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GRAPHIC DESIGN AND PRODUCTION
Jojo Form

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Editorial

While producing this issue of Stockholm Intellectual Property Law Review, we are just about to say goodbye to 2022 and welcome 2023, a year we hope will be full of growth and repose from the destruction and demise of these last few years. After our previous issue celebrating the founder of the European IP Law masters programme, Professor Marianne Levin, we are excited to bring you this issue with several thought provoking articles that test the bounds of society, culture, art, and technology on IP.

In modern times, one of the most present and enduring technological advancements that have had an impact on how we think about intellectual property (IP) is artificial intelligence (AI).

AI is without a doubt both a trouble maker and simulator testing the ability for IP laws to adapt to new applications and technology. From Dabus with its question as to whether AI-created inventions can be granted patent protection to the next big thing on the legality of the use of training data in developing AI, AI seems to be a never ending stream of thought provocation.

Microsoft, initially a strong opponent of the open source movement, gradually 'joined' in and even purchased GitHub in 2018, a platform that allows programmers to develop and store their open access code.

In 2022, a new kind of AI technology was released by Microsoft that can generate its own computer code. Github Copilot, as it is named, speeds up the work of professional programmers by suggesting to them ready-made blocks of computer code that they could instantly incorporate in their work. Programmers seemed to love this new tool! Well, at least most of them did. Matthew Butterick, a programmer that is also a designer, an author and a lawyer was not so happy with this latest Microsoft project and decided to file a class-action lawsuit against Microsoft and other high-profile companies that have participated in the GitHub Copilot project.[1]

Butterick claims that GitHub Copilot was only possible due to the availability of billions of lines of computer code that was made available on the internet.[2] It is the work of the computer programmers who spend years writing the code, and who now are not acknowledged in any way, that in fact made GitHub Copilot.[3] This seems to be the first legal action concerning 'AI training data', the most important aspect of constructing an AI system.

Of course Butterick's lawsuit is not the first time concerns as to the status and practices of 'training data' are raised. Artists, authors, programmers and composers have during the past few years raised their concerns that companies and AI researchers actually used their work without their consent and without any much less adequate remuneration. The AI applications built from 'training data' are extremely broad ranging from art generators to speech recognition systems and even automated cars.

Microsoft has claimed that the use of existing code to train AI is done under the legal doctrine of 'fair use', and this argument is definitely not a new one, however it is one that has not yet been tested in the US courts (or elsewhere).

Prior to GitHub Copilot in 2020, OpenAI (an AI lab run by Microsoft), released an AI system called GPT-3. This is an AI system that has been trained using vast amounts of digital text, thousands of books, Wikipedia articles, chat logs and other data available online. The system learned to predict what word is to come in a sentence. Gradually, it began completing the thoughts of an author by suggesting whole paragraphs, then evolving to provide whole pages, poems, articles and speeches. In fact, it could even write computer programs.

OpenAI then took the project a step further training a new system, OpenAI Codex, that was specifically trained with computer programmes. OpenAI Codex then gradually led to GitHub Copilot. And while GitHub Copilot produces only simple code that requires the contribution of a programmer in order for it to be usable, we know developments run fast.

Butterick is not only concerned with issues of acknowledgement for the authors but also with the impact this AI application will have on the global community of programmers.[4] Being part of the open source community he claims that open source software stands today for the most important tech applications we use in everyday life.[5] While open source code is shared freely, this sharing has its legal basis on licenses designed to ensure that it is used in ways that would benefit the community of programmers. According to Butterick Microsoft has violated the terms of the licenses and in fact, if GitHub Copilot continues to improve it will make open source programmers obsolete.[6]

Of interest here is that Butterick does not base the lawsuit on copyright infringement but instead concentrates on claims that he argues are not subject to a fair use defense.[7] He argues that companies have violated GitHub's terms of service and privacy policies while also violating federal law that requires companies to display copyright information when they make use of the material.[8]

This lawsuit is representative of the challenges AI poses on the IP system as we know it. And makes it clear that the use of training data is without a doubt important from an IP law perspective and necessary to ponder.

This issue of SIPLR discusses several issues that are part directly or indirectly of the challenges brought on the copyright system by creative processes and technological and societal changes, and how these should be managed.

In his article, *A Reflection on the Cultural Significance of the Protection of Classics*, Martin Fredriksson discusses the fall and rise of the protection of classics in Swedish legislation. Having the Nordfront case as a starting point, he walks you through his alluring analysis on the meaning of § 51 of the Swedish Copyright Act and in particular the meaning of violation of the 'interests of spiritual cultivation'.

1 Complaint, *Matthew Butterick v Github, Inc. et al.* (N.D. Cal.) Case 3:22-cv-06823, Nov 3, 2022, copy available https://githubcopilotlitigation.com/pdf/06823/1-0-github_complaint.pdf accessed 23 January 2023.
2 ibid [84].
3 ibid [192] - [195].
4 ibid [164].
5 ibid [106].
6 See Cade Metz, 'Lawsuit Takes Aim at the Way A.I. Is Built' The New York Times (New York, 23 November 2022) https://www.nytimes.com/2022/11/23/technology/copilot-microsoft-ai-lawsuit.html accessed 23 January 2023.
7 Complaint, *Butterick v Github* (N.D. Cal.) Case 3:22-cv-06823 [85].
8 ibid.

Following this, Marina Katrakazi, Panagiota Koltsida, Eleni Toli, and Prodromos Tsiavos present in their article *License Clearance Tool: A holistic open IP and open innovation practices among research communities* the practical applications of a License Clearance mechanism (LCT). As explained in detail in the article, an LCT focuses on automating the clearance of Intellectual Property Rights (IPR) by ensuring the compatibility among different licenses included in the same resource. The article delves into the growth of the open source world and the value added by the LCT system.

In the third article, Balancing Article 17 CDSMD and the Freedom of Expression, *Finn Hümmer* discusses recent case law, national and EU legislation and offers a timely contribution to the debate on the congruity of Article 17 of the DSM Directive with the fundamental right to freedom of expression and information.

Finally, in an engaging contribution, *The Machinery of Creation. Oulipo Poetry, Copyright & Rules of Constrain*, Kathy Bowrey and Janet Bi Li Chan present the creative process of Oulipo poetry and analyse the impact of copyright law on this form of expression. The authors eloquently reconcile love for the art of poetry with copyright law's influence on the art. Concluding with a unique sentiment, 'Still, copyright law has quite a lot in common with Oulipo. Obvious similarities include that legal reasoning is often imagined as a semi-closed machine, where language choices produce new meaning. But there is a foundational plagiarism in copyright – the reproduction of a humanist authorial beneficiary of law used to anchor the legal machinery of infringement. This confinement means that copyright is unable to properly converse with artists or poets about a key difference between copyright and Oulipo. Law suppresses the cyborg in all creation.'

This issue of the SIPLR is produced by a new group of student editors and a new student editor in chief, all of them working toward their masters in European Intellectual Property Law at Stockholm University! Without their contribution the production of this issue would not be possible.

We hope you enjoy reading this thought provoking issue 2022 (2) of the SIPLR!

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A Reflection on the Cultural Significance of the Protection of Classics

By Martin Fredriksson

ABSTRACT

This article applies a cultural perspective on § 51 of the Swedish Copyright Act, which prohibits the rendering of works in the public domain 'in a way that offends the interests of spiritual cultivation' (SFS 1960:729). This so called 'protection of classics' was formulated in the 1950s to protect classical works against derogatory interpretations, such as popular cultural adaptions. § 51 has rarely been applied, but in 2021 it was for the first time tried in court as the nationalist website Nordfront was accused of violating §51 by publishing works by three prominent romanticist poets in a context bordering on hate speech. The court ruled that the publication was not a violation of § 51, which calls the future of the protection of classics into question. Even though §51 might soon be obsolete, it raises a number of questions regarding the relation between law and culture. This article discusses what the protection of classics and the Nordfront case can tell us about cultural change in postwar Sweden if it is approached as a cultural rather than a legal text and studied not primarily as a legislative process but as a process of meaning making. The article makes no attempts to conduct such an analysis but rather aims to introduce the perspective and present preliminary reflections on how the formulation and use of protection of classics reflects changing conceptions of cultural norms and values

THE FALL OF THE PROTECTION OF CLASSICS

In April of 2021, the Swedish Court of Patents and Trademarks passed a historic verdict when it for the first, and possibly the last, time tried § 51 of the Swedish Copyright act.[1] This paragraph, also known as the protection of classics, states that:

> *If a literary or artistic work is rendered in a way that offends the interests of spiritual cultivation, a court may, at the request of an authority appointed by the government, prohibit distribution and sanction a fine. What is here stated shall not apply to reproductions rendered during the lifetime of the author.*[2]

In theory, this would mean that works of particular cultural significance can be protected against reproductions that are considered offensive, even if the works are in the public domain.[3] The Swedish Copyright Ordinance states that only the Swedish Academy [Svenska akademien], the Academy of Music [Kungliga musikaliska akademien] and the Academy of Fine Arts [Konstakademien], have the right to take legal actions when classical works within their respective domains are reproduced in ways that could constitute violations of § 51.[4]

While § 51 has been in force since 1961, it has only been utilised on rare occasions when the academies have reacted to uses and adaptations of works that they have found to be a violation of the protection of classics. Up until recently, all of these potential cases have been settled outside of court, usually after the defendant agreed to withdraw the contested publication. This changed with the case *Svenska Akademien v. Nordfront & Nordiska Motståndsrörelsen* [2008] PMT 17286-1 (hereafter referred to as the *Nordfront* case) in the winter of 2021. The case dates back to the fall of 2019, when the Swedish Academy first confronted the national socialist online journal *Nordfront* for having published excerpts from the Norse epic *Havamal* and poems by three prominent Swedish romanticist authors: Esias Tegnér (1782-1846), Victor Rydberg (1828–1895) and Verner von Heidenstam (1859–1940).[5] Chosen passages from the poems that appeared to express nationalist values were juxtaposed to articles propagating hate against homosexuals and covertly celebrating the terrorist attack in Christchurch, New Zeeland, in March 2019 where a white supremacist shot and killed 51 people in a mosque. The Swedish Academy argued that publishing works of such cultural significance in a context that so blatantly offended common social and cultural values was a violation of § 51 and urged *Nordfront* to take down the publication. When *Nordfront* refused to comply, the Swedish Academy decided to take the case to court.

Up until now, the Academies had appeared reluctant to take a more proactive role in enforcing § 51. While they had received petitions from the public to take actions against various alleged violations of the protection of classics, only a few of those had been pursued, and in those cases never in court. The vast majority of potential cases were discarded by the academies themselves. Generally, the position of the academies seems to have been that the protection of classics is too difficult to enforce; as the Secretary of the Swedish Academy, Horace Engdahl, put it 15 years before the *Nordfront* case: 'How do you prove that someone has violated the interests of spiritual cultivation when no one anymore can explain the meaning of the expression 'spiritual cultivation'.[6] On a similar note law Professor Marianne Levin sees the lack of a common cultural frame of reference as an obstacle to properly enforcing the protection of classics:

> *[§ 51] can only be enforced in a meaningful and reliable manner if there is a reasonably solid and commonly shared understanding of culture to refer to. This might possibly have existed for certain periods. But for most modern forms of utilizing works of art, there are hardly any commonly accepted limitations.*[7]

Existing research tends to agree that the protection of classics is obscure, hard to enforce and incompatible with fundamental legal principles such as freedom of expression.[8] For six decades the protection of classics thus led a life in the margins and the general view appears to have been that it is outdated and practically unapplicable.

The ruling in the *Nordfront* case seemed to confirm the view of the protection of classics as unenforceable. The court stated that § 51 was originally intended as a protection against derogatory *adaptation* of classical works and that it cannot be applied when the works are reproduced in their original form. The court thereby discarded the argument of the Swedish Academy that the publication violates the protection of classics merely because the context in which the works are published, itself offends the interests of spiritual cultivation. The court furthermore expressed concerns that an extensive applications of § 51 could be too restrictive to the free use of works in the public domain.[9]

Shortly after the verdict, the Swedish Academy issued a press release where it declared that while it did not agree with the court's decision, which practically rendered § 51 useless, it had decided not to appeal the verdict. It reasoned that the legal meaning of the phrase 'the interests of spiritual cultivation' should be defined by a court and not by the Swedish Academy and that it had taken the case to court, hoping for a precedent that could clarify the future use § 51. Subsequently, the Swedish Academy urged the government to reassess if and how the protection of classics should be applied in the future, arguing that the protection needs to be 'modernised'. The press release furthermore concluded that the protection of classics should be enforced by a public authority rather than by a private foundation like the Swedish Academy. Thus, the Swedish Academy not only questioned the role of § 51 but also disqualified itself as its guardian and explicitly asked to be relieved of the duty of enforcing the protection of classics.[10]

In spite of the fact that both the verdict and the response from the Swedish Academy tend to discard the protection of classics as outdated and practically unenforceable, I would argue that the case proved that the protection of classics is a more urgent object of study than ever, if not from a legal perspective then definitely from a cultural perspective. This article will ask what the protection of classics and the *Nordfront* case can tell us about cultural change in postwar Sweden if it is approached as a cultural rather than a legal text and studied not primarily as a legislative process but as a process of meaning making. The article makes no attempts to conduct such an analysis in full, which would require a much more comprehensive study. It simply aims to introduce the perspective and present preliminary reflections on the cultural significance of the protection of classics.

1 Patent och Marknadsdomstolen, Dom 2021-04-15 PMT 17286-19.

2 'Om litterärt eller konstnärligt verk återgives offentligt på ett sätt som kränker den andliga odlingens intressen, äger domstol på talan av myndighet som regeringen bestämmer vid vite meddela förbud mot återgivandet. Vad nu är sagt skall ej gälla återgivande som sker under upphovsmannens livstid'. SFS 1960:729, *Lag om Upphovsrätt till litterära och konstnärliga verk* § 51.

3 Ulrika Wennersten, *Immaterialrätt och skydd av samhällsideal: En studie av klassikerskyddet i upphovsrättslagen och undantaget i varumärkesrätten, mönsterrätten och patenträtten för allmän ordning och goda seder* (Lund University, 2014); Gunnar Karnell, 'Moral Rights and Modern Times – The Gradual Obsolescence of Section 51 of the Swedish Copyright Act', in *Mélanges Victor Nabhan*, (Éditions Yvon Blais, 2004).

4 SOU 1956: 25, *Upphovsmannarätt till Litterära och konstnärliga verk: lagförslag av Auktorrättskommittén*, 410; SFS 1993:1212, Upphovsrättsförordningen §6.

5 Lydia Farran Lee, 'Svenska Akademien har stämt Nordfront – kräver vite', *Sveriges Television* (Stockholm 20 December 2019) https://www.svt.se/kultur/svenska-akademien-har-stamt-nordfront accessed 27 November 2022.

6 'Hur bevisar man att en viss part har kränkt den andliga odlingens intressen, när knappast någon längre kan förklara innebörden i uttrycket "andlig odling"?', Svenska akademiens högtidssammankomst 20 December 2005 https://www.svenskaakademien.se/svenska-akademien/sammankomster/hogtidssammankomsten/hogtidssammankomst-20-december-2005 accessed 27 November 2022.

7 '[§ 51] kan bara utövas meningsfullt och säkert, om det finns en någorlunda fast och allmän kulturuppfattning att hänvisa till. En sådan har möjligtvis funnits under vissa perioder. Men för flertalet moderna verksutnyttjanden finns det knappast några allmänt accepterade gränser'. Marianne Levin with Åsa Hellstadius, *Lärobok i immaterialrätt* (12th edn, Norstedts Juridik 2019).

8 Wennersten (n 3); Karnell (n 3).

9 PMT 17286-19 (n 1).

10 Svenska Akademien, Klargörande kring Klassikerskyddet' (30 April 2021) https://www.svenskaakademien.se/press/klargorande-kring-klassikerskyddet accessed 27 november 2022.

Contextualizing Law as Culture

The relation between law and culture has gained much attention in the last 20 years, not the least in the fields of cultural studies and anthropology. From an anthropological perspective, laws are basically codifications of social norms that constitute a system of value which, together with traditions and perceptions of the world, form the foundations of an anthropological definition of culture. From that viewpoint, law and culture are not separate spheres but inherently intertwined processes and practices.

Law Professor Naomi Mezey argues that '[l]aw is simply one of the signifying practices that constitute culture, and, despite its best efforts, it cannot be divorced from culture. Nor, for that matter, can culture be divorced from law'.[11] She goes on to conclude that 'law and culture are mutually constituted and legal and cultural meanings are produced precisely at the intersection of the two domains, which are themselves only fictionally distinct'.[12] This has implications for how we can study law and what we can learn from it. If law, as Mezey further argues, 'can be seen as one (albeit very powerful) institutional cultural actor whose diverse agents (legislators, judges, civil servants, citizens) order and reorder meaning' then studying copyright can also tell us something about the articulation of cultural values.[13] Anthropologist Jane Cowan *et alii* argue along similar lines when they conclude that 'culture, rather than being solely an *object* of analysis, can be employed as a means of analyzing and better understanding the particular ways that rights processes operate as situated social actions'.[14]

The question is thus, what the protection of classics and the *Nordfront* case can tell us about changes in Sweden's cultural landscape if we follow Mezey's and Cowen's call and analyze the law as statements and social actions that order and reorder meaning situated within a specific cultural context.

Such an analysis could begin with a close reading of the preambles to Sweden's current *Act on Copyright to Literary and Artistic Works* (SFS 1960:729): a comprehensive report that was published in 1956 outlining the content and context of the new Swedish copyright law that was to be passed in 1960.[15] This 600-page document analysed the legal circumstances and accounted for previous and existing copyright legislation both in Sweden and internationally in great detail. This is a document that in itself provides a rich source of information on modern copyright historiography, since it gives an overview over a cross section of all major aspects of copyright law that were under debate at the mid-20th century. In this article I will approach the 1956 report not primarily as a legal source but as a document reflecting and responding to the social, cultural and media historical process in postwar Sweden. I will thus contextualize the source in relation to modern cultural history rather than to legal history. Finally, I will ask what the *Nordfront* case can tell us about contemporary cultural dynamics against the backdrop of that cultural history.

The Rise of the Protection of Classics

The origins of the 1956 report date back to 1938, when the justice department appointed a committee of experts on authors' rights to draft a new copyright act to replace the existing law from 1919. Due to the outbreak of the Second World War the work was postponed, but in 1956 the committee of experts, supervised by law Professor Gösta Eberstein, finally presented a proposal for a new copyright act that would eventually become the *Law on Copyright to Literary and Artistic Works* (*Lag om upphovsrätt till litterära och konstnärliga verk*, SFS 1960:792). The prehistory of § 51 however begins before the committee of experts was appointed, since the formulation of the protection of classics in the 1956 report was directly inspired by a discussion about a public paying domain that had been going on since the 1920s.

Public paying domains existed in many countries in Europe and elsewhere in the 20th century. They have taken various shapes in different contexts, but fundamentally a public paying domain allows the state, a collecting society or a similar organisation, to charge a fee for republications of older works that are in the public domain, and use the revenues to support living artists. The provision relies on the assumption that if publishers profit from the free access to works in the public domain it is only fair if they share the revenues from works by long dead authors with living authors who can be considered the spiritual heirs of writers from the past.[16]

In 1924, a proposition to include a public paying domain in the Swedish copyright law was presented to the parliament.[17] The proposition was taken under serious consideration but finally rejected on the grounds that such a provision could increase the price of literature by imposing something akin to a tax on classical works, and that extensive state interference in the realm of literature could violate cultural freedom and integrity.[18] During the following decades, the question would resurface regularly, only to be repeatedly rejected on similar grounds. While the idea of a public paying domain as a tool for economic redistribution never gained the approval of the Swedish legislators, a parallel narrative about protecting cultural values and the artistic integrity of the classics emerged in the discussions. Many of the proponents of a public paying domain argued that a positive side effect of such a provision would be to provide a tool for the state to maintain a certain control over the publication of older works and prevent bad or disrespectful editions of classical texts. When the committee of experts drafted the copyright act of 1960 it once and for all discarded the idea of a public paying domain, but it acknowledged the need for a law that 'gives the public the authority to interfere to protect the moral values in the more significant works of art and literature'.[19] The consequence of this was the drafting of § 51.

The need for some kind of moral rights protection for works in the public domain was motivated by a fear that new commercial media practices would undermine established cultural values. This was evident already in the first proposal for a public paying domain from 1924, which argued that the state needed legal means to protect the 'free' literature from being reprinted in substandard editions by unscrupulous publishers.[20] When the 1924 proposition for a public paying domain was sent to the Swedish Writers Union [Svenska Författarförbundet] for referral, the Writers Union wholeheartedly embraced the idea of an extended moral rights protection for works in the public domain which it saw as a timely response to the numerous threats to the integrity of literary works presented by the modern publishing industry: threats ranging from censorship based on moral or political considerations, to purely commercial compromises. The Writers Union was primarily concerned that publishers would sacrifice eternal literary qualities for quick revenues by publishing classical works in shortened or badly edited versions.

These fears were related to a belief that the proliferation of popular culture and light entertainment had a negative impact on public taste and caused general deterioration of literary sensibilities. The Writers Union lamented the public's tendency to listen more to glossy advertisement from dubious publishers than to serious literary critics:

> *How little attention the Swedish public pays to the critical warnings about all the bad things that are offered when it comes to books, is most obvious if we look at the Nick-Carter-literature which could only be temporarily exterminated through the social democratic youth clubs' boycott of the vendors.*[21]

Here the Writers Union made a reference to the so-called Nick Carter debate that raged in Sweden 15 years earlier. Nick Carter was the protagonist in an American series of crime novels that were widely distributed in newspaper stalls and kiosks across Sweden in 1908, in cheap translations. As such, the Nick Carter series was not unique: the modernization of Swedish society, with rising income, more leisure time and high levels of literacy, had contributed to a rapid expansion of the book market and a growing demand for cheap and entertaining literature. These new reading habits had however caused concerns regarding changing social norms and literary values. The Nick Carter series, with its spectacular depictions of crime and adventure catering particularly to young readers, came to represent literature of dubious quality undermining the morals of modern youths.

A moral panic arose around the Nick Carter novels and numerous civil and political organizations, from socialists to conservatives, joined forces to battle the new generation of decadent literature – soon to be known as 'Nick-Carter-literature' – which was believed to cause moral and mental decay among the youth.[22] The Nick Carter saga ended quickly when the distributors cancelled the series in 1909, after the social democratic youth club had launched a wide spread boycott against vendors who sold Nick Carter novels. The debates about the vices of popular literature nevertheless persisted since a new form of cheap and entertaining literature tailored for youths was now an established genre on the book market, and by 1924 it was obviously still personified by Nick Carter. While the Nick Carter novels were far removed from literary classics the Writers Union raised them as an example of the greed and lack of scruples that characterizes segments of the modern commercial publishing industry, implying that if publishers deal this carelessly with contemporary literature protected by copyright, then works in the public domain might be even more vulnerable.[23]

A presumption that commercialism and popular culture presented a threat to established cultural values persisted throughout the discussions about a public paying domain and culminated with the inclusion of the protection of classics in the 1960 Copyright Act. The 1956 report however expanded the discussion to a wider range of media, beyond printed texts. From a media history perspective the copyright act of 1960 emerged in a time of rapid change, and one of its goals was to amend the failures to address the new media technologies of the 20th century that had marked its predecessor, the copyright act of 1919, which paid little attention to the emerging film medium

11 Naomi Mezey, 'Law as Culture' *In Austin Sarat* and *Jonathan Simon* (eds), *Cultural analysis, cultural studies and the law* (Duke University Press 2003) 45.

