C4C’S COMMENTS ON THE INITIAL PROPOSALS TO ADAPT
THE COPYRIGHT LEGISLATION TO THE DCDSM REQUIREMENTS

INTRODUCTION

The Copyright for Creativity (C4C) Coalition welcomes the opportunity to share written comments on the German Ministry of Justice and Consumer Protection its discussion document with initial proposals to adapt the copyright legislation to the requirements of the Directive on copyright and related rights in the Digital Single Market (DCDSM – 2019/790/EU). For further questions on our submission, please do not hesitate to contact Caroline De Cock, C4C Coordinator, at cdc@nsquare.eu.

ABOUT C4C

C4C is a broad-based coalition that seeks an informed debate on how copyright can more effectively promote innovation, access, and creativity. C4C brings together libraries, scientific and research institutions, digital rights groups, technology businesses, and educational and cultural heritage institutions that share a common view on copyright. See our members here: http://copyright4creativity.eu/about-us/.

COMMENTS

1) Articles 3 and 4 – Text and Data Mining (TDM)

Article 3

- Article 3(1) – Works covered by the Computer Programs Directive need to be included in the scope: Contrary to Article 4(1), Article 3(1) scope does not includes works covered by the Computer Programs Directive (2009/24/EC). This oversight needs to be corrected to ensure that works covered by the Computer Programs Directive are also included in the scope for TDM activities for scientific research.

- Article 3(3) – Additional safeguards and ongoing scrutiny are crucial to avoid rightholders abusing network security or integrity measures to unduly restrict TDM: Such safeguards should be included into the proposal. Network security or integrity measures implemented by rightholders need to be:
  1) justified and only applied in exceptional circumstances; and,
  2) open to a rigorous scrutiny and abide by a set of parameters that prevent abuse, inspired on for example on some of the criteria used in the telecoms sector.¹

These conditions are crucial to avoid unnecessary hurdles unduly restricting the use of the TDM exception.² as well as to ensure that researchers are not faced with a situation where the rightholders’ platforms and tools become the only viable solution to conduct TDM.³ Therefore, we suggest that:

- The safeguards in Recital 16 should be explicitly included in Article 3(3);⁴ and,
- Network security or integrity measures are subject to further clarification and regular monitoring and oversight in the stakeholder dialogue foreseen under Article 3(4).

Finally, as a general rule, the only security measure that should be needed is verification of whether the user has legitimate access in the first place.
The TDM exception cannot be limited to institutions in order to permit and encourage citizen science: Citizen Science is an important part of the European Open Science Agenda, and universities now increasingly partner-up with citizen scientists, as it has been acknowledged that they provide significant contributions. Science Europe already observed in 2018 that: “Of all EU member states, Germany is arguably most advanced in its citizen science policy”. Therefore, it is important to also enable these citizen scientists, who cannot or do not wish to rely on institutional support (i.e. those not affiliated with a research institution), to engage in TDM activities. This includes allowing them to also make copies of works and other subject matters for TDM purposes, and not limit this prerogative to institutions.

It is crucial to facilitate, for both citizen scientists and institutions, a clear and simple framework for secure dataset storage to make TDM meaningful in practice: the degree of complexity of the rules will directly affect the (overhead) costs for TDM activities. EU cooperation and harmonisation in this area is of utmost importance to avoid competitive (dis)advantages across the EU.

### Article 4

- **No compensation mechanism:** We welcome the lack of a compensation mechanism for rightsholders.
- **Article 3 beneficiaries should benefit from Article 4 when conducting activities that do not meet the threshold of the ‘for the purposes of scientific research’ criterion:** Article 3 beneficiaries (= research organisations and cultural heritage institutions) need to also be able to engage in TDM activities under Article 4 if and when their activities do not fall under the ‘for the purposes of scientific research’ Article 3 criterion.
- **Machine-readable opt-out mechanism should:**
  1) **Be the mandatory for all types of digital content, both online and offline:** Mandatory machine-readable opt-out mechanisms should be the norm for all types of minable content, and not be limited to online content. Such mechanisms enable TDM algorithms to easily check rights reservations before engaging in mining activities. This avoids manual checks, which entail a substantial time and resource investment that increases overhead costs and defeats the purpose of engaging in TDM. In situations where such mechanism cannot be used and content is being licenced, TDM activities should be deemed as allowed by default, unless the rightholder unambiguously stipulates in the licencing terms that TDM activities are prohibited.
  2) **Not lead to blanket/automatic rights reservation:** Given the huge number of rightsholders online, schemes to try and licence TDM of online content are likely to prove complicated and inefficient. Therefore, it needs to be avoided at all cost that such a mechanism opens the door for abuses from rightholders through, for example, blanket or automatic rights reservation. Academics have observed that this is not a hypothetical threat.
  3) **Not impact other uses, including the TDM activities covered under Article 3:** This is recognised by Recital 18 DCDSM, which clearly states that: “Other uses should not be affected by the reservation of rights for the purposes of text and data mining.”
  4) **Preferably be uniform across the EU:** A uniform opt-out mechanism across the EU would be favourable, especially in cross-border contexts. This could not only benefit users, but also rightholders, as everyone could rely on one coherent regime, instead of 27 different ones.

