ReCreating Europe

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

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Abbreviation list

AG	Advocate General
CDSM	Copyright in the Digital Single Market (Directive)
CH	Cultural heritage
CHI	Cultural heritage institution
CJEU	Court of Justice of the European Union
CRMO	Collective rights management organization
DSM	Digital Single Market
EU	European Union
GM	Galleries and Museums
GLAM	Galleries, Libraries, Archives, Museums
InfoSoc	Information Society (Directive)
IP	Intellectual property
IPR	Intellectual property right
LA	Libraries and Archives
SSSA	Sant'Anna School of Advanced Studies
UNITN	University of Trento

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Executive Summary

Under the auspices of the *reCreating Europe* project, the work presented in this report responds to the growing need for a sector-specific analysis of European digital copyright law vis-à-vis cultural heritage institutions (CHIs). The research carried out within *Task 5.1 - European legal framework for GLAM industries: from closure to Openness* of the *reCreating Europe*'s Work Package (WP) 5 dedicated to Galleries, Libraries, Archives, and Museums (GLAM) aims to deliver a comprehensive legal mapping of EU and national copyright provisions impacting the sector. This report is the first result of such endeavor. It outlines the research outcomes stemming from the specific focus on the European copyright regulation affecting Libraries and Archives (LA). A complementary analysis on Galleries and Museums (GM) will be delivered in Month 18.

Consistently with the specific aim of the Task, the embraced methodology is a two-tiered systematic legal analysis. The first tier is represented by the collection and systematization of, respectively, EU and national legal sources. The second tier foresees a cross-jurisdictional analysis, which displays the degree of harmonization of copyright rules, main points of convergence and divergence among the selected copyright systems, thus setting the floor for further qualitative, quantitative, and comparative research.

The conducted research on LA-relevant copyright provisions offers three main preliminary results. First, the systematized EU copyright legal framework shows a growing sensitivity and focus on LA, as well as CHIs in general, and a considerable body of sector-specific mandatory copyright exceptions and limitations. Second, the relevant national copyright regulations turn out to be significantly harmonized, despite the presence of optional provisions at EU level. Third, the patterns of convergence and divergence between the legislative approach of the Member States with regards to specific provisions (e.g. public lending, uses by LA and/or at their premises for purposes of preservation, private study or research) corroborate the need for a sound process of copyright modernization, capable of effectively tackling legal uncertainties in the digital environment.

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1. Methodology

1.1. Introductory Remarks

The report stems from the research conducted within the frame of *reCreating Europe*'s *WP5 - Galleries, Libraries, Archives, Museums (GLAM)*. The overall aim of the *reCreating Europe* project is to deliver ground-breaking multidisciplinary contributions to support the modernization of the European copyright regulatory framework, promoting a culturally diverse production of and inclusive access to cultural content across Europe. An integral part of this ambitious and multi-faceted research endeavour is represented by the investigation within WP5 - GLAM, which specifically aims at comprehensively studying the evolving features, practices, obstacles, and impact of European copyright policies and regulation in the GLAM sector.

The work plan of WP5 - GLAM encompasses a cohesive array of interdisciplinary research activities tackling the needs and envisioning the direct involvement of CHIs, individual stakeholders and experts, such as archivists, librarians, technologists and scholars closely working within or on the GLAM sector, as well as investors, policymakers, and users. Among the main deliverables foreseen within WP5 - GLAM are reports of the current copyright regulatory framework of the GLAM sector (D5.1 and D5.2), guidelines and FAQs for stakeholders (D5.3 to D5.6), ad hoc policy recommendations and an encompassing policy report (D5.7 and D5.9), and high-profile scientific contributions (D5.8 and D5.10).

Among the activities envisioned in the work plan of WP5 - GLAM, *Task 5.1 - European legal framework for GLAM industries: from closure to Openness* sets the basis of the analysis by closely investigating the state of the art of the European regulatory framework. It does so by providing a cross-national mapping of the relevant provisions and policies regarding uses, practices and business models established and consolidating across CHIs across Europe. In light of the ongoing evolution of the legislation and of persisting issues raised by the actors involved, Task 5.1 tackles the need for an up-to-date, comprehensive, and systematic overview of the current European copyright framework impacting the access, preservation, and promotion of cultural goods and cultural heritage.

The research carried out within the frame of Task 5.1 consists of two pillar activities:

(i) a cross-national mapping of EU and national public sources of law (e.g. legislative acts, court decisions, governmental policies, practices, and schemes); and
(ii) a study of existing open policies and standards, including the use of open licensing and public domain (PD) tools, such as those provided by Creative Commons and RightsStatement.org, and other private ordering tools of relevance to the GLAM sector.

