

EPIP 2022 Panel proposal

Roundtable on “Is there still a research and policy agenda for EU copyright?”

***25 min presenters, 20 min discussants, 15 min discussion and Q&A
(assuming a one hour session, slightly longer would be welcome)***

Structure:

- Short introduction by the chair on (1) current EU policy agenda, (2) introduction on reCreating’s results and how their recommendations do not match the plans of the current Commission
- 5 reCreating Europe presenters, illustrating in a few minutes each relevant highlights of their WP/task results and their implications for the future research and policy agenda on EU copyright law
- 2 academic discussants, offering their feedback to the presentations, to the questions they raise, and to the general roundtable question – “is there still a research agenda for EU copyright?”

reCreating Europe: 1 chair + 5 presenters

Martin Kretschmer, chair

Ula Furgal on revocation right

Thomas Margoni on AI

Joost Poort on the perspective of authors

Peter Mezei or Sebastian Schwemer (preference for in-person attendance) on intermediaries

Caterina Sganga on copyright flexibilities

2 academic discussants **TBD**

Description

In the past decade, EU copyright law has been subject to a wide array of policy debates and interventions. The remarkable attention the EU legislator devoted to the matter has been triggered by the dramatic changes in the patterns of production, distribution and consumption of cultural and creative goods and services - from AI-based creations to the advent of new digital business models, up to automated content moderation and rights management mechanisms – and by the pressing need to balance copyright exclusivity against new conflicting interests and policy goals.

From 2012 on, the EU copyright regulatory framework has been the object of public consultations and numerous preparatory works, which have led to the enactment of 3 vertical Directives (CMO, Orphan Works, Marrakesh), 1 Regulation (Marrakesh), and the first horizontal intervention after 2001, the heatedly debated CDSM Directive in 2019. Parallel to this, the CJEU has issued a bounty

of landmark decisions that have pushed the EU harmonization even further, sometimes with historical shifts. Having copyright so much in the center of the stage has also strongly revived the academic debate and its contribution to the policy discussion.

In this context, starting from January 2020, the H2020 consortium *reCreating Europe* (www.recreating.eu) has mapped, measured and assessed in a cross-disciplinary and transnational fashion the effect of market and regulatory changes on the centripetal forces that shape up and pave EU copyright law. Bringing together researchers and stakeholders, *reCreating Europe* has offered ground-breaking contributions to a clearer understanding of what makes a regulatory framework fit to promote a diverse cultural and creative production and optimize inclusive access, distribution and consumption of cultural and creative content.

Approaching the end of the project, its almost final results are now being conveyed into policy recommendations and research questions for the future. Significantly, this comes in a moment when copyright seems to have fallen out from the EU policy agenda. Not only does copyright appear only cursorily in the Commission's IP Action Plan, but its key role in the EU AI and data policies is remarkably downplayed and neglected.

Against this background, **this roundtable builds on reCreating Europe's results and recommendations** to provocatively stimulate an academic **discussion on whether it is still possible to conceive a research and policy agenda for EU copyright** and, if so, what its directions should be.

To this end, *reCreating Europe's* researchers will present highlights from the qualitative and quantitative results achieved by mapping and measuring the impact of the multi-level EU and national regulatory framework, and illustrate related policy recommendations, in the field of (a) copyright flexibilities, users' rights, access to culture and vulnerable groups (b) authors' income developments against the background of the covid pandemic and their experiences with platforms and AI; (c) copyright and AI technologies; (d) intermediaries, content moderation, access to culture and freedom of (creative) expression. This will lay the groundwork for a forward-looking exchange of ideas on which research questions should guide our future efforts in the copyright arena, and on how the EU copyright policy agenda will likely look like, and should look like, in the next decade.