### Articles 3 & 4

- **Interplay with Article 15 [press publishers’ right]:** It is necessary to ensure that works and other subject matters covered under the press publishers’ right are included in the scope of Articles 3 and 4.
2) Article 5 – Education

- Password-based authentication is sufficient to meet the threshold of a secure electronic environment: In general, we regret the very strict transposition approach taken and encourage you to modify this approach in subsequent proposals. In this regards, we observe that an important clarification on the use of secure electronic environments, which also help to facilitate cross-border teaching activities, is missing, namely that: Recital 22 DCDSM explicitly mentions password-based authentication as an appropriate authentication procedure.

3) Article 6 – Cultural Heritage Preservation

- **Scope:** We welcome the intention to expand the scope of application of the German national legislation to also cover commercial libraries and museums and to include software.

- **No clear rules on preserving online content:** We consider that it would be beneficial to consider setting out clear rules on the preservation of online content.

4) Article 7 – Common provisions

- Technical protection measures (TPMs) should be removed within 72 hours when they hinder lawful access to content: Even if protection against contractual override is enshrined in the legislation, as long as it can still be bypassed through technical protection measures (TPM), such as digital right management systems, it will be rendered useless. This is especially import if one takes into account that resolving such TPM related issues currently easily take-up from 1 week to over 2 months, with all of the negative consequences being to the detriment of the end-user. Therefore, clear time frames should be set in place to ensure that any technical protection measures (TPMs) hindering lawful access to content, for example in the context of TDM activities, are removed within a maximum of 72hrs. Financial compensations should apply if access to purchased content is not restored within the set time frame. Such a mechanism could be implemented through Article 6 of the InfoSoc Directive. This approach would help overcome the fact that existing mechanisms to deal with TPMs are often unclear, not transparent and time-consuming.

5) Article 15 – Press Publishers’ Right

**Positive elements**

- **No compensation mechanism:** We welcome the lack of a compensation mechanism for rightsholders.

- **Ensuring legal certainty for private or non-commercial uses:** The proposal clearly recognises that Article 15 does not impact private or non-commercial uses. In order to ensure legal certainty for private or non-commercial uses, it should be clarified that the ‘non-commercial’ nature of a use should be assessed based on the activity that is being carried out, rather than the medium/platform that is being used to do so. This would, for example, provide more legal certainty for users who re-use a news snippet in a private or non-commercial capacity on a commercial blogging platform or on social media. Moreover, in light of modern practices (e.g. highlighting content in a private Facebook group) the notion of what constitutes as ‘private’ use would also benefit from further clarifications that are aligned with users’ expectations.

- **Safeguarding hyperlinks:** The proposal clearly attempts to safeguard hyperlinks, which is positive. However, it is necessary to ensure that all types of hyperlinks are excluded from Article 15’s scope, not only plain and simple hyperlinks, but also other forms of hyperlinking, such as framing and embedding. This should be further clarified in the text.
o Safeguarding individual words and very short extracts by exploring the possibility to impose a minimum baseline for ‘very short extracts’: It is a good starting point that the proposal attempts to safeguard a minimum set of elements in regards to what should be covered under individual words and very short extracts. However, we are concerned about the technical limitations imposed in this context – see more below. Moreover, we believe that this still leaves the notion of what ‘very short extracts’ are open to the arbitrary interpretation of commercial entities. This would not be advisable, as this could lead to legal uncertainty, which sooner or later will result in a court having to further refine/define the concept. Therefore, the legislators should explore the possibility of imposing a minimum baseline for ‘very short extracts’ that goes beyond the elements currently proposed, by also seeking to define the minimum length for snippets. This baseline should not be seen as a maximum threshold, but rather as a guiding benchmark of what is to be considered acceptable or not as a snippet.  

o Implied consent as a guiding principle for the application of Article 15: We welcome that the document recognises that that under certain circumstances an implied consent must be assumed (see p. 35), and encourage the legislator to maintain this guiding principle for the implementation of Article 15 into the explanatory memorandum of the final text.

