

Title and citation

The text and data mining exception in the proposal for a directive on copyright: why the European Union needs to go further than the laws of member states. *

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Abstract

The European Union is currently debating the adoption of a copyright exception for text and data mining (TDM). Some member states have jumped the gun by adopting their own TDM exception. From the various possible options, the European Union should adopt the broadest possible TDM exception, to boost the international competitiveness of its knowledge economy – notably against countries with copyright laws more favourable to research and innovation such as the US or even a post-Brexit Britain.

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Introduction

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Text and data mining (TDM) is a process by which computer algorithms analyse large amounts of data to identify new patterns and discover new knowledge. TDM is often presented as a new frontier in research and innovation, opening new avenues of intellectual inquiry and of business opportunity in a wide range of fields such as medical research, artificial intelligence, linguistics, marketing or finance. However, an inherent part of this process requires the copying of vast amounts of content such as articles in scientific journals, books, pictures, music recordings or films, all of which are protected by intellectual property rights. This mass scale reproduction of works raises the question of the compatibility of TDM with copyright law. In the context of international competitiveness that is increasingly focused on the knowledge economy, lawmakers and courts around the world are challenged to find the right balance between enabling the computerised analysis of content and protecting the creators of content. In that quest, the copyright regime of the United States is often presented as a model, providing protection for both creators and users of content, thus fostering research and the emergence of new technology companies as well as promoting the creative and entertainment industries.

In Europe, the discussion on the balance between TDM and copyright started at the beginning of the present decade in some member states, and is now also being conducted by the European Union (EU). In September 2016, the debate entered a crucial phase when the European Commission published its proposal for a directive on copyright in the digital single market, which includes, amongst other things, the proposal to create a TDM exception in EU copyright law.¹ The EU debate is expected to last at least until the end of 2018. However, even before new rules have been agreed at European level, several member states have already modified their copyright laws to include exceptions for data mining, each one of those exceptions having different characteristics. This issue of a TDM exception thus raises a series of questions. The overarching one is normative: what kind of TDM exception should the EU adopt? To answer that question, it is worth examining the exceptions already enacted in member states to see which policy rationales have underpinned their adoption, as well as to see their specific characteristics. It is of interest to identify how the existing European

¹ [Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM\(2016\) 593 final, European Commission, 14 September 2016 \[COM\(2016\) 593 final\], article 3.](#)

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framework shaped those national exceptions, and in turn, to see how the national experiences are shaping the debate at EU level.

In the first part we will detail the copyright issues relating to TDM as well as the terms of the debate regarding the solutions to such issues (I). We will then focus on the experiences in the United Kingdom and France. In 2014, the United Kingdom became the first country in Europe to introduce a TDM exception in its copyright law. In part (II) we will show how this trail-blazing decision evidences a determination to bolster research and innovation as well as a willingness to test the limits of the European copyright framework. France followed in these reformist footsteps in 2016 with its own TDM exception. In part (III) we will look at the fraught legislative history of the French exception and explain how the French Parliament overcame the resistance of the government towards the idea of an exception. We will also show that the compromise found by Parliament results in a much narrower exception than the British one. Then, in part (IV), we will look at the debate at EU level, addressing the complex interplay between policy making at EU and national level. When the European Commission proposed its new copyright directive, two exceptions, with different characteristics, were already implemented in the EU. More countries have adopted their own exceptions without waiting for the conclusion of the EU debate. And others have undergone important political changes which may impact policy at national and EU level. Chief amongst these is the vote by the UK to leave the EU which may leave the champion of the TDM exception free to align itself with the US copyright laws. Lastly, in part (V), we argue that the EU should adopt the widest possible TDM exception, in particular to boost the international competitiveness of its knowledge economy.