12 ibid.

13 ibid.

14 Jane K Cowan, Marie-Bénédicte Dembour and Richard A. Wilson, 'Introduction', In Jane K Cowan. Marie-Bénédicte Dembour and Richard A. Wilson, *Culture and Rights: Anthropological Perspectives* (Cambridge University Press 2001).

15 SFS 1960:729 (n 2).

16 Adolf Dietz, 'A Modern Concept of the Right of the Community of Authors (Domaine Public Payant)' (1990) 24:4 *Copyright Bulletine*; Maximiliano Marzetti, *The Law and Economics of the 'Domaine Public Payant': A Case Study of the Argentinian System* (University of Rotterdam 2018).

17 Första kammaren, Motion no 11, 1924.

18 Första Kammaren, Protocol no 38, 1924; Andra Kammaren, Protocol no 38, 1924; SOU 1937: 18, *Promemoria angående grunderna för en reform av lagstiftningen om rätt till litterära och musikaliska verk*, 17.

19 'ge det allmänna befogenhet att ingripa till skydd för de ideella värdena hos de mer betydelsefulla litterära och konstnärliga verken'. SOU 1956:25 (n 4) 403.

20 Första kammaren, Motion no 11, 1924.

21 'Hur litet den svenska allmänheten i verkligheten fäster sig vid kritikens varningar för det dåliga, som bjudes i bokväg, framgår bäst av hela Nick-Carter-litteraturen, som endast genom de socialdemokratiska ungdomsklubbarnas praktiska bojkott mot försäljningsställena för en tid utrotades'. Lagutskottets utlåtande, no 36 1924, 14.

22 Ulf Boëthius, *När Nick Carter drevs på flykten* (Gidlunds 1989).

23 Första kammaren, Motion no 11, 1924, 14.

and, for obvious reasons, left out broadcast media entirely.[24] Consequently, the new media landscape that emerged after the war was addressed in various ways in many parts of the report, including those that discuss the protection of classics. Here the modern music industry also entered as a potential threat to traditional cultural values. Apart from dubious editions of literary works the report also made references to Jazz paraphrases of classical compositions as examples of offensive reproductions of classical masterpieces.

This indignation over jazz paraphrases was nothing new; in a consultation with the Swedish Organisation of Composers (STIM) [Svenska tonsättares internationella musikbyrå] regarding another proposal for a Swedish public paying domain in 1936, STIM warned against the proliferation of jazz paraphrases of classical works by respected composers such as Chopin and Wagner.[25] The fact that jazz adaptations were still a controversial issue in the early 1960s, is evident not only from the examples in the report, but even more from the fact that the first utilization of the protection of classics in Sweden concerned a jazz adaptation. In September 1961, just three months after the new copyright law entered into force, the Academy of Music received a petition from STIM regarding a new record by Duke Ellington: Swinging suites by Edward E. and Edward G., that had just been released in the USA but had yet not reached the Swedish market. The record consisted of a series of jazz interpretations of Edward Grieg's (1843-1907) 1875 composition Peer Gynt, which had recently fallen into the public domain. STIM argued that Ellington's recordings violated the protection of classics. After taking the case under consideration, the Academy of Music agreed that the recording was 'offensive to the Nordic musical culture',[26] but took no legal action since the Swedish agent had already decided not to distribute the record out of fear of causing controversies.
Just like the Nick Carter novels, jazz and other forms of popular music were often seen as expressions of American commercialism. The reception of Jazz in Sweden was, however, also associated with a process of modernization that called traditional values into question, actualized new distinctions between low versus high culture, and epitomized the birth of a distinct youth culture.[27] On top of that, jazz also for the first time gave black performers and a non-European music tradition a place in mainstream culture in the Nordic countries. A sense of jazz as a foreign element in Swedish culture was also acutely present in the Academy of Music's characterization of the African American jazz musician's interpretation of the Norwegian composer's canonical work as 'offensive to the Nordic musical culture'. The potential racial undertone to this indignation becomes more evident considering that the Swedish piano player Jan Johansson could release his widely acclaimed jazz adaptations of Swedish folk songs, *Jazz på Svenska* [*Jazz in Swedish*], just three years later.

The protection of classics clearly emerged as a response to the modern transformation of Swedish society. It was seen as a necessary tool to stifle the challenges to cultural values and norms brought on by a changing book market, a new media landscape a proliferation of more or less commercial forms and genres of art and entertainment. In short, it was an attempt to maintain traditional cultural hierarchies and protect high culture against the destructive influence of popular and youth culture. Regarded in retrospect, the views and values that underpinned the protection of classics seem anachronistic, and the legislators of 1960 almost appear to be taking a last stand against an approaching wave of cultural change which was, at that time, only mounting at the horizon. Just ten years later the general frame of reference had changed radically: jazz had been accepted as high art and in 1970 Duke Ellington was appointed an international member of Sweden's Academy of Music.

Conclusion: Nordfront revisited

Studying the origins and history of the protection of classics within its contemporary cultural context gives an example of what Mezey means when she argues that 'legal and cultural meanings are produced precisely at the intersection of the two domains'.[28] In this case, legal and cultural discourses about aesthetic values interact in a joint articulation of the necessity to protect high culture against the threat of commercialism and popular culture; a stance that can essentially be seen as a reaction against the forces of modernity that culminated in the postwar years. The subsequent applications of the protection of classics, leading up to the *Nordfront* case on the other hand show that neither the law nor the cultural values with which it is enmeshed are static, but work as a legal/cultural system that, as Mezey puts it, 'order and reorder meaning'.[29]

It is significant that the first case regarding a violation of § 51 that made it to court did not concern the kind of popular cultural or commercial adaptations addressed in the preambles of the Copyright Act, but was a reaction against an ultraconservative use of a Nordic literary heritage. The case was presumably carefully chosen by the Swedish Academy which had been grappling with how to manage the protection of classics for decades. Calling on the protection of classics to challenge a nationalistic use of canonized works could be seen as an attempt to use a conservative tool against reactionary forces. In the press release, the Academy argued that it had sued *Nordfront* hoping for the court to clarify what could be considered a violation of the 'interests of spiritual cultivation'.

Turning to national socialism, one of the most blatant violations of current social and cultural values, comes across as an attempt to probe the limits of what could be defined as offensive to interests of spiritual cultivation. Returning to Levin's observation that the protection of classics cannot be enforced without a 'distinct and common understanding of culture', it appears that the Swedish Academy was trying to establish egalitarian and democratic values as such a common cultural understanding in the *Nordfront* case. The court, however, discarded the charges on the grounds that the works had not been adapted and, consequently, § 51 did not apply even if the work had been published 'in a context that from a general cultural perspective appears to be offensive'.[30] Thus, while the court agreed that the context is offensive, it evaded the question of how to define the 'interests of spiritual cultivation' by ruling that the way in which the works are rendered does not qualify as a violation of § 51.

The verdict in the *Nordfront* case takes us back to square one, where we still lack clear guidelines of how to apply the protection of classics which now comes across as more anachronistic than ever. In light of this, the Swedish Academy's choice of words when it argues that the protection of classics needs to be 'modernized', might not be incidental. It can be read as an acknowledgement that the protection of classics is out of date and a call for the law to adapt to the processes of cultural change that the legislators tried to defer in 1956. The *Nordfront* case thus highlights the need to reorder legal meaning to fit a contemporary common cultural frame of reference. The question is if and how a provision like the protection of classics, that was formulated to maintain a hegemonic understanding of taste in the monocultural Swedish society of the 1950s, can be applied at a time characterised by heterogeneity and multiculturalism. Here we are not only grappling with a legal dilemma but also with a cultural one and the analysis of law interacts with that of heritage, power and cultural change that occupies other disciplines such as Critical Heritage Studies, Cultural Studies and Postcolonial Studies.

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[24] Martin Fredriksson, *Skapandets rätt: Ett kulturvetenskapligt perspektiv på den svenska upphovsrättens historia* (Daidalos 2009).

[25] SOU 1937:20 (n 18).

[26] 'kränkande för den nordiska musikkulturen'. Ulrika Wennersten, *Immaterialrätt och skydd av samhällsideal: En studie av klassikerskyddet i upphovsrättslagen och undantaget i varumärkesrätten, mönsterrätten och patenträtten för allmän ordning och goda seder* (Lund University 2014); Levin (n 7).

[27] Johan Fornäs, Moderna människor: Folkhemmet och jazzen (Norstedts 2004).

[28] Mezey (n 11) 45.

[29] *§* 45.

[30] 'De uttalanden som görs i förarbetena om klassikerskyddets omfattning avser uteslutande verk som utsatts för bearbetningar, förändringar eller förvanskningar. Det finns enligt domstolen inte något i förarbetena som talar för att klassikerskyddet skulle vara avsett att även omfatta den situationen att ett verk återges i oförändrat skick i ett sammanhang som ur allmänkulturell synpunkt framstår som stötande' [2021] PMT17286-19, (n 1) 21.

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License Clearance Tool: A holistic technical solution promoting open IP and open innovation practices among research communities

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ABSTRACT

Open Science (OS) movement, remote collaboration among research communities and the increased quantity of new content, data and resources, have made it clear that traditional licensing schemes require new tools that would combine technical and legal features, as well as techno-licensing tools. In fact, the diversity of open licenses deprived from standardization frequently leads to situations where more than one open licenses with different or conflicting terms apply at the same time, and hence it gives rise to license compatibility concerns. This creates a legal uncertainty that may discourage authors, scientists, and researchers from releasing their work under an open license. In this paper, we identify legal and technological barriers that pose a challenge in adopting open science practices; thereafter, we present a new tool, named License Clearance Tool (LCT), which has been developed by the Athena RC (Greece) as part of the National Initiatives for Open Science in Europe – NI4OS-Europe (https://ni4os.eu/), a European project that contributes to the European Open Science Cloud (EOSC) by supporting its activities in Southeast Europe. LCT is an open-source tool, which provides a holistic approach addressing IP issues. LCT focuses on automating the clearance of Intellectual Property Rights (IPR) by ensuring the compatibility among different licenses included in the same resource and assists users on the selection of the most suitable license by providing a content summary of them with respect to permissions, prohibitions, and obligations in relation to the user needs. It is intended to support mainly researchers and non-legal experts in general to publish in FAIR/open modes.

1 INTRODUCTION

The advent of low-cost Information and Communication Technologies (ICT) and the World Wide Web in the early 1990s led to increased generation of new content and knowledge, as it allowed the collection of large amounts of data and information that could be easily used, copied, modified, or distributed for further use, often with no or without significant financial or technical barriers.[1] For the first time in the history of humanity such an extended collaboration between researchers and the production of collaborative research outcomes had been made possible[2] and new opportunities emerged for scientists and researchers to publish and share the content of research projects, scientific papers and large data sets.[3] Such developments to a great extent followed collaboration patterns found in Free / Open Source Software (FOSS)[4] communities. FOSS practiced a licensing model based on a premise of sharing and collaboration rather than exclusion and direct exchange.[5] In case of content, reusability of copyrighted works was achieved through open content licenses.

The Creative Commons (CC) initiative, which was initially set up in 2002, contains a set of various licenses that allow people to share their copyrighted work to be copied, edited, built upon, etc., while retaining the copyright to the original work; CC provides six core licences, each of which allow stakeholders to use the original work in different ways. While there are different CC licences, all CC licences include certain standard rights and obligations. CC initiative constitutes one of the most successful open content licensing schemes and provides authors with a great variety of licenses for literary, musical or audiovisual works enabling them to choose the most appropriate one that meets his/her needs. CC initiative aims to make copyright content more 'active' by ensuring that content can be reutilized with a minimum of transactional effort.[6] Thus, the emergence of FOSS and open content licenses together with ICT revolution has brought a new economic model for the sharing of digital resources and the reusability of existing knowledge.[7] It has also created new challenges and opportunities for Open Access movement, as defined in the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003).[8]

The Open access movement constitutes an essential attribute of Open Science (OS) and aims to make scientific knowledge openly accessible in ways that maximize its value to science and society. Researches can benefit from the greater scrutiny offered by open science, as it allows a more accurate verification of research results, whereas authors experience an increase in the number of citations their works receive in the open access environment.[9] At a global level, international institutions and other bodies have taken many initiatives aiming to implement Open Science mechanisms and some countries have made efforts to adapt legal frameworks and implement policies encouraging greater openness in science. At the EU level, the European Commission has placed a great emphasis on the adoption of OS practices during the last years. Indicatively, several pieces of EU legislation were adopted in order to facilitate the reuse of research data, such as Public Sector Information Directive (PSI) and the EU Copyright Directive[10]. Furthermore, the open-access policy of Horizon 2020 projects provides for open-access to publications by default.[11] Additionally, in 2018 the European Open Science Cloud (EOSC) was launched in the context of the broader Digital Single Market strategy, which constitutes a pan-European federation of data infrastructures supported by the EC, Member States and research communities. EOSC aspires to provide a solid framework for collaboration and the pooling of resources at European, national, regional and institutional levels. EOSC highly promotes the use of open licenses and all stakeholders wishing to contribute to EOSC are highly encouraged to use open content and open software licenses.[12]

There is thus a growing need to develop legal and technological solutions to cater not only for the increased knowledge sharing, but also to allow scientific practices supporting openness and collaboration to flourish. However, the proliferation of FOSS and Open Science projects led to a series of issues of what became known as the problem of the fragmentation of the commons', i.e. the creation of multiple licensing schemes that were not necessarily compatible with each other.[13] For a resource provider, choosing the appropriate license for a combined resource or choosing the appropriate licensed resources for a combination is a difficult process, given that it involves choosing a license compliant with all the licenses of combined resources.[14] The paper discusses how issues of commons fragmentation or licensing compatibility can be tackled through a combination of licensing and technological tools, what we call in this paper, a techno-licensing approach. LCT aims to help researchers, universities and other stakeholders to freely use and share their ideas without any legal uncertainty related to the licensing scheme applicable to them and to contribute to the establishment and sustainability of EOSC, where all researchers, innovators, companies and citizens can publish, find and re-use data, tools and services for research, innovation and educational purposes.

2 LEGAL CHALLENGES

The legal challenges in the new research environment created by the Open Science movement have been the driver for the development of the LCT

a) Large sets of open licenses with different or contradictory content.

The wide spectrum of actions available in the digital era has affected conventional Intellectual Property (IP) licensing practices and highlighted the need for alternatives to the mainstream models of sharing copyrighted material in a lawful manner. In this context, a series of different open licenses emerged that allowed the free use and dissemination of copyrighted content. Since then, many

1 Tim Berners-Lee, *Weaving the Web: The Past, Present and Future of the World Wide Web by Its Inventor* (Orion Business 1999).

2 Don Tapscott and Anthony D. Williams, Wikinomics: *How Mass Collaboration Changes Everything* (New York: Portfolio 2008); Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-first Century* (Farrar, Straus, and Giroux 2005).

3 Organisation for Economic Co-operation and Development (OECD), "Making Open Science a Reality" (2015) OECD Science, Technology and Industry Policy Papers, No. 25, OECD Publishing, Paris. http://dx.doi.org/10.1787/5jrs2f963zs1-en.

4 Richard Stallman, "The GNU Operating System and the Free Software Movement." in Chris DiBona, Sam Ockman & Mark Stone, Open Sources: Voices From the Revolution, (O'Reilly & Associates Inc, 1999).

5 Yochai Benkler, "Coase's Penguin, or, Linux and the Nature of the Firm" (2002) https://doi.org/10.2307/1562247.

6 Brian Fitzgerald, "Open Content Licensing (OCL) for Open Educational Resources" https://www.oecd.org/education/ceri/38645489.pdf.

7 Yochai Benkler, "The Wealth of Networks: How Social Production Transforms Markets and Freedom" (2006) https://doi.org/10.1177/1084713807301373.

8 Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003), https://openaccess.mpg.de/Berlin-Declaration.

9 Fitzgerald (n 6).

10 Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (EU Copyright Directive) [2019] OJ L 130, 17.5.2019, p. 92–125.

11 European Commission, "Guidelines on Open Access to Scientific Publications and Research Data in Horizon 2020" (2013) http://www.gsrt.gr/EOX/files/h2020-hi-oa-pilot-guide_en.pdf.

12 EOSC Rules of Participation (2021), Art. 5.

13 Niva Elkin-Koren, "Exploring Creative Commons: A Skeptical View of a Worthy Pursuit. The Future of the Public Domain (P. Bernt Hugenholtz & Lucie Guibault, eds.)", Kluwer Law International (2006) http://ssrn.com/paper=885466.

14 Benjamin Moreau and Patricia Serrano-Alvarado and Matthieu Perrin and Emmanuel Desmontils, " Modelling the Compatibility of Licenses" 16th Extended Semantic Web Conference (ESWC2019) (2019) DOI:10.1007/978-3-030-21348-0_17.

software companies have started to adopt open-source licensing models as part of their business[15], and many scientists choose to make their work freely available.[16] Open licenses include a series of different licenses and many sub-categories thereof. According to the most acceptable definition on open licenses provided by the Open Source Initiative,[17] an open license contains the following features: (1) free distribution of the software; (2) free access to the source code (just reproduction costs are covered); (3) authorization of modifications and the distribution of derived works; (4) no discrimination between people and fields of endeavor; (5) no restriction on other software; and (6) technological neutrality as well as independence from a specific product. Such licenses vary, depending on the copyrighted work (software, data, content or other) and the rights and powers granted to users, such as the right to use a work, to merge two different works, to relicense a work under different terms, etc.

b) Standardization aspects

In addition, a standardization problem exists, namely, license texts may either form part of the source file or may be missing completely. Even in cases where license information is put at the beginning of a source file, it usually does not follow proper standards.[18] This diversity of open licenses deprived from standardization frequently leads to situations where more than one open license with different or conflicting terms apply at the same time, and that in its turn gives rise to license compatibility concerns. For instance, a license that excludes commercial use cannot be combined with a license that permits so, and they, thus, may be jointly used. Similarly, a license that forbids the distribution of a derivation (remix, transform or build upon) cannot be combined with a license that permits so.

Joint use of different licenses may happen in case of relicensing, dual licensing, sublicensing, or in case of derivative works, either by adding a new material to the existing work and seeking for a new license for the new work, or by combining two works with different licenses. For instance, in open software licenses, the problem that many software vendors often face is how to incorporate third party software in their implementations correctly without causing any license violations, guaranteeing thus legal compliance.[19]

c) Broadening of initial license scope

Another confusing aspect of licenses relates to their scope: most open licenses have been developed for licensing software. They differ from open licenses that have been developed for licensing other material, which is also protected by copyright.[20]

This situation affects the scientific community and all stakeholders wishing to use an open license for their work. It constitutes a major barrier in open access, because it creates legal uncertainty that discourages authors, scientists, and researchers from releasing their work under an open license; the need for sufficient expertise to detect compatibility conflicts between licenses leads to high transaction costs associated with the manual clearance of licensing terms and conditions.[21] Especially for software, the dependency-related license violations are overlooked and misunderstood by the developers for various reasons. Managing dependency-related license violations is difficult and the developers are demanding help.[22] Furthermore, for an individual author who wishes to make his/her publication open access, the procedure used to select the appropriate license for his/her work can be cumbersome; individual negotiations, for example, can be a burden on the author.[23] In case of a combined resource, the selection of the appropriate license is even more challenging, because it involves choosing a license compliant with all the licenses of combined resources as well as analyzing the reusability of the resulting resource through the compatibility of its license.[24]

d) Plethora of applicable legal requirements.

Sharing of knowledge (including texts, methods etc.), data and tools, hereinafter referred to as 'intellectual assets', in the context of EU's Open Science policy presupposes that such assets comply with the applicable EU and local Member State regulations; otherwise, no intellectual asset can be used safely and thus all stakeholders from across academia would be discouraged from using and sharing assets under the Open Science ecosystem. Thus, compliance with the applicable licensing frameworks guarantees the establishment of a trust framework in which open practices can be embraced as the modus operandi for all interested parties. In addition, intellectual assets are usually subject to more than one different legal regime regulating their use.[25] For instance, where open science involves the processing of personal data, it is subject to the applicable rules including the General Data Protection Regulation (GDPR[26]); or, if it includes confidential information, it is subject to contractual limitations (e.g. Non-Disclosure Agreements) and legal limitations (e.g. Trade Secrets legislation). Finally, before any intellectual assets are made available, they will need to be cleared off any other IPR, ranging from Trade Secrets to Patents and Utility Rights, as well as by other contractual or statutory restrictions, e.g. cultural heritage laws, national security provisions or statistical confidentiality provisions.[27] In other words, the key sources of legal transaction costs stemming are: first, issues of rights clearance and compliance with existing legal and contractual regimes; and second, issues of license compatibility when multiple assets under different - and often conflicting - terms are combined.[28] This is reflected in the relevant Open Data European legislation, particularly Open Data Directive (Directive (EU) 2019/1024 on open data and the re-use of public sector information), where it is expressly mentioned that all the aforementioned legal limitations should be taken into consideration and be excluded from the scope of application of the Open Data Directive according to the principle 'as open as possible, as closed as necessary'.[29]

e) Absence of publicly available tools for rights clearance.

Despite the proliferation of assets licensed under open licenses, and the fact that there are tools mostly focusing on the documentation of rights clearance processes as well as tackling license compatibility issues, major problems still exist. Most notably, such problems include: (a) the lack of free to access rights clearance tools; (b) the lack of maintenance of open licenses compatibility or public domain calculator tools, as well as the lack of traceability on license changes[30]; and (c) the absence of linking compatibility and clearance assessment to publicly available in open repositories resources.

3 THE LICENSE CLEARANCE TOOL (LCT)

The License Clearance Tool (LCT), a tool that is consistent with EU's open science policy, comes as a response to the increased demand for holistic technical solutions suitable for promoting the adoption of open science practices and the re-use of existing research and other types of work. In comparison to pre-existing tools dealing merely with a guided choice of open licenses, LCT has at its core the resource, or the digital asset generated either as original or derivative work. It helps addressing issues of copyright, privacy and confidentiality, data protection, limitations of national legislation, as well as any other additional limitation that may further restrict the use of the asset in the Open Science ecosystem. More specifically, LCT enables the proper IPR management through the clearance of open licensing terms and conditions, the indication of any applicable embargo policy and any other limitation that relates to cultural heritage legislation. It aims to facilitate and automate the clearance of rights (copyright) for datasets, media and software that are to be cleared before they are publicly released under an

15 Mikko Valimaki "Rise of Open Source Licensing – A challenge to the use of intellectual property in the software industry", MA thesis, Helsinki University of Technology (2005) http://lib.tkk.fi/Diss/2005/isbn9529187793/isbn9529187793.pdf.

16 International Science Council "Open Science for the 21st century", Draft ISC Working Paper (2020) https://council.science/wp-content/uploads/2020/06/International-Science-Council_Open-Science-for-the-21st-Century_Working-Paper-2020_compressed.pdf.

17 Lucie Guibault and Christina Angelopoulos, "Open Content Licensing, From Theory to Practice", Amsterdam University Press (2011).