Both activities are conducted predominantly via desk research. However, while the cross-national legal mapping envisions a key phase of collection, aggregation, processing, and systematic analysis of relevant legal sources, the study of open policies, open standards, and private ordering mechanisms is carried out by means of a structured online survey designed and implemented with the help of sociologists on the basis of the "snowball sampling" strategy.

The division of work within Task 5.1 is planned according to two sub-tasks, each resulting in a specific deliverable. Sub-task T5.1.1, whose leader is the University of Trento (UNITN) team, is entitled "Existing legal framework for Galleries and Museums (GM)"; it provides the legal mapping on GM industries, and coordinates the research on open policies, standards, and other private ordering mechanisms by way of collecting and analysing the data resulting from the online survey (D5.1, due in Month 18). Sub-task T5.1.2, led by the research team at the Sant'Anna School of Advanced Studies (SSSA), focuses instead on the "Existing legal framework for Libraries and Archives (LA)", hence conducts the legal mapping for LA industries, as illustrated by this report (D5.2, due in Month 12).

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In light of the organization of the project's and WP's activities, this report presents the preliminary results of the cross-national legal mapping, in fulfilment of the requirements of the deliverable D5.2. The findings presented in the following pages focus on LA industries, and serve as a starting point for the other WP5 - GLAM deliverables, first among which the complementary report on GM due in Month 18.

1.2. Research Question

The core aim of sub-task T5.1.2 is to update and systematize EU and national sources of copyright law impacting the access to cultural heritage in the EU. The collection and analysis of the sources is structured along the lines of two overarching research questions:

- To what extent does the EU legal framework succeed in *harmonizing* copyright rules concerning the access to digitised and digital-born cultural heritage?
- What are the *strengths and weaknesses* of the current EU and national copyright legal frameworks from a GLAM-centred perspective?

The first research question focuses on the notion of *harmonization*. The study sees the ongoing process of harmonization of national laws not only as the most distinctive feature of the European copyright landscape, and, hence, an empirical fact. It presents this process as a valuable occasion of systematization and re-conceptualization of sector-specific rules, thus suggesting a topical mapping of legal norms that are relevant to the GLAM sector, its players, and beneficiaries.

The second research question pivots on the concepts of *strengths and weaknesses* of the analysed legal sources. This broadens the scope of the study and enhances its utility, paving the way towards a qualitative and comparative legal analysis.

The two research questions define the building blocks of the study, as the results illustrated in this report show. They also underpin the *utility* of the systematic analysis carried out during the legal mapping exercise, and its potential to effectively support the achievement of the objectives pursued by WP5 - GLAM, as well as by the whole *reCreating Europe* project. The resulting wide-ranging and sector-specific picture of EU and national copyright law, which highlights convergences, divergences, and potential points of ineffectiveness of the legislation, will fundamentally help

- exploring the applicability of Open Knowledge principles and standards, together with or in alternative to strict IPRs (see D5.1);
- empirically monitoring and understanding the legal and societal consequences of digitisation and the implementation of the Digital Single Market (DSM) on cultural diversity, access to culture, and creation of cultural value in the GLAM sector, by way of surveys and interviews (see D5.1);
- improving the GLAM stakeholders' awareness of EU copyright law, and helping them to deal with digitisation issues by providing guidelines and FAQs (see D5.3, D5.4, D5.5, and D5.6);
- understanding effects and uses of the digitisation of art, architecture and cultural heritage, and compiling sound policy analyses and drawing final recommendations (deliverables D5.7, and D5.9);
- contributing to the relevant literature with up-to-date, methodologically sound, interdisciplinary research (see D5.8, and D5.10).

1.3. State of the Art

The study and both its leading research questions build on existing literature, predominantly consisting of legal scholarship and policy reports. There is a significant body of studies on the GLAM sector from a European copyright perspective, and vice versa. High profile scholarly contributions have investigated the

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role of copyright law in digitisation practices,[1] the notions of access and right to access in cultural studies and cultural matters,[2] and, not the least, empirical data on practices and behavioural patterns regarding the preservation, valorisation, and evolution of cultural heritage content.[3] Innovative solutions to enduring legal and impact problems related to the preservation and promotion of cultural heritage have been advanced, too.[4] Moreover, pre-existing experiences of copyright legal mapping (e.g. "copyrightexceptions.eu"[5], CDSM-specific resource pages,[6] dedicated WIPO,[7] Creative Commons,[8] and Wikipedia pages[9]) do not encompass a GLAM-specific focus.