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I. Text and data mining and EU copyright law

In Europe, the discussion on the copyright challenges posed by data mining starts at the beginning of the current decade. Reports commissioned by governments play a crucial role in framing the debate and in offering policy options. The UK, France and the EU, the three jurisdictions this article focuses on, have commissioned the following reports on TDM: for the UK, the review from Professor Ian Hargreaves;² for the EU, the report from the De Wolf & Partners law firm, chaired by Jean-Paul Triaille,³ and the report by the European Expert Group chaired by Professor Hargreaves,⁴ both of which were delivered to the European Commission; and, finally, for France, the review chaired by Jean Martin for the High Council on Artistic and Literary Property (*Conseil supérieur de la propriété littéraire et artistique* (CSPLA)).⁵ These reports all present data mining as a promising avenue for the discovery of new knowledge

² Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (UK Intellectual Property Office, 2011) [Hargreaves Review].

³ Jean-Paul Triaille, Jérôme de Meeûs d'Argenteuil and Amélie de Francquen, 'Study on the Legal Framework of Text and Data Mining' (De Wolf & Partners for the European Commission, March 2014) [De Wolf Report].

⁴ Ian Hargreaves, Lucie Guibault, Christian Handke, Peggy Valcke, Bertin Martens, Ros Lynch and Sergey Filippov, 'Report from the Expert Group on the standardisation in the area of innovation and technological development, notably in the field of text and data mining' (Expert Group for the European Commission, April 2014) [Expert Group Report].

⁵ Jean Martin and Liliane de Carvalho, 'Rapport de la mission sur l'exploration de données (« Text and Data mining »)' (Conseil Supérieur de la Propriété Littéraire et Artistique, July 2014) [Rapport CSPLA].

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but one which can encroach on copyright (A). Although there is consensus on this diagnosis, the potential solutions are the subject of a debate, the terms of which we will detail (B).

A. Text and data mining: a promising process encroaching on copyright

TDM can be defined as “the automated processing of digital materials, which may include texts, data, sounds, images or other elements, or a combination of these, in order to uncover new knowledge or insights.”⁶ This broad definition covers a wide range of practices. Anybody with a computer and an appropriate algorithm for analysis can mine the data stored on their computer to gain new insights. Of course, the more powerful the computer, the better the algorithm, and the higher the quantity and quality of data available, the more fruitful the data analysis will be. Given its cutting-edge nature and the costs involved, it is unsurprising that TDM is being applied primarily in universities, businesses or public services for projects where significant financial, human and technical resources can be mobilised. Examples of uses, or of potential uses, of TDM are therefore generally linked to either research in universities or research conducted by businesses to improve their commercial services. Amongst the examples given in the reports, we can highlight the UK project Text2genome which has, thanks to the analysis of millions of publications, mapped the human genome.⁷ The analysis of large quantities of videos can also enrich knowledge in meteorology.⁸ Researchers in social sciences can benefit from TDM in a wide range of scenarios. For instance, a political scientist could analyse the evolution of the use of the term ‘digital’ within policy making in the European Union.⁹ TDM is also beneficial to private companies and can be applied in finance, marketing, or industry.¹⁰ Potentially, TDM can be applied in any type of research on any type of content. And ultimately, once costs have significantly decreased, access to the process will be democratised. It is therefore important to bear in mind that, in principle, TDM can be implemented by anyone, for any kind of purpose and on any type of content.

The processing of a vast amount of content, inherent to data analysis, raises copyright questions. As the report for the CSPLA explains, prior to the analysis of data is the process of collecting data, which requires the copying of all or parts of items of digital content.¹¹ Furthermore, it is often necessary to transform data to make it exploitable by computer tools, by, for instance, converting a PDF document into an XML file. Both the collection and the transformation of data can engage the intellectual property rights recognised in the Union. Indeed, the 2001 copyright directive¹² recognises that the creator of an original work, such as a book, a musical composition or a database, has the exclusive rights of reproduction and dissemination of this original work. Furthermore, European law recognises, through a 1996 directive, a specific right for the producers of non-original databases.¹³ This sui generis right

⁶ [De Wolf Report](#), supra note 3, p. 17.

⁷ [Rapport CSPLA](#), supra note 5, p. 11.

⁸ [Expert Group Report](#), supra note 4, p. 10.