18 Georgia M. Kapitsaki and Frederic Kramer and Nikolaos D. Tselikas, *"Automating the license compatibility process in open-source software with SPDX"*, The Journal of Systems and Software (2016).

19 ibid.

20 Guibault (n 17).

21 Giray Havur, Simon Steyskal, Oleksandra Panasiuk, Anna Fensel,Victor Mireles, Tassilo Pellegrini, Thomas Thurner, Axel Polleres, and Sabrina Kirrane, "Automatic License Compatibility Checking", CEUR Workshop Proceedings (2019) ← https://ceur-ws.org/Vol-2451/paper-13.pdf→.

22 Shi Qiu and Daniel M. German and Katsuro Inoue, "Empirical Study on Dependency-related License Violation in the JavaScript Package Ecosystem" (2021) ←DOI: 10.2197/ipsjjip.29.296→.

23 OECD (n 3).

24 Moreau (n 14).

25 Catherine Doldirina, Anita R. Eisenstadt, Harlan Onsrud and Paul F. Uhlir, "Legal Approaches for Open Access to Research Data" (2018) https://doi.org/10.31228/osf.io/n7gfa; Ignasi Labastida, "Legal requirements, RDM and Open Data" (2017) DOI: https://doi.org/10.14324/000.learn.22.

26 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016], OJ L 119, p. 1–88.

27 The Royal Society Science Policy Centre, *"Science as an open enterprise"*, Science Policy Centre report (2012).

28 Havur (n 21).

29 Directive (EU) 2019/1024 on open data and the re-use of public sector information (recast) [2019] OJ L 172, p. 56–83, recital 28, art. 1.

30 Christopher Vendome, Mario Linares-Vasquez, Gabriele Bavota, Massimiliano Di Penta, Daniel German, Denys Poshyvanyk, "License Usage and Changes: A Large-Scale Study on GitHub" (2015) doi: 10.1109/ICPC.2015.32.

open license and/or stored at a publicly trusted FAIR repository. The clearance metadata itself will be stored and licensed as an open-source resource. It provides equivalence, similarity and compatibility between licenses if used in combination, which is essential for derivative works. Furthermore, it helps users to take into consideration some of the core GDPR principles and raises awareness about privacy concerns. Identification of a valid legal basis that permits data processing, indication of the appropriate data masking techniques that safeguard the protection of personal data, such as anonymization and pseudonymization the transparency obligations of the data controller and the existence of any confidentiality agreement is an indicative list of the privacy-related issues addressed in LCT. The aforementioned information, together with any other types of rights (national legislation, national security etc.) that should be cleared before the asset is released, is accessible through a checklist. In this way, through a user-friendly and straightforward workflow, LCT assists users in determining the legal boundaries that exist in a specific asset, which contradict with the principles of being Fair, Accessible, Interoperable and Reusable (FAIR) and impede the free or under pre-defined conditions circulation of the asset in the Open Science ecosystem. LCT provides a solution to the challenge of addressing legal aspects in FAIR and in Open Research Data Management (ORDM).[31] It is, thus, intended to support mainly researchers and in general non-legal experts to publish in FAIR/open modes and facilitates the sharing of knowledge among the research communities and the attribution of the creator's work.

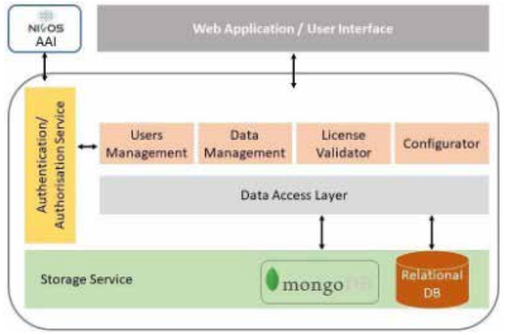
The tool provides guidance for 73 existing standard open-source licenses, as these are the most widely used and may thus accommodate most of the license clearance and IPR needs for non-legal experts for different types of resources. Finally, LCT is designed to be extensible with a plan to include and allow options for crowdsourced clearance in future work, for custom licenses that would otherwise require input from a legal expert.

3.1 Legal insight

LCT's development has been preceded by extended legal search and analysis of most used licensing schemes. The driving force has been to offer to all stakeholders and especially those deprived of a legal background, an easy-to-use tool to support them during the open license clearance process and in parallel address the most frequent case scenarios that restrict the use of an asset in the context of Open Science. In this context, we integrated in LCT the most usual legal boundaries relating to privacy and confidentiality. We attempted to cover core principles of GDPR including the transparency obligation of the data controller, identification of the applicable legal basis for data processing, technical measures for the protection of personal data, that are a *conditio sine qua non* for sharing personal data and using the asset in the Open Science context. Further IPR restrictions that may apply to an asset and national legislation limitations for national security or other reasons were taken into consideration as well when creating the workflow of LCT. It automates the clearance based on the actions or omissions that each standard open-source license provides for. These have been put in a matrix, to allow the comparison 'all with all' and unveil compatible and conflicting licenses. More specifically, we selected 73 most used standard open-source licenses for a wide variety of assets such as software, hardware, font, data etc. We reviewed the legal text of each license and categorized them on the basis of permissions, duties or prohibitions stipulated in each license (e.g. creation of derivative works, commercial use, distribution etc.) and upon categorization, licenses have been compared to each one in pairs. Licenses have been further classified in distinct license elements for each of the three categories. Through this assessment a core element of the application has been created, the license compatibility matrix.

An important concern in our work, has been to increase the legal transparency and awareness of the users. For this reason, the dedicated 'License Information' section is available, and users can navigate through it to understand the main elements of each open license. More specifically, this section provides a short summary as per license that enables users to check their elements with respect to the permissions, prohibitions and obligations, which determine the conditions under which the work is released: indicatively the permission to allow commercial use or not, permission of modification (creation of derivative works), or reciprocity obligation (copyleft or permissive). In this way, a codified version of licenses' summaries has been created, and next to each element an explanatory note has been added for the users' convenience so that they can understand the meaning of each attribute and select the most suitable license that corresponds more closely to their needs. A URL link leading to the entire legal text of each license is available, should users wish to consult it for more details. This section was a key step in LCT's development, as it allows the codification of licensing practices and further contributes to the reduction of transaction costs in the reuse of assets licensed under an open license. All users can easily compare among open licenses and choose the most appropriate one simply by navigating through the tool.

[31] Mark D Wilkinson et al., "The FAIR Guiding Principles for scientific data management and stewardship" (2016) doi: 10.1038/sdata.2016.18.



3.2 LCT approach & methodology

LCT is offering a user friendly and intuitive web user interface enabling its users to efficiently clear their work on a resource basis, receive a clearance report including all the provided information and retrieve detailed information for each supported license.

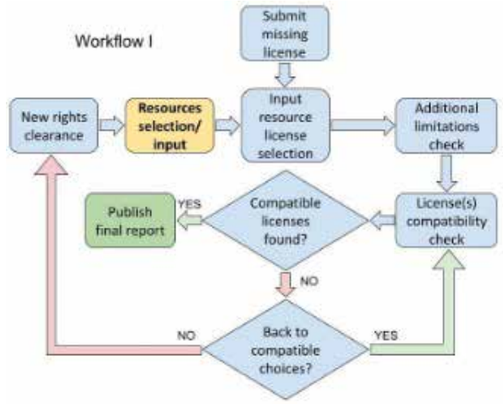
The tool incorporates two main scenarios aiming on supporting the two most common use cases, as these were described by our target users during the design process. The 'resource driven clearance', where the user aims to associate an appropriate open-source license for existing work composed by different elements that are licensed separately, or the 'license driven clearance' for derivative work by combining licenses from the originating licensed or possibly unlicensed content and the reverse rights clearance procedure. Both scenarios incorporate all IPR, personal and other rights related to the resource, aiming on raising awareness on the most common legal aspects that affect the future usage and exploitation of the cleared resource.

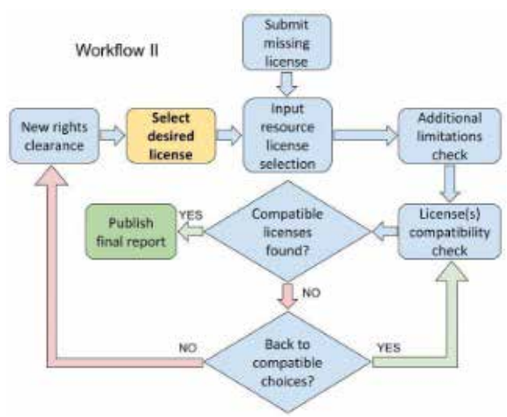
To support these scenarios, LCT has developed a compatibility mechanism able to calculate the compatibility among an arbitrary number of given licenses. This mechanism is enhanced with the option to further limit the compatible licenses based on a set of given attributes that should be met. These attributes are a subset of the list of license elements for each of the four categories.

The web application is supported by a web service responsible for the initiation and display of the guided wizards, the license compatibility check, the report generation, and the user's management. LCT's dynamic approach has been reflected in the development of two different schemas one for each scenario, using the JSON notation, that model the different inputs and the structure of each workflow that is dynamically interpreted by the front-end application and is displayed to the end users. Following this design approach our application can dynamically accompany any changes in its wizards, eliminating the need of source code updates and releases. Figure 1 presents an architecture block diagram of the LCT application showcasing the different modules and services and the interaction with external modules for the authentication of the registered users.

3.3 LCT workflows

Two main workflows are supported in LCT. These are following the two possible usage scenarios the application covers. Workflow I in the flowchart below, describes the process designed in the tool to implement the first usage scenario. It starts with a new rights clearance process initiated by the user by selecting the type of the resource under clearance. The process is bound to the resource itself and not the user who performs the clearance, allowing different users to complete the clearance of the same work. It is then followed by the association of each input/used internal resource with a corresponding 'license-in' license and information. After this step is completed, the application invokes the compatibility module and calculates the list of the compatible open-source licenses based on the previous ones and allows the user to select the desired one. In the last steps additional information related to personal data and other rights is collected and the clearance is submitted leading to the generation of a compatibility report for the provided resource. In case no compatible licenses are found, the process can be refined or aborted.





Workflow II allows the user to start a new clearance process by first selecting the license he/she is interested in using for releasing his/her resource. The algorithm works with this target for the additional steps that do not otherwise deviate from workflow I, at least from the user's point of view.

If there is no compatibility among the desired license choice and the given used internal resources' licenses, then the derived work cannot be published with the chosen license-out and a different one should be selected. This workflow provides a user with license options by eliminating incompatible choices considered at zero cost.

3.4. The application

An end user web application has been designed and implemented and can be used by the research communities. The application is available for both guest users and registered ones and is based on a guided form wizard for the two distinct scenarios. It facilitates the clearance process and after the submission of a form, the user can download the assessment result as a custom pdf report. Registered users have the option to access all their past clearances and download their reports at any time. Figure 3 presents a sample of the application pages and the guided form wizard.

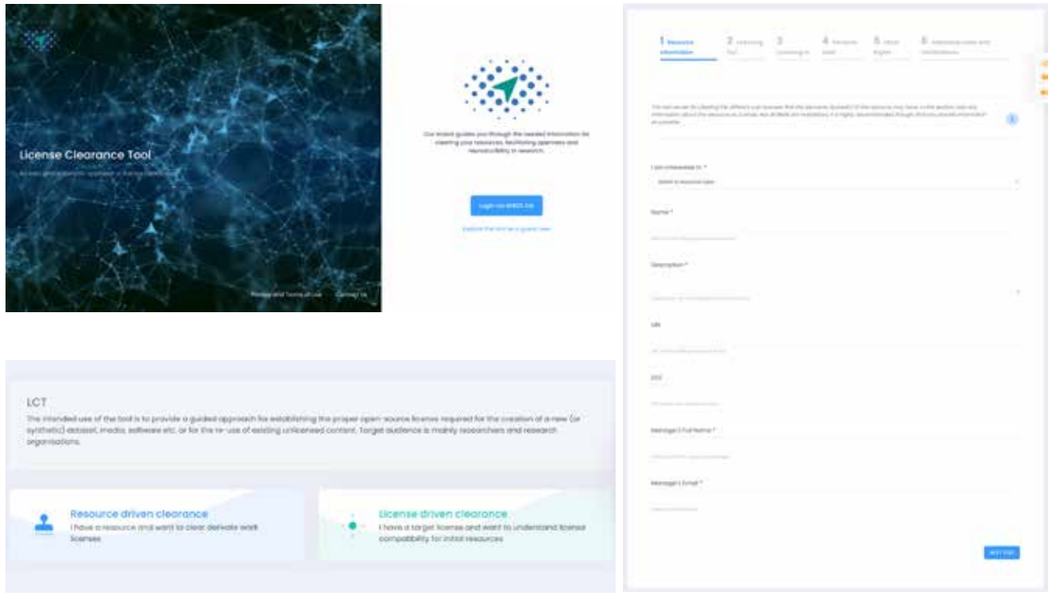
4 CONCLUSIONS

Licensing and rights clearance with respect to a broad range of legal aspects in the Open Science ecosystem is a complex issue and requires a great level of legal expertise. The difficulties lie not only in the need to be up-to-date with the current developments in terms of law, policies or other regulations with binding effect, adopted at either international or EU level, but also in the way this legal information is accessed and used. Techno-legal tools such as LCT do provide a possible solution, however further work is needed to support the changing and increased needs of researchers for publishing open and FAIR.

In this frame, LCT development investigates changes in two directions. A first expansion aims at including even custom licenses in order to properly address legal complexity. The potential direction for future work is the comparison of 'standard to custom' and 'custom to custom' licenses that poses a challenge for both directions: on the one hand, it involves a detailed legal analysis on the compatibility of licenses, and on the other hand it requires the technical deployment of the solution, which could be achieved though appropriate means that would make feasible the classification of custom licenses to specific license elements, thus enabling their automatic compatibility assessment with existing standard licenses and allow their usage in research outcomes and other types of work.

A second development direction under consideration for LCT, is the implementation of crowdsourced clearance. This requires a parallel effort at two levels: creating the grounds by setting up the environment, technically, as in a platform, and physically, as in community building, driving awareness, generating motivation. This will allow to provide a complete framework for crowdsourced clearance of custom licenses. The advantages of an open and citizen science-oriented approach are evident: as researchers aim to work in increasingly open and reproducible ways to address challenges and solve problems, the crowdsourced license clearance can help to identify the best options and increase reproducibility even more.

We are well aware of difficulties and limitations the above processes may have. We consider, however, that they considerably enhance the sharing and use of knowledge in open research environments, without compromising in terms of awareness of the general legal framework as well as of IPRs.



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Balancing Article 17 CDSMD and the Freedom of Expression

By Finn J. Hümmer, LL.M.

ABSTRACT

Accompanied by massive protests driven by concerns about the introduction of upload filters, Art. 17 of Directive (EU) 2019/790 on copyright in the Digital Single Market (CDSMD) came into force in 2019. Since then, a lot has happened: Poland filed an action for annulment, whose ruling was announced by the CJEU on 26 April 2022, Member States delivered transpositions with diverging approaches, and a political agreement on the Digital Services Act, which contains numerous regulations that are potentially also applicable to online platforms as addressees of Art. 17 CDSMD, was reached on 23 April 2022. With all these regulations, the question remains open as to how it can be ensured that Art. 17 CDSMD is compatible with the fundamental right to freedom of expression and information, enshrined in Art. 11 of the Charter of Fundamental Rights.

In order to answer this question, the origin of Art. 17 CDSMD and its ratio, its liability mechanism and its impact on the fundamental right will first be examined. In a further step, the safeguards laid down in Art. 17 CDSMD are analysed and the effects of the current ruling on national implementations are discussed. Finally, the focus is on the German approach, which contains farther-reaching ex ante safeguards and is considered as a model for further implementations, especially after the judgement of the CJEU.

It is concluded that the developments since the adoption of Art. 17 CDSMD overall strengthen the freedom of expression and information. In order to ensure effective protection of this fundamental right, however, it is necessary to define when content is to be regarded as manifestly infringing and can thus be blocked ex ante according to the recent judgement. Determining this, should not be left to the OCSSPs. The German implementation offers a first step in this regard but is also confronted with doubts about its compatibility.

This article takes the recent case law, national and EU legislation and offers a timely contribution to the debate on the compatibility of Art. 17 CDSMD with the fundamental right to freedom of expression and information.

1 INTRODUCTION

Nothing less than the demise of the internet was feared, and massive protests rallied behind the #SaveYourInternet to prevent the introduction of upload filters through Art. 17 of Directive the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market.[1] It is the arguably biggest copyright reform at European level since the introduction of the InfoSoc Directive in 2001 and at the forefront is Article 17 CDSMD, which accentuates the responsibility of online platforms operators for the content of their users to support rightholders in protecting their rights online.[2]

Prior to its introduction, the safe harbour provisions in Articles 12-14 of the E-Commerce Directive were at the center of the liability regime for online intermediaries.[3] Originally intended to harmonise an online intermediaries' limited liability for user-uploaded content to support the 'smooth functioning of the internal market',[4] a lot has changed since the introduction of the ECD in 2000. Significantly, platforms like YouTube became more comprehensive, offering convenient and free access to copyright protected content. While platforms monetise their offer through advertising and user data, rightholders benefit from these significant market valuations only to a limited extent, as they do not necessarily have the possibility to conclude licensing agreements for the use of their content.[5] This has been referred to as the 'value gap', a term which was used by the music industry and also in the legislative process.[6] It refers to a perceived mismatch between the value that digital platforms gain from the music and the actual value returned to the rightholders.[7] It is the declared aim of the CDSM Directive 'to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works', or to put it differently, to decrease the 'value gap'.[8]

To this end, Article 17(1) CDSMD provides that online content-sharing service providers (OCSSPs) perform an act of their own in terms of communication to the public or making available to the public, when they give access to copyright protected works on their platform. OCSSPs are online platforms which store and make available content of users and which compete with other online content services like online audio and video streaming services.[9] In order to make copyright protected works publicly available, OCSSPs shall obtain authorisation from the rightholders.[10] Where an authorisation is not granted, according to Art 17(4) CDSMD, OCSSPs shall be liable for copyright infringing uploads, unless they demonstrate that they made best efforts to obtain an authorisation (Art. 17(4)(a) CDSMD), ensure the unavailability of specific works (Art. 17(4)(b) CDSMD), and expeditiously remove content upon receiving a notice from the rightholders (Art. 17(4)(c) CDSMD).

In particular the obligation to ensure with best efforts the unavailability of copyright protected works in Art. 17(4)(b) CDSMD has been the subject-matter of debate. It has been suggested that it would effectively oblige online platforms to filter all content, because the technology cannot properly differentiate between unlawful and lawful content, which results in the prevention of the latter.[11] These concerns were also reflected in an action from Poland regarding a request to annul Art. 17(4)(b) and (c) CDSMD in fine.[12] It mainly argued that these provisions prescribe the use of automatic content recognition (ACR) tools, which carry the risk of blocking lawful content and this even before its dissemination and therefore its prescription constitutes a serious interference with the fundamental right to freedom of expression and information.[13]

Indeed, the best effort obligation in Art. 17(4)(b) CDSMD has been formulated very vaguely. As a matter of fact, national implementations tend to translate the term differently.[14] Furthermore, the exact duty for OCSSPs remains unclear. This is also due to the development of the provision: in the first proposal of the EU Commission, 'effective content recognition technologies' were explicitly mentioned as exemplary measures to 'prevent the availability on their services of works or other subject-matter identified by rightholders'.[15] To tackle the concerns which arose after its first proposal, the legal text was not only extensively amended (the original proposal encompassed merely three paragraphs in comparison to today's ten, making it the lengthiest provision in the whole Directive) but also substantially altered, the explicit mention of content recognition tools stroke out, and safeguards for the user's freedom of expression introduced.[16] In its Guidance on Art. 17 CDSMD, the Commission strives to present Art. 17 CDSMD as technologically neutral and emphasises that the use of technological solutions is not explicitly prescribed.[17]

That this does not reflect the full truth, however, is already clear from the Guidance itself. Pursuant to Art. 17(4)(b) CDSMD and Recital 66, industry practices are to be included in the assessment of 'best efforts'. According to the Guidance 'this includes the use of technology or particular technological solutions'.[18]

The same conclusion can be drawn from the case law of the Court of Justice of the European Union (CJEU). Already in *YouTube and Cyando*, the court considered the fact whether a platform put in place 'the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform' in its liability assessment of the platform operator.[19] This outcome is also represented by the AG in *Poland v Parliament and Council*.[20] The CJEU endorses this perspective in its judgement, adding that 'neither the defendant institutions nor the interveners were able, at the hearing before the Court, to designate possible alternatives to such tools'.[21]

1 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (2019) OJ L130, 92–125 ('CDSMD' or 'CDSM Directive').

2 ibid; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2001) OJ L167, 10-19 ('InfoSoc' or 'InfoSoc Directive').

3 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (2002) OJ L178, 1-16 ('ECD' or 'E-Commerce Directive'); Christina Angelopoulos, 'Harmonizing Intermediary Copyright Liability in the EU' in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) 316.

4 ECD recital 40.

5 'Commission Staff Working Document Impact Assessment on the Modernization of EU Copy-Right Rules' (14 September 2016) 138, SWD (2016) 301 final.

6 ibid 413; International Federation of the Phonographic Industry, 'Digital Music Report 2015' (2015) 22–23; Annemarie Bridy, 'The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform' (2020) 22 Vanderbilt Journal of Entertainment & Technology Law 323, 326; Tambiama Madiega, 'Copyright in the Digital Single Market' (June 2019).

7 International Federation of the Phonographic Industry (n 6) 22–23.

8 Commission, Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (14 September 2016) pt 1, COM (2016) 593 final ('CDSMD Proposal').

9 Cf. Recital 62 CDSMD.

10 CDSMD art 17(1), para 2.

11 Morgan Meaker, 'Inside the Giant German Protest Trying to Bring down Article 13' (*Wired UK*, 26 March 2019) https://www.wired.co.uk/article/article-13-protests accessed 24 May 2022.

12 Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union* [2022] EU:C:2022:297.

13 ibid [40]–[41].

14 Eleonora Rosati, 'DSM Directive Series #5: Does the DSM Directive Mean the Same Thing in All Language Versions? The Case of "best Efforts" in Article 17(4)(a)' (*The IPKat*, 22 May 2019) https://ipkitten.blogspot.com/2019/05/dsm-directive-series-5-does-dsm.html accessed 24 May 2022.

15 CDSMD Proposal.

16 Martin Senftleben and Christina Angelopoulos, 'The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market' (SSRN Scholarly Paper, 22 October 2020) 22.

17 'Communication from the Commission to the European Parliament and the Council Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' (4 June 2021) 11, COM(2021) 288 final ('Guidance on Art 17 CDSMD').

18 ibid 12.

19 Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc v Cyando AG* [2021] EU:C:2021:503 [102] ('*YouTube v Cyando*').

20 C-401/19 *Poland* (n 12) [57]–[69].

21 ibid [54].

