

A REVIEW OF EMPIRICAL EVIDENCE ON COPYRIGHT EXCEPTIONS

CREATe Working Paper 2021/9

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CREATe

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Abstract

Exceptions are an essential part of the copyright system. They aim to encourage innovation, serve the public interest or respond to market failures. While extensive theoretical and doctrinal research has examined the history, nature, justification, and judicial interpretation of exceptions, empirical evidence in this area of copyright law is limited. This article aims to synthesise the empirical studies on exceptions currently catalogued on the Copyright Evidence Portal. After a short introduction to the topic, the article reviews the debates and questions addressed by scholars investigating exceptions empirically. In doing so, it identifies five main areas of study: i) judicial interpretation; ii) evaluating policy options; iii) impact of exceptions; iv) public domain and incentives; and v) technology and compensation. Under each area of study, the article summarises the main findings of the catalogued studies with a view to generating a picture of existing evidence and research agendas. Finally, the article highlights recent legislative and policy developments that may suggest potential directions for future research.

Introduction

Copyright exceptions enable lawful copying of whole or substantial parts of protected works without the need for the copyright owner's permission. They are intended to allow uses that the legislator considers to be socially, culturally, politically or economically beneficial, such as education, the preservation of cultural heritage, or research, among many others. Together with other dimensions of copyright law that enable lawful copying (such as the limited duration of the copyright term and the distinction between non-protectable ideas and protected expression) exceptions help the copyright system strike a balance between the interests of copyright owners and the interests of copyright users. Exceptions are best understood as explicitly permitted acts.

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This article offers a synthesis of the empirical evidence on exceptions currently catalogued on the Copyright Evidence Portal,² with a view to identifying trends and gaps as well as suggesting potential directions for future research.

The oldest study on exceptions available on the Copyright Evidence Portal (Gordon 1982)³ characterises US 'fair use' as the 'most difficult area of copyright law'. The complexity of exceptions is reflected in their varied form of drafting. On the international level, Art. 9(2) of the Berne Convention⁴ establishes that '[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author', the so-called 'three-step test'. Certain jurisdictions such as the US have opted for an open-ended exception that can cover a wide range of transformative uses. Other jurisdictions, including the UK, provide an extensive list of specific permitted acts, carefully defined but still dependant on ambiguous notions and application criteria such as fair dealing. For decades, the European Union has tried to harmonise exceptions across member states, largely unsuccessfully. Art. 5 of the Information Society Directive 2001 (Directive 2001/29/EC)⁵ provides one mandatory exception ('Temporary acts of reproduction', art. 5(1) InfoSoc Directive) and an exhaustive list of twenty optional exceptions, which member states can choose to implement (or ignore). In 2019, the Directive on Copyright in the Digital Single Market (the CDSM Directive)⁶ introduces four more mandatory exceptions that member states 'shall' implement to enable text and data mining research, cross-border teaching activities, and the preservation of our cultural heritage. However, the CDSM Directive gives member states the freedom to limit the scope of application of these new 'mandatory' exceptions in various ways. The fragmented legal landscape that results from this problematic

² The Copyright Evidence Portal: Empirical Evidence for Copyright Policy. CREATE Centre: University of Glasgow (<http://CopyrightEvidence.org>) (last access 04/11/2021).

³ Gordon, W. J. (1982). Fair use as market failure: a structural and economic analysis of the "Betamax" case and its predecessors. *Columbia Law Review*, 82(8), 1600-1657. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Gordon_\(1982\)](https://www.copyrightevidence.org/wiki/index.php/Gordon_(1982)) (last access 04/11/2021).

⁴ Berne Convention on the Protection of Literary and Artistic Works 1886 (rev. Paris 1971). Current text available at <https://wipolex.wipo.int/en/treaties/textdetails/12214> (last access 04/11/2021).

⁵ 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 (the 'InfoSoc Directive'). Text available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029> (last access 04/11/2021).

⁶ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L 130 20 (the 'CDSM Directive'). For the text of the Directive and an independent academic perspective on its implementation, see <https://www.create.ac.uk/cdsm-implementation-resource-page/> (last access 04/11/2021).

approach to law-making adds to the complexity of exceptions, particularly in relation to cross-border uses.

Debates and recent developments

Exceptions have been subject to doctrinal and political debates for decades. Most studies relating to exceptions are theoretical rather than empirical, and tend to focus on the history, justification, and judicial interpretation of exceptions, as well as their nature and role in copyright law. For example, while most textbooks present exceptions as ‘defences’ that users can invoke when they are sued for copyright infringement, many scholars categorise them as ‘user rights’ (see for example Flynn and Palmedo 2017).⁷

Exceptions can be grouped according to at least three types of purposes or rationales: i) exceptions that promote innovation, enabling the development of new products and services; ii) exceptions that serve the public interest, such as those underpinned by fundamental rights (e.g. parody, criticism or review) and those supporting vulnerable groups, cultural heritage organisations, or education and research; and iii) exceptions induced by market failure, which cover uses that are socially desirable but cannot be accommodated by the market (e.g. private copying). Exceptions often serve all three purposes. For example, while the ‘policy justification for permitting parodies [...] stands primarily on non-economic grounds (i.e. freedom of speech and expression)’ (Erickson, Kretschmer and Mendis 2013),⁸ the parody exception also responds to a market failure (copyright owners’ unwillingness to license hostile parodies of their work, Gordon 1982),⁹ enabling the creation of innovative cultural materials.

The Copyright Evidence Portal provides an interesting picture of the available empirical studies that address exceptions. At the time of writing this synthesis (November 2021), the Wiki¹⁰ includes 137 empirical studies relating to exceptions published between 1982 and 2021.

⁷ Flynn, S. and Palmedo, M. (2017). The User Rights Database: Measuring the Impact of Copyright Balance. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Flynn_and_Palmedo_\(2017\)](https://www.copyrightevidence.org/wiki/index.php/Flynn_and_Palmedo_(2017)) (last access 04/11/2021).

⁸ Erickson, K., Kretschmer, M., & Mendis, D. (2013). Copyright and the Economic Effects of Parody: An Empirical Study of Music Videos on the YouTube Platform and an Assessment of the Regulatory Options. Intellectual Property Office Research Paper, (2013/24). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Erickson,_Kretschmer_and_Mendis_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Erickson,_Kretschmer_and_Mendis_(2013)) (last access 04/11/2021).

⁹ Gordon, W. J. (1982)(n 3).

¹⁰ The Copyright Evidence Wiki is the central part of the Copyright Evidence Portal. Other components include the Evidence Viz and Use Cases.

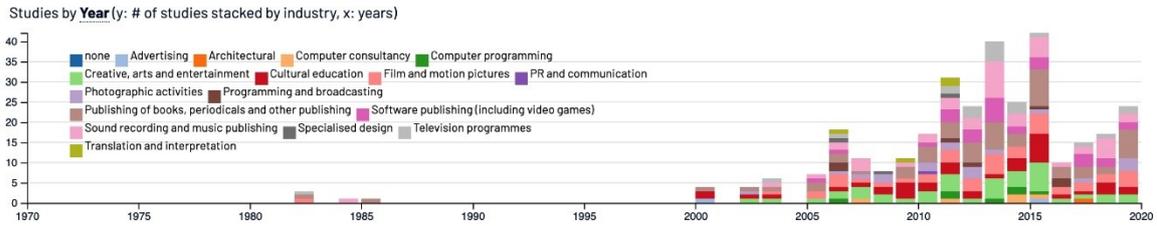


Figure 1 Timeline of empirical studies on exceptions stacked by industry from Copyright Evidence Viz, available at <https://www.copyrightevidence.org/viz/> (last access 04/11/2021).

According to the Wiki, the papers which examine policy issues relating to exceptions, among others, ‘distinguish exceptions and limitations for the purposes of innovation or public policy, open-ended provisions from closed lists, and commercial and non-commercial uses’.¹¹ Most of these studies adopt qualitative methods and concern the ‘Publishing of books, periodicals and other publishing’ industry (64), followed by ‘Sound recording and music publishing’ (46), ‘Creative, arts and entertainment’ (43), ‘Film and motion picture’ (43), and ‘Cultural education’ (39).

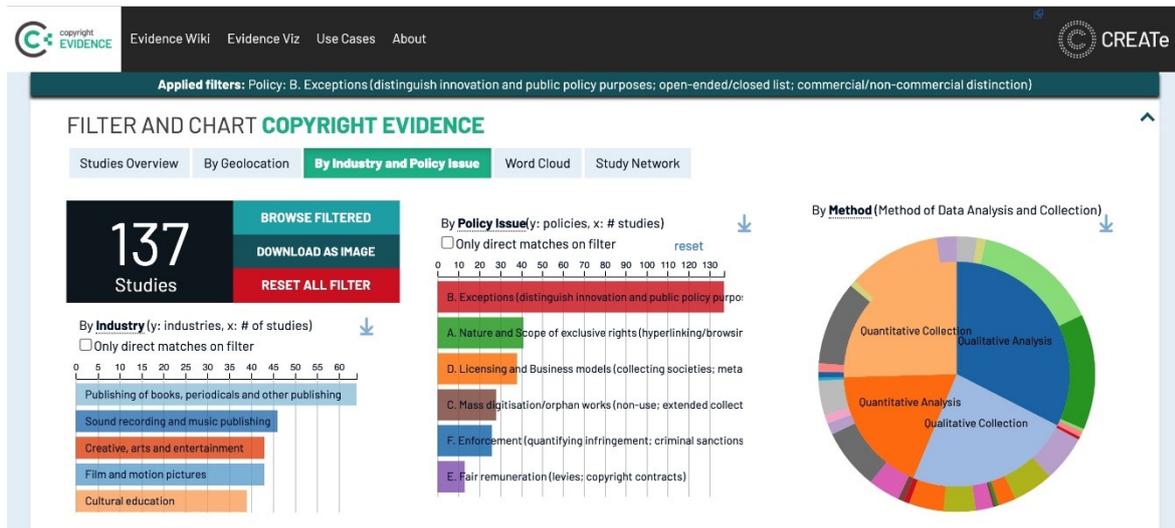


Figure 2 Industry and Policy Issue tab of the Copyright Evidence Viz, available at <https://www.copyrightevidence.org/viz/> (last access 04/11/2021).

A common theme across the 137 catalogued studies appears to be a motivation to reduce the complexity and so increase the predictability of the application of exceptions. Empirical

¹¹ Policy issue description provided by the Copyright Evidence Wiki at https://www.copyrightevidence.org/wiki/index.php/Copyright_Evidence (last access 04/11/2021).

studies on exceptions aim to help courts to interpret exceptions consistently; policy and law makers to draft them; and users to understand and rely upon them. They can be grouped into five categories: i) judicial interpretation; ii) evaluating policy options; iii) impact of exceptions; iv) public domain and incentives; and v) technology and compensation.

Judicial interpretation

US empirical studies seem to focus primarily on judicial interpretation of fair use. The statutory formulation of the fair use doctrine does not attract much academic interest, with only a few US studies evaluating or proposing changes to the statute (see for example Heins and Beckles 2005).¹² Some studies on exceptions in the US aim to develop models and tests to help courts interpret fair use consistently and to help users predict the outcome of exceptions cases. These include the 'three-part test' intended to be 'of assistance in analyzing fair use issues' and to provide 'a helpful tool for predicting and guiding decisions' developed in Gordon (1982);¹³ and the 'economic model to determine the appropriate level of fair use [...] aimed at usage by courts' proposed by Miceli and Adelstein (2006).¹⁴ Various US studies on exceptions review and analyse courts decisions to investigate doctrines and principles of case law, with a focus on 'predictability'. Lemley (1997)¹⁵ examines how 'improvements' in IP law were treated in 50 patent infringement cases in comparison to 80 copyright infringement cases between 1853 and 1996. Netanel (2011)¹⁶ analyses 68 court decisions on fair use between 2006 and 2010, with a quantitative analysis from 1995, to trace 'the rise to prominence of the transformative use paradigm'. Sag (2012)¹⁷ uses a dataset of more than 280 fair use cases to systematically 'assess the predictability of fair use outcomes in litigation'. Fuller and Abdenour (2018)¹⁸ assesses 27

¹² Heins, M., and Beckles, T. (2005). Will Fair Use Survive? Free Expression in the Age of Copyright Control. A Public Policy Report. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Heins_and_Beckles_\(2005\)](https://www.copyrightevidence.org/wiki/index.php/Heins_and_Beckles_(2005)) (last access 04/11/2021).

¹³ Gordon, W. J. (1982)(n 3).