⁹ *Id.*

¹⁰ *Id.*

¹¹ [Rapport CSPLA](#), supra note 5, p. 20.

¹² [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](#), OJ L 167, 22.6.2001, p. 10 [Directive 2001/29].

¹³ [Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases](#) OJ L 77, 27.3.1996, p. 20–28 [Directive 96/9].

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gives them, amongst other rights, exclusive prerogatives over the extraction and re-utilization of the content of their database. Focusing on copyright, the fact that creators of original works are granted numerous rights, such as the right to authorise the reproduction or communication to the public of the work,¹⁴ means that anyone wishing to copy or disseminate a protected work must, by default, obtain the prior authorisation from the copyright holder who can make this authorisation subject to receiving a payment. These copyrights are understood extensively by the courts and apply fully in the digital context. Thus, the copying of any image found on the internet, of any movie, newspaper article, video clip from a YouTuber, or scientific article, must have been authorised by the rightsholder. The same goes for the dissemination of those works, especially on the internet. It is also worth noting that European law offers an additional protection for copyright holders in the digital context. [*Page 27 in the original] The law protects the technological protection measures, also known as Digital Rights Management systems (DRMs), such as anti-copy software which the content industries insert in cultural products like movies sold on DVDs or in digital download form, by prohibiting the circumvention of those digital locks.¹⁵

This broad protection offered by copyright is not absolute, however. All copyright systems contain some exceptions which allow third parties to use content without the consent of the rightsholder, notably in instances where it would not be practical or sensible to expect such an authorisation. There are, for instance, copyright exceptions for news reporting or for parody. One of the key questions is thus to establish whether a copyright exception for TDM is recognised under EU law. The answer should have been simple. The 2001 directive sets up, in Article 5, an exhaustive list of allowed exceptions for all the member states of the Union. Therefore, either the TDM exception is in this list and it is allowed, or it is not. However, the issue is rendered more complex by two issues linked to the European harmonisation process, which was mindful of respecting the legal traditions of member states on exceptions.¹⁶ First, amongst the twenty or so exceptions only one of them, the transient copying exception, is mandatory in all member states. The other exceptions are optional, meaning that member states have the choice to implement them or not in their national law. Second, and more importantly, the wording of the exceptions in the directive is broad enough so that each exception could be implemented in different ways in member states. Combined with the challenge of multilingualism, which is inherent to the European project, those two issues often make it difficult to determine the exact scope of most exceptions. For instance, the directive provides, in article 5(3)(a), an exception for “use for the sole purpose of illustration for teaching or scientific research”. As Séverine Dusollier explained, only some member states have implemented this exception and amongst those who did there are significant differences of interpretation depending on the language of the relevant country.¹⁷ Depending on the language, the term ‘illustration’ can be applicable to both teaching and research, in which case there is only one exception for illustration; or the term ‘illustration’ applies only to teaching in which case there are effectively two exceptions, one for illustration for teaching and another for research. As we will see, this difference in interpretation will play a part in the debate on the TDM exception. At this stage though, what can be said with some

¹⁴ [Directive 2001/29](#), supra note 12, articles 2 and 3.

¹⁵ Id, article 6.

¹⁶ Id, recital 32.

¹⁷ [De Wolf Report](#), supra note 3, p. 61.

certainty is that, at the beginning of the decade, neither EU law nor the copyright laws of member states explicitly provided for a TDM exception.