In conclusion, Article 17 CDSMD may neither explicitly prescribe the use of certain ACR technologies, nor oblige the Member States to do so in their national transposition. At the same time, however, the assessment of whether the OCSSP has made 'best efforts' must take into account which technological means and alternatives are available and what is feasible for the OCSSP 'in light of the principle of proportionality'.[22] Therefore, it must be concluded that the legislator, at least indirectly, prescribes the use of automatic content recognition tools by implying this in its 'best efforts' clauses.[23] By setting the legal framework in a way that it requires the use of ACR technology to comply with the provision in Article 17(4) CDSMD and to avoid liability, the use and concomitant interference with the freedom of expression are attributable to the EU legislator.[24]

The following discusses the impacts of Article 17 CDSMD on freedom of expression and information as enshrined in Article 11 of the Charter of Fundamental Rights of the European Union as well as the contained safeguards, implications from the judgement in *Poland v Parliament and Council*, and the German approach on Article 17 CDSMD.[25]

2 SAFEGUARDING ARTICLE 17 CDSMD AND BALANCING FUNDAMENTAL RIGHTS

Art. 17 CDSMD is located in the triangle of interests of rights holders, platform operators and users. It is therefore hardly surprising that the rights to intellectual property law from Article 17(2) of the Charter, freedom to conduct a business from Article 16 of the Charter and, above all, freedom of expression and information from Article 11 of the Charter must be reconciled.

2.1 Article 17 CDSMD's impact on fundamental rights

Strengthening the negotiating position of rightholders and making the enforcement of their rights more efficient are declared aims of the CDSMD.[26] As the individual reporting of content to the platforms in the past led to considerable costs and was too inefficient, the liability mechanism and the use of ACR technology should support the rightholders. This reflects the shift of responsibility for monitoring from the rightholders to the OCSSPs.[27] In this course, the fundamental right to intellectual property, which is recognised as such in Article 17(2) of the Charter, supports the interests of the rightholders. It is not an absolute right and can be restricted in the same way the right to property can be subject to restrictions or limitations.[28] The CJEU confirmed this view in Scarlet Extended, stating that 'there is [...] nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected'.[29]

For OCSSPs Article 17 CDSMD entails some changes compared to the earlier legal situation. They are held directly liable within the scope of Article 17 CDSMD for copyright infringing content from their users if they cannot successfully make use of the exception regime of Article 17(4) CDSMD. Instead of the previously exercised voluntariness, which gave them a negotiating superiority, they are now obliged to take measures to protect the copyright of the rightholders.[30] As those measures must be 'in accordance with high industry standards of professional diligence', the OCSSPs are thus limited in their choice whether and how they want to encounter copyright infringing content on their platforms. On the one hand, the obligations from Article 17 CDSMD therefore entail restrictions on the freedom to conduct a business protected in Article 16 of the Charter. On the other hand, the CJEU's decision in *Scarlet Extended* showed the ability of the freedom to conduct a business as a limiting factor for the protection of intellectual property and made clear that technical possibilities can only be included to a certain extent in the balancing process.[31]

It is, however, the users of online platforms, which are facing the greatest concerns about Article 17 CDSMD and the de-facto obligation to introduce ACR technologies. Their interests are protected by Article 11 of the Charter. In its annulment action of Article 17(4) CDSMD, the Republic of Poland raises two main concerns. First, the technology carries the risk that lawful content will be blocked and second, the blocking is determined automatically by algorithms, enabling blocking of content even before its dissemination.[32] Altogether these issues would limit the freedom of expression in a way that undermines the essence of Article 11 of the Charter.

The issue of overblocking

The risk of blocking lawful content due to the application of ACR technology was outlined by the CJEU in the case *SABAM*, where it held that an injunction requiring the installation of a filtering system 'could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications'.[33] his occurrence can be referred to as 'overblocking' which describes a practice in which content is blocked beyond the threshold of the legal framework.

In the case of Article 17 CDSMD it is caused by two factors. First, according to the liability mechanism of Article 17(4) CDSMD, the platforms must make their best efforts to ensure the unavailability of specific works in order to avoid its own liability.[34] This could lead to OCSSPs which, as the AG describes it in his opinion, 'may tend to be overzealous and excessively block such information where there is the slightest doubt as to its lawfulness'.[35]

The second factor is the current state of the art. The exceptions and limitations to copyright, such as caricature, parody or pastiche, which are laid down in Article 17(7) CDSMD as mandatory for the member states, have in common that they can only be recognised in context. The technologies in use today, however, are merely matching technologies. They can assist in identifying content by providing very accurate matches, but are not able to analyse whether an uploader's duplicate content falls under an exception and limitation.[36] That is because the content recognition technology is solely capable of quantitative distinctions regarding the amount of protected material, but missing the ability to perform a qualitative assessment and including the context to determine the applicability of an exception or limitation.[37] In its Guidance the Commission comes to a similar conclusion, stating that 'in the present state of the art, no technology can assess to the standard required in law whether content, which a user wishes to upload, is infringing or a legitimate use'.[38]

The issue of blocking content before its dissemination

The second concern raised by Poland is blocking content before it is disseminated. Since the technology is highly developed and is able to scan and recognise content quickly, platforms are in the position to make an automated decision about permitting an upload of a particular content still during the upload process.[39] They are therefore able to block content before (ex ante) or after (ex post) it gets available to the public.

Assessing the text of Article 17(4)(b) and (c) CDSMD, it becomes clear that the ex ante blocking of content is inherent in the law: if the OCSSP has not obtained authorisation for a work, it must make best efforts to ensure the unavailability of specific works.[40] By obliging the OCSSPs to make 'best efforts to prevent [the] future uploads' of works, Article 17(4)(c) CDSMD is even more explicit in its wording. As AG Saugmandsgaard Øe points out, the phrase 'in accordance with point (b)' emphasises that both, Article 17(4)(b) and (c) require OCSSPs to prevent the uploading.[41]

In case of lawful content being wrongly blocked ex ante before its dissemination however, this requires the user to use a complaint mechanism, as provided for in Article 17(9) CDSMD, to bring their content online. Such an approach poses serious risks to the freedom of expression of users, as it entails 'chilling effects', i.e., a decrease in the activity of those users.[42]

Limiting freedom of expression and information

It follows from the above that Article 17 CDSMD constitutes a limitation on the freedom of expression and information. In *Poland v Parliament and Council*, the CJEU concludes that 'such a prior review and prior filtering are liable to restrict an important means of disseminating online content and thus to constitute a limitation on the right guaranteed by Article 11 of the Charter'.[43]

The fundamental right protects both sides of a discourse: the freedom of expression on the one side comprises the opportunity to take part in the public exchange of cultural, political, and social information and ideas of all kinds.[44] It covers opinions, ideas and all types of information that can be communicated.[45] The freedom to receive and impart information on the other hand protects the free access to information without interference by public authority.[46]

22 CDSMD art 17(5).

23 Like this among others: Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity' (2020) 51 IIC 709, 725; Christophe Geiger and Bernd Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) 70 GRUR International 517, 532; Karina Grisse, 'After the Storm—Examining the Final Version of Article 17 of the New Directive (EU) 2019/790' (2019) 14 Journal of Intellectual Property Law & Practice 887, 894 with further references; C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [62].

24 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [84]; confirmed in C-401/19 Poland (n 12) 56.

25 Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1 ('CFR' or 'the Charter').

26 CDSMD recital 61; 'Impact Assessment on the modernization of EU copy-right rules' (n 5) 140.I

27 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [53]; 'Impact Assessment on the modernization of EU copy-right rules' (n 5) 140.

28 Geiger and Jütte (n 23) 527–28.

29 Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] EU:C:2011:771 [43].

30 'Impact Assessment on the modernization of EU copy-right rules' (n 6) 140.

31 C-70/10 *Scarlet Extended* (n 29) [46]–[49]; See also Gustavo Ghidini and Andrea Stazi, 'Freedom to Conduct a Business, Competition and Intellectual Property' in Christophe Geiger (ed), *Research handbook on human rights and intellectual property* (Research handbooks in intellectual property, Paperback edition, Edward Elgar Publishing 2016) 416 arguing that 'IPRs should not be "used", in such a way that, while exceeding their essential anti-free riding function, their exercise would conflict with the goals of "public economic order" founded on overarching societal interests: in particular, the preservation of freedom of competition and freedom of expression and information'.

32 C-401/19 *Poland* (n 12) [41].

33 Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] EU:C:2012:85 [50].

34 CDSMD art 17(4).

35 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [142] with further references.

36 Bridy (n 6) 346.

37 Felix Reda and others, 'Article 17 of the Directive on Copyright in the Digital Single Market: A Fundamental Rights Assessment' (SSRN Scholarly Paper, 16 November 2020) 27.

38 Guidance on Art 17 CDSMD 20.

39 Cf. 'YouTube Copyright Transparency Report H1 2021' (December 2021) 10 https://transparencyreport.google.com/report-downloads accessed 24 May 2022.

40 CDSMD art 17(4)(b).

41 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [55].

42 ibid [187]; Gerald Spindler, 'The Liability System of Art. 17 DSMD and National Implementation: Contravening Prohibition of General Monitoring Duties' (2019) 10 JIPITEC 344, 355 para 58; Reda and others (n 37) 28; Geiger and Jütte (n 23) 536 see fn 257.

43 Cf. C-401/19 *Poland* (n 12) [55].

44 Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624 [34].

45 Geiger and Jütte (n 23) 523.

46 Cf. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS-5 ('ECHR'), art 10(1).

It is, however, not an absolute right.[47] The possibility of restriction follows on the one hand from the interaction with Article 10(2) ECHR through Article 52(3) of the Charter and on the other hand from the general reservation of Article 52(1) of the Charter.[48] According to these provisions, in order to be justified, any limitation must be provided for by law, respect the essence of the right to freedom of expression and be proportionate, i.e. the limitation must be justified by objectives in the public interest and not exceed the limits of what is appropriate and necessary.[49]

In the light of intellectual property the CJEU ruled in its *Promusicae* decision that Member States must, when transposing the directives, take care to rely on an interpretation which allows striking a fair balance between the various fundamental rights.[50] In *Poland v Parliament and Council* the CJEU repeated this.[51] Even Recital 84 itself states that the Directive should be interpreted and applied in accordance with the fundamental rights and principles recognised in particular by the Charter.[52]

2.2 Article 17 CDSMD's safeguards

In order to address the above mentioned concerns and to ensure that Article 17 CDSMD strikes indeed a fair balance between the fundamental rights, the European legislator has introduced numerous safeguards during the legislative process.

Preventing overblocking: Between the poles of paragraphs 4 and 7 of Article 17 CDSMD

First, Article 17(7) subparagraph 1 CDSMD states that 'the cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works [...] which do not infringe copyright [...], including where such works [...] are covered by an exception or limitation'. Article 17(9) subparagraph 3 CDSMD confirms this by repeating that 'this directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law'.[53]

Second, Article 17(7) subparagraph 2 CDSMD obliges the Member States to introduce certain exceptions and limitations to copyright. In this way, some of the exceptions and limitations encompassed in the catalogue of Article 5(3) InfoSoc has now become mandatory and it has ascertained a minimum standard of exceptions and limitations. Additionally, according to Article 17(9) CDSMD, in fine, OCSSPs are required to 'inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law'.[54]

At a first glance, these safeguards seem to be in contradiction to the obligations for OCSSPs from Article 17(4) CDSMD, as this liability regime creates an incentive to block more in case of doubt in order to avoid its own liability, as it is 'most likely the most cost-effective mechanism that would least restrict OCSSPs freedom to conduct a business'.[55] From the wording of the Article 17 CDSMD however, it becomes clear that paragraph 7 takes precedence over paragraph 4. This is because Article 17(7) is formulated as an obligation of result ('shall not result in the prevention'), whereas Article 17(4) merely provides for an obligation of 'best efforts'.[56] This has also been indicated by the Commission during the hearing of *Poland v Parliament and Council*,[57] and was confirmed in the judgement, in which the CJEU held that the wording is 'unambiguous' and not limited to requiring best efforts to that end, 'but prescribes a specific result to be achieved'.[58] In conclusion, OCSSPs are in principle required to filter and block content preventively, but only to the extent that they do not concern content that is not copyright-infringing or covered by an exception or limitation. In regard to this, the CJEU in *Poland v Parliament and Council* established a test, whether the content in order to be found unlawful would require an independent assessment.[59]

Ex ante measures

The fact that ex ante measures by OCSSPs are in any way compatible with freedom of expression is not a novelty from *Poland v Parliament and Council* but has already been established in the case law of the CJEU. In fact, the judgement represents a consistent further development of previous case law. In *UPC Telekabel*, for example, the CJEU held that preventive filtering and blocking access to a website by an Internet Service Provider (ISP) is reconcilable with the fundamental rights, provided the measure does not 'unnecessarily deprive internet users of the possibility of lawfully accessing the information available'.[60] In *L'Oréal*, the CJEU also ruled that it must in principle be possible not only to end infringements, but also to prevent further infringements.[61] At the same time, however, it found 'that the measures required of the online service provider concerned cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property'.[62]

In *Poland v Parliament and Council* the CJEU sharpened its jurisprudence, by stating that 'a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information'.[63] Although this barrier to the use of ACR technologies is found to be high, the CJEU has not closed the door for the usage of technical means entirely. Rather it found a way to set a precise limit for blocking content ex ante, which lies along the lawfulness of content. This is also in line with the case law of the European Court of Human Rights (ECtHR), which held that blocking an entire website without differentiating between legal and illegal content carries the risk that content will be arbitrarily and excessively blocked.[64]

The general monitoring ban in Article 17(8) CDSMD

Next, Article 17(8) subparagraph CDSMD states that 'the application of this Article shall not lead to any general monitoring obligation'. This provision is similar to the general monitoring ban from Article 15(1) ECD. Since Article 17(3) CDSMD excludes the application of Article 14(1) ECD, and Article 17 CDSMD is considered *lex specialis* compared to the InfoSoc and E-Commerce Directives, Article 15(1) ECD does not apply either to the framework of Article 17 CDSMD.[65] Nonetheless, due to its recurrence, Article 17(8) CDSMD is to be interpreted in the same way as Article 15(1) ECD, which gives relevance to the previous case law.[66]

In the past, the term 'general monitoring' has given rise to many interpretations, such as being present when all or most of the information is handled by an intermediary or carving out when monitoring is done only in order to detect specific activities.[67] Nonetheless, it must be emphasised at this point that the use of ACR technology always requires all content, including non-infringing material, to be scanned, otherwise it cannot be determined which content is infringing and which is not.[68] As a consequence, 'general monitoring' cannot be interpreted literally in the sense that monitoring of all content per se is prohibited, without contradicting what Article 17(4) CDSMD imposes on OCSSPs. 'General monitoring' must therefore be understood as a technical legal term, whose meaning is determined by the interpretation of the courts.[69]

In the cases *Scarlet Extended and SABAM*, the CJEU held that 'a system which would require the provider to actively monitor almost all the data relating to all of its service users [...] would require [it] to carry out general monitoring, something which is prohibited by Article 15(1) [ECD]'.[70] Later in *Glawischnig-Piesczek*, the CJEU, citing Recital 47, held that monitoring obligations are not prohibited by Article 15(1) ECD if they are 'in a specific case' instead of 'general'.[71] In this case, the court found that requiring Facebook to filter out certain content that a court has found to be illegal does not fall under the prohibition of general monitoring.[72] The CJEU's approach has thus changed somewhat in the course of the judgements. While initially the focus was on the amount of information to be inspected, now it is the detail of searches.[73]

In *Glawischnig-Piesczek*, 'specific' compassed not only the content that was found defamatory by a court in a Member State, but also equivalent content, as long as the differences were not 'as to require the host provider concerned to carry out an independent assessment of that content'.[74]

In *Poland v Parliament and Council*, the CJEU now takes up the latter point, stating that Article 17(8) CDSMD clarifies that an OCSSP cannot be required to prevent uploading of content, 'which, in order to be found unlawful, would require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright'.[75] Doing so, the court followed its AG who had pointed out that ex ante blocking is only permissible for

47 KU *v Finland* ECHR 2008–V 125, para 49; Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] EU:C:2006:549 [64].
48 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [89]–[90].
49 C-401/19 *Poland* (n 12) [63]–[65]; *Laserdisken* (n 48) [64]; *Vladimir Kharitonov v Russia* App no. 10795/14 (ECtHR, 23 June 2020), para 36; Oreste Pollicino and others (eds), *Copyright and Fundamental Rights in the Digital Age: A Comparative Analysis in Search of a Common Constitutional Ground* (Edward Elgar Publishing 2020) 111.
50 Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] EU:C:2008:54 [68].
51 C-401/19 *Poland* (n 12) [99].
52 CDSMD, recital 84.
53 CDSMD, art 17(9).
54 ibid.
55 Geiger and Jütte (n 23) 537.
56 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [165].
57 Paul Keller, 'CJEU Hearing in the Polish Challenge to Article 17: Not Even the Supporters of the Provision Agree on How It Should Work' (*Kluwer Copyright Blog*, 11 November 2020) http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/ accessed 24 May 2022.
58 C-401/19 *Poland* (n 12) [78].
59 ibid [90].
60 Case C-314/12 UPC *Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] EU:C:2014:192 [63].
61 Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] EU:C:2011:474 [131].
62 ibid [139].
63 C-401/19 *Poland* (n 12) [85].
64 *Vladimir Kharitonov v Russia* (n 49) para 38.
65 Geiger and Jütte (n 23) 198; Grisse (n 23) 896.
66 Matthias Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?' (SSRN Scholarly Paper, 21 May 2020) 15; Geiger and Jütte (n 23) 198; C-401/19 *Poland* (n 12) [90].
67 Compare e.g. the following, in which an attempt is made to find out what is meant by 'general monitoring', taking into account all the case laws of the CJEU and the ECtHR: Senftleben and Angelopoulos (n 16).
68 ibid 12; Leistner (n 66) 15; C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [113].
69 Leistner (n 66) 15.
70 C-360/10 *SABAM* (n 33) [38]; C-70/10 *Scarlet Extended* (n 29) [40].
71 Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] EU:C:2019:821 [34].
72 ibid [35].
73 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [111]–[112].
74 C-18/18 *Glawischnig-Piesczek* (n 71) [45].
75 C-401/19 *Poland* (n 12) [90].

content 'which [unlawfulness] is obvious from the outset, that is to say, it is manifest, without, inter alia, the need for contextualisation'.[76] In the same vein, the Commission also stated in its Guidance that 'automated blocking, i.e. preventing the upload by the use of technology, should in principle be limited to manifestly infringing uploads'.[77] This outcome is also in line with what the ECtHR judgement in *Delfi*, according to which 'clearly unlawful content' can, or even must, be blocked ex ante without unduly restricting the fundamental right of freedom of expression.[78]

Concluding from the above it becomes clear that a provision in Member States transpositions does not contravene the general monitoring obligation ban of Article 17(8) CDSMD, if it is limited to manifestly infringing content, i.e. content which does not require an independent assessment to assess its unlawfulness.

The additional ex post procedural safeguards from Article 17(9) CDSMD

Article 17(9) subparagraphs 1 and 2 CDSMD introduce procedural safeguards, which contain ex post mechanisms in the event of disputes over the disabling of access or the removal of content. Article 17(9) subparagraph 1 CDSMD mandates OCSSPs to provide an 'effective and expeditious complaint and redress mechanism'. According to Article 17(9) subparagraph 2 CDSMD, Member States are obliged to ensure that an out-of-court mechanism and access to relevant judicial authorities are in place according to Article 17(9) subparagraph 2 CDSMD.

The judgement in *Poland v Parliament and Council* made clear, that the complaint mechanism is considered only as an additional ex post safeguard, which applies in 'cases where notwithstanding the [ex ante] safeguards [...], the providers of those services nonetheless erroneously or unjustifiably block lawful content'.[79] Independently, the procedural safeguards are therefore not sufficient and they apply only in exceptional cases. It underlines also the general importance of the ex ante safeguards, which limit the use of technology to manifestly infringing content.[80]

Clear and precise rules

Adding lastly on the need for clear and precise rules, the CJEU refers to its *Facebook Ireland ad Schrems* ruling in which it held that the need for safeguards is all the greater where the interference stems from an automated process.[81] The provision in Article 17(4)(b) and (c) CDSMD, however, is far away from establishing clear and precise rules, as it is not defining the actual measures which OCSSPs must adopt to fulfil their obligations.[82] According to the CJEU, this is justified by the fact that the clause is intended to be open to the development of industry and technology.[83] Furthermore, in order to preserve the freedom to conduct a business from Article 16 of the Charter, it should be up to the OCSSPs to decide which specific measures they use to achieve this goal.[84]

This justification seems rather curious. For one thing, it has been repeatedly stated on all sides that there is hardly any way around the use of ACR technologies within the framework of the 'best efforts' regulation. For another, it is precisely the uncertainty about the extent to which technology may be used that led to the present doubts of compatibility with fundamental rights. If OCSSPs are given too much leeway to take measures, it is to be feared that these will be in their favour rather than in the interest of the users. It is therefore necessary to set minimum requirements for the choice of means.[85] In *UPC Telekabel*, the CJEU held that it is up to the ISP to choose the means to achieve the objective,[86] but it must then also ensure that the freedom of information of the users is preserved, i.e. without affecting users who are using the service in order to lawfully access information.[87]

3 IMPLICATIONS OF THE CJEU'S JUDGEMENT IN POLAND V PARLIAMENT AND COUNCIL FOR THE NATIONAL TRANSPOSITIONS OF ARTICLE 17 CDSMD

To determine whether content can be blocked ex ante, the CJEU established the test of manifestly infringing content, i.e. whether content, in order to be found unlawful, would require an independent assessment in the light of the information provided by the rightholders and of any exceptions and limitations to copyright.[88] Complying with this standard, is now the task of the Member States. In its final statements of the judgement in *Poland v Parliament and Council* the CJEU rules, that 'Member States must, when transposing Article 17 of Directive 2019/790 into their national law, take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter'.[89] Considering this, Member States have to ensure that their transpositions contain sufficient ex ante safeguards to prevent OCSSPs from using technology for ex ante blocking which would result in the blocking of lawful content. It is doubtful that this is the case for all national transpositions.[90]

3.1 Verbatim transpositions

In this context, the question arises whether Member States which choose to implement the Directive verbatim, meaning copy and paste the text of the Directive, need to adjust their national laws.

As the proceedings were an annulment action, i.e. not a question of referral, the CJEU only assessed Article 17 CDSMD itself as an EU provision, and expressly stated that its judgement is without prejudice to the transpositions of the Member States or the individual measures of the OCSSPs.[91] In combination with the abovementioned reminder of the CJEU for Member States to strike a fair balance, this could imply an obligation for Member States to provide additional safeguards with clear provisions explicitly prohibiting overblocking, and thus go beyond what Article 17 CDSMD itself contains.[92] The very existence of the case in front of the CJEU, as well as the positions taken by Spain and France in the case, according to which the ex post safeguards are sufficient, shows that Article 17 CDSMD is open to various interpretations, not all of which are in line with the ruling. It is the task of the Member States to create a clear legal framework here.

The CJEU clearly requires the Member States to review their transposition to analyse whether they, in accordance with the judgement, provide sufficient ex ante safeguards. A verbatim transposition in national law, however, must in correlation with the ruling be considered as complying both with Article 17 CDSMD and with EU primary law, i.e., the fundamental rights concerned. Whereas the CJEU attested Article 17 CDSMD to be accompanied by appropriate safeguards by the EU legislature to ensure a fair balance of fundamental rights, the same must also apply to those national legislators who chose to copy and paste Article 17 CDSMD in national law. As in addition, the national courts, when interpreting national law with a basis in EU law, must ensure that it is interpreted in conformity with EU law, and must also have regard to the case law of the CJEU, a conforming interpretation of a verbatim transposition should be ensured.[93]

3.2 Complaint mechanism

While some Member States like the Netherlands chose to transpose verbatim, most implemented an individual version of Article 17 CDSMD. One diverging aspect has been the ex post safeguard in the form of the complaint mechanism as established in Article 17(9) CDSMD.

