



ReCreating Europe

Rethinking digital copyright law for a
culturally diverse, accessible, creative Europe





This booklet, issued in the occasion of **reCreating Europe's final conference**, offers a brief overview of background, objectives and results of the project, a list of its main outputs, and its final policy recommendations.

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ReCreating Europe

www.recreating.eu

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ReCreating Europe

FINAL CONFERENCE



21-22 March 2023



Day 1 @ Museum of Natural Sciences

Day 2 @ European Parliament



Day 1 (21 March 2023) @ Museum of Natural Sciences

9.00 – 9.15 **Three years of reCreating Europe**

Caterina Sganga (Sant'Anna School of Advanced Studies, Pisa)

9.15 – 9.55 **Keynote addresses**

Rethinking Copyright in Generative AI Models

Niva Elkin Koren (Professor of Law, Tel-Aviv University Faculty of Law)

Digital challenges in the book publishing industry

Imke Reimers (Associate Professor, Department of Economics, Northeastern University)

9.55 – 11.10 **Session 1 – End Users and Vulnerable Groups**

Chair: **María Lillà Montagnani** (Bocconi University, Milan)

- **The state of EU copyright flexibilities: comparative mapping**
Caterina Sganga (Sant'Anna School of Advanced Studies, Pisa)
- **Copyright flexibilities on online platforms: empirical analysis of selected end-user license agreements**
Peter Mezei (University of Szeged)
- **Update on the Global Piracy Study**
Arianna Martinelli (Sant'Anna School of Advanced Studies, Pisa) – Joost Poort (IViR, University of Amsterdam)
- **Challenges, barriers and opportunities for vulnerable groups**
Delia Ferri (Maynooth University)

Respondents

Severine Dusollier (Professor of Law, Science Po School of Law, Paris)

Alejandro Moledo (Deputy Director, European Disability Forum)

Christoph Schmon (International Policy Director, Electronic Frontier Foundation)

11.10 – 12.25 **Session 2 – Authors, Performers and AI**

Chair: **Martin Senftleben** (IViR, University of Amsterdam)

- **Authors' and performers' experiences with using AI and platform algorithms**
Joost Poort (IViR, University of Amsterdam)
- **AI training data and text and data mining**
Thomas Margoni (CITiP, KU Leuven) – **Martin Kretschmer** (CREATE, University of Glasgow)
- **Reversion rights**
Ula Furgal (CREATE, University of Glasgow)
- **Copyright and neighboring rights for AI (music) productions**
Joao Pedro Quintais (IViR, University of Amsterdam)

Respondents

Alain Strowel (Professor of Law, UCLouvain and University Saint-Louis, Brussels)

Pauline Durand-Vialle (CEO, Federation of European Screen Directors (FERA))

Jeremy Rollinson (Senior Director, EU Government Affairs, Microsoft)

12.25 – 13.15 **Lunch break**

13.15 – 14.30 **Session 3 – Creative industries**

Chair: **Sean Flynn** (Professor and Director, Program on Information Justice and Intellectual Property, American University Washington College of Law)

- **New business models and challenges in creative industries**
Eneli Kindsiko (University of Tartu)
- **Digitalisation, agglomeration and sustainability of cultural creative enterprises: lessons from COVID-19 in a creative hub**
Ingmar Pastak (University of Tartu)
- **Codes of Best Practices in Creative Reuse: Making Copyright Exceptions a Viable Option for Creators**
Bartolomeo Meletti (CREATE – University of Glasgow) – **Stef van Gompel** (Vrije Universiteit Amsterdam)
- **Case studies on IP negative spaces**
Alessandro Nuvolari – **Raffaele Danna** (Sant'Anna School of Advanced Studies, Pisa)
- **CopyrightUser.EU: Making EU Copyright Law Accessible to Everyone**
Bartolomeo Meletti (CREATE – University of Glasgow)

Respondents

Estelle Derclaye (Professor of Intellectual Property Law, University of Nottingham)

Maartje Hülsenbeck (Advisor, The Netherland Institute for Sound & Vision)

14.30 – 15.45 **Session 4 – Cultural heritage institutions (GLAMs)**

Chair: **Marie-Christine Janssens** (Professor and Director, CITIP, KU Leuven)

- **GLAM: copyright and openness in the data era**
Roberto Caso – Paolo Guarda (University of Trento)
- **Evidence-based research in GLAM: measuring the impact of digitization**
Giulia Dore – Laura di Nicola (University of Trento)
- **“City TM (c)”: copyright, trademarks and placemaking**
Marta Iljadica (CREATE – University of Glasgow) – **Pinar Oruç** (University of Manchester)
- **On the need for a new approach to the regulation of cultural heritage in copyright law. Conclusions from the inDICEs project**
Konrad Gliscinski (IP expert, Centrum Cyfrowe, Researcher, Jagellonian University)

Respondents

Fiona MacMillan (Professor, University of Roma Tre and Birkbeck University of London)

Elke Kellner (Board Member, International Council of Museums (ICOM) and Managing Director, ICOM Austria)

Stefano Parise (Director of the Public Library Network, Milan; past Vice-President, EBLIDA)

15.45 – 16.00 **Coffee break**

16.00 – 17.15 **Session 5 – Intermediaries**

Chair: **Tanya Aplin** (Professor of Intellectual Property Law, King's College London)

- **The fragmented EU legal landscape of Copyright Content Moderation**
Joao Pedro Quintais (IViR, University of Amsterdam) – **Peter Mezei** (University of Szeged)
- **The Future of Copyright Content Moderation**
Sebastian Schwemer (Centre for Information and Innovation Law (CIIR), University of Copenhagen)
- **Challenges to Empirical Research on Copyright Content Moderation**
Christian Katzenbach – Daria Dergacheva (University of Bremen)

Respondents

Alexander Peukert (Professor of Civil and Commercial Law, Goethe-Universität Frankfurt am Main)

Cedric Manara (Director, Head of Copyright, Legal, Google)

Paul Keller (President, COMMUNIA Association for the Public Domain)

17.15 – 18.00 **Wrap-up and reception**

Day 2

22 March 2023, 9.00 – 11.00

European Parliament

The future of EU copyright law: policy recommendations

With the keynote addresses of

- **Brando Benifei (S&D)**
Rapporteur of the AI Act
- **Axel Voss (EPP)**
Rapporteur of the CDSM Directive
- **Marco Giorello**
Head of the Copyright Unit – DG CONNECT, European Commission

And the intervention of

- **Caterina Sganga** (Sant'Anna School of Advanced Studies, Pisa) on ReCreating Europe: setting the scene
- **Peter Mezei** (University of Szeged) on End users, vulnerable groups and access to culture
- **Thomas Margoni** (KU Leuven) on Authors and performers
- **Martin Kretschmer** (CREATE – University of Glasgow) on Creative industries
- **Roberto Caso** (University of Trento) on Cultural heritage institutions
- **Joao Pedro Quintais** (IViR – University of Amsterdam) on Intermediaries

Chair: **Paul Keller** (Communia and OpenFuture)

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END USERS AND VULNERABLE GROUPS

GENERAL/SYSTEMATIC MATTERS

- Reconsider the approach to harmonization for all copyright flexibilities
- Simplify the E&Ls regimes and ensure consistency in the rationales underlying their adoption
- Introduce purpose-oriented provisions to overcome rigidities
- Ensure the national operation of key doctrines developed by the CJEU to increase legal certainty
- Consider operating a horizontal joint update of traditional E&Ls to new technological, market and socio-cultural developments
- Specify the notion of protected work and harmonize exclusions
- Evaluate the opportunity to introduce flexibilities for transformative uses

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- Move towards a greater harmonization of the private copy and reprography exceptions for seamless cross-border activities and management by CMOs
- Build on Deckmyn and Article 17(7) CDSM to move towards a greater harmonization of the parody exception
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- Align EU copyright law with the EU policies on open access and open science
- Conduct an impact assessment after the full CDSM transposition to verify the need to streamline traditional and digital teaching exceptions
- Embrace a wider notion of disability in copyright law and harmonize related exceptions across the EU, beyond the limits of the Marrakesh directive, and leverage on the combined effect of the disability copyright exception and EU accessibility legislation

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- Address underlying structural barriers that affect access to digital culture and ultimately render copyright flexibilities less effective
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- Support education in and awareness of audience development strategies to promote democratisation of culture

ON PRIVATE ORDERING

- Review the non-compliance of OCSSPs with the novel public regulatory sources
- Reconsider the legal status of UGC

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- Clarify and simplify the eu copyright framework for cultural heritage
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- Boost the eu role in cultural heritage
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- Educate and engage with glam stakeholders to ensure a fair balance of copyright interests

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SUMMARY CHART OF POLICY RECOMMENDATIONS

BACKGROUND, APPROACH AND GENERAL RESULTS

Four key phenomena drive the need for effective policy and law making in the field of copyright and associated intellectual property rights. The first is that technological, sociological and legal changes have transformed digital copyright law in a regulatory instrument having a direct substantial impact on a wide array of policy goals, interests, rights and freedoms, much beyond the strict copyright realm (© **complexity**). This has become particularly evident in the highly politicized public debates surrounding the decision-making on the Directive on Copyright in the Digital Single Market (CDSM). The second is that where regulation fails to meet societal needs, it systematically triggers the adoption of alternative coping strategies, both on the side of consumption (e.g piracy and circumvention of copyright) and on the side of creation (e.g. technical protection measures (TPMs) and copyleft). These are rarely mapped and analysed holistically in connection with policy reforms despite of their significance (© **relinquishment**). The third is that, although through studies and data collection our knowledge about creative processes and consumption practices has improved, important gaps remain, underlining the need for more evidence on copyright impact, and for an analysis that could clarify the principles underlying copyright, and the standards for delineating exclusive rights and exceptions as informed by those principles, making copyright law and the use of copyrighted works more transparent, consistent, and evidence-based. (© **knowledge gap**). The fourth is that the level of awareness of copyright regulation and its impact on stakeholders appears to be consistently low across the entire spectrum of stakeholders, despite the efforts made to tackle the problem. Especially the awareness of end users and individual authors and performers often falls short (© **awareness gap**).

Each of the four phenomena carries a set of negative, or at least problematic effects. Copyright complexity challenges the predictability of the impact of regulation and the reliability of evidence-based policy making, requiring a more articulated interdisciplinary analysis to produce all-encompassing results. It increases the difficulty of reaching a consensus on the level and focus of harmonization. It broadens the range of stakeholders involved, steepening the road to finding the balance. Moreover, it creates coordination problems within the EU multi-level competence structure, since not all the policy realms touched upon by copyright belong to the competence of the EU legislator. Copyright relinquishment triggers practices that develop outside, without, and sometimes against copyright, weakening its regulatory weight and impact on the mechanisms of creation, dissemination and access/consumption of cultural and creative goods and services. Copyright knowledge gap undermines the capability of the EU legislator to effectively prioritize its actions, establish the most appropriate level of harmonization, and consider the necessary interplay between copyright and other regulatory branches and policy measures. Copyright awareness gap has an obvious impact on the effectiveness of copyright incentives, enforcement and flexibilities, since the measures it offers are not properly understood nor used by users and creators

alike. By doing so, it contributes to copyright relinquishment.

With its cross-disciplinary approach and a research platform that comprises researchers, practitioners and various stakeholders, *reCreating Europe* tackled the four phenomena and responded to the challenge by bringing a wide array of contributions to the understanding and management of copyright in the DSM, and advancing the discussion on how IPRs can be best regulated to facilitate access to, consumption of and generation of cultural and creative products. It did so at four intertwined levels.

(1) *reCreating Europe* provided an unprecedented cross-national mapping of multi-level regulatory responses including both public sources and private rules or practices having an impact on access to culture, cultural/creative production, and growth and competitiveness of creative industries. This analysis was situated within the broader conceptual framework of democratization of culture, with a stakeholder-focused analysis. *reCreating Europe* also identified coping/alternative strategies of different categories of end users (including particularly vulnerable users, which are often neglected by mainstream research projects), individual creators and performers, cultural and heritage institutions, niche creative communities, and different sizes and sectors of creative industries vis-à-vis IPRs pitfalls and constraints impairing their interests and hindering their goals.

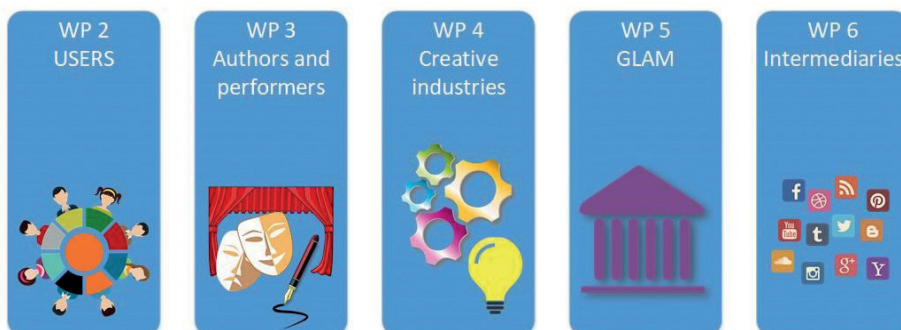
(2) To support evidence-based policy making, *reCreating Europe* collected a wide range of data sets portraying the impact of digitization and copyright on patterns of consumption, creation and dissemination of cultural and creative content. The focus of such an exercise was on, *inter alia*, users' access to culture, barriers to accessibility, lending practices, content filtering performed by intermediaries, old and new business models - also non IP-based - in creative industries of different sizes, sectors and locations, experiences, perceptions and income developments of creators and performers, who are the beating heart of the cultural and copyright industries, throughout Europe, and the emerging role of artificial intelligence (AI) in the creative process. developed **innovative methods to measure the impact** of the digital market on extent, forms and content of production and consumption of cultural/creative goods and services, coupling qualitative and quantitative methods, within the framework of a participatory research strategy. Together with traditional market actors, particular attention was devoted to old and new intermediaries, vulnerable users, niche sectors and creative communities/networks, micro entities and SMEs.

(3) Due to their key importance in the digital environment, *reCreating Europe* performed a legal, economic and technological mapping and evaluation of technological measures of protection, access-enabling technologies and content-filtering algorithms, in order to assess their impact on cultural diversity, access to culture and creation of cultural/creative value.

(4) Last, building on its findings, *reCreating Europe* offered a set of policy recommendations and best practices, the production of which involved stakeholders where relevant, with the aim of democratizing access to culture

and fostering access for vulnerable groups such as people belonging to ethnic or linguistic minorities and people with disabilities, while effectively sustaining the growth and competitiveness of rich and diverse cultural and creative industries. Recommendations and practices target, *inter alia*, (a) the **removal of bottlenecks** to digital access, accessibility and creation of cultural and creative content posed by copyright law and territoriality, and the current incapability of copyright to fully represent the diversity of artistic and cultural communities, networks and sectors; (b) the **exploitation of yet-untapped opportunities** offered by the digitization of cultural/creative works and the digital single market (DMS) to enhance the democratization of culture; (c) the **embedment of copyright and technological measures within the broader realm of cultural policies** to achieve a balance between access, protection and incentive to creation, and to enhance cultural diversity.

