

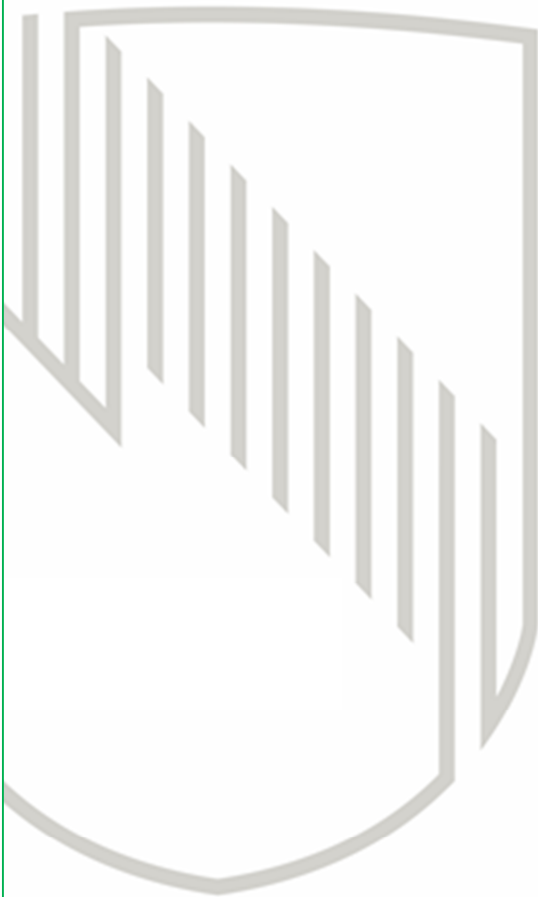


OPINION OF THE CEIPI

ON THE EUROPEAN COMMISSION'S PROPOSAL

TO REFORM COPYRIGHT LIMITATIONS AND EXCEPTIONS

IN THE EUROPEAN UNION



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**Opinion of the CEIPI on the European Commission's Proposal
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The Centre for International Intellectual Property Studies (CEIPI) is an institute devoted to education and research in intellectual property and is a constituent part of the University of Strasbourg. CEIPI analyses and comments the main developments in the area of intellectual property at national, European and international levels. From this perspective, the European Commission's Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market of 14 September 2016—and more generally any step towards copyright reform in the European Union—is of particular interest to CEIPI, which hereby intends to react on the proposal to introduce in EU law new mandatory copyright exceptions and limitations to promote the Digital Single Market.

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Summary

The European Commission's planned copyright reform proposes to adapt EU law to the challenges emerging in the Digital Single Market (DSM).¹ In particular, new mandatory exceptions and limitations should contribute to improving the creative ecosystem in the digital environment. This CEIPI Opinion does support the plan to develop a—much needed—strategy to take copyright into the 21st century and make it functional to the DSM, especially by addressing important needs with regard to access to copyrighted works in order to boost creativity and innovation, promoting cumulative research and sharing of knowledge-based resources. CEIPI moreover fully endorses the goal of the proposal of lowering barriers to research and innovation in the EU DSM; however, in order to address these issues in a satisfying manner, this opinion strongly suggests an expansion of the reform's scope. In particular,

- The introduction of mandatory exceptions and limitations is a welcome, innovative arrangement that promotes harmonization and, therefore, the DSM. Obviously, focus on facilitation of research, teaching and preservation of cultural heritage stands as a primary need for the promotion of the DSM. However, this reform should be an opportunity to consider also additional exceptions and limitations that are crucial in a knowledge-based society and to reflect on the future design of an "opening clause" to address uses that are not yet covered by existing exceptions and limitations but are justified by important public interest rationales and fundamental rights such as freedom of expression and the right to information². Moreover, a true harmonisation of the DSM will only be achieved if all exceptions and limitations provided in past EU copyright instruments are declared mandatory and have thus to be implemented as such in national law. A recent study done for the EUIPO by CEIPI researchers involving an analysis of the copyright legislation in 28 Member States revealed that there are major uncertainties for consumers to know what is permitted or not with regard to exempted uses in copyright law, as

¹ This is the second in a series of position papers dedicated to the upcoming Digital Single Market Copyright reform. The first paper Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio (2016), *Opinion of the CEIPI on the European Commission's Copyright Reform Proposal, with a Focus on the Introduction of Neighbouring Rights for Press Publishers in EU Law*, CEIPI Research Paper No. 2016-01 is available at: <https://papers.ssrn.com/sol3/papers=2921334>. A slightly amended version was published under the title "The Introduction of a Neighbouring Right for Press Publisher at EU Level: the Unneeded (and Unwanted) Reform" in the *European Intellectual Property Review (EIPR)* 2017, pp. 202-210.

² As the Explanatory Memorandum to the directive Proposal admits, the Directive proposal will only have a "limited impact [...] on the freedom of expression and information, as recognised respectively by Articles 16 and 11 of the Charter, due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders".

“‘everyday’ uses of copyrighted works in the online world currently still lack a clear and straightforward answer as regards their legality”.³

- Given the uncertainties that researchers face in applying present exceptions and limitations to text and data mining (TDM), a new mandatory exception might drive innovation and bridge the gap with other jurisdictions. In particular, application to commercial and non-commercial uses and prohibition of contractual override should guarantee effective results, although limitations to technological blocking should be introduced as well by clearly spelling out that both Technological Protection Measures (TPMs) and network security and integrity measures should not undermine the effective application of the exception. Moreover, the TDM exception should not be limited to research organisations but extended to all those enjoying lawful access to underlying mined materials—as the right to read should be the right to mine—especially in order not to cripple research from start-ups and independent researchers.

- The new mandatory teaching exception does promote the DSM agenda by facilitating digital and cross-border teaching activities. The introduction of a voluntary scheme to limit the exception’s applicability—if an adequate licence is easily available on the market—would nonetheless work against harmonization, undermining positive externalities of the mandatory approach. As per the adequacy of the licence, this notion would be hard to determine and, thus, if loosely construed, undermine the new exception. Finally, the scope of the exception should be expanded in order to match with the teaching and research exception included in Directive 2001/29/EC. Any wording that would be diminishing the scope of the teaching limitations might have the opposite effect of forcing national legislatures which have implemented the provision of the InfoSoc Directive to modify their legislation in a restrictive manner, diminishing the permitted uses for teaching purposes and creating further uncertainties in the EU.

³ Christophe Geiger and Franciska Schönherr, *Frequently Asked Questions (FAQ) of Consumers in relation to Copyright, Summary Report* (A project commissioned by the European Union Intellectual Property Office, 2017), p. 8, available at:

<https://euiipo.europa.eu/ohimportal/en/web/observatory/news/-/action/view/3423769>; (noting that “[c]opyright law throughout the EU does not give unanimous answers to Consumers’ 15 Frequently Asked Questions. While international and EU law have approximated the different copyright traditions to a certain extent, a closer look reveals that divergences still prevail. These might relate to the fact that even in areas that have already been the subject of harmonization measures, Member States have often not implemented provisions of EU secondary legislation in a uniform way. Moreover, some key aspects of copyright law have not been harmonised so far. The result is the following: even if a few common basic principles can certainly be identified, the exceptions to these principles as well as their implementation vary significantly”, p. 6). The study lists exceptions and limitations to copyright as one of the areas of major divergence in national copyright law.

- The proposed reform emphasises the role of European cultural heritage in the DSM through the introduction of an exception for its preservation. The new exception expands previous voluntary exceptions to facilitate mass preservation projects and allow reproduction in any format and medium including format-shifting and digital copying. Possibly, beneficiaries should also include educational institutions. Again, the new exception should reach also objects not permanently in the collection of beneficiaries as this limitation might stifle collaboration efforts between Cultural Heritage Institutions (CHIs) to share artworks within the DSM. Finally, the exception should include a limitation to contractual as well as technological override.