The originality of the research conducted within Task 5.1 and, in particular, of the findings of sub-task 5.1.2 lies in the combination of the systematic approach with a sector-specific perspective. Studies focusing on the current reality and prospective future specifically of LA industries predominantly deal with public lending activities, with a growing interest in e-lending.[10] Some cutting-edge studies and projects have recently emerged on the topic of digitisation of out-of-commerce works.[11] The research carried out within the frame of *reCreating Europe*'s WP5 - GLAM and presented in the following pages represents a significant novel contribution, strongly characterized by its systematic approach and sensitive focus on the peculiarities of the

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[1] E.g., Michal Koščík and Matěj Myška, "Copyright Law Challenges of Preservation of "born-digital" Digital Content as Cultural Heritage" (2019) *European Journal of Law and Technology* 10(1); Sunimal Mendis, *A Copyright Gambit. On the Need for Exclusive Rights in Digitised Versions of Public Domain Textual Materials in Europe* (Springer 2019); Andrea Wallace and Ronan Deazley, "*Display At Your Own Risk – An Experimental Exhibition of Digital Cultural Heritage"* (2016), available at https://displayatyourownrisk.org/publications/ (8/10/2020); Maurizio Borghi and Stavroula Karapala, *Copyright and Mass Digitization. A Cross-Jurisdictional Perspective* (Oxford University Press 2013); Estelle Derclaye (ed.), *Copyright and Cultural Heritage. Preservation and Access to Works in a Digital World* (Edward Elgar 2010); June Besek and Philippa Loengard, "Mantaining the integrity of digital archives" (2008) *Columbia Journal of Law and the Arts* 31(3) 267 ff.

[2] E.g., Christophe Geiger, "Copyright as an access right: Securing cultural participation through the protection of creators' interests" in Rebecca Giblin and Kimberlee Weatherall (eds.), *What if we could reimagine copyright?* (Australian National University Press 2017); Caterina Sganga, "Right to Culture and Copyright: Participation and Access" in Christophe Geiger (ed.), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 560-576; Marcella Favale, "The right of access in digital copyright: right of the owner or right of the user?" (2012) *The Journal of World Intellectual Property* 15(1) 1-25.

[3] E.g., Tom Evens and Laurence Hauttekeete, "Challenges of digital preservation for cultural heritage institutions" (2011) Journal of Librarianship and Information Science 43(3) 157-165; June Besek et al., "Digital preservation and copyright: An international study" (2008) *The International Journal of Digital Curation* 2(3) 103 ff.

[4] E.g., Johan Axham, "Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?" (2011*) International Conference on Theory and Practice of Digital Libraries* TPDL 2011: Research and Advanced Technology for Digital Libraries, 501-504;

[5] <www.copyrightexceptions.eu> (last access 20/11/2020).

[6] 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).

[7] <https://www.wipo.int/copyright/en/limitations/> (listing relevant studies with global focus from 1999 to 2015) (last access 20/11/2020).

[8] <https://cc-caselaw.herokuapp.com/> (last access 20/11/2020).

[9]<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).

[10] E.g., Rita Matuliontye, "E-lending and a public lending right: is it really time for an update?" (2015), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2660555< (8/1/2020); Séverine Dusollier, A manifesto for an e-lending limitation in copyright, 5 (2014) JIPITEC 213 para 1; Kelly Breemen and Vicky Breemen, "Can e-lending land itselt a spot unde rthe public lending right?" (2013) Kluwer Copyright Blog, available at <http://copyrightblog.kluweriplaw.com/2013/03/04/can-e-lending-land-itself-a-spot-u
nder-the-public-lending-right/> (8/12/2020).

[11] For a first overview, see <https://www.ip-watch.org/2014/05/06/digitisation-projects-for-orphan-and-out-of-commerce-works-presented-at-wipo/> (8/12/2020). Among others, see ReLIRE, <https://relire.bnf.fr/accueil> (8/12/2020); Untapped, <https://untapped.org.au/> (8/12/2020).

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LA industries. Both these aspects solidly build a new ground for critical assessments, design, and effective implementation of policy proposals and innovative practices in the digitisation, access, use, and reuse of content by European public and private libraries and archives.

1.4. Selection of Sources and Methodological Approach

The methodology embraced for the purpose of the cross-national legal mapping has been a combination of systematic and qualitative analysis of relevant legal sources. Both methodological approaches are based on desk research and review of the existing literature.

The systematic approach has been the leading methodology in the phase of collection, cross-reading and cross-annotation of EU and national legal sources.

The qualitative analysis has been carried out with the support of national copyright experts from all the EU Member States, who have been involved via a survey. The selection of the survey respondents has first addressed partners within the *reCreating Europe* consortium, then included copyright experts based on the project partners' networks. The recruited national experts have participated on a pro bono voluntary basis. The questionnaire sent to the recruited national expert (Annex 3) has been designed in conjunction with the needs of another project deliverable, i.e. D2.1 from WP2 - End-users and access to culture, by integrating a specific focus on national copyright rules on cultural uses of copyrighted works and subject matter.