Compared to previous studies, one of *reCreating Europe's* main strengths is the **parallel, comprehensive focus on five key groups of stakeholders** (end-users, cultural and heritage institutions, individual authors and performers, creative industries, intermediaries), whose needs were assessed along intertwined research patterns, and through a cross-disciplinary approach that innovatively merged different methodologies within the framework of a participatory research strategy. This stakeholder-based analysis was vital to capture the complexity of the phenomena. It allowed looking at oft-neglected subjects, such as vulnerable users and niche cultural/creative communities and sectors. It placed emphasis on alternative coping strategies adopted by stakeholders to fulfill their access, (re)creation and dissemination needs, analysing the innovative and positive contribution of such responses instead of simply treating them as distortions to be corrected by policy reforms. Finally, it ensured stakeholders' involvement through participatory research strategies, thus tackling copyright awareness gap.



THE CONSORTIUM

reCreating Europe is a Horizon 2020-funded project, coordinated by Scuola Superiore Sant'Anna (Pisa, Italy) and based on a consortium of leading scholars in the field of copyright, geography and economics of creativity, sociology of innovation, communication and media studies, cultural policies, open knowledge and access to culture, cultural policies, minority rights and disability rights.



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MAIN OUTPUTS AND RESULTS

END USERS AND VULNERABLE GROUPS

SGANGA, C., MEZEI, P., CONTARDI, M., TURAN, P., HARKAI, I., BUCARIA, G., SIGNORETTA, C., (2022) Copyright flexibilities: mapping and comparative assessment of EU and national sources

(D2.3, <https://zenodo.org/record/7540511#.Y8VqwnbMK3A>)

This report illustrates the results of reCreating Europe's comparative, EU and cross-national mapping and assessment of sources impacting on copyright flexibilities, focusing on (a) statutes, court decisions, governmental policies, practices and schemes in the field of copyright law, DSM, and broader cultural policies, and (b) private ordering sources, such as standardized license agreements (EULAs) and terms of use from online platforms, selected to represent a wide array of cultural and creative goods and services. The study built on a rich state of the art, and relied both on in-house desk mapping of available sources and on a wide network of national experts from academia and private practice. The mapping produced a wealth of data and findings, which have been systematized and structured in an internal dataset and will be made available to the public on the user-friendly website www.copyrightflexibilities.eu.

The report is structured in 6 parts. The introductory sections (1 and 2) sketch the state of the art underlying the study, summarize its research questions, objectives and expected outcomes, and outline the general structure and workflow of the research, illustrating its general and sector-specific methodology and selection of sources. Section 3 offers a detailed overview of the mapping of public regulatory sources, focusing first on the EU and then on each of the 27 Member States. Section 4 provides a comparative analysis and assessment of the results, articulated around twelve categories of uses/flexibilities. Section 5 reports on the study of the state of copyright flexibilities in online platforms' EULAs, assessing their compliance with the CDSM Directive. Section 6 concludes, commenting on the descriptive findings of the research and sketching the road ahead.

FERRI, D., HIGGINS, N., DONNELAN, K., SERRA, M.L., (2022) Report on barriers experienced by vulnerable groups

(D2.4, <https://zenodo.org/record/6793172#.YsKljHZBw2w>)

This deliverable assesses of the extent to which vulnerable groups experience barriers in accessing digital cultural content, and investigates whether, and to what extent, the EU regulatory framework might exacerbate or counteract those barriers. The concept of vulnerability was linked ex ante to structural inequalities faced by specific vulnerable groups, i.e., persons with disabilities, and persons belonging to minority groups (ethnic and linguistic minorities and Indigenous peoples). The methodology adopted combined traditional legal research with qualitative analysis, with an overall socio-legal approach. Semi-structured interviews and a qualitative survey, both conducted across 12 EU Member States (Belgium, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta and Spain) were undertaken and served as a basis for the analysis of literature, law and

policy. This research highlighted that copyright law per se offers little to no support for people belonging to minorities in accessing digital culture. While the Marrakesh package helped consolidation of the disability exception, still gaps remain. The research also identified specific barriers encountered vulnerable groups in accessing digital culture, including, accessibility issues (persons with disabilities, lack of available translations (linguistic minorities), ethnic stereotyping in cultural content (ethnic minorities).

RUSSO, E., MARTINELLI, A., NUVOLARI, A., PALAGI, E., (2022) Impact of copyright law and perception on demand for cultural goods and services (D2.6, <https://zenodo.org/record/6044769#.YsKNeHZBw2w>)

The ambiguity of the empirical results on the relationship between copyright and creativity calls for a better theoretical understanding of the issue, possibly enlarging the analysis to other factors such as technology and copyright enforcement. This publication addresses these complex policy issues by developing an agent-based model (ABM) to study how the interplay between digitization and copyright enforcement affects the production and access to cultural goods. The model includes creators who compete in different submarkets and invest in activities that might lead to the generation of creative outputs in existing submarkets, new (to the creators) submarkets, or in newly “invented” submarkets. Finally, the model features a copyright system that provides creators with the exclusive right to reproduce their original copies and a pirate market responsible for creating and distributing pirated copies.

MARTINELLI, A., POORT, J., NUVOLARI, A., MEZEI, P., (2022) Report on the effect of digitisation and regulatory changes on access to cultural/creative goods and services

(D2.7, <https://zenodo.org/record/6779277#.YrxbvHZBw2w>)

This report documents the use of legal and illegal content acquisition channels in seven European countries (France, Germany, The Netherlands, Poland, Spain, Sweden, United Kingdom). Empirical data on the use of specific channels for specific cultural goods are collected through a consumer survey administered by a specialised marketing service company. In a nutshell, this report provides an updated picture on cultural goods consumption channels as the one provided by the “Global Online Piracy Study” (see <https://www.ivir.nl/projects/global-online-piracy-study/>). Furthermore, as the survey was undertaken right after the acute pandemic phase, we also document how the pandemic emergency has affected the legal and illegal consumption of different types of content.

ROSSELLO, G., MARTINELLI, A., FERRI, D., DONNELAN, K. (2022) Report on case studies on the effectiveness of regulatory measures to increase digital access to academics and people with visual impairments

(D2.8, <https://zenodo.org/record/6793215>)

This deliverable analyses the impact of regulatory responses to paradigmatic access issues focusing on two case studies: (i) academics and the research exception, and (ii) people with visual impairments and the so-called Marrakesh exception. The methodology adopted combined legal research with quantitative analysis on perceptions and knowledge of copyright law and relevant flexibilities. In particular, data were collected by means

of survey across six European countries (Italy, Ireland, Sweden, Germany, Hungary, The Netherlands). With regard to the first case study, the survey evidence that academics are strongly opinionated about journal copyright agreements and, in general, advocate for a short and soft protection, rather than the complete withdrawal of copyright protection. Generally, scholars show a good general knowledge of copyright law, but they lack a specific knowledge. The analysis of the second case study on people who are blind or have visual impairments shows that, generally, they have a limited knowledge of copyright law and of the Marrakesh Treaty. For blind people, the limited use of Braille and associated technologies (e.g. Braille printers) constitutes an additional barrier to further access improvements.

SGANGA, C., SIGNORETTA, C., MEZEI, P., FERRI, D., HIGGINS, N., (2022) Policy recommendations and code of best practices

(D2.9, forthcoming on Zenodo)

This deliverable contains the Best Practices and Policy Recommendations developed by *reCreating Europe* on copyright flexibilities and access to culture. Best practices are directed to stakeholders and aim at facilitating the understanding and use of the most important copyright flexibilities offered by the EU and national legal systems. Policy Recommendations propose reforms directed to national and EU policymakers to achieve a fairer copyright balance, incentivizing a diversified and competitive cultural and creative production while ensuring access to culture and the enjoyment of basic fundamental rights to all. Best practices were tested at an expert and stakeholders workshop in Amsterdam (Institute of Information Law – University of Amsterdam) on 21 September 2022 and jointly organized with Communia. Draft policy recommendations were tested in an informal workshop in Brussels on 20 September 2022 with interested EC policymakers.

AUTHORS, PERFORMERS AND AI

POORT, J, PERVAIZ, A., FURGAL, U., (2021) Mapping Document on income development of authors and performers and copyright reversal in EU

(D3.1, <https://zenodo.org/record/5552531#.YV2Ks5pBw2w>)

The objective of this document is to address the income development of authors and performers and their experience with digitization and copyright reversal. Part 1 focusses on existing theoretical and empirical research on authors and performers. It provides an overview of notable studies from various countries over the last 40 years and identifies how authors and performers struggle with their earnings and how they lead portfolio lives to supplement their artistic income. It also discusses the experience of digitization on artists' income/earnings specifically with regards to digital platforms. Digital platforms themselves are complex and lack transparency which makes artists' positions more vulnerable. It further identifies the role Artificial Intelligence (AI) plays for artists and whether it is seen as an opportunity or a threat to artists. Another significant challenge that is highlighted in this document is that of the COVID-19 pandemic and how it

has influenced artists and their earnings. Part 2 of the report is on Reversion Rights and discusses the full list of identified national provisions (per 19 Nov 2020). The provisions are presented in the form of tables, with each Member State having its own section. Two resource pages have been developed to present the relevant data: <https://www.create.ac.uk/reversion-rights-resource-page/> and <https://www.create.ac.uk/cdsm-implementation-resource-page/>.

POORT, J., PERVAIZ, A. (2022) Report on the perspectives of authors and performers

(D3.2/D3.3, <https://zenodo.org/record/6779373#.Yrxgy3ZBw2w>)

This report is based on the results derived from a survey which targeted artists from diverse creative fields within the European Union (EU). The first part of the report is the methodology section, where the research design is discussed. It discusses in detail the methods used in preparing the survey – from inception to execution. This is followed by an extensive data analysis section that provides descriptive results followed by an analysis of the results both empirically and from interviews. The report then ends with a discussion section and conclusions.

QUINTAIS, J.P., BULAYENKO, O., GERVAIS, D., POORT, J., (2021) AI Music Outputs: Challenges to the Copyright Legal Framework

(D3.5, <https://zenodo.org/record/6405796#.YkbhSihBw2w>)

This report examines the application of EU copyright and related rights law to outputs generated by or with the assistance of artificial intelligence (AI) systems, tools or techniques (AI outputs), with a focus on outputs in the musical domain. The Report examines the question: How can and should EU copyright and related rights law protect AI musical outputs? The interdisciplinary (legal and empirical) research involves: (i) analyzing of the protection of AI outputs under EU copyright and related rights law; (ii) examining the attribution of authorship and ownership to (natural and legal) persons involved in the creation or production of AI outputs; (iii) proposing interpretative guidelines and policy recommendations on increasing legal certainty regarding the protection, authorship, and ownership of copyright and related rights over AI outputs, especially music outputs.

MARGONI, T., KRETSCHMER, M., ORUC, P., (2022) Final report on the role of EU copyright law in relation to training models for machine learning purposes

(D3.7, <https://zenodo.org/record/7541425#.Y8Vvu3bMK3A>)

This report examines the role of copyright and related rights in “training and input data” of AI applications, particularly those based on Machine Learning. The report focuses on exclusive rights (mainly the right of reproduction within copyright law and the right of extraction within the Sui Generis Database Right) as well as on limitations to these rights, chiefly the exceptions for temporary copies (Art. 5(1) ISD) and for text and data mining in Arts. 3 and 4 CDSM. The analysis is based on doctrinal research for the legal part and on a reverse inductive method based on three case studies for the part analyzing the relevant technological processes involved in machine learning. The study’s objective is to map and clarify the law in relation to a complex and evolving technological framework, discuss the deeper implications of

the recognition of property rights over raw data and information, and offer a set of guidelines and recommendations for legislators (domestic, EU and International), Courts and policy makers to increase legal certainty and to favor a balanced evolution of EU's technological, creative, and cultural sectors.

CREATIVE INDUSTRIES

VAN EECHOUD, M., ES, R. (2021), Report on EU policy space in light of the international framework

(D4.2, <https://zenodo.org/record/5069608#.YOROY-gzY2w>)

The objective of this paper is to analyze the space that the international system allows the EU to take measures overcoming territoriality problems. In order to do that, we first recapitulate what those current mechanisms are. In chapter 2 we describe the position of the EU and its Member States in the field of international intellectual property, and the key features of the main treaties. For a better understanding of the landscape, in chapter 3 we map the most important grounds of competence of the EU relevant to copyright and neighbouring rights. Chapter 4 analyzes the current 'anti-territoriality' mechanisms identified in Deliverable 4.1 against the background of the international treaties. The concluding Chapter 5 summarizes the findings and elaborates issues to consider should the EU proceed with more far-reaching measures. This work ultimately feeds into the third stage of Recreating Europe's work package 4 on territoriality.

KINDSIKO, E., KÖUTS-KLEMM, R., EENMAA, H., PASTAK, I. (2022), Newly emerging business models in the creative industries in the wake of increasing digitalisation

(D4.5, <https://zenodo.org/record/7118715#.Y06eMXZBy71>)

The report investigates emerging business models, i.e., the models that are relatively new or greatly triggered by or built on digitalisation. The report delivers rich descriptions of three case studies that reveal unique contextual settings in terms of IPRs and digitalisation: influencers, circular fashion SMEs, and free computer-aided-design (CAD) sharing platforms users. The case studies reveal how the role of digitalisation differs greatly across the creative industries. For many, Covid-19 was an accelerator for their digitalisation. In parallel with noticing the impact and change in digitalisation, it is worth noticing that the role of IPR is vastly different in new emerging business models. Furthermore, even within the same business model, some enterprises are heavily affected by the IPR violations, whilst others perceive no need for IPR whatsoever. This tends to depend on the background and the sector of the users. The study points out the need for a customized approach to the IPRs in case of emerging business models in creative industries.

NUVOLARI, A., DANNA, R. (2023), Report on IP negative spaces

(D4.7, forthcoming on Zenodo)

This report presents the results of Subtask 4.2.2, which examines negative intellectual property spaces in the European context. Part 1 of the report provides a theoretical framework for the study of negative IP spaces. The section introduces the concept of negative IP space and provides a systematic

analysis of the sectors that have been considered negative intellectual property spaces, identifying a new taxonomy of intellectual property spaces, and elaborating on the structural elements that characterize negative IP. Part 2 of the report outlines the results of two case studies. The first case study investigates Italian haute cuisine chefs, a sector that has long been considered a negative IP space. The study aims to bring new perspectives to a consolidated scholarly debate by elaborating new evidence on knowledge exchanges among accomplished chefs. This evidence is gathered through an original online survey. The second case study explores whether academic book publishing is an industry that is transitioning towards a low-IP equilibrium. Based on a series of semi-structured interviews, this study provides interesting insights into an industry that is currently undergoing deep transformations, presenting the issues and criticisms raised by professionals, analysing changes in current business models, and presenting emerging practices.

PASTAK, I., KÖUTS-KLEMM, R., EENMAA, H., KINDSIKO, E. (2023), Entrepreneurship patterns of creative industries in gentrifying urban neighbourhoods

(D4.9, <https://zenodo.org/record/7550691#.Y8krXXbMLq4>)

Micro and small enterprises in creative and cultural industries (CCI) tend to be in the crossroads of two, in many senses the opposite trends: digitalisation that in the last two decades have changed the production of creative products, and agglomeration - the concentration of CCI in certain areas of cities. High agglomeration means that the work in the CCI tends to still take place largely within dense webs of micro-interactions depending to a large extent on tacit knowledge, physical proximity, and personal contacts. Conducted during the Covid-19 pandemic, this report offers the close up view to the intertwining processes of agglomeration, digitalisation and the influence of these trends on the diversity of the enterprises. The results of this report show that the COVID-19 pandemic boosted the digitalisation in every phase of the value chain of enterprises. Studied enterprises reported growing diversity of their products and services. Surprisingly, the agglomeration of the CCI enterprises played a significantly lesser role than expected in the context where enterprises searched for rapid solutions to their digitalisation challenges during the pandemic outbreak. The study concludes that the restrictions of physical encounters and limits to the traditional production processes initiated new cultural products and services and thus fostered the further digitalisation of highly agglomerated CCI.

