

Kluwer Copyright Blog

ReCreating Europe's report, datasets and data analysis on EU and comparative copyright flexibilities now available online – Part I

Caterina Sganga (Scuola Superiore Sant'Anna) · Wednesday, May 17th, 2023

From January 2020 to July 2022, the H2020 project reCreating Europe and its teams at Scuola Superiore Sant'Anna (Pisa) and the University of Szeged performed an



unprecedented mapping of EU and Member States' sources on copyright flexibilities, focusing both on public regulatory sources (statutes, court decisions, governmental policies and practices) and on private ordering tools, such as end-user license agreements (EULAs) and terms of use of online content-sharing service providers (OCSSPs). The research relied both on in-house desk research and on a network of 36 national experts, who were involved in two rounds of questionnaires and a mid-term workshop.

The mapping produced a wealth of data and findings, which are systematized in a dataset available on the user-friendly website www.copyrightflexibilities.eu, and analyzed in a report downloadable from [Zenodo](#), [SSRN](#) or [ResearchGate](#), entitled "Copyright Flexibilities: Mapping and Comparative Assessment of EU and National Sources". This two-part post offers some snapshots on the main findings and conclusions of the research. Part I of this blog post deals with the mapping of EU sources and their conclusions. Part II will deal with the comparative analysis of the law of all 27 Member States, with related comparative findings.

The report is structured in 6 parts. The introductory sections (1 and 2) sketch the state of the art, research questions, objectives and expected outcomes of the research, outlining its structure and workflow, methodology and selection criteria. Section 3 maps public regulatory sources across EU. Section 4 provides the comparative analysis of national solutions under 12 categories of uses/flexibilities. Section 5 investigates flexibilities in EULAs under the CDSM-benchmark. Section 6 concludes.

The mapping of EU legal sources has drawn an all-encompassing picture of the state of the copyright balance in the EU, covering not only statutory interventions but also the CJEU case law, and tracking all uses, purposes, policy goals and conflicting rights and interests privileged in the copyright balance against rightholders' prerogatives. Flexibilities have been classified on the basis of a blended taxonomy, centred around categories of uses, purposes/goals and rights/interests

balanced against copyright, coupled with horizontal, catch-all categories such as “public domain” and “external copyright flexibilities”. The analysis of legislative sources confirmed the presence of promising steps forwards, yet with persisting problems, such as:

- A **conceptual fragmentation and “clusterisation” of copyright flexibilities, with persisting gaps**. The closed-list approach to exceptions and limitations (E&Ls) led to the construction of a complex array of intertwined provisions. This net of clustered rules presents overlaps, while leaving uncovered beneficiaries, uses and purposes that share similar balancing needs.
- The **contemporary presence of multiple regimes**, ranging from optional to mandatory E&Ls, or E&Ls that are mandatory only in specific fields (e.g. Article 17(7) CDSM Directive), **hampering legal certainty**.
- The **outdated nature of several provisions**, which due to the rigidity of the EU system of copyright flexibilities requires the constant intervention of the EU legislator to adjust existing provisions to new technological, market and social-cultural developments, or to introduce new provisions to the same end.

The mapping of the **relevant CJEU case law** offered a heterogeneous picture, which can be summarized as follows.

- Some sectors have been **heavily harmonized** and defined in a wide range of details (e.g. private copy, reprography and temporary reproduction) while others have been **completely left uncovered**.
- Some optional exceptions have been **indirectly declared mandatory** and their **requirements clarified or standardized** against the silence of the corresponding EU provisions (e.g. parody and quotation).
- Some provisions have been **broadened in scope** and reach to safeguard their effectiveness and the underlying fundamental rights and public interest goals they protect (e.g. private study, e-lending).
- The notion and boundaries of **public domain** have been indirectly drawn by identifying basic principles to distinguish protected from non-protected works.
- In some instances, the Court has offered **game-changing interpretations** of certain provisions (e.g. the three-step test); triggered the countervailing reaction of the EU legislature to **overrule by law** the effects of some of its decisions (as in the *Reprobel* case); or went as far as to reshape the boundaries and operation of copyright flexibilities by developing horizontal principles such as the **fair balance doctrine**, leading to the horizontal application of fundamental rights on copyright E&Ls.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please [subscribe here](#).

Kluwer IP Law

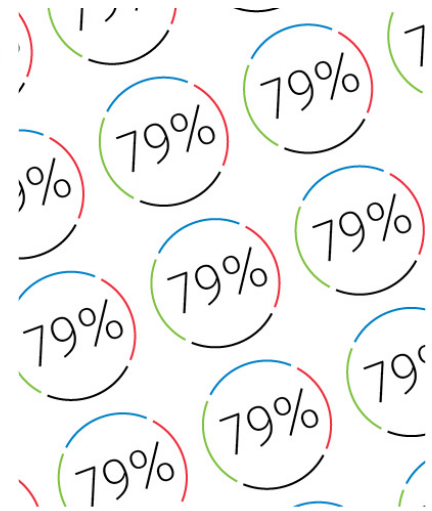
The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Wednesday, May 17th, 2023 at 8:03 am and is filed under [Contract](#), [Digital Single Market](#), [Exceptions and Limitations](#), [Liability](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.