Rethinking digital copyright law for a culturally diverse, accessible, creative Europe

Grant Agreement No. 870626

Deliverable Title	**D2.1 Interim report on EU and national sources and private practices on legitimate uses and flexibilities**
Deliverable Lead:	SSSA
Partner(s) involved:	SSSA, USZ
Related Work Package:	WP2 End-users and access to culture
Related Task/Subtask:	Task 2.1 Comparative and EU cross-national mapping of regulatory and private ordering sources/Subtasks 2.1.1 and 2.1.2
Main Author(s):	Giulia Priora (SSSA), Caterina Sganga (SSSA)
Other Author(s):	Péter Mezei (USZ), István Harkai (USZ)
Dissemination Level:	Public
Due Delivery Date:	31.12.2020
Actual Delivery:	30.12.2020
Project ID	870626
Instrument:	H2020-SC6-GOVERNANCE-2019
Start Date of Project:	01.01.2020
Duration:	36 months

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

Version history table			
Version	**Date**	**Modification reason**	**Modifier(s)**
v.01	20/11/2020	First draft	Giulia Priora
v.02	01/12/2020	Revised draft (sent to other contributors)	Giulia Priora
v.03	09/12/2020	Full draft sent to partners' involved for contributions	Giulia Priora, Caterina Sganga
v.04	14/12/2020	Full draft, including contributions from partner involved, sent to peer-reviewers and the Quality Assurance Manager (QAM)	Giulia Priora, Caterina Sganga, Péter Mezei, István Harkai
V.05	23/12/2020	Accommodated suggested actions requested from the peer-reviewers and the QAM; Final version released	Giulia Priora

Legal Disclaimer

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

Table of Contents

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

Abbreviation list

CDSM	Copyright in the Digital Single Market (Directive)
CHIs	Cultural Heritage Institutions
CJEU	Court of Justice of the European Union
DMCA	Digital Millennium Copyright Act (US)
DSM	Digital Single Market
GLAMs	Galleries, libraries, archives, museums
EU	European Union
EULA	End-user license agreement
InfoSoc	Information Society (Directive)
NUIM	Maynooth University
SSSA	Sant'Anna School of Advanced Studies
UGC	User-generated contents
USZ	University of Szeged, Hungary
WIPO	World Intellectual Property Organization
WP	Work Package

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

Executive Summary

The end-users' perspective is often an unspoken side of the European copyright regulatory framework. In light of the objectives pursued by *reCreating Europe*, and its overarching aim to promote a modern, creative, culturally diverse, accessible Europe, *Work Package (WP) 2 – End users and access to culture* takes up the challenge of unveiling the role of end-users' rights, interests, expectations, and behaviors vis-à-vis copyright rules.

To this end, *Task 2.1 - Comparative and EU cross-national mapping of regulatory and private ordering sources* purports to set the ground for high-profile multidisciplinary research by way of an encompassing mapping of relevant public and private sources of law related to copyright flexibilities. The scope of the legal mapping encompasses the harmonized European Union (EU) copyright legal framework, the national copyright systems of all 27 EU Member States, and a selection of contractual regulations from over 20 digital platforms. Its unprecedently wide coverage and sound methodological approach make the database resulting from the research efforts of WP2 - Task 2.1 a unique repository on copyright flexibilities in Europe and beyond.

In its first year of operation, the researchers' teams involved in this Task have virtually completed the collection of the relevant data, and successfully consolidated the structure for their systematic analysis. A preliminary version of the threefold dataset addressing, respectively, EU legal sources, national legal sources, and private ordering mechanisms, is provided as Annexes 1, 2, and 3 to this document.

The interim report here presented offers a detailed overview of the pursued objectives, specific research questions, consolidated structure and methodology, and preliminary findings of the research conducted to date. The study focuses on two guiding concepts, i.e., the notion of "copyright flexibilities" within the copyright legislative framework, and the "user-friendliness" of market-based private ordering practices related to the consumption of digital content. The conceptualization of both these notions has been elected as the beacon of the ongoing quantitative, qualitative, and comparative analysis of the data collected, as well as the leading principles for the purpose of dissemination and public discussion of the research findings.

1. Aim and methodology

1.1. Introductory Remarks

The interim report stems from the research activities of *reCreating Europe*[1] *WP2 - End-users and access to culture,* focusing on the "end users" topic. The overall aim of the project is to deliver ground-breaking contributions towards a clear understanding of what makes a regulatory framework that promotes culturally diverse production, and optimizes inclusive access and consumption. An integral part of such endeavor is represented by the support the project provides to craft and embrace a sound "end-user perspective" of copyright law in Europe. In this light, WP2 sets a specific focus on general users and selected vulnerable groups, aiming at comprehensively studying the regulatory aspects involved in the notion of access to culture.

Among its main tasks, WP2 lists an unprecedented comparative EU and cross-national mapping of regulatory sources, with a focus on copyright and the Digital Single Market (DSM). Task 2.1 builds on solid research expertise and on previous attempts to systematize parts the regulation impacting the access to culture and

[1] For an overview of the project activities and outcomes, see <https://www.recreating.eu/> (21/12/2020).

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

information in the EU. The unique nature of the task is enshrined in its aim to encompass all relevant regulatory and policy sources: if previous studies and the existing literature have introduced and consolidated sector-specific focuses on the exceptions and limitations to copyright protection, Task 2.1 charts for the very first time an exhaustive EU copyright legal mapping entirely focused on the end-user's perspective and experience.

The work plan of WP2 foresees a series of nine deliverables and two milestones that consistently lead to a complete and interdisciplinary understanding of strengths and obstacles of accessing culture in the EU, and to sound evidence-based recommendations on future policy and regulation. The interim report here presented is the first of this series of deliverables (D.2.1). A second interim report focused on the barriers experienced by vulnerable users to access culture (D.2.2), a final report and public dataset on copyright flexibilities (D.2.3, MS10), a policy brief on barriers for vulnerable groups (D.2.4), an interim and a final report on case studies (D.2.5, D.2.8), a peer-reviewed publication on the impact of copyright law and perception on the demand for cultural goods and services (D.2.6), a report on effect of digitization and regulatory changes on access to culture (D.2.7), and final policy recommendations and code of best practices (D.2.9, MS14) will follow.

1.2. Research Question

This report fundamentally tackles the question of copyright flexibilities within the EU copyright regulatory landscape. By showing the preliminary results of the legal mapping, it showcases the structure, methodological approach, and first substantial research outcomes of the study of the copyright regulation most directly impacting the access to culture in the EU.

The research pivots on the notion of copyright flexibilities in the attempt of proposing an open and sufficiently broad category, capable of encompassing both public and contractual sources of law that carve out room for the end-users to access, use, or re-use copyrighted works. However, this notion is an unsettled facet of the theoretical debate and spectrum of practices revolving around the access to culture in the EU. As illustrated in the following Section 1.3, the relevant literature presents a wide array of inquiries into aspects, which are highly relevant to the idea of copyright flexibility. However, an all-encompassing definition, capable of reflecting the complexity of this notion, remains to be found. It is not by chance that, in the academic and public debates, it is significantly more common to encounter references to copyright exceptions and limitations, public domain, private ordering, contractual arrangements, and freedom of contract.

The research is articulated around three main questions:

- To what extent and how are the EU and national copyright systems promoting access to culture, knowledge, and information?
- What is the role played by private ordering in regulating access and use of cultural goods and services?
- What are the regulatory enablers, obstacles and gaps interfering with the access to culture in the EU?