MELETTI, B., VAN GOMPEL, S. (2021), Reports on how copyright exceptions and other permitted uses that are relevant for documentary filmmakers and immersive digital heritage practitioners are understood in the Netherlands and the UK

(D4.10, <https://zenodo.org/record/5070427#.YORQo-gzY2w>)

This report outlines the most pressing copyright-related issues and concerns faced by documentary filmmakers and by curators and creators of immersive experiences in the United Kingdom and the Netherlands. After a short introduction to the project and its methodology (Section 1), the document offers an overview of the issues identified and discussed by the communities being examined in relation to copyright and the lawful reuse of audiovisual materials. The findings of four online workshops are systematized in four

issue reports (Sections 2 and 3). Each issue report describes the creative and cultural practice of the workshops' participants and the core copyright-related concerns they identified. The copyright issues that documentary filmmakers reported as being the most worrying related to access (identifying and negotiating with right owners and archives), use (exceptions and limitations/fair dealing vs rights clearance) and distribution (territoriality of the law). The main copyright concerns raised by curators and creators of immersive digital heritage revolved around the questions of identifying, contacting and negotiating with rights holders, the uncertainties of knowing whether your use is fair/lawful or not, and responsibilities (for infringement and preservation). This was the same in both jurisdictions. Section 4 provides a snapshot of the copyright exceptions and limitations in UK and Dutch law which may cover the uses of protected content discussed by participants. Section 5 concludes.

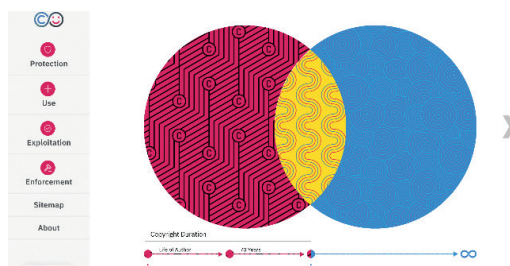
MELETTI, B., VAN GOMPEL, S. (2023) Two Codes of Best Practices on creative reuse for documentary filmmakers and immersive experiences

(D4.11, <https://zenodo.org/record/7143359#.Y06fV3ZBy70>)

The Codes of Best Practices in Creative Reuse aim to help creators make informed decisions around the lawful reuse of existing protected materials under copyright exceptions and other flexibilities. The Codes developed by ReCreating Europe address the specific needs of two creative communities: documentaries filmmakers and curators of immersive experiences. They are based on the views and statements collected through a series of workshops with these communities in the UK and the Netherlands. Rather than highlighting the differences between the two jurisdictions, the Codes attempt to bridge legal traditions by focusing on what the law permits in both the UK and the Netherlands. The Codes have proven to be a powerful tool to increase awareness and use of copyright flexibilities across different EU jurisdictions, while also help explain and give meaning to ambiguous legal norms contained in European copyright exceptions. The Codes aim to describe common uses of protected works that are considered fair by creators and lawful by lawyers.

MELETTI, B. (2023) Deployment of the new platform www.CopyrightUser.EU

CopyrightUser.EU is an independent online platform intended to make EU copyright law accessible to everyone. The website provides accessible and authoritative guidance on what works are protected by copyright; how one can use existing works lawfully; the different ways rightholders can exploit their own work; and what actions are available to rightholders to enforce their rights. The interactive infographics on the landing page are designed to help users understand the thought process they need to follow to make informed decisions on copyright issues. The topics mentioned in the infographics are



explained in more detail in a series of commentaries. Each commentary provides accessible guidance on the topic, additional guidance by type of work, research outputs as well as relevant legislation and court cases. The website – launched in March 2023 – was developed by CREATE (University of Glasgow) as part of the ReCreating Europe consortium. CopyrightUser.EU builds upon the success of CopyrightUser.org, which provides guidance on UK copyright law. The textual content of the website has been produced by leading copyright experts and is intended to be accurate and authoritative. However, it does not constitute legal advice.

CULTURAL HERITAGE INSTITUTIONS

CASO, R., DORE, G., ARISI, M. (2021), Report on the existing legal framework for Galleries and Museums in EU

(D5.1 https://zenodo.org/record/5070449#.YORS_gzY2w)

The findings of the report, centring on Galleries and Museums, confirm the growing relevance of sector-specific copyright E&Ls at EU level. The collection and analysis of data has been structured around selected macro-categories of legal provisions, which fit to describe the approach of GM towards copyright regulation and copyright E&Ls. The analysis considers the implementation of the described EU rules in seven countries (Denmark, Estonia, Germany, Hungary, Ireland, Italy, The Netherlands) and one former Member State (the United Kingdom). The report acknowledges that the national regulatory landscape presents convergences for some provisions that address uses and practices in the cultural heritage sector, but the adopted solutions present differences with each other for details and structure. This is mainly caused by the optional nature of some of the copyright-related E&Ls, which is likely to create legal uncertainty and be a threat to cross-border transactions. The analysis reveals that many national legal frameworks already have provisions that attempt to address the emerging needs related to the digital ecosystem of GLAM. Overall, the analysis withstands the proposal for a structured copyright reform that would better address the challenges of the digital age and confirms the need to enhance the regulatory effort towards the harmonization.

SGANGA, C., PRIORA, G. (2021), Report on the existing legal framework for Libraries and Archives

(D5.2, <https://zenodo.org/record/4621049#.YFR8zNqSk2x>)

This report focuses on libraries and archives and opens interesting perspectives on access to culture by vulnerable users. It begins with a legal mapping and systematic analysis of EU legal sources relating to copyright provisions, especially E&Ls, in the LA sector. Three distinctive characteristics are discussed in respect of the EU E&Ls: the sectorial nature that if, on one hand, provides legal certainty to the specific uses addressed, on the other hand, it could hinder a more flexible interpretation in similar real-life scenarios; the optional nature of some E&Ls, which can lead to a risk of regulatory fragmentation and the beginning of a shift towards a broader exploitation of the potential of technology. The second part covers the collection, systematization, and analysis of national legal sources. Overall, it acknowledges an advanced stage of harmonization and the national regulatory landscape concerning public lending, use for private

study and research, and preservation of cultural heritage appears convergent. In conclusion, the study recognizes the sensitivity towards the importance of cultural uses, and the access, promotion, preservation, and restoration of cultural heritage as distinctive features of both EU and national provisions.

DORE, G., CASO, R., ARISI, M., BELTRAME, L., (2022) Guidelines & FAQs – Galleries and Museums

(D5.3/D5.5 – <https://zenodo.org/record/7586081>)

Guidelines & FAQs for Galleries and Museums aims at offering easy-to-read information to help GLAMs deal with a range of aspects concerning digitization, selected due to their relevance for GMs and for their ambiguous scope and implementation difficulties: digital preservation, use of orphan works and use of out-of-commerce works. The document, which includes an analysis of the legal framework, a set of Frequently Asked Questions and Guidelines, address the needs of CHIs through a mixed methodology that combines theoretical research with empirical analysis. The Guidelines aims at identifying (a) whether different and/or clearer rules may facilitate the process of dealing with the identified controversial issues, and (b) whether the current legal framework is too strict to comply with, and thus possibly hindering GLAMs mission of democratising culture. An interim version of the document was tested with cultural heritage institutions (CHIs), which helped to redraft the text by simplifying/claring it and discussing other challenges they face in their everyday activities.

BLAKE, O., WHITE, B., SATTLER, E., VOIGTS, M.; TRENCEVA, T. (2023) Guidelines and FAQs – Libraries and Archives

(D5.4/D5.6 - <https://zenodo.org/record/7528723>)

This deliverable presents Guidelines and Frequently Asked Questions (FAQs) for the Libraries and Archives (LA) sector with regards to their conducts on a) legal compliance and compliance with standards for Openness, b) implementation of technological measures, c) adoption of social norms and common practices, particularly if in conflict with formal legal norms and more aligned to Open Knowledge principles and d) access to content by people with disabilities. The work derives from Work Package (WP) 5 of the reCreating Europe project. This focuses specifically on cultural heritage institutions, such as galleries, libraries, archives, and museums (GLAM). The project conducted a comparative and cross-national landscape analysis, aiming to map the governance and implementation processes for Intellectual Property Rights (IPRs) in GLAM, and a report on the existing copyright legal framework addressing Libraries and Archives (LA) in the EU. Building on these efforts, this deliverable intends to use the work conducted in this branch of the reCreating Europe project to formulate a valuable resource for LA professionals in need of information to carry out their work in an informed manner, in accordance with best practice.

ILJADICA, M., ORUC, P., PASTAK, I., EENMAA, H., DORE, G., DI NICOLA, L. (2022), Policy report on IP law, cultural heritage and placemaking

(D5.9, forthcoming on Zenodo)

This report highlights the intersection of intellectual property law and geography and examines copyright and trade mark law rules in their spatial

context. It is focused on culture and creativity broadly conceived with an emphasis on the uses of, and interactions with, culture in cities, including especially copyright and digitisation of material and city branding. While the copyright implications of both digitisation and circulation of cultural heritage have been addressed in a large body of literature, there is relatively little attention paid to the specific interaction of copyright, and also trade marks, in the context of placemaking. What we see in this report, and perhaps more broadly in the discussion of intellectual property and placemaking is both a reaching in (addressed for example in projects directed inwardly for and within specific places, especially for inhabitants) and a reaching out (seen especially in projects and campaigns directed outwardly, especially for tourism and investment). The three places considered the cities of Glasgow (UK), Tallinn (EE) and Trento (IT) focus the discussion of intellectual property and placemaking in a practical way.

INTERMEDIARIES

QUINTAIS, J.P., MEZEI, P., HARKAI, I., MAGALHÃES, J.C., KATZENBACH, C., SCHWEMER, S.F., RIIS, T., (2022) Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis

(D6.1, https://zenodo.org/record/7081626#.Y7V_TnbMJPY)

This report describes the results of our research mapping of the EU legal framework and intermediaries' practices on copyright content moderation. The Report addresses the following main research question: how can we map the impact on access to culture in the Digital Single Market of content moderation of copyright-protected content on online platforms? The report consists of six chapters. After a brief introduction in Chapter 1, Chapter 2 develops a conceptual framework and interdisciplinary methodological approach to examine copyright content moderation on online platforms and its potential impact on access to culture. Chapter 3 carries out a legal mapping of the topic of this report at EU level, focusing on legal regime of Article 17 of the Copyright in the Digital Single Market Directive (CDSMD). Chapter 4 provides an analysis of the findings of our comparative legal research at national level, based on two legal questionnaires carried out with national experts in ten Member States, before and after the implementation due date of the CDSMD. Chapter 5 uses qualitative methods to map out the copyright content moderation structures of key social media platforms, with a focus on their terms and conditions and automated systems. Chapter 6 concludes with a summary of our analysis and recommendations for future policy actions.

QUINTAIS, J.P., MEZEI, P., HARKAI, I., MAGALHÃES, J.C., KATZENBACH, C., SCHWEMER, S.F., RIIS, T. (2022) Final report on mapping of EU legal framework and intermediaries' practices on copyright content moderation and removal

(D6.2, https://zenodo.org/record/6461568#.Y7V_vHbMJPY)

This report describes the results of the research carried out in the context of WP6 on the mapping of the EU legal framework and intermediaries' practices on copyright content moderation and removal. The nature

of the research described in this report is that of a mapping exercise, on which the subsequent evaluative work in WP6 is developed, in particular the deliverables D.6.3 (Final Evaluation and Measuring Report - impact of moderation practices and technologies on access and diversity) and D.6.4 (Best Practices and Policy Recommendations Brief).

SCHWEMER, S.F., KATZENBACH, C., DERGACHEVA, D., RIIS, T., QUINTAIS, J.P. (2022) Final Evaluation and Measuring Report - impact of moderation practices and technologies on access and diversity

(D6.3, , <https://zenodo.org/record/7705391#.ZAJ34-zMK3J>)

This evaluation report includes first a legal and normative analysis on multi-level legal frameworks regulating copyright content moderation. This covers an examination of the overlaps and interplay of existing legal frameworks, the development of benchmarks for normative assessment (focusing on concept of “rough justice” and “quality” of moderation) and, with a view to future regulation in this field, a reflection on context and bias in copyright content moderation. The empirical prong of our evaluative research addresses the challenging topic of measuring the impact of moderation practices and technologies on access and diversity. To do so, we tackle three dimensions of this problem: (1) we investigate all the aggregated data on copyright moderation provided by the platforms themselves; (2) we analyze content level data of platforms with regard to changes and factors of cultural diversity on social media and streaming platforms, specifically YouTube; and (3) we explore creators’ understanding and experiences of copyright moderation in relation to their creative work and the labor of media production on social media platforms.

QUINTAIS, J.P., SCHWEMER, S.F., DERGACHEVA, D., RIIS, T., MEZEI, P., HARKAI, I. (2022) Copyright Content Moderation in the EU: Conclusions and Policy Recommendations

(D6.4, *forthcoming on Zenodo*)

This report describes and summarizes the results of the research carried out on the examination of EU legal framework and intermediaries’ practices on copyright content moderation and removal. After a brief introductory chapter, Section 2 of the report summarizes the main conclusions and findings from our mapping analysis into content moderation of copyright-protected content on online platforms in the EU. Section 3 then summarizes the main conclusions and findings from our evaluation analysis. Section 4 outlines our policy recommendations for EU and national policymakers on the following topics: the definition of “online content-sharing service provider”; the recognition and operationalisation of user rights; the complementary nature of complaint and redress safeguards; the scope of permissible preventive filtering; the clarification of the relationship between art. 17 CDSMD and the DSA, including as regards the application of fundamental rights through terms and conditions; monetisation and restrictive content moderation actions; recommender systems and copyright content moderation; transparency and data access for researchers; trade secret protection and transparency of content moderation systems; the relationship between art. 17 CDSMD, the DSA and the AI Act Proposal respectively; and human competences in copyright content moderation.

POLICY RECOMMENDATIONS

END USERS AND VULNERABLE GROUPS

The findings of *reCreating Europe's* research on copyright flexibilities and barriers to access to culture experienced by vulnerable groups highlight the need for specific policy interventions, which are addressed in the following recommendations. They are grouped around four areas of intervention, i.e. **(a)** general/systematic matters; **(b)** specific flexibilities; **(c)** coordination between EU copyright law and cultural and social policies with regard to vulnerabilities; and **(d)** interventions on platforms' private ordering mechanisms (EULAs). While some actions may already be undertaken in the **short term**, for instance through official Guidelines or Recommendations for Member States, others address **medium** and **long term** solutions which will likely require legislative interventions.

