



ReCreating Europe

Centrifugal forces in EU copyright flexibilities An EU and national mapping and assessment of public and private regulatory sources

Caterina Sganga

EPIP Annual Conference – Roundtable on “Centrifugal forces in EU copyright law”
Madrid - 9 September 2021



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Key points

- Centrifugal forces and still lack of harmonization in EU copyright flexibilities
- CDSMD has learnt some lessons, but approach still the same
- Few minutes, few remarks
 - Snapshots of research conducted
 - Interim conclusions
 - Policy recommendations



What we did

- Jan 2020 – June 2021
 - Mapping of EU and national laws and judicial decisions on copyright flexibilities
 - Broader scope than in the state of the art → not only exceptions but all kind of flexibilities
 - Questionnaire to national experts (36 from of 27 Member States)
 - Analysis of 17 EULAs from different internet platforms to assess compression of users' rights and freedoms

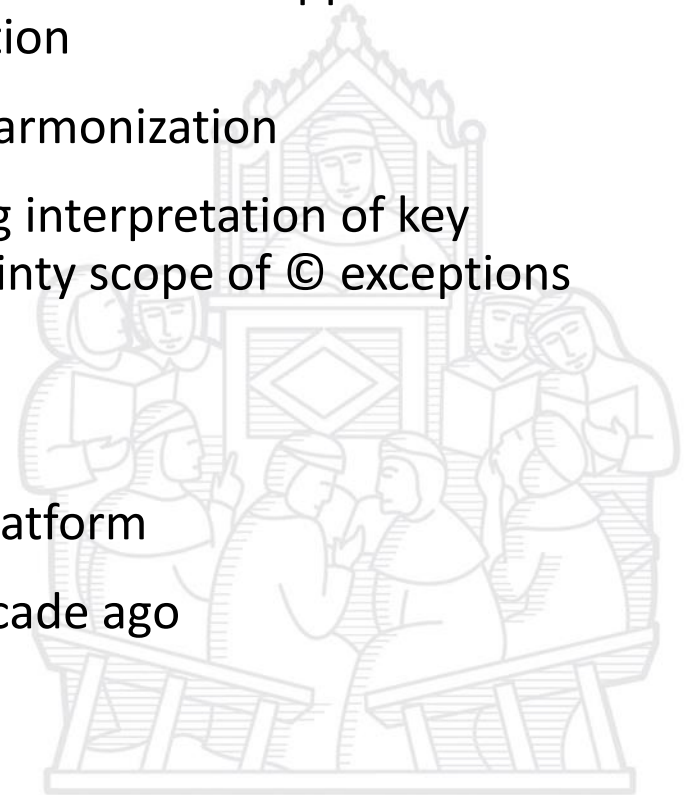
What these data tell us

- **National statutes and case law**

- Far from achieving bottom-up convergence of national approaches in implementation of optional InfoSoc exception
- If we move to © flexibilities → even less harmonization
- In case law, remarkable divergence in living interpretation of key concepts → cannot define with legal certainty scope of © exceptions and flexibilities

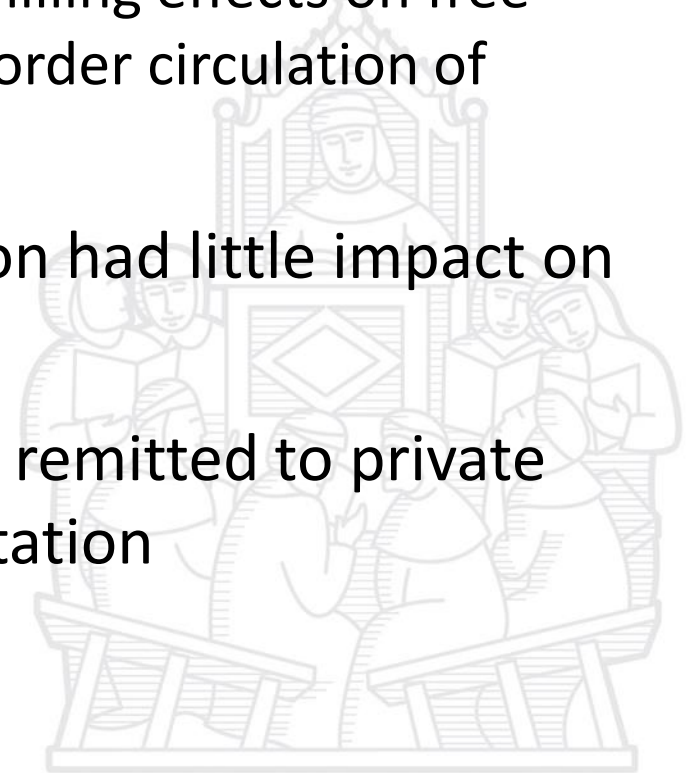
- **EULA**

- Degree of flexibilities depend on type of platform
- Users' rights compressed MORE than a decade ago



