Text and data mining

53. (a) [In particular if you are an end user/consumer or an institutional user:] **Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?**

(b) [In particular if you are a service provider:] **Have you experienced obstacles, linked to copyright, when providing services based on text or data mining methods, including across borders?**



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(c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the use of text and data mining in relation to copyright protected content, including across borders?

X YES –The Nexa Center for Internet & Society was involved in drafting Creative Commons international licenses 4.0 (which are applicable to contents protected by *sui generis* database right). One major issue has been represented by text/data/content mining (TDM) works which are licensed under the CC licence: different TDM methods (e.g. with or without temporary/permanent reproduction of the initial work), as well as, non-homogeneous exceptions and limitations regime in the EU (e.g. Member States may provide exceptions to the reproduction and communication right for teaching or scientific research purposes, or private copy exceptions) create uncertainty and differences in the application of the licenses.

NO

NO OPINION

54. If there are problems, how would they best be solved?

In order to assess, if and to, which extent copyright interferes with text/data/content mining (TDM), we will try to clarify the nature of TDM.

To begin, we make three assumptions:

1. Texts, contents, and data (objects of TDM) are protected by copyright: if not, the problem of interference by TDM in copyrights would not exist;
2. The final output of TDM is not a “derivative work” or a “substantial part of the initial DB” (where “work” is the text or content and “DB” the database object of TDM): if it were, the consent of the original work/DB rightholder would be required;
3. The single information and data which are sorted out of TDM are “public”, in the sense that they are not restricted by other exclusive rights (e.g. personal information or image rights). This assumption does not mean that the overall output of TDM cannot be covered and protected by copyright (e.g. computer-based works) or by DB right.

If these three conditions are met, a few consequences will follow.

First, the typical and normal purpose of TDM is to extract “public” information and data, that is, contents and ideas (explicit or hidden) which



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are contained in a work/DB. Copyright does not protect the content and ideas on which the works are based. Such contents and ideas enclosed in the work/DB are freely accessible and re-usable by anybody; regardless of the copyright on such work/DB because copyright only protects the way in which such contents-ideas are expressed. TDM is the tool to free open knowledge and create new knowledge buried in copyrighted works/DB.

Second, TDM does not imply exploitation of the work protected by a copyright: a "TDMiner" does not "consume" the work, nor exploits it commercially: either to create derivative works or to communicate it to the public (in the broadest sense). Additionally, a TDM output does not interfere with a copyright of the initial work/DB (above Assumption #2). The TDM activities which could formally violate copyright (such as, permanent/temporary reproduction of a copy of the work/DB) are ancillary to legitimate activities of public interest: freeing open knowledge and creating new knowledge. We may reasonably affirm that such activities do not conflict with a normal exploitation of the work/DB and do not unreasonably prejudice the legitimate interests of the copyright holder.

Third, TDM is functional not only to scientific research purposes but also to businesses, commercial activities, and non-commercial activities. In all such cases, the above considerations are valid. In all such cases, copyright holders are not prejudiced.

Reasoning further on the above, we believe that the basic issues to tackle for TDM are the following:

1. When TDM requires a copy of the work/DB (temporary or permanent), it should be clarified that such reproduction does not conflict with the copyright of the work/DB. Therefore a copyright exception/limitation should be provided in order to permit TDM without copyright infringement.
2. If TDM requires mere access to a copy of the work/DB, as long as the "TDMiner" has legitimate access to the relevant text, content, and data, then there is no copyright infringement. An idea reaffirmed by the Open Knowledge Foundation in the Data Mining Declaration of 1 June 2012 which states "the right to read is the right to mine".
3. There should be an evaluation as to the feasibility and appropriateness of specific exception/limitation in cases where the output of TDM is a work/DB derived from the initial work/DB (above Assumption #2 not being valid). Perhaps by restricting the application of the exception to



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specific cases and purposes (e.g., teaching and scientific research purposes which are not covered by other exceptions/limitations).