GENERAL/SYSTEMATIC MATTERS

RECONSIDER THE APPROACH TO HARMONIZATION FOR ALL COPYRIGHT FLEXIBILITIES

The most recent legislative interventions (OWD, Marrakesh and CDSM) opted for mandatory provisions being very detailed in the definition of their requirements, and/or adopting the country of origin principle to overcome territoriality problems (e.g. Article 5 CDSMD). This shift in the approach has already proven successful in reaching a greater harmonization across Member States. However, the change has been only forward-looking. Existing exceptions remain optional and vague in the language, as opposed to highly harmonized exclusive rights, and despite the CJEU has repeatedly hinted to the fact that L/Es protecting fundamental rights shall be indirectly understood as having a mandatory nature.

SHORT-TERM ACTIONS

- Conduct an impact assessment of the optional nature of existing L/Es.

MEDIUM-TERM ACTIONS

- Extend the country of origin principle to all existing flexibilities.

LONG-TERM ACTIONS

- Intervene on existing L/Es on the basis of the impact assessment.
- Provide for mandatory and detailed L/Es every time a greater harmonization would not harm national cultural diversities.

SIMPLIFY THE E&LS REGIMES AND ENSURE CONSISTENCY IN THE RATIONALES UNDERLYING THEIR ADOPTION

Another consequence of the shift in the approach on the nature of L/Es is the current presence of several different regimes for different flexibilities. Some provisions are mandatory; others are optional; Article 17(7) CDSM declares mandatory some optional InfoSoc exceptions only for online uses on OCSSPs. Aside from cursory references (e.g. Recital 70 CDSMD), it is not possible to identify common rationales that explain why the EU legislator has opted for this or that regime, to the detriment of legal certainty and predictability.

MEDIUM/LONG-TERM ACTIONS

- Simplify the L/Es regimes accordingly, using explicitly similar regimes for provisions sharing similar goals (e.g. mandatory L/Es when protecting fundamental rights).

INTRODUCE PURPOSE-ORIENTED PROVISIONS TO OVERCOME RIGIDITIES

National and EU case laws show that provisions that are function-oriented are more adaptive to the evolution of technologies, markets, business models and users' needs, allowing courts to strike an effective balance between the opposite needs for flexibility and legal certainty. A telling example is the creative use of the quotation exception by national judges to overcome the rigidity of national copyright systems and fill in legislative gaps. In this sense, a valid alternative to an overarching fair use clause to tackle the rigidity of L/Es in EU copyright law may be found in the introduction of mandatory purpose-oriented provisions, acting as residual/closing rules in all jurisdictions, and thus embedding the CJEU's fair balance doctrine within the EU legislation.

LONG-TERM ACTIONS

- Consider using a purpose-oriented language when framing new L/Es, to ensure the coherent and consistent adoption of their principles in all Member States.

ENSURE THE NATIONAL OPERATION OF KEY DOCTRINES DEVELOPED BY THE CJEU TO INCREASE LEGAL CERTAINTY

reCreating Europe's mapping has evidenced the weak reception, by several national courts, of landmark CJEU doctrines that have reached a substantial degree of development and clarity (e.g. fair balance doctrine, principle of effectiveness of L/Es, the *Deckmyn* doctrine on the implied mandatory nature of L/Es linked to fundamental rights). Ensuring the smooth and uniform implementation of such doctrines at a national level would greatly contribute to the harmonization of EU copyright and the balanced fulfillment of its goals, increasing legal certainty across the Union.

SHORT-TERM ACTIONS

- Issue Guidelines and/or Recommendations for Member States to consider revising their laws in order to embed key CJEU's ruling.
- Provide trainings to national judges on copyright and related matters.

MEDIUM/LONG-TERM ACTIONS

- Consider introducing ad-hoc provisions or Recitals to implement such doctrines within the tangles of EU copyright law.

CONSIDER OPERATING A HORIZONTAL JOINT UPDATE OF TRADITIONAL E&LS TO NEW TECHNOLOGICAL, MARKET AND SOCIO-CULTURAL DEVELOPMENTS

Due to the use of a language that is not fully tech-neutral and definitions that are often rigid, several copyright flexibilities have become outdated vis-à-vis the many technological, market and socio-cultural developments happened in the past decade. This is hampering the effectiveness of existing provisions and frustrating their balancing goals.

SHORT-TERM ACTIONS

- Issue interpretative Guidances for Member States, which offer technologically-neutral definitions of key copyright terms and concepts (e.g. copy, original, work, good / product etc.), in order to preserve the effectiveness and functions of existing L&E and align EU copyright law to other domains of EU law (e.g. consumer protection), while ensuring compliance with EU international obligations.

MEDIUM/LONG-TERM ACTIONS

- Consider the opportunity to translate the Guidances into binding provisions.
- Address the matter in international fora, especially at WIPO.

SPECIFY THE NOTION OF PROTECTED WORK AND HARMONIZE EXCLUSIONS

The boundaries of public domain represent one of the least harmonized matters in EU copyright law. No EU provision define the general notion of protected work, nor does it delineate it *e contrario* by means of common exclusionary rules. The CJEU offered some guidance with *Infopaq*, *Levola* and *Cofemel*, but these are only fragmented hints. While in the preparatory phase of the InfoSoc Directive this was not perceived as a pressing issue, the advent of AI and the surge of the data economy have radically changed the framework. With the boundaries of copyright becoming increasingly more blurred, the time has come for a more substantial and incisive harmonization of its subject-matter, starting from clear-cut standardized exclusionary rules.

SHORT-TERM ACTIONS

- Insert into the AI and Data Package clear exclusionary rules to reduce legal uncertainties on the external boundaries of copyright subject-matter.

LONG-TERM ACTIONS

- Intervene on the notion of protected work in the next harmonizing intervention on copyright.

EVALUATE THE OPPORTUNITY TO INTRODUCE FLEXIBILITIES FOR TRANSFORMATIVE USES

An area where Member States show substantial divergences is the treatment of conducts and uses that, although formally falling under an exclusive right or outside the borders of an E/L, do not conflict nor compete with the normal exploitation of a protected work. Such instances, which are akin to cases that in the US would fall under the category of “transformative uses”, are shielded from copyright protection by some national courts and banned by others, with dissonances also within the same Member State. Against this background, EU copyright law would benefit from a legislative clarification on the matter. Since the transformative uses doctrine does not conflict with any general principle characterizing the copyright *acquis communautaire*, an objective impact assessment on its economic and non-economic effects could usefully ground and direct future EU policy actions.

SHORT-TERM ACTIONS

- Conduct an economic and non-economic impact assessment of national practices on transformative uses and of their divergences on the internal market.

MEDIUM/LONG-TERM ACTIONS

- Evaluate the opportunity to introduce a EU-wide, standardized L/E for transformative uses and related requirements and limitations.

SPECIFIC FLEXIBILITIES

MOVE TOWARDS A GREATER HARMONIZATION OF THE PRIVATE COPY AND REPROGRAPHY EXCEPTIONS FOR SEAMLESS CROSS-BORDER ACTIVITIES AND MANAGEMENT BY CMOs

It is not by chance that the area of L/Es mostly touched by the CJEU case law is that of private copy and reprography. As testified by *reCreating's* national and comparative reports, most of the EU countries feature the provisions, but with few basic points of convergences. The lack of harmonization on key matters such as beneficiaries, types of works covered/excluded, quantitative or qualitative caps and other limitations, application of the provision on new technologies (e.g. cloud services) is substantial. Only remuneration schemes converge to private levy models sharing common features, also thanks to the CJEU's repeated interventions. Still, methods of calculations and basic principles are not fully streamlined. Such a fragmentation constitutes an obstacle to the equal treatment of rightholders across the Union, to legal certainty for all parties involved, and to the development of a common competitive market for CMOs engaging in cross-border activities. The matter was tabled during the Public Consultation on the Modernization of EU copyright rules but later abandoned. More empirical data shall be collected to measure the impact of this weak harmonization on rightholders and on the implementation of the EU plan of boosting EU-wide CMOs and markets for licenses. This will ground a sounder distinction between aspects that require a more intense harmonization, and aspects which are to be remitted to national discretion.

SHORT-TERM ACTIONS

- Conduct impact assessments and launch consultations with stakeholders to objectively evaluate the effects of the current lack of harmonization in the field of private copy and levy schemes.
- Organize a table for Member States, CMOs and representative of rightholders to facilitate the adoption of bottom-up and/or national solutions.

MEDIUM-TERM ACTIONS

- Issue Guidelines for Member States to facilitate convergence.

LONG-TERM ACTIONS

- Intervene on the private copy exception to ensure greater harmonization of the mechanisms used to ensure fair compensation, also in case of cross-border or multi-territorial uses.

BUILD ON DECKMYN AND ARTICLE 17(7) CDSM TO MOVE TOWARDS A GREATER HARMONIZATION OF THE PARODY EXCEPTION

Despite its importance for the protection of freedom of expression, as reiterated by the CJEU in *Deckmyn* and by the CDSM Directive, several Member States still do not provide for a parody exception, having their courts fill the gap by stretching provisions such as quotation or free uses. Those that feature it present diverging approaches as to key definitions, further conditions of applicability et al, some of them ruled out by the CJEU but still emerging in national decisions. It is highly recommended that also the general InfoSoc L/E on parody, caricature and pastiche is transformed into a mandatory provision and complemented with additional binding details on purpose and limitations, with the exclusion of additional conditions. This will ensure consistency, greater harmonization and legal certainty in cross-border uses, and thus a more uniform and less discriminatory treatment of freedom of expression against copyright across the EU.

LONG-TERM ACTIONS

- Amend Article 5(3)(k) by introducing clearer, more specific requirements and making the L/E mandatory.

TRANSFORM THE QUOTATION EXCEPTION IN A RULE OF MAXIMUM HARMONIZATION

Although the quotation exception is present in all Member States, mostly due to its mandatory nature in the Berne Convention, national laws show great divergences in the regulation of the key features of the provision (works covered, exclusions and other limitations, further conditions of applicability etc.). Particularly in light of the importance of the provision for freedom of expression in the borderless digital world, it is strongly recommended to introduce further specifications to Article 5(3)(d) InfoSoc, in the form of a maximum harmonization, reordering the indications provided by the CJEU.

LONG-TERM ACTIONS

- Amend Article 5(3)(d) InfoSoc by introducing clearer, more specific requirements and making the L/E mandatory.

ADAPT THE FLEXIBILITIES FOR INFORMATORY PURPOSES TO THE NEW ONLINE INFORMATION INDUSTRY

Flexibilities related to informatory purposes are present in all Member States, but with great divergences. Differences range from less significant elements to much more radical ones. First, the three informatory purposes exceptions included in the InfoSoc Directive are not always transposed in all EU countries. Second, beneficiaries highly vary, ranging from very strict to more flexible approach. Third, their judicial application is scarce and often negatively impacted by their overlap with other exceptions such as quotation. Last, most national provisions use non-tech neutral terminologies, thus making such flexibilities outdated vis-à-vis new technologies and new business models. The introduction of a new press publishers' rights represented a missed opportunity to intervene on the matter.

LONG-TERM ACTIONS

- Aim at a more pervasive harmonization in the field of flexibilities for informatory purposes, with the introduction of updated mandatory provisions that are capable of including effectively new digital actors and online uses through the use of a technologically neutral and purpose-oriented language.
- As a second best, it shall be considered the possibility to overcome the negative impact of territoriality by means of the application of a country of origin principle on existing informatory purpose exceptions.

INTRODUCE A GENERAL MANDATORY RESEARCH EXCEPTION

reCreating Europe's comparative mapping shows that the great majority of Member States have implemented Article 5(3)(a) InfoSoc and, to a lesser extent, Article 5(3) Software and Articles 6(2)(b) and 9(b) Database. However, the fact that all EU Directives but for the CDSMD always covered the two purposes – teaching and research – under the same general exception paved the way towards the enactment of a wide variety of solutions, covering either both categories or just one of the two. Beneficiaries, permitted uses, conditions of applicability are addressed in a similarly various fashion, often without distinction between teaching and research activities when the national provision covers the two purposes jointly. Along with the lack of harmonization, research purposes are almost completely neglected, for most national provisions are directly and solely addressed to teaching or general educational activities. This cannot but have a substantial impact on cross-border cooperative research endeavours, to the detriment of the competitiveness of the EU R&I ecosystem and OS goals.

SHORT-TERM ACTIONS

- Conduct an ex ante impact assessment on the effects of the fragmentation of research exceptions across the EU and on policy options available to tackle the issue. Two options worth exploring are:

a. The introduction of a general, purpose-oriented mandatory research exception, defining in great details beneficiaries, works and uses covered, limitations and conditions of applicability, and following the model of Article 5 CDSM as to the application of the country of origin principles for cross-border uses. The debate that surrounded the drafting of Article 3 CDSM may also be used as a useful guidance.

b. As second best, the amendment of Article 5(3)(a) InfoSoc, by splitting the research and teaching exceptions, and defining in greater details beneficiaries, works and uses covered, safeguards, and other conditions of applicability, in coordination with EU OS and ERA policies.

MEDIUM/LONG-TERM ACTIONS

- Intervene on EU copyright law in accordance with the result of the impact assessment.

ALIGN EU COPYRIGHT LAW WITH THE EU POLICIES ON OPEN ACCESS AND OPEN SCIENCE

The EU has recently boosted its commitment to open access and open science with several, multi-level interventions. The fulfilment of these policy goals require also the removal of obstacles and the creation of adequate leverages in key regulatory sectors such as data laws and copyright law. The findings of reCreating Europe's mappings on copyright flexibilities fully support the conclusions and recommendations advanced by two studies commissioned and recently published by DG RTD/Open Science on the impact of EU copyright law on (a) access and reuse of scientific publications and (b) access to scientific data (EC 2022a; EC 2022b). More specifically, and together with the introduction of a mandatory research exception as detailed above, it is strongly advisable to implement the following actions.

SHORT-TERM ACTIONS

- Introduce an EU-wide secondary publication right limited to OA via self-archiving, not overridable by contract and attributed either to authors or directly to their employers. This would also allow harmonizing the largely divergent approach of Member States that have already regulated the matter.
- Explore non-legislative avenues such as MoU and other forms of stakeholders' agreements to facilitate Gold and Diamond OA.
- Launch stakeholders' consultations and conduct an ex ante impact assessment on the potential introduction of a mandatory reversion right in favour of scientific authors.

MEDIUM/LONG-TERM ACTIONS

- Intervene on copyright contract law, imposing mandatory clauses for scientific publishing agreements in line with non-legislative EU OA-OS policies.

CONDUCT AN IMPACT ASSESSMENT AFTER THE FULL CDSM TRANSPOSITION TO VERIFY THE NEED TO STREAMLINE TRADITIONAL AND DIGITAL TEACHING EXCEPTIONS

The mapping and analysis of national implementations of Article 5 CDSMD to date showed that Member States still present different approaches to flexibilities for teaching purposes. While the CDSM Directive has overcome the problem of territoriality in the field of digital teaching with the introduction of the country of origin principle, just a handful of Member States have taken care of coordinating their traditional teaching E/L with the new digital teaching provision, while the majority of national legislators have merely juxtaposed the two rules. As a consequence, digital and non-digital teaching uses are still treated differently across the EU.

SHORT-TERM ACTIONS

- Schedule an impact assessment of such divergences after the full transposition of the CDSM Directive, in order to verify whether and to which extent an intervention to streamline national teaching exceptions is needed.