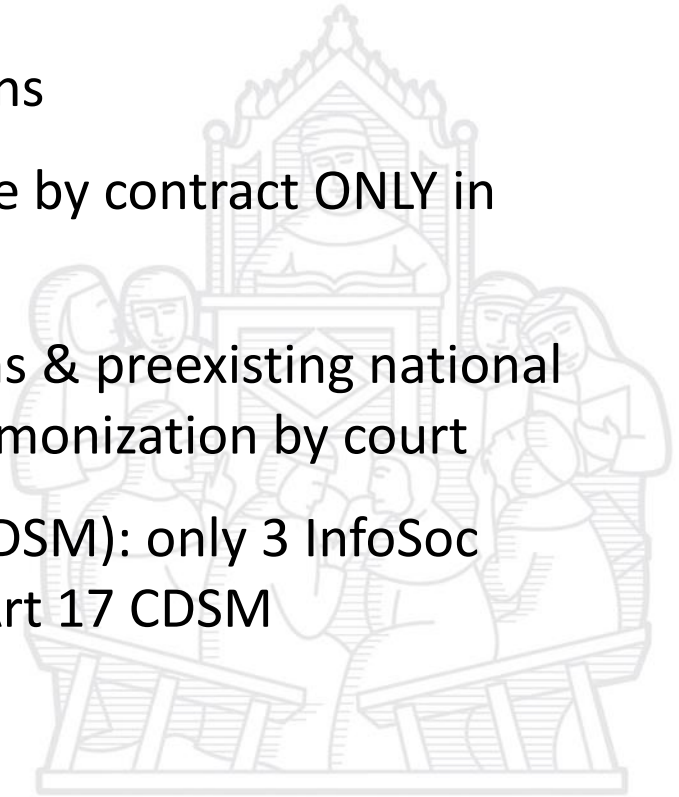
Interim conclusions

- Situation worse than in the past
 - Little certainty on users' rights → chilling effects on free uses → factual obstacles to cross-border circulation of content
- CJEU's push to greater harmonization had little impact on national decisions
- Impact of EULA still high → balance remitted to private autonomy → - certainty, + fragmentation



