

The Exception(s) for Text and Data Mining (TDM) in the Directive on Copyright in the Digital Single Market

“Copyright in the Digital Single Market, Analysis and Implementation of the New Directive”

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Christophe Geiger

Professor of Law and Director of the Research Department of the Centre for International Intellectual Property Studies (CEIPI), University of Strasbourg

Affiliated Senior Researcher, Max Planck Institute for Innovation and Competition (Munich);

Spangenberg Fellow at the Spangenberg Center for Law, Technology & the Arts, Case Western Reserve University School of Law (US)



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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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A Note on the EU Copyright Law

Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society established a limited list of **optional exceptions and limitations**, only Article 5(1) is mandatory; Directive 96/9/EC of 11 March 1996 on the legal protection of databases provides for closed list of optional exceptions (Articles 6(2) and 9)

- Consequence: There is **no harmonisation**; Exclusive rights are defined in **broad terms** and adapt relatively easily to social, economic and technological changes.

Limitations and exceptions are defined **in a closed list**. In most countries, they tend to be interpreted restrictively, even if the CJEU using fundamental rights has increasingly tried to give some room to manoeuvre.

Result: - limited flexibility on the limitations side,
- **no general provision allowing a “fair use”** to address new uses such as Text and Data mining

Unsatisfying situation - Green Paper of the Commission of the European Communities on “Copyright in the Knowledge Economy”, Brussels, 16 July 2008, COM (2008) 466/3: “Exceptions and limitations ensure the dissemination of knowledge within copyright law and **are the key to the balance of Community legislation**”.



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A Note on EU Copyright Law

➤ *In addition*, Article 6 InfoSoc Directive:

Legal protection for technical measures (TPM) against circumvention

Problem: What to do when a TPM conflicts with an exception?

TPMs are “blind” and can not recognize if a use is legitimate or not

Solution of the Directive:

Article 6(4): “In the absence of *voluntary* measures taken by rightholders, [...] Member States **shall** take appropriate measures to ensure” availability of certain exceptions, but only **may** take such measures in respect to others (e.g. private copy exception). Therefore, some exceptions are not guaranteed.

And: *possibility of derogating from the exceptions and limitations by contract in an “access on demand” context, also in relation to databases (Article 6(4) para. 4)*

Consequence: **balance of copyright law can often be ruled out by contracts and TPMs**



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A Note on the EU Copyright Reform

- **Objectives of the EU Copyright Reform:**

Jean-Claude Juncker – A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change (July 2014): Priority n°2: A Connected Digital Single Market

- “**Better access to digital content and a modern, more European copyright framework is needed**”.
- Need for “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” (Communication from the Commission, *Digital Single Market Strategy for Europe*, 6 May 2015, COM(2015) 192 final, par. 2.4)
- - With regard to TDM, Directive proposal of 14 Sept. 2016 underlined that new technologies “***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). Similar wording in Directive of 17 April 2019 (Recital 8)



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A Note on the EU Copyright Reform

- What is TDM? Defined in the new directive of 17 April 2019, Art. 2.2

*“Text and data mining’ means any **automated** analytical technique **aimed at analysing text and data in digital form** in order to generate information which includes but is not limited to patterns, trends and correlations”;*

Crucial for researchers (automated key word search), but also for journalists (ex « Panama Papers ») or Start-ups developing machine learning and artificial intelligence, as automated data search is needed to « feed » the AI algorithm.

Very high on the policy agenda, e.g.

Communication from the Commission on Artificial Intelligence for Europe, 25.4.2018
COM(2018) 237 final

“The European Union (EU) should have a **coordinated approach** to make the most of the opportunities offered by AI and to address the new challenges that it brings. **The EU can lead the way in developing and using AI for good and for all**, building on its values and its strengths. It can capitalise on:

- **world-class researchers, labs and startups**. The EU is also strong in **robotics** and has **world-leading industry**, notably in the transport, healthcare and manufacturing sectors that should be at the forefront of AI adoption;
- the **Digital Single Market** (...)



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INTELLECTUAL PROPERTY PROTECTION AND TDM

One of these urgent needs for adaptation of the limitations is **Text and Data Mining**: in the analog world, not an issue: not covered by intellectual property rights

Facts and data, as such, **are not protected** by copyright. Reading and searching is not covered by exclusive right.

However, in the digital world, some TDM acts and techniques are nevertheless IP-relevant: modern research tools allow to search large sets of data and protected works. 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.



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PREVIOUSLY 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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PREVIOUSLY EXISTING TDM EXCEPTIONS IN THE MEMBER STATES

- Some of the Member States adopted a special exception for TDM before the adoption of the CDSM Directive (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 were of very different scope, **fragmenting the Digital Single Market and complicating cross-border research cooperation**

THE HISTORY OF THE INTRODUCTION OF TDM EXCEPTION(S) IN EU COPYRIGHT LAW

Different subsequent steps:

- **European Commission** Proposal for a Directive on copyright in the Digital Single Market, 14 September, COM (2016), 593 final (“**Draft Directive Proposal 14.9.2016**”);
- Proposal by the Presidency of the **Council** of the EU, **17 May 2018**, Interinstitutional File: 2016/0280 (COD);
- **European Parliament**, Copyright in the Digital Single Market, **Amendments** adopted by the European Parliament on **12 September 2018** on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), P8_TA-PROV(2018)0337 (Parliament’s Amendments); *based on the Report of the JURI Committee on Legal Affairs (JURI) of the European Parliament on 20 June 2018.*
- **Directive 2019/790** of the European Parliament and of the Council of **17 April 2019** on copyright and related rights in the Digital Single Market, OJEU 17.5.2019, L 130/92.