¹⁴ Miceli, Thomas J., and Richard P. Adelstein (2006). An economic model of fair use. *Information Economics and Policy* 18.4: 359-373. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Miceli_and_Adelstein_\(2006\)](https://www.copyrightevidence.org/wiki/index.php/Miceli_and_Adelstein_(2006)) (last access 04/11/2021).

¹⁵ Lemley, M. A. (1997). The Economics of Improvement in Intellectual Property Law. *Tex. L. Rev.*, 75, 989-1835. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Lemley_\(1997\)](https://www.copyrightevidence.org/wiki/index.php/Lemley_(1997)) (last access 04/11/2021).

¹⁶ Netanel, N. W. (2011). Making sense of fair use. *Lewis & Clark L. Rev.*, 15, 715. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Netanel_\(2011\)](https://www.copyrightevidence.org/wiki/index.php/Netanel_(2011)) (last access 04/11/2021).

¹⁷ Sag, M. (2012). Predicting fair use. *Ohio State Law Journal*, 73, 1. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Sag_\(2012\)](https://www.copyrightevidence.org/wiki/index.php/Sag_(2012)) (last access 04/11/2021).

¹⁸ Fuller, P.B., and Abdenour, J. (2018). It's Bigger Than Hip-Hop: Sampling and the Emergence of the Market Enhancement Model in Fair Use Case Law. *Journalism and Mass Communication Quarterly*, 1 - 25. Available on the Copyright Evidence Wiki at

court cases to explore the tension between the 'pure market substitute' and 'market enhancement' fair use models. Lee (2018)¹⁹ includes an analysis of 177 court decisions concerning the infringement of a musical work to identify instances of possible fair use claims in 'same-type transformative musical works' (e.g. parody). Liu (2019)²⁰ analyses 'all transformative use decisions in US copyright history, as of 1 January 2017, consisting of 260 decisions'.

Other US studies focus on more specific aspects of the judicial interpretation of fair use. For example, Balganes, Manta and Wilkinson-Ryan (2014)²¹ explores juries' decision-making on 'substantial similarity' through a series of experiments; Schuster, Mitchell and Brown (2018)²² assesses the 'effect on the market' fairness factor by looking at the effect of music sampling on sampled songs, based on 450 sampling songs.

EU scholarship on judicial interpretation of exceptions is more limited. However, a few catalogued key studies examine the judgements of the Court of Justice of the European Union and related documents (e.g. Favale, Kretschmer and Torremans 2016;²³ Favale, Kretschmer and

[https://www.copyrightevidence.org/wiki/index.php/Fuller_and_Abdenour_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Fuller_and_Abdenour_(2018)) (last access 04/11/2021).

¹⁹ Lee, E. (2018). Fair Use Avoidance in Music Cases. *Boston College Law Review*. Vol 56(6). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Lee_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Lee_(2018)) (last access 04/11/2021).

²⁰ Liu, J. (2019). An Empirical Study of Transformative Use in Copyright Law. *Stan. Tech. L. Rev.* 22(1), 164-241. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Liu_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Liu_(2019)) (last access 04/11/2021).

²¹ Balganes, S., Manta, I., and Wilkinson-Ryan, T. (2014). Judging similarity. *100 Iowa Law Review* 267; University of Pennsylvania Law School, Public Law Research Paper No. 14-15; Hofstra Univ. Legal Studies Research Paper No. 2014-09. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Balganesh,_Manta_and_Wilkinson-Ryan_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Balganesh,_Manta_and_Wilkinson-Ryan_(2014)) (last access 04/11/2021).

²² Shuster, W.M., Mitchell, D.M. and Brown, K. (2018). Sampling Increases Music Sales: An Empirical Copyright Study. *American Business Law Journal*. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Schuster,_Mitchell_and_Brown_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Schuster,_Mitchell_and_Brown_(2018)) (last access 04/11/2021).

²³ Favale, M., Kretschmer, M., and Torremans, P.C. (2016). Is there an EU copyright jurisprudence? An empirical analysis of the workings of the European Court of Justice. *Modern Law Review*, 79(1): 31-75. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Favale,_Kretschmer_and_Torremans_\(2016\)](https://www.copyrightevidence.org/wiki/index.php/Favale,_Kretschmer_and_Torremans_(2016)) (last access 04/11/2021).

Torremans 2018;²⁴ Kalimo, Meyer and Mylly 2018;²⁵ Favale 2020),²⁶ but only one of them focuses on the interpretation of exceptions (Kalimo, Meyer and Mylly 2018).²⁷

Many empirical studies on exceptions in the EU (which until the end of 2020 included the UK) and other jurisdictions such as Australia are aimed at policy and law makers rather than courts. Some of these studies evaluate different policy options as part of ongoing law-making processes; others assess the impact of existing legislation on specific sectors or communities, often generating policy recommendations (but not necessarily linked to an ongoing reform). Other empirical studies on exceptions can be grouped under the categories 'public domain and incentives' and 'technology and compensation'.

Evaluating policy options

A good example of a law-making process informed by several empirical studies available on the Wiki is the UK copyright reform that culminated with the introduction of new exceptions in 2014. Following the Gowers Review in 2006²⁸ (for a review of the literature 'on the possible economic effects of [Gowers'] proposed changes to the copyright exceptions system', see Rogers, Corrigan, and Tomalin 2010),²⁹ in 2010 the UK Prime Minister commissions Professor Ian Hargreaves to conduct another review of the UK intellectual property framework. The Hargreaves Review is based on written evidence submitted by almost 300 individuals and

²⁴ Favale, M., Kretschmer, M., and Torremans, P. L. C. (2018). Who Is Steering the Jurisprudence of the European Court of Justice? The Influence of Member State Submissions on Copyright Law. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Favale,_Kretschmer_and_Torremans_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Favale,_Kretschmer_and_Torremans_(2018)) (last access 04/11/2021).

²⁵ Kalimo, H., Meyer, T., and Mylly, T. (2018). Of Values and Legitimacy - Discourse Analytical Insights on the Copyright Case Law of the Court of Justice of the European Union. *The Modern Law Review*, 81:2. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Kalimo,_Meyer_and_Mylly_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Kalimo,_Meyer_and_Mylly_(2018)) (last access 04/11/2021).

²⁶ Favale, M. (2021). "The Role of the Court of Justice in the Development of EU Copyright Law: an Empirical Experience". In *EU Copyright Law*. Cheltenham, UK: Edward Elgar Publishing. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Favale_\(2020\)](https://www.copyrightevidence.org/wiki/index.php/Favale_(2020)) (last access 04/11/2021).

²⁷ Kalimo, H., Meyer, T., and Mylly, T. (2018)(n 25).

²⁸ Gowers, A. (2006). *Gowers Review of Intellectual Property*. The Stationery Office. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Gowers_\(2006\)](https://www.copyrightevidence.org/wiki/index.php/Gowers_(2006)) (last access 04/11/2021).

²⁹ Rogers, M., Corrigan, R., and Tomalin, J. (2010). *The economic impact of consumer copyright exceptions: A literature review*. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Rogers,_Corrigan,_and_Tomalin_\(2010\)](https://www.copyrightevidence.org/wiki/index.php/Rogers,_Corrigan,_and_Tomalin_(2010)) (last access 04/11/2021).

organisations, including Kretschmer (2011)³⁰ on 'Private Copying and Fair Compensation' (for a discourse analysis of the industry submissions to the Gowers and Hargreaves reviews, see Edwards, Klein, Lee, Moss and Philip 2015).³¹ In 2011, the Review (Hargreaves 2011)³² produces ten recommendations for the UK government 'to ensure that the UK has an IP framework best suited to supporting innovation and promoting economic growth in the digital age'. The UK Intellectual Property Office then commissions a series of studies to evaluate policy options to implement some of Hargreaves' recommendations, including Favale, Homberg, Kretschmer, Mendis and Secchi (2013)³³ and Public and Corporate Economic Consultants (2013)³⁴ on orphan works (recommendation #4); Erickson, Kretschmer and Mendis (2013)³⁵ on the parody exception; and Camerani, Grassano, Chavarro and Tang (2013)³⁶ on the private copying exception (recommendation #5). To evaluate how to establish a cross sectoral Digital Copyright Exchange (recommendation #3), the UK IPO also commissions a feasibility study (Hooper and Lynch 2012a)³⁷ and an independent review (Hooper and Lynch 2012b).³⁸

³⁰ Kretschmer, M. (2011). Private Copying and Fair Compensation: An Empirical Study of Copyright Levies in Europe. Intellectual Property Office Research Paper No. 2011/9. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Kretschmer_\(2011\)](https://www.copyrightevidence.org/wiki/index.php/Kretschmer_(2011)) (last access 04/11/2021).

³¹ Edwards, L., Klein, B., Lee, D., Moss, G., and Philip, F. (2015). Discourse, justification and critique: towards a legitimate digital copyright regime?. *International Journal of Cultural Policy*, 21(1), 60-77. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Edwards,_Klein,_Lee,_Moss_and_Philip_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Edwards,_Klein,_Lee,_Moss_and_Philip_(2015)) (last access 04/11/2021).

³² Hargreaves, I. (2011). Digital Opportunity: A Review of Intellectual Property and Growth. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Hargreaves_\(2011\)](https://www.copyrightevidence.org/wiki/index.php/Hargreaves_(2011)) (last access 04/11/2021).

³³ Favale, M., Homberg, F., Kretschmer, M., Mendis, D., and Secchi, D. (2015). Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation. Intellectual Property Office Research Paper No. 2013/31. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Favale,_Homberg,_Kretschmer,_Mendis_and_Secchi_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Favale,_Homberg,_Kretschmer,_Mendis_and_Secchi_(2013)) (last access 04/11/2021).

³⁴ Public and Corporate Economic Consultants (2013). Orphan Works in the UK and Overseas. Intellectual Property Office Research Paper No. 2013/17. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Public_and_Corporate_Economic_Consultants_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Public_and_Corporate_Economic_Consultants_(2013)) (last access 04/11/2021).

³⁵ Erickson, K., Kretschmer, M., and Mendis, D. (2013).

³⁶ Camerani, R., Grassano, N., Chavarro, D., and Tang, P. (2013). Private Copying, Intellectual Property Office. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Camerani,_Grassano,_Chavarro_and_Tang_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Camerani,_Grassano,_Chavarro_and_Tang_(2013)) (last access 04/11/2021).

³⁷ Hooper, R., & Lynch, R. (2012). Rights and wrongs: Is copyright licensing fit for purpose for the digital age? The first report of the Digital Copyright Exchange feasibility study, Intellectual Property Office. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Hooper_and_Lynch_\(2012a\)](https://www.copyrightevidence.org/wiki/index.php/Hooper_and_Lynch_(2012a)) (last access 04/11/2021).

³⁸ Hooper, R., & Lynch, R. (2012). Copyright works: Streamlining copyright licensing for the digital age. Intellectual Property Office. Available on the Copyright Evidence Wiki at

The Hargreaves reform is just one example of the policy-making processes and debates on exceptions that can be explored using the Copyright Evidence Wiki. In 2013–2014, the European Commission consultation on the review of EU copyright rules attracts over 9,500 responses (58.7% from end users), including Kretschmer, Deazley, Edwards, Erickson, Schafer and Zizzo (2014).³⁹ The responses, a selection of which is analysed in Erickson (2014),⁴⁰ inform Reda (2015)⁴¹ Draft Report on the Implementation of Directive 2001/29/EC and triggers public debates on specific exceptions such as ‘freedom of panorama’ (Dulong de Rosnay and Langlais 2017).⁴² As part of the review, the European Commission also commissions several studies from private consultants such as Charles River Associates (2013)⁴³ and De Wolf and Partners (2014a).⁴⁴ Previously, the European Commission had funded Guibault, Westkamp and Rieber-Mohn (2007)⁴⁵ to examine ‘the application of Directive 2001/29/EC in the light of the development of the digital market’.

[https://www.copyrightevidence.org/wiki/index.php/Hooper_and_Lynch_\(2012b\)](https://www.copyrightevidence.org/wiki/index.php/Hooper_and_Lynch_(2012b)) (last access 04/11/2021).

³⁹ Kretschmer, M., Deazley, R., Edwards, L., Erickson, K., Schafer, B., and Zizzo, D. J. (2014). The European Commission's Public Consultation on the Review of EU Copyright Rules: A Response by the CREATE Centre. *European Intellectual Property Review*, 36(9), 547–553. Available on the Copyright Evidence Wiki at

[https://www.copyrightevidence.org/wiki/index.php/Kretschmer,_Deazley,_Edwards,_Erickson,_Schafer_and_Zizzo_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Kretschmer,_Deazley,_Edwards,_Erickson,_Schafer_and_Zizzo_(2014)) (last access 04/11/2021).