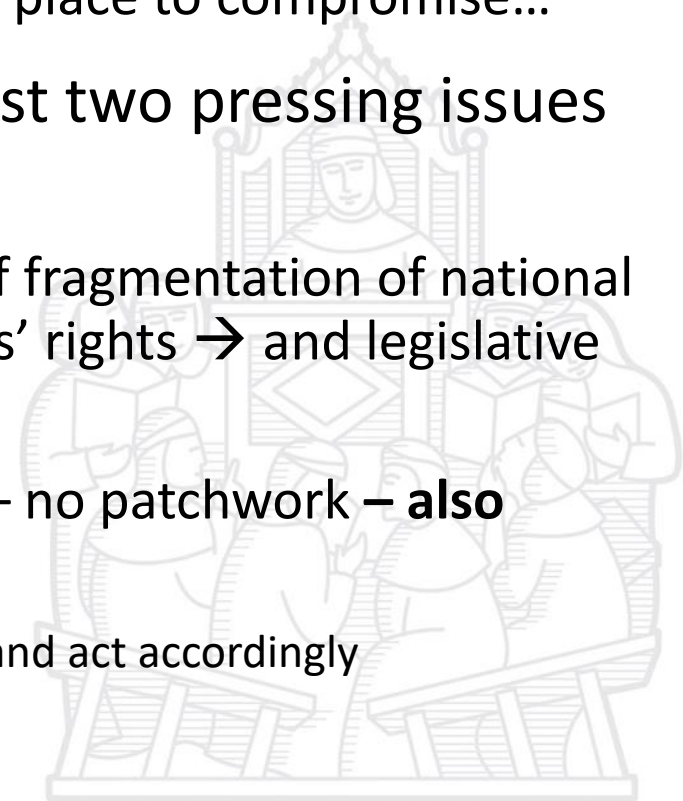
The monster is still there and biting

- CDSM Directive confirmed existence of different regimes for © flexibilities
 1. Little harmonization beyond exceptions
 2. Mandatory exceptions not overridable by contract ONLY in specific cases (but why distinction?)
 3. Big list of optional (InfoSoc) exceptions & preexisting national flexibilities → no trend towards > harmonization by court
 4. YET another sub-regime (Recital 70 CDSM): only 3 InfoSoc exceptions mandatory, BUT only for Art 17 CDSM



(Interim) policy recommendations

- Well done with new CDSM approach to exception
 - Why overridability by contract? Wrong place to compromise...
- NOT ENOUGH: if not © Code, at least two pressing issues to tackle
 - Impact assessment of consequences of fragmentation of national copyright flexibilities on DSM and users' rights → and legislative intervention
 - Holistic intervention on © exceptions – no patchwork – **also amending past mistakes**
 - Decide if we need more regimes and why and act accordingly





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Thank you

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Use-it-or-lose-it: Creators' reversion rights

Ula Furgal
Lecturer in Intellectual Property
CREATE, University of Glasgow

Art. 22: Right of revocation



„Member States shall ensure that where an author or a performer has **licensed or transferred** his or her rights in a work or other protected subject matter on an **exclusive basis**, the author or performer may **revoke in whole or in part** the licence or the transfer of rights where there is a **lack of exploitation** of that work or other protected subject matter.”

Exercised after **a reasonable time**

Set procedure including an **appropriate deadline**

Precluded due to creator's fault

Specific provisions for different sectors/types of works/collective works

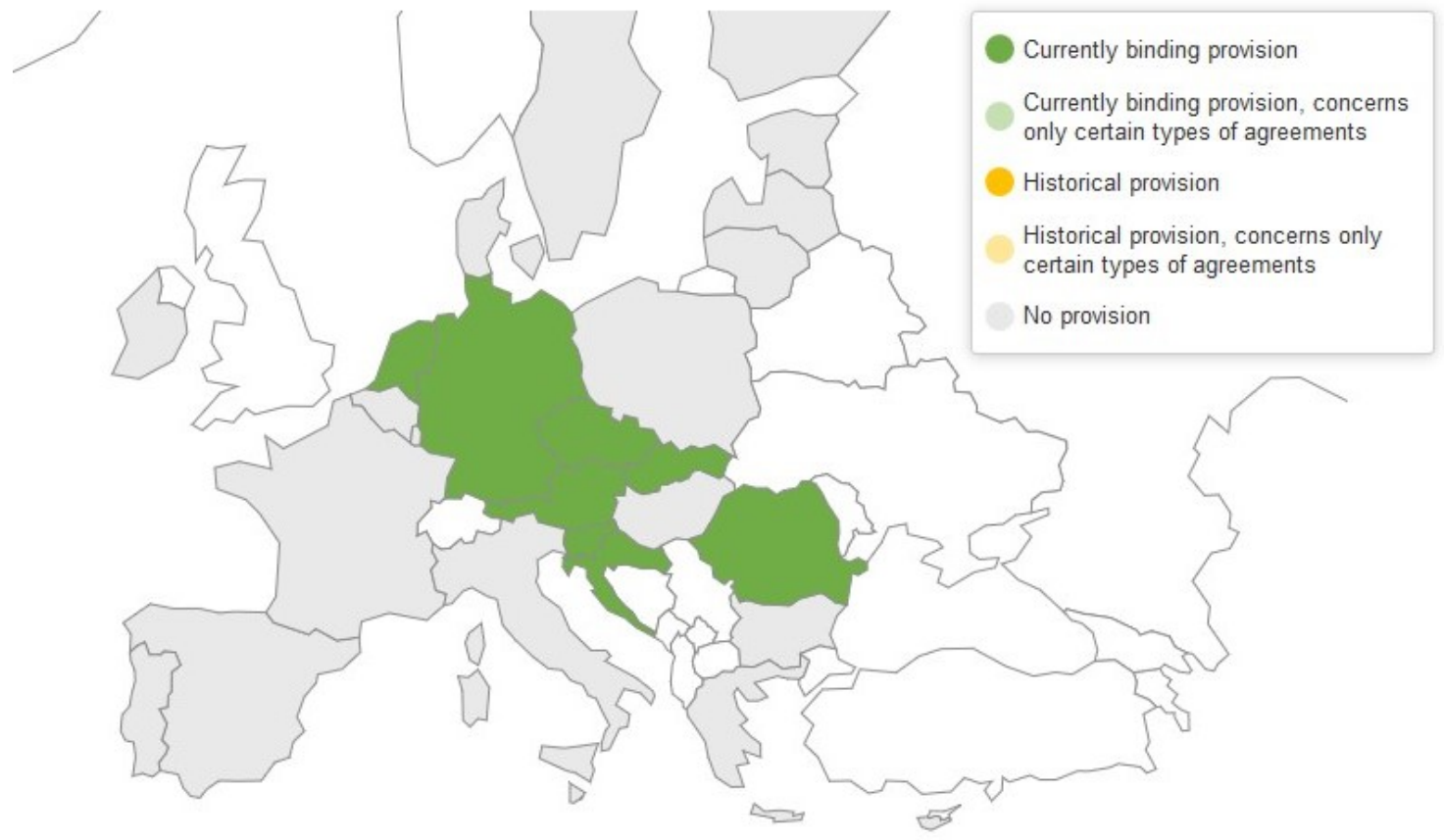
Exclusion of works including contributions of **plurality of creators**

