



Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU

Analysis of specific policy options

EXECUTIVE SUMMARY

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Prepared by

Julian Boulanger, Alexandre
Carbonnel, Raphaël De Co-
ninck and Gregor Langus

Charles River Associates
99 Bishopsgate
London EC2M 3XD

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CRA Charles River
Associates

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LIST OF ACRONYMS

CHIs: Cultural heritage and educational institutions

CMO: Collective Management Organisation

DRM: Digital Rights Management

MoU Memorandum of Understanding

OA: Open Access

PLR: Public Lending Right

TDM: Text and data mining

EXECUTIVE SUMMARY

Background and aim of the report

This report is the second part of a wider study, commissioned by DG Internal Market and Services, that aims at assessing targeted changes in European copyright law, with a focus on exceptions and limitations to copyright, as a response to technological advances.

The first part of the study is the report by Charles River Associates “Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU” (Langus et al., 2013, henceforth “CRA Methodology Report”), which establishes a methodology to assess exceptions and limitations to copyright. While the report identifies the channels through which copyright exceptions affect total welfare¹, it argues that on the basis of theory alone, one cannot make a case that technological advances (resulting for example in a decrease in the cost of copying and extended consumer uses) call for broader or narrower exceptions. Indeed, there are opposing effects at play and only a detailed assessment of the trade-offs involved taking into consideration the specificities of the exceptions considered can lead to such a conclusion.

In turn, the present report uses the aforementioned methodology to assess the economic impacts of specific policy options in several topics of interest, in view of providing policy guidance on these topics. This report focuses on the following topics:

- Digital preservation by cultural heritage and educational institutions;
- The provision of remote access by cultural heritage and educational institutions to their collections for the benefit of their patrons;
- E-lending by publicly accessible libraries;
- Text and data mining for the purpose of scientific research;
- Reproductions made by natural persons for private uses.

For each of these topics, we first provide a general assessment of the current landscape (the *Status Quo*). As discussed in detail in the CRA Methodology Report, free markets for copyrighted works may or may not deliver socially efficient outcomes. When markets perform efficiently, there is no reason for a market intervention. But when markets for copyrighted works are likely to be inefficient, an exception can, in principle, provide a partial remedy. We thus view exceptions as partial remedies for potential market failures and assess the rationale for an exception on the basis of our assessment of the Status Quo. We close each section with the assessment of specific policy options for the topics considered.

¹ For the purpose of this report, total welfare is defined as the sum of welfare of all the participants in the economy.

Summary of the main findings of the report

Preservation and the provision of remote access by cultural heritage and educational institutions

The advent of digital technologies offers new ways to preserve and communicate European cultural heritage to the public. Cultural heritage is a very broad concept that may include works which are both in the public domain and in copyright (and of the latter, include works which are orphaned, works out of commerce or distribution and works in commerce, including the latest bestsellers). Cultural heritage and educational institutions have started to build digital collections in order to preserve and make their collections available, but significant part of their collections have not yet been digitised. For preservation purposes, a specific EU-wide (optional) exception allowing cultural heritage institutions to reproduce copyrighted items exists, but has been implemented in various, and generally rather narrow, ways across member states. A particular drawback of the current EU legal landscape for digital preservation is that cultural institutions cannot engage into “mass preservation”² projects, unless they acquire rightholders’ explicit consent. As for remote access, cultural heritage and educational institutions do not currently benefit from an exception allowing them to make their collections remotely available without the prior authorisation of rightholders.

Some member states (most notably, Scandinavian countries) have established Extended Collective Licensing schemes allowing cultural heritage and educational institutions to clear the rights for certain parts of their collections through a “one-stop-shop”. However, this system generally prevents these institutions from making their collections available on an EU-wide level. Absent collective licensing solutions, cultural heritage and educational institutions must clear the rights on copyrighted works individually, which has proven to result in non-negligible transaction costs. Broader exceptions to copyright for cultural heritage and educational institutions could in principle offer partial remedies to the said problems.

Regarding the rationale for an exception for remote access by cultural heritage and educational institutions, we find that, on the one hand, such an exception could in principle be justified on the grounds that it could decrease transaction costs and reduce the risk of hold-up faced by these institutions, and that it could broaden access to creative works, potentially further releasing in this way positive externalities associated with education and research. On the other hand, with a broad exception the revenues of rightholders and thus the incentives to produce new works could be hurt.

