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Text and data mining – New Interpretative Framework

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2019 © DSM dir.: two text & data mining (TDM) exceptions

For research purposes (art. 3)

- Available to **research organisations and cultural heritage institutions**
 - non-for-profit
 - Lawful access



Contracts cannot override the exception (art. 7(1))



TPM can override the exception



Mandatory exception

For other beneficiaries (art. 4)

- Available to **anyone** for any purpose
- Lawful access



the use of works/other subject matter has not been expressly reserved by their rightholders (including by machine readable means)



Contracts can override the exception

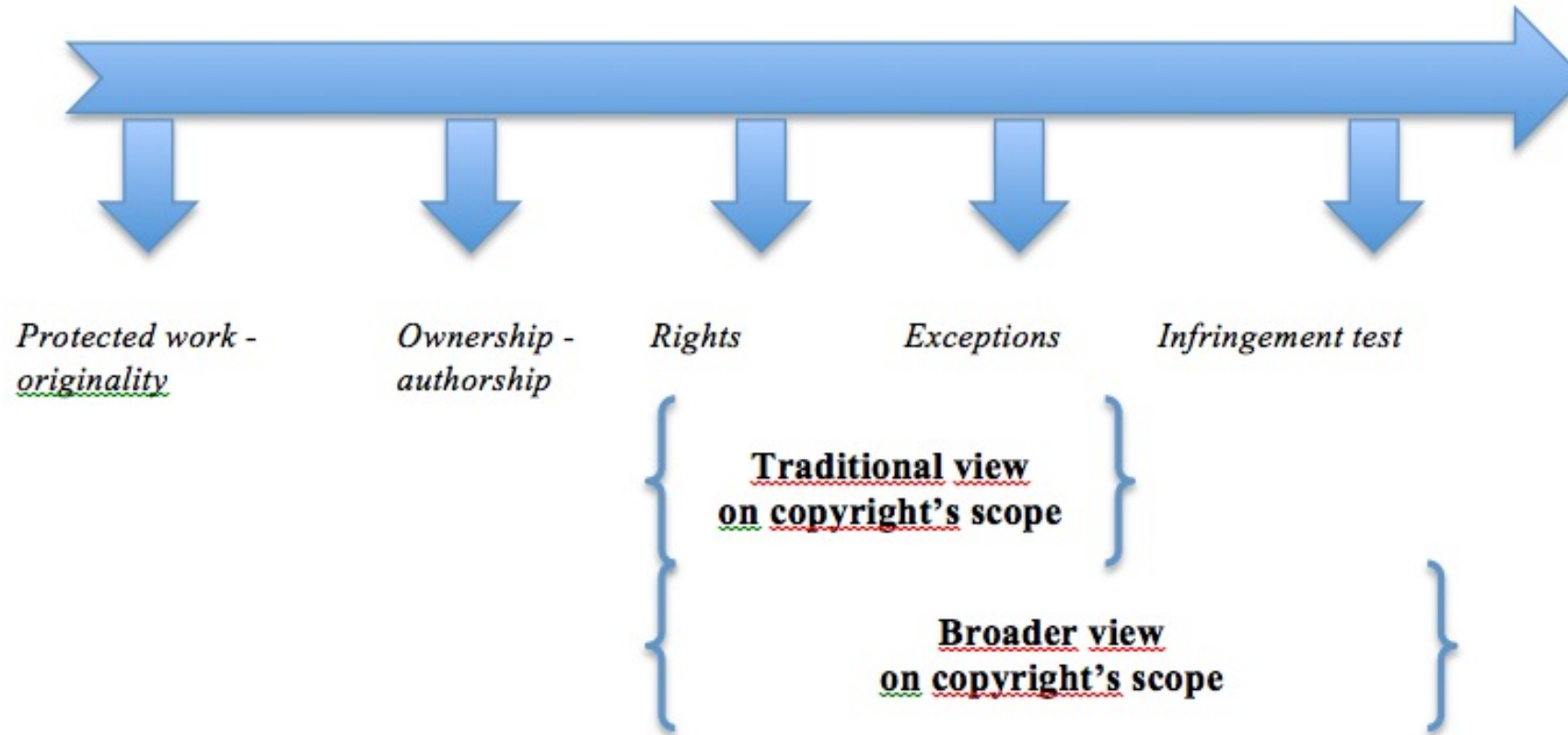


TPM can override the exception



Mandatory exception

The scope of © protection: it is determined through the infringement test (not only the scope of rights and exceptions)



Rethinking the infringement test for reproduction: a purposive view

- Infringement test: requires i) substantial similarity + ii) copying (presumed if access is proven)
- Purposive reading of what is copying: requirement to ‘use the work *as a work*’ >< in the case of TDM = ‘use of a work *as data*’
 - See trademark infringement test: ‘use as a TM’
 - Old standard in case law: no infringement if TM used in a non-branding way
 - But still works as a filter for technical uses (ex. keyword sale)
 - © : ‘use *as a work*’: nexus for a communication between the author and a public
 - Not in case of technical copies
 - Not in the case the work/portion of the work cannot be perceived by the audience (criterion of CJEU in *Pelham*: no reproduction if “unrecognizable to the ear”), etc.

Thanks for your attention

Additional references:

- R. Ducato & A. Strowel, *Ensuring Text and Data Mining: Remaining Issues With the EU Copyright Exceptions and Possible Ways Out*, *European Intellectual Property Review*, 2021, p. 322-337
- R. Ducato & A. Strowel, *Limitations to Text and Data Mining and Consumer Empowerment: Making the Case for a Right to “Machine Legibility”*, *IIC*, 2019, Vol. 50/6, p. 649-684
- A. Strowel, *Big data and data appropriation in the EU*, in T. Aplin (ed.), *Research Handbook on Intellectual Property and Digital technologies*, Edward Elgar, 2020, p. 107-134