Exercise within the specific **time-frame**

Change to **non-exclusive assignment**

Waivability

Use-it-or-lose-it



Implementation



5 countries* implemented the provision

***Hungary** (§51): lack of implementation

- **Minor modifications** to existing provisions

Romania (48¹): new provision alongside current use-it-or-lose-it

- Tendency to **limit application in time**

Belgium (XI.167/1; XI.205/1), **Luxembourg** (13quater), **Bulgaria** (39), **Estonia** (§49³), **Lithuania** (40³) and **Italy** (110 *septies*): lack of exploitation within set time following conclusion of the agreement/delivery of work

Cyprus (27): does not apply to rights acquired before 7 June 2021

- **Narrow interpretation**

Czechia (§2378): insufficient use removed

Conclusions

Use obligation

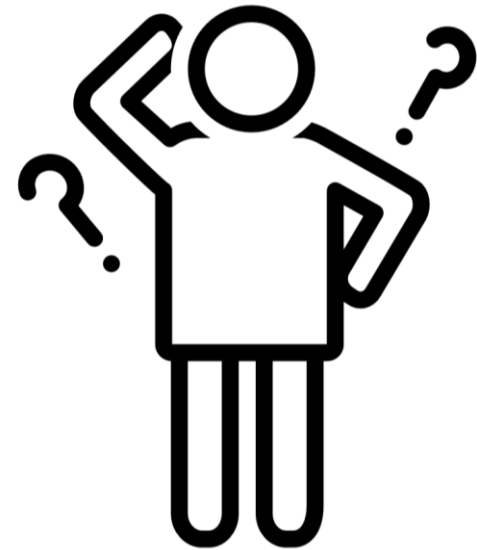
Lack of initial exploitation vs continuous use obligation
No use = no remuneration

Digital uses of works

Availability of a digital file
Exploitation as a yes-no question

Guidance on exercise of right

Terms and remuneration
Termination is not the only option



Proprietary approaches to data in the DSM

EPIP 2021 - Roundtable on Centrifugal forces in EU copyright law

Thomas Margoni
Research Professor of Intellectual Property Law
CiTIP, Faculty of Law - KU Leuven

- “The CDSM directive promised a digital single market. Our research for the reCreating project indicates this is not happening”
 - WP3, Task 3.3: Focus on data used for training/analytic purposes in AI/ML systems with a focus on (quasi-)property rights.
 - In our analysis we identify a number of potential hurdles for an open, fair and accountable development of AI applications in the pre-CDSM EU *acquis*, which it may be argued to have been only partially addressed by the new TDM exceptions.