The first two research questions explore the twofold nature of the regulatory landscape under analysis: on the one side, the public sources of copyright law (e.g. legislative acts, court decisions, governmental policies, practices and schemes); one the other side, the private ordering sources (e.g. standardized license agreements, terms and conditions of use, other types of relevant contractual arrangements). The research aims to respond to these two core queries by way of an exhaustive legal mapping, thus systematizing the

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

complex and fragmented regulation involved. The report provides a detailed overview of how research efforts in this direction have been envisioned and carried out so far.
The third research question stems from the quantitative, qualitative, and comparative analysis of the data collected and systematized within the frame of our legal mapping. The preliminary results shared in the following pages signal first key elements of the analysis on enablers, obstacles, and gaps in the EU copyright regulation. The core research work of analysis and interpretation is still ongoing, and a full inquiry will be provided with the final report (D.2.3) scheduled for Month 30 of the *reCreating Europe* project timeline. This upcoming study will provide an exhaustive and refined response to the question of the strengths and issues of the EU copyright regulatory framework vis-à-vis access to culture, knowledge, and information, thus representing a solid basis for the policy recommendations and code of best practices (D.2.9) at month 33.

1.3. State of the Art

1.3.1. Studying EU copyright flexibilities

As mentioned above, the existing literature concerning copyright flexibilities is varied. The studies that are most relevant for the purpose of this interim report, and for Task 2.1 in general, are those embracing a broad scope and holistic approach to the topic.

With regards to copyright flexibilities and *public* sources of law, a substantial segment of the literature meeting this criterium is composed by reports and expert opinions commissioned to or independently delivered by organizations representing end-users or other stakeholders.[2] Of considerable significance is also the number of ad hoc studies commissioned by legislative bodies at international, supra-national, and national level. Interesting contributions can be found in the United Nations (UN) General Assembly resource repository,[3] and several studies tackling some copyright flexibilities in selected critical scenarios were commissioned by the World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights.[4] Similarly, the EU Parliament has increasingly relied on expert opinions, thorough studies, and internal working documents focusing on the role and effectiveness of copyright exceptions and limitations

[2] E.g. European Audiovisual Observatory IRIS Plus (Francisco Javier Cabrera Blazquez et al), "Les exceptions et limitations en matière de droit d'auteur" (2017); Association of European Research Libraries (LIBER), "Limitations and Exceptions in EU Copyright Law for Libraries, Educational and Research Establishments: A Basic Guide" (2016); The Lisbon Council (Benjamin Gibert), "The 2015 Intellectual Property and Economic Growth Index: Measuring the Impact of Exceptions and Limitations in Copyright on Growth, Jobs and Prosperity" (2015); Creative Commons - Project Open Educational Resources Policy in Europe (Teresa Nobre), "Mapping Copyright Exceptions and Limitations in Europe (Working Paper)" (2014); Communia, "Policy Paper Nr.10 on the importance of exceptions and limitations for a balanced copyright policy" (2015); Consumers International (Jeremy Malcom), "Consumers in the Information Society: Access, Fairness and Representation" (2012).
[3] E.g. UN General Assembly Human Rights Council, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, "Copyright policy and the right to science and culture" (2014); UN e-Copyright Bulletin (Lucie Guibault), "The nature and scope of limitations and exceptions to copyright and neighboring rights with regards to general interest missions for the transmission of knowledge: prospects for their adaption to the digital environment" (2003); UN e-Copyright Bulletin (Anne Lepage), "Overview of Exceptions and Limitations to Copyright in the Digital Environment" (2003).
[4] E.g. Kenneth D. Crews, 'Study on Copyright Limitations and Exceptions for Libraries and Archives: Updates and Revised' (2015); Séverine Dussolier, "Scoping study on copyright and related rights and the public domain", Study prepared for the WIPO Secretariat (2010); Raquel Xalabarder, "WIPO Study on Copyright Exceptions for Educational Activities in North America, Europe, Central Asia and Israel" (2009); Judith Sullivan, 'Study on Exceptions and Limitations for the Visually Impaired' (2006).

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

within the EU legal framework.[5] At national level, the focus on copyright flexibilities has been more confined, mostly revolving around informative materials on access to cultural heritage, libraries, and education.[6]

The academic scholarship on the topic of copyright flexibilities is flourishing. The revamped interest in copyright exceptions, limitations, flexibilities, and the public domain has recently led to a remarkable body of scholarly contributions across Europe and beyond. The numerous relevant publications in the field show a wide variety of specific focuses and methodological approaches: thorny issues related to the process of harmonization of copyright exceptions and limitations lay most often in the spotlight,[7] while studies more closely focusing on the notion of public domain, the judicial interpretation and adjudication of disputes on copyright flexibilities, and the practical effectiveness of their enforcement in the digital age have been subject to remarkably growing attention.[8] Some analyses take full account of the polyhedric nature of copyright flexibilities, and purport to draw a big picture, exploring the variety of legislative and judicial responses by way of theoretical, comparative, and legal design approaches.[9] Innovative policy proposals have been also put forward by copyright scholars, who rethink the role and envision a more solid structure for copyright flexibilities both at international and EU level.[10]

---

[5] E.g. EU Parliament Study (Martine Hebette et al), "Copyright law in the EU. Salient features of copyright law across the EU Member States" (2018) PE 625.126; EU Parliament Study (Udo Bux), "The Balance of EU Copyright: impact of exceptions and limitations on industries and economic growth" (2015) PE 519.209; EU Parliament Study (Benjamin White and Chris Morrison), "How to tackle copyright issues raised by mass-scale digitisation?" (2009) PE 419.619; EU Parliament Study (Mihaly Ficsor), "How to deal with Orphan Works in the digital world?" (2009) PE 419.611.

[6] E.g. UK IP Office, "Exceptions to Copyright. Guidance for Consumers" (2014); <https://www.gov.uk/guidance/exceptions-to-copyright> (last access 20/11/2020); Italian Libraries Association, "Pubblico dominio – Istruzioni per l'uso" (2020).

[7] E.g. Eleonora Rosati, "Copyright in the EU: in search of (in) flexibilities" (2014) *Journal of Intellectual Property Law & Practice* 9(7) 585-598; Susan Marsnik, "A Delicate Balance Upset: A Preliminary Survey of Exceptions and Limitation in US and European Union Digital Copyright Laws" (2004) *International Business Law Review*; Bernt Hugenholtz, "Why the copyright directive is unimportant and possibly invalid" (2000) *European Intellectual Property Review (EIPR)*; Lucie Guibault, "Why cherry-picking never leads to harmonization" (2000) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC)*; Joao Pedro Quintais, "Rethinking normal exploitation: enabling online limitations in EU copyright law" (2017) *AMI - tijdschrift v oor auteurs-, media- en informatierecht* 2017/6, 197-205; Séverine Dussolier, "A Manifesto for an E-Lending Limitation in Copyright" (2014) *JIPITEC* 5; Christophe Geiger, Daniel Gervais, and Martin Senftleben, "Three step test revisited: How to use the test's flexibility in national copyright law" (2014) *American University International Law Review* 29(3) 582 ff.; Maria Daphne Papadopoulou, "Copyright Limitations and Exceptions in E-Education Environment" (2010) *European Journal of Law and Technology* 1(2); Michael Hart, "The proposed Directive for Copyright in the Information Society: Nice rights, shame about the exceptions" (1998) *EIPR*, 169–171;

[8] E.g. Lucie Guibault, "Drawing the Contours of the European Public Domain" in Godt et al (eds), *The Boundaries of Intellectual Property* (Common Core of European Private Law, forthcoming); E.g., European Copyright Society, "Opinion on the Judgment of the CJEU in Case C-201/13 Deckmyn – Limitations and exceptions as key elements of the legal framework for copyright in the EU" (2013).

[9] E.g. Emily Hudson, *Drafting Copyright Exceptions. From the Law in Books to the Law in Action* (Cambridge University Press 2020); Haochen Sun, Shyam Balganesh, Wee Loon Ng-Loy (eds), *Comparative Aspects of Limitations and Exceptions in Copyright Law* (Cambridge University Press 2018); Ruth Okediji (ed), *Copyright in the Age of Exceptions and Limitations* (Cambridge University Press 2017); Graham Greenleaf and David Lindsay, *Public Rights. Copyright's Public Domains* (Cambridge University Press 2018); Reto Hilty and Sylvie Nérisson (eds), *Balancing Copyright. A Survey of National Approaches* (Springer 2012); Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Springer 2008); Robert Burrell and Allison Coleman, *Copyright Exceptions. The Digital Impact* (Cambridge University Press 2005).