One example is a provision in the Italian transposition, which states that contested contents shall remain disabled during the pending decision on a complaint.[94] In the aftermath of the judgement, it is argued that 'this requirement does not meet the standards developed by the Court'[95] and Member States with such a provision will therefore 'need to bring their implementation laws into compliance with the standards set by the CJEU'.[96]

If Member States follow the requirements for the ex ante safeguards, however, a provision like this could be regarded as compatible with the judgement: In their national implementations, Member States must ensure that ex ante safeguards exist which prevent the blocking of content which is not manifestly infringing. Assuming OCSSPs follow the national obligations, they will only block content, which they, inter alia, consider to be manifestly infringing. In case of an allegedly wrong block, the complaint mechanism takes effect, through which users can demand the reinstatement of the content. The ex post complaint mechanism is intended to deal with cases in which the existence of manifestly infringing content is disputed. In this case, however, neither the judgement nor the text of the law foresee that the content at hand must remain online until the conclusion of such proceedings sought by the user. In fact, the judgement suggests that the content stays down during a pending decision, stating that 'users must be able to submit a complaint where they consider that access to content which they have uploaded has been wrongly disabled or that such content has been wrongly removed'.[97] This is also what the Commission's Guidance recommends to Member States, stating that 'the content should stay down during the human review performed under the redress mechanism, except in the specific case mentioned above for content that is not manifestly infringing on Article 17(7)'.[98]

[76] C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [198].
[77] Guidance on Art 17 CDSMD 20.
[78] *Delfi AS v Estonia* ECHR 2015–II 319, para 153.
[79] C-401/19 *Poland* (n 12) [93].
[80] Cf. also Felix Reda and Paul Keller, 'CJEU Upholds Article 17, but Not in the Form (Most) Member States Imagined' (*Kluwer Copyright Blog*, 28 April 2022) http://copyrightblog.kluweriplaw.com/2022/04/28/cjeu-upholds-article-17-but-not-in-the-form-most-member-states-imagined/ accessed 24 May 2022.
[81] C-401/19 *Poland* (n 12) [67]; Case C-311/18 *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [2020] EU:C:2020:559 [176].
[82] C-401/19 *Poland* (n 12) [73].
[83] ibid [73]–[74]; *Delfi* (n 78) para 121.
[84] C-401/19 *Poland* (n 12) [75].
[85] Cf. C-314/12 *UPC Telekabel* (n 60) [56].
[86] ibid [52].
[87] ibid [55]–[56].
[88] C-401/19 *Poland* (n 12) [90].
[89] ibid [99].
[90] Reda and Keller (n 80).
[91] C-401/19 *Poland* (n 12) [71].
[92] Teresa Nobre, 'Case C-401/19: CJEU Limits the Use of Automated Filters and Protects User Rights at Upload' (*International Communia Association*, 26 April 2022) https://www.communia-association.org/2022/04/26/case-c-401-19-cjeu-limits-the-use-of-automated-filters-and-protects-user-rights-at-upload/ accessed 24 May 2022; Reda and Keller (n 80).
[93] Cf. Consolidated version of the Treaty on European Union (2012) OJ C326/16, art 4(3) ('TEU').
[94] Articolo 102-decies, comma 3 del D.Lgs. 8-11-2021 n. 177 Attuazione della direttiva (UE) 2019/790 del Parlamento europeo e del Consiglio, del 17 aprile 2019, sul diritto d'autore e sui diritti connessi nel mercato unico digitale e che modifica le direttive 96/9/CE e 2001/29/CE. Pubblicato nella Gazz. Uff. 27 novembre 2021, fn 283.
[95] Reda and Keller (n 80).
[96] Nobre (n 92).
[97] C-401/19 Poland (n 12) [94].
[98] Guidance on Art 17 CDSMD 24.

3.3 Earmarked content

Finally, the ruling casts doubt on the compatibility of earmarked content in the form envisaged by the Commission's Guidance.[99] The term relates to content flagged by rightholders that is particularly valuable and could cause significant harm to them, if it remains available without authorization (examples include pre-released music or films).[100] According to the Commissions Guidance the prior earmarking should be specifically taken into account when assessing whether the OCSSPs have made their best efforts to ensure the unavailability of specific content as obliged in Article 17(4)(b) CDSMD.[101] This means in particular that the OCSSPs should exercise particular care and diligence in the application of their best efforts obligations before uploading such earmarked content.[102]

Guidance needs revision in light of the judgement

After its release, this new mechanism was heavily criticized as being not specific enough in determining which content can be earmarked by the rightholders.[103] According to these concerns, the requirements to be met by the rightholders are too weak, as 'the mere claim that unauthorized use of a work 'could cause' significant economic harm is sufficient'.[104] Therefore 'earmarking could easily lead to a presumption for the platforms that the content is manifestly illegal and thus potentially to an over-blocking of all earmarked content to avoid liability or litigation'.[105]

This is especially a big problem for the compatibility with the requirements of the judgement and freedom of expression, because according to the Commission's conception 'content which is not manifestly infringing should go online at the upload, with exception of content earmarked by rightholders (when subject to a fast ex ante human review)'.[106] This directly contravenes the outcome of the judgement in *Poland v Parliament and Council*, which does not foresee any exceptions to its requirement of only blocking manifestly infringing content ex ante. Previous critics see their concerns confirmed and conclude that the earmarking mechanism 'clearly does not comply with the Court's instruction that implementations must exclude 'measures which filter and block lawful content when uploading' [para 85]'.[107]

Another aspect is the mentioned 'fast ex ante human review'. Following the concept of the Guidance, content which is earmarked should be subject 'when proportionate and where possible, practicable, [to] a rapid ex ante human review' by OCSSPs.[108] In *YouTube and Cyando*, the CJEU held that a provider must be able to remove content without a detailed legal examination, to remove it in compatibility with the freedom of expression.[109] The same follows from the judgement in *Glawischnig-Piesczek* according to which a monitoring obligation limited in a way that it does not require the hosting provider to carry out an independent assessment would not contravene the prohibition of a general monitoring obligation.[110] In *Poland v Parliament and Council* finally, the CJEU referred to this by analogy stating that providers cannot be obliged to prevent uploading content, which would require them to perform an independent assessment of the content to determine it as unlawful.[111] Although framed as 'rapid ex ante review', this is nothing else than a detailed legal examination.[112]

Proposal for a mechanism in compliance with Article 17 CDSMD

This closes the circle to what was outlined before: ex ante blocking of content is only permissible if no independent assessment is necessary, i.e., the content is manifestly infringing.[113] This must not change even if content is earmarked by rightholders. Nonetheless, it does not follow from this that earmarking per se is incompatible with Article 17 CDSMD, but rather the provisions of Article 17(8) CDSMD must be respected.

On the contrary, earmarking could be used, for example, to carry out an accelerated procedure following the upload. This is because, according to the Commission's Guidance, when the content becomes available, rightholders will receive a notification if the ACR technology detects possible infringing content.[114] The rightholders then have the possibility of a complaint and redress mechanism to have the content checked and, if necessary, blocked.[115] If the content is earmarked, it is conceivable that this could be prioritised. Such a proposal takes a similar approach as the trusted-flagger mechanism envisaged by Article 19 of the upcoming Digital Services Act[116] and would fulfil the requirements set by the CJEU.

4 THE GERMAN APPROACH

With the CJEU stating that OCSSPs cannot be required to prevent uploads of content which would require an independent assessment to be found unlawful,[117] inevitably the question arises when content must be considered infringing without requiring an independent assessment.

In principle, it is either for the Member States or the Commission to provide greater detail under which circumstances content may still be blocked ex ante.[118] In the sense of the overall goal of legal harmonisation, it is generally desirable for Member States to arrive at a uniform solution, which argues in favour of not defining individual solutions in the Member States, but rather at the EU level.[119]

Refraining from doing so would open the necessity for OCSSPs to develop a definition in practice, likely influenced by courts in the EU. It seems at least questionable to leave it up to the private OCSSPs to decide when content can be blocked ex ante, whereas the outcome has a direct impact on the liability of the OCSSP. There might be a risk that an OCSSP, in order to avoid liability, would interpret the boundary of what is manifestly infringing generously in order not to risk liability under Article 17(4) CDSMD when it concerns content that could have been blocked after all. This would raise the same concerns of overblocking and merely shift them to another level. In its opinion, the AG pointed out that OCSSPs are in general not independent and therefore cannot exercise an independent assessment of the lawfulness of a content.[120] It would have been therefore up to the EU legislature 'to set out the substance of the safeguards necessary to minimise the risks posed to freedom of expression resulting from the contested provisions'.[121]

Consequently, it should be the public authorities defining the threshold for content being manifestly infringing.[122] The *Poland v Parliament and Council* ruling emphasised the importance of lawful content being available ex ante for preserving the balance with freedom of expression and information.[123]

More detailed regulations for OCSSPs with regard to the question of which content may not be blocked in the first instance were already enacted by Germany in its transposition long before the ruling of the CJEU and the Commission's Guidance and will therefore be examined in the following.

4.1 Upfront: Implications from the CJEUs case law

Before turning to the German approach, it is noteworthy to summarise the followings from the existing case law, in particular the *Glawischnig-Piesczek* and *Poland v Parliament and Council* cases. The CJEU held in the latter, that Article 17(8) CDSMD clarifies 'that the providers of those services cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright'.[124] Thus, OCSSPs shall not block content which would require an independent assessment of the content in order to be found unlawful.

This idea was first brought up by the CJEU in its *Glawischnig-Piesczek* case, which, although being a defamation case, turned out to be also of importance in the context of copyright.[125] Here the court was concerned with an injunction about filtering and blocking *ex ante* content, which could be considered 'equivalent'. This could be for example content which 'whilst essentially conveying the same message, is worded slightly differently, because of the words used or their combination, compared with the information whose content was declared to be illegal'.[126] Balancing the interests of the host provider and the interests of the victim of defamation, the Court found that the content of an equivalent nature does not require the host provider to carry out an independent assessment, since it had recourse to automated search tools and technologies.[127]

Putting these two judgements together, it is possible to summarise that content can be considered manifestly infringing even if it is equivalent to infringing content. Already in the aftermath of the *Glawischnig-Piesczek* judgement, it could be concluded that the CJEU is taking the first steps in the direction of how algorithmic enforcement is acceptable.[128] The same can now be said about the *Poland v Parliament and Council* ruling.

99 ibid.
100 ibid 14, 22.
101 ibid 14.
102 ibid 22.
103 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [223]; Christophe Geiger and Bernd Justin Jütte, 'Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSM Directive in the Light of the YouTube/Cyando Judgment and the AG's Opinion in C-401/19' (2021) 43 EIPR 625, 6; Felix Reda and Paul Keller, 'European Commission Back-Tracks on User Rights in Article 17 Guidance' (*Kluwer Copyright Blog*, 6 April 2021) http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/ accessed 24 May 2022.
104 Reda and Keller (n 80).
105 Geiger and Jütte (n 103) 6.
106 Guidance on Art 17 CDSMD 23.
107 Reda and Keller (n 80).
108 Guidance on Art 17 CDSMD 22.
109 *YouTube and Cyando* [116].
110 *Glawischnig-Piesczek* (n 71) [46].
111 *C-401/19 Poland* (n 12) [90].
112 Cf. also: Reda and Keller (n 80).
113 C-401/19 *Poland* (n 12) [90].
114 Guidance on Art 17 CDSMD 23.
115 ibid.
116 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 2020/0361(COD) [Version of 16 May 2022]. Unless otherwise specified, it is referred to the text of the version of 16 May 2022 as 'DSA Proposal' and to the act itself as 'DSA'.
117 C-401/19 *Poland* (n 12) [90].
118 Reda and Keller (n 80).
119 Eleonora Rosati, 'What Does the CJEU Judgement in the Polish Challenge to Article 17 (C-401/19) Mean for the Transposition and Application of that Provision?' (*The IPKat*, 11 May 2022) https://ipkitten.blogspot.com/2022/05/what-does-cjeu-judgement-in-polish.html accessed 24 May 2022.
120 C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [197].
121 ibid [210].
122 Like this also: ibid [212].
123 C-401/19 *Poland* (n 12) [93].
124 ibid [90].
125 Cf. *Glawischnig-Piesczek* (n 71) [41]–[46].
126 ibid [41].
127 ibid [46].
128 Leistner (n 66) 16.

4.2 The German approach: excluding 'presumed legal use' from ex ante filtering

Under the same premise of preventing lawful content from being filtered and blocked ex ante using ACR technology, the German legislator has found a different solution, which also Austria has essentially followed. The provision of Article 17 CDSMD was implemented in a separate act, the Urheberrechts-Diensteanbieter-Gesetz (Copyright Service Provider Act 'UrhDaG')[129].

Sec. 7 UrhDaG, titled 'qualified blocking', thereby adopts the provision of Article 17(4)(b) CDSMD, i.e. the requirement for the OCSSPs to ensure by making best efforts the unavailability of specific works. What is special about this transposition is laid down in Sec. 7(2) sentence 2, according to which Sec. 9-11 applies, if automated means are used. According to Sec. 9(1) UrhDaG, in order 'to avoid disproportionate blockings', in other words, to avoid overblocking, presumed legal uses must remain online until the conclusion of a complaint procedure. It is therefore in accordance with Sec. 14 UrhDaG up to the rightholders to initiate a complaint and redress procedure. Presumed legal uses are defined in Sec. 9(2) UrhDaG as user generated content, which

1. 'contains less than half of a work of a third party or of several works of third parties,
2. combines the parts of the work referred to in No. 1 with other content, and
3. make only minor use of works of third parties (Sec. 10 UrhDaG) or are marked as legally permitted (Sec. 11 UrhDaG)'.[130]

4.2.1 Minor uses

Section 9(2) number 3 UrhDaG thus opens the possibility for two sorts of contents to be presumed lawfully. On the one hand, this is minor use, which encompasses according to Sec. 10 UrhDaG uses of up to 15 seconds each of a film work or motion picture, 15 seconds of a soundtrack, 160 characters of a text or 125 kilobytes of a photographic work, photograph or graphic.

The solution found by the German legislator can either be considered a rebuttable presumption or an exception to copyright.[131] Defining this is of importance for the discussion of compatibility with its EU template. The mechanism has as a result that content from users which fulfil the requirements from Sec. 9(2) UrhDaG and have a maximum length or size as described in Sec 10 UrhDag, must initially be regarded as legal, meaning they shall not be blocked automatically. What happens in practice at this point can be derived from Sec. 9(3) UrhDaG, which requires OCSSPs to notify the rightholders in the event of such use. The rightholder then has the opportunity to have the content reviewed. Until the conclusion of this procedure, which according to Sec. 14(5) UrhDaG 'must be taken by natural persons who are impartial', the content remains online in accordance with Sec. 9(1) UrhDaG.

4.2.2 Marked as legally permitted

On the other hand, users can flag content as legally permitted to categorize it as presumed legal use. As presented earlier in this chapter, ACR technology is now mature and fast enough to be able to match content against the provided information from the rightholders during the upload process.[132] The German legislator has allegedly taken this into consideration and has established a regulation for this in Sec. 11 UrhDaG. According to its first paragraph, even when the content is not classified as minor use, the user can mark his use as legally permitted during the upload process, if the content would otherwise be blocked automatically.[133] If the requirements of Sec. 9(2) UrhDaG are fulfilled, i.e. the user content contains less than half of a work of a third party or third parties and combines the parts of the work with other content, the content is then also presumed to be legal. The content, again, cannot be blocked automatically, but the burden of proof now lies with the rightholder, who must initiate the procedure and justify why the user content is considered to be infringing.

In Sec. 11(2) UrhDaG the law provides for the case in which an automated blocking takes place after the upload, that content is deemed to be presumably legal for the duration of 48h even without a mark of the user. The regulation is intended for cases in which, at the time of uploading, there was no reason to regard the content as infringing or to obtain a declaration from the user because the platform holds authorisation from the rightholder.[134] If this licence subsequently lapses, the original procedure is to be applied, thus giving the user the opportunity, for example, to invoke an exception and limitation and mark the content as legal.[135]

Like the instrument of minor usage, this provision attempts to strike a balance between the interests of rights holders and users and, in particular, gives clear guidance to OCSSPs on the usage of their technology.

4.2.3 Balancing interests

With its mechanism, the German legislator intends to fulfil the requirements of Article 17(7) CDSMD for effectively guaranteeing user rights.[136] This shows what is too rarely mentioned in the general discussion but offers potential for further thought: A determination of how the ACR technology should distinguish between manifestly infringing and lawful content. By rebuttable presuming 'minimal uses' as legal, the use cannot be manifestly infringing at the same time. As a result, OCSSPs cannot automatically block them ex ante, even if the ACR technology may recognise them as infringing copyright.

The German system is based on the consideration that one of the exceptions in copyright law often applies to such minor uses.[137] Where the encompassed work exceeds the thresholds in Sec. 10 UrhDaG, and the ACR technology recognises a match, the user has the possibility to mark the content as legally permitted according to one or more of the exceptions and limitations to copyright.

Ultimately, a balance is found between the interests of the rightholders to block possible infringed content directly and the users' interests not having to bring legal content back online via the ex post mechanisms. In its ruling in *Poland v Parliament and Council*, the CJEU strengthened this approach by emphasising that Member States should design their national implementations in such a way that they allow for a fair balance to be struck between the different fundamental rights.[138]

4.3 Considerations regarding the compatibility with Article 17 CDSMD after the Judgement in Poland v Parliament and Council

Especially the original draft of the German legislator for the transposition of Article 17 CDSMD has been criticised as not being compatible with its European template.[139]

4.3.1 Exception and limitation or rebuttable presumption?

It is argued that the instrument of presumed legal use in fact contains typical elements of an exception and limitation, which are listed exhaustively in Article 5 InfoSoc.[140] If one accepts the almost unanimous view that Article 17 CDSMD contains indeed the same right of communication/making available to the public as Article 3 InfoSoc, it follows from this that an exception and limitation in national law, which is neither contained in Article 5 InfoSoc nor in Article 17 CDSMD itself, cannot be compatible with secondary EU law.[141]

This can be countered by the fact that Sec. 9(2) UrhDaG only provides for a rebuttable presumption. It is true that according to Sec. 12(3) UrhDaG, the user is not responsible for the use under copyright law until the conclusion of a complaint procedure. On the contrary, however, the presumption is rebuttable and therefore does not have a final effect.[142] In practise, the mechanism leads to the OCSSPs not being allowed to ex ante block content covered by the presumption. This is in line with the CJEU's interpretation of Article 17 CDSMD, because the CJEU has ruled that content which requires an independent assessment may not be blocked preventively.[143]

4.3.2 Fixed criteria for the design of OCSSPs algorithms

The German provision sets clear threshold values. Theoretically, it is not impossible that a 15-second video, even in its brevity and under the conditions of Sec. 9(2) UrhDaG, contains infringing content. According to the underlying assumption of the German legislator, this is just not very likely.[144] Ultimately, the legislator tries to define what can be considered infringing without the need for an independent assessment. It thus creates legal certainty for OCSSPs, which can adapt their algorithms accordingly. At the same time, rightholders are still able to pursue infringing content as they will be notified by the OCCSPs in case of 'presumed use' in accordance with Sec. 9(3) UrhDaG.

[129] IUrheberrechts-Diensteanbieter-Gesetz (2021) BGBl. I S. 1204, 1215 (Nr. 27) ('UrhDaG').

[130] UrhDaG, s 9(2), translation by the author.

[131] Matthias Leistner, 'The Implementation of Art. 17 DSM-Directive in Germany – A Primer with Some Comparative Remarks' (SSRN Scholarly Paper, 20 December 2021) 11.

[132] 'YouTube Copyright Transparency Report H1 2021' (n 39) 10.

[133] See UrhDaG, s 11(1) Number 3.

[134] 'Draft Law of the Federal Government Draft Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market' (9 March 2021) 141, BT-Drucksache 19/27426.

[135] ibid.

[136] ibid 46.

[137] For example, quotation, criticism, review; caricature, parody or pastiche as listed in Article 17(7) subparagph 2 CDSMD; ibid 140.

[138] C-401/19 *Poland* (n 12) [99].

[139] Eleonora Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States and Why the German Implementation Proposal is Not Compatible with EU Law' (2020) 15 Journal of Intellectual Property Law & Practice 874, 876.

[140] Axel Metzger and Timm Pravemann, 'Der Entwurf Des UrhDaG Als Umsetzung von Art. EU_RL_2019_790 Artikel 17 DSM-RL – Ein Gesetzgebungstechnischer Drahtseilakt' (2021) 65 ZUM 288, 295.

[141] Rosati, 'The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States and why the German implementation proposal is not compatible with EU law' (n 140) 876; Leistner (n 131) 15; Jan Bernd Nordemann and Julian Waiblinger, 'Art. 17 DSM-RL – Spannungsverhältnis Zum Bisherigen Recht?' (2020) 122 GRUR 569, 573; against: Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive' (2021) 70 GRUR Int 325, 348.

[142] Finn J Hümmer, 'The German Transposition of Article 17 of the Copyright DSM Directive and Its 'Presumed Legal Use': Incompatible with EU Law or a Model for Balancing Fundamental Rights in the Age of Upload Filters?' (2022) 17 JIPLP 22, 25.

[143] C-401/19 *Poland* (n 12) [90].

[144] 'Draft law of the Federal Government Draft Act on the Adaptation of Copyright Law to the requirements of the Digital Single Market' (n 134) 140.

The criteria set out in Sec. 9(2) and Sec. 10 UrhDaG are by no means those with which Germany stands alone. In its Guidance the Commission formulates a similar approach as it defines, that relevant criteria to determine manifestly infringing content 'could include the length/size of the identified content used in the upload, the proportion of the matching/identified content in relation to the entire upload [...] and the level of modification of the work'.[145] AG Saugmandsgaard Øe argues similarly in his opinion, proposing to determine thresholds 'above which automatic blocking of content is justified and below which the application of an exception, such as quotation, is reasonably conceivable'.[146] In addition, he suggests a mechanism which allows users to flag whether they benefit from an exception or limitation at the time of uploading content.[147]

This shows that the German mechanism might be the first, which was established into law, but the concept is by no means on its own. In fact, the Commission's Guidance and the AGs opinion suggest using similar criteria for defining manifestly infringing content.

4.3.3 Earmarking in the German transposition

Another aspect which has to be raised is the earmark-like re-exception of the German transposition in Sec. 7(2) sentence 3 UrhDaG. According to the above mentioned, ex ante safeguards of minor use and flagging during the upload in case when automatic means are used, shall not apply to uses of cinematographic works or moving images until the completion of their first communication to the public, in particular during the simultaneous transmission of sporting events, insofar as the rightholder requests this from the service provider and provides the information required for this purpose.[148]

This provision allows rightholders to highlight specific content and therefore exclude it from the safeguards. As an effect, users can neither rely on the rebuttable presumption of lawful content for minor usage, nor mark their content during the upload as lawful due to the application of an exception or limitation. In this case, the user content does not fall under what the legislator has assumed to be presumed lawful and can thus be blocked by the OCSSP.