B. The terms of the debate on a copyright exception

The issue of the compatibility of TDM with copyright first arose in the field of academic research. The increasing number of researchers voicing concerns about their inability to use TDM processes on the scientific publications they subscribed to, forced EU and national authorities to address the issue. Two main solutions were discussed. The first option was a contractual solution through which rightsholders, especially publishers of scientific journals, would agree, in their licensing agreements and terms of services, to allow their customers to mine their content. The second option was a legislative solution whereby copyright law would be adapted to include a TDM exception. Scientific publishers, supported by other rightsholders, favour the contractual solution whereas researchers, supported by other users such as companies in the digital economy, argue for a copyright exception. Advocates of an exception point to other jurisdictions where copyright laws are more favourable to research and innovation. For instance, in 2009 Japan introduced an exception applicable to all “information analysis” without distinction and thus including analysis for commercial purposes.¹⁸ But above all, it is US copyright law which is presented as a model of flexibility and of friendliness to researchers, internet start-ups and innovation. Its flexibility lies in the method of creation of the exceptions. Whereas the European model sets, in statutes, exhaustive lists of approved exceptions which can only be modified through the legislative process, US law recognises a general principle of fair use which gives the courts a lot of discretion to authorise new uses of protected content by third parties. This fair use doctrine has often been applied by the courts in a way that is friendly to innovation and technology companies. The US courts have, for instance, in the *Authors Guild v Google* case, authorised the digitisation by Google of book collections of some American universities even though this mass copying of books had been done without the authorisation and against the wishes of copyright holders.¹⁹ It is against this copyright model, and the dominance of American technological innovation, that the innovation-friendliness of EU copyright law is often assessed.

A key question is thus to know how far the EU could and should go to try to emulate the US model. Can it import the US fair-use doctrine, or would a copyright exception be enough? The possibility of a new exception raises the question of its characteristics. Some elements of consensus emerge in the discussion. It seems a given that a TDM exception could only be invoked if the user has had lawful access to the content. This is an essential guarantee for rightsholders in general, and for scientific publishers in particular, as it ensures that people wishing to mine their corpus of articles need to pay the subscription fees for their services. In exchange, it seems also established that such an exception should be a mandatory rule, one that cannot be overridden by contract. Other elements, however, such as the remit of the

¹⁸ Japan Copyright Act [Translation by Yukifusa Oyama et al. for the CRIC (Copyright Research & Information Center) dated October 2016], Article 47-7 ; see notably, *De Wolf Report*, supra note 3, pp. 10-12 and, in French, Makoto Nagatsuka, ‘L’exception de data mining en droit d’auteur japonais’ (2016) 3 *Revue Francophone de la Propriété Intellectuelle* 68, esp., p. 7.

¹⁹ *Authors Guild v. Google* (2015) 804 F. 3d 202 upholding the first instance decision in *Authors Guild v. Google*, 954 F.Supp.2d 282 (S.D.N.Y.2013).

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exception, are debated: who the beneficiaries should be (researchers, companies, all the users), for which type of use and purpose (commercial or not) and on which types of content? To those questions national and European legislators offered different answers.
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II. The United Kingdom: a trailblazer with its exception for text and data analysis

The UK was the first country in the EU to address the conflict between copyright and TDM. This enquiry about the adaptation of copyright to TDM was part of a broader review of the overall framework for UK copyright exceptions conducted by the Hargreaves review. The statutory changes introduced in response to the review evidenced the determination of the British government to bolster innovation, as well as a willingness to take risks within the European framework (A). The principle and remit of the TDM exception introduced in 2014 tested the limits of this European framework (B).

A. Review, resolve and risk-taking on copyright exceptions

The report by Professor Hargreaves, handed to the British government in 2011,²⁰ played a crucial part in the emergence and framing of the debate on the TDM exception. Ian Hargreaves's mission was to review the main intellectual property rights and identify the aspects of those rights that were creating obstacles to innovation and economic growth. We can note here how the terms of reference as well as the nature of the commissioner, the Department for Business, Innovation & Skills, sets the review in the Anglo-Saxon tradition of a utilitarian approach to intellectual property rights. Amongst all the intellectual property rights, the review identified copyright, especially the rules regarding exceptions, as the most ripe for reform. The review first looked at the overall architecture of the system and then addressed specific exceptions.