[10] E.g. Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use. The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020); Maurizio Borghi, "Exceptions as user rights in EU copyright law" (2020) CIPPM/Jean Monnet Working Papers No.06-2020; Bernt Hugenholtz and Martin Senftleben, "Fair Use in Europe. In Search of Flexibilities" (2011) IViR/Vrije Conference Paper; Christophe Geiger, "Implementing an International Instrument for Interpreting Copyright Limitations and Exceptions" (2009) International Review of Intellectual Property and Competition Law (IIC) 40; Daniel Gervais, "Making copyright whole: a principled approach to copyright exceptions and limitations" (2008) University of Ottawa Law and Technology Journal 5, 1-42; Bernt Hugenholtz and Ruth Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (2008) Open Society Institute.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

With regards to copyright flexibilities and *private ordering* mechanisms, the state of the art is significantly more limited, both in quantity and in substantial engagement with a predominantly normative, rather than empirical analysis. To date, a scant amount of research has been carried out specifically addressing how platforms manage users' rights and/or possibilities to use the materials downloaded or uploaded. The legal focus of these relevant studies is also diverse. A selection of the most meaningful research publications has been compiled and is here presented in the following.

Looking for the most substantial body of literature on the topic, it ought to be noted that North American legal scholars have dedicated considerable efforts analysing end-user license agreements (EULAs) of software providers and online retailers in light of applicable legislation and related case law. Among others, Alice J. Won has focused on the computer games industry's EULAs,[11] and Nina Aragon has addressed Apple's terms and conditions in light of various US cases.[12] None of these studies have, however, paid any attention to the consequences of private ordering mechanisms involved in the operations of various platforms. Hans Schulte-Nölte has discussed in details the American Law Institute's Restatement of Consumer Contract Law and the relevant provisions of incorporation of standard contract terms on websites, including platforms relevant for the research conducted in *reCreating Europe*'s WP2 End-users.[13] A leading role in the US scholarship regarding the meaning and relevance of EULAs, and the related consequences on users' rights and flexibilities is held by the research conducted by Aaron Perzanowski and Jason Schultz. [14] Building on numerous articles in the field, the two authors have outstandingly proven the presence of a heavily misleading terminology (e.g. via the use of terms such as "sale" and "purchase"), and its problematic impact on consumers' expectations regarding the online access to protected works and subject matter. Perzanowski and Schultz's book mainly focuses on the specific issue of digital resales, without developing a holistic approach to user flexibilities in copyright law. Last but not less insightful, Pascale Chapdelaine published a book on contracts and the changing nature of property in the digital age, with special regards to the user remedies, user rights and user privileges,[15] representing one of the analytical attempts coming from overseas, which closely fits the intent and purpose of Task 2.1, and this report.

In Europe, several authors have addressed questions similar to our research topic. In 2017, Liliia Oprysk, Raimundas Matilevicius, and Aleksei Kelli studied the development of secondary market for e-books, and, as a part of their research, they developed a focus on Amazon's e-book business and related terms and conditions of Amazon's EULAs.[16] By doing so, the authors have convincingly evidenced that Amazon's EULAs leave almost no level playing field for end-users regarding the resale of lawfully acquired e-books.[17] An equally important research paper was co-authored by Sabrina V. Helm, Victoria Ligon, Tony Stovall, and Silvia Van Riper, conducting a focus group research related to the consumer interpretation of "ownership" of

[11] Alice J. Won (2013): Exhausted? Video Game Companies and the Battle Against Allowing the Resale of Software Licenses, Journal of the National Association of Administrative Law Judiciary, p. 386-438.
[12] Nina Aragon (2017): Calculating Artists' Royalties: An Analysis of the Courts' Dualistic Interpretations of Recording Contracts Negotiated in a Pre-Digital Age, *Cardozo Law Review De Novo*, p. 180-209.
[13] Hans Schulte-Nölte (2019): Incorporation of Standard Contract Terms on Websites, *European Review of Contract Law*, Issue 2/2019, p. 103-129.
[14] Aaron Perzanowski and Jason Schultz, *The End of Ownership – Personal Property in the Digital Economy* (MIT Press 2016).
[15] Pascale Chapdelaine, *Copyright User Rights – Contracts and the Erosion of Property* (Oxford University Press 2017).
[16] Liliia Oprysk, Raimundas Matilevicius & Aleksei Kelli, "Development of a Secondary Market for E-Books" (2017) *JIPITEC* 2, 128-138.
[17] The issue of "ownership" of lawfully acquired e-books via Amazon is also addressed in a currently pending case in the United States, see inter alia Ariel Zilber, "Amazon argues customers who buy Prime Video content don't own it as California woman sues company for 'secretly reserving the right' to cut off access to purchased titles" (2020) *Daily Mail*, 28 October 2020, <https://www.dailymail.co.uk/news/article-8890213/Amazon-argues-customers-buy-Prime-Video-content-dont-California-woman-sues-company.html> (last access 02/12/2020).

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

tangible and digital products, with a special focus on the book industry.[18] In the book edited by Thomas Riis, the authors - among others, Thomas Riis, Ole-Andreas Rognstad, Jens Schovsbo, Sebastian Felix Schwemer, Henrik Udsen, and Clement Salung Petersen - address the phenomenon of user generated law, the collective and other forms of cross-border licensing schemes, and private enforcement procedures by Internet Service Providers (ISPs).[19] On a complementary note, Adrian Kuenzler published a book tackling the problem of consumer sovereignty and its relation to the markets that try to manipulate the consumers.[20]

More recently, European scholarship has extensively discussed specific focuses, which pertain to the uses' perspective and negotiation power vis-à-vis digital platforms. First among them, the issue of resale of digitally acquired contents under the doctrine of exhaustion versus licensing limitations on such resale was substantively discussed. In 2018, Péter Mezei provided a systematic, but predominantly normative analysis of "digital exhaustion" comparing European and US norms and case law.[21] Caterina Sganga[22] and Reto M. Hilty[23] have also contributed to this analysis with widely cited contributions. Recent studies have also developed a focus on the interaction between the copyright exceptions, in primis the private copy and teaching exceptions, and the private regulation of digital exploitation of content online, as the recent study by Bernd Justin Jütte, Giulia Priora, Guido Noto La Diega, and Léo Pascault outlines, analysing terms and conditions of online service providers used in digital teaching activities.[24]

The emergence of empirical studies is a promising development in the field. In 2019, Joan-Josep Vallbé, Balázs Bodó, João Pedro Quintais, and Christian Handke paid close attention to user preferences on digital cultural distribution, with a special focus on user satisfaction and copyright compensation systems.[25] Their paper is based on empirical data analysis, which is highly useful within the frame of the research conducted in Task 2.1. Most recently, Liliia Oprysk and Karin Sein have provided for an empirical analysis of various consumer-law-oriented questions regarding user flexibilities in the age of platforms.[26] This paper is not only methodologically close to our research plan, but also focuses on some of the platforms we have analysed (e.g. Amazon, Microsoft, Apple online services). Hence, this paper does not only serve as a useful source of our literature review, but also as a "reference source" to double-check the validity of our findings in our own research.