4. An alternative resolution disputes system (ADR) could be provided to mediate uncertain situations and balance the different interests (e.g. between copyright holders and TDMiners). The same ADR system could be used for other specific situations where a balance between different interests is required (e.g. orphan works and out-of-print works).
5. Facilitate access to relevant text, content, and data for TDM purposes by law (exceptions, limitations, and compulsory licensing schemes) and by agreement (standard licensing models).
6. Consider attribution is an open issue: not indispensable, but it may be an incentive.

7. Address technological issues, platforms, standards, and interoperability including standardized API, server infrastructures, networks suitable to manage heavy traffic, and digital works repositories dedicated exclusively to TDM.

55. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

As evidenced above, the following explicit provisions could better clarify the extent and limits of TDM activities and strike a balance between copyright protection and free knowledge:

1. Permit temporary/permanent reproduction of the work/DB for the sole and only purpose of TDM.
2. Allow creation through TDM of works/DB derived from the initial work/DB, exclusively for non-commercial purposes, or exclusively for teaching and scientific research purposes (if not still covered by other exceptions/limitations).
3. Provide compulsory access to works/DB for TDM purposes through controlled repositories.

56. If your view is that a different solution is needed, what would it be?

//

57. Are there other issues, unrelated to copyright, that constitute barriers to the use of text or data mining methods?

//



F. User-generated content

58. (a) [In particular if you are an end user/consumer:] Have you experienced problems when trying to use pre-existing works or other subject matter to disseminate new content on the Internet, including across borders?

(b) [In particular if you are a service provider:] Have you experienced problems when users publish/disseminate new content based on the pre-existing works or other subject-matter through your service, including across borders?

(c) [In particular if you are a right holder:] Have you experienced problems resulting from the way the users are using pre-existing works or other subject-matter to disseminate new content on the Internet, including across borders?

X YES -Uncertainty in re-using pre-existing works limits the remixing practise by users.

A clear legal framework permitting the remix of pre-existing works will uphold freedom of expression, limit abusive practises (such as, the use of copyright for censoring purposes and to limit the freedom of expression), and foster cultural diversity.

NO

NO OPINION

59. (a) [In particular if you are an end user/consumer or a right holder:] Have you experienced problems when trying to ensure that the work you have created (on the basis of pre-existing works) is properly identified for online use? Are proprietary systems sufficient in this context?

(b) [In particular if you are a service provider:] Do you provide possibilities for users that are publishing/disseminating the works they have created (on the basis of pre-existing works) through your service to properly identify these works for online use?

YES

NO

X NO OPINION



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60. (a) [In particular if you are an end user/consumer or a right holder]:] Have you experienced problems when trying to be remunerated for the use of the work you have created (on the basis of pre-existing works)?

(b) [In particular if you are a service provider:] Do you provide remuneration schemes for users publishing/disseminating the works they have created (on the basis of pre-existing works) through your service?

- YES
- NO
- NO OPINION

61. If there are problems, how would they best be solved?

A suitable user-generated content regulation is one of the most relevant themes in the modernization of the copyright framework with the digital environment.

Any user-generated content, any remix, shared by users on Internet, could be a derivative work proceeding from pre-existing protected works. This means that theoretically, in the current situation, this massive production of contents should be specifically and individually authorized and licensed by each and all of the upstream rightholders.

Otherwise, all this new content could be illegal.

On the other hand, it is evident that all user-generated content without commercial purposes are beneficial to rightholders because users, by remixing and sharing, are creating exponential possibilities of dissemination for protected works. A copious flow of contents in the internet by users promoting without profit and without harming the normal exploitation, turns into a great opportunity for copyright owners.

The need to remodel the legislative framework concerns user-generated content with commercial purposes as well. The current, most common, individual licensing scheme, in which the users have to reach an agreement with rightholders to get an authorization, seems to be an obstacle for both a fair remuneration for using protected works and the possibility of creating new contents from pre-existing works.

In this landscape, the standard licensing practise might not fit either the needs of rightholders or those of the users.