The overall assessment of the system of exceptions contemplates the US model but satisfies itself with the European anchoring of the British system of exceptions. The government wanted to know, amongst other things, whether it was desirable and possible to adopt a US-style fair use system. The question was whether importing this doctrine would create a more welcoming environment for innovation in the digital economy. David Cameron, the then Prime Minister, had, whilst launching the work of the Hargreaves review, referenced the founders of Google who had said they could never have started their company in Britain due to the lack of fair use.²¹ On the opportunity of such a transplant, the review concluded that fair use could bring some benefits in terms of flexibility for copyright but that fair use was only one of the aspects explaining the success of US internet companies; other much more important factors were attitudes to business risk and investor culture. On the possibility of such a transplant, the review concluded that it was not possible under current EU rules.²² The review went on to make a series of recommendations to reform UK exceptions. In response, the government passed legislation through parliament in 2014 to modify the

²⁰ [Hargreaves Review](#), supra note 2.

²¹ Id, p. 44.

²² Id, p. 46.

exceptions in the Copyright, Designs and Patents Act 1988 (CDPA).²³ These reforms modify some existing exceptions and add new ones. In the category of the modified exceptions we can highlight the broadening of the research exception which was until then only applicable to “literary, dramatic, musical or artistic” works, but is now applicable to any type of work, including audio-visual works.²⁴ In the category of new exceptions, the introduction of a parody exception did not raise much difficulty as the UK seized the opportunity offered by the 2001 directive. The introduction of an exception for private copying could have been equally painless. The directive sets the following framework: it allows for such an exception but makes it conditional on the setting up of a system of compensation for rightsholders, by way of a levy to compensate the harm done to rightsholders by the copying of their works. However, the UK government decided to create a private copying exception without a compensation scheme. The UK exception was meant to be compatible with EU law because it was designed to be so narrow that it would not cause any harm (or only minimal harm) to the rightsholders, making a levy unnecessary.²⁵ Even before EU authorities could say anything, British rightsholders immediately asked for a judicial review of the provision. The High Court in London sided with them in 2015 by ordering the repeal of the provision by ruling that the government had not proved that the absence of a levy scheme would cause no or very little harm to the rightsholders.²⁶ [*Page 29 in the original] In this instance, then, the UK government saw its original interpretation of EU rules on private copying rebuffed by the courts. Its interpretation of the directive on the TDM exception was arguably even more daring.

B. The 2014 exception: a broad exception

The UK felt it could introduce such an exception even though it was not listed in the 2001 directive. The TDM exception was understood as a mere extension of the general research exception said to be found in article 5(3)(a) of the directive. This analysis by the UK government of the TDM exception has not been challenged in court by either the rightsholders or the European institutions. And the new section 29A of the CDPA thus provides for a copyright exception²⁷ for “text and data analysis” for non-commercial research. It is a broad exception. It applies to all types of content and to any (non-commercial) research. The term “research”, in the absence of opposite case law, has always been understood in a very broad way, applying to any person doing research irrespective of her status or that of the institution

²³ [The Copyright and Rights in Performances \(Research, Education, Libraries and Archives\) Regulations \(SI 2014/1372\)](#) [SI 2014/1372]; [The Copyright and Rights in Performances \(Disability\) Regulations \(SI 2014/1384\)](#); [The Copyright \(Public Administration\) Regulations \(SI2014/1385\)](#); [The Copyright and Rights in Performances \(Quotation and Parody\) Regulations \(SI 2014/2356\)](#).

²⁴ [SI 2014/1372](#), supra note 23, regulation 3(1).

²⁵ [The Copyright and Rights in Performances \(Personal Copies for Private Use\) Regulations \(SI 2014/2361\)](#) [Repealed].

²⁶ [British Academy of Songwriters, Composers And Authors & Ors, R \(On the Application Of\) v Secretary of State for Business, Innovation And Skills](#) [2015] EWHC (Admin) 1723; [BASCAM v Secretary of State](#) [2015] EWHC (Admin) 2041; see on the case notably Julian Wilkins, ‘Legislation to introduce copyright exception law with no accompanying levy scheme deemed unlawful’ [IRIS](#), August 2015 and on the history of the private copying exception in the UK see, [Hector MacQueen, ‘Performance Rights in Music: Some Perspectives from Economics, Law and History’ in The Artful Economist \(Springer, 2016\) pp. 113-31.](#)

²⁷ The 2014 reforms do not add a specific exception for the sui generis right of database producers.