The selection and aggregated analysis of the relevant sources has led to identify the following macro-categories as the backbone structure of the study on copyright and access to cultural heritage:

1. Public lending;
2. Private study and private research;
3. Preservation of cultural heritage;
4. Uses of orphan works;
5. Uses of out-of-commerce works;
6. Other uses by LA.

The focus on LA industries entails the need for methodologically sound and practically useful definitions, criteria of source selection, and related limitations of the scope of the analysis. The reality characterizing LA is part of the broader context of CHIs. In the research conducted in sub-task 5.1.2, the embraced definition of LA is a *lato sensu* classification thereof, i.e. including public and private institutions dedicated to the public access to cultural goods and cultural heritage, including but not limited to literary, music, audiovisual, and artistic works.

By embracing a holistic and inclusive approach, the research opens interesting perspectives on the present and future of libraries and archives across Europe. Its scope would also allow to maintain a specific focus on access to culture by vulnerable users,[12] such as persons with visual, sensory, physical, or intellectual disabilities, which is developed within WP2 - End-users of the *reCreating Europe* project. Given that a focus

[12] Consistently with the scope and aims of the *reCreating Europe* project, the notion of vulnerable user/group refers to the interdisciplinary focus developed on persons belonging to national and new minorities and people with disabilities. Specifically, the embraced definition of disability pivots on the interaction between the individual impairment and social barriers, whereas the focus on minorities encompasses ethnic and linguistic minorities, selected as their access to culture has been significantly undermined over time, despite its link with linguistic rights and the fostering and maintenance of cultural diversity.

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on vulnerable users will be developed in WP2, we have excluded the relevant exception from the scope of this report.

2. Research outcomes

2.1. Legal mapping of EU sources

The legal mapping and systematic analysis of EU legal sources relating to copyright flexibilities in LA industries sheds light on several key provisions enshrined in the vast body of EU copyright Directives. The complete mapping is provided in attachment to this report as Annex 1. All provisions analysed qualify within the legal notion of copyright exceptions and limitations, a core structural component of the copyright paradigm in Europe and beyond. A complete overview of the analysed EU provisions is presented as follows, the provisions being ordered under a chronological line of adoption of the respective Directives.

2.1.1. Overview of relevant legal provisions

Reproduction by LA entities

Art.5(2)(c) of Directive 2001/29/EC (hereinafter InfoSoc Directive) provides for an exception for specific acts of reproduction by public libraries, educational establishments, museums and archives, which are not for direct or indirect economic or commercial advantage. The exception is of optional nature, and does not present further mandatory constraints to its scope. However, it is subjected to the so-called three-step-test ex Art.5(5) InfoSoc Directive, which limits its application to certain special cases which do not conflict with a normal exploitation of the work or other subject-matter, and do not unreasonably prejudice the legitimate interests of the right holder.

Private study and private research in LA establishments

Art. 5(3)(n) of the InfoSoc Directive introduces an exception for acts of reproduction, communication to the public, and making available to the public of a protected work belonging to the collection of education institutions, libraries, or other CHIs, which is not subject to purchase or licensing terms, by way of dedicated terminals in such establishments for the purpose of research or private study by individual users. The exception is optional, and subjected to the restrictive interpretation stemming from the three-step-test. Its scope embraces the exclusive rights of communication and making available to the public, contrary to Art.5(2)(c) InfoSoc Directive illustrated above. The private study and private research exception presents a potential overlap with the private use/private copy exception enshrined in Art.5(2)(b) InfoSoc Directive. However, the latter provision has not been considered relevant for the purpose of the conducted legal mapping, which encompasses uses of protected works or other subject matter specifically promoted by CHIs and, in particular, by LA industries.

Public lending

Cornerstone of the copyright discipline from the perspectives of the LA industries, Art.6(1) of Directive 2006/115/EC (hereinafter Rental Directive) introduces an exception to the exclusive rights of rental and lending for the public lending of protected works or other subject-matter. Besides the constraints imposed by the three-step-test, the application of the exception is also subjected to the obligation of a mandatory fair compensation to the right holder, which can be lifted only for certain categories of CH establishments.