THE INITIAL COMMISSION'S PROPOSAL

Legal characteristics of the TDM exception

FIRST STEP: (Draft Proposal 14.9.2016)

Art 3. Text and data mining

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”



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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 Assessment of the Directive proposal

- Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko (2018), *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market - Legal Aspects*, In-depth analysis for the European Parliament's Committee on Legal Affairs: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IDAN_POL_IDA\(2018\)604941_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IDAN_POL_IDA(2018)604941_EN.pdf); CEIPI Research Paper no. 2018-02: <https://ssrn.com/abstract=3160586>;
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- Published as:
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THE COMMISSION'S PROPOSAL

Scope of the TDM exception

Problem 1: The scope was 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 ASSESSMENT OF THE COMMISSION'S PROPOSAL

Scope of the TDM exception

Solution proposed: 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** (e.g., failure of the stakeholders' dialogue brokered by the Commission, Licences for Europe, TDM Working Group (WG4));
- Will help bridging the regulatory gap with other innovation-driven jurisdictions (USA, Canada, Japan, Israel);
- Include a right to equitable remuneration when provided by a professional, commercial "Text and Data mining" service?



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THE ASSESSMENT OF THE COMMISSION'S PROPOSAL

Scope of the TDM exception

Extending the scope of the limitation and its beneficiaries :

Steps in this direction by the EP and the Council:

- Extension of circle of the beneficiaries of the TDM limitation to **cultural heritage institutions** (Article 3(4) and Recitals 8, 11a, 11b and 11c Council May 2018), as well as to **educational establishments** (Article 3(1) and Recital 10 of EP Sept. 2018);
- Extension of the scope of the limitation to **storing of text and data sets processed for TDM** (Article 3(1a) of Council May 2018 and EP Sept. 2018)



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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 “the purpose of scientific 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”



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FURTHER PROPOSED IMPROVEMENTS TO THE PROPOSAL

- **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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PROPOSALS OF THE COUNCIL AND THE EP

Optional Additional TDM Limitation (1)

An new additional exception was introduced by Council and European Parliament

“this Directive should enable the Member States to provide under certain conditions for an exception or limitation for temporary reproductions and extractions of works and other subject-matter, insofar as these form a part of the text and data mining process and the copies made are not kept beyond that process. **This optional exception or limitation** should only apply when the work or other subject-matter is accessed lawfully by the beneficiary, including when it has been made available to the public online [...]” (Recital 13a of the Council May 2018)

“Without prejudice to Article 3 [on mandatory TDM limitation] of this Directive, **Member States may provide for an exception or a limitation** [...] for reproductions and extractions of lawfully accessible works and other subject-matter that form a part of the process of text and data mining, ***provided that the use of works and other subject matter referred to therein has not been expressly reserved by their rightholders, including by machine readable means.***” (Article 3a of the EP Sept. 2018 (Article 3a of the Council May 2018 contains a similar wording))



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PROPOSALS OF THE COUNCIL AND THE EP Optional Additional TDM Limitation (2)

Possibility for Member States to introduce a TDM limitation going further than the scope of the mandatory limitation defined by the Directive Proposal (Article 3a and Recital 13a of Council May 2018 and of EP Sept. 2018)

(positive step in principle, but should be mandatory; no good experiences with optional limitations)

Under this optional, additional TDM limitation, rightholders will have the right to reserve uses under the limitation (“opt out”), including through technical protection measures over the exception
(negative; the purpose of introducing the exceptions risks to be undermined)



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FINAL TEXT ADOPTED BY THE DIRECTIVE OF 17 APRIL 2019

Introduction of two mandatory exceptions for TDM

Art 3 Text and data mining for the purposes of scientific research

Art 4 Exception or limitation for text and data mining

- Introduction of a common provision for all the new exceptions regulating the relationship with contracts and TPM

Art. 7 Common provisions



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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 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by **research organisations and cultural heritage institutions** in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have **lawful access**.
2. Copies of works or other subject matter made in compliance with paragraph 1 **shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.**
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, research organisations and cultural heritage institutions to **define commonly agreed best practices** concerning the application of the obligation and of the measures referred to in paragraphs 2 and 3 respectively.



Art. 3 analysed

- Beneficiaries:

1) research organisations and

2) cultural heritage institutions (meaning “a publicly accessible library or museum, an archive or a film or audio heritage institution” (Art. 2(3)).

In order to qualify as research organisation, they 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”. This is reflected through public funding or public contracts (Recital 12). Not easy to define and apply!

