

EU copyright, quo vadis ?

Conference of the European Copyright Society



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INTRODUCTION

A Note on the EU Copyright Law

- **Copyright objectives:** incentivize creativity and protect creators, *in order to secure broad access to copyrighted works for citizens and enhance cultural diversity* (the social function of copyright law); **protection and access are two sides of the same coin and need to be secured!**
- **Exceptions and limitations** ensure the dissemination of knowledge and create free space for future creativity and research and are thus key to the balance within EU copyright legislation;
- Many of them incorporate core values of the EU such as **freedom of expression, freedom of information and freedom of art and science** located at the top of the hierarchy of norms thus binding for EU legislature and judiciary (Since the Lisbon Treaty 2007 - “the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...] shall have the same legal value as the Treaties”); thus, obligation of the EU to secure these values in secondary legislation.



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INTRODUCTION

A Note on the EU Copyright Reform

- **Objectives of the EU Copyright Reform:**
 - “**Better access to digital content and a modern, more European copyright framework is needed**”.
 - “Immediate action is therefore required to break down barriers to **cross-border online activity** including differences in contract and copyright law between Member States”
(Communication from the Commission, *Digital Single Market Strategy for Europe*, 6 May 2015, COM(2015) 192 final, pp 4 and 6)
- With regard to TDM, Directive proposal of 14 Sept. 2016 underlines that it “***allow researchers to process large amounts of information to gain new knowledge and discover new trends. Whilst text and data mining technologies are prevalent across the digital economy, there is widespread acknowledgment that text and data mining can in particular benefit the research community and in so doing encourage innovation***” (Recital 8).

INTELLECTUAL PROPERTY PROTECTION AND TDM

One of this urgent need for adaptation of the limitations is TDM: in the analog world, not an issue: not covered by intellectual property rights

Facts and data, as such, **are not protected** by copyright.

However, in the digital world, some TDM acts and techniques are nevertheless IP-relevant: modern research tools allow to search large set of data and protected work . This is a major improvement for research and innovation and thus crucial for our *European knowledge economy!*

TDM may involve **reproductions and extractions** of and/or from:

- Works protected by **copyright**
- Subject matter protected by **neighbouring rights**
- **Databases** protected by copyright and sui generis database rights

It also can further require the ability to **communicate** TDM files and share them with a community of researchers.

EXISTING COPYRIGHT EXCEPTIONS AND LIMITATIONS AND TDM

- Mandatory exception for **temporary acts of reproduction** (Article 5(1) of the InfoSoc Directive)
- Voluntary **research exception** (Article 5(3)(a) of the InfoSoc Directive and Articles 6(2)(b) and 9(b) of the Databases Directive)
- **“Normal use” of databases’** contents by the lawful user (Article 6(1) of the Databases Directive)
- **Extraction and/or re-utilization of insubstantial parts** of databases’ content (Article 8(1) of the Databases Directive)
- Voluntary **private copying** exception (Article 5(2)(b) of the InfoSoc Directive)

Legal uncertainty with regard to the TDM acts and techniques covered by the existing exceptions and limitations and unharmonised legal framework;

Possible solutions, creation of:

- **special TDM exception** and/or
- **“opening clause”** exception



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THE TDM LIMITATION IN THE MEMBER STATES AND THE EU

- Some of the Member States adopted a special exception for TDM (e.g.:
 - **UK** (Article 29A of the Copyright, Designs and Patents Act)
 - **France** (Articles L122-5, 10 and Article L342-3, 5 of the Intellectual Property Code)
 - **Estonia** (Article 19(3¹) of the Estonian Copyright Act)
 - **Germany** (Article 60d of the German Law on Copyright and Related Rights)
- Legislative discussions about introduction of the TDM exception in other Member States.
- Problem: already adopted national TDM exceptions are of very different scope, **fragmenting the Digital Single Market and complicating cross-border research cooperation**

THE COMMISSION'S PROPOSAL

Legal characteristics of the TDM exception

Art 3. Text and data mining (Draft Proposal 14.9.2016)

1. 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.

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

3. 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.

4. Member States shall encourage rightholders and research organisations to define commonly-agreed best practices concerning the application of the measures referred to in paragraph 3.