This problem could be solved with the adoption of two exceptions:



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1. An exception that allows remixing for non-commercial purposes without levy.
2. An exception that allows remixing for commercial purposes in consideration of payment of a levy.

It is worth mentioning that a non-commercial exception that allows remixing for non-commercial purposes has already been adopted in Canada (Section 29.21 of the Canada Copyright Act).

62. *If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?*

See above answer to Question 61.

63. *If your view is that a different solution is needed, what would it be?*

//

III. Private copying and reprography

64. *In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions³ in the digital environment?*

X YES -Private copying by end users should be permitted without payment of a levy.

The adoption of a legal scheme to provide payment of a levy for private copying raises different problems.

On the one hand, it is perceived negatively by the users who see it as an abusive “tax”.

On the other hand, the jurisprudence of the ECJ (see, Case C-467/08, Padawan v. SGAE) has already shown how difficult it could be to discriminate between buyers of recording devices or media who are bound to pay the levy (e.g. end users) and buyers who are exempted (e.g. undertakings and professionals).

The growing availability of contents that are “born digital” raises the question about the opportunity to maintain such a legal scheme: the cases where levy for private copying plays a positive role become increasingly less important.

³ Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.



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Another relevant issue to be clarified at the EU level concerns the third-party services provided for facilitating private copy. Private copy exceptions are exclusively reserved to natural persons (Art. 5.2b InfoSoc Directive) but this does not automatically impede that third parties (natural or legal persons) offer services aimed at facilitating the legitimated subject (natural person) to enjoy his right and to make his private copy. Legislation of Member States is considerably different to this regard: while certain countries explicitly prohibit such services (e.g. Italy), others allow them, while in other countries the issue is simply controversial. This situation becomes even more problematic considering that nowadays digital technologies easily allow the provision of "remote private copy" services and that a market of such services could develop. We refer, for instance, to digital "remote video recording" services: where in some EU countries such services are considered legitimate or at least subject to certain conditions, in other countries, they seem to be unlawful in any case (e.g. Italy), while in non-EU countries (such as Switzerland) commercial remote private copy services are available and the national legislation provides the levy for remote private copy.

Such differences and uncertainty in the national legislations seriously affect the understanding and confidence of the legal background for both citizens (who enjoy the private copy exception) and companies (which are authorised to offer their services in certain countries while in others, they are not), harm the EU basic principles of freedom to provide services/freedom of establishment and prejudice competitively of EU companies toward non-EU companies (which are not affected by these limitations and may freely provide their services).

It should be expressly clarified in the EU legislation that provision of third-party services aimed at facilitating private copy (remote or on-the-spot) is lawful.

- NO
- NO OPINION

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?⁴

- YES

⁴ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies



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X NO -Once the rightholders are paid by the user to access the digital content, there is no reason to apply a private copying levy. Rightholders are in a position to shape their pricing policy taking into account the possibility that users could make private copies from the digital files that they buy.

NO OPINION

66. *How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders' revenue on the other?*

//

67. *Would you see an added value in making levies visible on the invoices for products subject to levies?*⁵

YES

NO

X NO OPINION

68. *Have you experienced a situation where a cross-border transaction resulted in undue levy payments, or duplicate payments of the same levy, or other obstacles to the free movement of goods or services?*

YES

NO

NO OPINION

69. *What percentage of products subject to a levy is sold to persons other than natural persons for purposes clearly unrelated to private copying? Do any of those transactions result in undue payments? Please explain in detail the example you provide (type of products, type of transaction, stakeholders, etc.).*

⁵ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.



70. Where such undue payments arise, what percentage of trade do they affect? To what extent could a priori exemptions and/or ex post reimbursement schemes existing in some Member States help to remedy the situation?