⁴⁰ Erickson, K. (2014). User Illusion: Ideological Construction of ‘User- Generated Content’ in the EC Consultation on Copyright. *Internet Policy Review* 4(3). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Erickson_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Erickson_(2014)) (last access 04/11/2021).

⁴¹ Reda, J. (2015). Draft Report on the Implementation of 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, Committee on Legal Affairs, European Parliament (2014/2256(INI)). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Reda_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Reda_(2015)) (last access 04/11/2021).

⁴² Dulong de Rosnay, M., and Langlais, P. (2017) Public artworks and the freedom of panorama controversy: a case of Wikimedia influence. *Internet Policy Review* Vol. 6(1). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Dulong_de_Rosnay_and_Langlais_\(2017\)](https://www.copyrightevidence.org/wiki/index.php/Dulong_de_Rosnay_and_Langlais_(2017)) (last access 04/11/2021).

⁴³ Charles River Associates (2013). Assessing the Economic Impacts of Adapting Certain Limitations and Exceptions to Copyright and Related Rights in the EU. European Union. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Charles_River_Associates_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Charles_River_Associates_(2013)) (last access 04/11/2021).

⁴⁴ De Wolf & Partners (2014). Study on the Legal Framework of Text and Data Mining (TDM). European Union. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/De_Wolf_and_Partners_\(2014a\)](https://www.copyrightevidence.org/wiki/index.php/De_Wolf_and_Partners_(2014a)) (last access 04/11/2021).

⁴⁵ Guibault, L., Westkamp, G., and Rieber-Mohn, T. (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. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Guibault,_Westkamp_and_Rieber-Mohn_\(2007\)](https://www.copyrightevidence.org/wiki/index.php/Guibault,_Westkamp_and_Rieber-Mohn_(2007)) (last access 04/11/2021).

In parallel, the Australian Law Reform Commission (2013)⁴⁶ recommends the introduction of fair use in Australian copyright law. This recommendation is later questioned by PricewaterhouseCoopers (2016)⁴⁷ but supported by Aufderheide et al. (2018).⁴⁸ Barker (2012b)⁴⁹ offers a theoretical critique of empirical studies that advocate for more flexible exceptions to encourage economic growth, focussing on two reports commissioned by the Australian Digital Alliance in 2012. The introduction of fair use in Japanese copyright law is assessed in relation to *dojinshi* (amateur derivative works of anime or manga) in Arai and Kinukawa (2014).⁵⁰ The 'impact on access to knowledge and learning' of the exceptions introduced by the South African Copyright Amendment Bill 2017 – which include a US-style fair use provision – is examined in Pistorius and Mwim (2019).⁵¹

From the early 2000s, the World Intellectual Property Organization (WIPO) commissions several empirical studies on exceptions – including Ricketson (2003),⁵² Monroy Rodríguez (2009),⁵³ Seng

⁴⁶ Australian Law Reform Commission (2013). Copyright and the Digital Economy (ALRC Report 122). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Australian_Law_Reform_Commission_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Australian_Law_Reform_Commission_(2013)) (last access 04/11/2021).

⁴⁷ PricewaterhouseCoopers (2016). Understanding the costs and benefits of introducing a 'fair use' exception. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/PricewaterhouseCoopers_\(2016\)](https://www.copyrightevidence.org/wiki/index.php/PricewaterhouseCoopers_(2016)) (last access 04/11/2021).

⁴⁸ Aufderheide, P., Pappalardo, K., Suzor, N. and Stevens, J. (2018). Calculating the consequences of narrow Australian copyright exceptions: Measurable, hidden and incalculable costs to creators. *Poetics*, 69, 15-26. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Aufderheide_et_al._\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Aufderheide_et_al._(2018)) (last access 04/11/2021).

⁴⁹ Barker, G. R. (2012). Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Barker_\(2012b\)](https://www.copyrightevidence.org/wiki/index.php/Barker_(2012b)) (last access 04/11/2021).

⁵⁰ Arai, Y. and Kinukawa, S. (2014). Copyright infringement as user innovation. *Journal of Cultural Economics*, 38(2), 131-144. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Arai_and_Kinukawa_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Arai_and_Kinukawa_(2014)) (last access 04/11/2021).

⁵¹ Pistorius, T. and Mwim, O. S. (2019). The impact of digital copyright law and policy on access to knowledge and learning. *Reading & Writing*, 10(1). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Pistorius_and_Mwim_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Pistorius_and_Mwim_(2019)) (last access 04/11/2021).

⁵² Ricketson, S. (2003). Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment. WIPO, SCCR/9/7. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Ricketson_\(2003\)](https://www.copyrightevidence.org/wiki/index.php/Ricketson_(2003)) (last access 04/11/2021).

⁵³ Monroy Rodríguez, J. C. (2009). Study on the limitations and exceptions to copyright and related rights for the purposes of educational and research activities in Latin America and the Caribbean. WIPO, SCCR/19/4. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Monroy_Rodr%C3%ADguez_\(2009\)](https://www.copyrightevidence.org/wiki/index.php/Monroy_Rodr%C3%ADguez_(2009)) (last access 04/11/2021).

(2009),⁵⁴ Xalabarder (2009),⁵⁵ Canat, Guibault and Logeais (2015),⁵⁶ Crews (2015),⁵⁷ and Hackett (2015).⁵⁸ In 2010, WIPO publishes its own Updated Report on the Questionnaire on Limitations and Exceptions based on more than 6,000 responses from 61 member states (World Intellectual Property Organization 2010).⁵⁹ Policy documents with a more specific focus include the European Commission (2011b)⁶⁰ impact assessment on the cross-border online access to orphan works; and Intellectual Property Office (2016b)⁶¹ on changes to s.72 of the UK Copyright, Designs and Patents Act 1988.

Impact of exceptions

A large number of empirical studies on exceptions assess their impact on and their use in practice by specific sectors and communities. Groups of particular interest are galleries, libraries, archives and museums (GLAM), academic libraries, researchers, fan communities, and primary creators, among others. Studies on the impact of exceptions on GLAM organisations

⁵⁴ Seng, D. (2009). WIPO study on the copyright exceptions for the benefit of educational activities for Asia and Australia. WIPO, SCCR/19/7. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Seng_\(2009\)](https://www.copyrightevidence.org/wiki/index.php/Seng_(2009)) (last access 04/11/2021).

⁵⁵ Xalabarder, R. (2009). Study on copyright limitations and exceptions for educational activities in North America, Europe, Caucasus. Central Asia and Israel. WIPO, SCCR/19/8. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Xalabarder_\(2009\)](https://www.copyrightevidence.org/wiki/index.php/Xalabarder_(2009)) (last access 04/11/2021).

⁵⁶ Canat, J., Guibault, L., and Logeais, E. (2015). Study on Copyright Limitations and Exceptions for Museums. WIPO, SCCR/30/2. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Canat,_Guibault_and_Logeais_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Canat,_Guibault_and_Logeais_(2015)) (last access 04/11/2021).

⁵⁷ Crews, K. (2015). Study on Copyright Limitations and Related Rights. WIPO, SCCR/30/3. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Crews_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Crews_(2015)) (last access 04/11/2021).

⁵⁸ Hackett, T. (2015). Time for a single global copyright framework for libraries and archives. WIPO Magazine, No. 6. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Hackett_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Hackett_(2015)) (last access 04/11/2021).

⁵⁹ WIPO Secretariat (2010). Updated Report on the Questionnaire on Limitations and Exceptions. WIPO, SCCR/21/7. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/World_Intellectual_Property_Organization_\(2010\)](https://www.copyrightevidence.org/wiki/index.php/World_Intellectual_Property_Organization_(2010)) (last access 04/11/2021).

⁶⁰ European Commission (2011). Summary of the impact assessment on the cross-border online access to orphan works. Commission Staff Working Paper SEC(2011) 616. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/European_Commission_\(2011b\)](https://www.copyrightevidence.org/wiki/index.php/European_Commission_(2011b)) (last access 04/11/2021).

⁶¹ Intellectual Property Office (2016), Government Response to the further consultation and technical review on changes to Section 72 of the Copyright, Designs and Patents Act 1988 (which permits the free public showing or playing of a film contained in a broadcast). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Intellectual_Property_Office_\(2016b\)](https://www.copyrightevidence.org/wiki/index.php/Intellectual_Property_Office_(2016b)) (last access 04/11/2021).

include Pritcher (2000),⁶² Astle and Muir (2002),⁶³ Hudson and Kenyon (2007),⁶⁴ Dryden (2008),⁶⁵ Corbett (2011),⁶⁶ Morrison and Secker (2015),⁶⁷ Hackett (2015),⁶⁸ Todorova et al. (2017),⁶⁹ and Hudson (2020).⁷⁰ Some of these studies address specific issues faced by GLAM organisations such as the digitisation and making available of orphan works (Korn 2009;⁷¹ Vuopala 2010).⁷² Dickson (2010)⁷³ and Stobo, Deazley and Anderson (2013)⁷⁴ analyse GLAM digitisation projects which successfully adopted a risk-managed approach to rights clearance, including take-down

⁶² Pritcher, L. (2000). Ad* access: seeking copyright permissions for a digital age. D-Lib Magazine, Vol. 6 No. 2. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Pritcher_\(2000\)](https://www.copyrightevidence.org/wiki/index.php/Pritcher_(2000)) (last access 04/11/2021).

⁶³ Astle, P.J., and Muir, A. (2002). Digitization and preservation in public libraries and archives. *Journal of Librarianship and Information Science*, 34(2), 67-79. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Astle_and_Muir_\(2002\)](https://www.copyrightevidence.org/wiki/index.php/Astle_and_Muir_(2002)) (last access 04/11/2021).

⁶⁴ Hudson, E., and Kenyon, A.T. (2007). Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries, and Archives. *UNSWLJ*, 30, 12. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Hudson_and_Kenyon_\(2007\)](https://www.copyrightevidence.org/wiki/index.php/Hudson_and_Kenyon_(2007)) (last access 04/11/2021).

⁶⁵ Dryden, J. E. (2008). Copyright in the real world: Making archival material available on the Internet. Doctoral dissertation, University of Toronto. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Dryden_\(2008\)](https://www.copyrightevidence.org/wiki/index.php/Dryden_(2008)) (last access 04/11/2021).

⁶⁶ Corbett, S. (2011). Archiving Our Culture in a Digital Environment: Copyright Law and Digitisation Practices in Cultural Heritage Institutions. New Zealand Law Foundation Report. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Corbett_\(2011\)](https://www.copyrightevidence.org/wiki/index.php/Corbett_(2011)) (last access 04/11/2021).

⁶⁷ Morrison, C. and Secker, J. (2015). Copyright Literacy in the UK: a survey of librarians and other cultural heritage sector professionals. *Library and Information Research*, 39(121), 75-97. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Morrison_and_Secker_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Morrison_and_Secker_(2015)) (last access 04/11/2021).

⁶⁸ Hackett, T. (2015)(n 58).

⁶⁹ Todorova, T. Y., Kurbanoglu, S., Boustany, J., Dogan, G., Saunders, L., Horvat, A., Terra, A.L., Landøy, A., Repanovici, A., Morrison, C., Vanderkast, E. J. S., Secker, J., Rudzioniene, J., Kortelainen, T. and Koltay, T. (2017). Information professionals and copyright literacy: a multinational study. *Library Management*, 38(6/7), 323-344. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Todorova_et_al._\(2017\)](https://www.copyrightevidence.org/wiki/index.php/Todorova_et_al._(2017)) (last access 04/11/2021).

⁷⁰ Hudson, E. (2020). *Drafting Copyright Exceptions: From the Law in Books to the Law in Action*, Cambridge: Cambridge University Press. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Hudson_\(2020\)](https://www.copyrightevidence.org/wiki/index.php/Hudson_(2020)) (last access 04/11/2021).

⁷¹ Korn, N. (2009). In from the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public. *JISC*. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Korn_\(2009\)](https://www.copyrightevidence.org/wiki/index.php/Korn_(2009)) (last access 04/11/2021).

⁷² Vuopala, A. (2010). Assessment of the Orphan works issue and Costs for Rights Clearance. European Commission, DG Information Society and Media, Unit E4 Access to Information. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Vuopala_\(2010\)](https://www.copyrightevidence.org/wiki/index.php/Vuopala_(2010)) (last access 04/11/2021).