EMBRACE A WIDER NOTION OF DISABILITY IN COPYRIGHT LAW AND HARMONIZE RELATED EXCEPTIONS ACROSS THE EU, BEYOND THE LIMITS OF THE MARRAKESH DIRECTIVE, AND LEVERAGE ON THE COMBINED EFFECT OF THE DISABILITY COPYRIGHT EXCEPTION AND EU ACCESSIBILITY LEGISLATION

The disability exceptions in EU law which result from the application of the InfoSoc Directive and the Marrakesh Directive should be further harmonized and expanded *ratione personae* and *ratione materiae*. With regard to the scope *ratione personae*, the disability exception should embrace beneficiaries that fall within the definition of persons with disabilities proffered by the CRPD. With regard to the scope *ratione materiae*, the study released by the Commission, in April 2022, on the basis of Article 9 of the Marrakesh Directive did not indicate the need of an expansion of the disability exception provided for in the Marrakesh Directive to works other than printed works. However, this project signals that an enlargement of the material scope of the exception will *de iure* and *de facto* favour greater access to digital content for persons with disabilities.

Copyright legislation and accessibility legislation should be seen as complementary, and their combined effect should be leveraged to enhance accessibility and fully implement the CRPD. Once, fully commenced and implemented, the EAA will ensure the production and distribution of 'born accessible publications' and, from June 2025, consumers will be able to acquire and read e-books irrespective of their disability. Accessibility requirements do not apply when they would imply a significant change in a product or service

that results in the fundamental alteration of its basic nature. Since turning an e-book into a paper Braille book might be seen as a fundamental alteration, the copyright disability exception remains vital to ensure making available and distribute Braille copies.

MEDIUM-TERM ACTIONS

- Extend and further streamline the current disability exception.
- Conduct a study on the combined effect and interaction between copyright legislation and accessibility legislation in relation to e-books.

ADDRESSING VULNERABILITY BY BETTER COORDINATING EU COPYRIGHT LAW WITH BROADER EU CULTURAL AND SOCIAL POLICIES

Data from interviews with representatives of vulnerable groups, as well as from a survey answered by vulnerable people themselves, illustrate that EU copyright law should be applied in a way to better address the needs of vulnerable groups such as minorities (both old and new minorities) and should be embedded within broader cultural policies enhancing open access and audience development. Further, since, for vulnerable groups, barriers created by copyright add to structural barriers, such as the digital divide, it is essential the copyright law does not operate in a silo, but is embedded in broader social policies.

ADDRESS UNDERLYING STRUCTURAL BARRIERS THAT AFFECT ACCESS TO DIGITAL CULTURE AND ULTIMATELY RENDER COPYRIGHT FLEXIBILITIES LESS EFFECTIVE

The analysis of the interviews shows that there are persistent structural barriers that undermine the cultural participation of vulnerable groups, confirming the results of other past and well-established research. The barriers to access and participation identified by interview participants relate to their lower socio-economic status of vulnerable groups, their economic, social and political disempowerment, the paternalistic attitudes they face from creators and providers of digital cultural goods and services, and the well-studied 'digital divide'. It is hence necessary that copyright flexibilities become part of broader cultural and social policies to enhance access to culture.

SUPPORT TRANSLATION OF CULTURAL CONTENT INTO MINORITY LANGUAGES

The analysis of interviews shows difficulties in respect of acquiring permission from copyright holders to translate into minority languages, and therefore restricting cultural offer to linguistic groups. Thus, cultural policies should ensure a better balance between the copyright of the holder and the needs of vulnerable groups.

SUPPORT EDUCATION IN AND AWARENESS OF AUDIENCE DEVELOPMENT STRATEGIES TO PROMOTE DEMOCRATISATION OF CULTURE

Data from interviews with representatives of vulnerable groups illustrate that public authorities, including publicly-funded cultural institutions, within States, have not been able to effectively leverage audience development strategies (i.e. a set of strategies employed by public authorities to ensure democratisation of culture) to encourage access to certain type of ‘high culture’ offerings by vulnerable groups. Audience development strategies should leverage copyright flexibilities to support access to culture for vulnerable groups.

SHORT-TERM ACTIONS

- Provide additional funding for translation by means of EU cultural programmes.
- Apply copyright law in synergy with policies aimed at dismantling structural barriers (digital policies, social policies and cultural policies).

MEDIUM-TERM ACTIONS

- Support Member States audience development strategies through the Open Method of Coordination and other soft coordination tools.

ON PRIVATE ORDERING

REVIEW THE NON-COMPLIANCE OF OCSSPS WITH THE NOVEL PUBLIC REGULATORY SOURCES

The analysed OCSSPs – at the time of the review of their EULAs – diverged from the provisions of the CDSM Directive in multiple ways, especially regarding the contractual bypassing of liability under Article 17(4) CDSM Directive and the lack of introduction of end-user safeguards in line with Article 17(7) and (9) CDSM Directive. Furthermore, the applied terminology of the EULAs were found to be misleading in multiple instances, and the terms and conditions of the OCSSPs are asymmetric, which also leads to concerns from a consumer protection perspective. Also, various EULAs seem to bypass the applicability of the EU public regulatory sources by terms related to applicable law. It is highly recommended to initiate a stakeholders’ dialogue to check whether and how the private regulatory approach could be put into conformity with the public rules on copyright, consumer protection and international private law.

SHORT-TERM ACTIONS

- Initiate a stakeholders’ dialogue to understand the key concerns related to OCSSP’s EULAs from copyright, consumer protection and international private law perspective.

RECONSIDER THE LEGAL STATUS OF UGC

The CDSM Directive has added novel flexibilities to create and use UGC (e.g. via parody, pastiche, review etc. exceptions). At the same time, EULAs are already more flexible with respect to the sharing and use of such contents. It is highly recommended to review whether public regulatory sources need any further recalibration to meet the de facto online practices of end-users as well as to move UGC into the public regulatory space rather than leaving them in the private regulatory space.

SHORT-TERM ACTIONS

- Conduct an impact assessment (IA) regarding the possibility of and need for a general regulatory approach towards UGC.

LEGAL AND ILLEGAL CHANNELS OF CONSUMPTION FOR CULTURAL GOODS

Empirical data on using specific channels for specific cultural goods collected through a consumer survey indicates that the share of legal users is always larger than the share of illegal users, with a larger heterogeneity at the country level for illegal consumption. Young males (even minors) tend to rely more on unauthorized channels. No other individual characteristics look salient in the choice between legal and illegal channels. Respondents have diverse motivations for using illegal channels, ranging from the price to content availability and quality.

LIMITED THREAT FROM ILLEGAL CONSUMPTION OF CULTURAL GOODS

The group of pirates and non-pirates overlap, indicating a strong complementarity between the two types of consumption. Furthermore, pirates consume more cultural goods through legal channels than non-pirates. The extent to which illegal consumption displaces legal consumption greatly varies across content types and depends on several respondent characteristics. For music, we find that legal consumption is displaced by illegal consumption only for adult respondents and not for minors. For books and e-books, on the other hand, a displacement effect is only found for minors. For films and series, we do not find evidence of a displacement effect, and also, for games, the evidence for actual displacement appears weak. Based on these findings, if any, specific measures should consider the peculiarity of different contents and consumer characteristics.

MEDIUM-TERM ACTIONS

- No “one-size-fits-all” action should be undertaken to address the illegal consumption of cultural goods.

NO NEED TO ADDRESS PIRACY CONSUMPTION INCREASES DURING THE COVID19 EMERGENCY

The analysis of the consumption patterns during the COVID-19 document the extent to which income reductions and changes in working and schooling

conditions during the pandemic triggered the use of illegal channels, possibly resulting in a higher displacement effect (i.e. substitution of legal consumption with illegal consumption). The findings suggest that respondents who suffered an income loss or are unemployed tend to pirate more, but given their budget limitations, their piracy does not come at the expense of legal sales. Smart working, on the other hand, increases legal consumption displacements only for music and not the other content types. Based on these findings, no specific action to fight piracy or prosecute pirates is advisable as the increase in piracy is likely to be temporary.

SHORT-TERM ACTIONS

- Given the temporary nature of the piracy increase during the COVID-19 pandemic, no specific action is advisable.

AUTHORS AND PERFORMERS

CLARIFY DIGITAL USE

The use-it-or-lose-it reversion right introduced by the CDSM Directive provides a unique possibility for new income for creators, new exploitation possibilities for investors and new access to the public. While digital use and lack of use are key concepts for the existing reversion rights, there is no clarity as to their meaning. We would encourage the European Commission **to consider the application of the lack of exploitation requirement and issue relevant guidance** ensuring consistent application by Member States.

SHORT-TERM ACTIONS

- Publication of a guidance on the meaning of “use” in the digital environment to ensure consistent application of the revocation right by the Member States.

REVIEW CONTRACTING PRACTICES IN THE CREATIVE INDUSTRIES

The provisions on creator contracts introduced by Chapter 3 of the CDSM Directive aim to improve the contractual position of creators, for example by introducing transparency into contractual dealings between the parties. However, the current level of knowledge about the contractual practices within the creative industries is low, making the assessment of the effects of this legislative intervention limited if not impossible. **A comprehensive review of the implementation of Chapter 3 CDSM with respect to creator agreements would provide valuable knowledge if copyright contracting practices are changing.**

MEDIUM-TERM ACTIONS

- Conduct a review of the implementation of Chapter 3 CDSM provisions with respect to creator agreements to examine copyright contracting practices.

RAISE PUBLIC AWARENESS OF THE OPPORTUNITIES PROVIDED BY REVOCATION AND TRANSPARENCY PROVISIONS WITHIN COPYRIGHT LAW

ReCreating Europe is producing web portals and digital resources (such as **CopyrightUser.EU**) that offer responsive, up-to-date, accessible and authoritative copyright guidance. This initial investment should be a platform for further development of educational digital resources that improve contractual practices relating to copyright content. The findings of the research suggest that revocation and transparency opportunities derived from Chapter 3 CDSM have great potential and should be widely promoted.

MEDIUM-TERM ACTIONS

- Consider development of digital resources and educational activities to raise awareness of the opportunities provided to creators by revocation and transparency provisions of the CDSM Directive.

OPEN STREAMING

In order to improve markets in the streaming environment, remedies that complement copyright law with interventions derived from competition law, data and platform regulation should be considered. For example, an open streaming remedy, modelled on open banking, could allow both creators and users to switch platforms more easily, transferring their full network data (followers, use data) with the move. This would increase the contractual bargaining position of creators considerably, with consequences for remuneration. How to **implement interoperability and transfer of copyright related (meta and use) data** more effectively should be subject of a feasibility study that links work on digital strategy across the Commission.

LONG-TERM ACTIONS

- Conduct a feasibility study for an open streaming remedy, modelled on open banking. Facilitating the interoperability and portability of copyright related data would enable creators to switch platforms, increasing their bargaining power and linking CDSM and Data Act objectives.

NO NEW PROTECTION REGIMES FOR AI OUTPUTS

There is no clear case for a legislative action at the level of substantive rules in the EU copyright *acquis* in the short term as regards AI outputs. Existing proposals for new rights and forms of protection for AI outputs generally lack clear and convincing theoretical and economic justification. In most cases, these proposals fail to adequately consider existing protection for AI outputs under copyright law and, where such protection is lacking, under related rights or (in limited cases) specific regimes for protection of computer-generated works. Considering this, **it is recommended that no new protection regimes for AI outputs are introduced** absent clear and compelling evidence that justifies a change to the status quo.

SHORT-TERM ACTIONS

- No new protection regimes for AI outputs should be introduced absent clear and compelling evidence that justifies a change to the status quo (“wait and see” approach).

CONSIDER EU HARMONISATION OF THE REQUIREMENT FOR GRANTING RELATED RIGHTS TO PERFORMERS INDEPENDENTLY FROM THE COPYRIGHT STATUS OF THE CONTENT PERFORMED

With regard to the protection of performers, given the increasing frequency and scale of performances of AI music outputs, it is recommended in the short term to carry out a mapping analysis of whether and how Member States laws’ grant of related rights to performers is conditional on the performance of “works”. Taking into account the uncertainties of qualifying AI outputs as “works”, **it is recommended in the medium term to consider EU harmonisation of the requirement for granting related rights to performers independently from the copyright status of the content performed.**

MEDIUM-TERM ACTIONS

- Consider legislative intervention for EU harmonisation of the requirement for granting related rights to performers independently from the copyright status of the content performed.

THE DEVELOPMENT OF ARTISTIC, BUSINESS, AND CONTRACTUAL PRACTICES SHOULD BE CLOSELY MONITORED AND SUBJECT TO FURTHER STUDY

The flexibility of the requirements for copyright protection and authorship at the EU level provides private parties concerned with some interpretative space. Private actors are experimenting with different contractual arrangements for achieving desired legal certainty and rights attribution. Open disputes between the parties on the subsistence of copyright protection and/or authorship are rare. As such, and absent concrete evidence to the contrary (particularly of economic nature), **it is recommended that the development of artistic, business, and contractual practices is closely monitored and subject to further study.** Future work in this respect at the international or EU level could include stakeholder dialogues and co-regulatory approaches with a view to identifying and developing best practices and model clauses to guide AI service providers in this area.

SHORT-TERM ACTIONS

- The development of artistic, business, and contractual practices regarding AI output protection and authorship should be closely monitored and subject to further study.

MEDIUM-TERM ACTIONS

- Consider development of stakeholder dialogues and co-regulatory approaches with a view to identifying and developing best practices and model clauses to guide AI service providers in their relationship with users as concerns AI output protection and authorship.

SCRUTINISE THE PRESUMPTION OF AUTHORSHIP AND OWNERSHIP IN ARTICLE 5 ENFORCEMENT DIRECTIVE

In the medium term, **it is recommended to scrutinise the presumption of authorship and ownership in Art. 5 Enforcement Directive**. The assessment of this provision should focus on the areas: (i) where a declared absence of authors could spare economic actors from some copyright-related costs (e.g., royalty payments to authors); and (ii) where the declared presence of authors could create copyright-related revenues (e.g., based on copyright protection of the AI outputs). Users of AI systems should retain the right to claim authorship over AI outputs that qualify as works as a result of their contribution, as well as have recourse to legally effective means to disclaim authorship of AI outputs or parts thereof. Further research should focus on the legal mechanism(s) that could achieve these goals in the context of a revision presumption of authorship and ownership and/or the right to object to false attribution.

MEDIUM-TERM ACTIONS

- The presumption of authorship and ownership in Art. 5 Enforcement Directive should be scrutinized with a view to future legislative intervention.

ARTICLES 3&4 CDSM REPRESENT THE REGULATORY FRAMEWORK TO ACCESS DATA NECESSARY FOR AI DEVELOPMENT

Data ownership has emerged as a central theme of EU legislative interventions, both within the copyright *acquis* (e.g. Arts. 3&4 CDSM, SGDR, Art. 2 ISD) and beyond (Open Data Directive, DGA, AI Act, Data Act, etc). As shown in our analysis, the issue of data ownership has profound ramifications that transcend the legal field and heavily influence societal, economic and cultural practices and shape technological development. Data has become the enabler of most digital activities (not only, but predominantly AI), therefore, the way in which we regulate data will fundamentally impact the way in which we govern the technologies based on data (e.g., AI). Arts. 3&4 CDSM (the TDM exceptions) are an integral component of this relationship.