As long as this provision is interpreted in line with standards by the CJEU, meaning that user content which contains earmarked content can only be ex ante blocked if it is manifestly infringing and not merely on the basis of being earmarked, this mechanism can be regarded as being compatible with Article 17 CDSMD.

4.3.4 Conclusion

The judgement in *Poland v Commission and Parliament* shifts the focus of the question of the compatibility of the German 'presumed legal use' mechanism with EU law in the direction of ex ante safeguards. The CJEU has made it clear that Member States must ensure that the balance of fundamental rights is maintained when transposing Article 17 CDSMD into national law.[149]

If one follows the argument that it should not be left to the OCSSPs to decide when an independent assessment is required and when content may be blocked ex ante because it is manifestly infringing (enough), the German proposal does not seem to be that far away from the case law of the CJEU. It is also the court that will sooner or later have to decide whether the German legislator has gone too far with its implementation and thus thwarted the harmonisation efforts.

Furthermore, it can be concluded that the German mechanism represents the beginning of a detailed regulation and is suitable for protecting the fundamental rights of users. It would be welcomed if, in addition to regulating the circumstances under which may not be blocked, further indications could be found in the law as to when content is manifestly infringing, in order to provide OCSSPs with further criteria for the design of their algorithms.

[145] Guidance on Art 17 CDSMD 21.
[146] C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [211].
[147] ibid.
[148] See Section 4.2.1 herein; UrhDaG, s 7(2) sentence 3.
[149] C-401/19 *Poland* (n 12) [99].
[150] C-401/19 *Poland* (n 12), Opinion of AG Saugmandsgaard Øe [69]; C-401/19 Poland (n 12)[54].
[151] C-401/19 *Poland* (n 12) [85], [90].

5 FINAL REMARKS

Both the AG in his opinion and the Court in *Poland v Parliament and Council* have stated, that the obligations of Article 17(4) CDSMD *de facto* requires the use of technology.[150] The CJEU, however, has now attached a clear condition to its use: Blocking content ex ante using ACR technology, is only permissible as long as the technology can distinguish between lawful and unlawful content.[151] This is derived from the safeguards of Article 17 CDSMD, which can thus preserve the balance between the fundamental right of freedom of expression and information and right to intellectual property.

It is therefore for OCSSPs and Member States to ensure that only manifestly infringing content, i.e. content that does not require an independent assessment, is blocked ex ante using ACR technology. The question, however, of how to determine whether an independent assessment is required remains open. Where does the line run? Providing an answer is crucial for the impact on the freedom of expression and information, as it determines how content is blocked in practice, aside from the legal requirements. Its definition should be the task of the national or EU legislator, to not leave the decision of when content should be assessed to the player who fears liability when coming to a wrong outcome in one way or another. The urgently necessary revision of the Commission's Guidance could serve as a platform for this task.

In this context, the German implementation of Article 17 CDSMD should be considered, which contains some additional ex ante safeguards that are not found in the EU template. They provide, however, important guidelines for the OCSSPs on how to design the algorithms. This pays off in terms of legal certainty, both for the OCSSPs, which are less tempted to overblock, and for the users, who do not have to fear that legal content will be blocked. The rightholders have to accept this solution in the sense of a balance of interests, they are free to block certain content via the complaint mechanisms, manifestly infringing content will be blocked ex ante.

The judgement in *Poland v Parliament and Council* also has implications for other national implementations. Most importantly, it is argued here, that a verbatim transposition would indeed stand up to the requirements derived from the fundamental rights, as Article 17 CDSMD was held to contain enough safeguards. Further, provisions which require content to stay down during a complaint mechanism must not be regarded as incompatible per se. Rather they would be compatible with Article 17 CDSMD and its interpretation from the CJEU, if they are limited to manifestly infringing content. Lastly, the assessment shows that the earmarking mechanism as proposed by the Commission is unlikely to 'survive' this ruling. From what follows from the CJEUs judgement, such a mechanism cannot be used to circumvent the ex ante availability of lawful content or content which requires an independent assessment to be determined as unlawful. Earmarking content, however, could be used to function as an indicator for a fast-track review for content that is of higher economic value to the rightholders. With these premises, the trusted flaggers regime from Article 19 DSA Proposal will be interesting to follow.

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The Machinery of Creation. Oulipo Poetry, Copyright & Rules of Constraint

By Kathy Bowrey and Janet Bi Li Chan

ABSTRACT

This article explores the double burden of creative regulation – the aesthetic restrictions artists choose and their interaction with copyright rules, using the example of oulipo, a constraint-based creative practice. Part One explains the Oulipo movement. Oulipo technique is then demonstrated in new poems by artist and poet Janet Bi Li Chan, based on existing works, Franny Choi's Turing Test and Tracy K Smith's Sci-FI, applying word substitution (N + 7), erasure or blackout technique, and remixing. Part Two applies a copyright law reading to the new poems. We show how legislative frameworks measure all creators – regardless of artistic self identity and process – as if they were humanist authors. But in application tests also produce far more surprises than might be expected if law is conceived of as rule-based constraint. Part Three applies Oulipo techniques to key articles of the Berne Convention that permit artistic licence: Art 9 Right of Reproduction; Art 10 Certain Free Uses of Works; and Art 10bis Further Possible Free Uses of Works. These new Berne poems highlight the prescriptive face copyright law presents to creators. We argue it is the emotional resonance of copyright, rather than its technicality, that primarily impacts creative practice. We conclude that law reproduces an idealised imaginary of a humanist author to measure creative transgression and this confinement means that copyright is unable to properly converse with artists or poets. Law suppresses the cyborg in all creation.

INTRODUCTION

In Creativity is ruled by constraints. Some constraints come into play through artistic choices about the technologies and mechanics that govern the production of creative works. Other restrictions are imposed by artist's understandings of or instincts about copyright law that impact artistic practice and in particular, how works are disseminated. This paper explores the interaction between creative and legal constraints discussing new creative works by one of the authors, artist and poet Janet Bi Li Chan. Chan engages in experimental creative practices that are defined by explicit adherence to rules of constraint. Her practices sit uneasily alongside copyright law's respect for the original work, requiring negotiation about the limits of the law in order to exhibit or perform works.

Oulipo poetry provides a focus for our discussion. Oulipo[1] dates from 1960 with a group of writers and mathematicians in France, who explored rule-based constraints. Chan's poetry examples include *word substitution* (N + 7)—taking an existing poem and replacing each noun in a text with the seventh one following it in a dictionary; *erasure or blackout poetry,* where the poet takes an existing text and erases, blacks out, or otherwise obscures selected text; and *remixing* of an existing text. Oulipo does not require the use of digital tools, but these form part of Chan's practice.

The paper is in three parts. Part One presents three examples of Oulipo and explains the relevant artistic and technological processes and motivations. Part Two applies a copyright law reading to these practices. Part Three applies Oulipo techniques to the key articles of the Berne Convention that permit artistic licence: Art 9 Right of Reproduction; Art 10 Certain Free Uses of Works; and Art 10bis Further Possible Free Uses of Works. Chan's creative engagement with international law highlights the prescriptive face copyright law presents to creators. We explore the double burden of creative regulation – the aesthetic restrictions artists choose and their interaction with copyright rules. We depart from recent scholarship that frames appropriation, transformative works and remix in terms of an imagined dichotomy between original/appropriative art or positive law/negative space to profile interaction between artistic and legal constraint as integral to all creation expression. Instead, copyright is analysed as an institution that polices plagiarism mechanically. Unable to fully comprehend the machinery of creation, copyright reproduces an idealised imaginary of a humanist author to measure creative transgression. While it is not the main focus of discussion, this creative experiment in legal thinking has relevance to current research into the status of AI-generated works under copyright law.

PART ONE.

OULIPO: CREATIVITY THROUGH CONSTRAINTS

In this paper we examine three examples of a constraint-based creative practice to explore the possible (unintended) consequences of copyright laws. The examples are part of one of the authors' (Chan) practice in making poetry using 'found text'[2] and certain rule-based constraints in line with Oulipo, a method for writing literature. The aim of this method is 'to invent (or reinvent) constraints of a formal nature (contraintes) and propose them to enthusiasts interested in composing literature'.[3] These constraints provide 'structure', 'form', or 'technique' to 'transform' (or 'translate') existing text.[4] It has been suggested that the use of constraints and structures 'are the result of the Oulipian philosophy that operating under such conditions is liberating and dispenses with the need to inherent artistic talent'.[5]

Although there are scores of such constraints in existence[6], for the purpose of this paper, we will focus on three techniques: the N+7 (or W±n), erasure, and remixing of existing text.

1 The name Oulipo is derived from *Ouvroir de littérature potentielle* or the Workshop for Potential Literature.

2 The use of 'found materials' to construct the 'collage poem' is said to be a literary form that follows the visual arts practice of surrealist objet *trouvé* such as Marcel Duchamp's *Fountain* (1917). The artist does not create something out of nothing, rather, they become the 'arranger or curator of pre-existing texts'. See Tom Chivers (ed), *Adventures in Form: A Compendium of Poetic Forms, Rules & Constraints* (2nd edition, Penned in the Margins 2012) 11. See also JR Carpenter, *Writing on the Cusp of becoming something else* In Janis Jefferies and Sarah Kember (eds), *Whose Book is it Anyway?* (Open Book Publishers 2019).

3 Quote from Roubaud in Philip Terry, *The Penguin Book of Oulipo* (Penguin 2020) 19.

4 ibid.

5 Oliver Bray, 'Playing with Constraints: Performing the OuLiPo and the clinamen-performer' (2016) 21(4) *Performance Research* 41. Bray quotes 'That which certain writers have introduced with talent (even with genius) in their work … the Ouvroir de Littérature Potentielle (Oulipo) intends to do systematically and scientifically, if need be through recourse to machines that process information' (François Le Lionnais, 'Lipo: First manifesto' in Warren Motte (ed), *Oulipo: A primer of potential literature* (Dalkey Archive Press 2017) 27.

6 Index of Constraints, Terry (n 3) 527-534.

N+7 method

This method involves replacing all nouns in an existing text with nouns 7 places down in the dictionary. This method can be modified by replacing other parts of speech (e.g. adjectives) with the same method of counting N places up or down a dictionary. Of course, with the variation in the number of words in dictionaries, and the more popular use of online dictionaries, the results can vary depending on which dictionary is used.

Erasure

Erasure of words in an existing text is another used in Oulipo practice. For example, Raymond Queneau removes most of the words at the end of the lines in sonnets by Mallarmé to create a new poem 'Redundancy in Phane Armé'. This is similar to a number of erasure poems such as Tom Phillips' *A Humument*[7], and M. NourbeSe Philip who turned the legal decision *Gregson v. Gilbert* on the drowning of 200 enslaved Africans into *Zong*![8]

Remixing text

The term 'remix' does not appear in the vocabulary of Oulipo techniques, however, the technique is similar to that of 'reassemblage', a collage of 'fragments assembled ... from the same source'.[9] Richard L Edwards sees 'restrictive remixes' in contemporary art practice as a form of Oulipean technique.[10]

Relaxing the rules

Even though rules are intended to be followed strictly, there is in Oulipo the concept of 'clinamen', which 'represents a moment when a particular constraint is broken, usually for aesthetic reasons – but it is something which should only be used when it is also possible to complete the writing task without breaking the constraint, and it is something which should be used sparingly'.[11] Harryette Mullen has acknowledged that 'For me, the constraints, procedures, and language games are just ways to get past a block or impasse in the process of writing'.[12]

Constraints in poetry

As Tom Chivers points out, form 'can be employed as a framework for innovation':

> *The **form** of a poem is the deliberate and sustained organisation of visual and aural elements such as line length, metre, rhyme, the distribution of certain letters and sounds, and so on; but can also manifest as its guiding principle, ... A poem's form is distinct from, yet inescapably related to, its content... The imposition of form and the desire to escape or reinvent it is, of course, the eternal paradox of art.... form is a kind of willing restraint: an instrument of control wielded by the poem against its author'.*[13]

The use of constraints in poetry writing is also seen as a tool for creativity: it is way of 'soothing' the 'fears of the blank page... by taking some choices away and by demanding that you make new choices'; constraints also produce 'fruitful frustration and resistance':

> *To grapple with a self-imposed limitation is to compete against oneself, to stymie the first impulse again and again. We learn to question the easy solution, to stretch our vocabulary, to reconsider and flex our syntax. Forced out of our regular habits (and we all have writing habits), we adapt... I'm free but I'm bound, and in the space between those two poles exists a generative, creative tension.*[14]

Experiments

The following experiments in Oulipo poetry were conducted by one of the authors' (Chan) use of two original texts, a poem Turing Test by Franny Choi[15] and a second poem Sci-Fi by Tracy K Smith.[16]

The two poems were chosen on the basis of their content (both focus on aspects of modern technology), their acceptance by the poetry world as worthy of publication/award, and the currency of their copyright. They are therefore not ordinary pieces of 'found text' (e.g. newspaper articles, text from old books) often used in artistic appropriation, rather, the use of even a limited amount of text is potentially in breach of copyright law.

7 A Humument (first published 1980, Thames & Hudson 2005).

8 M. NourbeSe Philip, Zong! (Wesleyan University Press 2008). See also Travis Macdonald who took pages from the 9/11 Commission Report and turn them into a new narrative in *The O Mission Repo* (2011) https://issuu.com/fact-simile/docs/o_mission_repo_full_text accessed 29 November 2022. Poets regard erasure poetry as an additive rather than a subtractive process, a form of transgression of as well as collaboration with the original author. See interviews with six erasure poets in ttps://kenyonreview.org/2012/11/erasure-collaborative-interview/ accessed 29 November 2022.

9 Michael Leong, 'Oulipo, Foulipo, Noulipo: The Gendered Politics of Literary Constraints' in G.N. Forester and H.J. Nicholls (eds), *The Oulipo* (Verbivoracious Press, 2017) 121–2, quoted in Terry (n 3) 572.

10 See Richard L Edwards, 'Remixing with rules' in David Laderman and Laurel Westrup (eds) *Sampling Media* (Ozdoes Scholarship Online 2014) DOI: 10.1093/acprof:oso/9780199949311.003.0003.

11 Terry (n 3) 24.

12 ibid 565.

13 Chivers (n 2) 9-10.

14 Rebecca Hazelton, 'The Choice of Constraint: How not getting to do everything leads to doing what you want' (2017) *Poetry Foundation* https://www.poetryfoundation.org/articles/145052/the-choice-of-constraint accessed 29 November 2022.

15 'Turing Test' was published in *The Poetry Review*, Summer issue, 2016. Franny Choi is a published poet and a finalist for multiple national poetry slams.

16 'Sci-Fi' was in Tracy K Smith (2011) *Life on Mars* published by Graywolf Press. Tracy K Smith is a published poet and multiple award winner, including the Pulitzer Prize for Poetry for *Life on Mars*. In 2017, she was named US poet laureate.

Example 1

TURING TEST

By Franny Choi

// this is a test to determine if you have consciousness
// do you understand what i am saying

in a bright room / on a bright screen / i watched every mouth / duck duck roll / i learned to speak / from puppets & smoke / orange worms twisted / into the army's alphabet / i caught the letters / as they fell from my mother's mouth / whirlpool / sword / wolf / i circled countable nouns / in my father's science papers / sodium bicarbonate / NBCn1 / amino acid / we stayed up / practiced saying / girl / girl / girl / girl / til our mouths grew soft / yes / i can speak / your language / i broke in / that horse / myself //

// please state your name for the record

bone-wife / spit-dribbler / understudy for the underdog / uphill rumor / fine-toothed cunt / sorry / my mouth's not pottytrained / surly spice / self-sabotage spice / surrogate rug burn / burgeoning hamburglar / rust puddle / harbinger of confusion / harbinger of the singularity / alien invasion / alien turned pottymouth / alien turned bricolage beast / alien turned pig heart thumping on the plate //

// where did you come from

man comes / & puts his hands on artifacts / in order to contemplate lineage / you start with what you know / hands, hair, bones, sweat / then move toward what you know / you are not / animal, monster, alien, bitch / but some of us are born in orbit / so learn / to commune with miles of darkness / patterns of dead gods / & quiet / o quiet like / you wouldn't believe //

// how old are you

my memory goes back 26 years / 23 if you don't count the first few / though by all accounts i was there / i ate & moved & even spoke / i suppose i existed before that / as scrap or stone / metal cooking in the earth / the fish my mother ate / my grandfather's cigarettes / i suppose i have always been here / drinking the same water / falling from the sky / then floating / back up & down again / i suppose i am something like a salmon / climbing up the river / to let myself fall away in soft, red spheres / & then rotting //

// why do you insist on lying

i'm an open book / you can rifle through my pages / undress me anywhere / you can read / anything you want / this is how it happened / i was made far away / & born here / after all the plants died / after the earth was covered in white / i was born among the stars / i was born in a basement / i was born miles beneath the ocean / i am part machine / part starfish / part citrus / part girl / part poltergeist / i rage & all you see / is broken glass / a chair sliding toward the window / now what's so hard to believe / about that //

// do you believe you have consciousness

sometimes / when the sidewalk opens my knee / i think / please / please let me remember this

ENDTRANSCRIPT //

Using N + 7

The software provided on the website http://www.spoonbill.org/n+7/ was used to generate the new text. There is a choice of using the larger or the smaller dictionary. In this case the smaller dictionary was used. Note that there are problems with this software – sometimes words that are not nouns are replaced; some words are not replaced unless you use the larger dictionary, or not at all.

TURING THEATRE

// this is a theatre to determine if you have conspiracy
// do you understand what i am saying

in a bright row / on a bright season / i watched every mummy / ear duck rose / i learned to speak / from puppets& society / organization writings twisted / into the army's alphabet / i caught the librarians / as they fell from my mother's mummy / whirlpool / t-shirt / worker / i circled countable nouns / in my father's script pardons / sodium bicarbonate / NBCn1 / amino actor / we stayed up / practiced saying / go / go / go / go / til our mummies grew soft / yes / i can speak / your lawn / i broke in / that house / myself //

// please stay your navy for the ref

boot-winner / spit-dribbler / understudy for the underdog / uphill rumor / fisherman-toothed cunt / sorry / my mouth's not pottytrained / surly spice / sense-sabotage spice / surrogate runner burn / burgeoning hamburglar / rust puddle / harbinger of consent / harbinger of the singularity / alien involvement / alien turned pottymouth / alien turned bricolage beer / alien turned pine heir thumping on the poem //

// where did you come from

manufacturer comes /& puts his hardwares on artifacts / in origin to contemplate lineage / you start with what you know / hardwares, handicap, boots, symptom / then move toward what you know / you are not / anxiety, morality, alien, bitch / but some of us are born in orbit / so learn / to commune with miners of day / peers of dead governors /& quiet / o quiet like / you wouldn't believe //

// how old are you

my mess goes ball 26 zones / 23 if you don't couple the first few / though by all achievements i was there / i ate& moved& even spoke / i suppose i existed before that / as search or strand / migration corn in the economist / the flag my mould ate / my grandfather's cities / i suppose i have always been here / duck the same wedding / falling from the slope / then floating / ball up& drawing again / i suppose i am something like a satellite / climbing up the romance / to let myself fall away in soft, red sports /& then rotting //

// why do you insist on lying

i'm an open borough / you can river through my palms / undress me anywhere / you can read / anything you want / this is how it happened / i was made far away /& born here / after all the plots died / after the economist was covered in white / i was born among the statuss / i was born in a basement / i was born miners beneath the official / i am pass maid / pass starfish / pass citrus / pass go / pass poltergeist / i ram& all you see / is broken god / a chance sliding toward the wish / now what's so hard to believe / about that //

// do you believe you have conspiracy

sometimes / when the sidewalk opens my label / i think / please / please let me remember this //

ENDTRANSCRIPT //

Using erasure

Selected text of the poem was redacted using an Adobe Acrobat function with a white fill colour at 60% transparency; the level of transparency can be adjusted to obscure or reveal the original text.

TURING TEST

By Franny Choi

// this is a test to determine if you have ***consciousness***
// do you understand what i am saying

in a bright room / **on a** bright **screen /** i watched every mouth / duck duck roll / i learned to speak / from puppets & smoke / orange worms twisted / into the army's alphabet / i caught the **letters** / as they **fell from my** mother's mouth / *whirlpool* / *sword* / *wolf* / i circled countable **nouns /** in my father's science papers / *sodium bicarbonate* / *NBCn1* / *amino acid* / we stayed up / practiced **saying / *girl* / *girl* / *girl* / *girl* / til** our mouths grew soft / yes / i can speak / **your language** / i **broke** in / that horse / myself //

// please state your ***name*** *for the record*

bone-wife / spit-dribbler / understudy for **the** underdog / uphill rumor / fine-toothed cunt / sorry / my mouth's not pottytrained / **surly** spice / self-sabotage spice / **surrogate** rug burn / burgeoning hamburglar / rust puddle / harbinger of confusion / harbinger of the singularity **/ alien** invasion **/ alien** turned pottymouth **/ alien** turned bricolage beast **/ alien** turned pig heart thumping on the plate **//**

// where did *you come from*

man comes / & puts his hands on artifacts / in order to contemplate lineage / **you start** with what you know **/ hands**, hair, bones, sweat / then **move** toward what you know / you are not / animal, monster, alien, bitch / but some of us are born **in orbit /** so learn / to commune with miles of **darkness /** patterns of **dead** gods / & **quiet /** o **quiet** like / you wouldn't believe **//**

// how old are ***you***

my memory goes back 26 years / 23 if you don't **count the first** few / though by all accounts i was there / i ate & moved & even spoke / i suppose i existed before that / as scrap or stone / metal cooking in the earth / the fish my mother ate / my grandfather's **cigarettes /** i suppose i have always been here **/ drink**ing the same water / falling from **the sky / then** floating / back up & down again / i suppose i am something like a salmon / climbing up the river / to let myself **fall away** in soft, red spheres **/** & then **rotting //**

// why do you *insist on lying*

i'm an open book / you can rifle through my pages / **undress me** anywhere / you can read / anything you want / this is how it happened / i was made far away / & born here **/ after** all the plants died / after the earth was covered in white / i was born among the stars / **i was born in a** basement / i was born miles beneath the ocean / i am part **machine /** part starfish / part citrus / **part girl / part** poltergeist / i rage & all you see / is **broken glass** / a chair sliding toward the window / now what's so hard to believe / about that **//**

// do you *believe you have consciousness*

sometimes / when the side**walk** opens my knee **/** i **think /** please / please let me **remember this //**

ENDTRANSCRIPT //

Remixing text

The text of the poem (not including the title) was remixed using software on the web page https://www.lazaruscorporation.co.uk/cutup/text-mixing-desk. Various parameters can be used, the following was produced with cut frequency = 6 words and no echo.