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Uses of orphan works

Art.6 of Directive 2012/28/EU (hereinafter Orphan Works Directive) introduces the first mandatory exception or limitation for education and cultural establishments to make available to public, digitise, index, catalogue, preserve and restore the orphan works in their collections. The scholarship is almost unanimous in considering this a watershed moment in the evolution of EU copyright law, opening towards a new role played by copyright exceptions and limitations, with special regards to uses by CHIs and for purposes of cultural heritage preservation and promotion.[13]

Text and data mining

With Directive (UE) 2019/790 (hereinafter CDSM Directive), three new exceptions have been introduced, directly addressing uses by LA entities and/or occurring in their establishments. Art.3 CDSM Directive provides for an exception to the exclusive right of reproduction and the sui generis database protection, for research organizations and CHIs to carry out acts of reproduction and extraction of text and data from lawfully accessed works for the purpose of scientific research. The exception allows for copies of said works to be retained for the same purpose. Even though the provisions do not explicitly refer to libraries or archives (nor does the related Recital 8 of the CDSM Directive), the definition of CHIs enshrines in Art.2(3) CDSM Directive explicitly encompasses "publicly accessible librar[ies] or museum[s], […] archive[s] or […] film or audio heritage institution[s]". The exception is subjected by the three-step-test, and cannot be overridden by way of contractual agreement ex Art.7 CDSM Directive. The CDSM Directive is set to be implemented by 7 June 2021.

Preservation of cultural heritage

The second relevant provision introduced by the CDSM Directive is enshrined in its Art.6, which sets a mandatory exception for CHIs to make copies in any format or medium of works permanently in their collections for purpose of their preservation. Also this exception is subjected by the three-step-test, and cannot be overridden by way of contractual agreement ex Art.7 CDSM Directive. The CDSM Directive is set to be implemented by 7 June 2021.

Uses of out-of-commerce works

The third and last relevant provision introduced by the CDSM Directive is Art.8. The norm boasts a twofold nature. On the one side, it introduces an extended collective licensing scheme, i.e. the possibility for collective rights management organisations (CRMOs) to conclude a non-exclusive licenses with CHIs for uses for non-commercial purposes of out-of-commerce works or other subject matter that are permanently in their collection (Art.8(1) CDSM Directive). The selected CRMOs shall be sufficiently representative of right holders in the relevant type of works and rights licensed, and all right holders shall be granted equal treatment. On the other side, the article envisions an exception or limitation for CHIs to make available out-of-commerce works that are permanently in their collections, for non-commercial purposes (Art.8(2) CDSM Directive). Specific conditions applying to the exception are the mandatory indication of the name of the author or any identifiable right holder, unless this turns out to be impossible, and the making available of the works on non-commercial websites.

[13] E.g., Séverine Dusollier, "The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition" (2020) *Common Market Law Review* 57, 979-1030, with reference to the EU Communications on Copyright in the Knowledge Economy COM(2009)532 final, and on the Digital Agenda for Europe COM(2010)245 final, as representatives of the momentous shift towards a more solid framework of copyrigth exceptions and limitation. See Dusollier, p.983.

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2.1.2. Results of the analysis

The body of identified provisions regarding copyright flexibilities in the LA sector presents itself as a substantial part of the EU copyright legal framework. The provisions illustrated above cover a wide range of practices, uses, and business models revolving around the promotion of access, preservation, and promotion of cultural heritage in CHIs and, specifically LA, across Europe. The analysis of the provisions presented above reflects to a considerable extent the main features of the whole EU copyright legal framework. Three of its distinctive characteristics emerge from the legal mapping.

First, the LA-specific legal framework for copyright flexibilities in the EU is a glaring example of its structural *sectoriality*. The closed-list approach embraced in Europe to regulate exceptions and limitations to the exclusive rights of copyright holders play a key role in the resulting sectorial nature of the related provisions. Following the *numerus clausus* legal design, rules tend to look at specific common scenarios - e.g. the public lending of books, their use for private study purposes, the practice of text and data mining, the copying of works for the purpose of archiving and preservation - which are defined by way of strict legal constraints. If, on the one side, this sectorial approach notably provides legal certainty to the specific uses addressed, on the other side, it equally hinders a more flexible interpretation of the copyright exceptions and limitations under analysis to similar real-life scenarios.

Second, the *optional* nature of some of the relevant exceptions and limitations is of crucial relevance. Similarly to other copyright exceptions and limitations, which have been harmonized by the InfoSoc Directive and maintained an optional nature, the implementation of the illustrated provisions on reproduction by LA entities, private study and private research in LA establishments, and public lending, remains to the discretion of national legislators. This has caused, within the realm of copyright flexibilities for uses by CHIs and beyond, a high risk of regulatory fragmentation. As it will be illustrated in the following Section, such a risk has concretized into a heterogenous patchwork of national provisions, which substantially jeopardizes the effectiveness of copyright exceptions and limitation in cross-border uses, and, more generally, the achievement of the aims and rationales of the ongoing EU copyright harmonization process. However, it is worth noting that, in light of the EU copyright legislation in its entirety, the presence of mandatory copyright exceptions regarding uses of cultural heritage is considerable. Compared with other categories of flexibilities, such as flexibilities for private non-commercial uses, informatory, teaching, or administrative purposes, the adoption of five provisions introducing mandatory exceptions or limitations – i.e. the exceptions for orphan works, out-of-commerce works, text and data mining, preservation, and the extended collective licensing scheme for out-of-commerce works – sets a higher standard than the average number of mandatory provisions within the realm of copyright flexibilities.