I. Introduction

On 14 September 2016, the European Commission published a Proposal for a Directive on copyright in the Digital Single Market (“DSM Draft Directive”).⁴ While part of the proposal aims at “combatting copyright infringement and closing the value gap”,⁵ the upcoming copyright reform would also like to improve access to protected works across borders within the Digital Single Market (DSM). To this end, the DSM Draft Directive includes a set of new mandatory exceptions and limitations.⁶ This is certainly a welcome initiative as the optional list of exceptions and limitations included in the InfoSoc Directive failed to harmonise the EU legislative framework in this regard.⁷ In this opinion, CEIPI would like to review the most relevant provisions, draw attention to selected aspects of the reform, and consider room for improvement where necessary.⁸

⁴ See European Commission (14 September 2016), Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, 14 September 2016, COM(2016) 593 final, 2016/0280 (Text with EEA relevance). Please note that this opinion considers the draft proposal as issued by the Commission only. Proposed amendments from parliamentary Committees will not be directly discussed but might be mentioned. So far, only the Committee on the Internal Market and Consumer Protection (IMCO) approved an opinion. See Committee on the Internal Market and Consumer Protection (IMCO), Opinion for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 16 June 2017, PE 599.682v02-00, IMCO_AD(2017)599682. Also, the Culture and Education Committee (CULT) has approved its final opinion, which is still to be published. See Culture and Education Committee (CULT), Draft opinion on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 6 February 2017, PE 595.591v01-00, CULT_PA(2017)595591. Finally, the Committee on Legal Affairs (JURI) also released a draft opinion and will vote on its amendments later this year. See Committee on Legal Affairs (JURI), Draft opinion on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market, 10 March 2017, PE 601.094v01-00, JURI_PR(2017)601094.

⁵ Commission (2016), *supra* 4, Art. 11-13.

⁶ *Ibid.*, Art. 3-6, 7-9.

⁷ See Christophe Geiger and Franciska Schönherr (2014), ‘Limitations to Copyright in the Digital Age’, in Andrej Savin and Jan Trzaskowski (eds.), *Research Handbook on EU Internet Law*, Cheltenham, UK: Edward Elgar, pp. 110-142; Christophe Geiger and Franciska Schönherr (2012), ‘Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions’, in Tatiana-Eleni Synodinou (ed.), *Codification of European Copyright Law, Challenges and Perspectives*, Amsterdam, Netherlands: Kluwer Law International, pp. 133-167; Jonathan Griffiths, Christophe Geiger, Martin Senftleben, Raquel Xalabarder and Lionel Bently (2015), ‘Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn’, *EIPR*, Vol. 45, No. 1, pp. 93-101.

⁸ For critical comments on the proposal, see also European Copyright Society (2017), *General Opinion on the EU Copyright Reform Package*, 24 January 2017; Max Planck Institute for innovation and Competition, Position Statement on the Proposed Modernisation of European Copyright Rules, available

II. Mandatory Exceptions and Limitations

[1] The DSM Draft Directive would like to implement “measures to adapt exceptions and limitations to the digital and cross-border environment”.⁹ It does so by implementing a set of exceptions applying to text and data mining (TDM), digital teaching and preservation of cultural heritage. In the discussion leading to the DSM Draft Directive, other exceptions have been considered as possible candidates for the reform but finally—and hopefully only momentarily—discarded.¹⁰ In particular, the introduction of an open norm—or general exception—similar to US fair use has long been considered in EU legal scholarship and policy debate.¹¹ CEIPI itself has already endorsed in the past a policy option that would

guarantee legal certainty through a list of further harmonised or unified exceptions and limitations, but to combine it with a certain dose of *flexibility* of the EU legal framework, in order to ensure its capacity to adapt to a rapidly changing environment. This limited “opening” of the list

at: <http://www.ip.mpg.de/en/research/intellectual-property-and-competition-law/position-statement-modernization-of-european-copyright-rules.html>.

⁹ Commission (2016), *supra* 4, Title II. See also Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine and Sophie Valais (2017), *Exceptions and Limitations to Copyright*, Strasbourg, France: IRIS Plus, European Audiovisual Observatory, pp. 61-73.

¹⁰ For example, despite massive mobilization and a public consultation, it seems that freedom of panorama will not be part of the directive. See European Commission (2016), *Public consultation on the role of publishers in the copyright value chain and on the ‘panorama exception’*, 23 March 2016, available at: <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception>. Also, discussions surround the introduction of an exception for user-generated content. The DSM Draft Directive is silent on point but a UGC exception was proposed in the IMCO opinion and the CULT draft opinion, although the JURI Committee did not incorporate a UGC exception in its draft opinion. See IMCO, *supra* 4; CULT, *supra* 4, JURI, *supra* 4. See also Judith Blijden, ‘Keeping an eye on the fine print: the UGC exception and the JURI committee’, *COMMUNIA Association*, 15 June 2017, <http://www.communia-association.org/2017/06/15/keeping-eye-fine-print-ugc-exception-juri-committee>.

¹¹ See Martin Senftleben (2017), ‘The Perfect Match – Civil Law Judges and Open-Ended Fair Use Provisions’, *Am. U. Int’l L. Rev.*, Vol. 32, No. 4 (forthcoming); P. Bernt Hugenholtz (2016), Flexible Copyright: Can EU Author’s Rights Accommodate Fair Use?, in Irini Stamatoudi (ed.), *New Developments in EU and International Copyright Law*, Leiden, Netherlands: Kluwer Law International, pp. 417-433; Martin Senftleben (2014), ‘Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law’, in Graeme Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property*, Cheltenham, UK: Edward Elgar; Antony Dnes (2013), ‘Should the UK Move to a Fair-Use Copyright Exception’, *ICC*, Vol. 44, No. 4, pp. 418-444; Rob Van der Noll, Stef van Gompel, Lucie Guibault, Jarst Weda, Joost Poort, Ilan Akker and Kelly Breemen (2012), *Flexible Copyright: The Law and Economics of Introducing an Open Norm in the Netherlands*, SEO Economic Research Report N. 2012-60; Christophe Geiger (2008), ‘Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law’, *ICC*, Vol. 39, No. 2, pp. 178-197.

of exceptions and limitations could have possibly been based on the “three-step test”.¹²

An enumerated list of exceptions and limitations has shown little flexibility in adapting to evolving market and technological conditions, whereas an open fair use or fair dealing norm alone would be little predictable, increasing transaction costs and favouring economically stronger market players.¹³ An “opening clause” should address uses that are not yet covered by existing exceptions and limitations but are justified by important public interest rationales and fundamental rights such as freedom of expression and the right to information. A balanced approach—melding together the two options—might overcome the limitations of each of the two alternatives and boost the European DSM’s international competitiveness.

[2] The proposal does introduce a new approach to exceptions and limitations in EU law. Contrary to the general structure of Article 5 of the Directive 2001/29/EC¹⁴—which with the exception of temporary copies in Article 5(1) provides an optional list of exceptions and limitations that Member States are free to implement—the new exceptions and limitations would be mandatory. This is a welcome arrangement that promotes harmonization and, therefore, the DSM. However, in the past, CEIPI has already highlighted “the importance of declaring that exceptions and limitations justified by the public interest be mandatory.”¹⁵ Therefore,

¹² Christophe Geiger, Oleksandr Bulayenko, Théo Hassler, Elena Izyumenko, Franciska Schönherr and Xavier Seuba (2015), Reaction of CEIPI to The Resolution on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright in the Information Society Adopted by the European Parliament on the 9th July 2015, CEIPI Research Paper No. 2015-01, pp. 20-21, available at: <https://papers.ssrn.com/sol3/papers=2970507>. This paper was published with the title “The Resolution of the European Parliament of 9 July 2015: Paving the Way (finally) for a Copyright Reform in the European Union?” in: EIPR 2015, pp. 683-701. For a comprehensive analysis of the merit and legality of this approach, see Evangelia Loli, Copyright Exceptions and Limitations in the European Union: Exploring the Flexibilities, CEIPI Master thesis, Strasbourg September 2017.