Negative elements

o Pixel limitations are not technologically neutral, nor device-agnostic: The 128x128 pixels limitation for preview images is not only too prescriptive, but also not technologically neutral, nor device-agnostic, and hence not future-proof. This image size might be too large for a smartwatch, acceptable on a smartphone, whilst being completely dysfunctional on a smart TV. Such limitations risks hampering the development of new and innovative services, as consumers today expect these to operate seamlessly on different devices and screen sizes. It is interesting to note that this limitation will not hinder ‘Google News’, which could continue to index license-free items from press publications and show their headlines and thumbnails, as it currently displays thumbnails in 100x100 pixels, but might constitute a hurdle in perfectly innocuous activities of users (see below).

o Strict (technical) limitations hinder users’ possibilities to rely on exceptions, including the ones specifically highlighted in Article 17: Strict (technical) limitations imposed in the implementation of Article 15, such as size limitations for thumbnails – see above, could risk severely hindering users in exercising their rights under Article 17 to upload and share user-generated content based on (parts of) press publications for the purposes of quotation, criticism, review, caricature, parody or pastiche. This is not aligned with the fact that Member States have an active duty to safeguard users’ exceptions under Article 17, and would be inconsistent with Member States’ obligation under Article 17(9) to ensure that the “Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”.

Other further improvements

o Blogs and facts need to be explicitly safeguarded: The document acknowledges the important clarifications provided in Recitals 56 to limit Article 15’s scope, but neglects Recital 57 (see p. 32). In our view, these clarifications should be included in the implementation of the definition or the article, in order to clearly state that Article 15 does not apply or extend to:

1) “websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher”; and,

2) “mere facts reported in press publications”.

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Experience and best practices could be drawn from the telecoms sector, where telecoms operators’ traffic management practices need to be compliant with a set of requirements, such as proportionality, efficiency, non-discrimination, in order to safeguard the principle of net neutrality on their networks. This would be aligned with the fact that network security and integrity measures are, according to Recital 16, supposed to support rightholders in mitigating network congestion “in view of a potentially high number of access requests to, and downloads of, their works or other subject matter”.


Current market practices show the need for precaution: rightholders already hinder researchers who attempt to engage in TDM efforts, for example, through the use of CAPTCHA challenges, which are claimed to be designed to block off ‘robots’, when researchers attempt to download articles in bulk. This makes the use of algorithms pointless, if human intervention is required, for example, every X number of articles (e.g. a CAPTCHA every 25 articles). Other attempts from rightholders to slow down or discourage researchers consist of, for example, limiting the number of downloads through time-based restrictions (e.g. one article per 20 seconds, which equates to 12 years to download 20 million documents). See Peter Murray-Rust’s examples of the obstacles put in place by rightholders to access papers.

Christophe Geiger, Giancarlo Frosio, and Oleksandr Bulayenko, from the Centre for International Intellectual Property (CEIPI), observe that technical measures, which are commonly used to ensure security and integrity of databases “constitute a barrier for application of TDM techniques”. In this context, they also warn that “researchers have to cope with the rent-seeking behaviour of economic actors controlling content”. See: Geiger, C., Frosio, G., & Bulayenko, O., (2019). Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU. Center for International Intellectual Property Studies Research Paper No. 2019-08. Available at, https://ssrn.com/abstract=3470653. p. 18.

Non-discrimination is a key criterion to protect researchers and avoid vendor lock-in: This criterion applied in the telecoms sector could be repurposed in the TDM context. This would ensure that rightholders need to apply the same network security and integrity measures towards their own platforms and tools (e.g. APIs), as those being applied for algorithms and tools created by third parties, such as researchers. Although tools created by rightholders can be beneficial, researchers need to retain the possibility to freely create their own algorithms and tools to engage in TDM activities. For many researchers, devising their own TDM algorithm is their ‘secret recipe’ to success.