1.3.2. Pre-existing experiences of copyright legal mapping

The work carried out in Task 2.1 relates also to pre-existing experiences of "mapping" of copyright laws across Europe. First among them, and most directly related to the research here outlined, is the platform

[18] Sabrina V. Helm, Victoria Ligon, Tony Stovall & Silvia Van Riper, "Consumer Interpretations of Digital Ownership in the Book Market" (2018) *Electronic Markets*, 177-189.
[19] Thomas Riis (ed), *User Generated Law – Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar 2016).
[20] Adrian Kuenzler, *Restoring Consumer Sovereignty – How Markets Manipulate Us and What the Law Can Do About It*, (Oxford University Press 2017).
[21] Péter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union* (Cambridge University Press 2018).
[22] Caterina Sganga, "A Plea for Digital Exhaustion in EU Copyright Law" (2018) *JIPITEC* 3, 211-239.
[23] Reto M. Hilty, "Kontrolle der digitalen Werknutzung zwischen Vertrag und Erschöpfung" (2018) *GRUR*, 865-880.
[24] Leo Pascault, Guido Noto La Diega, Bernd Justin Jütte, and Giulia Priora, "Copyright and remote teaching in the time of Covid-19: A study of contractual terms and conditions of selected online services" (2020) European Intellectual Property Review 42(9) 548-555. See also Bernd Justin Jütte, "Coexisting digital exploitation for creative content and the private use exception" (2016) *International Journal of Law and Information Technology*, 24(1), 1-21.
[25] Joan-Josep Vallbé, Balázs Bodó, Joao Pedro Quintais and Christian W. Handke, "Knocking on Heaven's Door: User Preferences on Digital Cultural Distribution" (2019) *Internet Policy Review*, 2, 1-24.
[26] Liliia Oprysk and Karin Sein, "Limitations in End-User Licensing Agreements: Is There a Lack of Conformity Under the New Digital Content Directive?" (2020) *International Review of Intellectual Property and Competition Law*, 5, 594-623.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

"copyrightexceptions.eu"[27]. Such resource shows affinity with the aims and rationale underlying the legal mapping presented in this interim report. It displays the national legislations on copyright exceptions and limitations of all EU Member States, proposing a particularly user-friendly interface and a dual (Member-State-/exception-based) browsing option. The platform does not provide information on public sources of law other than adopted legislation (it does not include e.g. Court decisions, draft laws/bills, policy proposals) and no private sources of regulation (e.g. contracts, standardized licenses). Still looking at the legislative sources, some recent research experiences of monitoring ongoing developments, especially those concerning the national implementation processes of the 2019/790 Directive (EU) on Copyright in the Digital Single Market (CDSM), have turned into highly popular online database, presenting a solid structure and multiple browsing options.[28]

Systematic efforts to compile information regarding copyright flexibilities have been made also by WIPO,[29] Creative Commons,[30] and the Wikimedia Foundation.[31] These platforms do not boast an exhaustive geographic coverage of all EU Member States, yet encompass a wider variety of sources, including also case law, explanatory documentation, and policy briefs. Fulfilling a similar aim of informing the public about copyright flexibilities and boundaries of protection, the platforms "outofcopyright.eu"[32] and "copyrightuser.org".[33] With the latter, run by the research institute CREATe (UK Copyright and Creative Economy Centre) based at the University of Glasgow, who is consortium partner of *reCreating Europe,* a synergy and cooperation in the delivery of research outcomes and dissemination strategies are already established.

1.3.3. Original contribution and expected outcomes

The legal mapping envisioned in Task 2.1 represents an original contribution to the study of copyright flexibilities in the EU. Its added and original value is enshrined in three of its main features. First, the *comprehensive* nature of the dataset: the legal mapping charts a complete and up-to-date picture of the regulatory framework on copyright flexibilities in the EU. It encompasses the public sources of copyright law from all EU Member States, inclusive of case law and policy proposals, as well as a meaningful selection of private sources of regulation related to the digital access to cultural goods and services. Second, the *interactive* nature of the dataset. The remarkable amount of data collected are aggregated and processed following a solid structure of main focuses (serving as "nodes") and unveiling the interrelations among them ("links"). This will translate into a user-friendly interface with multiple browsing options, thus facilitating the user's experience and use of the public database. Third, the *accessible* nature of the data and information provided: the database will be available in multiple EU languages and in accessible audio-format for visually

[27] <www.copyrightexceptions.eu> (last access 20/11/2020).
[28] E.g., CREATe Implementation CDSM Directive page, https://www.create.ac.uk/cdsm-implementation-resource-page/ (last accessed 20/11/2020); Communia DSM Implementation Tracker, https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879 (last accessed 20/11/2020).
[29] <https://www.wipo.int/copyright/en/limitations/> (listing relevant studies with global focus from 1999 to 2015) (last access 20/11/2020).
[30] <https://cc-caselaw.herokuapp.com/> (last access 20/11/2020).
[31] <https://en.wikipedia.org/wiki/Limitations_and_exceptions_to_copyright>; <https://commons.wikimedia.org/wiki/Commons:Copyright_rules_by_territory/Consolidated_list_I-L>; <https://en.wikipedia.org/wiki/EU_copyright_case-law> (last access 20/11/2020).
[32] <http://outofcopyright.eu/> (last access 20/11/2020).
[33] <https://www.copyrightuser.org/understand/exceptions/> (last access 20/11/2020).

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

impaired persons. Short explanations will also help the user navigating the complexity and technicalities of the regulatory framework.

In this light, the public database resulting from the legal mapping is expected to effectively sustain the overarching aim of the *reCreating Europe* project to tackle the main challenges EU digital copyright law is currently facing, i.e., its complexity, its growing relinquishment, and the consolidating awareness and knowledge gaps among policymakers and stakeholders. More concretely, the research outlined in the next pages is expected to fundamentally support the achievement of the WP2 objectives and deliverables as follows:

- The legal mapping will help the empirical analysis, mostly conducted via semi-structured interviews, on the impact of EU legislation and policies on end-users;
- It will contribute to the comparative cross-national mapping of the legal, economic and technological barriers faced by certain vulnerable groups in accessing digital culture;
- It will help designing the agent-based model, which is meant to evaluate the effects of digitalization and changes in IPR (Intellectual Property Rights) and copyright legislation on access, accessibility, affordability and consumption of cultural/creative goods and services;
- It will support the building a complete and informed assessment of legal and policy measures impacting on access to culture, identifying best practices and formulating policy recommendations for regulators to unleash the full potential of digitization and the DSM in achieving universal access to culture, and foster cultural diversity and democratization.

1.4. Legal Mapping

1.4.1. Research scope and division of work

The scope of the legal mapping reflects its underlying research questions, as illustrated above, thus encompassing:

a) a legal mapping of EU and national public sources of regulation on copyright flexibilities (Annexes 1 and 2); and
b) a legal mapping of private sources of regulation on copyright flexibilities (Annex 3).

The division of work and sub-tasks among the consortium partners involved in Task 2.1 follows this twofold scope: the research team at the Sant'Anna School of Advanced Studies (SSSA) in Pisa, Italy, is in charge of the analysis of public regulatory sources (e.g. legislation, court decisions, governmental policies, practices and schemes) in the field of copyright law, DSM, and broader cultural policies (subtask T2.2.1); the University of Szeged (USZ), Hungary, is in charge of the analysis of private ordering sources (e.g. standardized license agreements, terms and conditions of use) (subtask T2.2.2). The two involved teams of researchers support each other's activities by promoting occasions of cooperation, regular exchange, and mutual feedback.

1.4.2. Selection of sources and main focuses – public sources of law

With regards to EU and national public sources of regulation on copyright flexibilities, relevant data on legislations, case law, EU and national policies have been collected via desk research, relying on the institutional online repositories of the EU and the Court of Justice of the European Union (CJEU). The selection of CJEU decisions mostly focuses on recent (2010 –to date) case law related to digital uses of copyrighted works or other subject matter. Data on national copyright legislations, case law, and policies have been gathered via desk research, building on existing databases such as "copyrighexceptions.eu", and through a

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

questionnaire administered to selected national copyright experts in each EU Member State. The recruitment of national experts has relied on the members of the *reCreating Europe* project consortium and their networks. The engagement of the recruited national copyright experts has been on a pro bono voluntary basis.