¹³ See, e.g., P. Bernt Hugenholtz (2017), ‘Flexible Copyright. Can EU Author’s Right Accommodate Fair Use?’ in Ruth Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions*, Cambridge, UK: Cambridge University Press, pp. 275-291; Pamela Samuelson (2017), ‘Justifications for Copyright Limitations and Exceptions’, in Ruth Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions*, Cambridge, UK: Cambridge University Press, pp. 12-59; P. Bernt Hugenholtz and Martin Senftleben (2012), *Fair Use in Europe: in Search of Flexibilities*, Institute for Information Law Research Paper No. 2012-39, available at: <https://papers.ssrn.com/sol3/papers=2013239>.

¹⁴ See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2000 O.J. (L 167) 10-19, Art. 5.

¹⁵ Stéphanie Carre, Christophe Geiger, Jean Lapousterle, Franck Macrez, Adrien Bouvel, Théo Hassler, Xavier Seuba, Oleksandr Bulayenko, Franciska Schönherr and Marie Hemmerle-Zemp (2014), Response of the CEIPI to the Public Consultation of the European Commission on the Review of the European

the mandatory nature should be extended to all exceptions and limitations of the EU *acquis* in order to achieve true harmonisation and legal security for all players in the creative process, from authors to exploiters and users of copyrighted works.¹⁶ As CEIPI already pointed out, a unified and mandatory approach is especially crucial in the “digital environment as the internet involves uses that, most of the time, affect several copyright legislations, leading to a major insecurity regarding what is allowed.”¹⁷

[3.1] According to Article 6 of the DSM Draft Directive—a provision common to all three new exceptions—the three-step test would apply to all three new exceptions. In addition, technological protection measures (TPMs) anti-circumvention provisions would also apply to all new exceptions.

Article 5(5) and the first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exceptions and the limitation provided for under this Title.¹⁸

[3.2] It is worth noting that the application of anti-circumvention provisions might trample over users’ privileged uses. TPMs’ effects on exceptions and limitations have been highlighted by abundant literature.¹⁹ TPMs might limit or

Union Copyright Rules, CEIPI Research Paper No. 2014-01, p. 6, available at: <https://ssrn.com/abstract=2971029>. Christophe Geiger, Frank Macrez, Adrien Bouvel, Stéphanie Carre, Théo Hassler and Joanna Schmidt-Salewski (2009), ‘What Limitations to Copyright in the Information Society? A Comment on the European Commission’s Green Paper ‘Copyright in the Knowledge Economy’’, *IIC*, Vol. 40, pp. 412-433.

¹⁶ Christophe Geiger, *The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information / L’avenir du droit d’auteur en Europe : Vers un juste équilibre entre protection et accès à l’information*, Report for the Committee on Culture, Science and Education – Parliamentary Assembly, Council of Europe, Strasbourg, July 2009 (Revised and updated in October 2009), www.ceipi.edu (short version published in French in: (2009) *La Semaine Juridique*, Edition Générale, No. 48, pp. 50-57; extended version published in English in: (2010) *Intellectual Property Quarterly*, Vol. 14, No. 1, pp. 1-14).

¹⁷ Geiger, Bulayenko, Hassler, Izyumenko, Schönherr and Seuba (2015), *supra* 12, p. 17.

¹⁸ Commission (2016), *supra* 4, Art. 6.

¹⁹ See, e.g., Giancarlo Frosio (2011), *COMMUNIA Final Report on the Digital Public Domain*, report prepared for the European Commission on behalf of the COMMUNIA Network and the NEXA Center, pp. 99-103, 135-141 (discussing most of the relevant literature and major threats that technological protection measures pose for fair dealings, privileged and fair uses); Christophe Geiger (2008), ‘The Answer to the Machine should not be the Machine, Safeguarding the Private Copy Exception in the Digital Environment’, *EIPR*, Vol. 4, pp. 121-129; Séverine Dusollier (2003), ‘Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions’, in Eberhard Becker, Willms Buhse, Dirk Günnewig and Niels Rump (eds.), *Digital Rights Management. Technological, Economic, Legal and Political Aspects*, Berlin, Germany: Springer, pp. 462-478.

prevent altogether access to works for purposes that are not restricted by authors' rights or for uses that are actually privileged. Rightholders' obligations to make available the means to benefit from exception and limitations do not themselves limit liability for circumvention.²⁰ As Guibault et al noted, "for even if Article 6(4) creates an obligation to provide the means to exercise a limitation, this obligation is imposed on rights owners and does not give users any authority to perform act of circumvention themselves".²¹ Also, inconsistent implementations across national jurisdictions of measures to guarantee application of exceptions and limitations against TPMs' anti-circumvention provisions might effectively curtail harmonized enjoyment of the new mandatory exceptions, thus limiting DSM effectiveness.²² The DSM Draft Directive should plainly state that TPMs cannot prevent the enjoyment of the new mandatory exceptions and implement effective means for users to secure their removal.

III. Text and Data Mining

[1] According to Article 3 of the DSM Draft Directive, TDM would enjoy a specific mandatory exception. TDM refers to a research technique to collect information from large amounts of digital data through automated software tools. It works by (1) copying substantial quantities of materials—which are turned into a machine-readable format so that structured data can be extracted—(2) extracting the data, and (3) recombining it to identify patterns.²³ TDM is a ground breaking tool for research of all kind both for-profit and non-profit.²⁴ Some studies have estimated

²⁰ See Directive 2001/29/EC, *supra* 14, Art. 6(4). See also Common Position No. 48/2000 of 28 September 2000 adopted by the Council, with a view to adopting a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, 2000 O.J. (C 344) 1, 1 December 2000, p. 19 (noting that "Art. 6(1) protects against circumvention of all technological measures designed to prevent or restrict acts not authorized by the rightholder, regardless of whether the person performing the circumvention is a beneficiary of one of the exceptions provided for in Article 5").

²¹ Lucie Guibault et al (2007), *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, report prepared for the European Commission, DG Internal Market, ETD/2005/IM/D1/91.

²² For example, under the French law only some of the uses permitted under exceptions and limitations are protected to some extent against application of technological protection measures preventing users from taking advantage of them. See Art. L331-31 of the French Intellectual Property Code.

²³ See e.g., JISC (2012), *The Value and Benefit of Text Mining to UK Further and Higher Education. Digital Infrastructure*, available at: <http://bit.ly/jisc-textm>.

²⁴ See European Commission (2014), *Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining: Report from the Expert Group*, April 2014, p.

that it could create value in excess of hundreds of billions for Europe if data can be used more effectively.²⁵

[2] TDM usually involves some act of copying, which even in case of limited excerpt might infringe the right of reproduction.²⁶ Only TDM tools involving minimal copying of few words or crawling through data and processing each item separately could be operated without running into potential liability for copyright infringement.²⁷ Again, TDM might involve the reproduction, translation, adaptation, arrangement, and any other alteration of database protected by copyright.²⁸ Finally, TDM might infringe *sui generis* database rights, in particular the extraction—and to a minor extent the re-utilization—of substantial parts of a database.²⁹

[3] A TDM exception have been long under consideration in Europe.³⁰ As also highlighted in previous CEIPI opinions,³¹ a TDM exception should serve to bridge the

3. See also Irini Stamatoudi (2016), 'Text and Data Mining', in Irini Stamatoudi (ed.), *New Developments in EU and International Copyright Law*, Leiden, Netherlands: Kluwer Law International, pp. 252-282.

²⁵ See James Manyika et al (2011), *Big Data: The Next Frontier for Innovation, Competition, and Productivity*, San Francisco, USA: McKinsey Global Institute.

²⁶ See CJEU, C-5/08, Infopaq International A/S v. Danske Dagblades Forening (16 July 2009) ECLI:EU:C:2009:465, §§ 54-55 (finding that even an excerpt of 11 words might be protected). See also André Lucas, Henri-Jacques Lucas and Agnès Lucas-Schloetter (2012), *Traité de la propriété littéraire et artistique*, 4th edition, Paris, France: LexisNexis, pp. 349-353.