- CDSM: The Good

- mandatory nature of Art. 3
- retention of (permanent) copies
- “cumulability” with other preexisting TDM exceptions and with 5(1)

- CDSM: The Bad:

- excessively broad definition of TDM which makes the entire field of EU data-driven AI development dependant on an exception
- the scope of the exception limited to the right of reproduction
- the limitation as of beneficiaries

- CDSM: The unexpected
 - the requirement of lawful access; which may have the unexpected result to reduce even further the applicability of 5(1) to TDM
- CDSM: The fragmented:
 - Relative uncertainty of the opt-out mechanism in Art. 4. Early indication of divergences in implementation (“express reservation”?).
- CDSM: The un-coordinated:
 - PSI/Open Data; AI Reg; Data Act?

RECREATING EUROPE

ROUNDTABLE ON CENTRIFUGAL FORCES IN EU COPYRIGHT LAW

PERSPECTIVE OF CREATORS AND PERFORMING ARTISTS ON DIGITIZATION, COPYRIGHT AND THE DIGITAL SINGLE MARKET

Joost Poort
Institute for Information Law (IViR), University of
Amsterdam

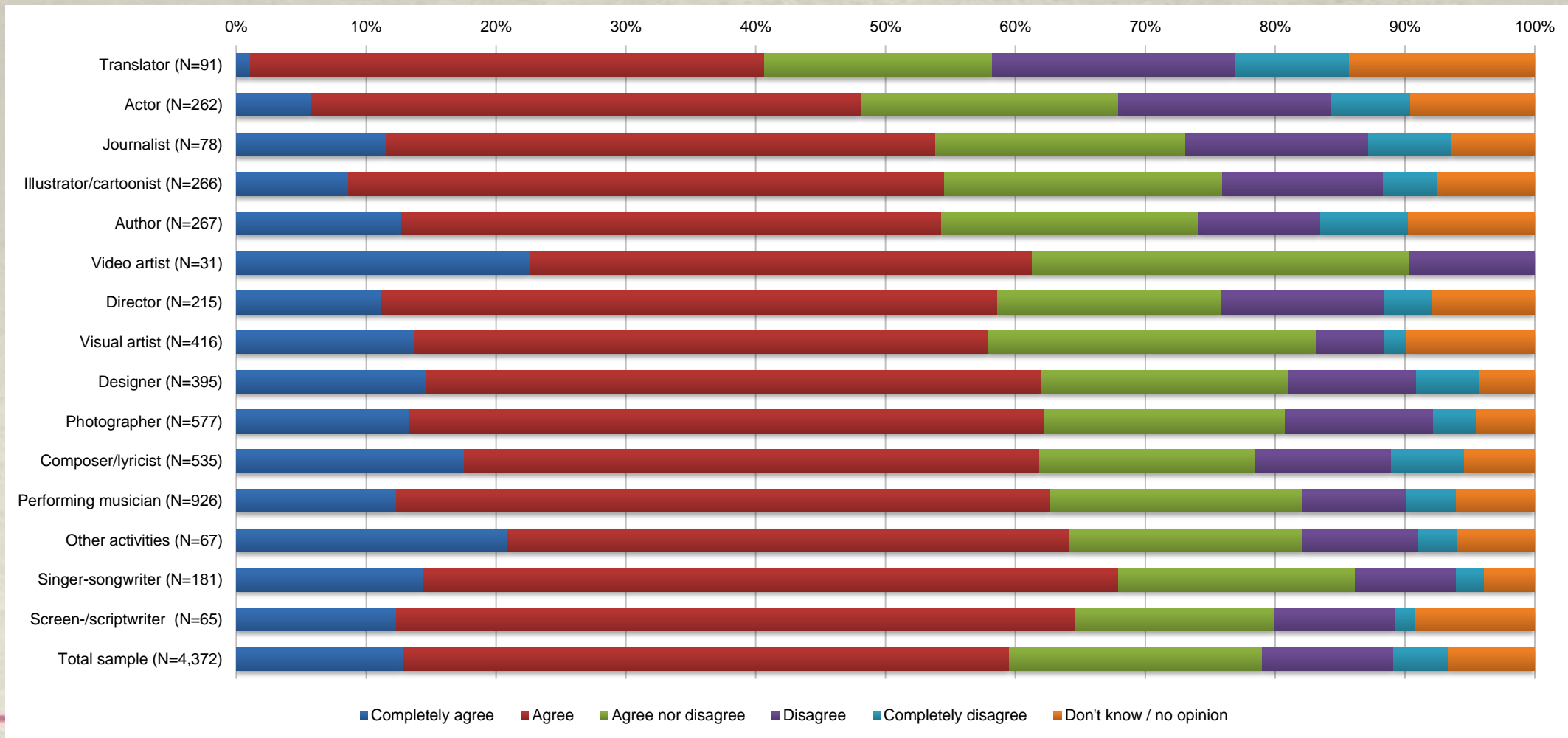
EPIP2021 Madrid
9 September 2021



BACKGROUND FOR SURVEY

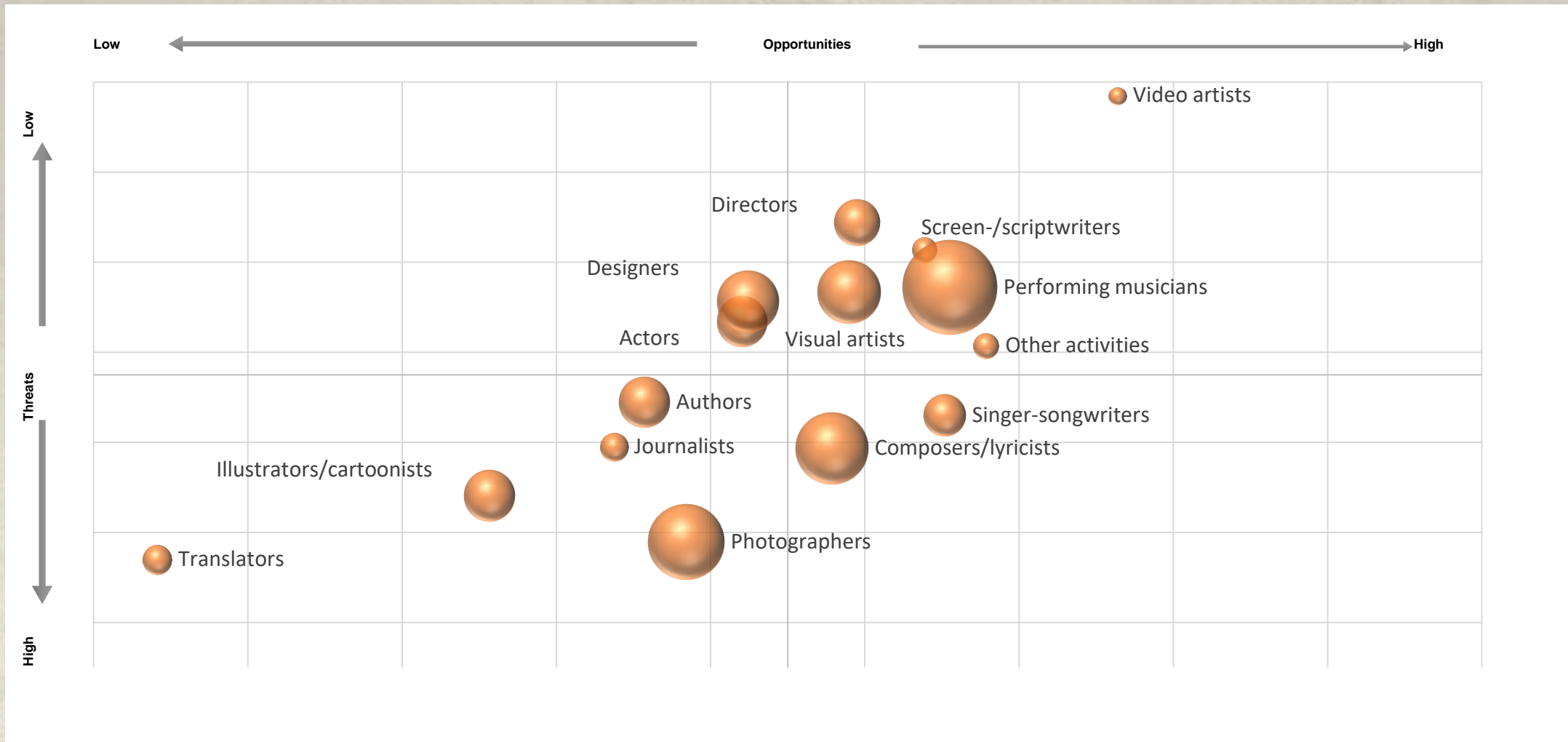
- **Ten years ago, most creators and performers were optimistic about future earning opportunities as a result of digitisation**
- **At the time, online piracy was considered one of the major threats**