SHORT-TERM ACTIONS

- Arts. 3&4 should be seen as the regulatory framework not only for Text and Data Mining, but more generally for how training data contained in copyright protected works and in databases can be used for AI training purposes.

VERIFY THE COMPATIBILITY OF PROPERTY-BASED AND GOVERNANCE-BASED APPROACHES TO THE REGULATION OF DATA

Accordingly, we have identified what we called a “property-based approach” in the regulation of data, and by proxy, of AI. At the same time, however, we have observed a parallel, but not necessarily convergent, approach, often featuring traits of other areas of law, which we collectively refer to as a “governance-based approach” to the regulation of AI (e.g., DGA, DA, AI Act, Open Data Dir., etc.). While the focus of our analysis was limited to the copyright/property approach, **it is recommended that further research be developed on the compatibility of these promising, but potentially divergent, approaches to the regulation of data and of the technologies they enable.** The achievement of the ambitious goals of the EU Data Strategy (cfr. EC “A European Strategy for Data”), including the full realization of European Data Spaces heavily relies on an optimal integration of these different approaches. Art. 35 Data Act is an illustrative example of the need to coordinate these potentially diverging approaches.

MEDIUM-TERM ACTIONS

- Research and assess the compatibility between property-based and governance-based approaches to the regulation of (non-personal) data.

MONITOR AND MAP THE IMPLEMENTATION OF ARTICLES 3&4 AT THE NATIONAL LEVEL

The new TDM exceptions are a welcome addition to the EU *acquis* and possess essential elements for the achievement of EU legal (harmonization/unification), social (fair access to data and to technology), cultural (pluralism, inclusiveness) and economic (competitive business models based on AI applications) values. Examples in this sense are the possibility to perform TDM by anyone for any purpose under Art. 4, and the faculty to retain copies for verifiability. Other elements, however, appear excessively narrow (e.g. research purposes by research and cultural organisations under Art. 3; the possibility to reserve the right to TDM in Art. 4; lawful access and relationship with TPMs for both). Additionally, we observed initial divergences in wording regarding Art. 4 implementation where the term “express” (in “express reservation”) was not present in some national implementing laws.

SHORT-TERM ACTIONS

- Monitor and map the implementation of Arts. 3&4 into domestic law to ensure that the TDM exceptions receive the intended implementation and that divergences in national wording (and the margin of discretion that Member States retain) do not cause unnecessary hurdles or fragmentation.

MONITOR THE INTERPRETATION OF ARTICLE 5(1) INFOSOC AND CONVERT ARTICLES 5(2) AND 5(3) INTO UNIFORM, MANDATORY AND DATA-PROOF EXCEPTIONS

At the same time, “old” provisions such as Art. 5(1) InfoSoc establishing a mandatory exception for certain temporary copies as well as Arts. 5(3)(a) and (d) (illustration for teaching or scientific research and quotation) continue to play an important role for technological development and user rights, as reiterated on various occasions by the CJEU. It is recommended to:

- a. monitor the interpretation of Art. 5(1) InfoSoc by European and national courts to ensure that the fundamental task attributed to it by the Court of Justice are safeguarded across the single market;
- b. assess the feasibility to convert fundamental rights-based exceptions contained in Art. 5 ISD, such as Arts. 5(3)(a) and (d) into uniform, mandatory and data economy-proof exceptions. This approach seems functional to the realization of a European Research Area based on the principles of Open Science.

MEDIUM-TERM ACTIONS

- Monitor the uniform interpretation of Art. 5(1) by national courts.

LONG-TERM ACTIONS

- Assess the feasibility and desirability of converting Art. 5 ISD optional ELCs into mandatory and imperative ELCs, both at the EU as well as at the Member State level.

MAP AND MEASURE THE PRACTICE OF IMPORTING INTO THE EU LEGAL ORDER EXTRA EU TRAINED MODELS AND ASSESS THE LEGAL, ECONOMIC AND CULTURAL CONSEQUENCES

From a regulatory competition point of view, the restrictions imposed on EU based individuals, firms and governments to perform TDM activities may create **perverse incentives** whereby it may be economically or opportunistically attractive **to develop AI applications (i.e. to train models) in “cheaper” legal systems** (i.e. in legal systems where broader TDM exceptions apply, such as US, Canada, Japan, Singapore, South Korea, Israel, etc), or **to import into the EU already pre-trained models** avoiding the economic or transactive costs present under EU law.

SHORT-TERM ACTIONS

- Assess and measure the practice and the legal, cultural, and technological consequences of importing pre-trained models in the EU single market.

CREATIVE INDUSTRIES

reCreating Europe's research has highlighted several issues faced by different sectors and communities within the Creative Industries. The following recommendations are based primarily on the findings of two projects: i) the development of codes of best practices in creative reuse for documentary filmmakers and for curators of immersive experiences; and ii) the creation of the CopyrightUser EU portal. The recommendations below share the overall aim of promoting and encouraging the lawful reuse of European cultural heritage with a view to stimulating innovation and creativity as well as fostering the expansion of cultural industries by means of proper balancing between value creation and broad access.

SOFT LAW: CODES OF BEST PRACTICES AND EDUCATIONAL DIGITAL RESOURCES

CODES OF BEST PRACTICES IN CREATIVE REUSE

The codes of best practices in creative reuse developed by *reCreating Europe* have proven to be a powerful tool to increase awareness and use of copyright flexibilities across different EU jurisdictions, while also help explain and give meaning to ambiguous legal norms contained in European copyright exceptions. By focusing on creative reuse that the laws in both the UK and the Netherlands permit, the codes evade to a certain extent thorny issues of territorial legal differences that may exist across jurisdictions. It would be worthwhile to support research aimed at analysing territorial commonalities in other EU Member States and adapting the codes accordingly with a view to making them applicable to other jurisdictions. Adoption and endorsement of the codes by representatives of documentary filmmakers and curators of immersive experiences as well as by funders, broadcasters, distributors and archival institutions should also be encouraged. This could have the effect of furthering the harmonization of the legal framework of EU copyright exceptions for the two creative communities in practice. At the same time, the development of new codes for other creative and cultural communities should be funded and supported.

SHORT-TERM ACTIONS

- Disseminate the codes of best practices to documentary filmmakers and curators of immersive experiences in the EU.
- Encourage endorsement and adoption of the codes by representatives of these communities as well as by funders, broadcasters, distributors and archival institutions.

MEDIUM-TERM ACTIONS

- Promote the adaptation of the current codes across different jurisdictions.
- Fund and support the development of new codes of best practices for other creative and cultural communities.

COPYRIGHTUSER.EU AND OTHER EDUCATIONAL DIGITAL RESOURCES

reCreating Europe is developing CopyrightUser.EU, an independent online portal intended to make EU copyright law accessible to everyone. The project builds upon the existing and successful platform CopyrightUser.org, which offers authoritative and accessible guidance on UK copyright law and attracts over 200,000 unique visitors every year. By increasing awareness of copyright law and providing guidance that responds to creators' needs, CopyrightUser.EU will enable different creative and cultural communities across Europe make informed and confident decisions on copyright issues. This initial investment should be a platform for further development of educational digital resources with a view to improving, among other things, access to culture for vulnerable groups, contractual practices relating to copyright content, opportunities for lawful and creative reuse of existing works, and the amplest enjoyment of European cultural heritage by everyone. The *reCreating Europe* network, through its collaborations with COMMUNIA and the Europeana Copyright Steering Group, is in a good position to keep capturing the needs of creative and cultural communities and produce responsive, up-to-date, accessible and authoritative copyright guidance. However, baseline funding is required for maintenance and updates in the short, medium and long term.

SHORT-TERM ACTIONS

- Disseminate CopyrightUser.EU and CopyrightFlexibilities.EU to relevant communities.

MEDIUM-TERM ACTIONS

- Financially support the further development and maintenance of CopyrightUser.EU and CopyrightFlexibilities.EU.

LAW REFORM: FURTHER HARMONISE AND STRENGTHEN EXCEPTIONS FOR CREATIVE REUSE

STRENGTHEN EXCEPTIONS UNDERPINNED BY FREEDOM OF EXPRESSION AND OTHER FUNDAMENTAL RIGHTS

While the soft law recommendations above would help make the most out of the current legislative framework, true harmonization also requires law reform. The *reCreating Europe* project has highlighted the important role that exceptions enabling creative and artistic uses of copyright works play for documentary filmmakers, curators of immersive experiences and other creators. In particular, quotation for purposes such as criticism or review (Art. 5(3)(d) InfoSoc) and use for the purpose of caricature, parody or pastiche (Art. 5(3)(k) InfoSoc) are essential to enable expressive uses that cannot be accommodated by licensing.

These exceptions may already be considered mandatory based on Art. 17(7) CDSM and were explicitly recognised as “user rights” both in the AG Opinion in C-401/19 and in the Commission’s Guidance (COM/2021/288 final), and implicitly by the Court’s Grand Chamber in the same judgement. However, unlike other exceptions such as those introduced in Art. 3, 5 and 6 CDSM, their mandatory and non-overrideable nature is not made explicit in statutory EU

law. As a result, several Member States do not provide for the exception for caricature, parody or pastiche, and the quotation exception is implemented with great divergences across the EU. This unharmonized framework presents major challenges for creators and firms who increasingly rely on the online distribution of their work.

The European Commission should clarify at the statutory level that all Member States *shall* provide for the exception for caricature, parody or pastiche and for that for quotation for purposes such as criticism or review; and that any contractual provision contrary to these exceptions shall be unenforceable. The open-ended nature of the quotation exception (for purposes *such as* criticism or review) should also be made mandatory, thus enabling 'transformative uses' of protected materials.

LONG-TERM ACTIONS

- Clarify at the statutory level that all Member States shall provide for the exception for caricature, parody or pastiche and for that for quotation for purposes such as criticism or review.
- Provide that any contractual provision contrary to these exceptions shall be unenforceable.
- The open-ended nature of the quotation exception (for purposes such as criticism or review) should also be made mandatory, thus enabling 'transformative uses' of protected materials.

TERRITORIALITY AND OTHER CROSS-CUTTING ISSUES

Following the approach of the work on territoriality, the recommendations can be grouped in two categories. One takes improvement in the existing *acquis* as a starting point. The other is based on a more forward looking longer term perspective of a unitary title for copyright and related rights. In terms of timing, it may be said that more acute problems with the current *acquis* as a starting point. The other is based on a more forward looking longer term perspective of a unitary title for copyright and related rights. In terms of timing, it may be said that more acute problems with the current *acquis* exist in other areas. This explains why the actions are largely designated as medium- or longer term.

ON EXISTING MECHANISMS TO OVERCOME TERRITORIALITY ('COUNTRY OF ORIGIN')

Because fictive localization is the predominant mechanism used in secondary EU copyright law to overcome adverse effects of territoriality, the recommendations focus on consistency in the use particularly of that mechanism. Below is a key recommendation and associated actions. Recommendations are set out in more detail in D4.3 Policy recommendations.

SEEK CONSISTENCY IN PROVISIONS DESIGNATING A SINGLE GOVERNING LAW

The research has shown that it is often unclear why a certain approach has been chosen by the lawmaker. Also, the level of precision as regards the definition of the place of establishment (or habitual residence in the case of natural persons) varies. This may contribute to legal uncertainty.

MEDIUM-TERM ACTIONS

- Assess whether in cases of fictive localization, legal certainty can be strengthened and consistency in the law improved by using connecting factors of the Rome I and II regulations.
- Clarify the situation where a beneficiary may have more than one place of activity, by using the specifications of the Rome I and II regulation's definition of place of habitual residence.
- When introducing specific provisions aimed at identifying a single governing law, seek consistency with existing provisions in the copyright acquis, i.e. preferably use as connecting factor the habitual residence of the party whose direct benefit the provision mainly serves.

ON A UNITARY TITLE

A key finding of the project is that considering the advanced level of harmonization and the needs of the digital single market, the idea of a unitary copyright title (and titles for neighbouring rights) merits serious consideration. In this light, the following recommendations are made.

ADOPT A POLICY AGENDA THAT MAPS OUT THE ROAD TOWARDS THE INTRODUCTION OF A UNIFORM TITLE

The introduction of a unitary title for copyright and related rights would be a highly aspirational and also challenging undertaking. It requires work on many levels. The D4.3 Policy recommendations and the D4.4 Roundtable report set them out in more detail. The key actions below can be elements of such a road map.

SHORT-TERM ACTIONS

- Articulate a clear vision on what European copyright aspires to.
- Comprehensively identify for which areas of copyright law shared norms are still to be developed.
- Assess the impact of a unitary title on transaction costs for stakeholders in creative industries (through the value chain) through economic analysis.

MEDIUM-TERM ACTIONS

- Elaborate various models for the introduction of a unitary copyright, so as to be able to assess their feasibility.
- Determine what institutional structures at EU level are needed to ensure stakeholders have meaningful agency (especially creators) and to ensure rights are transparently managed.
- Consolidate and simplify the existing *acquis* (now spread over more than 15 instruments), with special attention for unification of limitations & exceptions.

CULTURAL HERITAGE INSTITUTIONS

In the backdrop of the reCreating Europe's research on cultural heritage and GLAM stakeholders, six essential policy recommendations were identified: (1) Reform the EU copyright framework systematically; (2) Clarify and simplify the EU copyright framework for cultural heritage; (3) Expand and safeguard the public domain; (4) Boost the EU role in cultural heritage; (5) Safeguard the public value of cultural heritage through EU initiatives; (6) Educate and engage with glam stakeholders to ensure a fair balance of copyright interests. Some actions are expected to be made in the **short term**, by means of Guidelines or Recommendations for Member States, while others may address **medium** and **long term** solutions requiring legislative intervention. It is worth specifying that the following specific recommendations, deliberately and in line with reCreating Europe's efforts to work closely with stakeholders, recall and uphold the policy recommendations referring to or otherwise affecting digital cultural heritage, including those drafted by Communia, Creative Commons, NEMO and ICOM. They also expressly link to the other reCreating Europe's Policy Recommendations, and the meaningful research work undertaken by the fellow project INDIGES.

REFORM THE EU COPYRIGHT FRAMEWORK SYSTEMATICALLY

It is acknowledged the noteworthy and auspicious contribution that the CDSM Directive conveyed, especially regarding the provisions on text and data mining preservation of cultural heritage, the use of out-of-commerce works, the reproduction of public domain works of visual art. However, the EU copyright framework is not yet fit for the digital future of cultural heritage. In particular, the national implementation shows a high degree of fragmentation that conflicts with the need for legal certainty and the effectiveness of copyright fair balance.

SHORT-TERM ACTIONS

- Guide legal interpreters to understand E&Ls as linked to fundamental rights.

MEDIUM-TERM ACTIONS

- Introduce purpose-oriented provisions to support the legislative implementation of the CJEU's fair balance doctrine and other doctrines.

LONG-TERM ACTIONS

- Undertake a systematised reform of copyright regulatory framework.
- Through a Regulation or a dedicated Directive, make all E&Ls mandatory and not to be overridden by contract or technological measures.
- Introduce a broader norm to fulfill and protect a universal right to culture and science.