⁷³ Dickson, M. (2010). Due diligence, futile effort: Copyright and the digitization of the Thomas E. Watson papers. *The American Archivist*, 73(2), 626-636. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Dickson_\(2010\)](https://www.copyrightevidence.org/wiki/index.php/Dickson_(2010)) (last access 04/11/2021).

⁷⁴ Stobo, V., Deazley, R. and Anderson, I. (2013). Copyright & Risk: Scoping the Wellcome Digital Library Project. CREATE Working Paper 10/2013. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Stobo,_Deazley_and_Anderson_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Stobo,_Deazley_and_Anderson_(2013)) (last access 04/11/2021).

policies. Travis (2010)⁷⁵ estimates the 'economic impact of mass digitisation projects on copyright holders', using Google Book Search as a case in point.

Several studies investigate how exceptions affect academic libraries, often with a focus on copyright literacy. These include Schofield and Urban (2015),⁷⁶ Benson (2018),⁷⁷ Mathangani and Otike (2018),⁷⁸ and Masenya and Ngulube (2019).⁷⁹ Stannard (2015)⁸⁰ looks at the impact of the Hargreaves reforms on information professionals working within the cultural heritage and education sectors.

Recent scholarship investigates the impact of copyright law and exceptions on academic researchers in arts and humanities (Waelde, Kheria and Levin 2015)⁸¹ and health and science (Palmedo 2019);⁸² and those who engage with data mining (Handke, Guibault and Vallbe 2015);⁸³

⁷⁵ Travis, H. (2010). Estimating the economic impact of mass digitization projects on copyright holders: Evidence from the Google Book search litigation. *Journal of the Copyright Society of the USA*, 57, 41-62. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Travis_\(2010\)](https://www.copyrightevidence.org/wiki/index.php/Travis_(2010)) (last access 04/11/2021).

⁷⁶ Schofield B. L. and Urban J. M. (2015). Takedown and Today's Academic Digital Library. UC Berkeley Public Law Research Paper No. 2694731. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Schofield_and_Urban_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Schofield_and_Urban_(2015)) (last access 04/11/2021).

⁷⁷ Benson, S.R. (2018). Increasing Librarian Confidence and Comprehension in a Fair Use Training Session. *Libraries and the Academy*, Vol. 18(4), 781-804. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Benson_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Benson_(2018)) (last access 04/11/2021).

⁷⁸ Mathangani, S. W., and Otike, J. (2018). Copyright and information service provision in public university libraries in Kenya. *Library Management*, Vol 39, Issue 6-7, 375-3. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Mathangani_and_Otike_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Mathangani_and_Otike_(2018)) (last access 04/11/2021).

⁷⁹ Masenya, T. M., and Ngulube, P. (2019). Digital preservation practices in academic libraries in South Africa in the wake of the digital revolution. *South African Journal of Information Management*, 21(1). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Masenya_and_Ngulube_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Masenya_and_Ngulube_(2019)) (last access 04/11/2021).

⁸⁰ Stannard, E. (2015). A Copyright Snapshot: the Impact of New Copyright Legislation on Information Professionals. *Legal Information Management*, 15(04), 233-239. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Stannard_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Stannard_(2015)) (last access 04/11/2021).

⁸¹ Waelde, C., Kheria, S., and Levin, N. (2015). Copyright and Publicly-Funded Arts and Humanities Research: Identifying and Developing Sustainable Exploitation Models in the Digital Economy. *Edinburgh School of Law Research Paper No. 2015/33*. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Waelde,_Kheria_and_Levin_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Waelde,_Kheria_and_Levin_(2015)) (last access 04/11/2021).

⁸² Palmedo, M. (2019). The Impact of Copyright Exceptions for Researchers on Scholarly Output. *EfilJournal*, 2(6). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Palmedo_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Palmedo_(2019)) (last access 04/11/2021).

⁸³ Handke, C., Guibault, L., and Vallbé, J.-J. (2015). Is Europe Falling Behind in Data Mining? Copyright's Impact on Data Mining in Academic Research. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Handke,_Guibault_and_Vallbe_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Handke,_Guibault_and_Vallbe_(2015)) (last access 04/11/2021).

Handke et al. 2021).⁸⁴ For a synthesis of empirical studies on text and data mining, see Thomas Margoni's 21 for 2021 post 'Computational Uses'.⁸⁵

User generated content, and more specifically the norms and practices of fan and user communities, attract much academic interest: Cheliotis (2007),⁸⁶ Humphreys, Fitzgerald, Banks, Suzor (2008),⁸⁷ Humphreys (2008),⁸⁸ Haefliger, Jäger and Von Krogh (2010),⁸⁹ Lee (2011),⁹⁰ Poor

⁸⁴ Handke, C, Guibault, L, and Vallbé, J-J. (2021). Copyright's impact on data mining in academic research. *Managerial Decision Economics*, 1- 18. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Handke_et_al._\(2021\)](https://www.copyrightevidence.org/wiki/index.php/Handke_et_al._(2021)) (last access 04/11/2021).

⁸⁵ Margoni, T. (2021). 21 for 2021: Computational Uses. Available on the CREATE Blog at <https://www.create.ac.uk/blog/2021/10/08/21-for-2021-computational-uses/> (last access 04/11/2021).

⁸⁶ Cheliotis, G. (2007). Remix culture: an empirical analysis of creative reuse and the licensing of digital media in online communities. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Cheliotis_\(2007\)](https://www.copyrightevidence.org/wiki/index.php/Cheliotis_(2007)) (last access 04/11/2021).

⁸⁷ Humphreys, S., Fitzgerald, B., Banks, J. and Suzor, N., (2005). Fan-based production for computer games: User-led innovation, the 'Drift of Value' and intellectual property rights. *Media International Australia Incorporating Culture and Policy*, 114(1), 16-29. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Humphreys,_Fitzgerald,_Banks,_Suzor_\(2008\)](https://www.copyrightevidence.org/wiki/index.php/Humphreys,_Fitzgerald,_Banks,_Suzor_(2008)) (last access 04/11/2021).

⁸⁸ Humphreys, S. (2008). The challenges of intellectual property for users of Social Networking Sites: a case study of Ravelry. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Humphreys_\(2008\)](https://www.copyrightevidence.org/wiki/index.php/Humphreys_(2008)) (last access 04/11/2021).

⁸⁹ Haefliger, S., Jäger, P., and Von Krogh, G. (2010). Under the radar: Industry entry by user entrepreneurs. *Research policy*, 39(9), 1198-1213. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Haefliger,_J%C3%A4ger_and_Von_Krogh_\(2010\)](https://www.copyrightevidence.org/wiki/index.php/Haefliger,_J%C3%A4ger_and_Von_Krogh_(2010)) (last access 04/11/2021).

⁹⁰ Lee, H. K. (2011). Participatory media fandom: A case study of anime fansubbing. *Media, Culture & Society*, 33(8), 1131-1147. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Lee_\(2011\)](https://www.copyrightevidence.org/wiki/index.php/Lee_(2011)) (last access 04/11/2021).

(2012),⁹¹ Lastowka (2013),⁹² Erickson (2014),⁹³ Fiesler (2018),⁹⁴ Fiesler and Bruckman (2019),⁹⁵ Katz (2019),⁹⁶ Khaosaeng (2019),⁹⁷ Marshall and Shipman (2019),⁹⁸ Flaherty (2020).⁹⁹

Finally, there is a series of empirical studies investigating the impact of copyright law and rights clearance mechanisms on primary creators through the development of codes of best practices in fair use. In 2004, the pioneering work with documentary filmmakers by Aufderheide and Jaszi (2004)¹⁰⁰ (followed on in Aufderheide and Sinnreich 2015)¹⁰¹ starts a whole research strand which develops a series of best practice codes for various communities, including communication

⁹¹ Poor, N. (2012). When Firms Encourage Copying: Cultural Borrowing as Standard Practice in Game Spaces. *International Journal of Communication*, 6, 689-709. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Poor_\(2012\)](https://www.copyrightevidence.org/wiki/index.php/Poor_(2012)) (last access 04/11/2021).

⁹² Lastowka, G. (2013). The Player-Authors Project. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Lastowka_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Lastowka_(2013)) (last access 04/11/2021).

⁹³ Erickson, K. (2014). User Illusion: Ideological Construction of 'User- Generated Content' in the EC Consultation on Copyright. *Internet Policy Review* 4(3). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Erickson_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Erickson_(2014)) (last access 04/11/2021).

⁹⁴ Fiesler, C. (2018). Everything I Needed to Know: Empirical Investigations of Copyright Norms in Fandom. *IDEA - The Law Review of the Franklin Pierce Centre for Intellectual Property*, 59(1), 65 - 87. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Fiesler_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Fiesler_(2018)) (last access 04/11/2021).

⁹⁵ Fiesler, C., and Bruckman, A. (2019). Creativity, Copyright, and Close-Knit Communities: A Case Study of Social Norm Formation and Enforcement. *Proc. ACM Hum.-Comput. Interact.*, 3. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Fiesler_and_Bruckman_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Fiesler_and_Bruckman_(2019)) (last access 04/11/2021).

⁹⁶ Katz, R. (2019). A Pilot Study of Fan Fiction Writer's Legal Information Behavior. *Journal of Copyright in Education and Librarianship*, 3(1), 1-29. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Katz_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Katz_(2019)) (last access 04/11/2021).

⁹⁷ Khaosaeng, K. (2019). The Conflicts between Copyright and the Norms of Online Re-Creations: An Empirical Analysis. *ASEAN Journal of Legal Studies*, 2(1). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Khaosaeng_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Khaosaeng_(2019)) (last access 04/11/2021).

⁹⁸ Marshall, C. C. and Shipman, F. M. (2019). The Ownership and Control of Online Photos and Game Data: Patterns, Trends, and Keeping Pace with Evolving Circumstances. 2019 ACM/IEEE Joint Conference on Digital Libraries. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Marshall_and_Shipman_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Marshall_and_Shipman_(2019)) (last access 04/11/2021).

⁹⁹ Flaherty, R. (2020). Benefits of Quantitative and Doctrinal Methodological Approaches to Fan Studies Research. In *Fan Studies Methodologies*, edited by Largent, J.E. Popova, M., and Vist, E., special issue, *Transformative Works and Cultures*, no. 33. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Flaherty_\(2020\)](https://www.copyrightevidence.org/wiki/index.php/Flaherty_(2020)) (last access 04/11/2021).

¹⁰⁰ Aufderheide, P., and Jaszi, P. (2004). Untold stories: Creative consequences of the rights clearance culture for documentary filmmakers. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Aufderheide_and_Jaszi_\(2004\)](https://www.copyrightevidence.org/wiki/index.php/Aufderheide_and_Jaszi_(2004)) (last access 04/11/2021).

¹⁰¹ Aufderheide, P., and Sinnreich, A. (2015). Documentarians, fair use, and free expression: changes in copyright attitudes and actions with access to best practices. *Information, Communication & Society*, (ahead-of-print), 1-10. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Aufderheide_and_Sinnreich_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Aufderheide_and_Sinnreich_(2015)) (last access 04/11/2021).

scholars (Center for Social Media 2010;¹⁰² followed on in Sinnreich and Aufderheide 2015)¹⁰³ and journalists (Aufderheide et al. (2013)).¹⁰⁴ Their work on best practices in fair use will inspire similar research in other jurisdictions, such as Pappalardo, Aufderheide, Stevens, and Suzor (2017)¹⁰⁵ in Australia, or more recently Meletti and van Gompel (2021)¹⁰⁶ in the UK and the Netherlands. Other studies that explore community practices and norms are Loshin (2007)¹⁰⁷ on magicians and Silbey (2019a)¹⁰⁸ on photographers.

Public domain and incentives

Several studies investigate the public domain in a wider sense, not focussing exclusively on exceptions, but on all the opportunities offered by copyright law to lawfully copy existing materials without permission, including the limited duration of the copyright term.

¹⁰² Herman, B. (2010). Clipping Our Own Wings: Copyright and Creativity in Communication Research. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Center_for_Social_Media_\(2010\)](https://www.copyrightevidence.org/wiki/index.php/Center_for_Social_Media_(2010)) (last access 04/11/2021).

¹⁰³ Sinnreich, A., and Aufderheide, P. (2015). Communication Scholars and Fair Use: The Case for Discipline-Wide Education and Institutional Reform. *International Journal of Communication*, 9. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Sinnreich_and_Aufderheide_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Sinnreich_and_Aufderheide_(2015)) (last access 04/11/2021).