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she might be associated with.²⁸ However, the benefit of the exception is limited to non-commercial research. It is worth remembering that the distinction between commercial and non-commercial research was only introduced in the UK by the implementation of the 2001 directive and that commentators have highlighted how difficult it can be to implement.²⁹ And it is notably to avoid such difficulty that Hargreaves had recommended that the UK government should lobby the European institutions to ensure that any future TDM exception also applied to commercial research.³⁰ Another key point is that the UK exception cannot be overridden by contract. In return, section 29A provides many guarantees for rightsholders. First, there is the requirement of lawful access to the work. Then, the user must, in so far as it is possible, accompany the copy of a work with a sufficient acknowledgement. More importantly, the use of the copies for any activity other than TDM or the communication of those copies is forbidden and is, in the absence of prior agreement by the rightsholders, an infringement.

The UK experience is interesting on many counts. The UK identified a need to modify its copyright law to accommodate TDM and promote research and innovation. Doing so meant revisiting copyright arbitrages between relevant stakeholders and finding a new balance to satisfy users and rightsholders. But it also meant testing the existing EU framework which did not provide for a specific TDM exception. Furthermore, UK policy aimed to modify EU rules to enable TDM for commercial purposes. We can draw some parallels between the UK government's attitude on copyright and that exhibited at the time towards EU rules more generally. Indeed, the reformist copyright agenda was concluded in 2014 at a time when the government was increasingly eager to revisit the UK's relationship with the EU. David Cameron, pressured by the rise of Euroscepticism, notably in his own party, had already promised to hold a referendum on exiting the EU if re-elected. He also promised to engage with European institutions in a process of renegotiation of the UK's relationship with the EU, the failure of which bolstered support for the pro-Brexit campaign.³¹ In both copyright and politics, the UK government showed a willingness to take risks in pursuit of UK policies.

²⁸ See notably: Charlotte Waelde, Abbe Brown, Smita Kheria and Jane Cornwell, *Contemporary Intellectual Property*, (Oxford University Press, 4th ed, 2016) [Waelde et al], p. 183 noting that "the meaning of the word 'research' appears never to have been judicially considered in the UK"; Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (Sweet & Maxwell, 17th ed, 2016) [Copinger], paragraph 9-37 pointing that "in the equivalent Australian provision, 'research' has been held to have its ordinary dictionary meaning, namely, the "diligent and systematic inquiry or investigation into a subject in order to discover facts or principles [*De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 I.P.R. 292 (Fed. Ct of Australia) at 298-299]" and Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 4th ed, 2014) [Bently and Sherman], p. 236, arguing that the UK research exception would "certainly cover photocopying documents for the purposes of an academic research project, whether by a professor, doctoral student, or undergraduate researching an essay" and "would also cover the acts of independent researchers investigating topics, as well as people researching their family history".

²⁹ Waelde et al, supra note 28, p. 184 noting that "there is a large amount of ambiguity in the distinction between commercial and non-commercial research"; Copinger, supra note 28, paragraph 9-37: "Quite what the limits are of non-commercial research is not clear"; Bently and Sherman, supra note 28, p. 237: "Much research...will occupy a difficult middle ground".

³⁰ [Hargreaves Review](#), supra note 2, p. 48, paragraph 5.26.

³¹ [EU referendum timeline: Countdown to the vote](#), BBC News, 20 February 2016; [Maxime Vaudano, « Brexit » : comment Cameron s'est laissé prendre à son propre piège](#), Le Monde, 24 juin 2016.

III. France and its two data mining exceptions

The debate on TDM started in France as it was concluding in the UK. The debate in France was rowdier, the discussions more conflictual, and the constraints linked to the European framework, as well as the uncertainties about its probable evolution, more pressing. The opposition between the government and the parliament made the recognition of the principle of an exception very uncertain for a long time (A). The compromise that would eventually be adopted resulted in two very narrow exceptions whose implementation is suspended and whose long-term survival is in doubt (B).