The questionnaire circulated to the national copyright experts (Annex 4) has been designed based on the preliminary results of the mapping of relevant EU sources, and the identified main focuses of the research, that are the following:

- Copyright exceptions and limitations and three-step-test
  - De minimis uses (e.g. temporary reproduction, ephemeral recording, incidental inclusion, technically necessary uses)
  - Private non-commercial uses (e.g. reprography, private copy, freedom of panorama)
  - Quotation
  - Parody
  - Teaching and scientific research (e.g. illustration for teaching and scientific research, digital teaching activity, text and data mining)
  - Uses within/by cultural heritage institutions (e.g. public lending, preservation of cultural heritage, uses of orphan works, and of out-of-commerce works) *> ad hoc focus study within WP5 - Galleries, libraries, archives, museums (GLAM) (see below)*
  - Uses for visually impaired persons
  - Uses for informatory purpose (e.g. news reporting, public speeches and lectures)
  - Uses by public authority (e.g. public security, legislative and judicial proceedings, religious and official celebrations)
  - Three-step-test
  - Other non-infringing uses

- Public domain and other flexibilities
  - Copyright expiration
  - Works or subject matter excluded from protection
  - Public domain schemes
  - Compulsory licensing schemes
  - Copyright exhaustion

- User rights and public interest
  - Main legal instruments adopted to achieve a fair balance
  - References to notion of public interest
  - References to notion of user's rights

Legal provisions and case law closely related to uses of protected works and other subject matter within the realm of cultural heritage institutions (CHIs), such as galleries, libraries, archives, and museums (GLAMs) is excluded from the scope of this report, as it represents a specific focus study carried out within *reCreating Europe*'s WP5. As such, an ad hoc report is dedicated to the presentation of the results of the legal mapping pertaining copyright law in the GLAM sector, and cultural uses of protected contents by users via CHIs.

1.4.3. Selection of sources and main focuses – private ordering mechanisms

Data on private ordering sources will be collected through a mapping and assessment of a set of contractual documents, selected so as to represent a meaningful array of cultural and creative goods. The collection

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

includes any such documents (named e.g. “terms of service”; “terms of use”; “conditions of use”; “terms and conditions of use”; “subscriber agreement”; “user agreement”) that set the parameters of the lawful uploading, hosting and dissemination of protected subject matters (e.g. software, music, audiovisual materials, video games, etc.) by both professional creators and end-users. In case of uploading, hosting and dissemination by professional creators, the focus is nevertheless on the abilities (flexibilities) of end-users to use the involved protected subject matters.
The research has been conducted via desktop research, no interviews were needed.
The collection of data focused on various main topics, which were further dissected into subthemes. The majority of these subthemes were closely connected to the flexibilities covered/regulated by the public copyright sources (e.g. private copying, parody, notice-and-take-down). On the other hand, some of the focus points reflected “platform realities” (e.g. family sharing, contract termination, terms related to the creation, use and licensing of user-generated content), that is, functionalities and options that seem to be crucial for a good-functioning and popular online service.

The order of analysis was as follows:

- Private users’ acts - reproduction
  - download a permanent copy (or more copies)
  - create a back-up copy
  - re-download option (multiple downloads in case of the loss of device, etc.)
  - download and use of copies on multiple devices

- Private users’ acts - dissemination
  - family sharing
  - resale/transfer of copies or accounts
  - linking (hyperlinks, embedding, framing) and sharing

- Cultural uses (uses backed by the freedom of expression, education)
  - teaching/research/studying
  - news reporting
  - parody (etc.)
  - quotation (etc.)
  - “user-generated content”

- Rights granted to service provider regarding user-generated content

- Procedural safeguards
  - notice-and-take-down & redress mechanisms
  - contract amendments with or without users’ agreement
  - removal of contents uploaded/shared by the user
  - termination of user account

The categorization of and the exact platforms covered by the research are the followings:

- Music streaming platforms
  - Soundcloud
  - BandCamp

This project has received funding from the European Union’s Horizon 2020 research and innovation programme under grant agreement No 870626

- Spotify

- Video streaming platforms
  - Netflix
  - Disney+
  - Hulu

- Hosting platforms
  - YouTube
  - Twitch
  - DailyMotion
  - PornHub

- Gaming platforms
  - Steam
  - EA Origin

- Social networks
  - Twitter
  - Instagram
  - Facebook

- Online marketplaces
  - eBay
  - Amazon
  - Apple Media Services
  - Google Play
  - Microsoft 365

The selected EULAs are valid as of August 31, 2020.

Datasets of both EU and national legal sources, and private contractual sources from 20 EULAs have been designed and built for internal use of the WP2 team, but already taking into account the technical needs and dissemination strategies to launch the final public database at Month 33 of the *reCreating Europe* project. The datasets effectively flag similarities, differences, common paths, and issues, thus fulfilling the needs dictated by its multifold methodological approach, illustrated as follows.

1.4.4. Systematic and comparative legal analysis

The methodology embraced for the study of the selected sources is a cohesive combination of systematic, qualitative, and comparative analysis. The research conducted in Task 2.1 starts with a thorough collection, up-to-date re-ordering, and related *systematic* analysis of all relevant legal sources, thus embracing a consolidated methodology in the legal scholarship as well as in the policy analysis. The wide-range systematization of legal sources will lead the study to engage with their *quantitative* and *qualitative* interpretation. Building on the vast existing literature on the topic, the analysis of the regulation will

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

eventually lead to the identification of enabling factors, obstacles, and gaps that impact end-users in their access to culture, knowledge and information in the EU. This will add remarkable contributions not only to the scholarly debates surrounding the discipline, but also to the policy discourse of the current effectiveness, future enhancement and modernization of EU digital copyright law.

The *comparative* analysis complements the research endeavour. This methodological approach is embraced upon reflections and solid structuring of its pursued objectives, scope, considerations on comparability, and analytical steps. These pillar elements of the comparative legal analysis, as outlined among others by Wolff,[34] well fit macro comparative research efforts, and support the design of our research, even though it can be described as a methodologically hybrid comparative analysis on user flexibilities. The goals pursued by our comparative research are, as often the case in the comparative legal scholarship,[35] to enhance the learning and knowledge about the topic of copyright's user flexibilities, support the emergence of evolutionary and taxonomic research efforts, thus de facto helping the process of study and harmonization of the legal systems involved. Pursuing these aims, we welcome Mark van Hoecke's idea of "toolbox", rather than a fixed methodological roadmap, underlying the notion of comparative legal research.[36] Among the various methods included in the comparative legal research "toolbox", our study emphasizes the functional,[37] contextual,[38] and, consequently, the common core[39] methods, as it purports to look at the effects and the "living" nature of the law, as well as the actual functioning of EULAs of online intermediaries, thus also fundamentally including empirical research tools.

As highlighted by Wolff, a successful comparative research shall consistently respond to the question of "what shall be compared".[40] In this light, comparative research allows for the macro-, meso- or micro-level of analysis to be the selected to serve as the research question.[41] Our study ambitiously covers both the macro-level analysis, analysing and comparing EU and national laws in its focus on public sources, and the meso-level research, studying online intermediaries' private ordering mechanisms.