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THE COMMISSION'S PROPOSAL

Legal characteristics of the TDM exception

- **Mandatory character** (all the Member States have to implement it)
- Absolute **protection from contractual override**:
 - “Any contractual provision contrary to the exception [...] shall be unenforceable”
- **Some protection from technological override**:
 - “measures to ensure the security and integrity of the networks and databases [...] shall not go beyond what is necessary to achieve that objectives”

THE COMMISSION'S PROPOSAL

Scope of the TDM exception

- Permitted acts: **reproductions** of works and **extractions** from databases for carrying out TDM
- Beneficiaries: **research organisations** acting “either on a **not for profit** basis or in the context of a **public-interest** mission recognised by the State” (recital 11 of the Proposal). Not easy to apply!
- *Art. 2 (1) ‘research organisation’ means a university, a research institute or any other organisation the primary goal of which is to conduct scientific research or to conduct scientific research and provide educational services:*
 - (a) on a non-for-profit basis or by reinvesting all the profits in its scientific research; or
 - (b) pursuant to a public interest mission recognised by a Member State
- Conditions: beneficiaries should have “**lawful access for the purposes of scientific research**”

THE COMMISSION'S PROPOSAL

Scope of the TDM exception

Problem 1: **The scope is too narrow!**

- The TDM limitation **will not help individual researchers, journalists, innovation-driving start-ups and other actors** of the innovation society other than research organisations.
 - What about public-private partnerships? (recital 10: “Research organisations should also benefit from the exception when they engage into public-private partnerships”, *but how would this work?*)
 - Beneficiaries: **extension needed of the circle of the limitation’s beneficiaries** (Regretfully, application of the TDM limitation to actors other than research organisations was not examined by Commission’s Impact Assessment).
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THE COMMISSION'S PROPOSAL

Scope of the TDM exception

Solution: Extending the scope of the limitation and its beneficiaries:

- TDM needs to be broadly allowed and secured to foster the knowledge economy. Vital to create a good innovation environment and not to enter into the uncertainties of licensing agreements
- Will help bridging the regulatory gap with other innovation-driven jurisdictions (USA, Canada, Japan, Israel);
- Include a right to equitable remuneration is provided by a professional, commercial « Text and Data mining » service?

THE COMMISSION'S PROPOSAL

Scope of the TDM exception

Problem 2: The condition of “lawful access for the purpose of scientific research is unclear and could endanger the exception

- What does it mean? Seems to come from the French exception, allowing acts of reproduction only from “lawful sources” (materials lawfully made available with the consent of the rightholders), not present in Germany or Estonia.
- Legal insecurity: Not clear what sources are lawful (can be applied restrictively, leaving out many researches, for example on the internet); lawful access for education does not necessarily cover lawful access for research etc
- Applying the exception only to works to which the research organisations have “lawful access” subjects TDM research to **private ordering**; ECS (2017, p. 4): “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”

POSSIBLE IMPROVEMENTS TO THE PROPOSAL (4)

- **Extension of the protection against contractual and technological override to:**
 - **works and subject matter not protected** by copyright or neighbouring rights (e.g., by amendment of Article 3(3) of the Directive Proposal);
 - **other TDM-relevant exceptions** (e.g., temporary reproduction Article 5(1) InfoSoc Directive);



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THE COMMISSION'S PROPOSAL

Scope of the TDM exception

Proposal by the Presidency of the Council of the EU, 17 May 2018, Interinstitutional File: 2016/0280 (COD)

Article 3, Text and data mining for the purposes of scientific research

1. 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 and cultural heritage institutions** 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.

1a. Copies of works or other subject-matter made in compliance with paragraph 1 shall be **stored with an appropriate level of security and not be retained for longer than necessary for achieving the purposes of scientific research.**

Article 3a, Optional exception or limitation for text and data mining

1. Without prejudice to Article 3 of this Directive Member States **may** provide for an exception or a limitation 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 temporary reproductions and extractions of lawfully accessible works and other subject-matter that form a part of the process of text and data mining.**

2. The exception or limitation provided for in paragraph 1 shall apply provided that the use of works and other subject matter referred to therein **has not been expressly reserved by their rightholders including by technical means.**

THE COMMISSION'S PROPOSAL Scope of the TDM exception

***Proposal by the Presidency of the Council of the EU, 17 May 2018,
Interinstitutional File: 2016/0280 (COD), A brief evaluation:***

- Broadening of the TDM exception for research organisation to cultural heritage institutions (**positive**)
- Storage for longer than necessary for achieving the purposes of scientific research, meaning obligation to delete (introduces insecurity and uncertainty, **negative**)
- Additional possibility to introduce TDM exception for temporary reproductions and extractions of lawfully accessible works (**positive** in principle, but should be mandatory; no good experiences with optional limitations)
- Additional condition: Primacy of technical protection measures over the exception (**negative**)

“OPENING CLAUSE” Limitation

- **Future perspective:** Need to reflect further on the design and implementation of an open-ended flexibility clause in the EU
- Possibility: The “**Three-Step Test**”, considered as an “opening” norm in the EU aquis (debated)
- “**Opening clause**”: combining flexibility with an exemplary catalogue of limitations, on the model of the **Article 5 of the European Copyright Code (2010)**
- **Several Advantages:**
 - adaptability to the constantly evolving digital environment
 - fundamental rights balancing
 - more security to rightholders than the US-style fair use

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