²⁷ See Commission (2016), *supra* 4, Recital 8 (stating that “[t]ext and data mining may also be carried out in relation to mere facts or data which are not protected by copyright and in such instances no authorisation would be required”). For avoidance of doubt, Recital 8 should mention that also works and other subject matter not protected by copyright or neighbouring rights can be freely mined.

²⁸ See Directive 1996/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77) 20, Art. 5(a-b). See also Stamatoudi (2016), *supra* 24, pp. 264-265.

²⁹ See Directive 1996/9/EC, *supra* 28, Arts. 2(a), 7(1) and 7(2)(b). See also CJEU, C-203/02, The British Horseracing Board Ltd and Others v. William Hill Organization Ltd (9 November 2004) (providing that the transfer of data from one medium to another and its integration into the new medium constitutes an act of extraction); Stamatoudi (2016), *supra* 12, p. 267 (noting that “although extraction is likely to take place on most occasions, this is not the case for re-utilization”).

³⁰ See, e.g., Thomas Margoni and Giulia Dore (2016), 'Why We Need a Text and Data Mining Exception (But it is Not Enough)', 1 April 2016, available at: <https://zenodo.org/record/248048#.WXdf2oiGNEY>; Christian Handke, Lucie Guibault and Joan-Josep Vallbé (2015), 'Is Europe Falling Behind in Data Mining? Copyright's Impact on Data Mining in Academic Research', in Brigit Schmidt and Milena Dobrova (eds.), *New Avenues for Electronic Publishing in the Age of Infinite Collections and Citizen Science: Scale, Openness and Trust*, Amsterdam, Netherlands: IOS Press, pp. 120-130; Michelle Brook, Peter Murray-Rust and Charles Oppenheim (2014), 'The Social, Political and Legal Aspects of Text and Data Mining (TDM)', *D-Lib Magazine*, Vol. 20, No. 11/12, § 4, <http://openaccess.city.ac.uk/4784>;

gap with other jurisdictions where apparently TDM would be beyond the reach of the copyright holders' exclusive rights.³² In the United States, for example, TDM either belongs to the ontological or the functional public domain.³³ Starting with *Baker v. Selden*, courts argued that protected subject matter can be used when it "must necessarily be used as an incident to" using unprotected materials.³⁴ In the U.S., *Baker's* reasoning has been applied to software reverse engineering.³⁵ Once applied to TDM, this caselaw would imply that in order to mine text and data—which are itself unprotected materials—a user might lawfully reproduce protected materials. In *Google Books*, more recently, TDM the entire corpus of human knowledge in order to create a relational database was found a transformative use, hence fair under § 107 of the US Copyright Act.³⁶

[4] *Mutatis mutandis*, similar arguments could be applied also to EU law. However, although TDM might be possibly covered by exceptions and limitations available under current EU copyright law, their application is uncertain. The mandatory exception for temporary acts of reproductions might apply to limited TDM techniques.³⁷ Recital 10 of the DSM Draft Directive itself clarifies that this exception

Jean-Paul Triaille, Jérôme de Meeûs d'Argenteuil and Amélie de Francquen (2014), *Study of the Legal Framework of Text and Data Mining (TDM)*, European Union, March 2014, pp. 96-118, available at:

http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf. Cf. Nils Dietrich, Lucie Guibault, Thomas Margoni, Krzysztof Siewicz, Gerald Spindler, and Andreas Wiebe, *Safe to Be Open: Study on the Protection of Research Data and Recommendations for Access and Usage*, Göttingen, Germany: Universitätsverlag Göttingen, available at: <http://eprints.gla.ac.uk/129335>. Such exceptions have been already introduced in some European countries or other jurisdictions. See, e.g., Copyright, Designs and Patents Act 1988, § 29A (UK); Copyright Act, Sec. 5, Art. 47-7 (Japan).

³¹ See Geiger, Bulayenko, Hassler, Izyumenko, Schönherr and Seuba (2015), *supra* 12, p. 24.

³² See Commission (2014), *supra* 24, pp. 12-13, 43. See also Handke, Guibault and Vallbé (2015), *supra* 30, pp. 120-130.

³³ See Frosio (2011), *supra* 19, pp. 65-68. Similar conclusions can be extended to Canada featuring a very inclusive fair dealing exception. See Michael Geist (2013), 'Fairness Found: How Canada Quietly Shifted from Fair Dealing to Fair Use', in Michael Geist (ed.), *The Copyright Pentology*, Ottawa, Canada: University of Ottawa Press, pp. 157-186.

³⁴ See *Baker v. Selden*, 101 U.S. 99, 104 (1880).

³⁵ See, e.g., Pamela Samuelson (2005), 'The Story of Baker v. Selden: Sharpening the Distinction between Authorship and Invention', in Rochelle Dreyfuss and Jane Ginsburg (eds.), *Intellectual Property Stories*, New York, USA: Foundation Press, pp. 159-193.

³⁶ See *Authors Guild v. Google*, 804 F.3d 202 (2nd Cir. 2015). See also *Authors Guild v. HathiTrust*, 755 F.3d 87 (2nd Cir. 2014).

³⁷ See Directive 2001/29/EC, *supra* 14, Art. 5(1). See also, for a commentary, Christophe Geiger and Franciska Schönherr, Irini Stamatoudi and Paul Torremans (2014), 'The Information Society Directive', in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary*, Cheltenham, UK: Edward Elgar, pp. 403-404 and 447-448 and Michel M. Walter and Silke von Lewinski (2010),

still applies but its application would be limited to TDM techniques which involve only the making of temporary reproductions transient or incidental³⁸ to an integral and essential part of a technological process which enables a lawful use with no independent economic significance.³⁹ Doubts have been repeatedly casted on whether all these requirements are fulfilled by reproductions done for TDM purposes, especially whether these reproductions are transient and have no independent economic relevance.⁴⁰ According to Stamatoudi, for example, available exceptions—including temporary acts of reproduction, scientific research, normal use of a database, and extraction of “insubstantial parts” from a database protected by the *sui generis* right—would hardly be fit for purpose.⁴¹

As a consequence—as also reported by the Impact Assessment—“researchers are faced with legal uncertainty with regard to whether and under which conditions they can carry out TDM on content they have lawful access to”.⁴² In addition, when researchers come to publish, they might find that they lack the right copyright permissions.⁴³ Publishers can put specific clauses in their licences that rule out mining, and gaining permission to mine content from various publishers can be hugely complex. The voluntary nature of the exceptions that might possibly apply to TDM further affects cross-border collaborations as researchers would be unaware—

‘Information Society Directive’, in Michel M. Walter and Silke von Lewinski (eds.), *European Copyright Law: A Commentary*, New York, USA: Oxford University Press, pp. 968-969 and 1024-1027.

³⁸ CJEU, C-360-13, Public Relations Consultants Association (5 June 2014), ECLI:EU:C:2014:1195, §§ 43 and 50 (noting that an act of reproduction is “incidental” “if it *neither exists independently of, nor has a purpose independent of, the technological process of which it forms part*” (emphasis added)).

³⁹ See Commission (2016), *supra* 4, Recital 10. The clarification of the application of Art. 5(1) at least to some TDM techniques might be rendered more prominent either in Recital 10 or by amending Recital 33 of Dir. 2001/29/EC, which has been frequently mentioned by the CJEU when interpreting Art. 5(1). See, e.g., See C-5/08, *supra* 26, § 63.

⁴⁰ See C-5/08, *supra* 26, § 64 (noting that an act is “transient” “only if its duration is limited to what is *necessary for the proper completion of the technological process* in question, it being understood that that *process must be automated so that it deletes that act automatically, without human intervention*, once its function of enabling the completion of such a process has come to an end”) (emphasis added). See also CJEU, C-360/13, Public Relations Consultants Association (5 June 2014), ECLI:EU:C:2014:1195, §§ 40 and 48.

