



## OPEN SCIENCE: ESPERIENZE E PROPOSTE DI RIFORMA DAL PROGETTO H2020 RECREATING EUROPE

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Seminario "Open Science: il clima sta cambiando?"  
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## A broader concept: copyright flexibilities

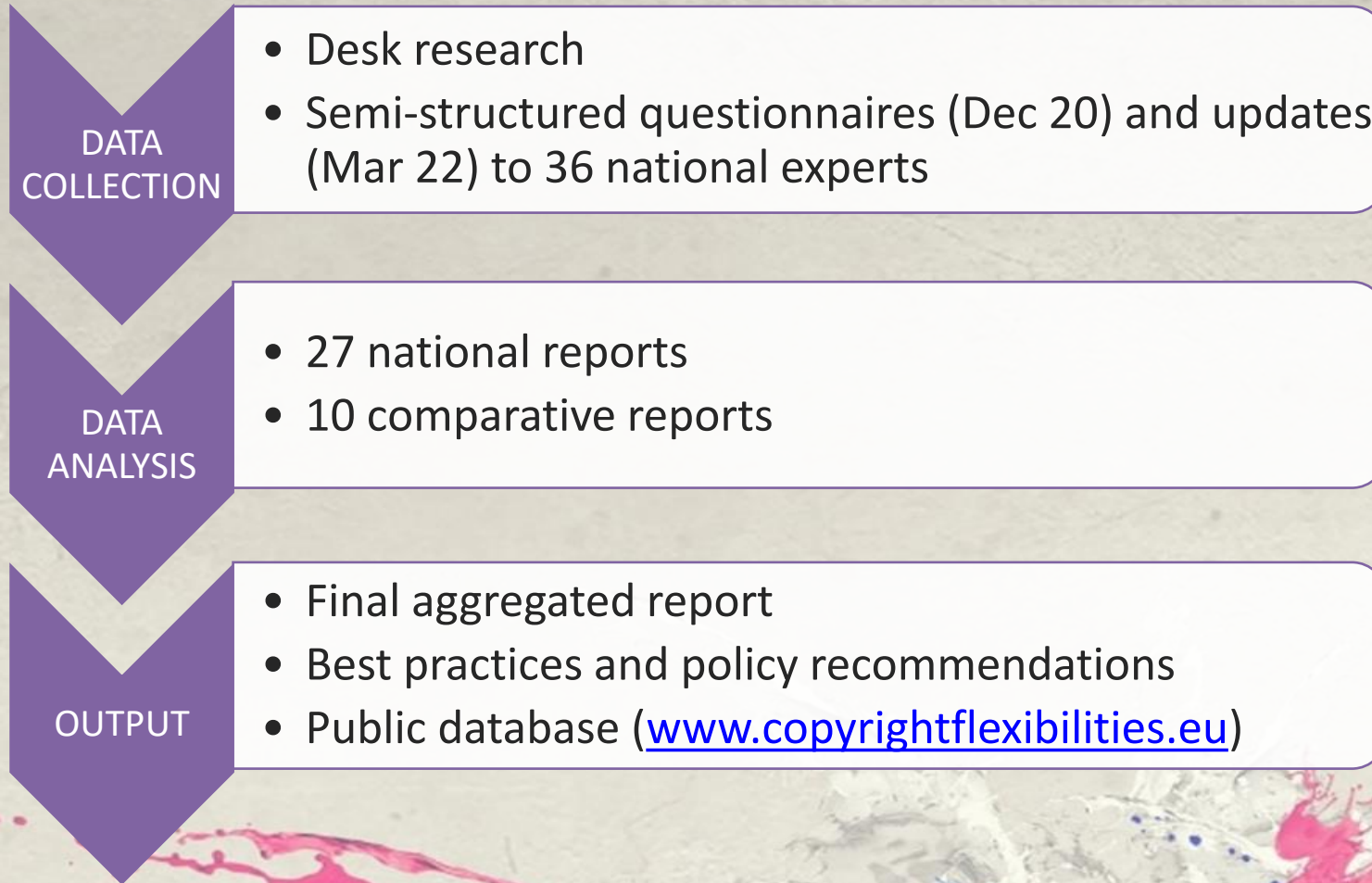


- **Any regulatory tool contributing to © balance**
  - **Not only copyright E&Ls**, but also exhaustion, terms of protection, public domain, statutory licensing, fair balance, 3ST, other non-infringing uses
- State of the art: few or no attempt of overarching definition





**What we did: a comprehensive mapping**



## Methodology, workflow and outputs



## 1. On EU legislative sources

- a) Conceptual fragmentation and “clusterisation” of copyright flexibilities, with persisting gaps
- b) Contemporary presence of **multiple regimes**, hampering legal certainty
- c) **Outdated** nature of several flexibility provisions + rigidity

