The importance of exceptions and limitations for a balanced copyright policy. Licensing alone will not secure user rights.

Culture, education and science require a “breathing space” within the copyright system. In this space, secured by exceptions and limitations, we learn, create art, appreciate culture and conduct research. It is also in this space that public institutions can fulfill their missions, to the benefit of the society. User rights are an essential part of a balanced copyright system, secured by a social contract between rights owners and users.

Public Domain and user freedoms

A wealth of our knowledge and culture is not proprietary, but shared as a common resource. It constitutes the Public Domain - content and information that is free from any copyright protection.

Just as essential for a healthy Public Domain are rules that enable individuals and institutions to freely use works still under the protection of copyright. These represent the "breathing space" of our current culture and knowledge, ensuring that copyright protection does not interfere with specific requirements, values and public interest of the society and the voluntary choices of authors.

Among these regulations, a crucial role is played by exceptions and limitations to copyright, which ensure a set of usage rights. It is from this perspective, of a broadly understood Public Domain, that we look at key copyright related challenges.

Licenses are not enough for Europe

Licensing-based solutions, which are a result of self-regulation by market actors, are often proposed by the industry as the optimal mechanism for regulating content circulation in the digital environment. Yet licensing can neither provide the necessary balance between rights owners and users nor provide solutions in situations where there are insufficient incentives for rights holders to license.

In 2013, the European Commission conducted the “Licenses for Europe” structured dialogue. Licensing - and associated technological solutions - was seen as the sole and sufficient solution for copyright to “stay fit for purpose in this new digital context”. Yet ten months of meetings have largely failed to identify any solutions which can be backed by all, or even the majority of, stakeholders involved. Ten pledges were made unilaterally, without the support of public institutions and civic actors.

These pledges hardly amounted to even a minimal reform portfolio. Even worse, licensing solutions were - and are until today - commonly raised in order to block more progressive reforms. While licensing-based solutions were being debated, studies requested by the EC have shown that a new balance between the rights of creators and the rights of users is both necessary and possible.

The EU Commission's public consultation on a review of the EU copyright rules has shown a clear demand from individual and institutional users for extending and harmonising user rights in Europe. These results can only be achieved through copyright reform at the European level. Self-regulation will not provide expected results if it ignores expectations and needs of users. A balancing of copyright cannot be achieved through a "licensing only" approach.

Exceptions and limitations are not damages!

In the ongoing debate, rights owners' and creators' organisations portray exceptions and limitations as harmful for cultural creators. Recently, in an open letter to MEP Reda, CISAC described exceptions and limitations as a source of damages to *"our lives, the lives of our families and the diversity and vibrancy of our culture"*. Instead, *"simple licensing processes"* are mentioned as a solution.

Exceptions and limitations are not damaging to rights owners and never have been in the modern copyright regime. This is ensured, under the Berne Convention, TRIPS and the EU copyright directive, by the three-step test. The three-step test ensures that each individual exception does 'not conflict with a normal exploitation of the work or other subject-matter and do[es] not unreasonably prejudice the legitimate interests of the rightholder'. In many cases exceptions and limitations are tied to some form of remuneration that can constitute an important source of income for many creators.

With its letter CISAC ignores the social and economic value of public interest use of content - by libraries, schools, heritage institutions or research centers. It ignores the fact that creators themselves benefit from these rules - for example for quoting, creating parodies or teaching in art schools.

This one-sided position is not acceptable and contradictory to the European approach to copyright that has a long tradition of reconciling the legitimate interests of rights holders with the interests of users, public institutions and society at large. Uses covered by exceptions and limitations for public use should be supported as vital elements of our culture - from which creators and rights holders benefit as much as any other member of the society.

Exceptions and limitations re-imagined

In response to ongoing revisions of copyright, it has been suggested that licensing makes reform unnecessary. The success of free licensing, such as that promoted by Creative Commons, is sometimes provided as proof. This is certainly not the case. Any license is just a patch, not a fix, for the problems of the copyright system. They apply only to works whose creators or owners make a conscious decision to affirmatively license rights to users. And the success and importance of Creative Commons proves the demand for legal "breathing spaces" and flexible solutions for rights owners.

The following four cases demonstrate situations where licensing is not enough to achieve a

reasonable balance between the interests of creators and society as a whole. In all of these cases, clear legislative solutions exist that would provide this balance without harming the interests of rights holders.

- The collections of cultural heritage institutions contain large numbers of in-copyright works that are out of commerce and are not actively managed by their rights holders anymore. This means that clearing rights (obtaining licenses) to make them available online is extremely difficult and resource-consuming and as a result large parts of Europe's rich cultural heritage remain inaccessible online. **The social and cultural value of these works can easily be unlocked by expanding the existing exceptions benefiting cultural heritage institutions to allow them to make out of commerce work in their collections available online.**
- In Poland, despite a relatively broad exception for teaching in schools, educators are often uncertain about legality of their activities. Media education, extracurricular film clubs for students are encouraged by the educational system, but ambiguous from a copyright perspective. Licensing solutions provided to schools by commercial companies could spell an additional cost of millions of Euros to the national education system. **The matter could be solved by an exception in line with the broadest standard set by InfoSoc, harmonised across Europe.**
- In countries without a freedom of panorama exception such as Belgium or France, citizens infringe rights on a daily basis with every selfie they take in front of a monument. No licensing pledge will create a practical solution allowing amateur photographers to clear rights before posting pictures with public artworks on the web. **Certainty of acting within the scope of law can be provided to every smartphone user by a Europe-wide exception providing freedom of panorama.**
- LIbrarians working with online catalogs fall within a grey zone when they add book and film covers to their databases. Uses of such artworks are covered by exceptions in analog form and for traditional catalogs, stacked in library buildings. The same use becomes infringing when shifted online. Licensing cannot solve this issue as many of the works in question are not actively managed by their rights holders anymore. **A flexible open norm would allow our copyright system to adapt to adopt more swiftly to new uses which do not interfere with the ability of rights holders to exploit their works.**

The scope and shape of the exclusive rights granted by copyright law need to be reviewed today to ensure maximum benefit for all stakeholders. The current scope of exceptions and limitations has been defined in the Information Society Directive at a time when the internet was still a novelty and social media or smartphones were unheard of. After fifteen years, the existing legal frameworks is no longer fit to provide a proper balance between rights owners' and users' rights, especially in the digital, online environment. A re-imagined, harmonised set of clear and strong exceptions and limitations should be a key element of any proposal for copyright reform.