⁴¹ Stamatoudi (2016), *supra* 24, p. 252. For an updated commentary of the application of exceptions and limitations to TDM also in the context of the proposed reform, see also Maria Lillà Montagnani and Giorgio Aime (2017), ‘Il text and data mining e il diritto d’autore’, *Annali Italiani di Diritto d’Autore*, Vol. 26 (forthcoming).

⁴² See European Commission (2016), Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD(2016) 301 final, PART 3/3, p. 94 (emphasis added).

⁴³ See Rita Morais, Julian Bauer and Lidia Borrell-Damian (2017), *Open Access: 2016-2016 EUA Survey Results*, June 2017, p. 27.

or face high transaction costs for clearance—of whether TDM would be lawful across all EU jurisdictions involved in the research collaboration. In sum, current research exceptions in the EU law are not fully adapted to TDM, diversity of licencing practices generates high transaction costs, and there is a fragmentation of rules in the single market.⁴⁴

[5] In May 2015, the EU Commission issued its Digital Single Market Strategy (DSMS), in which it announced steps to be taken “towards a connected digital single market” and plans to provide “greater legal certainty for the cross-border use of content for specific purposes (e.g., research, education, text and data mining, etc.) through harmonised exceptions”.⁴⁵ Following up on this plan, the DSM Draft Directive includes the following exception to copyright and database *sui generis* right:

Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.⁴⁶

The proposal provides a TDM exception to the right of reproduction of copyright protected subject matters and databases and the *sui generis* database extraction right. In addition, the TDM exception would apply to the new right over digital uses of press publication that the DSM Draft Directive has proposed.⁴⁷

[6.1] Several limitations would apply to the TDM exception. First, TDM exception’s beneficiaries are limited to research organizations,⁴⁸ meaning “any

⁴⁴ Ibid., p. 95.

⁴⁵ See European Commission (2015), Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final, 6 May 2015, § 2.4. Apparently, the Commission dropped previous plans to explore licencing arrangements to deal with TDM. See, e.g., European Commission (2012), Communication on Content in the Digital Single Market, COM(2012) 789 final, 18 December 2012, p. 4.

⁴⁶ Commission (2016), *supra* 4, Art. 3(1).

⁴⁷ Ibid., Art. 11(1). See also for a discussion new neighbouring right proposal, Geiger, Bulayenko and Frosio (2016), *supra* 1.

⁴⁸ The Impact Assessment does not assess the possibility of extending the exception to some other defined categories of beneficiaries. For example, using automated analytical techniques in journalistic research to their fullest extent may contribute to solving some of modern media troubles (e.g., costs optimization, “fake news” phenomenon). Furthermore, given the global nature of the modern economy, the Impact Assessment should have examined the impact of the proposed exception on EU’s

organisation the primary goal of which is to conduct scientific research or to conduct scientific research and provide educational services".⁴⁹ To qualify for the exception, research organizations must operate on a not-for-profit basis or by reinvesting all the profits in their scientific research, or pursuant to a public interest mission.⁵⁰ The Impact Statement acknowledged that "part of the research community has expressed the concern that the concept of public interest organization could be difficult to define and apply".⁵¹ According to Recital 11, a public interest mission might be "reflected through public funding or through provisions in national laws or public contracts".⁵² The DSM Draft Directive further limits the scope of the exceptions that does not apply to research institutions controlled by commercial undertakings.⁵³ Control could be exercised "because of structural situations such as their quality of shareholders or members".⁵⁴ In particular, it does exclude research organizations providing preferential access to the results of their research to commercial entities.⁵⁵

Much discussion regarding this proposal does concern whether the TDM exception's beneficiaries should not be limited to "research organisations". From a broader and more fundamental perspective, limiting beneficiaries would undermine a widespread assumption that the "right to read should be the right to mine".⁵⁶ From a practical market-based perspective, this policy choice might cripple opportunities for start-ups and individual researchers in this area.⁵⁷ Indeed, the policy choice of

competitive advantage in comparison to other top innovative economies enabling all undertakings to carry out text and data mining under fair use/fair dealing exception (e.g., USA, Canada, Israel). See Christophe Geiger, Oleksandr Bulayenko, Théo Hassler, Elena Izyumenko, Franciska Schönherr and Xavier Seuba (2015), 'Reaction of CEIPI to the Resolution on the Implementation of Directive 2001/29/EC on the Harmonisation of Copyright in the Information Society adopted by the European Parliament on the 9th July 2015', *EIPR*, Vol. 37, No. 11, pp. 683-701; Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2015-01, p. 24, available at: <https://ssrn.com/abstract=2970507>.

⁴⁹ Commission (2016), *supra* 4, Art. 2(1).

⁵⁰ *Ibid.*, Art. 2(1)(a-b).

⁵¹ Commission (2016), *supra* 42, p. 98.

⁵² *Ibid.*, Recital 11.

⁵³ *Ibid.*, Art. 2(1).

⁵⁴ *Ibid.*, Recital 11.

⁵⁵ *Ibid.*, Art. 2(1) and Recital 11.

⁵⁶ See Peter Murray-Rust, Jennifer Molloy and Diane Cabell (2014), 'Open Content Mining', in Samuel A. Moore (ed.), *Issues in Open Research Data*, London, UK: Ubiquity Press, p. 28; Handke, Guibault, and Vallbé (2015), *supra* 30, p. 2; IFLA (2013), Statement on Text and Data Mining, p. 2, available at https://www.ifla.org/files/assets/clm/statements/iflastatement_on_text_and_data_mining.pdf.

⁵⁷ See, e.g., EUA, CESAER, LERU and Liber (2017), Future-proofing European Research Excellence: A Statement from European Research Organisations on Copyright in the Digital Single Market, 10 January 2017, pp. 1-2 (strongly supporting the principle that "the right to read is the right to mine" meaning that having lawful access to content includes the right to mine that content); Bundesrat (2016), Beschluss 565/16, Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über das

excluding from the reach of the exception unaffiliated individuals and researchers—operating under the same terms as those organized in a qualifying research organization—is hardly understandable. Actually, the existing UK exception for text and data analysis includes also individual researchers as beneficiaries and any person with lawful access to a work.⁵⁸ In addition, the new reform package might result in a further bad trade-off for parties excluded from the application of the exception. Apparently, they might face higher transaction costs for running TDM research as they might have also to clear—in addition to traditional copyright and *sui generis* database right—the new neighbouring rights of press publishers that the DSM Draft Directive would like to introduce for online uses.⁵⁹ Basically, copying for TDM purposes of online news publications would trigger potential liability for infringement—and thus licencing obligations—also against press publishers for all those parties excluded from the proposed exception’s application.

Limited indirect application of the new exception to private parties is given by Recital 10 of the DSM Draft Directive clarifying that “[r]esearch organisations should also benefit from the exception when they engage into public-private partnerships”.⁶⁰ Apparently, the recital refers to TDM research carried out by private businesses within the framework of a collaboration with a research organization, unless the private entity controls the research organization according to Article 2(1). In any event, public-private partnerships might be a limited option for start-ups as they are “time intensive and nearly impossible to handle for small teams”.⁶¹

[6.2] Second, the exception allows only purpose-specific TDM, namely “for the purpose of scientific research”.⁶² Indeed, this scope is consequential to the policy choice of limiting the exception only to research institutions as narrowly defined by Article 2. However, the Impact Assessment does not provide any rationale for making lawful access purpose-specific. This approach disregards a large number of possible application of TDM that might now be construed—being excluded from the reach of the exception—as within the exclusive rights of the copyrightholders. In addition, this

Urheberrecht im digitalen Binnenmarkt, COM(2016) 593 final, Ratsdok 12254/16, § 22 (noting that the narrow scope of the EU TDM exception would put out of business many providers of data analysis in Europe) See also Martin Senftleben (2017), *EU Copyright Reform and Startups: Shedding Light on Potential Threats in the Political Black Box*, March 2017, pp. 5-9, available at: <http://www.innovatorsact.eu/wp-content/uploads/2017/03/Issues-Paper-Copyright-Directive-2.pdf>.