71. If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?

IV. Fair remuneration of authors and performers

72. [In particular if you are an author/performer:] What is the best mechanism (or combination of mechanisms) to ensure that you receive an adequate remuneration for the exploitation of your works and performances? In the online environment: 1) it is impossible to assert the exclusive right for certain uses of copyrighted material; 2) in other cases, the exclusive right can be asserted but this generates such transaction costs for licenses that no one wants; 3) as a result, authors and performers end up not deriving benefits from the exclusive rights. Therefore, it would be better to introduce licensing or legal systems of extended collective licensing, giving authors and performers a non-waivable right to receive a fair compensation (as an alternative compensation schemes).

73. Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts)?

X YES – It is well-known that in this area there is minimal harmonisation.

In Member States, there are substantial differences between the mechanisms to transfer rights and the remuneration for such rights.

In this area, the EU should recommend the introduction of 1) some non-waivable “Termination Rights” (provided by Art. 2 bis of the Term Directive 2006/116/E, as amended by Directive 2011/77/EU) that enables performers to terminate their transfer and assignment contracts in the event that the music producer does not exploit the phonogram in question, and should also be extended to the audiovisual sector; 2) a time span for the producer within which he has to exercise the rights acquired by the contracts; and 3) rights for authors and performers to share the profits deriving from any exploitation of the work.



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Because online exploitation of works and performances are increasingly likely to take place cross-border, it would be desirable for the EU to harmonize a few contractual practises. For example, some contracts obligate the artist to perform exclusively in the interest of the producer for a set period of time. However, this exclusivity clause is not counter-balanced by an obligation of the producer to exploit the work. Finally, considering that the current situation involves not just the EU territory but also the entire world (especially where the digital market is concerned), an aspiration to achieve realistic levels of international harmonisation is necessary to revise the Berne Convention in order to better adapt to international principles in digital copyright.

NO

NO OPINION

74. If you consider that the current rules are not effective, what would you suggest to address the shortcomings you identify?

//

V. Respect for rights

75. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?

YES

X NO -In the foreword to this consultation, we read: "the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet".

This statement is correct, although the reason for the inefficiency is not so much in the procedures and the means of enforcement, as in the incompatibility of the many current rules in the digital ecosystem. Changes have occurred in the ways of creation, as well as, in the distribution chain. Similarly, changes have also occurred and are still occurring in the way the public enjoys works. Without a modernization on the rights granted to creators or an update to the exclusive rights scattered along the long route of distribution, no system of protection could ever be effective.



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If the right to protect is outdated or dysfunctional causing the system to no longer respond properly to the changing reality, and this problem is not recognized or addressed by the community, then the protection is likely to be experienced by users as ineffective and would only lead to inevitable fractures in the already vulnerable relationship between conflicting rights of different actors.

Based on the many observations made at the "Online Consultation on the Civil Enforcement of Intellectual Property Rights", organized by the European Commission, March 2013, it became clear that what we need now is not a new set of enforcement rules, but instead a new system of copyright, such as a Copyright 2.0., that is more efficient and better-suited to the digital world. This need should be focused on the rights, the exclusivity, and the exceptions and limitations that we want and should have to protect works.

On a more specific level, it should be noted that the notion of "copyright infringement committed with a commercial purpose" does not have a clear interpretation because of the many different situations that could occur. In fact, in various models of unlawful diffusion of works, or in their stages of reuse and remixes, we only sometimes find commercial purposes for the illegal works involved, usually by those persons or entities offering intermediary communication services. In these situations, the activities actually stand very far from direct infringement of an exclusive right. In many situations, in the beginning, infringement of works are committed by users for non-commercial purposes but then they begin to generate business and end up profiting from the diffusion environment of online content. This type of activity does not clearly amount to outright infringement, and by suppressing such activities, we could be suppressing creativity. A possible balancing may be achieved if copyright holders, such as authors, artists, and performers were given the opportunity to decide how they can take advantage of the new ways to distribute their works in digital communication networks. For this reason, we need to change the current rigid system of copyright by creating different levels of protection including one where "all rights reserved" does not exist; in order to enable a realistic and effective safeguard system.