¹⁰⁴ Aufderheide, P., Jaszi, P., Bieze, K. and Boyles, J. (2013). Copyright, Free Speech, and the Public's Right to Know: How Journalists Think About Fair Use. *Journalism Studies*, 14(6). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Aufderheide_et_al._\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Aufderheide_et_al._(2013)) (last access 04/11/2021).

¹⁰⁵ Pappalardo, K., Aufderheide, P., Stevens, J., and Suzor, N. (2017). Imagination foregone: A qualitative study of the reuse practices of Australian creators. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Pappalardo,_Aufderheide,_Stevens,_and_Suzor_\(2017\)](https://www.copyrightevidence.org/wiki/index.php/Pappalardo,_Aufderheide,_Stevens,_and_Suzor_(2017)) (last access 04/11/2021).

¹⁰⁶ Meletti, B. and van Gompel, S. (2021). Issue reports on how copyright exceptions and other permitted uses that are relevant for documentary filmmakers and immersive digital heritage practitioners are understood in the Netherlands and the UK. *ReCreating Europe*. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Meletti_and_van_Gompel_\(2021\)](https://www.copyrightevidence.org/wiki/index.php/Meletti_and_van_Gompel_(2021)) (last access 04/11/2021).

¹⁰⁷ Loshin, J. (2007). *Secrets Revealed: How Magicians Protect Intellectual Property Without Law*. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Loshin_\(2007\)](https://www.copyrightevidence.org/wiki/index.php/Loshin_(2007)) (last access 04/11/2021).

¹⁰⁸ Silbey, J. (2019). Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment. *Columbia Journal of Law & the Arts*, 42(3), 351-364. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Silbey_\(2019a\)](https://www.copyrightevidence.org/wiki/index.php/Silbey_(2019a)) (last access 04/11/2021).

Some of those studies try to define the contours, map the size or measure the value of the public domain, such as Dusollier (2010),¹⁰⁹ Gerhardt (2014),¹¹⁰ Erickson, Heald, Homberg, Kretschmer and Mendis (2015);¹¹¹ or examine its level of harmonisation across jurisdictions (Angelopoulos 2012).¹¹²

Many studies investigate the long-standing research question of whether innovation and creativity (for a working definition of 'artistic innovation' see Castañer and Campos 2002)¹¹³ are better encouraged through strong exclusive rights or a robust public domain. These include David (1993),¹¹⁴ Akerlof, Hahn and Litan (2002),¹¹⁵ Javorcik (2004),¹¹⁶ Png and Wang (2006),¹¹⁷

¹⁰⁹ Dusollier, S. (2010). Scoping Study on Copyright and Related Rights and the Public Domain. WIPO, CDIP/7/INF/2. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Dusollier_\(2010\)](https://www.copyrightevidence.org/wiki/index.php/Dusollier_(2010)) (last access 04/11/2021).

¹¹⁰ Gerhardt, D. R. (2014). Copyright at the Museum: Using the Publication Doctrine to Free Art and History. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Gerhardt_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Gerhardt_(2014)) (last access 04/11/2021).

¹¹¹ Erickson, K., Heald, P. J., Homberg, F., Kretschmer, M., and Mendis, D. (2015). Copyright and the Value of the Public Domain: An Empirical Assessment. Intellectual Property Office Research Paper. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Erickson,_Heald,_Homberg,_Kretschmer_and_Mendis_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Erickson,_Heald,_Homberg,_Kretschmer_and_Mendis_(2015)) (last access 04/11/2021).

¹¹² Angelopoulos, C. (2012). The myth of European term harmonisation: 27 public domains for the 27 member states. *International Review of Intellectual Property and Competition Law*, Vol. 43, 567-594. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Angelopoulos_\(2012\)](https://www.copyrightevidence.org/wiki/index.php/Angelopoulos_(2012)) (last access 04/11/2021).

¹¹³ Castañer, X., and Campos, L. (2002). The determinants of artistic innovation: Bringing in the role of organizations. *Journal of Cultural Economics*, 26(1), 29-52. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Casta%C3%B1er_and_Campos_\(2002\)](https://www.copyrightevidence.org/wiki/index.php/Casta%C3%B1er_and_Campos_(2002)) (last access 04/11/2021).

¹¹⁴ David, P. A. (1993). Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights and Trade Secrets in Economic Theory and History. In M. Wallerstein, M. Moguee and R. Schoen (eds.), *Global Dimensions of Intellectual Property Rights in Science and Technology*. National Academy Press, 19-61. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/David_\(1993\)](https://www.copyrightevidence.org/wiki/index.php/David_(1993)) (last access 04/11/2021).

¹¹⁵ Akerlof, G. A., Arrow, K. J., Bresnahan, T., Buchanan, J. M., Coase, R., Cohen, L. R. and Hemphill, C. S. (2002). The copyright term extension act of 1998: An economic analysis. AEI-Brookings Joint Center for Regulatory Studies. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Akerlof,_Hahn_and_Litan_\(2002\)](https://www.copyrightevidence.org/wiki/index.php/Akerlof,_Hahn_and_Litan_(2002)) (last access 04/11/2021).

¹¹⁶ Javorcik, B. S. (2004). The composition of foreign direct investment and protection of intellectual property rights: Evidence from transition economies. *European economic review*, 48(1), 39-62. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Javorcik_\(2004\)](https://www.copyrightevidence.org/wiki/index.php/Javorcik_(2004)) (last access 04/11/2021).

¹¹⁷ Png, I. P., and Wang, Q. H. (2009). Copyright Duration and the Supply of Creative Work: Evidence from the Movies. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Png_and_Wang_\(2006\)](https://www.copyrightevidence.org/wiki/index.php/Png_and_Wang_(2006)) (last access 04/11/2021).

Charness and Daniela (2014),¹¹⁸ Handke, Girard and Mattes (2015),¹¹⁹ Handke (2015),¹²⁰ Flynn and Palmedo (2017),¹²¹ and Reimers (2019).¹²²

Other studies look at the public domain through the lens of fundamental rights such as freedom of speech (Benkler 1999;¹²³ Depoorter and Walker 2013)¹²⁴ and the right to science and culture (Shaheed 2014).¹²⁵

Technology and compensation

Empirical studies on exceptions also investigate their complex relationship with technology that allows users to copy and rights holders to protect copyright works. With regard to the latter, Akester (2009)¹²⁶ and Favale (2011)¹²⁷ look at whether Technological Protection Measures (TPMs) and Digital Rights Management (DRMs) can accommodate uses that are permitted by law. This

¹¹⁸ Charness, G., and Grieco, D. (2014). Creativity and Financial Incentives. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Charness_and_Daniela_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Charness_and_Daniela_(2014)) (last access 04/11/2021).

¹¹⁹ Handke, C., Girard, Y., and Mattes, A. (2015). Copyright and Innovation: Fit for Digitization?. *DIW Economic Bulletin*, 5(16). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Handke,_Girard_and_Mattes_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Handke,_Girard_and_Mattes_(2015)) (last access 04/11/2021).

¹²⁰ Handke, C. (2015). Digitization and Competition in Copyright Industries: One Step Forward and Two Steps Back?. *Homo Oeconomicus*, 32. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Handke_\(2015\)](https://www.copyrightevidence.org/wiki/index.php/Handke_(2015)) (last access 04/11/2021).

¹²¹ Flynn, S. and Palmedo, M. (2017)(n 7).

¹²² Reimers, I. (2019). Copyright and Generic Entry in Book Publishing. *American Economic Journal: Microeconomics*, 11(3), 257-84. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Reimers_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Reimers_(2019)) (last access 04/11/2021).

¹²³ Benkler, Y. (1999). Free as the air to common use: First amendment constraints on enclosure of the public domain. *NYU Law Review*, 74, 354. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Benkler_\(1999\)](https://www.copyrightevidence.org/wiki/index.php/Benkler_(1999)) (last access 04/11/2021).

¹²⁴ Depoorter, B. and Walker, R.K. (2013). Copyright false positives. 89 *Notre Dame L. Rev.* 319, UC Hastings Research Paper No. 74. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Depoorter_and_Walker_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Depoorter_and_Walker_(2013)) (last access 04/11/2021).

¹²⁵ Shaheed, F. (2014). Copyright Policy and the Right to Science and Culture. Human Rights Council, U.N. General Assembly (A/HRC/28/57). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Shahed_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Shahed_(2014)) (last access 04/11/2021).

¹²⁶ Akester, P. (2009). Technological accommodation of conflicts between freedom of expression and DRM: the first empirical assessment. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Akester_\(2009\)](https://www.copyrightevidence.org/wiki/index.php/Akester_(2009)) (last access 04/11/2021).

¹²⁷ Favale, M. (2011). Approximation and DRM: can digital locks respect copyright exceptions?. *International Journal of Law and Information Technology*, 19(4), 306-323. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Favale_\(2011\)](https://www.copyrightevidence.org/wiki/index.php/Favale_(2011)) (last access 04/11/2021).

debate has recently evolved to consider whether content moderation algorithms accommodate exceptions (Erickson and Kretschmer 2018;¹²⁸ Brøvig-Hanssen and Jones 2021).¹²⁹

Other studies address the controversial question of whether allowing users to copy protected materials for private use causes harm to rights holders and therefore requires compensation in the form of levies on copying devices. Widdows and McHugh (1984)¹³⁰ and Liebowitz (1985)¹³¹ investigate the impact of home tape recorders and photocopying machines on the music industry and academic publishers respectively. More recently, Sanchez-Graells and Santaló (2007),¹³² Kretschmer (2011),¹³³ and Camerani, Grassano, Chavarro and Tang (2013)¹³⁴ investigate the private copying exception and the related concept of 'fair compensation' introduced by the InfoSoc Directive into EU law in 2001. The scope of the private copying exception in the EU, the US and Canada is examined also in De Wolf and Partners (2014b).¹³⁵

Existing evidence and research agendas

Judicial interpretation

US scholarship on judicial interpretation of fair use finds that 'since 2005 the transformative use paradigm has come overwhelmingly to dominate fair use doctrine' (Netanel 2011).¹³⁶ Although

¹²⁸ Erickson, K. and Kretschmer, M. (2018). 'This Video is Unavailable': Analysing Copyright Takedown of User-Generated Content on YouTube. *Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC)*, 9(1). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Erickson_and_Kretschmer_\(2018\)](https://www.copyrightevidence.org/wiki/index.php/Erickson_and_Kretschmer_(2018)) (last access 04/11/2021).

¹²⁹ Brøvig-Hanssen, R., and Jones, E. (2021). Remix's retreat? Content moderation, copyright law and mashup music. *New Media & Society*. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Br%C3%B8vig-Hanssen_and_Jones_\(2021\)](https://www.copyrightevidence.org/wiki/index.php/Br%C3%B8vig-Hanssen_and_Jones_(2021)) (last access 04/11/2021).

¹³⁰ Widdows, R., and McHugh, R. J. (1984). Taxing purchases of home tape recorders and supplies to compensate for copyright infringements: An econometric analysis of the role of economic and demographic factors. *Journal of Consumer Affairs*, 18(2), 317-325. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Widdows_and_McHugh_\(1984\)](https://www.copyrightevidence.org/wiki/index.php/Widdows_and_McHugh_(1984)) (last access 04/11/2021).

¹³¹ Liebowitz, S. J. (1985). Copying and indirect appropriability: Photocopying of journals. *The Journal of Political Economy*, 945-957. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Liebowitz_\(1985\)](https://www.copyrightevidence.org/wiki/index.php/Liebowitz_(1985)) (last access 04/11/2021).

¹³² Sanchez-Graells, A., and Santaló, J. (2007). Economic Analysis of Private Copy Remuneration. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Sanchez-Graells_and_Santal%C3%B3_\(2007\)](https://www.copyrightevidence.org/wiki/index.php/Sanchez-Graells_and_Santal%C3%B3_(2007)) (last access 04/11/2021).

¹³³ Kretschmer, M. (2011)(n 30).

¹³⁴ Camerani, R., Grassano, N., Chavarro, D. and Tang, P. (2013)(n 36).

¹³⁵ De Wolf & Partners (2014). Study on the Making Available Right and its Relationship with the Reproduction Right in Cross-border Digital Transmissions. European Union. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/De_Wolf_and_Partners_\(2014b\)](https://www.copyrightevidence.org/wiki/index.php/De_Wolf_and_Partners_(2014b)) (last access 04/11/2021).

¹³⁶ Netanel, N. W. (2011)(n 16).