The third prong of a successful comparative research is the proper selection of jurisdictions/countries. As far as the research on public sources of law is concerned, the scope embraced by our study covers all 27 Member States, and the harmonized EU copyright legal framework, thus representing an unprecedented exercise of mapping in the field of copyright flexibilities. With regards to the research on private ordering mechanisms, the prong shall be reformulated as requiring a proper selection of online intermediaries. In fact, all platforms are potentially eligible, but selection is inevitable**.** The main criteria followed in the selection of the analysed platforms have been (i) a certain level of development (predominantly web 2.0 models, i.e. models where end-user involvement is not only necessary but inevitable), and (ii) similar, or almost similar, functions

[34] Lutz-Christian Wolff, "Artificial Intelligence ante portas: The End of Comparative Law?" (2019) *The Chinese Journal of Comparative Law* 3, 490 ff.
[35] H. Patrick Glenn, "The Aims of Comparative Law" in Jan M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar 2006) 57-65.; Wolff (2019) 491.
[36] Mark Van Hoecke, "Methodology of Comparative Legal Research" (2015) *Law and Method*, 1 ff.
[37] According to van Hoecke, this method practically means that "rules and concepts may be different, but that most legal systems will eventually solve legal problems in a similar way". This method allows for the looking for functional equivalents and differences in various legal systems. Compare to ibid., at p. 9. On the "functionalism" of comparative law see especially Konrad Zweigert & Hein Kötz: *Einführung in die Rechtsvergleichung,* Dritte Auflage, J. C. B. Mohr (Paul Siebeck), Tübingen, 1996.
[38] This method focuses on the political-technological-economic environment, which formed the body of the law; it necessitates the empirical observation of case law and more. Compare to van Hoecke (2015) 16-18.
[39] This method "looks for commonalities and differences between legal systems in view of the question to what extent harmonization on certain points would be possible among the compared legal systems or the question how a European rule (…) could be interpreted in such a way that it fits best the different national traditions". Compare to ibid., at p. 21.
[40] Wolff (2019) 491.
[41] See van Hoecke (2015) 21-22; Wolff (2019) 491-492.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

(mainly, hosting, streaming and/or selling of protected works or subject matter via the platform primarily by rightsholders and/or lawfully by end-users). Prima facie infringing websites were excluded from the scope of the analysis. Further relevant factors in the selection of platforms were their general availability in the EU, and the availability of English language versions of their EULAs. Furthermore, a "coincidence factor" was also taken into account: we are focusing on platforms that we are generally familiar with and have broad relevance (i.e. boast great numbers of users) in this field - hence, niche platforms have not been covered. The resulting selection is meant as a starting point, which effectively provides for a fair cross research output.

Finally, due considerations have been made regarding the comparability of the data collected. This requirement has been ensured by the selection of the research parameters, e.g., the categorization of copyright flexibilities, the presence/absence of EU general principles, the type and scope of platforms; the focus of the research (EULAs); the exact focal points (certain provisions and features of EULAs). As such, the initial plan was to provide for an overview of the relevant rules, and the quantitative and qualitative analysis of these rules from the point of view of end-users.

2. Research outcomes

The current state of the research on public and private sources of law regarding copyright flexibilities allows for first meaningful insights and considerations. The work is in progress, and more extensive results are expected by Month 30 of the *reCreating Europe* project timetable. The preliminary findings presented below are to be read in conjunction with the datasets attached as Annexes 1, 2, and 3.

2.1. Interim results on the legal mapping of public sources

To date, a significant amount of public legal sources has been collected and systematically analysed. The relevant data and information amount to more than half the envisioned size and scope of the final WP2 public database on legal sources on copyright flexibilities. The mapping of all most relevant EU legal sources, inclusive of related CJEU case law, has been completed (see Annex 1). The questionnaires from the national copyright experts of 23 Member States (out of 27) have been received, and the provided insights and data processed and aggregated (see Annex 2). The advanced stage of both processes of collection and systematization of public legal sources has allowed us to delve into the quantitative/qualitative analysis thereof, setting the basis for the comparative study, which is upcoming next in the work plan of the SSSA team (from Month 13). The preliminary outcomes stemming from this analysis follow the methodological design of the created dataset, which differentiates between EU source, and national sources of law.

2.1.1. EU law sources

The mapping of EU legal sources of copyright flexibilities draws an all-encompassing picture of the aims and relevant provisions enshrined in the EU copyright legal framework. By doing so, the topical systematization of EU copyright law helps visualizing and understanding the "room" for flexibilities in favour of end-users. The resulting picture is that of a wanting legal framework, yet also of promising recent developments. As widely acknowledged by the scholarship, the harmonization of copyright exceptions and limitations lags behind the ongoing process of modernization and approximation of national copyright rules. The conducted mapping well displays three main reasons behind this underdevelopment.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

First, the *optional* nature of copyright exceptions and limitations emerges as a dominant pattern, under the tag "O" (optional) as opposed to "M" (mandatory) (see Annex 1). With the sole exemption of the provisions on copyright duration and scope of protection, all the identified categories show a dominance of legal rules, whose implementation is not imposed, but rather left to the discretion of Member States.

Second, the dataset helps visualizing the *conceptual fragmentation* underlying the idea of copyright flexibility. The approach embraced by the EU legislator is notoriously that of a closed list of exceptions and limitations, which leads to a wide variety of provisions, dealing with different scenarios, and aiming at exhaustively cover the need for flexibility and protection of end-users' fundamental rights and freedoms. This helps understanding how the resulting European copyright landscape, when it comes to exceptions and limitations, is not only fragmented due to the considerable discretion left in the hands of national Parliaments, but also, and possibly even more importantly, due to an *ab initio* fragmented design of copyright flexibilities.

Third, entangled between the various provisions scattered across the analysed Directives lie expressed references to *outdated* assumptions, which hardly fit the current digital reality. Glaring examples are, among others, the exception for "minor analogue uses" (Art.5(3)(o) InfoSoc Directive 2001/29/EC, see Annex 1 page 2.A.), and the reprography exception for "reproduction on paper or similar medium by way of photography" (Art.5(2)(a) InfoSoc Directive – see Annex 1 page 2.B.).

In addition, the unprecedented mapping exercise of the relevant CJEU case law has proved particularly fruitful. The compilation of the dataset has led to identify a substantial focus of the Court on the exceptions and limitations relating to private non-commercial uses and de minimis uses (see Annex 1 – pages 2.A. and 2.B.). The Court's engagement with the interpretation of other copyright flexibilities has been, to date, significantly lower.

Despite the elements of the analysis supporting the argument of a problematic and still wanting EU copyright legal framework, the analysis sheds light also on promising, most recent developments. In particular, the shift towards *mandatory* exceptions and limitations, epitomized by the 2019/790 CDSM EU Directive and 2017/1564 Marrakesh EU Directive, emerges clearly from the dataset (see Annex 1 – pages 2.F., 2.G.). The most recent evolution of the CJEU case law sheds light also on an increasingly broader variety of copyright exceptions and limitations addressed by the Court's reasoning. Paying attention to the specific years of the decisions indicated in our table, one can notice the timely nature of some CJEU interpretations regarding, among others, the objective scope of copyright protection, the exceptions for quotation, teaching and scientific research, informatory purpose, and copyright exhaustion (see respectively Annex 1 – pages 1.B., 2.C., 2.G., 2.H., 5.A.).

2.1.2. National law sources

The mapping of national sources has fundamentally complemented the legal picture on copyright flexibilities in the EU. The research effort in collecting, systematizing, and analysing the relevant data has been notably substantial, and, as explained above, has seen the engagement of national experts providing valuable inputs and up-to-date information from the Member States. All relevant data have been processed and aggregated following a consistent structure with the EU legal mapping, as Annex 2 shows.

At the current stage of completion of the dataset, the first, overarching result emerging is the *solidity* of our designed dataset structure, and its *utility* in supporting the systematization and analytical approaches to the topic of copyright flexibility. The identified macro-categories fit, indeed, the purpose of sketching an encompassing "legal cartography" of relevant national legal provisions, and related case law. Not the least,

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

our analysis displays first meaningful outcomes regarding consolidating trends, and novel developments across the Member States.

As far as copyright exceptions and limitations are concerned, as showed by pre-existing experiences of legal mapping (e.g. "copyrightexceptions.eu"), the scenario presents itself considerably fragmented. Glaring examples confirming this are the copyright exceptions for parody (see Annex 2 – page 1.D.), uses for teaching and scientific research purposes (ibid. – page 1.G.), and uses by public authorities (ibid. – page 1.I.).