NO OPINION

76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If



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not, what measures would be useful to foster the cooperation of intermediaries?

The role of intermediaries is a crucial issue on which we should reflect. In addition, we need to achieve harmonisation in the Single Market. It is important to note, Internet service providers are key players in the functioning of the online environment: they play different functions and they are always essential to the dissemination of contents, providing technical means, and creating new business models.

In the EU legal framework, intermediaries are recognized as carriers of fundamental rights, such as the freedom of enterprise and economic initiative, or the freedom of speech ("Article 10 applies not only to the content of the information but also to the means of transmission or reception since any restriction on the means necessarily imposed interferes with the right to receive and impart information" cfr. Peter Sunde and Fredrik Neij *Kolmisopp vs. Sweden, Application No. 40397/12*).

It is readily accepted that the notion of "intermediary" is broadly understood by the IPRED Directive and by judicial courts to include all persons and entities "whose services are used by a third party to infringe an intellectual property right." This implies that even intermediaries who do not have a direct contractual relationship or connection with the infringer may be subjected to IPRED measures provided in the Directive. But the current EU legal framework, along with the e-commerce Directive, actually only harmonises certain limitations of liability as it relates to a few internet service providers and only if certain conditions are satisfied.

In the Italian experience, internet service providers (in particular, access and hosting services) are almost the exclusive focus in the enforcement activities of rightholders. In particular, through court granted interim injunctions or cease-and-desist orders, and in the near future, through administrative decisions set by the independent authorities (e.g., AGCOM). These actions are usually undertaken by rightholders resorting to a procedure that avoids directly involving the infringer, who often is not even notified by a request for removal or offered the subsequent option to delete the infringing content.

The involvement of intermediary service providers in the prevention and suppression of online copyright infringements is certainly necessary, but it is essential to recognize their fundamental function is to ensure both the provision of basic services that safeguard the continued flow of free information in the network, and to the provision of a framework that allows the internet and e-commerce to develop.



Therefore, it is necessary, for the harmonisation of laws, to define with particular attention to copyright notions such as facilitation, contributory infringement, and liability limitations of intermediary services used by users. All of which are essential features for the dissemination of contents on the Internet.

Even with new forms of enforcement developing, such as the so-called "follow the money" approach, which involves neutral services such as payment or advertising systems providers, it is essential to provide procedural and transparent safeguards in order to preserve the balance between all the different fundamental rights of the various parties involved in the dissemination of contents.

77. Does the current civil enforcement framework ensure that the right balance is achieved between the right to have one's copyright respected and other rights such as the protection of private life and protection of personal data?

X YES -The right to information based in the IPRED Directive (Art. 8) provides a proper balance between the protection of property rights (including intellectual property) and the protection of user's rights (including privacy and data protection). Moreover, these rights are not arbitrarily decided by individuals or private entities but instead on a legal basis by a Court of Law. Conversely, the safeguards of copyright enforcement, as laid down in Art. 52 of the EU Charter of Fundamental Rights, do not always seem fully respected in relation to data protection and, sometimes, in relation to the freedom of speech.

As highlighted in the consultation on the Civil Enforcement of Intellectual Property Rights, with respect to Art. 7 and 8 of the Charter of Fundamental Rights, in some Member States, users' personal data related to accessing and hosting services are obtained without a Court Order (e.g., in the Netherlands). In Italy, the National Authority on Communication Networks (AGCOM) has recently issued a Regulation which entrusts AGCOM with powers to require access and hosting providers to supply information on their service users related to online copyright infringements without a legal trial or a Court Order.

The main problem is access to the identification data and metadata in connection with copyright infringements. This data, certainly useful in identifying the infringer, are held by electronic communications services providers and are regulated by the E-privacy Directive (2002/58/CE) and the Data Retention Directive (2006/24/CE). The Directive on data retention compels internet service providers to keep a large amount of user information that is obviously coveted by copyright holders to identify



infringers. Currently, this Directive is under examination before the ECJ in joined Cases C-293/12 and C- 594/12 to ascertain 1) any other reasons that may justify the access to such data (because the Directive only mentions serious crimes), 2) what happens in situations where there is an absence of law to specifically provide data access to judicial or independent authorities, and 3) the duty of providing information and transparency towards the person(s) involved.