'before 1995 no case of transformative use was ever successful', now 'transformative use cases make up 90% of all fair use decisions' (Liu 2019).¹³⁷ According to Sag (2012),¹³⁸ 'transformative use by the defendant is a robust predictor of a finding of fair use'. Netanel (2011)¹³⁹ and Sag (2012)¹⁴⁰ argue that the fair use standard is not actually as unpredictable and indeterminate as some of its critics claim, and it is therefore a desirable legislative option for other jurisdictions. Both empirical studies find that 'the fair use doctrine is more rational and consistent than is commonly assumed' (Sag 2012).¹⁴¹ In contrast, Liu (2019)¹⁴² notes that 'the nature of transformative use in itself was built on dubious policy foundations' and the paradigm 'falls short of streamlining fair use practice or increasing its predictability'.

Lemley (1997)¹⁴³ proposes the adoption in copyright law of a 'radical improvement doctrine' which in patent law 'through the blocking patents rule and the reverse doctrine of equivalents offers a better protection for radical improvers than copyright law does'. Fuller and Abdenour (2018)¹⁴⁴ finds that a 'pure market substitution' theory is applied to most fair use cases concerning music sampling, suggesting that a 'market enhancement' would be a better guiding principle. Schuster, Mitchell and Brown's (2018)¹⁴⁵ analysis of sales data finds that 'when a song is sampled and incorporated into a different song, the sales of the original song increase', suggesting that 'forward-thinking' copyright owners and firms 'should create business models which encourage cost-free sampling in order to maximise their income'.

The discourse analysis conducted in Kalimo, Meyer and Mylly (2018)¹⁴⁶ suggests that the 'CJEU should adopt a more inclusive discourse in order to provide a more balanced view of copyright issues, including the voices of consumers, users, and dissenting opinions from other interested parties'.

Evaluating policy options

Most studies commissioned as part of the UK 2010-2014 copyright reform support the recommendations made by the Hargreaves Review (Hargreaves 2011).¹⁴⁷ Public and

¹³⁷ Liu, J. (2019)(n 20).

¹³⁸ Sag, M. (2012)(n 17).

¹³⁹ Netanel, N. W. (2011)(n 16).

¹⁴⁰ Sag, M. (2012)(n 17).

¹⁴¹ Ibid.

¹⁴² Liu, J. (2019)(n 20).

¹⁴³ Lemley, M. A. (1997)(n 15).

¹⁴⁴ Fuller, P.B., and Abdenour, J. (2018)(n 18).

¹⁴⁵ Shuster, W.M., Mitchell, D.M. and Brown, K. (2018)(n 22).

¹⁴⁶ Kalimo, H., Meyer, T., and Mylly, T. (2018)(n 25).

¹⁴⁷ Hargreaves, I. (2011)(n 32).

Corporate Economic Consultants (2013)¹⁴⁸ recommends that ‘the government should legislate to enable licensing of orphan works’, while Favale, Homberg, Kretschmer, Mendis and Secchi (2013)¹⁴⁹ more specifically suggests a ‘limited liability system’ to enable archives and other not-for-profit institutions to make orphan works available to the public, and ‘up-front rights clearing’ to provide more appropriate incentives for commercial uses of orphan works. Erickson, Kretschmer and Mendis (2013)¹⁵⁰ concludes that ‘[t]here is no substitution harm from the presence of parodies, reputation harm is very limited, and there are considerable benefits from permitting parodies for innovative producers and consumers that are likely to translate into economic growth’. Camerani, Grassano, Chavarro and Tang (2013)¹⁵¹ finds that ‘private copying is already largely or fully priced in the UK market’ of music, film and software.

Based on an analysis of industry submissions to the Gowers and Hargreaves Reviews, Edwards, Klein, Lee, Moss and Philip (2015)¹⁵² argues that policy making should involve members of the public, who ‘can be a source of legitimate perspective on the matter and should not just be considered as copyright infringers’. Although they struggle to influence the political agenda, civil society actors can find other effective ways to expand the possibilities to lawfully copy and share existing works. Dobusch and Quack (2013) finds that an ‘initially dispersed group of civil society actors with relative few resources effectively mobilized transnationally in support of a standardized copyright license for ‘open content’, while a better-resourced industry coalition was less successful in establishing its standards for Digital Rights Management’.¹⁵³

The Hargreaves Review was ‘specifically asked to investigate the benefits of Fair Use and how these might be achieved in the UK’ (Hargreaves 2011).¹⁵⁴ However, also considering many responses from established UK businesses which ‘were implacably hostile to adoption of a US Fair Use defence in the UK’, the Review concludes that ‘importing Fair Use wholesale was unlikely to be legally feasible in Europe and that the UK could achieve many of its benefits by taking up copyright exceptions already permitted under EU law’. Similarly, in Australia,

¹⁴⁸ Public and Corporate Economic Consultants (2013)(n 34).

¹⁴⁹ Favale, M., Homberg, F., Kretschmer, M., Mendis, D., and Secchi, D. (2015)(n 33).

¹⁵⁰ Erickson, K., Kretschmer, M., and Mendis, D. (2013)(n 8).

¹⁵¹ Camerani, R., Grassano, N., Chavarro, D., and Tang, P. (2013)(n 36).

¹⁵² Edwards, L., Klein, B., Lee, D., Moss, G., and Philip, F. (2015)(n 31).

¹⁵³ Dobusch, L., and Quack, S. (2013). Framing standards, mobilizing users: Copyright versus fair use in transnational regulation. *Review of International Political Economy*, 20(1), 52-88. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Dobusch_and_Quack_\(2013\)](https://www.copyrightevidence.org/wiki/index.php/Dobusch_and_Quack_(2013)) (last access 04/11/2021).

¹⁵⁴ Hargreaves, I. (2011)(n 32).

the recommendation by Australian Law Reform Commission (2013)¹⁵⁵ to introduce fair use to 'promote innovation and enable a market-based response to the demands of the digital age' generates positive responses from academia and resistance from industry. Aufderheide et al. (2018)¹⁵⁶ finds that Australian creators would be keen 'to explore and experiment more if laws were relaxed'; whereas the industry-led study PricewaterhouseCoopers (2016)¹⁵⁷ argues that the introduction of fair use may generate 'a loss of GDP in the order of \$1.3 billion in Australia' and may lead to 'a reduction of available copyright works'. As a result, fair use has not been introduced in Australian copyright law yet. In South Africa, Pistorius and Mwim (2019)¹⁵⁸ concludes that the new exceptions introduced in 2017, including an open-ended fair use provision, 'are too radical, and perhaps in some instances unworkable'.

In 2019, the CDSM Directive adopts only some of the recommendations made by Reda (2015).¹⁵⁹ In an attempt to safeguard public domain works, as recommended by Reda, the Directive creates an obligation on member states to provide that 'any material resulting from an act of reproduction' of out of copyright works of visual art are not subject to copyright or related rights.¹⁶⁰ However, the Directive does not 'harmonise the term of duration' and does not make 'mandatory all the exceptions and limitations referred to in Directive 2001/29/EC' as Reda recommended, but only the four new exceptions it introduces. The optional nature of exceptions is considered by Reda (2015)¹⁶¹ a 'particularly pressing issue' in regard to the 'fragmentation of EU copyright law and the resulting lack of transparency'.

Whether the social, cultural, political and economic benefits that the copyright system intends to realise are better served by open- or closed-ended exceptions has been subject to a long, mostly theoretical debate. In 2020 though, Hudson (2020)¹⁶² concludes a 14-year long empirical study into how exceptions operate in practice in the GLAM sector in Australia, Canada, UK and the US. The study, 'through its analysis of the law in action, provides support for fair use, albeit not as a panacea that can and should be rolled out universally'.

¹⁵⁵ Australian Law Reform Commission (2013)(n 46).

¹⁵⁶ Aufderheide, P., Pappalardo, K., Suzor, N. and Stevens, J. (2018)(n 48).

¹⁵⁷ PricewaterhouseCoopers (2016)(n 47).

¹⁵⁸ Pistorius, T. and Mwim, O. S. (2019)(n 51).

¹⁵⁹ Reda, J. (2015)(n 41).

¹⁶⁰ Art. 14 CDSM Directive – Works of visual art in the public domain. Available with related Recitals at <https://www.create.ac.uk/recitals/#article-14> (last access 04/11/2021).

¹⁶¹ Ibid.

¹⁶² Hudson, E. (2020)(n 70).

Impact of exceptions

The empirical literature on the impact and practical implementation of exceptions tends to focus on sectors and communities that are excluded from the rights clearance system due to its complexity and high costs. The excessive complexity and costs of rights clearance for GLAM organisations, researchers, users and primary creators is recognised in several academic studies – including Cave, Deegan and Heinink (2000),¹⁶³ Aufderheide and Jaszi (2004),¹⁶⁴ Dickson (2010),¹⁶⁵ and Meletti and van Gompel (2021),¹⁶⁶ among others – as well as in the industry responses to Hargreaves 2011¹⁶⁷ (e.g. Pearson submission highlights that ‘clearing rights is a cumbersome and costly exercise’).

Overall, copyright law has a negative effect on these communities. GLAM organisations and academic libraries struggle to preserve (Hackett 2015),¹⁶⁸ digitise and make available their collections (Astle and Muir 2002;¹⁶⁹ Dryden 2008),¹⁷⁰ particularly when these include – as it is often the case – unpublished and orphan materials (Korn 2009;¹⁷¹ Vuopala 2010).¹⁷² Although the WIPO-administered Marrakesh Treaty¹⁷³ introduced mandatory exceptions to ensure accessibility of cultural products for disabled persons, contractual terms can limit libraries’ ability to make accessible copies of copyright works (Giannoumis and Beyene 2020).¹⁷⁴ Stobo, Deazley and Anderson (2013)¹⁷⁵ shows that risk management is often the only viable approach to rights clearance for mass digitisation GLAM projects. Exceptions designed to enable preservation and

¹⁶³ Cave, M., Deegan, M. and Heinink, L. (2000). Copyright clearance in the refugee studies centre digital library project. RLG DigiNews, 4(5). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Cave,_Deegan_and_Heinink_\(2000\)](https://www.copyrightevidence.org/wiki/index.php/Cave,_Deegan_and_Heinink_(2000)) (last access 04/11/2021).

¹⁶⁴ Aufderheide, P., and Jaszi, P. (2004)(n 100).

¹⁶⁵ Dickson, M. (2010)(n 73).

¹⁶⁶ Meletti, B. and van Gompel, S. (2021)(n 106).

¹⁶⁷ Hargreaves, I. (2011)(n 32).

¹⁶⁸ Hackett, T. (2015)(n 58).

¹⁶⁹ Astle, P.J., and Muir, A. (2002)(n 63).

¹⁷⁰ Dryden, J. E., 2008 (n 65).

¹⁷¹ Korn, N. (2009)(n 71).

¹⁷² Vuopala, A. (2010)(n 72).

¹⁷³ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) (2013). Available at <https://www.wipo.int/treaties/en/ip/marrakesh/> (last access 04/11/2021).

¹⁷⁴ Giannoumis, G.A., and Beyene, W. M. (2020). Cultural Inclusion and Access to Technology: Bottom-Up Perspectives on Copyright Law and Policy in Norway. In Antona, M. and Stephanidis, C. (eds) Universal Access in Human-Computer Interaction. Applications and Practice. HCII 2020. Springer, 12189. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Giannoumis_and_Beyene_\(2020\)](https://www.copyrightevidence.org/wiki/index.php/Giannoumis_and_Beyene_(2020)) (last access 04/11/2021).

¹⁷⁵ Stobo, V., Deazley, R. and Anderson, I. (2013)(n 74).

digitisation of collections are often not fit for purposes (e.g. Corbett 2011);¹⁷⁶ or are not known or misunderstood (Morrison and Secker 2015;¹⁷⁷ Todorova et al. 2017;¹⁷⁸ Masenya and Ngulube 2019),¹⁷⁹ causing risk aversion and self-censorship among GLAM practitioners (Dryden 2008).¹⁸⁰ Several studies identify the need for copyright training in GLAM organisations (Mathangani and Otike 2018,¹⁸¹ Benson 2018),¹⁸² which in turn should educate their users (Stannard 2015,¹⁸³ Schofield and Urban 2015).¹⁸⁴ Travis (2010)¹⁸⁵ suggests that, contrary to the claims made by the Association of American Publishers, mass digitisation projects such as Google Books may have a positive impact on the publishing industry.