Expectations 2010: *'I expect more earning opportunities as a consequence of digitisation'*





Translators were most fearful of digitisation





BACKGROUND FOR SURVEY

- **Has the future delivered?**
 - Online piracy has decreased in most EU countries
 - Markets for recorded music, AV, books and games are generally growing

- **But: indications that creators and performers remain empty handed**
 - Platforms take a large cut
 - Poor contractual conditions for creators and performers seem to persist
 - New threats emerged, such as AI



SURVEY: PROVIDE EVIDENCE FROM PERSPECTIVE OF CREATORS AND PERFORMERS ON THESE CENTRIFUGAL FORCES

- EU-wide survey and focus groups in coming months on perspectives and experiences of creators and performers
- Target musicians, songwriters, composers, photographers, video artists, designers, actors, illustrators, authors, etc.
- Topics to include:
 - Income developments and remuneration
 - Digitalisation
 - Platforms and publishers
 - Copyright and piracy
 - Content removal from platforms, prominence issues due to algorithmic ranking
 - Competition from AI driven creation
 - Copyright reversal, second publication rights, out of commerce issues
 - ...



Thank you!

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Centrifugal forces in EU copyright law

Intermediaries & Copyright Content Moderation

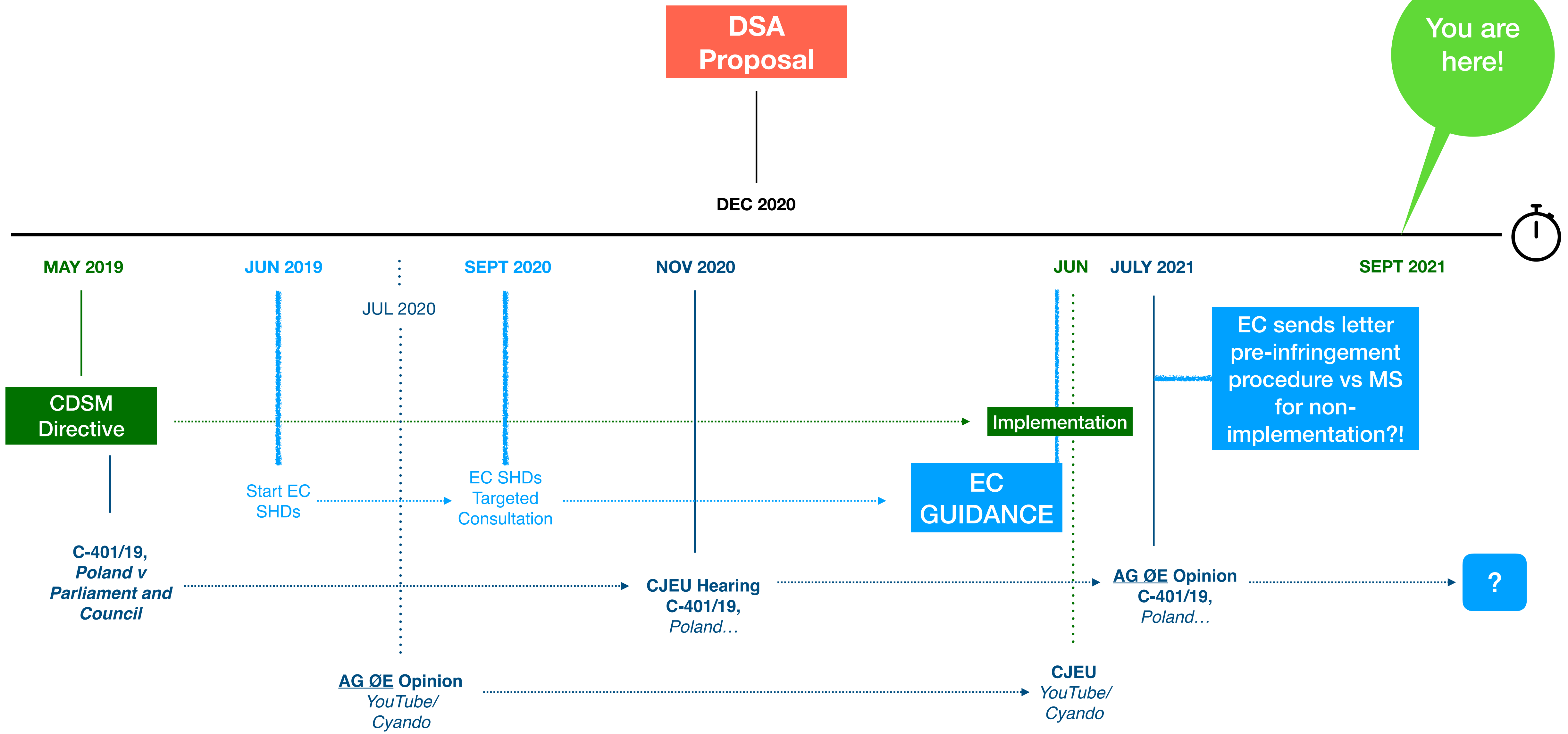
João Pedro Quintais

Assistant Professor, Institute for Information Law (IViR), University of Amsterdam

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EPIP 2021

Art. 17 CDSMD Timeline



A bifurcated online platform world

non-OCSSP

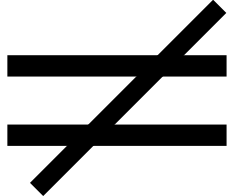
OCSSP

art. 3 InfoSoc + 14 eCD (→ DSA)

art. 17 CDSMD

Default: no direct liability
hosting safe-harbor + modular duties of care

Default: direct liability + licensing