For a proper balance between the requirement to protect copyright rights and the requirement to safeguard users' fundamental rights, this legislative framework should be expressly regulated by law. Access to personal data held by internet service providers should be released for certain conditions: 1) only in cases of specific crime, 2) restricted to intellectual property infringements when they are massive, committed with a commercial purpose, are part of a criminal organizations, or are dangerous to the health or safety of the public; 3) only with a Court Order, or 4) only with the provision of specific limitations of a use under a full contradictory procedure of stakeholders.

NO

NO OPINION

VI. A single EU Copyright Title

78. Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?

X YES

There are reasons to back the creation of a single EU Copyright Title which are both short and medium term. A single EU copyright title based on a regulation relying on Art. 118 TFEU would have immediate advantages in several regards. In the short term:

1. EU-wide licensing would be the default rule; but this would not prevent rightholders or assignees/licensees to agree on more limited territorial rights at the EU Member State or regional level.
2. A unique set of limitations and exceptions would avoid the – all too obvious – outcome that harmonization, which has to leave a minimum of



flexibility by way of options, results in greater disharmony than the one which triggered harmonisation in the first place.

3. A single EU Copyright Title would bring benefits also in areas such as DRMs and enforcement (including uniform rules for the liabilities and immunity of ISPs).

In the medium term, the EU might lead a more ambitious project: to conceive the single EU Copyright Title as a blueprint for phasing in dual systems for copyright protection including a Copyright 2.0 intended to enable digital-networks driven cooperation to create works. As stated earlier, this latter tool requires exclusivity, albeit in an attenuated, Creative-Commons-like form. To provide for this dual mode of protection would be the starting point for a process leading to a Berne II Convention, which the EU has the potential and prestige to lead at the global level. In this phase, the global registration system and the default mode for Copyright 2.0 protection should be the first building blocks towards the establishment of a dual system of copyright protection.

NO

NO OPINION

79. *Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?*

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VII. Other issues

80. *Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.*

§ 1. COPYRIGHT AND THE NEW SOCIAL AND TECHNOLOGICAL BASIS OF CREATIVITY. Any initiative seriously intending to re-cast copyright at the European level must take into account the extent to which, in the last two decades or so, the social and technological basis of creation of works, including music, text, photographs and audiovisual content, has been transformed.

The time has come to become aware that, in our post-post-industrial age, the long route which used to lead the work from its creator to the public by passing through different categories of businesses is gradually being



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replaced by a short route, which puts in direct contact creators and the public, and even leads to an increasing overlap between these two categories. This development may be sketched as follows.

1.1. In the analogue word, it could be taken for granted that the intermediation of business was necessary to bring works from creators to markets. In particular, books and records needed to be printed. For this purpose some kind of “factory” was required, to manufacture what in effect were fixed, stable, material or – as the expression now goes – “hard” copies of the work. In turn these hard copies needed to be stored, transported, distributed, before reaching the shelves where the public would finally find them. It was difficult for creators to engage in all these steps; and this is why, as a rule, they preferred to resort to the help and assistance of businesses. The kind of business which appeared indispensable for this purpose had features which the last two centuries made familiar. To begin with, it had to make substantial outlays to figure out whether there was a market for the work; then again, it had to invest and take large risks for the mass production of material copies of works and for their distribution; and this, on a scale which increased in step with the extension of the markets. Publishers, the movie industry, and record labels are appropriate cases in point. Radio and TV came in to take care of the so called “secondary” utilization of work. In all these regards, it certainly can be said that this was quite a long route to institute a contact between the creator and the public; and that business was a very valuable, indeed indispensable intermediary to achieve such a goal.