A. Resistance to, then acceptance of, the principle of an exception

In July 2014, the High Council on Artistic and Literary Property (*Conseil supérieur de la propriété littéraire et artistique* (CSPLA)), the advisory body in charge of advising the Ministry of Culture on copyright issues, submitted its report on TDM.³² The approach, the analysis and the recommendations of the French report were almost the opposite of those of the Hargreaves Review. While the British report asked how to adapt copyright to the needs of the economy, the French report was more concerned with affording as much protection as possible to copyright against TDM, which it compares to a parasite.³³ In terms of legal analysis, the CSPLA produced an in-depth analysis which, we contend, describes more accurately the position regarding the EU legal framework. The report highlighted that rights receive an extensive interpretation whereas exceptions are narrowly interpreted. [*Page 30 in the original] It concluded that none of the exceptions in French copyright law offered enough guarantees to allow TDM; especially not the teaching exception,³⁴ the French implementation of article 5(3)(a) of the directive, given its very limited scope in French law.³⁵ According to the report, it is not possible to modify national law without a change in the EU framework.³⁶ Implicitly, it rejected the British analysis on the ability to create a new exception within the existing framework. Crucially, for the French report the creation of such a new exception was not even necessary as contractual solutions should be promoted.³⁷ It proposed to “favour self-regulation over statutory changes” and set “a two-year period after which a sectorial overview will be conducted and the need for legislative change assessed”.³⁸ The CSPLA report also recommended that the French government should share this wait-and-see approach and oppose any initiative to reform copyright at European or international level.³⁹ Once more, this was in stark contrast with the Hargreaves review which had urged the UK government to press the EU to change its copyright law. The French government followed the recommendations of the report. The question of a possible TDM exception was not addressed during the discussions on the Law on Creativity (*Loi Création*) even though the law modified some

³² [Rapport CSPLA](#), supra note 5.

³³ *Id.*, p. 2.

³⁴ [French Intellectual Property Code](#), article L. 122-5 3° e.

³⁵ [Rapport CSPLA](#), supra note 5, p. 30.

³⁶ *Id.*, p. 45.

³⁷ *Id.*, p. 38.

³⁸ *Id.*, p. 4, recommendations 5, 6 and 7 respectively.

³⁹ *Id.*, p. 5, recommendations 11 and 12.

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copyright exceptions.⁴⁰ Similarly, the Secretary of State for the Digital Economy did not include a TDM exception in the bill that would eventually become the Law for a Digital Republic (*Loi pour une République Numérique*).

However, during the debate on the Law for a Digital Republic, the members of the *Assemblée nationale*, the lower house of parliament, were responsive to the demands the proponents of the idea of a TDM exception. Those demands had notably been made by research institutes during the online consultation process on the draft bill as well as by the French Digital Council (*Conseil national du numérique* (CNNum), the advisory body which advises the government on digital issues, which, quoting the British analysis, and noting it had not been challenged by European institutions, had recommended the creation of a dedicated TDM exception.⁴¹ The government did not follow those recommendations and the bill submitted to parliament did not provide for a modification of copyright law. The government would pursue this opposition throughout the debate and would be supported by the relevant committees in the lower house. Although the committees recognised that data mining needed to be made easier, they highlighted the lack of a specific exception in the 2001 directive and pointed to the soon-to-be-announced proposal by the EU on the topic.⁴² In the legal affairs committee, the rapporteur, Luc Belot, and the secretary of state, Axelle Lemaire, rejected the British analysis, arguing it was in breach of EU law and explained it would be premature to introduce an exception in French copyright law.⁴³ The committee on culture mentioned the hopes raised by promising new contractual solutions promoting TDM.⁴⁴ Despite those strong arguments, the idea of an exception was pushed by a large cross-party consensus in the lower house. Many members of parliament, led, on the left, by Christian Paul, Isabelle Attard et André Chassaigne, and, on the right, by Nathalie Kosciusko-Morizet, submitted a series of amendments in support of an exception to improve the competitiveness of French researchers vis-à-vis those of the US and the UK. They also wanted to force the executive to clarify its negotiating position in European negotiations, and to ensure it would strongly support an EU exception.⁴⁵ In the end, the lower house adopted the Kosciusko-

⁴⁰ [Loi n° 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine](#) (Law 2016-925 on the freedom of creation, on architecture, and on heritage).