⁵⁸ See Copyright, Designs and Patents Act 1988, § 29A (UK).

⁵⁹ See Commission (2016), *supra* 4, Art. 11(1). See also Geiger, Bulayenko and Frosio (2016), *supra* 1.

⁶⁰ Commission (2016), *supra* 4, Recital 10.

⁶¹ Allied for Startups, Policy Paper, p. 2,

http://www.innovatorsact.eu/wp-content/uploads/2017/04/AFSOne PagerCopyright_0417.pdf.

⁶² Commission (2016), *supra* 4, Art. 3(1).

purpose-specific approach might raise subtle issues of applicability of the new exception within research organizations enjoying lawful access to a database. For example, if a public university has lawful access to a database under a “for educational purpose” licence, would it need to pay an additional licencing fee for a “scientific research” purpose? If this is the case, would this obligation contradict the prohibition of contractually overriding the TDM exception?⁶³ Given the scope of the new exception—and the “no-contractual-override” provision—the answer is probably not. Still, research institutions might find these possible legal uncertainties a limitation to the deployment of TDM research due to potential liability that might arise and related transaction costs that should be considered before running TDM research projects. Since the exception is already limited to research organisations, dropping restrictions to purpose-specific uses of lawfully accessed databases might avoid unwanted results.

[6.3] Third, the exception does apply to works or other subject-matter to which research organizations “have lawful access”. Preliminary, it is worth noting that the proposed reform does not define the notion of “lawful access”.⁶⁴ However, the existing exception ex Article 5(1) of Directive 2001/29/EC that might cover some TDM techniques involving temporary reproduction refers to “lawful use”, which has been defined by the Directive and unambiguously interpreted by the CJEU.⁶⁵ If “lawful access” is intended to mean what “lawful use” means, the reform should maintain the term already adopted in EU law in a provision already covering some TDM techniques.

This additional limitation would subject the proposed exception to private ordering. According to the European Copyright Society, “the exception can effectively be denied to certain users by a right holder who refuses to grant ‘lawful access’ to works or who grants such access on a conditional basis only”.⁶⁶ In addition, subjecting TDM to lawful access will make TDM research projects harder to run by raising related costs. Possibly, publishers might price TDM into their subscription fees, if only those with lawful access can performed TDM research. Subjecting TDM research to market access does discriminate research according to research organizations’ market power. Only few research organisations will be able to acquire licences for all databases that are relevant for a TDM research project.⁶⁷ This will make

⁶³ *Ibid.*, Art. 3(2).

⁶⁴ See Recital 9 and Art. 3(1) of the Directive Proposal.

⁶⁵ See Directive 2001/29/EC, *supra* 14, Recital 33 (“A use should be considered lawful where it is authorised by the rightholder or not restricted by law”). See also CJEU, C-403/08 and C-429/08, *Football Association Premier League and Others* (4 October 2011), ECLI:EU:C:2011:631, § 168; CJEU, C-302/10, *Order, Infopaq International* (17 January 2012), ECLI:EU:C:2012:16, § 42.

⁶⁶ European Copyright Society (2017), *supra* 8, p. 4.

⁶⁷ *Ibid.*

comprehensive TDM projects impossible to perform for the majority of research organizations, especially those from Member States with more limited access to funding. In turn, this shall spread the gap between richer and poorer research institutions and, most likely, increase the scientific and innovation divide between developed and less developed European countries. Overall, the quality and value of TDM research will be sub-optimal as budget considerations will constrict the scope of research. Negative externalities of this policy choice on overall global research outputs become even more substantial because those organizations—mainly private—with relevant market power that might run comprehensive TDM projects are excluded from the reach of the exception, which “should [at least] be extended to anybody who has lawful access”.⁶⁸

[6.4] Finally, a further limitation is provided by Article 3(3) and Recital 12 allowing academic publishers to introduce measures to protect the “security and integrity” of their network.

Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.⁶⁹

Commentators highlighted that this provision might allow rightholders to block access for researchers trying to conduct TDM.⁷⁰ However, Recital 12 spells out clearly that “those measures should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception”.⁷¹ For the avoidance of doubt, the same wording should be included in Article 3(3) also, rather than only referring to a limitation to measures exceeding their objective. A parallel can be made between these provisions and the safeguards put in place in the context of “traffic management” by telecom operators.⁷² According to the Telecoms Single Market Regulation, “traffic management measures” can be applied only in order to comply with EU law and public authorities bound by EU law, preserve the integrity and

⁶⁸ Commission (2016), *supra* 42, p. 98.

⁶⁹ Commission (2016), *supra* 4, Art. 3(3).

⁷⁰ See EUA, CESAER, LERU and Liber (2017), *supra* 57, p. 2.

⁷¹ Commission (2016), *supra* 4, Recital 12 (emphasis added).

⁷² Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, 2015 O.J. (L 310) 1-18, Art. 3(3).

security of the network, and prevent or mitigate network congestion.⁷³ Apparently, the scope of the DSM Draft Directive does focus on measures to prevent congestion as Recital 12 provides that the security and integrity measures should be allowed “in view of a potentially high number of access requests to and downloads of their works or other subject-matter”.⁷⁴ The application of these measures should be the result of commonly agreed best practices.⁷⁵

[7] Within these limitations, the TDM exception’s scope is very inclusive as it applies both to commercial and non-commercial uses and—very importantly—cannot be overridden by contract.

Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.⁷⁶

This inclusion would be extremely welcome and indeed necessary not to devoid the exception of any practical utility. As mentioned, publishers can contractually rule out mining in their licences, and transaction costs to obtain permission to mine content from multiple publishers might *de facto* make TDM projects unsustainable. Certainly, the proposal deserves praise for protecting TDM research from contractual enclosure. However, technological enclosure might cripple TDM research as well. Therefore, the proposal should make clear that the exception would also be protected from override by TPMs. In addition, a provision limiting contractual and technological override should be extended to any exceptions potentially covering TDM, including for example the TDM techniques covered by Article 5(1), Directive 2001/29/EC.

IV. Text and Data Mining

[1] Article 4 introduces an exception for “use of works and other subject-matter in digital and cross-border teaching activities”. The exception applies to the same exclusive rights as the TDM exception with the addition of the right to communication and making available to the public and the right of reproduction, alteration, and distribution of a computer program.

Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Articles 5(a)

⁷³ *Ibid.*, Art. 3(3)(a-c).

⁷⁴ Commission (2016), *supra* 4, Recital 12.

⁷⁵ *Ibid.*, Art. 3(4).

⁷⁶ *Ibid.*, Art. 3(2).

and 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EC and Article 11(1) of this Directive in order to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use: (a) takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff; (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.⁷⁷

The new exception is limited to (i) digital uses, (ii) illustration for teaching, (iii) non-commercial uses, (iv) uses taking place in an educational establishment or through a secure electronic network, which shall be deemed to occur only in the country of establishment.

The use of works and other subject-matter for the sole purpose of illustration for teaching through secure electronic networks undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.⁷⁸

Finally, the exception applies (v) as long as the source is acknowledged, unless impossible.

[2] With this provision, the Commission plans to make mandatory an exception closely resembling the optional teaching and research exception included in Directive 2001/29/EC. According to Article 5(3)(a), EU Member States may introduce an exception for "use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved".⁷⁹

As obvious from a comparison of the two exceptions, the proposal would enjoy a narrower scope than the teaching and research exception in Directive 2001/29/EC. The proposal would first restrict the exception to digital outputs. Second, it will also limit the exception to illustration for teaching purposes, rather than illustration for both teaching and scientific research. Both limitations might undermine the

⁷⁷ *Ibid.*, Art. 4(1).

⁷⁸ *Ibid.*, Art. 4(3).