(a) Copyright flexibilities. Since the very first EU interventions in the field, copyright flexibilities have been left to the legislative discretion of Member States, in stark opposition with the increasingly more pervasive harmonization of exclusive rights. Despite the change in the approach by the EU legislator, from 2012 (Orphan Works Directive) to the most recent CDSMD reform, and the harmonization attempt of the Court of Justice, EU copyright law is still characterized by a piecemeal of national limitation and exceptions, the greatest majority of which is overridable by contract. Much has been written on the flaws in EU copyright flexibility. *reCreating Europe* contributes to the debate with an unprecedented EU and cross-national mapping and assessment of legal and policy measures impacting on access to culture, looking at (a) regulatory sources, court decisions, governmental policies, practices and schemes, in the field of copyright law, DSM, and broader cultural policies, and (b) private ordering sources, such as standardized license agreements, terms of use etc. The mapping focuses on digital access to culture for general users and for selected vulnerable groups (new and old minorities, migrants, people with disabilities), and has been conducted by gathering national data on public sources through a questionnaire administered to selected legal experts in each Member States, and by collecting and examining a set of standardized license agreements selected to represent a wide array of cultural and creative industries. This EPIP roundtable will offer the opportunity to present the final results of the mapping and related policy recommendations.

(b) Authors' remuneration, income distribution, reversion right. As one of the elements of the *ReCreating Europe* project, a survey has been conducted targeting a wide range of creators and performers across the EU. Items addressed in the survey are: (1) overall experiences with digitization of cultural content; (2) experiences with publishers, platforms and aggregators: contract and market power issues, accessibility, role of algorithms and content moderation; (3) income development over past years, against the background of the pandemic and support packages; (4) competition from amateurs and AI as content producers. Some key insights from the survey will be presented at the roundtable. With respect to copyright reversal, a cross-national mapping has been made of the range of mechanisms and practices in EU member states that enable authors to recover their works and make these (re-)available for use. Rights reversion, second publication rights, and provisions relating to out-of-commerce works are an important range of interventions that are designed to increase access to European cultural goods while putting the author back into the centre of copyright law. During the

roundtable reCreating Europe's presenters will offer an overview of the final results of the research and propose related policy recommendations.

(c) **Copyright and AI technologies.** The development of most modern AI applications relies on the data used by machines to learn certain tasks or functions. These datasets are usually called *training* data. Not too differently from natural intelligence, also artificial intelligence depends on the quality and availability of the information used for these training activities. However, what is labelled "data" from a technological point of view, is not necessarily "data" from a legal point of view. A plurality of rights, mainly from the domain of copyright, have the potential to confer property-like exclusiveness to training data and therefore to determine the conditions, including price, to access them. The technological, social and economic implications of a property right approach to the regulation of AI are deep and not fully explored in the current institutional framework, despite interesting developments contained in recent legislation such as the CDSM and Open Data Directives and the AI Regulation proposal. *ReCreating Europe* has analysed the legally relevant technological processes in three empirical settings (web data scraping, natural language processing, image identification) in order to characterize the forces linking data ownership, machine learning and the future of the European AI sector. This EPIP roundtable will offer the opportunity to present the final results of this research and related policy recommendations.

(d) **Intermediaries and content moderation.** Online content-sharing platforms service providers (OCSSPs) are a main point of access to copyright-protected content in the digital age. To mediate access, these OCSSPs engage in 'content moderation' activities aimed at detecting, identifying, and addressing as copyright infringing content. Art. 17 of the CDSM Directive pushes OCSSPs towards increased algorithmic content moderation. *ReCreating Europe* focuses on copyright content moderation in online platforms (predominantly OCSSPs) and its impact on access to culture in the Digital Single Market (DSM), looking into how the law – at EU level and in ten Member States – and the private practices, mechanisms and structures of different sized platforms (including their policies and terms of service) interact and shape the ways in which users disseminate and access cultural and creative expression through online platforms. The aim is not only to gain a better understanding of how content moderation by platforms impacts access to culture, but also to provide recommendations on how the private and public regulatory framework can be improved in the DSM. The results of the legal and empirical mapping conducted in the field will be presented during the roundtable, and complemented with related policy recommendations.

The participation of two academic discussants will enrich the discussion by bringing further considerations and suggestions from both a legal and an economic perspective.