CLARIFY AND SIMPLIFY THE EU COPYRIGHT FRAMEWORK FOR CULTURAL HERITAGE

It is noted that some EU copyright law E&Ls determine uncertainty and ambiguity in their interpretation and application to cultural heritage when lacking clarity, and the possibility of being derogated through contract and technological measures reduces their strength. Therefore, it becomes necessary to strengthen harmonisation, also referring to horizontal provisions, to enable free uses for the cultural heritage sector. For instance, Article 5(3)(d) InfoSoc may be amended to turn the quotation exception into a maximum harmonization norm from which all stakeholders, including CHIs, can benefit, conversion of a mandatory EU “Freedom of Panorama” (FoP) exemption to cover works belonging to the cultural heritage, and amendment of Article 6 DSMD to make the preservation exception for CHIs more encompassing and less discretionary. In addition, the option of extending the country-of-origin principle may help to overcome territoriality problems, foster cross-border cooperation and boost a wider development of common cultural policies. The following actions will benefit and have an impact not only on CHIs but also on end-users.

SHORT-TERM ACTIONS

- Conduct an impact assessment of current E&Ls applying to cultural heritage.

MEDIUM-TERM ACTIONS

- Extend the country of origin principle to all existing flexibilities.

LONG-TERM ACTIONS

- Harmonise E&Ls in force and make them as expansive as possible to cover free uses for the cultural heritage sector.
- Reduce the number of norms and opt for a language that is technological, social and market neutral.
- Broaden the scope of flexibilities for cultural uses to move beyond mere preservation.
- Consider introducing mandatory purpose-oriented provisions allowing free access and uses for the cultural heritage sector.

EXPAND AND SAFEGUARD THE PUBLIC DOMAIN

Despite the recent and auspicious enactment of Article 14 DSMD, the role of public domain for cultural heritage remains largely at stake, either for the unlawful application of exclusive rights or because the use of cultural heritage resources is constrained or even nullified based on other legal grounds, such as cultural heritage law and data protection. Overall, EU competences should be reconsidered, also in order to introduce an encompassing norm that would uphold public or free domain against any potential detriment of copyright E&Ls, based on a broader and stronger notion of public domain that would support free uses for the culture heritage sector and be fit for the digital age.

SHORT-TERM ACTIONS

- Guide Member States to applying more strictly the idea/expression dichotomy.

MEDIUM-TERM ACTIONS

- Define and harmonise the boundaries of public domain in the EU.
- Further specify the notion of protected works.

LONG-TERM ACTIONS

- Reinforce Article 14 CSMD to avoid interference with other legal grounds.
- Introduce an encompassing norm to uphold public domain.
- Reduce the term of copyright protection for works to 50 years after DoA.

BOOST THE EU ROLE IN CULTURAL HERITAGE

Not attributing the necessary emphasis on the fundamental public value of CHIs serving a public mission, in the regulation of cultural heritage, increases the risk of privatising culture. This is especially revealed in the context of copyright E&Ls, where the difference between private and public CHIs remains unclear, but also in the rules regarding data from cultural heritage institutions.

LONG-TERM ACTIONS

- Clarify the relationship between copyright and cultural heritage norms.
- Consider gaining competence on matters of culture interpreting and modifying the EU Treaties, i.e., Article 3(3) TEU and Article 6 and 167 TFEU.

SAFEGUARD THE PUBLIC VALUE OF CULTURAL HERITAGE THROUGH EU INITIATIVES

In order to protect the value of cultural heritage, it is of paramount importance to safeguard the public mission of CHIs, which have a crucial role in the advancement of knowledge, cultural participation, and creation of culture.

The public value of cultural heritage must be highlighted and protected, particularly when addressing regulation of copyright (cf. Sec. “Expand and safeguard the public domain”) and data from CHIs.

SHORT-TERM ACTIONS

- Protect the public value of cultural heritage by safeguarding the public domain.
- Clarify norms on cultural heritage and data.
- Support CHIs to make their data and metadata open.

LONG-TERM ACTIONS

- Amend the Open Data legislation to include CHIs not currently considered.
- Make all CHIs data and metadata open by default.

EDUCATE AND ENGAGE WITH GLAM STAKEHOLDERS TO ENSURE A FAIR BALANCE OF COPYRIGHT INTERESTS

The lack of clear guidance for interpreters, including national courts, makes it difficult to construe and apply provisions for the cultural heritage in a fair balanced way. This is especially true when considering the recurrent tensions between copyright law and cultural heritage law. The issue is also consistent with the more general consideration that with regards to the subject matter of culture the EU is not attributed an exclusive competence, but it supports, coordinates or supplements actions of the Member States, essentially through soft law. There is a need to guide all legal actors and stakeholders to interpret norms, with particular attention to those that are more articulate (i.e. provisions concerning use of out-of-commerce works), ensuring a fair balance of fundamental rights and the interests at stake in the cultural heritage sector. To this extent, it is important to guarantee the bottom-up approach in the development of regulatory instruments applicable to cultural heritage, to pursue the amplest enjoyment of cultural heritage by everyone.

SHORT-TERM ACTIONS

- Provide clear interpretive guidance to enable uniform application of provisions.
- Endorse actions promoting training on copyright and data regulation.

MEDIUM-TERM ACTIONS

- Complement educational efforts with access to legal assistance for CHIs.

INTERMEDIARIES

The findings of reCreating Europe’s research on intermediaries on copyright content moderation and access to culture highlight the need for specific policy interventions, which are addressed in the following recommendations.

They are grouped around five areas of intervention, i.e. (a) clarification and fundamental rights alignment of Article 17 CDSMD; (b) Relationship with other EU law instruments; (c) regulatory gaps; (d) transparency and data access (e) human competences in content moderation. While some actions may already be undertaken in the **short term**, for instance through the review of the Commission’s Guidance on Article 17 (COM/2021/288 final), others address **medium** and **long term** solutions, which in some cases might require legislative interventions.

CLARIFICATION AND FUNDAMENTAL RIGHTS ALIGNMENT OF ARTICLE 17 CDSMD

DEFINITION OF OCSSPS

Considering the potential for legal uncertainty and fragmentation of the digital single market as regards copyright content moderation, we recommend that the Commission reviews its Guidance on art. 17 CDSMD (COM/2021/288 final) in order to provide clearer guidelines on the definition of OCSSPs, especially for small and medium-sized online platforms and coordinates its application across Member States.

SHORT-TERM ACTIONS

- Commission should revise Guidance on Article 17 as regards definition of OCSSPs.

RECOGNITION OF USER RIGHTS

National legislators should review their national transpositions of art. 17 CDSMD to fully recognize the nature of the exceptions and limitations in paragraph (7) as “user rights” in accordance with CJEU jurisprudence, rather than mere defences.

MEDIUM-TERM ACTIONS

- If not possible in the short term, Member States should adjust or revisit their implementation of Article 17(7) in light of CJEU interpretation in C-401/19.

IMPLEMENTATION OR OPERATIONALIZATION OF USER RIGHTS

We further recommend that the Commission reviews its Guidance in order to provide guidelines from the perspective of EU law as to the concrete implications of a “user rights” implementation of paragraph (7) in national laws. This should include, to the extent possible, concrete guidance on what type of actions users and their representatives (e.g., consumer organisations) may take against OCSSPs to protect their rights.

SHORT-TERM ACTIONS

- Commission should revise Guidance on Article 17 as regards interpretation of Article 17(7) in light of CJEU interpretation in C-401/19.

COMPLEMENTARY ROLE OF COMPLAINT AND REDRESS MECHANISMS

National legislators should review their national transpositions of art. 17 CDSMD to ensure that ex post complaint and redress mechanisms under paragraph (9) are not the only means to ensure the application of user rights, but rather a complementary means, in line with the Court's judgment in case C-401/19. We further recommend that the Commission's Guidance is updated to fully reflect the Court's approach in case C-401/19, as regards the complementary role of complaint and redress mechanisms under paragraph (9).

SHORT-TERM ACTIONS

- Commission should revise Guidance on Article 17 as regards interpretation of Article 17(9) in light of CJEU interpretation in C-401/19.

PERMISSIBLE PREVENTIVE FILTERING

The Commission should review its Guidance to clearly align it with the Court's judgment in C-401/19, namely by clarifying that: (1) OCSSPs can only deploy ex ante filtering/blocking measures if their content moderation systems can distinguish lawful from unlawful content without the need for its "independent assessment" by the providers; (2) such measures can only be deployed for a clearly defined category of "manifestly infringing" and strictly defined category of "equivalent" content; and (3) such measures cannot be deployed for other categories of content, such as (non-manifestly infringing) "earmarked content". Member States should further adjust their national implementations of art. 17 CDSMD to reflect these principles. In implementing these principles, the Commission and Member States could take into consideration the approach proposed by the AG Opinion on how to limit the application of filters to manifestly infringing or "equivalent" content, including the consequence that all other uploads should benefit from a "presumption of lawfulness" and be subject to the ex ante and ex post safeguards embedded in art. 17, notably judicial review. In particular, the AG emphasized the main aim of the legislature to avoid over-blocking by securing a low rate of "false positives". Considering the requirements of the judgment, in order to determine acceptable error rates for content filtering tools, this approach implies that the concept of "manifestly infringing" content should only be applied to uploaded content that is identical or nearly identical to the information provided by the rightsholder that meets the requirements of art. 17(4) (b) and (c) CDSMD.

SHORT-TERM ACTIONS

- Commission should revise Guidance on Article 17 as regards interpretation of the scope of permissible filtering in light of CJEU interpretation in C-401/19, namely by excluding the category of "earmarked content".

RELATIONSHIP WITH OTHER EU LAW INSTRUMENTS

CLARIFICATION OF RELATIONSHIP BETWEEN ARTICLE 17 CDSMD AND THE DSA

The Commission should review its Guidance to clarify which provisions in the DSA's liability framework and due diligence obligations Chapters apply to OCSSPs despite the *lex specialis* of art. 17 CDSMD, within the limits of the Commission's competence as outlined in art. 17(10) CDSMD.

SHORT-TERM ACTIONS

- Commission should revise Guidance on Article 17 to include a clarification of the relationship between that provision and the DSA.

RELATIONSHIP ARTICLE 17 CDSMD AND DSA – TERMS AND CONDITIONS AND FUNDAMENTAL RIGHTS

The Commission should clarify in its Guidance that the obligations of Article 14 DSA apply to OCSSPs, in particular the obligation in paragraph (4) to apply and enforce content moderation restrictions with due regard to the fundamental rights of the recipients of the service, such as freedom of expression. The authorities and courts of the Member States should equally interpret their national law in a manner consistent with the application of art. 14 DSA to OCSSPs.17(4) (b) and (c) CDSMD.

SHORT-TERM ACTIONS

- Commission should revise Guidance on Article 17 to include a clarification of the relationship between that provision and Article 14 DSA.

MEDIUM-TERM ACTIONS

- If too premature to include in a revised Guidance, the Commission should carry out further research on the application of Article 14 DSA to OCSSPs.
- To the extent possible, national authorities of the Member States should align their national implementations of Article 17 with Article 14 DSA.

RELATIONSHIP ARTICLE 17 CDSMD AND AI ACT PROPOSAL

We recommend that the Commission studies the legal interplay between legislation on AI and platform regulation, in particular the issue of whether and to what extent algorithmic content moderation systems might be covered by the AIA proposal. Any such study should consider the future scenario and potential impact of algorithmic content moderation systems that rely on machine learning which will be deployed to assess contextual uses covered by user rights under art. 17(7) CDSMD, and how this might affect the permissibility of preventive filtering measures.

SHORT-TERM ACTIONS

- Commission should carry out research on the application of relationship between Article 17 and the AIA proposal, if feasible before its final approval, in order to suggest relevant amendments during the legislative process.

MEDIUM-TERM ACTIONS

- If not possible, Commission should carry out research on the relationship between Article 17 CDSMD and the AIA as regards algorithmic copyright content moderation.

REGULATORY GAPS

MONETIZATION AND RESTRICTIVE CONTENT MODERATION ACTIONS

At EU level, EU institutions and in particular the Commission should explore to what extent the copyright *acquis* already contains rules addressing content moderation actions relating to monetization and related restrictive content moderation actions (e.g. shadow banning and downranking) of copyright-protected content on online platforms (e.g., in arts. 18 to 23 CDSMD), and to what extent policy action is needed in this area. Further research is needed specifically on the imbalanced nature of the contractual relationship of online platforms and uploading users, as well as in the transparency and fairness of their remuneration.

MEDIUM-TERM ACTIONS

- Commission should carry out research on the extent to which existing rules in the copyright *acquis* apply to copyright content monetization on OCSSPs.

RECOMMENDER SYSTEMS AND COPYRIGHT CONTENT MODERATION

Although our research has focused on issues of content moderation, we note the related but separate issue of content recommendation. Whereas the actual phenomena are somewhat related, however, they relate to a different set of issues and perspectives. We note that more research is needed in the field of copyright content recommendation as well as copyright's role in content recommendation with a view to access and diversity. We therefore recommend that the EU institutions (e.g. the Commission through its Joint Research Centre) takes steps to carry out such research.

MEDIUM-TERM ACTIONS

- EU institutions should carry out research on copyright content recommendation in relation to access and diversity.

TRANSPARENCY AND DATA ACCESS

TRANSPARENCY AND ROBUST DATA ACCESS FOR RESEARCHERS

At EU level, EU institutions and in particular the Commission should explore the application of the DSA's provisions on transparency and access to data to OCSSPs and non-OCSSPs hosting copyright protected content (see art. 40 DSA on data access and scrutiny), as well as study and, if adequate, propose EU level action that imposes transparency and access to data obligations on online platforms regarding their copyright content moderation activities. Inspiration could be drawn by the design and implementation of the German national transposition law under Section 19(3) UrhDaG as regards rights to information. In that context, special care should be taken to: (1) ensure mandatory rules for data access for researchers; (2) carefully define the scope of beneficiary researchers, research institutions and research activities so not to be overly restrictive; (3) design a regime that avoids the potential negative effects of requiring researchers to reimburse the platforms' costs related to complying with such requests; (4) fund and support academic initiatives to build up collaborations and institutional capacity to develop and coordinate the necessary expertise and infrastructure to process this data, including database creation and secure processes for data access. To the extent possible, the Commission should advance recommendations in this direction in its revised version of the Guidance on art. 17 CDSMD.

SHORT-TERM ACTIONS

- Commission should revise Guidance on Article 17 to include recommendations on transparency and data access for researchers.

MEDIUM-TERM ACTIONS

- EU institutions should carry out research on transparency and data access for researchers with a view to proposing legislation if the current framework is deemed inadequate.

TRADE SECRET PROTECTION AND TRANSPARENCY OF CONTENT MODERATION SYSTEMS

In order to make transparency meaningful, proper account must be taken on trade secrets protection, which likely extends to different aspects of human and algorithmic copyright content moderation by platforms. Achieving meaningful transparency in this area will likely require legislative intervention that exempts platforms algorithmic moderation systems from trade secrets protection, at least for purposes of data access and scrutiny by researchers and policy makers.

MEDIUM-TERM ACTIONS

- EU institutions should carry out research on the barriers imposed by trade secret protection on meaningful transparency and data access for copyright content moderation, with a view to proposing legislation if the current framework is deemed inadequate.