⁷⁹ Directive 2001/29/EC, *supra* 14, Art. 5(3)(a).

effectiveness of the exception since it does not embrace the full range of materials which universities wish to use and teaching and research intertwine inseparably at most university and research organizations. Accordingly, some stakeholders have proposed to transpose the exception for education and research into the new DSM Directive as a mandatory exception,⁸⁰ which would be more coherent as in line with the past acquis. Moreover, a change in the scope of the limitations will penalize the Member states that have implemented the wording of the InfoSoc Directive in their national law and adapted their legislation accordingly, as they will have to modify again their legal framework for copyright in relation to teaching and research.

[3] As one possible major limitation to the mandatory nature of the new exception, the proposal provides that Member States can make the exception inapplicable if an adequate licence is easily available on the market.

Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific types of works or other subject-matter, to the extent that adequate licences authorising the acts described in paragraph 1 are easily available in the market.⁸¹

Supposedly, Member States could subject the mandatory exception to a voluntary opt out scheme, given that the necessary requirements are in place. Preliminary, it is worth noting that the introduction of a voluntary scheme to limit the scope of the mandatory exception would work against harmonization, undermining positive externalities of the mandatory approach. As the European Copyright Society noted “Art. 4(2) [. . .] runs contrary to the idea of a mandatory exception, and should therefore be deleted”.⁸² CEIPI is sympathetic to this conclusion and would support the deletion of Article 4(2). Obviously, this policy option does hinder, rather than promote, the DSM. In particular, cross-border collaboration of multiple teaching institutions in developing and offering online courses might suffer from a scattered applicability of the exception across the DSM.

Again, the proposal—in order to allow this limitation—would ask for adequate and easily available licences to be available. While the notion of “adequate” licence would be hard to determine and does not find clarification in the proposal, that of “easily available” might be construed through further specifications included in the DSM Draft Directive.

⁸⁰ See EUA, CESAER, LERU and Liber (2017), *supra* 57, p. 2.

⁸¹ Commission (2016), *supra* 4, Art. 4(2).

⁸² European Copyright Society (2017), *supra* 8, p. 4.

Member States availing themselves of the provision of the first subparagraph shall take the necessary measures to ensure appropriate availability and visibility of the licences authorising the acts described in paragraph 1 for educational establishments.

From this wording, it might be inferred that only if these measures ensuring “appropriate availability and visibility” are taken—thus making visible the licences—the requirement would be fulfilled and the exception inapplicable. Apparently, it might be argued that if Member States want to avail themselves of this limitation, they will bear the burden of making the adequate licences visible and, thus, easily available. If they do not do so, the exception should remain applicable. As per the adequacy of the licence, this seems a puzzle that might occupy scholars and courts for a while. Would a licence that is too costly be adequate? Would the notion be construed in absolute or relative terms, meaning that the licence should be adequate for the specific context within which the teaching organization does operate?

In any event, the proposal would allow Member States to ignore and by-pass this teaching exception through licensing schemes, thus subjecting the exception to private ordering. This might be a poor policy choice in terms of balancing of fundamental rights. As the European Copyright Society suggested, exceptions’ benefit “should not be dependent on the market decisions of copyright owners, particularly for exceptions grounded in fundamental rights or public interests like research and education”.⁸³ In theory, Article 4(2) of the DSM Draft Directive might undermine the exception for teaching activities directly by denial of licence, although it might be argued that if a licence is denied, an adequate licence would be unavailable, thus making the exception still applicable. Most likely, Article 4(2) might frustrate the teaching exception indirectly by establishing, for example, excessive and unfair licensing terms that cannot be met by the teaching institution. Here, the extent to which Article 4(2) might indirectly impair teaching activities will all depend on the construction of the notion of “adequate” licence. Should excessive and unfair licencing terms be considered inadequate? Moreover, what will amount to excessive and inadequate terms? Besides possible substantive answers to these questions, it is apparent that Article 4(2) would introduce legal uncertainty, defeating the very goal of a mandatory teaching exception that should remove those uncertainties—and related transaction costs—so that teaching activities might be performed smoothly and cheaply. In particular, as risk-adverse entities, non-commercial teaching establishments would err in applying the exception narrowly—or not applying it at all—due to the unclear scope of the notion of adequate licences available.⁸⁴

⁸³ Ibid.

⁸⁴ Ibid.

Apparently, the German experience with such a provision⁸⁵ shows that even highly professional “educational establishments” like university libraries can have difficulties applying such a rule.⁸⁶

[4] The last paragraph of Article 4 would provide for optional remuneration for the uses covered by the teaching exception:

Member States may provide for fair compensation for the harm incurred by the rightholders due to the use of their works or other subject-matter pursuant to paragraph 1.⁸⁷

CEIPI does not encounter fundamental issues with the optional remuneration provided for by Article 4(4), which would redeploy the same arrangement endorsed by Recital 38 of Directive 2001/29/EC. Actually, several European countries have in place a remuneration scheme for uses covered by the teaching exception, whereas others have implemented completely or largely unremunerated exceptions.⁸⁸ However, the proposal should restrain itself from using the wording “harm” and “compensation”—that might imply tort or extra-contractual liability—but rather refer to the term remuneration. As the use is pursuant to a privileged use, Article 4(4) supposedly remunerate creators’ contributions, rather than compensating them for infringement’s harm.

In *passim*, it might be noted that that optional remuneration schemes might create negative externalities in terms of harmonization, therefore contrasting with the goals of the DSM. In particular, countries implementing unremunerated exceptions might free ride on creators from other Member States, creating inconsistencies within the DSM. Therefore, making remuneration mandatory, as proposed within the ongoing parliamentary debate, might foster harmonization.⁸⁹ However, arguably, adding transaction costs to uses that might already be free of charge in a considerable number of Member States would burden and deter teaching activities there, rather than promoting them, especially for research institutions with

⁸⁵ See Urheberrechtsgesetz (UrhG), § 52a(4).

⁸⁶ See European Copyright Society (2017), *supra* 8, p. 4.

⁸⁷ Commission (2016), *supra* 4, Art. 4(4).

⁸⁸ See Christophe Geiger (2010), ‘Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law’, *Vanderbilt J. of Entert. & Tech. L.*, Vol. 12, No. 3, pp. 515-548. See also Christophe Geiger and Oleksandr Bulayenko (2017), ‘Scope and Enforcement Tools to Ensure Remuneration, General Report for the ALAI Congress 2015’, in Silke von Lewinski (ed.), *Remuneration for the Use of Works, Exclusivity vs. Other Approaches*, Berlin, Germany: De Gruyter, pp. 112-182.

⁸⁹ See Alex Tarkowski (2017), ‘CULT Committee Wants Educators to Pay for Content that they Now Use for Free’, *COMMUNIA Association*, 19 July 2007, <http://www.communia-association.org/2017/07/19/cult-committee-wants-educators-pay-content-now-use-free>.

limited market power. This is a complex policy conundrum. A possible solution might be to establish a mandatory remuneration regime flexible enough to take into account differences among research institutions—such as size, funding, turnaround, location, etc—and set up minimum—or just nominal—fees for some institutions and higher fees for others.

V. Preservation of Cultural Heritage

[1] Finally, the DSM Draft Directive would like to introduce a mandatory exception to promote the preservation of cultural heritage and cross-border cooperation by harmonizing different approaches in the Member States.⁹⁰ This exception should cover the same rights as the teaching exception, in particular the “right of reproduction in order to allow [. . .] acts of preservation” of the collections of cultural heritage institutions (CHIs).⁹¹

Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 11(1) of this Directive, permitting cultural heritage institutions, to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.⁹²

[2] Directive 2001/29/EC already provided an optional exception “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives” provided that there is no direct or indirect economic or commercial gain.⁹³ Similarly, the beneficiaries of the new exception are limited to cultural heritage institutions, namely “a public accessible

⁹⁰ Commission (2016), *supra* 4, Recital 19. See also European Commission (2005), Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions, “i2020: Digital Libraries”, COM(2005) 465 final, 30 September 2005 (noting that Member States do not take digital formats into account when implementing at the national level the voluntary digital preservation exception in the Directive 2001/29/EC); Frosio (2011), *supra* 19, Recommendation 10, p. 153 (the COMMUNIA Network recommending that Memory Institutions “must benefit from compulsory and harmonized exceptions and limitations that allow them to make their collections available online for non-commercial purposes”).