Lastly, the presence of *outdated* assumptions is an important aspect, which corroborates the need for a sound process of copyright modernization at the EU level. Also in this regard, the legal mapping displays an ambivalent scenario, which combines, on the one side, a regulatory approach shaped after analogue uses and strong limitations to the recourse of digital technologies - e.g. in the case of the private study exception, the use of *in loco* terminals to access digital copies of works, or the lack of references to e-lending practices in the legislation - and, on the other side, an initiated change towards a broader exploitation of the potential of such technologies - e.g. the rationale underlying the recently introduced mandatory exception for (digital) preservation of cultural heritage.

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All in all, a striking element emerging from the conducted legal mapping is the unabated *evolution* of LA-related EU copyright provisions. Looking at the ensemble of relevant provisions and their systematic structure, the constant and recently remarkable advancement promoted in the modernization of the EU legislation on copyright flexibilities in the cultural heritage and GLAM sector proves to be a staggering reality. This development hints at a core role of the analyzed sector-specific provisions in shaping, defining, and qualifying the notion of copyright flexibility across the EU copyright legal framework.

Evidence of the fact that this remarkable evolution is primarily of legislative nature lies in the complementary finding emerging from the legal mapping: the *case law* of the Court of Justice of the European Union (CJEU) regarding copyright flexibilities for uses by LA industries is, indeed, rather scant. To date, the most relevant decisions issued on the topic are three, out of a notoriously vast body of copyright-related CJEU judgements. The first decision was issued in 2014 Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* (hereinafter *Ulmer*), and addressed the exception for uses of works by individual members of the public via dedicated terminals at public libraries for the purpose of private study. The second case having reached the CJEU bench is Case C-271/10 *Vereniging van Educatieve en Wetenschappelijke Auteurs v Belgische Staat* (hereinafter *VEWA*), which looked at the interpretation of the public lending exception and, in particular, the provision of a mandatory compensation for the right holder. Lastly and more recently, Case C-174/15 *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (hereinafter *VOB*) dealt with the question of e-lending, providing legal certainty in the dispute on whether the lending of digital copies of books was included in the scope of the public lending exception. Despite the fact that all three judgements, and related Advocate General (AG)'s opinions, offer meaningful insights on the interpretation of some copyright exceptions and limitations, the limited amount and highly specific engagement of CJEU case law on the topic is insufficient to be considered one of the main drivers of the evolution of the discipline.

2.2. Legal mapping of national sources

The collection, systematization, and analysis of national legal sources on copyright flexibilities in LA industries have required more extensive efforts of legal mapping and coordination among the researchers involved. The research has reached a satisfactory standpoint, with a total of 23 national copyright systems covered out of 27 Member States. For the purpose of subtask 5.1.2. this is considered a significant representative sample of national legislations on LA-related copyright flexibilities across Europe. Nevertheless, the researchers involved in the research highly value the synergic cooperation with the team working on *reCreating Europe*'s WP2 - End-users, and thus intend to complete and update the legal mapping for a prospective focus on GLAM-related copyright legislation in the public database that will be delivered at the end of the project timeline.

2.1.1. Overview of the relevant legal provisions

Public lending

All analysed national copyright systems provide for a copyright exception for the public lending of protected works and other subject matter (see Annex 2 – page 1.E.i). The emerging convergence of national copyright laws in this regard represents a meaningful finding, considering the optional nature of the public lending exception *ex* Art.6 Rental Directive. The provision and management of the due remuneration/compensation to the right holder is expressly reserved to CRMOs (e.g. Austria, Bulgaria, France). Several legislations exempt selected libraries from the obligation to pay equitable remuneration to the right holder (e.g. Greece,

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Netherlands, Romania, Spain). Some countries have implemented additional constraints to the public lending of music works, audiovisual works, database, and computer programs, guaranteeing an "embargo period" from the first publication (e.g. Belgium, Estonia, Italy) or excluding them from the objective scope of the exception (e.g. Czechia, Denmark, Estonia, Hungary). In some cases, the addressees of such exception are solely public libraries (e.g. Bulgaria, Cyprus, Greece, Hungary, Italy, Spain), whereas in other national copyright systems this limitation is not specified, thus potentially opening to private CHIs, too (e.g. Czechia, Estonia, Germany, Ireland, Luxembourg, Poland), or explicitly included (e.g. Latvia). No extensive interpretation of the exception for public lending, expressly including the lending of digital copies can be found.