1.2. In the digital environment all this dramatically changed. On the production side, perfect digital copies often make “factories” of physical, material copies of works redundant; the same development is now reaching the movie industry. The distribution side is similar. This is because digital goods which are distributed through the net are light rather than heavy, and use up a limited amount of storage space. But even more so because the technological endowment held by the public at the receiving end has in the meantime deeply changed. Here we have enormous excess capacity residing with the public at large at the receiving end; and this excess capacity can be mobilized to create distributive networks of extraordinary scale, scope, and effectiveness.

1.3. In this novel context, it would seem that the setting up of a relationship between creator and business no longer has the same compelling rationale it used to have in the past. Therefore both the production and distribution functions migrate from business to the public and there they can rely on excess resources available at each consumption unit.



The scenario is indeed changing. Sharing and peer production enter; business recedes. As a result, the long route from creators to the public is becoming much shorter; and this is happening more and more all the time. Today creators set up their own sites and make books and music directly accessible to the public therefrom. Currently, user generated content and social networks are growing exponentially: creators and public are finally merging into each other.

§ 2. REQUIREMENTS FOR A EU COPYRIGHT AGENDA. What are the implications of this upheaval for the frame of reference of a EU legislative agenda in the field of copyright? We can anticipate with some confidence that also in the future production and distribution of works will continue to originate from two different segments, the one relying on business and markets, the other on the production and distribution mode which is based on decentralized non-market decisions, often referred to as "social sharing"; that the latter segment, currently encompassing creations which go from the open content made available by Wikipedia and Flickr, from free music and pictures to blogs plus the massive volumes of user-generated content proceeding along the "short route" just sketched out, will exponentially grow, dwarfing the market segment based on the "long route"; and that the two components of creativity will not be mutually exclusive but will interact.

This is why any agenda for law-making for the digital environment which intends to avoid being obsolete at the very moment it is adopted should today be so designed that, in a not-so-distant future, at least three requirements are met.

First, the agenda should make room for the step by step incorporation of rules which are appropriate not only for the long route but also for the short route.

Second, it should plan for the "peaceful coexistence" of the two sets of rules, making them mutually compatible in such a way that the continued existence and specific contribution of the two sectors is maximized.

Third, obstacles inherited by the past which unduly inhibit the emergence of the short route should be gradually phased out in ways which should minimize the disruption of the workings of the old route.

§ 3. COPYRIGHT 2.0: INTERESTS AND RULES. Against this background, let us think for a moment about the set of rules which would appear to be appropriate, in the medium to long term, to meet the demands of creators operating along the short route.



3.1. The Interests. In the market-based model it was essential for creators and even more so for businesses to control and restrict access to works, as the monopoly granted by expansive exclusive rights enabled them to charge whatever price the market would bear. However, this would not appear to be the goal of creators currently operating along the short route. The great majority of them, be it 9 out of 10 or 95 out of 100, do not make a living out of "sales" of "copies" of their works; they earn their livelihood in another activity or business and devote a portion – often a very large portion – of their spare time to creating. In the new paradigm, creation may consist in contributions based on cooperation, where each novel input is intended to link with other reciprocal inputs to form a greater unit; it may give the contributor a bit of extra income, professional credit, recognition or just fun (or a combination of the three). Even when the creators operating along the short route are professionally engaged in the creation of works, their business model usually is based on income flows different from the sale of copies as such. Thus, it would appear that there is a shift whereby even singers and songwriters increasingly rely on performances, tours, endorsements, merchandising and their likes rather than sales of albums and tracks.

This is the business model which the Grateful Dead pioneered, possibly taking a clue from open source software and IBM, and is currently expanding to an increasing number of businesses. A few years ago, Paul Krugmann made the case that the demise of reliance on income based on "hard" copies was being generalized and, in doing so, quipped that "in the long run we will all be the Grateful Dead." What is important for creators engaged along the short route is, it would appear, that their work can be disseminated as widely as possible, on two conditions: first, that the work is correctly attributed to them, and second, that the creators may, if they so choose, reserve the right to prevent third parties to make a commercial profit out of their work unless this is agreed to by the creator herself.