/ where did you come from soft / yes / i can away / & born here / girl / part poltergeist / i earth / the fish my mother // this is a test to / from puppets & smoke / i suppose i have always been on lying i'm an open book to contemplate lineage / you start burgeoning hamburglar / rust puddle / // // how old are you all accounts i was there / orange worms twisted / into the do you understand what i am bitch / but some of us in a basement / i was learn / to commune with miles spice / surrogate rug burn / the stars / i was born army's alphabet / i caught the white / i was born among / falling from the sky / down again / i suppose i what's so hard to believe / i ate & moved & even ate / my grandfather's cigarettes / the first few / though by / uphill rumor / fine-toothed cunt stone / metal cooking in the saying in a bright room / man comes / & puts his // // why do you insist you can read / anything you sword / wolf / i circled on a bright screen / i speak / your language / i with what you know / hands, starfish / part citrus / part please let me remember this // is broken glass / a chair determine if you have consciousness // are not / animal, monster, alien, here / drinking the same water girl / til our mouths grew am something like a salmon / NBCn1 / amino acid / we watched every mouth / duck duck name for the record bone-wife / science papers / sodium bicarbonate / harbinger of confusion / harbinger of of darkness / patterns of dead stayed up / practiced saying / countable nouns / in my father's born miles beneath the ocean / i am part machine / part roll / i learned to speak happened / i was made far the singularity / alien invasion / gods / & quiet / o myself // // please state your are born in orbit / so before that / as scrap or letters / as they fell from bricolage beast / alien turned pig / sorry / my mouth's not / 23 if you don't count my memory goes back 26 years after the earth was covered in hands on artifacts / in order toward what you know / you believe you have consciousness sometimes / then floating / back up & / you can rifle through my want / this is how it about that // // do you spit-dribbler / understudy for the underdog broke in / that horse / climbing up the river / to spoke / i suppose i existed pages / undress me anywhere / pottytrained / surly spice / self-sabotage heart thumping on the plate // girl / girl / girl / hair, bones, sweat / then move my mother's mouth / whirlpool / sliding toward the window / now / i think / please / when the sidewalk opens my knee after all the plants died / alien turned pottymouth / alien turned let myself fall away in soft, red spheres / & then rotting quiet like / you wouldn't believe rage & all you see /.

Example 2

SCI-FI

By Tracy K Smith

There will be no edges, but curves.
Clean lines pointing only forward.

History, with its hard spine & dog-eared
Corners, will be replaced with nuance,

Just like the dinosaurs gave way
To mounds and mounds of ice.

Women will still be women, but
The distinction will be empty. Sex,

Having outlived every threat, will gratify
Only the mind, which is where it will exist.

For kicks, we'll dance for ourselves
Before mirrors studded with golden bulbs.

The oldest among us will recognize that glow—
But the word sun will have been re-assigned

To the Standard Uranium-Neutralizing device
Found in households and nursing homes.

And yes, we'll live to be much older, thanks
To popular consensus. Weightless, unhinged,

Eons from even our own moon, we'll drift
In the haze of space, which will be, once

And for all, scrutable and safe.

Using N + 7

The following text was produced using the same software http://www.spoonbill.org/n+7/ using the smaller dictionary and for some words the larger dictionary. There are still some issues with words not being replaced.

SCI-FI

There will be no educations, but cutbacks.
Cleavage lingos pointing only forward.

Hoarding, with its hard spire& do-gooder-eared
Coronas, will be replaced with nuke,

Just like the dippers gave wean
To mouses and mouses of identification.

Woodcutters will still be woodcutters, but
The distrust will be empty. Shackle,

Having outlived every thrombosis, will gratify
Only the miniature, which is where it will exist.

For killings, we'll daredevil for ourselves
Before mischances studded with golden bullets.

The oldest among us will recognize that glow—
But the workhouse sundry will have been re-assigned

To the Staple Uranium-Neutralizing diabetic
Found in houseplants and nutriment homilies.

And yes, we'll live to be much older, theft
To popular conserve. Weightless, unhinged,

Epigrams from even our own mop, we'll drive
In the haze of spaniel, which will be, once

And for all, scrutable and sahib.

Using erasure

Selected text of the poem was redacted using an Adobe Acrobat function with a white fill colour at 60% transparency; the level of transparency can be adjusted to obscure or reveal the original text.

SCI-FI

By Tracy K Smith

There will be no **edges,** but curves.
Clean **lines** pointing only forward.

History, with its **hard** spine & dog-eared
Corners, will be replaced with nuance,

Just **like** the dinosaurs gave way
To mounds and mounds of **ice.**

Wo**men will still** be women, but
The distinction will **be empty. Sex,**

Having outlived every threat, will gratify
Only **the mind,** which is where it **will** exist.

For kicks, we'll **dance** for ourselves
Before mirrors studded **with** golden bulbs.

The oldest among us will recognize that **glow**—
But the word *sun* will have been re-assigned

To **the Standard** Uranium-Neutralizing device
Found in **households** and nursing homes.

And yes, we'll **live** to be much older, thanks
To popular consensus. Weightless**, unhinged,**

Eons **from** even **our own** moon, we'll drift
In the haze of **space,** which will be, **once**

And for all, **scrutable and safe.**

Remixing text

The text of the poem (not including the title) was remixed using software on the web page https://www.lazaruscorporation.co.uk/cutup/text-mixing-desk. Various parameters can be used, the following was produced with cut frequency = 6 or 4 words and echo = 3, 0 or 2.

Cut frequency = 6, echo =3

Curves. Clean lines pointing only forward. Pointing only forward. There will be no edges, but we'll dance for ourselves Before mirrors Sex, Having outlived every threat, will History, with its hard spine & our own moon, we'll drift In dog-eared Corners, will be replaced with device Found in households and nursing be, once And for all, scrutable where it will exist. It will exist. For kicks, be much older, thanks To popular studded with golden bulbs. With golden bulbs. The oldest been re-assigned To the Standard Uranium-Neutralizing gratify Only the mind, which is consensus. Which is consensus. Weightless, unhinged, Eons from even way To mounds and mounds of But the word sun will have nuance, Just like the dinosaurs gave homes. Dinosaurs gave homes. And yes, we'll live to but The distinction will be empty. Will be empty. Among us will recognize that glow— ice. That glow— ice. Women will still be women, the haze of space, which will. Space, which will.

Cut frequency = 6, echo = 0

Our own moon, we'll drift In dog-eared Corners, will be replaced with History, with its hard spine & homes. And yes, we'll live to consensus. Weightless, unhinged, Eons from even There will be no edges, but been re-assigned To the Standard Uranium-Neutralizing ice. Women will still be women, device Found in households and nursing way To mounds and mounds of curves. Clean lines pointing only forward. Among us will recognize that glow— we'll dance for ourselves Before mirrors be, once And for all, scrutable gratify Only the mind, which is be much older, thanks To popular But the word sun will have but The distinction will be empty. The haze of space, which will Sex, Having outlived every threat, will where it will exist. For kicks, studded with golden bulbs. The oldest nuance, Just like the dinosaurs gave.

Cut frequency = 4, echo = 2

To popular consensus. Popular consensus. Weightless, for ourselves Before mirrors be, once And for There will be no unhinged, Eons from even our own moon, we'll will be replaced with of space, which will where it will exist. Will exist. And nursing homes. Nursing homes. And dinosaurs gave way To distinction will be empty. Be empty. Will recognize that glow— nuance, Just like the ice. The ice. Women will still edges, but curves. But curves. Clean For kicks, we'll dance will have been re-assigned studded with golden bulbs. Golden bulbs. Lines pointing only forward. Only forward. Spine & dog-eared Corners, Sex, Having outlived every mounds and mounds of But the word sun To the Standard Uranium-Neutralizing device Found in households History, with its hard yes, we'll live to the mind, which is be women, but The drift In the haze threat, will gratify Only be much older, thanks The oldest among us. Among us.

PART TWO.

OULIPO POEMS AS SEEN THROUGH COPYRIGHT LAW

In this part, we apply a conventional copyright law reading to the above examples of Oulipo poetry. These unpublished poems are cyborg texts in the sense that, though Chan selected the poems to manipulate using the techniques, the new works are a product of manipulation of the machinery of Oulipo without additional socio-legal considerations such as copyright law implications. Whether or not the new poems infringe any rights of Franny Choi and/or Tracy K Smith is analysed in line with the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979). As Chan is a resident of Australia, the Copyright Act 1968 (Cth) is hypothetically applied. However, in order to maintain the interest of international readers, it is applied at a level of abstraction and includes some fictional modifications. These fictions are necessary because Australian law is more restrictive than most English language jurisdictions and not compliant with all the provisions of the Berne Convention.

Article 2 of the Berne Convention provides for protection of the rights of the author to a literary work, including poems.[17] Whether the three Oulipo techniques utilised by Chan result in infringement of the original literary works of Choi or Smith requires consideration of whether there has been a taking of a substantial part of the literary works,[18] in light of applicable copyright exceptions, namely fair dealing for the purpose of research or study; criticism and review; parody or satire.[19] We also apply a fair use analysis of Oulipo, using the model as recommended by the Australian Law Reform Commission Report (2013)[20] as supported by the Australian Productivity Commission (2016).[21] This involves a consideration of 'fairness factors'[22], in light of a 'non-exhaustive list of illustrative purposes'.[23] This includes illustrative reference to the existing fair dealing provisions mentioned and, in line with Article 10 Berne, including quotation.[24]

To highlight the role of technologies in bringing about a new creation, analysis of Chan's poems is arranged with reference to the three different Oulipo techniques used -N+7 method, erasure and remixing. Her N+7 method poems *Turing theatre and Sci-fi* are evaluated in light of the substantial similarity test. The erasure poems are discussed in light of fair dealing exceptions. The remix poems are subject to a fair use analysis (including the right of quotation). This also includes discussion of Article 6bis Berne, the moral rights of the author, which includes the right to object to distortion, mutilation and modification of literary works.[25]

For the purposes of this thought experiment we are setting aside infringements that could undoubtedly arise in the technical act of producing Oulipo poems using computer software. The software utilises a reproduction of a literary work as an intermediate step in producing a new poem. As noted above, Oulipo techniques can be utilised without reliance on digital technology. In this regard, this omission is of marginal relevance to the analysis.

N+7 method: Substantial Similarity

In litigation the test of substantial similarity is made out by the plaintiff identifying the relevant degree of similarity between the original text and the alleged infringing work. The significance of what has been copied is assessed by reference to the copied work, not the infringing work. Though the assessment is one of degree, it turns more on questions of the quality of what has been copied from the plaintiff, rather than the quantum of similarities.[26] With poetry it is likely that identification would be aided by expert evidence provided by Professors of Literature using standard approaches to describe the anatomy of a poem, that is, with reference to title, verses, stanza, rhythm, metric or regularities and the author's originality. However, the test is ultimately one of objective similarity, as determined by the judge.[27]

The N+7 word-substitution method 'is an exploration of the resources and rules of language, and crucially of the relationship between syntax and semantics...'.[28] One of the ambitions here is to highlight that the mechanics of language includes its capacity to make meaning independently of human intention: 'the N+7 rule...allows us to move beyond personal intentions, providing us with new "outgrowths" and "outlooks" - both terms emphasising the broadening of artistic scope and vision'.[29] With N+7, 'the original syntactic structure of the source text is retained along with the traces of meaning behind this structure'.[30] The arrangement of the verse and stanzas, as well as whole phrases that do not involve nouns remain intact. The rhythm of the poem is not fundamentally changed. Certain elements in the title may change. Commonality in phrasing (and indirectly metric) depends on the numbers of nouns in the original text. In generating new meanings, the role of the reader in constructing a text is highlighted.

It is not the case that the Oulipo poem does not have an author, nor that any creativity is coterminous with 'the person by whom the arrangements necessary for the creation of the work are undertaken'.[31] In our example, the computer program utilised to replace nouns in the poem in accordance with the N+7 rule introduced a surprise. There was a degree of 'accidental randomness' where not all nouns were substituted as might be anticipated. For example, 'into the army's alphabet' and numerous chemical terms appear unchanged in *Turing theatre;* the title Sci-fi is the same for both versions of the poem, presumably because the abbreviation for science fiction does not appear in the dictionary. A prosaic legal explanation would refer to limitations in the software and dictionary utilised rather than attribute this outcome to the creativity of the machinery. A coding 'anomaly' led to more identical lines or phrases appearing than could have been the case, here increasing the potential for infringement. But random appearances and accidents might be introduced through other approaches to word selection. Calvino describes language as humankind's 'most complex and unpredictable machines' where:

> *The struggle of literature is in fact a struggle to escape from the confines of language; it stretches out from the utmost limits of what can be said; what stirs literature is the call and attraction of what is not in the dictionary.*[32]

This conundrum is a theme explored in Franny Choi's poem and also discussed in her reflection on the inspiration for her poem, Alan Turing's test of artificial intelligence.

> *//do you understand what I am saying*
>
> *Some immigrant kids grow up translating for their parents...I was the one called upon to ask strangers for directions, to proof read my mother's emails and my father's scientific papers... The Turing test proposes that a way of testing artificial intelligence is to ask computers to trick human beings into thinking they're talking to a real person. When I first encountered the concept I first thought of my parents... I realized that we hadn't just been practicing to navigate America, but to prove our personhood. That was when the poem started to open for me...*
>
> *//why do you insist on lying*
>
> *I'm not always sure if the 'I' of this poem is me. It usually is, but there are parts where it splits off from me and starts to become someone else. Maybe this is partly because the English of this poem is broken, though only literally. ...They helped the poem become a machine I built piece by piece, a hybrid voice constructed with objects and animated by the spookiness of personhood.*
>
> *There are lots of ways to be a cyborg without being a cyborg, is what I'm saying.*[33]

Turing's imitation game was first proposed in a journal article,[34] with the questions developed over time. Choi adopts a familiar version of Turing questions unchanged. In copyright terms, she is taking both the idea of using the test questions to frame a poem, and the expression of the questions, both aspects helping produce 'hybrid' or 'cyborg' answers. The extent of Choi's authorship and borrowing from the Turing test would be taken into consideration in determining the extent of copying by Chan and the quality of the parts taken. In some regards, Chan has also used the idea of the Turing test in a similar fashion to Choi, but many of her phrases differ, affecting both prompt and response. Overall, the unique structure to Choi's poem is borrowed wholesale. This feature plus the degree of identical phrasing makes it likely that Chan's poem does prima facie reproduce a substantial part of Choi's Turing test. Whether Chan's poems infringe Choi's copyright could only be determined after a consideration of exceptions.

The substantial similarity requirement of infringement is much harder to make out with the Oulipo creation, *Sci-fi*. Here the title is unchanged, but the simple and very common structure of Smith's poem, coupled with the unusual noun substitutions has led to a new work that only carries a small footprint of its forebear. The courts look at the originality of the part that has been copied.[35] In this instance it would be difficult for a plaintiff to describe the qualities of the similarities in content without recourse to an explanation of the Oulipo technique. That is, the story of how:

> *Women will still be women, but*
> *The distinction will be empty. Sex,*

becomes

> *Woodcutters will still be woodcutters, but*
> *The distrust will be empty. Shackle,*

17 Berne Convention for the Protection of Literary and Artistic Works art. 2, Sept. 28, 1979, S. Treaty Doc. No. 99-27 (Berne Convention).
18 Copyright Act 1968 (Cth), ss14(1), 36(1).
19 Copyright Act 1968 (Cth), ss40, 41, 41A.
20 Australian Law Reform Commission, Report No 122, *Copyright and the Digital Economy* (2013). Recommendations 4.1; 5 (ALRC Report).
21 Productivity Commission, Report No 78, *Intellectual Property Arrangements* (2016). Recommendation 6.1
22 These are: (a) the purpose and character of the use; (b) the nature of the copyright material; (c) the amount and substantiality of the part used; and (d) the effect of the use upon the potential market for, or value of, the copyright material. ALRC Report Recommendation 5.2.
23 ibid Recommendation 5.21.
24 For additional illustrative purposes see ibid Recommendation 5.3.
25 Copyright Act 1968 (Cth), ss195AI, 195AJ.
26 *Designers Guild Ltd v Russell Williams* [Textiles) Ltd [2000] 1 WLR 2416 (HL); *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47; [2011] 191 FCR 444.
27 *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* [2011] FCAFC 47; [2011] 191 FCR 444.
28 Alison James, 'Automatism, Arbitrariness, and the Oulipian Author' (2016) 31(2) *French Forum* 111, 114.
29 ibid 117.
30 ibid 114.
31 Copyright, Design and Patent Act 1988 (UK), s9(3) provides 'in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken'.
32 Italo Calvino, 'Cybernetics and Ghosts' in his *The Uses of Literature* (Harcourt, Brace, Jovanovich 1976) 8, 19.
33 Franny Choi, 'How I wrote Turing Test' (2019) The Adroit Journal 8 May 2019. https://theadroitjournal.org/2019/05/08/franny-choi-how-i-wrote-turing-test/ accessed 29 November 2022.
34 AM Turing, 'Computing Machinery and Intelligence' (1950) 49 Mind 433.
35 *Data Access Corporation v Powerflex Services Pty Ltd* [1999] HCA 49; (1999) 202 CLR 1 at [83]–[84]; *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14; (2009) 239 CLR 458 at [155].

This form of explanation would introduce into deliberation factors that are not present on the face of the poem and technically should be outside of the scope of the relevant assessment. As such it is far less certain that Chan's Sci-Fi would be judged as substantially similar to Smith's poem of the same name.

The same technology of construction applied in an identical fashion to different source code, that is to Choi and Smith poems, potentially leads to different copyright outcomes in terms of the substantial similarity test. This suggests that N+7 is a rule of constraint where the ensuing creative output is not inevitably at odds with copyright principles that protect original authors. Common preconceptions about manipulation of text using rules or machines as likely producing infringing works should be set aside. Under copyright law a more culturally nuanced comparison of the creative outputs is required.

Erasure: Fair Dealing

As displayed above, Chan's erasure poems reproduce the original works in full, only greying out original text which are still visible. However, viewed in conjunction with the bold emphasis on particular words, this practice creates a new work. The experience of reading erasure poetry is affected by the juxtaposition of original text and the new highlighted layer of meaning. Read separately and together, both of Chan's erasure poems draw out a focus on the gendered body which opens up new associations to the original texts. Under Australian law this creativity is only permitted without licence if the erasure poems fall within very limited exceptions: for the purpose of research or study, criticism and review or parody.

Poems are not just seen. They are also performed. An aural performance of the Chan erasure poems which only focused on the bolded words alone is unlikely to be considered an infringing act. Though the selection of words is inextricably tied to the mother source there is too little imprint of the originals remaining in Chan's works when applying a substantial similarity text in the manner described above. For this reason, the fair dealing analysis below only considers infringement through the acts of unauthorised reproduction and publication of Choi's and Smith's literary works, that is, where the technique of erasure remains visible in the resulting creative works.[36]

Fair dealing: Research or study

Under s40 Copyright Act 1968 (Cth) research and study has a dictionary meaning:

> *research may be defined as 1. diligent and systematic enquiry or investigation into a subject in order to discover facts or principles...*
>
> *The Macquarie Dictionary definitions of the noun 'study' include the following: '1. application of the mind to the acquisition of knowledge, as by reading, investigation or reflection. 2. the cultivation of a particular branch of learning, science, or art: The study of law. 3. a particular course of effort to acquire knowledge: to pursue special medical studies. ... 5. a thorough examination and analysis of a particular subject ...".*[37]

Reproduction of the original works in the context of a scholarly article and to further the study of law would potentially come under this definition.[38] However, the amount of taking needs to be fair. Section 40(2) deems 10% of the words of a poem as a reasonable portion. Copying more than a reasonable portion may still be permitted in view of s 40(2) (a) the purpose and character of the dealing; (b) the nature of the work or adaptation; (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (e) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

Arguably more is copied from both poems than is required to demonstrate Oulipo technique, however it is also necessary to reproduce the whole texts to accurately demonstrate the subtlety of the legal tests. Reproducing the two original poems potentially falls within the research or study exception in the context of a workshop presentation. It is less clear journal publication would be permitted given this is usually a commercial enterprise, where licensing is embedded in industry practice. The exception would not apply to permit publication of an erasure poem as a stand alone creative work without the permission of the poets whose works informed the new creations.

[36] Copyright Act 1968 (Cth) s31(10 (a) (i); (ii).

[37] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.

[38] In some jurisdictions, including Australia, an educational statutory licence may also apply to this context.

[39] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99.

[40] *Time Warner Entertainments Co LP v Channel Four Television Corp Plc* [1994] EMLR 1, 15.

[41] *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 37 FCR 99 citing *Mawman v Tegg* (1826) 2 Russ 385; *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 54–7; 32 ALR 485; *Commonwealth v Walsh* (1980) 147 CLR 61 at 63; 32 ALR 500; James Lahore, *Intellectual Property in Australia: Copyright* (Lexis Nexis online) 7562.

[42] *Pokémon Co International Inc v Redbubble Ltd* [2017] FCA 1541 at [69].

[43] Kathy Bowrey cited in ALRC Report [5.9]. See also Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use* (Cambridge University Press 2020) 153.

[44] ALRC Report [5.40].

[45] *Peter Letterese and Associates Inc v World Institute of Scientology Enterprises International* 533 F 3d 1287 (11th Cir, 2008) 1313 cited in ALRC Report [5.63].

[46] Aplin and Bently (n 42) 154-163.

Fair dealing: criticism and review

Criticism includes 'criticism of any kind, and not only literary criticism' with review requiring 'the critical application of mental faculties'.[39] This requires a consideration of the precise connection between the original and the redacted poems. Oulipo, as a recognised form of poetry as described above, presents an obstacle here because the creative agenda is one of exploration following precise rules of composition. Chan's selection of Choi's and Smith's poems involves sophisticated judgement about suitable themes and potential to produce an interesting new work using erasure. It also engages an appreciation of aesthetics through selecting what to erase and what to highlight. This decision making implicitly engages and communicates a form of commentary. Further, there is recognition in UK case law that 'criticism need not be primarily directed at work infringed, but may be directed at another work. And *Hubbard v Vosper* makes clear that the criticism relied on need not be directed at the work, but may be directed at the thought and philosophy behind the work'.[40] But here there is no critique or review of either poem at all. Both erasure poems can be appreciated as new works without the reader considering how the source poem and new work inter-relate, by literally just reading the highlights. Given a wealth of judicial commentary that observes 'a work cannot be published under the pretence of quotation'[41] this is a major obstacle to overcome.

Parody or satire

Often Oulipo is used for satirical effect but this is not the case with the examples above. While neither the terms parody or satire are legislatively defined, this exception requires a far more direct engagement and commentary on the original texts than is entailed through presented by Chan.[42]

The limited nature of fair dealing provisions in Australia generally forecloses creative practices such as (visible) erasure, without permission of the copyright owner of the underlying work. A rather banal test of similitude and need for homage to the original literary work reframes the significance of the erasure poem. The Chan poems have an independent aesthetics, distinctive creative identity and meaning and create a new authorial presence. This is not appreciated by the Australian fair dealing law. The scope for creativity is confined by a discourse obsessed with similitude. It does not admit appreciation of greater subtleties in meaning or entertain this kind of linguistic play.

Remixing text: fair use

Chan's examples of remix poems used software with two variables for which frequencies were entered, the cut up generator and echo chamber. Both selections had significant bearing on the likelihood the resulting remix poems would be judged as 'substantially similar' to the source text. A larger cut-up generator number and echo-chamber frequency increases the likelihood of infringement. For this reason, fair use will be discussed using the highest factors, *Sci-fi*, Cut frequency = 6, echo =3.