Private study and private research

Despite its optional nature, the pattern of implementation of the copyright exception for private study and private research is also all-encompassing, as it covers all analysed Member States, with the sole exception of Austria and Greece (see Annex 2 – page 1.E.ii). Consistently with the analysis of EU legal sources, national provisions regarding the private copy exception have been excluded from the scope of the analysis. The design of the vast majority of national rules follows Art.5(3)(n) InfoSoc Directive, carving out room for the free communication to the public and making available of lawfully published works belonging to CHIs' collections, which are not offered for sale or subject to licensing terms, to promote and encourage the private study and private research by individual users. Both libraries and archives are explicitly addressed in the provisions, without further indication of their public or private nature, Hungarian law being the only example of limitation to public archives. Only some among the analysed national copyright systems introduce, in conjunction with the private study exception, the additional authorization for LA to make copies for the users, within the limit of their study or research purpose (e.g. Germany, Hungary, Latvia, Spain). Virtually all the national implementations authorize uses carried out uniquely at the premises of the selected CHIs, by means of special terminals, technical equipment, or reading devices. Exceptional to this legislative wording is only Bulgarian law, which limits itself to grant access to individuals to the works in the CHIs' collections, as long as they pursue non-commercial scientific purposes. Peculiar cases are represented also by Germany and Spain, which provide for an equitable remuneration to be paid to the right holder, and by Romania, whose private study exception uniquely authorizes the reproduction of brief excerpts from works for information or research within the framework of libraries or archives.

Preservation of cultural heritage

Despite the ongoing implementation of the CDSM Directive and its mandatory copyright exception for the preservation of cultural heritage, the national landscape in this specific regard proves to be significantly developed (see Annex 2 – page 1.E.iii). The exception is uniformly provided for non-commercial uses that fulfil the purpose of preservation of the works and other subject matter included in libraries' and archives' collections. Also in this case, both libraries and archives are often expressly mentioned, without indication on their required public or private nature; Denmark and Estonia exceptionally limit the exception to public LA. By introducing an ad hoc exception for the purpose of preservation of the cultural heritage, some national copyright laws generally refer to the purpose of conservation and inclusion in the CHIs' own archives (e.g., Austria, Czechia, France). Others more specifically add reference to the aims of restoration and repairing of works partially damaged, lost, or rendered unusable (e.g. Czechia, Denmark, Estonia, Finland, Netherlands, Romania). The most common constraint faced by this exception is the limitation of scope to works not promptly available on the market (e.g. Greece, Ireland). Some legislations further exclude certain works (e.g. entire books, entire periodicals, and sheet music in Austria; computer programs in Denmark; works of particular documentary or cultural and historical significance in Latvia), or limit its application to a certain number of copies (e.g. Belgium). No remuneration is foreseen for the right holder, with the sole exception of

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Belgium, which provides the possibility for the author to access the copies of his/her work, and claim fair remuneration.

Uses of orphan works

The national regulatory landscape concerning the uses of orphan works is a glaring example of full harmonization, stemming from the provisions and mandatory exceptions and limitations introduced by the Orphan Works Directive 2012/28/EU. As it emerges from the conducted legal mapping (see Annex 2 – page 1.E.iv.), all analysed Member States have implemented the Directive, and no divergent trend can be identified.

Uses of out-of-commerce works

At the national level, explicit permission to use works that are no longer in commerce, either via a dedicated exception or mandatory collective licensing, has so far received limited attention. Based on the data collected (see Annex 2 – page 1.E.v), only seven Member States have enacted a specific provision. In terms of exceptions, legislators often specify who may benefit from it, namely institutions open to the public (e.g. Austria) including libraries and archives, with non-commercial purposes (e.g. Latvia) or otherwise not producing direct or indirect financial gain, which are in some instances subject to be indicated by government decree (e.g. Finland). The scope of the exception includes making available the work that is no longer available through normal distribution channels and satisfying users' purposes of research or private study on the premises of the institution (e.g. Finland). It is in some cases expressly linked to the institution's conservation and restoration efforts (e.g. Latvia), thus being strictly intertwined with provisions on preservation of cultural heritage. Depending on the type of work or other circumstances, its applicability may also depend on the necessary permission or consent of the author or the person entitled (e.g. Austria, Latvia). As per the mandatory collective licensing allowing copyright collecting societies, which may be furthermore designated by the State (e.g. Poland), to manage reproduction and making available of out-of-commerce works, the consent or non-opposition of the author or publisher is mostly required and may be subject to specific formalities (e.g. France) and conditions, for instance when the reproduction and the making available to the public serves a non-commercial purpose (e.g. Germany).