3.2. The Rules. If this is so, then what may currently be needed is a new kind of copyright, which sometimes is labelled Copyright 2.0. The new system would have just a few basic features. Old copyright, or Copyright 1.0, would still be available; but it would have to be claimed for by the creator at the onset, e.g. by registering in a global copyright Registry. If no registration is made, Copyright 2.0 would apply; and this would give creators just one right, the right to attribution. In this model, Copyright 1.0 should survive; and we may anticipate that this is likely to be resorted to by creators (and businesses) choosing to operate along the long route. Indeed, the ultimate goal is not to displace old copyright, which seems to be alive and well in many situations, but to add to the menu a second possibility, Copyright 2.0,



which should be better tailored to the characters of production and distribution of works prevailing in the current digital environment.

However, creators should opt-in for Copyright 1.0 at the time of the original release of their work; otherwise the new and more flexible Copyright 2.0 would operate as a default set of provisions. This is why this approach is sometimes characterized as “Creative Commons by default”. The idea behind the approach is that the very successful uptake of Creative Commons licenses and other copyleft licenses by creators operating along the short route shows that out there, in the digital prairies and wilderness, there is a very large number indeed of creators who prefer to reserve only some rights rather than all rights; and that the time has come for legal systems to recognize this fact of life by creating a regime in which downstream freedom is the rule and a system under which creators may have the option to reserve some rights or, if they like, all the old Copyright 1.0 rights, only if they wish and say so, by resorting to a global registration mechanism.

§ 4. PLANNING FOR CURRENT FEATURES WHICH FIT THE FUTURE INTERNATIONAL COPYRIGHT FOR THE DIGITAL AGE. The defining feature of smart legislation is that it incorporates in its current components which are already acceptable today but are designed to fit also in the next stage of legislative development. Along these lines, the current exercise of recasting EU copyright law should on the one hand, strive to gain widespread acceptance and recognition already in the current state of the play and on the other, lay the ground for a second, more ambitious legislative development, where EU action in the field of copyright becomes the initiator of an overall revision of international copyright.

In this perspective, the current exercise should more particularly incorporate a limited number of features such as:

1. The phasing in of the machinery for a global digital registration system;
2. Updating limitations and exceptions, also in light of the boundaries between the old and the new and of the goal of contributing to their mutually advantageous coexistence. A first point should tackle the issue of the mandatory nature of limitations and exceptions. In the 1886 Berne Convention, only the right of quotation under Art. 10(1) is clearly mandatory. Probably the time has come to ask ourselves whether there are other copyright limitations and exceptions which should be made mandatory, in the meaning of being dictated rather than enabled, in order to achieve a certain re-balancing of the expansion of copyright protection and also in order to provide the wherewithal which may enable the new



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paradigm to grow and become robust. We also should ask ourselves whether limitations and exceptions should be made mandatory in another meaning of the world, that is by provisions which cannot be contracted away; which is probably indispensable, taking into account that, while real-world transactions did not imply written agreements (you do not need to sign a contract to purchase a book), there is no economic transaction going on online which is not governed by written terms and conditions, which always do away with limitations and exceptions. Another point has to do with DRMs. Limitations and exceptions enabled by law should not be disabled by technology. Downstream users should have not only a claim to circumvent technological restrictions, but also to have them removed by the entities which originally resorted to them. Redress mechanisms, from ADR to class actions, should be put in place.

3. Special attention and care should be given to infrastructure which is used both by works created under the new and the old paradigm. Just to make an example, enforcement towards ISPs should take into account the impact the possible adverse effects this may have on the emergence and diffusion of user generated content and other forms of creation under the new paradigm.

4. The very welcome idea of introducing a EU-wide, unitary copyright should be devised in a way to design it as a blueprint for the future international copyright. The time for Berne II has come; and Europe has a chance to take once more the lead.

Turin, 4 March 2014

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