In general, a collective licensing system weakens the case for exceptions as it reduces transaction costs and thus the risk of a market failure. Rightholders’ ability to price discriminate in the market for access licences also seems to weaken the case for an exception, as it would often result in broader access than absent the ability to price discriminate, in particular when the rightholders have significant market power. However, this potentially positive effect of price discrimination is limited to sectors which feature well-functioning markets for access licences, such as the scientific publishing sector.

Regarding the specific policy options, we note that there is a significant degree of uncertainty with respect to the scope (as would be implemented in practice) of the

² “Mass preservation” refers to the preservation of the entirety or substantial parts of a cultural heritage or educational institution’s collection.

“closed-network” exception for the benefit of specific establishments. In particular it is not clear that the incentives for content creation would be sufficiently preserved under the scenario considered. Further considerations may need to be given as to which conditions could be clearly defined so as to ensure the proper balance. In particular, there is a trade-off between the savings in transaction costs which such an exception might enable and the preservation of incentives for content creation which such an exception might hurt.

We also find that an open-internet exception is not warranted, because it would reduce the incentives for content creation in the long-run, leading to too few new works and could also, in turn, narrow access to creative content in the future. While the open-internet exception would lead to short-term benefits for cultural heritage and educational institutions and final users, the costs associated with decreased incentives for rightholders are likely to exceed those benefits. We therefore currently favour the Status Quo.

With respect to the rationale for an exception for the purpose of preservation by cultural heritage and educational institutions, we argue that a preservation exception appears to be justified on the basis of externalities, missing markets for preservation, relatively high transaction costs and a risk of hold-up for cultural heritage and educational institutions. The existing exception does not allow for mass preservation projects, and economies of scale in digital preservation could be achieved under a broader exception that would not be restricted to *specific* acts of reproductions for the purpose of preservation.

However, we believe that acts of distribution and communication to the public should be excluded from the exception in order to preserve incentives for content creation. Under this condition, the introduction of a “mass preservation” exception that allows cultural heritage and education institutions to make (digital) reproductions of their collections could be warranted. Such an exception would very likely increase the rate of preservation of European cultural heritage without significantly affecting rightholders’ incentives.

If in-commerce works are covered by the mass preservation exception, rightholders might suffer some loss of revenue from replacement sales, though this effect would appear to be limited (as the exception would not include acts of distribution and communication to the public). For in-commerce works a fair compensation might then be warranted to avoid adverse effects on rightholders’ incentives to create new works. While there does not appear to be a strong need to mass-preserve in-commerce works (and these could be preserved at the point in time when they are no longer in-commerce), the economies of scale and the costs involved in determining whether a work is in-commerce or out of commerce might still justify it. Nevertheless, fair compensation may not fully and efficiently compensate rightholders of in-commerce works for lost replacement sales,³ and, taking into account the fact that in-commerce works might not be in urgent need of preservation as well as that fair compensation will be associated with some administrative costs, we believe that in-commerce works could be excluded from the scope of the proposed “mass preservation” exception.

With such an exception, we expect benefits to emerge from economies of scale being achieved, lower transaction costs and risk of hold-up, and higher rates of preservation,

³ Replacement sales refer to the lost sales incurred by rightholders under the (hypothetical) exception. These lost sales come from the replacement copies that are available to cultural heritage and educational institutions but that are not bought by these institutions as they are allowed to make reproductions of copyrighted works under the proposed (hypothetical) exception.

while incentives would be largely preserved and the harm to rightholders would likely be limited.

E-lending by public lending libraries

The lending of e-books by public libraries is at the forefront of the current debate on library e-lending. On the one hand, library e-lending could offer an improved access to libraries' collection. On the other hand, rightholders are concerned about the possible effects of e-lending on their revenue (due to its apparent frictionless nature), and it appears that they have been rather restrictive in dealing with libraries over the past years. No middle-ground has been found yet, and library associations are advocating policy changes in order to promote e-lending by public libraries.

Our analysis of an exception for library e-lending (amounting to an extension of the existing exception to the "Public Lending Right" to e-lending services by public libraries) does not result in a clear-cut conclusion regarding the desirability of an exception for the purpose of e-lending due to several potentially opposing factors at play. First, there clearly are some transaction costs in the market for library e-lending licences, but these do not appear to be prohibitively large. Therefore, a case for missing markets could hardly be made. Second, rightholders often have a significant degree of market power, but they can tailor licences to different types of libraries, which indicates their ability to price discriminate. In such circumstances the costs to total welfare of market power are often reduced, thus weakening the case for exceptions. The third relevant factor are the positive externalities that both the consumption and the production of new books feature. While an e-lending exception may be a partial remedy for the under-provision of access to existing e-books in the presence of externalities, it can aggravate the under-investment in new ones which is particularly harmful when there are positive externalities associated with access to (new) books.