## 2. On CJEU case law

- a) **Uneven**: some sectors heavily harmonized, some others left uncovered
- b) **More flexible/clearer**: some L&Es indirectly declared mandatory, and/or broadened in scope; several requirements clarified/standardized
- c) Notion and boundaries of **public domain** indirectly drawn
- d) Presence of game-changing interpretations; development of landmark **horizontal doctrines**)

**General conclusions: EU**

1. Full reception of EU Directives and Regulations
2. Alignment of majority of MSs around flexibility categories under InfoSoc Directive
3. Some variations in conceptualization of permitted uses
4. Wave of amendments of national laws after 2001 regarding **only certain categories BUT NOT others**
5. **Non-homogeneous reception of CJEU doctrines** by national courts

**General conclusions: national**





	Temporary, lawful, de minimis	Private copy	Parody	Quotation	Informatory	Teaching & research	Cultural and social	Disability	Public auth.	Public domain
HMZ (L)	+	-	-	-	-	-	-	=	+	-
HMZ (J)	+	-	-	-	=	=	-	=	+	=
GAPS	+	+	-	+	-	-	+	+	-	=
FXL	=	=	=	+	= +	+	= -	+	=	-

HMZ = degree of harmonization (L) in legislation and (J) case law

GAPS = elements not implemented / missed in national laws

FXL = overall degree of flexibility in national laws

## General conclusions: comparative



## TEMPORARY, LAWFUL DE MINIMIS USES

- No general *de minimus* principle, rather interpretative tool
- **Temporary reproduction** almost fully harmonized
- Conditions for lawful uses of software and DB NOT harmonized
- Overall flexibility BUT **bad link w/ general E&Ls**

## QUOTATION

- **EU-wide** implementation.
- Fragmentation regarding **what** and **how much** can be quoted.
- Diversification on the **allowed purpose** (closed list; nature of the quoted work).
- **Maximum** degree of flexibility in CY, DK, EE, FI, HU, IE, SE

## PARODY

- **Highly fragmented**
- **MISSING in some States**
- **Verbatim** in CZ, LT, IE, MT
- **Often additional requirements**, e.g. amount, reputational damages, risk of confusion → **Deckmyn not fully followed**





## PUBLIC AUTHORITIES

- Article 5(3)(e) InfoSoc implemented, (g) much less
- **Fragmentation** as to beneficiaries, purpose (**not all three declinations**: public security, official proceedings and official ceremonies – present); subject-matter limitations; other requirements

## INFORMATORY PURPOSES

- **No textual implementation** (BE, DK, EE, GR, LUX, LT, IE, PT, RO, SE)
- **Express overlap with quotation** (CY, FR, LV, LUX, NED, SP)
- **Fragmentation** in subjective element (media or broader), subject matter (more or less limited), remuneration
- **PROBLEM** → online vs offline dissemination

## SOCIALLY-ORIENTED USES

- **Only a few** Member States address socially-oriented uses through copyright flexibilities (AT, BE, CY, CZ, DK, IE, IT, MT, PL)
- **Fragmentation as to limitations** on permitted uses, works included, eligible beneficiaries, purpose, remuneration



## FLEXIBILITIES FOR PERSONS WITH DISABILITIES

- High degree of harmonization after Marrakesh
- Fragmentation: beneficiaries, definition of disability, permitted acts, remuneration scheme.
- Great divergences on existing disability exceptions (merged/not merged into Marrakesh)

## PUBLIC DOMAIN

- Few commonalities but overall fragmentation
- Uncertainty as to judicial decisions
- Emergence of idea-expression dichotomy

## PRIVATE COPY

- **Fragmentation** in beneficiaries, number of copies, levy schemes, subject matters
- **Rigidity** on amount of work
- Often only right of reproduction, few departures (FR performance; DE lending, IE time-shifting)
- **National courts increase fragmentation** by adding further criteria





- **Among most fragmented and least harmonized**
  - **Most MSs → only teaching**; other MSs regulate them together (as in InfoSoc); a few separated
- **Different categories, different rules** (“use for”, “illustration for”, quotation, public performance)
- **Common elements**: non-profit nature; necessity benchmark; need to mention source; few countries requires compensation
- **BUT! Fragmentation** as to beneficiaries, rights and works covered, quantity

## Teaching and research uses



## Beneficiaries

- ✓ Ample definitions on functional/role basis (DE, HR, RO, EE, HR)
- ✓ Very restrictive and geolocalized (AT, BE, BG, GR, SK, ES, SE, NED)

## Works

- ✓ Specific categories, MSs divergences, various judicial interpretations (eg HU, NED, DK)
- ✓ Exclusion of works published for educational market only in some MSs (AT, EE, ES)
- ✓ Differences in quantity (ES, DE: parts or %; CZ, HR: only brief works; parts or short works IT, NED; max copies: PL, SE, DK, BG, AT)