Christophe Geiger, Giancarlo Frosio, and Oleksandr Bulayenko, from the Centre for International Intellectual Property (CEIPI), consider this inclusion as essential, notably as regards the wording of the safeguard elements in Recitals 16 (e.g. proportionality) in Article 3(3).


The DCDSM recognises that pursuing an “as secure as Fort Knox” approach would not be proportionate and hinder the deployment of TDM, as Recital 15 states that: “In order not to unduly restrict the application of the exception, such arrangements should be proportionate and limited to what is needed for retaining the copies in a safe manner and preventing unauthorised use.”

Rossana Ducato and Alain M. Strowel, from the Interdisciplinary Research Center Jean Renaud Law Enterprise and Society at UCLouvain, analysed in 2018 the terms and conditions (T&C) of twenty-one online platforms, equally distributed among three sectors: mobility, accommodation and food. They observed a trend toward a general contractual ban of TDM, often very broadly worded: “The prohibition is broad and refers to all the website’s contents and services, thus including the informative pages containing the legal conditions.” More specifically, they found that “20 out of 21 platforms published the T&C on their website and 14 of them contained specific intellectual property clauses, directly or indirectly, related to TDM activities” – see page 22: Ducato, R. & Strowel, A., (2018, 31 October). Limitations to Text and Data Mining and Consumer Empowerment: Making the Case for a Right to “Machine Legibility”, CRIDES Working Paper Series. Available at, https://ssrn.com/abstract=3278901.


Christophe Geiger, Giancarlo Frosio, and Oleksandr Bulayenko, from the Centre for International Intellectual Property (CEIPI), observe in the context of TDM that: “(…) given that dominant market players customarily override exceptions by imposing both contractual and technological measures—depriving users of the enjoyment of exceptions and lawful uses—limitations to technological blocking should have been introduced as well by clearly spelling out that both TPMs and network security and integrity measures should not undermine the effective application of the exception. Accordingly, protection against contractual and technological override should also be clearly extended to TDM mining materials not protected by IPRs, including those made available in a database.” See: Geiger, C., Frosio, G., & Bulayenko, O., (2019). Text and Data Mining: Articles 3 and 4 of the Directive 2019/790/EU. Center for International Intellectual Property Studies Research Paper No. 2019-08. Available at, https://ssrn.com/abstract=3470653. pp. 36-37.
In our view, this baseline should at the very least include the article’s title, plus a percentage or number of characters of the article, and a thumbnail. A reference point to set such a baseline could be based on the fact that some press publications allow readers to see X% of a pay-walled article, or alternatively on Twitter’s 280-character limit, as this reflects common online social practices aimed at sharing information and not at replacing full articles. Such a baseline should also be kept as open and flexible as possible to ensure that the DCDSM implementation remains future-proof and can enable and cope with new technologies, services, and content sharing practices that arise.

Finally, it should not be forgotten that Article 10(1) of the Berne Convention comprises a mandatory exception for “press summaries”. As pointed out by Professor Peukert, “even if one takes the formalist position that an RRPP [related right for press publishers] is beyond the scope of application of the current international copyright acquis and thus does not run a foul of the obligations of the EU and its Member States under Berne, the WCT, and TRIPS, international copyright law highlights the importance of the freedom of news of the day and of press summaries/reviews”. See: Peukert, A. (2016, 20 Dec). An EU related right for press publishers concerning digital uses. A legal analysis. Research Paper No. 22/2016 of the Faculty of Law, Goethe University, Frankfurt am Main. Available at, https://ssrn.com/abstract=2888040, p. 21.


Safeguarding users’ exceptions in the context of Article 17 is an active task, not a passive one. It is not sufficient for users to be merely informed, for example by the terms and conditions of OCSSPs, about the fact that they have the right to rely on certain exceptions. The European Commission stated recently in an answer to a question from the European Parliament on this subject that: “(…) the Commission considers that the obligations provided for in paragraphs 7 and 9 cannot be considered fulfilled by Member States by seeking to rely on any general provision informing users about existing exceptions and limitations in the terms of use of the OCSSPs.” See: European Parliament. (2019). Question for written answer: Member States’ obligation to ensure that users can effectively use exceptions and limitations, as provided for in Article 17(7) of Directive (EU) 2019/790. Question available at, http://www.europarl.europa.eu/doceo/document/E-9-2019-002681_EN.html. Reply from the European Commission available at, http://www.europarl.europa.eu/doceo/document/E-9-2019-002681-ASW_EN.html.