Other uses by LA

The residual category of copyright flexibilities addressing uses by or at LA premises (see Annex 2 – page 1.E.vi). The legal qualification and scope of the flexibilities enshrined in the provisions vary. Some Member States add specific rules for some selected CHIs (e.g. the National Audiovisual Institute in Finland), other national provisions address libraries and/or archives (e.g. Austria, Estonia, Finland), or more generally refer to legal entities, potentially including LA entities (e.g. federal scientific institutions in Austria; educational and learning establishments in Bulgaria). The identified provisions differ also with regards to the objective scope of the copyright flexibilities they introduce. The legal mapping shows a mixed landscape, between provisions of very broad scope (e.g. allowing for "any use" in Cyprus; for any communication to the public unless explicitly prohibited by the author in Finland; for any use "to the benefit of libraries, archives" in Latvia), limited to certain uses (e.g. to uses for the purpose of exhibition and promotion of works collections in Estonia; for the purposes of security, insuring, cataloguing in Ireland; for the sole use of photocopying in Italy; for completion in Sweden), and/or certain works (e.g. Austria, Ireland, Poland). Two national provisions are worth of particular attention, as they represent unique cases in the regulation of LA practices, i.e. the free use of cultural heritage objects for private, non-commercial purposes in Bulgaria and the mandatory legal deposit for preservation and consultation of cultural heritage in France.

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2.1.2. Results of the analysis

The systematic overview based on the legal mapping of national sources of LA-relevant copyright flexibilities unveils an advanced stage of harmonization. Despite the optional nature of some of the copyright exceptions and limitations involved, the national regulatory landscape concerning public lending, use for private study and research, and preservation of cultural heritage is significantly (and, to an extent, surprisingly) convergent.

The differentiation between libraries and archives is not very significant across the analysed national legislations. The public lending exception represents the only atypical case, as it most often explicitly addresses libraries. The provisions remain most often silent with regards to the public or private nature of such institutions; when they include explicit references in this regard, it is to the favour of public LA.

The room for copyright flexibilities addressing uses and practices within the LA reality turns out to be significant and promising. As highlighted above, the relevant EU copyright legal framework shows a remarkable evolution, which is followed, often slavishly replicated, at times anticipates and further fostered by national legislators. The scope of the copyright exceptions and limitations included in the legal mapping follows a solid pattern of extensive interpretation of the notion of "use" and of "cultural heritage", which is only rarely limited by strict constraints that add to the three-step-test. The drawn picture concerning the legal regulation of LA-relevant copyright flexibilities in Europe shows a rather limited case law at national level. This makes it hard to draw conclusions on the judicial trends and prevalent interpretations of the provisions analysed.

All in all, the sensitivity towards the importance of cultural uses, and, in particular, the access, promotion, preservation, and restoration of cultural heritage is a distinctive feature and a beacon of copyright modernization not only at EU, but also at national level.

3. Conclusions

The findings of the research conducted within sub-task T5.1.2 ought to be considered a partial result of a broader legal mapping and related assessment of the regulatory framework impacting the access, preservation, and promotion of cultural heritage across Europe. The study represents a starting attempt to display the degree of harmonization of LA-relevant copyright rules, inclusive of its systematic analysis and identification of its main qualitative features.

In light of the aims and activities of WP5 - GLAM, and of the ongoing research conducted by the researchers' teams involved in Task 5.1, the encompassing steps envisioned to advance with the analysis and enhance the utility of the scheduled deliverables are the following:

- To complement the legal analysis with a focus on GM, by way of a report (due in Month 18);
- To complete and update the legal mapping, both on LA and GM, by Month 30, so to coordinate with *reCreating Europe*'s WP2 - End-users, and realize a GLAM-specific focus on the public database due, as a WP2 deliverable, by the end of Month 30.
- To promote the dissemination of the preliminary and final findings of the legal mapping, by way of adapting the format of the research outcomes to the specific audience (e.g. policy papers, academic contributions, tutorials, infographics, informative materials such as "toolkits");
- To build on the results stemming from the LA- and GM-related legal mapping to meaningfully contribute to the policy, academic, and public debate on the present and future of copyright regulation in the GLAM sector, specifically vis-à-vis the evolving practices, needs, and obstacles faced by libraries and archives;

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- To proactively engage European stakeholders – above all, public and private libraries, archives, museums, galleries, and representative umbrella association thereof - to raise awareness and open dialogue on the effectiveness and real-life impact of the analysed copyright flexibilities, by way of participatory events.

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Annexes

Annex 1 – Legal mapping of EU sources of copyright flexibilities in LA industries.

Annex 2 – Legal mapping of national sources of copyright flexibilities in LA industries.

Annex 3 – Questionnaire to national copyright experts.

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