What has found significantly less emphasis in the copyright scholarship as well as in mapping exercises prior to this study is the emergence of meaningful convergences, both at legislative and case law levels. An example, which our dataset brings to the surface, is the case of *de minimis uses* (see Annex 2 – page 1.A.). Despite their partially optional nature, copyright exceptions for the temporary or ephemeral reproduction, and incidental inclusion, boast a solid level playing field across the Union. Similarly, copyright exceptions for private non-commercial uses (e.g., reprography, private copy, freedom of panorama, see Annex 2 – page 1.B.), quotation (ibid. – page 1.C.), and uses for informatory purposes (ibid. – page 1.H.) tend to show converging trends, rather than substantial differences in the legislative design and interpretation.

Thanks to the systematic ordering of sources, we are able to identify some recent trends, tracing the current evolution of the EU copyright flexibilities scenario. Among them, the national response to the international and EU obligation to introduce new exceptions and limitation to promote *uses for visually impaired persons* has been unanimous and effective, at times leading to a broader sensitivity towards vulnerable end-users and including all types of disabilities (see Annex 2 – page 1.F.).

A pattern of innovative developments can be noticed also with regards to the category of *teaching and scientific research exceptions* (see Annex 2 – page 1.G.). Despite the numerous differences in structuring and regulating non-commercial educational and scientific uses of copyrighted content across the Member States, we detect several reforms of national copyright rules tilting towards an enhancement of the flexibilities in this specific regard. Indeed, even though the process of implementation of the most recent 2019/790 EU CDSM Directive is still ongoing (with the sole exception of Hungary, representing the first and, to date, only implementation of its Art.5 on the digital teaching activities exception), new rules have been introduced to lose the grip of copyright protection vis-à-vis reproduction and distribution of works for school use and educational objectives (e.g. 2005 reforms in Finland and Greece, 2016 reform in Slovakia, 2018 reforms in Poland and Romania), digital teaching activities (e.g. 2019 reform in Ireland, 2020 reform in Hungary); text and data mining practices (e.g. 2001 reform in Hungary; 2016 reform in France; 2017 reform in Estonia; 2018 reform in Germany; 2019 reform in Ireland), and other specific uses such as for the purpose of school media collections (e.g. 2018 reform in Germany), and by childcare institutions (e.g. 2019 reform in Belgium).

Our collection and analysis of relevant national case law is still ongoing. As a preliminary finding, it is worth noting that we have a rather homogenous distribution of relevant cases across the Member States, as well as across the identified categories of copyright flexibilities. The sole copyright exception, on which we have not encountered Court decisions yet is the one for uses for visually impaired persons, due most probably to its utmost recent implementation (see Annex 2 – page 1.F.). In line with the findings related to the CJEU case law (see above), national Court decisions addressing de minimis uses, and private non-commercial uses are significant in quantity. Peculiar is the case of the copyright exception for parody (see Annex 2 – page 1.D.), whereby the presence case law is as significant, if not more important, as legislative provisions on point.

Currently, our research is also focusing on the realms of the limitation of *objective scope of copyright protection* (see Annex 2 – page 2.B.), *public domain schemes*, and *compulsory licensing schemes*, which require peculiar and substantial efforts of analysis and classification of the relevant sources. In fact, as our dataset shows, the notions of public domain and compulsory license are remarkably varied across the national copyright cultures. In this light, one additional and refined objective of the work carried out within

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

Task 2.1, and, in particular, by the SSSA team, is to frame harmonized legal notions for both terms, capable of reflecting the current state of national legislations, and facilitating the recourse to such tools to advance the agenda for a modern, digital European copyright.

2.2. Interim results on the legal mapping of private sources

Following the collection of the relevant data from the terms and conditions of the selected platforms, we can draw several interim findings, and hence further limit the scope of our research.

Our first hypothesis seems to be immediately confirmed. It was assumed, and, in light of the relevant legislative framework, it was also confirmed that not all specific research topics find an equally meaningful relevance with respect to all main categories and/or the individual platforms. Among others, "*family sharing*" is not an issue for platforms that are not primarily dedicated to "sharing" copyright protected materials (e.g. social networking sites), or which can be freely accessed by anyone (e.g. free-of-charge music streaming platforms). Similarly, the reproduction of *"back-up copies"* is irrelevant for those services that do not offer the reproduction of files at all.

We further noticed that the majority of "*cultural uses*", intended lato sensu as including e.g. parody and news reporting, are almost never reflected in the terms and conditions. On the one hand, that might be due to the limited nature/purpose of the majority of the analysed platforms (e.g. gaming sites are not dedicated to news reporting). On the other hand, the majority of such culturally relevant activities are covered by public sources of law, and hence are directly binding on platforms (e.g. audiovisual materials covering the news of the day might, at least theoretically, be lawfully available via YouTube under the news reporting exception of the InfoSoc Directive). We have nevertheless noticed a significant amount of private regulations regarding user-generated contents (UGC), which can indirectly allow for numerous culturally-relevant private uses.

Third, the initial analysis of the data collection also confirms that the majority of terms and conditions intend to abide by the public rules or existing case law; with some notable exceptions regarding e.g. private copying and linking/embedding.

Fourth, the terms and conditions show a significant difference regarding their *language* (smooth/everyday language v. detailed/normative language), their *scope* (focusing on the most important features of the service v. overarching/complete regulation of topics; alternative regulate topics + adding external terms and conditions on further practical matters); and their *flexibility or user-friendliness* (e.g. with respect to the grants assigned, the formalities related to the termination/modification of the terms and conditions themselves or the specific terms of user subscriptions). Fifth, it is immediately visible that the majority of platforms intend to follow the more detailed *notice-and-take-down procedure* of the Digital Millennium Copyright Act (DMCA) of the United States,[42] rather than the less detailed set of rules of the EU E-Commerce Directive 2000/31/EC .[43]

Besides the above interim findings, we continue to analyse a selected, comparable set of focal points in our research. The first key element of our research will be dedicated to the *general terms of licensing to the end-users* (license granted to end-users to use contents that are accessible via the platform), *and by the end-users* (license granted to platforms to use end-users' contents). Our interim findings confirm that such licenses are

[42] 17. U.S.C. §512 [Digital Millennium Copyright Act, Pub. L. 105-304 (1998)].
[43] Unsurprisingly, our research might be directly affected by the normative developments of the European Union regarding the "Digital Services Act".

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

very close to each other in terms of user-friendliness (with a stronger trend towards inflexibility), but significant exceptions exist (giving rather broad rights to end-users in accessing and reusing the available protected subject matter).

Second, we intend to pay close attention to the prerequisites of using (i.e. creating, uploading, sharing, downloading) UGC via the selected platforms. We understand and note that not all of the respective service providers allow for any meaningful UGC policy, and hence some platforms will be expressly excluded from the analysis of this part. Nevertheless, addressing UGC is necessary to understand the abilities of creative users on these platforms.

Third, we intend to address the family sharing options which seem to comply – at least to a certain degree – with the "private" copying exceptions granted to end-users.

Fourth, a part of our review will be on the "resale" (i.e. redistribution, further dissemination) options of end-users. The existing case law on this field seems to seriously limit end-users' abilities regarding lawfully acquired copies of protected subject matters. Indeed, businesses are heavily relying on streaming (communication to the public) and temporary access models (licensing), which are strong arguments against the application of the doctrine of exhaustion in a digital environment.

Fifth, content moderation is not only a hot topic - which is specifically addressed by *reCreating Europe*'s *WP6 Intermediaries* - but is also of primary importance for both types of end-users: those who upload content to the platform's system, and those who intend to access contents of others. The predictability and reliability of any content moderation practices in general, and the exact operation of any specific content removal (filtering, disabling) is of vital importance. We have already highlighted the general path of relying on the DMCA's broader/stricter notice-and-take-down mechanism rather than (any specific or general) European model.