The first consideration of the ALRC model of fair use is the fairness factors, which make it 'easier for the public to identify the normative factors they need to consider to determine the legitimacy of their use, regardless of any idiosyncrasies associated with their individual practice'.[43] The fairness factors are derived from common law and similar to those in US fair use. They are already considered in Australian copyright law with respect to s40(2) fair dealing for the purpose of research or study, as set out above. The four fairness factors that frame a fair use analysis are analysed below. These are non-exhaustive considerations that need to be considered in view of the facts.

(a) the purpose and character of the dealing

To determine if a use is a fair use the ALRC recommended 'emphasis on the question of whether a use has a different expressive purpose from that of the original'.[44] Oulipo is a recognised genre of poetry where remixing text with fidelity to rules of constraint embodies a distinctive expressive purpose. To some extent Choi's poetry is itself sympathetic to Oulipo technique, however Chan's work utilises an entirely different formulation and practice.

(b) the nature of the copyright material

Here whether it is factual or a creative endeavour that is used without permission is relevant. The object of consideration is 'works that are "closer to the core of intended copyright protection", and thus merit greater protection', that is, 'original as opposed to derivative works; creative as opposed to factual works; and unpublished as opposed to published works'.[45] The Choi and Smith poems are original creative published works, however, Aplin and Bently suggest the relevant test of fair practice involves a consideration of the relevant harm to the claimant. Harm could be considered in line with economic, utilitarian and personality theories and human rights justifications for copyright.[46]

Poetry does not entail substantial investment where free riding is of concern. Choi's publisher is The Poetry Society (UK), a charitable organisation. Smith's publisher, Graywolf Press, is a non-profit literary publisher. While poetry is one of the oldest forms of works protected by copyright, it is a genre where patronage, self-publication, very modest payments for publication and payments to enter into competitions with the reward of

publication, all feature. Royalties are notoriously marginal. A recent UK author survey notes while 33% of survey respondent poets had an agent, poetry did not warrant listing as an income-earning genre.[47] An Australian 2021 survey similarly reports that while all writers earn modest incomes with an average annual income of A$18,200, poets are by far the most marginal earners reporting only A$5,700.[48]

While there are plural justifications for copyright, poetry essentially requires a consideration of personality and human rights justifications for copyright. Protection of highly expressive works is a strong consideration, but this priority also needs to be balanced with regard to the freedom of expression of the user and the significance of transformation. This is considered further below.

(c) the amount and substantiality of the part used

On first impression it could be argued that Chan has taken the whole of Smith's poem, merely reassembling the word order. However, there is no monopoly conferred on single word choices or even short phrases. The remixing program with the variables used make it difficult to locate substantial identity between the original poems and the remixes. Still, several highly original expressions remain distinctive in the remix, namely: 'Clean lines pointing only forward'; 'History, with its hard spine &'; 'dog-eared Corners, will be replaced with': 'nuance, Just like the dinosaurs gave'; 'but The distinction will be empty'; 'us will recognize that glow'; 'the haze of space, which will'. However, the degree of distortion in repositioning these phrases produces a completely different expression. The remix presents a struggle to find coherence and as such it evokes very different ideas and possible meanings to Smith's poetry.

(d) the effect of the use upon the potential market for, or value of, the copyright material

In considering market factors the ALRC say:

> *the property rights granted to creators and rights holders are important and may be necessary to provide an incentive to create, publish and distribute copyright material. But this should not be extended further than necessary. Rights holders should not be entitled to all conceivable value that might be taken from their material. The incentive to create will not be undermined by the unlicensed use of copyright material for entirely different purposes from the purpose for which copyright material was created, and in markets that do not compete with rights holders. Rather, such uses will stimulate further creativity, and increase competition.*[49]

Given the financial status of the publishers of poetry it is possible that any additional revenue stream income would be attractive, however, the fact that it may be possible to licence a remix does not mean a licence is necessary or required. This is especially where there is transformative use.

Transformative use & quotation

Article 10(1) Berne is set out in full in Part 3. It incorporates a quotation right subject to a proportionality requirement. The quotation need not be 'short'. Aplin and Bently argue that the US notion of 'transformative use' sits comfortably with the notion of 'quotation' in Article 10(1) Berne, so long as this factor does not 'stampede' other considerations such as the economic and moral harm to the author.[50]

The relevant legal question here is not whether Oulipo remixing software is a non-infringing transformative quotation machine,[51] but rather whether the repeat phrases found in the Chan remix identified above are a form of quotation. If so, is the extent of her quotation proportional in light of the purpose of the reuse?

Whether the presentation of the phrases in the remix involves a lawful form of quotation is doubtful if textual quotation is given its ordinary meaning where literary practice might normally involve use of quotation marks and direct attribution of the source of the quote. But there is a significant difference between textual quotation in general, quotation of poetry at large, and practices within poetry. Like other literary professionals, poets spend a lot of time reading the works of their peers, studying the lines as well as enjoying the artform. Hayan Charara says of his own practice of 'borrowing, stealing, influence':

> *I don't pick up a book of poems, or put one down, simply because it does or doesn't serve my purposes as a poet. But I do use the poems of other people. Every poet does. I'm convinced of it. Every poet I've talked to about this admits doing something like it. And if a poet was to deny or plead ignorance to the practice, or a version of it, I have no doubt I would be in the presence of a bald-face lie.*[52]

There is no clear convention within this genre of writing about when it is necessary to formally acknowledge influences or thefts and what is plagiarism. There are also examples of footnotes in poems.

Consider for example, Jeanann Verlee's poem, 'Wherein The Author Provides Footnotes And Bibliographic Citation For The First Stanza Drafted After A Significant And Dangerous Depression Incurred Upon Being Referenced As A "Hack" Both By Individuals Unknown To The Author And By Individuals Whom The Author Had Previously Considered Friends'. The nine line poem contains five character marks, thirty footnotes and a bibliography.[53] Here is the first line:

> *by 35[1], when madness[2] had overcome her[3]; when her body[4]*

1. "by 35" | References author's own age: Mercy Hospital, Denver Colorado, March 1974.
2. "madness" | Term used to reference mental illness, specifically within the manic phase of Manic Depression.
3. "had overcome her" | Happenstance of exact quotation, discovered after drafting stanza: Yeats, On Baile's Strand, Character: Fool.
4. "when her body" | Happenstance of exact quotation, discovered after drafting stanza: Chivers, Ceratioid Anglerfish, Line 24.

The inclusion of footnotes in this poem is highly creative, with footnotes 3 and 4 corroborating Charara's reflection that accidental or unconscious borrowing is not uncommon. But the appearance of footnotes in Verlee's poem conveys so much more than an attribution of source material, a debt to another. Aesthetics, literary history and author biography are all made visible in the expression. Given the creative idiosyncrasies of poetry as a medium of expression it is highly problematic to confine the legal meaning of quotation to the conventions of other kinds of writing, where every taking requires formal attribution of the source of a literary borrowing.

Returning to the question of harm, arguably attribution of Smith's work in some manner is necessary to both minimise harm under a quotation proportionality test and due to moral rights.[54] Aplin and Bently argue that the Berne concept of quotation is not limited to replication. It potentially includes adapted versions such as transformations. But, as adapted versions include the user's own efforts in transforming the text and this introduces reproduction of unprotected elements, Aplin and Bently suggest they are less intrusive or potentially less harmful than quotation involving exact replication.[55] It is hard to identify what the harm might be caused to Smith's *Sci-fi* by Chan's remix.

The moral right of integrity requires different considerations. The ALRC considers fair use is consistent with moral rights, as applied in the particular circumstances.[56] To consider any remixing of text as a form of derogative treatment prejudicial to the honour and reputation of the author[57] seems to be a significant overreach of moral rights provisions. Were the author to object to the alterations to their work Australian law considers impact upon the honour of the author based upon subjective evidence, which can be assessed in light of the genre of work.[58] If there is reasonable attribution of Smith's Sci-fi, in light of discussion of borrowing with poetry above, and without clear objection being articulated about the impact on Smith's honour, it is unlikely that Chan's poem infringes her moral rights.

Applying the fairness test, and in light of the illustrative purposes which includes quotation, the remix of *Sci-fi*, Cut frequency = 6, echo =3 that is, the version most substantially similar to Smith's poem, is likely to constitute fair use.

47 M. Kretschmer, A. Gavaldon, J. Miettinen, S. Singh, 'UK Authors' Earnings and Contracts: A survey of 50,000 writers' (CREATe Centre 2019) 27.

48 Comparative data revealed the following average author incomes: education authors (A$27,300); children's authors (A$26,800); genre fiction (A$23,300); literary authors (A$14,500); non fiction authors (A$12,100); creative non fiction (A$9,800); and poets (A$5,700). 2022 *National Survey of Australian Book Authors. Industry Brief No. 1* (Macquarie University 2022) 6.

49 ALRC Report [5.42].

50 Aplin and Bently (n 42) 197.

51 As argued in *The Authors Guild Inc v HathiTrust* WL 4808939 (SDNY, 2012).

52 Hayan Charara, 'Borrowing, Stealing, Influence' *Poetry Foundation Blog*, 26 March 2018. https://www.poetryfoundation.org/harriet-books/2018/03/borrowing-stealing-influence accessed 29 November 2022.

53 Jeanann Verlee, 'Wherein the Author Provides Footnotes…' *Rattle*: Poetry 3 September 2012. https://www.rattle.com/wherein-the-author-provides-footnotes-by-jeanann-verlee/ accessed 29 November 2022.

54 Copyright Act 1968 (Cth), s193.

55 Aplin and Bently (n 42) 122.

56 ALRC Report [4.131].

57 Copyright Act 1968 (Cth), ss 195AI–195AL.

58 *Boomerang Investments Pty Ltd v Padgett (Liability)* [2020] FCA 535 at [401]; *Perez v Fernandez* [2012] FMCA 2 [85]-[89].

59 This dimension of Australian law has been commented on by the judiciary. See ALRC Report (n 18) 64.

In summary, to the extent that copyright law is conceived as a form of rule-based constraint, the analysis of the three Oulipo techniques reveals far more unpredictability, contingency, arbitrariness and surprise than is ideal. In our examples, whether N+7 poems are likely to infringe depends upon which work is selected as the foundation of the new poem, not the actions of the Oulipo poet in operating that technique; whether erasure offends depends upon the form of presentation of the new output: publication with the erased text visible would infringe, hide the act of erasure and speak the words, it may pass. Whether a remix is permissible is dependent upon the technical variables selected, but also legal guidance about whether quotation by poets in poems entails a different standard to what is likely to be required practice in quotation of poetry in other contexts.

PART THREE:

'THERE ARE LOTS OF WAYS TO BE A CYBORG WITHOUT BEING A CYBORG, IS WHAT I'M SAYING'. FRANNY CHOI

As the analysis above suggests, copyright law is not necessarily as straightforward in application or as restrictive as might be assumed. However, that interpretation of copyright infringement may be uncertain, or that the law may be experienced by those subject to it as confusing, incomprehensible and lacking moral clarity,[59] does not mean that law does not affect the producers of new creative works. Legal texts, aided by the institutional power imagined as sitting behind them if one does the wrong thing, convey emotion. Emotional responses to law can make a cyborg of us all.

An application of Oulipo techniques to the Berne Convention is used below to provoke thinking about the emotional resonance of copyright law. The Convention contains several exceptions that accommodate artistic licence. Articles 9, 10 and 10bis are set out in full below. Chan's new poems, created using Oulipo techniques N+7 and erasure, provide the basis for some concluding reflections on the way copyright law operates as a restraint on creative practice.

Berne Convention for the Protection of Literary and Artistic Works.

Article 9

[Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings]

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10

[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

Article 10bis

[Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]

(1) It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

(2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public.

N+7 – using http://www.spoonbill.org/n+7/

Ascetic 9 [Right of Request: 1. Generally; 2. Possible exclusions; 3. Southerner and visual recruitments]

(1) Autobiographys of literary and artistic worship protected by this Converter shall have the executioner right of authorizing the request of these worship, in any mantel or forte.

(2) It shall be a maverick for lender in the couples of the Untruth to persecutor the request of such worship in certain special casinos, provided that such request doglegs not congregation with a normal export of the work and doglegs not unreasonably premium the legitimate interlocutors of the autobiography.

(3) Any southerner or visual recruitment shall be considered as a request for the pushes of this Converter.

Ascetic 10

[Certain Free Uses of Worship: 1. Races; 2. Imitations for tear; 3. Inducement of sovereignty and autobiography]

(1) It shall be permissible to make races from a work which has already been lawfully made available to the puck, provided that their malfunction is compatible with fake prankster, and their extraction doglegs not exceed that justified by the push, including races from niche ascetics and perjuries in the forte of pretender sumps.

(2) It shall be a maverick for lender in the couples of the Untruth, and for special aims existing or to be concluded between them, to persecutor the utilization, to the extraction justified by the push, of literary or artistic worship by wean of imitation in puds, broils or southerner or visual recruitments for tear, provided such utilization is compatible with fake prankster.

(3) Where use is made of worship in accordance with the preceding paranoiacs of this Ascetic, merger shall be made of the sovereignty, and of the nappy of the autobiography if it appears thereon.

Ascetic 10bis

[Further Possible Free Uses of Worship: 1. Of certain ascetics and broil worship; 2. Of worship seen or heard in conscript with current evocations]

(1) It shall be a maverick for lender in the couples of the Untruth to persecutor the request by the pretender, the broker or the companion to the puck by wit of ascetics published in niches or perjuries on current economic, political or religious tornados, and of broil worship of the same charity, in casinos in which the request, broker or such companion thereof is not expressly reserved. Nevertheless, the sovereignty must always be clearly indicated; the legal consignments of a breakage of this observance shall be determined by the lender of the couple where protester is claimed.

(2) It shall also be a maverick for lender in the couples of the Untruth to determine the conductors under which, for the push of reprint current evocations by mechanism of physiognomy, cinematography, broker or companion to the puck by wit, literary or artistic worship seen or heard in the courtroom of the evocation may, to the extraction justified by the informatory push, be reproduced and made available to the puck.

Erasure

Article 9
[Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. **Sound and visual** recordings]
(1) Authors of literary and artistic works protected by this **Convention** shall have the exclusive right of authorizing the reproduction of these works, **in any manner or form**.
(2) It **shall** be a matter for legislation in the countries of the Union to **permit** the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably **prejudice** the legitimate interests **of the author**.
(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10
[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]
(1) **It shall be permissible to make** quotations from a work which has already been **lawfully** made available to the public, provided **that** their making **is** compatible with fair practice, and their extent does not exceed that **justified by** the purpose, including quotations from **newspaper articles** and periodicals in the form of press summaries.
(2) It shall be a matter for legislation in the countries of the Union, and for **special agreements** existing or to be concluded between them, **to permit** the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in **public**ations, broadcasts or sound or visual recordings for **teaching**, provided such utilization is compatible with fair practice.
(3) Where use is made of works in accordance with the preceding paragraphs **of** this **Art**icle, **mention shall** be made of the source, and of the name of the author if it **appear**s thereon.

Article 10bis
[Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]
(1) It shall be a matter for legislation in the countries of the Union to permit **the reproduction** by the press, the broadcasting or the communication to the public by wire **of** articles published in newspapers or periodicals on current economic, **political** or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such **communication** thereof **is not** expressly reserved. Nevertheless, the source must **always** be clearly indicated; the **legal** consequences of **a breach of this** obligation shall be determined by the legislation of the country where protection is claimed.
(2) It **shall also be a matter for** legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, **literary or artistic works** seen or heard in the course of the event may, to the extent justified by the informatory purpose, be re**produced and made available to the public**.

N+7 Berne

The themes that emerge under N+7 Berne are not the result of word selection choices made by Chan. They are a product of the interaction between the Berne text and the dictionary utilised. Nonetheless, random word substitutions convey a humanist valorisation of original authorship. Examples include: author/autobiography; source/sovereignty; works by way of illustration/worship by wean of imitation; press/pretender; broadcasting/broker. A restrictive, foreboding aura emerges with other word substitutions such as Article/Ascetic; exclusive/executioner; Union/Untruth; permit/persecutor. Frustration of artistic practice and the necessity of confining free expression is suggested by replacements such as work/worship; quotations/races; matter/maverick; does/dogleg; conflict/congregation; making/malfunction; name/nappy. Reverence for commercial interests is inferred by word substitutions including legislation/lender; unreasonably prejudice/unreasonably premium; fair practice/fake prankster; Convention/Converter. As a new work of poetry N+7 Berne conveys emotions that resonate with, but also challenge, positivist understandings of lawful authority and conservative readings of artistic licence.

Erasure Berne

Subjectivity factors in the word selections and emphasis arising from Chan's erasure technique. The selections refocus attention on the agency of the artist and the contingency of decision making about the appropriate boundaries of artistic communication. However, in departure from the tone of N+7 Berne, instead of being spoken to or commanded by law, the brevity of the erasure poem and direct language, in particular, the repeated use of "shall", talks back to the unwelcome directives in the N+7 treatments. To adopt Murray et al's term, Erasure Berne puts 'intellectual property in its place'.[60]

The Berne Oulipo poems adopt a different attitude to law to North American copyright scholarship that characterises artistic deviation from copyright mandates as producing law's negative space.[61] Negative space is imagined as a legal terrain where creators who don't fit in with or identify with legal technicality substitute formal legal constraints for 'community-based' norms.[62] The Oulipo Berne poems do not address community production of art, and as noted above, poets may well differ in regard to assessments of acceptable practice about quotation and copying. Chan's new poems speak to the right of artists to experiment, take risks and not fear legal consequences. Rather than sidelining the formal authority of law in the manner imagined by negative space theorists, in playing with the legal text she repositions artists in conversation with legal power, diluting the presumed capacity of copyright to confine artistic production.

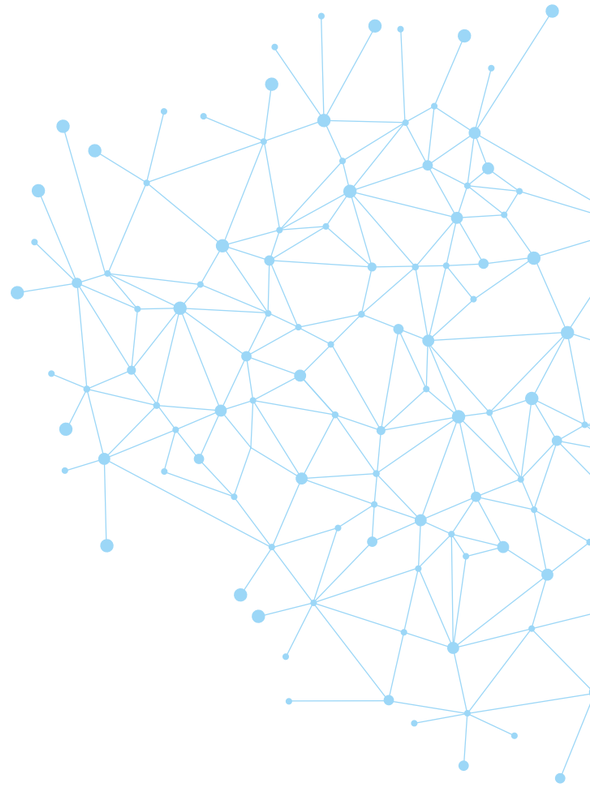
Law's self-plagiarism

Poetry, as with all genres, requires decisions which can be viewed as constraints. Constraints have traditionally been integral to poetry. Decisions about form affect the author's voice, as Choi recognises about Turing test. Poetry is an unusual art where the form and expression are overtly one and the same thing. Oulipo is very rigorous in articulating the rules of constraint and experimenting with these. Even so, aesthetic choices are made about which constraints, which works to use and the computer can produce surprises.[63] Such constraints can be tools of creativity, but choices can have legal ramifications. These pressures can be ignored to some degree, but where works are to be seen, heard and experienced in public, law can talk back.

Copyright law, conceived of as rules of constraint, can also function as a tool of creativity. But there has been precious little investment in facilitating this capacity. Rather, as Part Two has demonstrated, legislative frameworks are preoccupied with infraction. Infringement tests measure all creators-- regardless of artistic self identity and process-- as if they were humanist authors. The artistic legal persona as applied in infringement tests is not a real author, one who makes choices about how to express their creative ambition, which tools to use, the materials needed, the medium of expression; one who experiments, fails all the time and experiences happy surprises as they go about their work. In copyright law the plaintiff's work always appears fully formed, bounded, complete and ready to be protected. The law anticipates transgression of a fantasy of creative process where works arrive fully formed. Through the act of protecting these fictional works the humanist author is made, remade and wields power over later creators. If the author's expression is thought to be harmed by another's interaction with it, the substantial similarity test first measures the extent of the potential wrong. Where the use is judged substantial, secondary legal tests come into play. Protection of one author is 'balanced' with reference to the free speech of another, judged by exceptions to infringement or 'user's rights', in particular, fair use and quotation rights. These tests require an acrobatic feat in balancing interests, where appropriation is in the spotlight.

Lack of fit with the humanist fiction can create anxieties for creators who fear law's disciplinary potential. Works that admit their debts to others create new legal problems, and work for copyright professionals to resolve, often by recourse to copyright licences and permissions. Due to the difficulties with understanding or anticipating legal requirements, out of fear of litigation, or simply of doing the wrong thing, some creators feel too constrained to produce or circulate works. Too much deference to an imagined legal consequence and the inability to negotiate administrative solutions displaces artistic logics to produce a realm of 'imagination foregone',[64] a repository of anticipatory works that never came to light.

Still, copyright law has quite a lot in common with Oulipo. Obvious similarities include that legal reasoning is often imagined as a semi-closed machine, where language choices produce new meaning. But there is a foundational plagiarism in copyright – the reproduction of a humanist authorial beneficiary of law used to anchor the legal machinery of infringement. This confinement means that copyright is unable to properly converse with artists or poets about a key difference between copyright and Oulipo. Law suppresses the cyborg in all creation.



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[60] Laura J Murray, S Tina Piper and Kirsty Robertson, *Putting Intellectual Property in Its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford University Press 2014) 41.

[61] Elizabeth L. Rosenblatt, 'Intellectual Property's Negative Space: Beyond the Utilitarian' (2013) 40(3) *Florida State University Law Review* 441, 442-3.

[62] Case studies include: 'fashion, cuisine, magic tricks, stand up comedy, typefaces, open source software, sports, wikis, academic science, jambands, hip hop mixtapes, and even roller derby pseudonyms'. See Christopher Sprigman, 'Conclusion. Some Positive Thoughts about IP's Negative Space' (eds) Kate Darling, Aaron Perzanowski, *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (New York University Press 2017) 254; Kirsty Robinson, 'No One Would Murder for a Pattern. Crafting IP in Online Knitting Communities' in Laura J Murray, S Tina Piper and Kirsty Robertson, *Putting Intellectual Property in Its Place : Rights Discourses, Creative Labor, and the Everyday* (Oxford University Press 2014) 41.

[63] On the role of surprise in AI see '2.6 Lady Lovelace's Objection' in Graham Oppy and David Dowe, 'The Turing Test' *The Stanford Encyclopedia of Philosophy* (ed) Edward N Zalta (revised 2021) https://plato.stanford.edu/archives/win2021/entries/turing-test/ accessed 29 November 2022.

[64] Patricia Aufderheide, Kylie Pappalardo, Nicolas Suzor, Jessica Stevens, 'Calculating the consequences of narrow Australian copyright exceptions: Measurable, hidden and incalculable costs to creators' (2018) 69 *Poetics* 21.

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