We note that a constrained e-lending model, which introduces a set of artificial frictions associated with library e-lending, could preserve the incentives for creation of new works. However, a constrained model is unlikely to effectively broaden access to copyrighted works in the first place. Furthermore, an exception which allows e-lending by public libraries may decrease incentives for private investments in innovative e-lending services. Taking administrative costs into account (resulting, for instance, from the implementation of fair compensation to rightholders), the case for such a constrained e-lending model appears to be weak.

An alternative solution could be to induce rightholders and libraries to negotiate e-lending terms and conditions in view of establishing a Memorandum of Understanding. However, such a solution would improve upon the Status Quo only insofar as it resolves a coordination problem between the relevant market players, to the extent it exists. Administrative costs of such an initiative could ultimately outweigh its benefits and the Status Quo would then seem to be the preferred option. This would particularly likely be the case if coordination problem is absent.

Text and Data Mining for the purpose of scientific research

Text and data mining is generally thought of as a computational process that aims at discovering patterns in large databases and/or collections of textual content. For the purpose of our analysis, we focus on text and data mining which is conducted for the purpose of scientific research on content published in scientific journals.

Text and data mining is currently not covered by a specific exception to copyright. Given the absence of a clear legal situation for TDM, the relevant actors have had to resort to

licensing solutions. Licensing can in principle lead to significant transaction costs and some have argued that these are an impediment to the proper development of text and data mining for the purpose of scientific research. While this may be the case in some circumstances, recent developments in licensing suggest an increasing reliance on standardised licences for text and data research mining (at least as far as non-commercial research is concerned) and on services that offer “one-stop-shop” solutions to acquire the proper (text and data mining) licences. These developments are likely to further reduce transaction costs in the future, resulting in a more favourable environment for the development of text and data mining on content published in scientific journals. It should also be noted that licensing encourages rightholders (eg publishers) to make specific investments that are needed to facilitate effective access to content for the purpose of text and data mining. For these reasons, we believe that an introduction of a specific exception for the purpose of text and data mining for scientific research that would completely *replace* the current licensing mechanism is not warranted.

We then turn to the analysis of specific policy options and consider several exceptions whose scopes differ. Our analysis supports the introduction of an exception to copyright for TDM: (1) which is conducted for the purpose of scientific research; (2) which is conducted for non-commercial objectives; (3) which covers only TDM activities carried out on content to which there is a “lawful” access⁴; (4) which allows rightholders to implement minimal technical conditions to ensure secure access and a stable platform; and (5) which would kick in *only when a rightholder does not offer licences* for text and data mining. This exception may facilitate text and data mining for the purpose of scientific research, as compared to the Status Quo, without significantly adversely affecting rightholders’ incentives for content creation, content quality and TDM-specific investments.

Reproductions made by natural persons for private uses

Private copying relates to the reproduction of creative content for use in the private sphere. An exception is already in place for private copying in most member states. Rightholders are often financially compensated for this exception when it is assumed that private copying implies a loss of revenues for them. We however argue that harm does not necessarily arise as a result of private copying. In particular, there is no market failure if the price of original content already reflects the value attached by consumers to copying or if there is no substitution between original content and copies because of the valuation of consumers and the difference in cost of production.

The implementation of the exception varies between member states, although it generally consists of a levy charged on the purchase of blank media and equipment. We discuss the consequences of the emergence of digital innovation, such as streaming and cloud computing on the suitability of the current levies policies and show that they reduce the need for compensation. More generally, we discuss the benefits but also the issues raised by levies, such as the distortionary effect on consumers’ choices or the potential discrepancies between their objective and their implementation.

With respect to the rationale for a private copying exception, we explain that transaction costs, missing markets and potentially market power can justify it. However, since consumers do not necessarily possess a copy, as in the case of streaming for instance,

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That is, the miners must either already possess or acquire an access licence on the content they wish to mine.

the need for levies must be assessed according to the changes in the consumption of content. We identify two alternative policy options to the Status Quo: the adjustment of the levies fees or the absence of compensation. Although the two options would have positive effects on all stakeholders in the long run and given the recent trends observed in digital markets, they would likely be higher by entirely removing levies.

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