Not included: -research institutions controlled by commercial undertakings (art. 2 (1);
- research organisations providing preferential access to the results of their research to commercial entities (recital 12)

However, ***limited application to private parties*** “[r]esearch organisations should also benefit from such as exception **when their research activities are carried out in the framework of public-private partnerships**”. Unclear how this will work in practice/ where to draw the line

Not included: unaffiliated individuals/ researchers and journalists !



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FINAL TEXT ADOPTED BY THE DIRECTIVE OF 17 APRIL 2019

Other requirements/ conditions:

- **Lawful access** is needed (can be *problematic* to know, or access can be restricted, criteria uncertain)
- Possibility to **store works** for “with an appropriate level of security” and to be retain for the purposes of scientific research, including to verify the research results (art. 3(2)): very *positive*, for research quality and progress: research takes time! (in principle the storage could be permanent)
- Possibility for rightholders to introduce **measures to protect the security and integrity of networks and databases** (art. 3(3): *negative*, might allow to block access for researchers trying to conduct TDM)
- Member States shall encourage rightholders, research organisations and cultural heritage institutions **to define commonly agreed best practices (art. 3(4)).** *Wishful thinking, as they hardly agree?*



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Article 4: Exception or limitation for text and data mining

1. Member States **shall** provide for an **exception or limitation** to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of **lawfully accessible** works and other subject matter **for the purposes of text and data mining**.

2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.

3. The exception or limitation provided for in paragraph 1 shall apply **on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.**

4. This Article shall not affect the application of Article 3 of this Directive.



Art. 4 analysed

- Potential broad scope as no specific beneficiaries listed.
- However, in comparison to Article 3:
 - it provides rightholders with an “**opt out**” mechanism to this **exception**, as the exception applies “on condition that the use of works and other subject matter (...) has not been expressly reserved by their rightholders in an appropriate manner” (Art. 4(3)).
 - the duration of storage is limited by the purposes of TDM
- This basically limits potentially the effect of this exception for several players such as journalist, individual researchers, large companies / start ups, also undermining the potential of AI based innovation in the EU (Ducato/ Strowel, IIC 2019, p. 680)!
- **Better to follow the Swiss example!** New article 24d for the Copyright Law voted in Sept. 2019 provides for a TDM exception including commercial scientific research and is applicable also to private scholars



FINAL TEXT ADOPTED BY THE DIRECTIVE OF 17 APRIL 2019

Article 7 Common provisions, analysis

1. **Any contractual provision** contrary to the exceptions provided for in Articles 3, 5 and 6 **shall be unenforceable**.

Very positive as it secures that exception can not be overridden by contract !

2. **Article 5(5) of Directive 2001/29/EC shall apply** to the exceptions and limitations provided for under this Title. **The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply** to Articles 3 to 6 of this Directive.

Negative, as it refers to two uncertain mechanisms of the 2001 directive, the so called “three-step test” (art. 5(5)) which sets vague criteria to the admissibility of exceptions and the uncertain guaranty of certain limitations against technological protection measures (art. 6(4)).



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OVERALL CONCLUSIONS

- Introduction of the text and data mining exceptions is an important step, and is certainly a progress
- Many uncertainties left however on the scope that will have to be clarified by Courts
- Technical protection measures might hinder their effectiveness
- Overall, it could already be a **missed opportunity to position the European Union at the forefront of the digital innovation** as important players are excluded and the scope is too narrow. All these will have to license these uses in a legally very uncertain context!
- Instead of “opt outs”, as a compromise, it would have been more efficient to propose a right to fair remuneration with regard to commercial data mining activities (Geiger/Frosio/ Bulayenko, 2019, p. 58).



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FUTURE REFORM: AN “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 (see M. Senftleben, Ch. Geiger, but debated); *The Three-Step Test, a sort of “**Fair Use**” provision? (Court of Appeal of Barcelona (SAP), 17 September 2008)*
- “**Opening clause**”: combining flexibility with an exemplary catalogue of limitations, on the model of the **Article 5 of the European Copyright Code of the Wittem Project (2010)**
- **Several Advantages:**
 - adaptability to the constantly evolving digital environment
 - Allows fundamental rights balancing
 - more security to rightholders than the US-style fair use



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TOWARDS AN “OPENING CLAUSE” Limitation

Proposal: Introduction of a European ‘Fair use’ based on Freedom of Expression (3 factor-test based on proportionality)

In the course of the recent years, a European “fair use” has been gradually shaped by the courts through the application of fundamental rights (in particular the right to freedom of expression and information) to copyright disputes: ***Time to internalize it and make it more transparent!***

- Ch. Geiger and E. Izyumenko, “Towards a European ‘Fair Use’ Grounded in Freedom of Expression”, *American University International Law Review* 2019, Vol. 35, No. 1, 1.

- Ch. Geiger, “‘Fair Use’ through Fundamental Rights: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations”, in: W.L. Ng, H. Sun and S. Balganesch (eds.), “Comparative Aspects of Limitations and Exceptions in Copyright Law”, Cambridge, Cambridge University Press, 2020 (forthcoming).



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[Centre for International Intellectual Property Studies \(CEIPI\) Research Paper No. 2019-08;](#)

available at SSRN: <https://ssrn.com/abstract=3470653>

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