Finally, the details of contract modification and termination need to be addressed to. Predictability and reliability in general, as well as the (hoped) permanent access to lawfully accessed (or acquired) contents by the end-users require clear and straight terms and conditions on how end-users might access the services following any amendments to the EULAs by the service providers. As an interim remark, we can flag a diverse range of "willingness" on the service providers' side, whether and in what form are they willing to inform their clients about any changes to the terms and conditions.

In a nutshell, the ongoing research efforts regarding private ordering sources of copyright flexibilities are oriented towards a textual analysis of the selected relevant terms and conditions, but also towards the creation and broad dissemination of infographics, stemming from the findings of the analysis, to help visually positioning the various service providers on the scale of "user-friendliness". By framing and substantiating the notion of user-friendliness within the European copyright discourse we aim to reflect on how the way end-users consume digital contents has different characteristics compared to tangible goods. Digital marketplaces and streaming platforms are able to allow for sampling or experiencing contents, but in the meantime these services have rather strict policies on accessing the contents. At this initial stage of the research, it is already visible that consumers have to agree on stricter rules if they want to access the contents on a permanent basis, which rules are much stricter and narrowly construed as in case of tangible copies.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

3. Conclusions

The research carried out within Task 2.1 of *reCreating Europe*'s project aims to build a solid ground for further legal and multi-disciplinary study of the end-user's perspective, meant as the ensemble of rights, interests, experience, and own perception of European digital copyright. Such a perspective locates itself within the broader set of objectives pursued by the whole *reCreating Europe* project, consistently addressing the question of copyright modernization to promote a culturally diverse, accessible, and creative Europe.

The work accomplished to date and the ongoing activities carried out by both partner teams involved in the legal mapping of public and private sources of copyright flexibilities in the EU prove to be highly fruitful and solidly designed. The synergy between the two teams and respective selected focuses allows for expectations of high-profile research outcomes in the upcoming months, and complete fulfilment of the project's foreseen activities and deliverables as from its timeline.

The notions of "copyright flexibilities" within the legislative framework, and of "user-friendliness" of the market-based private ordering practices related to the consumption of protected content in the digital environment, will be the drivers of the upcoming phase of refined quantitative, qualitative, and comparative analysis, which both the SSSA and USZ researchers have initiated.

As illustrated above, the results achieved with the legal mapping allowed us to refine our research questions, and identify specific research focuses that will guide the work in the upcoming months. In light of the preliminary findings presented in this interim report, we envision the following future steps within the research plan of Task 2.1:

- the completion of the dataset of the legal mapping (D2.3, MS10), with the addition of further selected legal sources of both public and private nature, by Month 30;
- an online event aimed at disseminating and opening the discussion on the preliminary results of the legal mapping, with the participation of the researchers and national experts who have been directly involved in this research activity, to take place between Month 15 and Month 18;
- the creation, and user-friendly design of a publicly accessible database displaying all collected data, to be launched between Month 30 and Month 36, and enhancing the long-term contribution and utility of the project;
- the quantitative, qualitative, and comparative analysis of the results stemming from the legal mapping exercise, to be conducted separately for public legal sources and private ordering mechanisms. Following the drafting of both analyses, a joint effort of contextualization and interpretation of the end-user perspective in European copyright law will be promoted, which will take the shape of a highly informed study of enabling, constraining, and missing elements in the regulatory framework to promote access to culture, knowledge, and information. The outcomes of both the specific analyses, and the joint study will be shared by means of a report (D2.3) by Month 30;
- proactive support to the ongoing WP2 research activities focusing on the economic analysis of behavioural patterns and legal perception in the consumption of cultural goods (D2.6 and D2.7), and exploring the perspective of vulnerable end-users, inquiring into the experiences, needs, barriers, and perceptions of visually impaired persons and persons with disabilities vis-à-vis access to protected content and accessible formats thereof, as foreseen by the report and policy brief deliverables scheduled for Month 18 (D2.2) and Month 30 (D2.4);
- meaningful contributions to the academic debate and scientific research landscape on EU copyright law, by way of at least two scientific publications on peer-reviewed journals on the topic of copyright flexibilities;

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

- the provision of compiled informative materials, video-tutorials, and infographics to promote a wide dissemination of the results of the legal mapping analysis to the public at large via *reCreating Europe*'s website and planned dissemination activities;
- direct and proactive engagement in the drafting of best practices and policy recommendations for different categories of end-users (D2.9), and organization of an *ad hoc* stakeholder workshop at Month 30 to present and discuss the resulting code of best practices and policy recommendations with relevant stakeholders, consumers associations, associations representing vulnerable users (MS14);
- the promotion and further enhancement of synergies among WPs and consortium partners of *reCreating Europe*, with particular regards to the added value of the initiated cooperation with the team at Maynooth University (NUIM) working within the frame of *WP2 - End-users and access to culture* on vulnerable end-users, visually impaired persons, and persons with disabilities, as well as with *WP4 – Creative industries* and *WP5 - Galleries, libraries, archives, museums (GLAM)*, and *WP6 – Intermediaries*.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

References

Legislative sources

Austria: Austrian Copyright and Related Rights Act BGBl. Nr.111/1936.

Belgium: Belgian Code of Economic Law of 2014.

Bulgaria: Bulgarian Copyright and Neighbouring Rights Act Nr.56/1993; Cultural Heritage Act Nr.19/2009.

Cyprus: Cypriot Copyright Act Nr.59/1976.

Czechia: Czech Copyright and Related Rights Act Nr.120/2000; Higher Education Act Nr.111/1998.

Denmark: Consolidated Danish Act on Copyright No.1144/2014.

Estonia: Estonian Copyright Act Nr.RT I 1992, 49, 615.

Finland: Finnish Copyright Act Nr.404/1961; Orphan Works Act Nr.764/2013; Public Broadcasting Tax Act Nr.2012/484.

France: Intellectual Property Code, Act Nr.92-597/1992; Cultural Heritage Code, Ordonnance Nr.2004-178.

Germany: German Copyright and Related Rights Act Nr.BGBl. I S. 1273/1965; Collecting Societies Act BGBl. I S.1190/2016.

Greece: Greek Copyright and Related Rights Act Nr.2121/1993.

Hungary: Hungarian Copyright Act Nr.LXXVI/1999.

Ireland: Irish Copyright and Related Rights Act Nr.28/2000; S.I. No. 597/2008 - Copyright and Related Rights (Public Lending Remuneration Scheme) Regulations 2008; S.I. No. 221/2013 - Copyright and Related Rights (Public Lending Remuneration Scheme) (Amendment) Regulations 2013; S.I. No. 490/2014 - European Union (Certain Permitted Uses of Orphan Works) Regulations 2014.

Italy: Copyright and Related Rights Act Nr.633/1941.

Latvia: Copyright Act Nr.148/150 of 2000.

Luxembourg: Copyright Related Rights and Database Act Nr. Mémorial A N° 50/2001.

Malta: Maltese Copyright Act Nr.XIII/2001, Chapter 415 of the Laws of Malta; Certain Permitted Uses of Orphan Works Regulations (SL415.05) of 2014.

The Netherlands: Dutch Copyright Act Nr. Stb.308/1912.

Poland: Polish Copyright and Related Rights Act Nr.24 poz.83 of 1994.

Romania: Romanian Copyright and Related Rights Acts Nr.8/1996.

Slovakia: Slovakian Copyright Act No. 185/2015; Art Funds Act Nr.13/1993.

Spain: Spanish Intellectual Property Act of 11 November 1987 as consolidated by Royal Legislative Decree 1/1996.

Sweden: Swedish Copyright Act Nr.729/1960; Copyright Regulation Nr.1212/1993.

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626

Annexes

Annex 1 – Legal mapping of EU sources of copyright flexibilities

Annex 2 – Legal mapping of national sources of copyright flexibilities

Annex 3 – Legal mapping of private sources of copyright flexibilities

Annex 4 – Questionnaire to national copyright experts

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626