## Rights

- ✓ Some broad definitions (eg.AT, BG, NED, LT, MT, SE)
- ✓ Oft-fragmented with different restrictions (eg. DE, LUX, FR, IT, FI, DK, GR, PT, EE, IE, IT, LV...)
- ✓ Problem: digital uses (explicit only in AT, HU, MT, ES, PL, IE)

# Teaching and research uses





- Piecemeal approach to cultural uses and preservation
  - No single exception but several (private study, lending, preservation), with different combinations and not always implemented
  - Elements in common: beneficiaries (but different approaches), purpose/quantity limitation, place limitation, remuneration
  - Divergences: works and rights covered
  - Pre-InfoSoc exceptions remained: additional piecemeal
- OWD bringing more convergence but limited scope

## Cultural uses



## Beneficiaries

- ✓ **Open lists based on functions/roles** (EE, FI, GR, IE, LV, LT, NL, PT, RO, SK, AT)
- ✓ **Closed, geolocalized lists** (BE, SI, IT, PL, SE)

## Works

- ✓ **Mostly not relevant, but**
- ✓ **Teleological criteria:** only works damaged/not available on the market (CZ, EE, DE, GR, LV, LT)
- ✓ **Quantitative-functional:** only copies necessary for purpose (AT, CZ, GR)
- ✓ **Qualitative functional:** no virtual works (DK, LT); only some works (IT)

## Rights

- ✓ **Reproduction** in almost all MSs
- ✓ Some MSs **go beyond:** distribution (DK), adaptation (IE), transfer (GR), communication to limited public (FI, FR, LV, IE, PT), cataloguing and other uses (DE)
- ✓ **Problem: digital copies** (explicit only in DK, EE, LV)

# Cultural uses





- Relevant omissions (e.g. appropriate security measures in **NED** and **SE**)
- **BENEFICIARIES**
  - Detailed definitions but not fully convergent on “research institution” and “cultural institution” (**AT, HU, IT, NED, DE, SI**); no definition (**FR**)
  - Inclusive definition, also independent researchers (**FI, AT**) or people in collaborative research (**DE, AT**), to strict definition, i.e. only institutions defined by law (**IT, SI, HU**)
- **RESERVATION UNDER ARTICLE 4 CDSM**
  - Verbatim (**FR, HU, NED, SI, ES**); presumption if clear or via machine-readable format (IE); «optical means» (**PL**); no specifications (**FI, IT, SE**)
- **ALLOWED USES**
  - Also making available to limited circle (**DE, AT, IT**), limited in time (**DE**) or purpose (**HU**); derived uses (**ES**); only reproduction (**NED, CZ**)

## After the CDSM: TDM



- Implemented through **quotation exception (IT, HU, EE)**
- **BENEFICIARIES**
  - Inclusive and broad (**AT, CZ**), or purpose-based (teaching/research) **FI**; also traineeship, **FR**, and 3<sup>rd</sup> parties, **DE**)
- **RIGHTS INCLUDED**
  - **AT**: also distribution; **HU**: special provision for adaptation
- **WORKS INCLUDED**
  - Broad (**PT**); no if produced for educational market (**CZ, FI, IT, FR, SE**; with further specifications **SI**)

**After the CDSM: digital education**





- **Remuneration**
  - **AT, DE:** CMOs; **FR, SE, FI:** ECL
- **Licenses**
  - No exception if ECL (**SE**); only exception / no reference to license (**PT, CZ**); reference to reasonable license (**AT, IT**) objective/transparent and reasonable price (**FR**, requirements defined by Conseil d'Etat), **DE-SI** for works otherwise excluded
- **Amount allowed**
  - No references (**CZ, ES**); link to purpose (**FI**; if short work, up to all); “extracts” (**FR**) or passages/parts (**IT**); 15% **DE** all if illustrations); linked to 3ST (**IE**); specific restrictions (eg. 10% if movies **AT**)
  - Possible contractual derogation (! **FI**)

**After the CDSM: digital education (ii)**

- **Beneficiaries**

- All include basic Article 6; only a few MSs cover private institutions (**AT; DE**)
- IE restricts to libraries and archives; other MSs cover also audiovisual HI (**IT, AT, DE, HU, NED**)

- **Works, rights, uses covered**

- **All:** general definition of Article 6 CDSM (works/subject matters in permanent collection); **ES:** includes databases; **NED** refers to literary, scientific, artistic works

- **Further criteria introduced**

- Non-commercial purpose (**EE**); different conducts allowed depending if commercial or non-commercial purpose (**DE**); only one copy allowed (**IE**)

**After the CDSM: CH preservation**





**ReCreating Europe**



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