no hosting safe-harbor but liability exemption mechanism tied to best efforts obligations for (1) licensing & (2) preventive measures



Content Moderation:
modular duties of care based on *YouTube/Cyando* (Tied to liability assessment) + national laws

Content Moderation:
Preventive measures (4) vs substantive & procedural safeguards (5-9)

A bifurcated online platform world

Online Platform rules DSA (Regulation)

non-OCSSP

OCSSP

art. 3 InfoSoc + 14 eCD (→ DSA)

art. 17 CDSMD

Default: no direct liability
hosting safe-harbor + modular duties of care

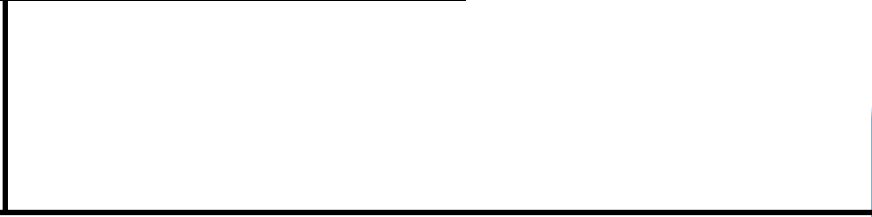
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Content moderation:
Preventive measures (4) vs substantive & procedural safeguards (5-9)

A bifurcated online
platform world



OCSSP

?

A bifurcated online platform world

OCSSP

?

art. 2(6) CDSMD

Positive definition

- UGC platform
- Large amount of works
- Organise and promote
- Commercial / competitive effect

Exclusions

- Electronic comms services
- B2B Cloud Services + cloud services
- Online market places
- Non-profit online encyclopedias
- Non-profit educational and scientific repositories
- OS Sw developing & sharing platforms

EC Guidance 2021

- MS cannot reduce or widen scope
- Verbatim transposition insufficient (must incorporate R61-63)
- “Main purpose” must mirror predominant function/role
- “Large amounts”: MS may not set quantitative thresholds... case-by-case combining elements of R.63
- How to assess “profit-making” purpose?
- Multi-service providers require service-by-service assessment for qualification as OCSSP!

Outcome: Bifurcation & Fragmentation?

- **Bifurcation**

- OCSSP vs Non-OCSSP vs Online Platform/VLOP
- Direct Liability vs Intermediary Liability (eCD...DSA)
- Different (c) CoMo Rules vs asymmetric Due Diligence (DD) obligations

- **Fragmentation**

- for (c), bifurcation (InfoSoc + CDSMD) x 27 Member States
- Plus: horizontal DSA liability rules + DD obligations