Researchers find 'the existing laws to be challenging in practice' in the UK (Waelde, Kheria and Levin 2015),¹⁸⁶ and publish more papers and books when they reside in 'countries that implement more robust research exceptions' (Palmedo 2019).¹⁸⁷ Handke et al. (2021)¹⁸⁸ suggests that 'a more permissive copyright framework can be associated with more data mining research'. According to Mattioli (2014),¹⁸⁹ 'existing intellectual property policy does little to meaningfully encourage the disclosure of big data practices'.

Research on user generated content recognises the increasing role of fans and users in the creative industries, such as users entering the animation industry by producing Machinima Haefliger, Jäger and Von Krogh (2010),¹⁹⁰ or questioning 'the cultural industries' current model of global distribution' through voluntary translation and fan-subbing of cultural products (Lee 2011).¹⁹¹ Recent scholarship (Flaherty 2020)¹⁹² shows that 'most research into copyright and fan studies is clustered in the US, with less consideration given to the UK'; and as 'most fan fiction writers are unlikely to litigate due to high costs and uncertainty of outcome, there is a lack of

¹⁷⁶ Corbett, S. (2011)(n 66).

¹⁷⁷ Morrison, C. and Secker, J. (2015)(n 67).

¹⁷⁸ Todorova et al. (2017)(n 69)

¹⁷⁹ Masenya, T. M., and Ngulube, P. (2019)(n 79).

¹⁸⁰ Dryden, J. E. (2008)(n 65).

¹⁸¹ Mathangani, S. W., and Otike, J. (2018)(n 78).

¹⁸² Benson, S.R. (2018)(n 77).

¹⁸³ Stannard, E. (2015)(n 80).

¹⁸⁴ Schofield B. L. and Urban J. M. (2015)(n 76).

¹⁸⁵ Travis, H. (2010)(n 75).

¹⁸⁶ Waelde, C., Kheria, S., and Levin, N. (2015)(n 81).

¹⁸⁷ Palmedo, M. (2019)(n 82).

¹⁸⁸ Handke et al. (2021)(n 84).

¹⁸⁹ Mattioli, M. (2014). *Disclosing Big Data*. *Minnesota Law Review*, 99(2), 535. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Mattioli_\(2014\)](https://www.copyrightevidence.org/wiki/index.php/Mattioli_(2014)) (last access 04/11/2021).

¹⁹⁰ Haefliger, S., Jäger, P., and Von Krogh, G. (2010)(n 89).

¹⁹¹ Lee, H. K. (2011)(n 90).

¹⁹² Flaherty, R. (2020)(n 99).

legal precedent on how fair dealing might apply to fan works'. Rather than by law, fan creators' behaviour is regulated by community norms (Fiesler 2018,¹⁹³ Fiesler and Bruckman 2019),¹⁹⁴ which 'judges often refer to in fair use considerations' (Fiesler 2018).¹⁹⁵ Users and fans report 'low levels of copyright knowledge' (Katz 2019)¹⁹⁶ and are confused about the 'legal specifics of copying' (Poor 2012).¹⁹⁷ They 'show a lack of understanding, and misconception of fair use which centre around ethical considerations as opposed to legal fact', and as a result 'fans self-censor by not uploading adapted content' (Fiesler 2018).¹⁹⁸ Humphreys (2008)¹⁹⁹ identifies a need for 'simplification and flexibility in intellectual property law' and 'for developing new literacies in legal matters in communities of users'. Similarly, Attorney-General's Department (2008)²⁰⁰ recommends increased public information and education' on format-shifting exceptions in Australia. The situation may have improved recently in certain communities as respondents to the survey by Marshall and Shipman (2019),²⁰¹ concerning 'user-generated content in photographs and games content', demonstrate 'an increasingly sophisticated knowledge about copyright'.

Primary creators also have limited knowledge or understanding of copyright law and exceptions (Heins and Beckles 2005;²⁰² Pappalardo, Aufderheide, Stevens, and Suzor 2017;²⁰³ Ekiz 2019;²⁰⁴ Meletti and van Gompel 2021),²⁰⁵ which leads to self-censorship (Pappalardo, Aufderheide, Stevens, and Suzor 2017)²⁰⁶ and reluctance to rely on exceptions (Meletti and van Gompel 2021).²⁰⁷ The development of sector-specific codes of best practices seems to encourage positive change in practice and behaviour within the targeted communities as a result of changed

¹⁹³ Fiesler, C. (2018)(n 94).

¹⁹⁴ Fiesler, C., and Bruckman, A. (2019)(n 95).

¹⁹⁵ Fiesler, C. (2018)(n 94).

¹⁹⁶ Katz, R. (2019)(n 96).

¹⁹⁷ Poor, N. (2012)(n 91).

¹⁹⁸ Fiesler, C. (2018)(n 94).

¹⁹⁹ Humphreys, S. (2008)(n 88).

²⁰⁰ Attorney-General's Department (Australia) (2008). Review of copyright exceptions for private copying of photographs and films - final report. Attorney-General's Department. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Attorney-General%27s_Department_\(2008\)](https://www.copyrightevidence.org/wiki/index.php/Attorney-General%27s_Department_(2008)) (last access 04/11/2021).

²⁰¹ Marshall, C. C. and Shipman, F. M. (2019)(n 98).

²⁰² Heins, M., and Beckles, T. (2005)(n 12).

²⁰³ Aufderheide, P., Pappalardo, K., Suzor, N. and Stevens, J. (2018)(n 48).

²⁰⁴ Ekiz, O. (2019). Documenting the copyright sphere: can festivals solve the problem of copyright clearance for documentaries? *Queen Mary Journal of Intellectual Property*, 9(4). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Ekiz_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Ekiz_(2019)) (last access 04/11/2021).

²⁰⁵ Meletti, B. and van Gompel, S. (2021)(n 106).

²⁰⁶ Aufderheide, P., Pappalardo, K., Suzor, N. and Stevens, J. (2018)(n 48).

²⁰⁷ Meletti, B. and van Gompel, S. (2021)(n 106).

understanding of what the law permits (Aufderheide and Sinnreich 2015;²⁰⁸ Sinnreich and Aufderheide 2015).²⁰⁹

Public domain and incentives

Determining what is in the public domain and what is protected by copyright is difficult, also due to the lack of a harmonised term of protection across jurisdictions (Angelopoulos 2012)²¹⁰ and the ambiguous copyright status of certain types of work such as advertisements (Pritcher 2000).²¹¹ As a result, ‘cultural treasures [are] locked in dark archives, vaults and basements’ (Gerhardt 2014)²¹² and creative businesses tend to opt for ‘licensing a less-suitable copyright work or hiring-in a replacement original work’ rather than incurring the high transaction costs of searching for and using public domain materials (Erickson, Heald, Homberg, Kretschmer and Mendis 2015).²¹³ A synthesis of empirical evidence related to the copyright term can be found in Paul Heald’s 21 for 2021 post ‘Term of Copyright: Optimality and Reality’.²¹⁴

According to Dusollier (2010),²¹⁵ the ‘construction of a positive regime for the public domain [...] would require both the adoption of normative rules in copyright laws and the setting up of material conditions to effectively enable access to, enjoyment and preservation of public domain resources’. Erickson, Heald, Homberg, Kretschmer and Mendis (2015)²¹⁶ recommends assisting communities in valorising the public domain, clarifying its legal status, and improving access to information as policy solutions. Gerhardt (2014)²¹⁷ suggests a better standard for determining when a work is ‘published’ to clarify what materials are in the US public domain.

Most empirical studies find that a robust public domain and weak intellectual property rights encourage innovation and creativity. According to Akerlof, Hahn and Litan (2002)²¹⁸ and Charness and Daniela (2014),²¹⁹ stronger and longer copyright protection does not necessarily increase creative output. Handke (2015)²²⁰ finds that unauthorised digital copying ‘has increased

²⁰⁸ Aufderheide, P., and Sinnreich, A. (2015)(n 101).

²⁰⁹ Sinnreich, A., and Aufderheide, P. (2015)(n 103).

²¹⁰ Angelopoulos, C. (2012)(n 112).

²¹¹ Pritcher, L. (2000)(n 62).

²¹² Gerhardt, D. R. (2014)(n 110).

²¹³ Erickson, K., Heald, P. J., Homberg, F., Kretschmer, M., and Mendis, D. (2015)(n 111).

²¹⁴ Heald, P. (2021). 21 for 2021: Term of Copyright: Optimality and Reality. Available on the CREATE Blog at <https://www.create.ac.uk/blog/2021/06/18/21-for-2021-term-of-copyright-optimality-and-reality/> (last access 04/11/2021).

²¹⁵ Dusollier, S. (2010)(n 109).

²¹⁶ Erickson, K., Heald, P. J., Homberg, F., Kretschmer, M., and Mendis, D. (2015)(n 111).

²¹⁷ Gerhardt, D. R. (2014)(n 110).

²¹⁸ Akerlof et al. (2002)(n 115).

²¹⁹ Charness, G., and Grieco, D. (2014)(n 118).

²²⁰ Handke, C. (2015)(n 120).

competition between suppliers of content, and the record industry has become more productive over recent years'. Flynn and Palmedo (2017)²²¹ argues that more open user rights 'correlate with higher firm revenues in information industries, computer system design, and software publishing' and with increased, higher-quality scholarly output. Reimers (2019)²²² analysis concludes that the 1998 copyright term extension in the US 'decreased welfare for the publishing industry'. In contrast, Javorcik (2004)²²³ argues that weak IP rights may discourage foreign direct investment; and Png and Wang (2006)²²⁴ finds that the extension of copyright term in 19 OECD countries between 1991–2002 'increased movie production'.

Technology and compensation

Akester (2009)²²⁵ and Favale (2011)²²⁶ find that permitted acts are negatively affected by DRMs and TPMs. While Favale (2011)²²⁷ suggests a technological solution ('optical disks have to embed fixed usage rules that allow copyright permitted uses'), Akester (2009)²²⁸ proposes amendments to EU law 'to enable expeditious access to works by beneficiaries of privileged exceptions'. In 2007, Guibault, Westkamp and Rieber-Mohn (2007)²²⁹ observes 'a dangerous tendency [...] to use TPMs to protect business models rather than content'. While 'a standardisation of TPMs could help avoid such abuses', the study suggests that 'legal solutions to this problem [...] are best found in consumer law and competition law rather than copyright law'.²³⁰ In South Africa, Pistorius and Mwim (2019)²³¹ recommends 'a New Zealand style model' which under certain circumstances allows the use of TPMs circumvention devices to exercise permitted acts.

In the context of content moderation, Erickson and Kretschmer (2018)²³² finds that 'the commercial success of parodies are negatively correlated with the risk of takedown, suggesting that commercial substitutability is not a factor in determining removal'. According to Brøvig-Hanssen and Jones 2021,²³³ exceptions are currently unsatisfactorily accommodated by platforms' content moderation, which has a negative impact on producers' motivation to create

²²¹ Flynn, S. and Palmedo, M. (2017)(n 7).

²²² Reimers, I. (2019)(n 122).

²²³ Javorcik, B. S. (2004)(n 116).

²²⁴ Png, I. P., and Wang, Q. H. (2009)(n 117).

²²⁵ Akester, P. (2009)(n 126).

²²⁶ Favale, M. (2011)(n 127).

²²⁷ Ibid.

²²⁸ Akester, P. (2009)(n 126).

²²⁹ Guibault, L., Westkamp, G., and Rieber-Mohn, T. (2007)(n 45).

²³⁰ Ibid.

²³¹ Pistorius, T. and Mwim, O. S. (2019)(n 51).

²³² Erickson, K. and Kretschmer, M. (2018)(n 128).

²³³ Brøvig-Hanssen, R., and Jones, E. (2021)(n 129).

mashups. A synthesis of empirical literature related to notice-and-takedown regimes can be found in Kris Erickson and Martin Kretschmer's 21 for 2021 post 'Notice-and-Takedown in Copyright Intermediary Liability'.²³⁴

Most empirical research on copying devices suggests that the claims by the creative and cultural industries on the harm caused by private uses of protected materials are often overstated. In the 1980s, US scholarship finds that 'the independent effect of taping on pre-recorded music sales may not have been as high as the recording industry has claimed' (Widdows and McHugh 1984),²³⁵ and that 'photocopying has not harmed journal publishers' and actually may be beneficial (Liebowitz 1985).²³⁶ More than 25 years later, in the UK, both Hargreaves (2011)²³⁷ and Camerani, Grassano, Chavarro and Tang (2013)²³⁸ find that a certain amount of private copying is already priced into the first retail purchase (the *de minimis* argument), and therefore no additional compensation is justified. In contrast, Sanchez-Graells and Santaló (2007)²³⁹ – funded by the Groupement Européen des Sociétés d'Auteurs et Compositeurs – argues that the economic impact of the private copying remuneration system 'is not negative and could increase total welfare'.