HUMAN COMPETENCIES IN CONTENT MODERATION

HUMAN COMPETENCES IN COPYRIGHT CONTENT MODERATION

Our research indicates that competences of human moderators directly impact the quality of the content moderation system. This much is recognized in the DSA, CDSMD and expert recommendations the codes we reviewed, which require human review at minimum in the appeal process, partly as a means to mitigate the risks of automated content moderation. From our viewpoint, a certain level of human involvement should also be required to reduce biases and errors and ensure accuracy in the first stage of automated moderation. One way to achieve this would be to mandate or incentivize random accuracy tests by human intervention at this stage. We therefore recommend that the Commission explore the best practices and mechanisms to mandate or incentivize such random accuracy test for OCSSPs.

MEDIUM-TERM ACTIONS

- Commission should carry out research on best practices and mechanisms mandate or incentivize random accuracy tests for human intervention and review for OCSSPs.

SUMMARY CHART OF POLICY RECOMMENDATIONS

END USERS & VULNERABLE GROUPS	EU - SHORT TERM	EU - MEDIUM TERM
	<ul style="list-style-type: none"> • Conduct an impact assessment (IA) of optional nature of existing L/Es. • Issue Guidelines for Member States to follow CJEU's ruling. • Provide trainings to national judges on copyright and related matters. • Issue interpretative Guidelines to offer technical definitions of key terms in existing L/Es. • Conduct economic and non-economic IA of national practices on transformative uses and their national divergences. • Conduct IA and stakeholders' consultation to assess effects of non-harmonization of compensation schemes for private copy. • Conduct ex ante IA on effects of fragmentation of research exceptions. • Introduce EU-wide secondary publication right for OA. • Explore non-legislative measures to facilitate Gold and Diamond OA. • Launch stakeholders' consultations and IA on mandatory reversion right for scientific authors. • Schedule IA on divergences in digital vs regular teaching exceptions. • Provide funding for translation via EU cultural programmes. • Apply copyright law in synergy with policies aimed at dismantling structural barriers (digital policies, social policies and cultural policies). • Initiate a stakeholders' dialogue to understand the key concerns related to OCSPP's EULAs from copyright, consumer protection and international private law perspective. • Conduct an impact assessment (IA) regarding the possibility of and need for a general regulatory approach towards UGC. 	<ul style="list-style-type: none"> • Extend the country of origin principle to all existing exceptions. • Issue Guidelines for Member States to facilitate convergence on private levy schemes. • Extend and further streamline the current disability exception Conduct a study on the combined effect and interaction between copyright legislation and accessibility legislation in relation to e-books. • Support Member States audience development strategies through the Open Method of Coordination and other soft coordination tool. • Avoid "one-size-fits-all" action to address the illegal consumption of cultural goods.

EU - LONG TERM

- Based on IA, intervene on existing L/Es to make them mandatory if needed.
- Simplify L/Es regimes, being consistent with provisions sharing similar goals.
- Consider using purpose-oriented language when framing new L/Es.
- Consider introducing ad-hoc provisions/recitals to implement CJEU's doctrines in EU law.
- Introduce horizontal provisions to update outdated terms in traditional L/Es.
- Address the same matter in international I (esp WIPO).
- Evaluate opportunity to introduce EU-wide transformative use L/E.
- Intervene on private copy exception to ensure greater harmonization.
- Amend parody and quotation exceptions to introduce more specific requirements and make them mandatory.
- Aim at a more pervasive harmonization in the field of flexibilities for informatory purposes, with the introduction of updated mandatory provisions that are capable of including effectively new digital actors and online uses through the use of a technologically neutral and purpose-oriented language.
- As a second best, it shall be considered the possibility to overcome the negative impact of territoriality by means of the application of a country of origin principle on existing informatory purpose exceptions.
- Intervene on EU research exception in line with IA.
- Intervene on EU copyright contract law imposing mandatory clauses in scientific publishing to align with EU OS policies.

MEMBER STATES

- Ensure compliance with the CJEU's key doctrines.

AUTHORS & PERFORMERS**EU - SHORT TERM**

- No new protection regimes for AI outputs should be introduced absent clear and compelling evidence that justifies a change to the status quo (“wait and see approach”).
- The development of artistic, business, and contractual practices regarding AI authorship should be closely monitored and subject to further study.
- Arts. 3&4 CDSM should be seen as the regulatory framework under which the data necessary for AI development can be accessed in the EU.
- It is recommended to map and measure the practice of import into the EU legal order foreign-trained models and assess the legal, economic, and cultural consequences.
- Publication of a guidance on the meaning of “use” in the digital environment to ensure consistent application of the revocation right (Art. 22) by the Member States.

EU - MEDIUM TERM

- Consider development of stakeholder dialogues and co-regulatory approaches with a view to identifying and developing best practices and model clauses to guide AI service providers in their relationship with users as concerns AI output protection and authorship.
- Consider legislative intervention for EU harmonisation of the requirement for granting related rights to performers independently from the copyright status of the content performed.
- The presumption of authorship and ownership in Art. 5 Enforcement Directive should be scrutinized with a view to future legislative intervention.
- Conduct a review of the implementation of Chapter 3 CDSM provisions with respect to creator agreements to examine copyright contracting practices.
- Consider development of digital resources and educational activities to raise awareness of the opportunities provided to creators by revocation and transparency provisions of the CDSM Directive.
- Further research is to be developed on the compatibility of property-based and governance-based approaches to the regulation of data.
- Monitor the interpretation of Art. 5(1) by European and national courts.

EU - SHORT TERM

- Disseminate the codes of best practices to documentary filmmakers and curators of immersive experiences in the EU.
- Encourage endorsement and adoption of the codes by representatives of these communities as well as by funders, broadcasters, distributors and archival institutions.
- Disseminate CopyrightUser.EU and CopyrightFlexibilities.EU to relevant communities.

EU - MEDIUM TERM

- Promote the adaptation of the current codes across different jurisdictions.
- Fund and support the development of new codes of best practices for other creative and cultural communities.
- Financially support the further development and maintenance of CopyrightUser.EU and CopyrightFlexibilities.EU.

CREATIVE INDUSTRIES

EU - LONG TERM

- Conduct a feasibility study for an open streaming remedy, modelled on open banking. Facilitating the interoperability and portability of copyright related data would enable creators to switch platforms, increasing their bargaining power and linking CDSM and Data Act objectives.
- It is recommended to assess the feasibility to convert fundamental rights-based exceptions contained in Art. 5 ISD, such as Arts. 5(3)(a) and (d) into uniform, mandatory and data economy-proof exceptions.

MEMBER STATES

- Transparency provisions of Art. 19 need to be made meaningful. Greater public awareness of these opportunities is needed (in line with recommendations and best practices on flexibilities).
- Monitor and map the implementation of Arts. 3&4 CDSM at the national level.
- Member States should consider the full implementation of Art. 5 ELCs (and of other non-mandatory ELCs present in the EU acquis) into domestic law. Furthermore, MS should consider excluding the possibility to limit ELCs by contract.

EU - LONG TERM

- Financially support the further development and maintenance of CopyrightUser.EU and CopyrightFlexibilities.EU.
- Clarify at the statutory level that all Member States shall provide for the exception for caricature, parody or pastiche and for that for quotation for purposes such as criticism or review.
- Provide that any contractual provision contrary to these exceptions shall be unenforceable.
- The open-ended nature of the quotation exception (for purposes such as criticism or review) should also be made mandatory, thus enabling 'transformative uses' of protected materials.

MEMBER STATES

CULTURAL HERITAGE INSTITUTIONS**EU - SHORT TERM**

- Guide legal interpreters to understand E&Ls as linked to fundamental rights.
- Conduct an impact assessment of current E&Ls applying to cultural heritage.
- Guide Member States to applying more strictly the idea/expression dichotomy.
- Protect the public value of cultural heritage by safeguarding the public domain.
- Clarify norms on cultural heritage and data
- Support CHIs to make their data and metadata open
- Provide clear interpretive guidance to enable uniform application of provisions
- Endorse actions promoting training on copyright and data regulation

EU - MEDIUM TERM

- Introduce purpose-oriented provisions to support the legislative implementation of the CJEU's fair balance doctrine and other doctrines.
- Extend the country of origin principle to all existing flexibilities.
- Define and harmonise the boundaries of public domain in the EU.
- Further specify the notion of protected works.
- Complement educational efforts with access to legal assistance for CHIs.

EU - SHORT TERM

- Commission should revise Guidance on Article 17 as regards definition of OCSSPs.
- If possible in the short term, Member States should adjust or revisit their implementation of Article 17(7) in light of CJEU interpretation in C-401/19.
- Commission should revise Guidance on Article 17 as regards interpretation of Article 17(7) and 17(9) in light of CJEU interpretation in C-401/19.

EU - MEDIUM TERM

- If not possible in the short term, Member States should adjust or revisit their implementation of Article 17(7) in light of CJEU interpretation in C-401/19.
- If too premature to include in a revised Guidance, the Commission should carry out further research on the application of Article 14 DSA to OCSSPs.
- To the extent possible, national authorities of the Member States should align their national implementations of Article 17 with Article 14 DSA.
- If not possible during the legislative process, Commission should carry out research on the relationship between Article 17 CDSMD and the AIA as regards algorithmic copyright content moderation.

INTERMEDIARIES

EU - LONG TERM

MEMBER STATES

- Undertake a systematised reform of copyright regulatory framework.
- Through a Regulation or a dedicated Directive, make all E&Ls mandatory and not to be overridden by contract or technological measures.
- Introduce a broader norm to fulfill and protect a universal right to culture and science.
- Harmonise E&Ls in force and make them as expansive as possible to cover free uses for the cultural heritage sector.
- Reduce the number of norms and opt for a language that is technological, social and market neutral.
- Broaden the scope of flexibilities for cultural uses to move beyond mere preservation.
- Consider introducing mandatory purpose-oriented provisions allowing free access and uses for the cultural heritage sector.
- Reinforce Article 14 DSMD to avoid interference with other legal grounds.
- Introduce an encompassing norm to uphold public domain.
- Reduce the term of copyright protection for works to 50 years after DoA.
- Clarify the relationship between copyright and cultural heritage norms.
- Consider gaining competence on matters of culture interpreting and modifying the EU Treaties, i.e., article 3(3) TEU and article 6 and 167 TFEU.
- Amend the Open Data legislation to include CHIs not currently considered.
- Make all CHIs data and metadata open by default.

EU - LONG TERM

MEMBER STATES

INTERMEDIARIES

- Commission should revise Guidance on Article 17 as regards interpretation of the scope of permissible filtering in light of CJEU interpretation in C-401/19, namely by excluding the category of “earmarked content”.
- Commission should revise Guidance on Article 17 to include a clarification of the relationship between that provision and the DSA in general, as well as Article 14 DSA in particular (on terms and conditions and fundamental rights).
- Commission should carry out research on the application of relationship between Article 17 and the AIA proposal, if feasible before its final approval, in order to suggest relevant amendments during the legislative process.
- Commission should revise Guidance on Article 17 to include recommendations on transparency and data access for researchers.

- Commission should carry out research on the extent to which existing rules in the copyright acquis apply to copyright content monetization on OCSSPs.
- EU institutions should carry out research on copyright content recommendation in relation to access and diversity. EU institutions should carry out research on copyright content recommendation in relation to access and diversity.
- EU institutions should carry out research on transparency and data access for researchers with a view to proposing legislation if the current framework is deemed inadequate.
- EU institutions should carry out research on the barriers imposed by trade secret protection on meaningful transparency and data access for copyright content moderation, with a view to proposing legislation if the current framework is deemed inadequate.
- Commission should carry out research on best practices and mechanisms mandate or incentivize random accuracy tests for human intervention and review for OCSSPs.

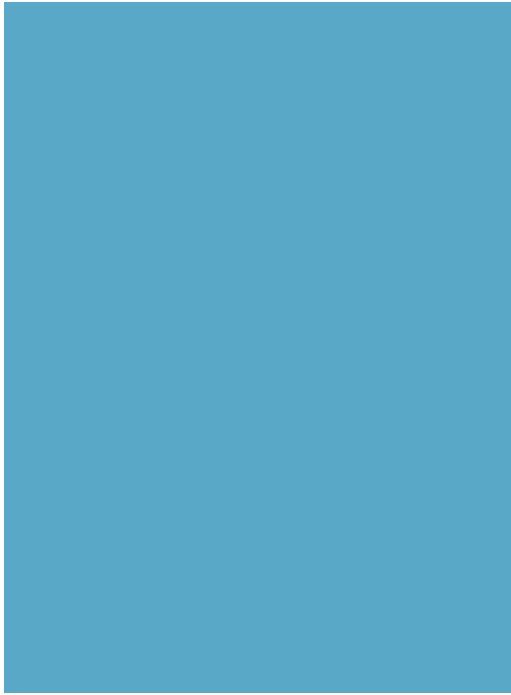
EU - SHORT TERM

- Articulate a clear vision on what European copyright aspires to.
- Comprehensively identify for which areas of copyright law shared norms are still to be developed.
- Assess the impact of a unitary title on transaction costs for stakeholders in creative industries (through the value chain) through economic analysis.

EU - MEDIUM TERM

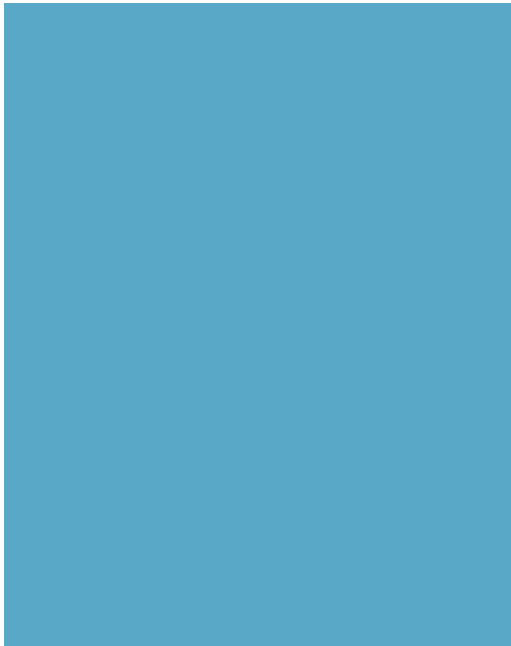
- Assess whether in cases of fictive localization, legal certainty can be strengthened and consistency in the law improved by using connecting factors of the Rome I and II regulations.
- Clarify the situation where a beneficiary may have more than one place of activity, by using the specifications of the Rome I and II regulation's definition of place of habitual residence.
- When introducing specific provisions aimed at identifying a single governing law, seek consistency with existing provisions in the copyright acquis, i.e. preferably use as connecting factor the habitual residence of the party whose direct benefit the provision serves.
- Elaborate various models for the introduction of a unitary copyright, so as to be able to assess their feasibility.
- Determine what institutional structures at EU level are needed to ensure stakeholders have meaningful agency (especially creators) and to ensure rights are transparently managed.
- Consolidate and simplify the existing acquis (now spread over more than 15 instruments), with special attention for unification of limitations & exceptions.

TERRITORIALITY & OTHER CROSS-CUTTING ISSUES



EU - LONG TERM

MEMBER STATES





ReCreating Europe

Technologies enable unprecedented democratization of cultural practices, and the production and use of intellectual property. An effective system of sustainable norms for digital copyright is needed but this is challenging to create. Copyright law is complex and there are gaps in knowledge and awareness. The reCreating Europe project brings researchers, libraries, copyright experts, policymakers and other stakeholders together in order to clarify what is needed for a regulatory framework which supports culturally-diverse production, inclusive access and consumption.

www.recreating.eu



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