⁹¹ Commission (2016), *supra* 4, Recital 18.

⁹² *Ibid.*, Art. 5.

⁹³ Directive 2001/29/EC, *supra* 14, Art. 5(2)(c).

library or museum, an archive or audio heritage institution".⁹⁴ The exclusion of educational establishments from the scope of the new exception seems unjustified.

[3] The scope of the new exception does not completely overlap with the present optional exception, being narrower in some instances and broader in others. On one side, the new exception's purpose-specific focus on preservation—although a major step forward for its mandatory nature—would be narrower than the existing exception, which allows reproduction by public interest institutions for any purpose. In this respect, the reform does leave aside the thorny issue of reproductions for interlibrary loan purposes and—more generally—the *ad hoc* supply of articles and book chapters for private research purposes to users located too far away to visit the library or CHI in person. This is a critical provision to be include in the reform that would promote cross-border research in Europe.⁹⁵

[4.1] On the other side, the voluntary exception was narrowly implemented by Member States,⁹⁶ limiting the possibility to engage in mass preservation as the exception covers only "specific acts of reproduction". The new mandatory exception appears to enjoy a broader scope as dropping the mention to "specific acts of preservation" would apparently include large preservation projects.

[4.2] However, the proposal apparently only enables preservation of objects permanently in the collection, thus possibly limiting collaboration efforts between CHIs to share artworks. In particular, according to the DSM Draft Directive:

For the purposes of this Directive, works and other subject-matter should be considered to be permanently in the collection of a cultural heritage institution when copies are owned or permanently held by the cultural heritage institution, for example as a result of a transfer of ownership or licence agreements.⁹⁷

This provision might negatively affect cross-border preservation project. As highlighted by Libraries and CHIs, the proposal should instead clarify that institutions

⁹⁴ Commission (2016), *supra* 4, Art. 2(3).

⁹⁵ See EBLIDA, Public Libraries 2000, IFLA, Europeana and Liber (2017), Commission Proposal on Copyright in the Digital Single Market, Library and Cultural Heritage Institution Responses, p. 2, available at :

https://www.ifla.org/files/assets/clm/publications/copyright_proposals_-_library_and_chi_responses.pdf.

⁹⁶ See Blázquez, Cappello, Fontaine and Valais (2017), *supra* 9, p. 69.

⁹⁷ Commission (2016), *supra* 4, Recital 21.

working within a cross-border network could allow a partner institution to undertake preservation of works on its behalf.⁹⁸

[4.3] Again, the new mandatory exception would allow reproduction “in any format and medium”, substantially expanding the scope of the present voluntary exception. In particular, the Directive 2001/29/EC provided that its exception “should not cover uses made in the context of the on-line delivery of protected works or other subject-matter”.⁹⁹ Accordingly, some national implementations do not allow format-shifting or digital copying altogether. As one of the accompanying Recitals explains, the new exceptions would allow a very inclusive range of preservation activities:

Member States should therefore be required to provide for an exception to permit cultural heritage institutions to reproduce works and other subject-matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports. Such an exception should allow for the making of copies by the appropriate preservation tool, means or technology, in the required number and at any point in the life of a work or other subject-matter to the extent required in order to produce a copy for preservation purposes only.¹⁰⁰

[5] The exception is a welcome addition that follows in the footsteps of the CJEU decision in *Ulmer*.¹⁰¹ Actually, the Commission’s proposal seems in some respects to stretch further the scope of the CJEU decision. The CJEU noted that European law “must be interpreted to mean that it does not preclude Member States from granting to publicly accessible libraries [. . .] the right to digitise the works contained in their collections [. . .]”.¹⁰² Therefore, the CJEU expanded the reach of the exception to include format-shifting and digitization, as long as such act of reproduction must be necessary for the purpose of making those works available to users, by means of dedicated terminals,¹⁰³ in public libraries, for the purpose of research or private

⁹⁸ See EBLIDA et al (2017), *supra* 95, p. 1.

⁹⁹ Directive 2001/29/EC, *supra* 14, Recital 40.

¹⁰⁰ Commission (2016), *supra* 4, Recital 20.

¹⁰¹ See CJEU, C-117/13, Technische Universität Darmstadt v Eugen Ulmer KG (11 September 2014), ECLI:EU:C:2014:2196. See also Eleonora Rosati (2014), ‘Copyright exceptions and user rights in Case C-117/13 *Ulmer*: a couple of observations’, *IPKat*, 20 September 2014, [http://ipkitten.blogspot.fr/2014/09/copy right-exceptions-and-user-rights-in.html](http://ipkitten.blogspot.fr/2014/09/copy-right-exceptions-and-user-rights-in.html).

¹⁰² C-117/13, *supra* 101, § 49.

¹⁰³ Stakeholders have mentioned that the reference to “dedicated terminals” in Directive 2001/29/EC is outdated and the reform should deal with the matter. The reform should consider allowing libraries

study.¹⁰⁴ However, the ECJ recognized this right provided that “specific acts of reproduction” are involved. Therefore, the public library may not digitize their entire collections.¹⁰⁵ Also, providing that the exception applies only to copies permanently in the CHIs’ collections, the proposal apparently follows the CJEU stating that “the number of copies of each work made available to users by dedicated terminals [cannot be] greater than that which those libraries have acquired in analogue format”.¹⁰⁶ Finally, the new mandatory exception does not attach digitization to any obligation of remuneration, while the CJEU apparently does by noting: “although [. . .] the digitisation of the work is not, as such, coupled with an obligation to provide compensation, the subsequent making available of that work in digital format, on dedicated terminals, gives rise to a duty to make payment of adequate remuneration”.¹⁰⁷

[6] The exception does not include a limitation to contractual override. This is an oversight that should be redressed. It is worth reminding—borrowing the words of previous CEIPI opinions—that the provision that exercise of exceptions and limitations should not be waived by means of contracts is “crucial to ensure that the balance of interests democratically decided by policy-makers is not unilaterally amended by stronger market actors”.¹⁰⁸ Also, technological override—through TPMs—should be specifically limited regardless of anti-circumvention provisions as mentioned discussing previous exceptions.

and CHIs to provide users on-the-premises access to their digitized collection via their own devices. See EBLIDA et al (2017), *supra* 95, p. 2.

¹⁰⁴ C-117/13, *supra* 101, § 46. At the time of the release of the DSM Draft Directive, the issue of e-lending—and whether the Rental and Lending Directive exception in Art. 6(1) would cover it—was under review before the ECJ. Therefore, the Commission decided not to include e-lending in the proposed reform. Finally, the CJEU decided that lending “covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user”. See CJEU, C174/15, *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (10 November 2016), ECLI:EU:C:2016:856, § 54.

¹⁰⁵ *Ibid.*, §§ 44-45.

¹⁰⁶ *Ibid.*, § 48.

¹⁰⁷ *Ibid.*

¹⁰⁸ Geiger, Bulayenko, Hassler, Izyumenko, Schönherr and Seuba (2015), *supra* 12, p. 17.

VI. Conclusion

The DSM Draft Directive does envision, *inter alia*, a number of synergic actions to promote European cultural development by facilitating preservation of European cultural heritage, teaching, and research in the upcoming DSM. The full implementations of these actions—by expanding them even further according to the suggestions included in this opinion—would be critical to European innovation and cultural unification. Aptly, public interest and access to European cultural heritage in the DSM represent a critical focus of the upcoming copyright reform. CEIPI urges the relevant institutions not to depart from this agenda in the path leading to final implementation, rather strengthen it as far as possible, promoting first the interests of European authors, researchers, teachers, students and users broadly, and paving the way for Europe’s future generations of innovators and artists.