Future directions for research

As an essential component of the copyright system, exceptions and other dimensions of law that enable lawful copying are likely to remain at the centre of the copyright debate. The implementation of the CDSM Directive offers a fresh opportunity to investigate empirically the purposes of exceptions and how to best achieve them. The Directive introduces exceptions aimed at encouraging innovation (Arts. 3²⁴⁰ and 4²⁴¹ enabling text and data mining activities);

²³⁴ Erickson, K., and Kretschmer, M. (2021). 21 for 2021: Notice-and-Takedown in Copyright Intermediary Liability Available on the CREATE Blog at <https://www.create.ac.uk/blog/2021/06/25/21-for-2021-notice-and-takedown-in-copyright-intermediary-liability/> (last access 04/11/2021).

²³⁵ Widdows, R., and McHugh, R. J. (1984)(n 130).

²³⁶ Liebowitz, S. J. (1985)(n 131).

²³⁷ Hargreaves, I. (2011)(n 32).

²³⁸ Camerani, R., Grassano, N., Chavarro, D. and Tang, P. (2013)(n 36).

²³⁹ Sanchez-Graells, A., and Santaló, J. (2007)(n 132).

²⁴⁰ Art. 3 CDSM Directive – Text and data mining for the purposes of scientific research. Available with related Recitals at <https://www.create.ac.uk/recitals/#article-3> (last access 04/11/2021).

²⁴¹ Art. 4 CDSM Directive – Exception or limitation for text and data mining. Available with related Recitals at <https://www.create.ac.uk/recitals/#article-4> (last access 04/11/2021).

exceptions that serve the public interest (Arts. 5²⁴² and 6²⁴³ on cross-border teaching and the preservation of cultural heritage); and provisions intended to respond to a market failure (e.g. Art. 17²⁴⁴ on the use of protected content by online content-sharing service providers).

Art. 17 intends to close the 'value gap' that according to certain stakeholders, particularly the music industry, would exist as a result of safe harbour legislation between the profits made by online content-sharing platforms (e.g. YouTube) and the revenue paid to musicians. The EU legislator aims to 'foster the development of the licensing market between rightholders and online content-sharing service providers' (Recital 61)²⁴⁵ by excluding the application of the limitation of liability established in Art. 14(1) of Directive 2000/31/EC²⁴⁶ to online platforms that give the public access to protected materials uploaded by their users. The 'value gap' rhetoric is reminiscent of the claims made by creative and cultural industries on the harm caused by copying devices (see for example Widdows and McHugh 1984;²⁴⁷ Liebowitz 1985;²⁴⁸ Kretschmer 2011),²⁴⁹ and is being questioned empirically (Kretschmer and Peuckert 2017;²⁵⁰ Erickson and Kretschmer 2018;²⁵¹ Elkin-Koren, Nahmias and Perel 2019).²⁵² One of the most controversial aspects of Art. 17 is its effect on fundamental rights such as freedom of expression and freedom of the arts. Art 17(7) requires member states to ensure that users are able to rely on the exceptions for 'quotation, criticism, review' and 'caricature, parody, or pastiche' when uploading content to online platforms. The Directive recognises that these exceptions 'which

²⁴² Art. 5 CDSM Directive – Use of works and other subject matter in digital and cross-border teaching activities. Available with related Recitals at <https://www.create.ac.uk/recitals/#article-5> (last access 04/11/2021).

²⁴³ Art. 6 CDSM Directive – Preservation of cultural heritage. Available with related Recitals at <https://www.create.ac.uk/recitals/#article-6> (last access 04/11/2021).

²⁴⁴ Art. 17 CDSM Directive – Use of protected content by online content-sharing service providers. Available with related Recitals at <https://www.create.ac.uk/recitals/#article-17> (last access 04/11/2021).

²⁴⁵ Recital 61 CDSM Directive. Available at <https://www.create.ac.uk/recitals/#article-17> (last access 04/11/2021).

²⁴⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). Text available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031> (last access 04/11/2021).

²⁴⁷ Widdows, R., and McHugh, R. J. (1984)(n 130).

²⁴⁸ Liebowitz, S. J. (1985)(n 131).

²⁴⁹ Kretschmer, M. (2011)(n 30).

²⁵⁰ Kretschmer, T., and Peukert, C. (2017). Video Killed the Radio Star? Online Music Videos and Recorded Music Sales. CEP Discussion Paper No 1265. Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Kretschmer_and_Peukert_\(2017\)](https://www.copyrightevidence.org/wiki/index.php/Kretschmer_and_Peukert_(2017)) (last access 04/11/2021).

²⁵¹ Erickson, K. and Kretschmer, M. (2018)(n 128).

²⁵² Elkin-Koren, N., Nahmias, Y., and Perel, M. (2019). Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals. *Stanford Law & Policy Review*, 31(1). Available on the Copyright Evidence Wiki at [https://www.copyrightevidence.org/wiki/index.php/Elkin-Koren,_Nahmias_and_Perel_\(2019\)](https://www.copyrightevidence.org/wiki/index.php/Elkin-Koren,_Nahmias_and_Perel_(2019)) (last access 04/11/2021).

guarantee the freedom of expression of users' should 'be made mandatory' (Recital 70),²⁵³ but none of the provisions explicitly require their implementation by member states. The methodology developed in Erickson and Kretschmer (2018)²⁵⁴ can be used to investigate empirically the 'tradeoffs between enforcement, innovation, and freedom of expression in online platforms' following the implementation of Art. 17.

The CDSM Directive also introduces new exceptions enabling text and data mining for non-commercial scientific research (Art. 3) and other purposes (Art. 4). Are purpose-specific exceptions that urge commercial actors to seek licences (Handke et al. 2021²⁵⁵ finds that 'there has been market failure regarding the licensing of data for academic data mining') or allow rightsholders to 'opt-out', a suitable legislative solution to encourage innovation? Would innovation be better supported through an open-ended exception like US fair use, or by taking text and data mining entirely out of the copyright arena (as suggested by Kretschmer, Deazley, Edwards, Erickson, Schafer and Zizzo 2014²⁵⁶ and further argued in Margoni and Kretschmer 2021)?²⁵⁷ Empirical research is needed to assess the impact of the new EU legislation on different sectors and communities, and its effectiveness in enabling scientific research and emerging technology with a view to stimulating innovation. Empirical evidence on right to research within international copyright law and policy is being produced by the Program on Information Justice and Intellectual Property.²⁵⁸

The relationship between copyright and innovation is subject to a global policy debate, with a focus on Artificial Intelligence. At the time of writing this synthesis, the Government of Canada has recently closed a consultation on a 'Modern Copyright Framework for AI and the Internet of Things',²⁵⁹ while the UK IPO has just opened one on 'Artificial Intelligence and IP: copyright and

²⁵³ Recital 70 CDSM Directive. Available at <https://www.create.ac.uk/recitals/#recitals-article-17-para-7> (last access 04/11/2021).

²⁵⁴ Erickson, K. and Kretschmer, M. (2018)(n 128).

²⁵⁵ Handke et al. (2021)(n 84).

²⁵⁶ Kretschmer, M., Deazley, R., Edwards, L., Erickson, K., Schafer, B., and Zizzo, D. J. (2014)(n 39).

²⁵⁷ Margoni, Thomas, and Kretschmer, Martin (2021). A deeper look into the EU Text and Data Mining exceptions: Harmonisation, data ownership, and the future of technology. CREATE Working Paper 2021/7. Available on Zenodo at <https://doi.org/10.5281/zenodo.5082012> (last access 04/11/2021).

²⁵⁸ Right to Research in International Copyright Law project, led by the Program on Information Justice and Intellectual Property at the American University, Washington DC. Summary available at <https://www.wcl.american.edu/impact/initiatives-programs/pijip/impact/right-to-research-in-international-copyright/> (last access 04/11/2021).

²⁵⁹ The Government of Canada Launches Consultation on a Modern Copyright Framework for AI and the Internet of Things. News release by the Government of Canada. Available at <https://www.canada.ca/en/innovation-science-economic-development/news/2021/07/the-government-of-canada-launches-consultation-on-a-modern-copyright-framework-for-ai-and-the-internet-of-things.html> (last access 04/11/2021).

patents'.²⁶⁰ In the US, in April 2021 the Supreme Court ended the *Google v. Oracle*²⁶¹ dispute by holding that Google's copying of 11,500 lines of code (out of 2.86 million lines) from the Java API into Android was fair use. This important decision will attract further empirical research on the judicial interpretation of fair use in the US, while raising once again the question of whether innovation and creativity are better encouraged through open- or closed-ended exceptions. Would technical innovations of this kind be permitted under closed-ended exceptions such as those in UK or EU law? A decade ago, a similar question triggered the Hargreaves Review in the UK (Hargreaves 2011),²⁶² and may now suggest potential directions for future research. Empirical evidence on how courts interpret exceptions in jurisdictions other than the US is needed. Researchers can take inspiration from studies such as Favale, Kretschmer and Torremans (2016)²⁶³ or Kalimo, Meyer and Mylly (2018)²⁶⁴ to examine the judgements of the CJEU or those of national courts in different jurisdictions using text mining or discourse analysis.

The EU opted for closed-ended drafting also for the public interest exceptions that aim to enable digital and cross-border teaching activities (Art. 5) and the preservation of cultural heritage (Art. 6). While the mandatory nature of these new exceptions may be seen as a step towards harmonisation, both provisions are narrow in scope. Art. 6 fails to address the concerns faced by GLAM organisations engaged in mass digitisation projects. Art. 5 allows national legislators to narrow down the teaching exception even further by limiting or excluding its applicability upon the availability of 'suitable licences' authorising the same uses covered by the exception. The EU legislator missed an opportunity to 'make mandatory all the exceptions and limitations referred to in Directive 2001/29/EC', as suggested by Reda (2015).²⁶⁵ Will the mandatory nature of the new exceptions introduced in Arts. 3, 4, 5 and 6 create sufficient legal certainty for EU researchers, innovators, educators and GLAM organisations relying on exceptions for cross-border activities? It seems unlikely, but empirical evidence is needed to provide a robust answer.

The synthesis above also shows how sectors and communities who are excluded from the rights clearance system struggle to rely on exceptions because of limited knowledge or understanding

²⁶⁰ Artificial Intelligence and IP: copyright and patents. Open consultation by the UK Intellectual Property Office. Available at <https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents> (last access 04/11/2021).

²⁶¹ *Google LLC v. Oracle America, Inc.*, 141 S. Ct. 1163 (2021). Syllabus available at https://www.supremecourt.gov/opinions/20pdf/18-956_d18f.pdf (last access 04/11/2021).

²⁶² Hargreaves, I. (2011)(n 32).

²⁶³ Favale, M., Kretschmer, M., and Torremans, P.C. (2016)(n. 23).

²⁶⁴ Kalimo, H., Meyer, T., and Mylly, T. (2018)(n 25).

²⁶⁵ Reda, J. (2015)(n 41).

of what uses are permitted. The research strand pioneered by Aufderheide and Jaszi (2004)²⁶⁶ suggests that one way of increasing awareness and creating better understanding of what exceptions permit is to document best practices, which in turn leads to positive change in practice and behaviour. According to Hudson (2020),²⁶⁷ best practice norms in GLAM organisations ‘influence decision-making more so than legislative reforms and landmark cases’. The research being conducted by Meletti and van Gompel (2021)²⁶⁸ for ReCreating Europe²⁶⁹ aims to identify best practices in documentary filmmaking and immersive digital heritage in the UK and the Netherlands. There is an opportunity for researchers to adapt these methods to document best practices in other communities such as fan creators and assess their compatibility with existing exceptions in different jurisdictions.

Overall, empirical research on exceptions should continue to pursue what appears to be its primary goal: to reduce the complexity and so to increase the predictability of exceptions, with a view to helping courts interpret exceptions consistently, policy and law makers to draft them, and users to understand and rely upon them.

²⁶⁶ Aufderheide, P., and Jaszi, P. (2004)(n 100).

²⁶⁷ Hudson, E. (2020)(n 70).

²⁶⁸ Meletti, B. and van Gompel, S. (2021)(n 106).

²⁶⁹ reCreating Europe: Rethinking digital copyright law for a culturally diverse, accessible, creative Europe. Funded by European Union’s Horizon 2020 research and innovation programme under grant agreement No 870626870626. Project website available at <https://www.recreating.eu/> (last access 04/11/2021).



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2021/09 DOI: 10.5281/zenodo.5705970

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