⁴¹ [CNNum, 'Avis n°2015-3 du Conseil national du numérique relatif au projet de loi pour une République numérique' \(30 Novembre 2015\)](#), p. 15 ; See also the demands made by French research institutes during the online consultation phase of the bill at www.republique-numerique.fr : [CNRS - DIST - RENAUD FABRE, « Une durée d'embargo plus courte, ne pas entraver le TDM \(fouille de texte et de données\) et ne pas interdire une exploitation commerciale » \(30 septembre 2015\)](#) ; [CONSORTIUM COUPERIN, « Proposition : Exception de fouille de textes et de données » \(2 octobre 2015\)](#) ; [INRA \(DIST ODILE HOLOGNE\), « Proposition d'amendement : exception de fouille de textes et de données » \(13 octobre 2015\)](#).

⁴² See notably : [Marietta Karamanli, 'Rapport d'information n° 3366 déposé par la commission des affaires européennes, portant observations sur le projet de loi pour une République numérique \(n° 3318\), et présenté par Mme Marietta Karamanli.' \(Assemblée nationale, 16 Decembre 2015\) \['Rapport Karamanli' n° 3366\]](#), p. 42.

⁴³ [Luc Belot, 'Rapport n° 3399 fait au nom de la commission des lois sur le projet de loi \(n° 3318\) pour une République numérique, fait par M. Luc Belot' \(Assemblée nationale, 15 January 2016\) \[Rapport Belot n° 3399\]](#), p. 277.

⁴⁴ [Emeric Bréhier, 'Avis n° 3389 présenté au nom de la commission des affaires culturelles et de l'éducation sur le projet de loi pour une République numérique par M. Emeric Bréhier' \(Assemblée nationale, 13 January 2016\)](#), p. 60.

⁴⁵ [Rapport Belot n° 3399](#), supra note 43, p. 277; See also: [Nathalie Kosciusko-Morizet et al., Amendement n° 180 \(Assemblée nationale, 15 January 2016\) \[Adopté\]](#) ; [Isabelle Attard et al., Amendement n° 89 \(Assemblée nationale, 15 January 2016\) \[Tombé\]](#) ; [André Chassaigne et al., Amendement n° 382 \(Assemblée nationale, 15 Propriétés Intellectuelles, no. 67 \(April 2018\), pages 25-35 - Please quote the original page numbers which are highlighted with the mention \[*Page __ in the original\]](#)

Morizet amendment which added to the bill an exception to copyright and to the *sui generis* database right “to explore text and data for the needs of public research, excluding any commercial use.”⁴⁶

In the Senate, the upper house of the French parliament, the exception was removed from the bill. The committee on legal affairs argued it was not possible to create a new exception and pinned its hopes on the contractual solution, which, it noted, could be the one ultimately favoured by the European authorities.⁴⁷ The committee on culture proposed a half-way solution between self-regulation and statutory changes to copyright. It did agree that it was neither possible nor desirable, at this stage, to modify copyright law in the manner of the lower house. However, it recommended the introduction of a statutory provision to help data analysis in France. Following lengthy discussions, during which many senators voiced their preference for the position of their colleagues in the lower house, the Senate eventually adopted the amendment of Colette Mélot,⁴⁸ adding a provision to “forbid, in contracts between publishers and research institutions or libraries, any clause limiting access to scientific publications owned by the publisher, for electronic data mining exclusively for the purpose of public research and excluding any commercial use.”⁴⁹ The aim was to offer some guarantees to researchers in their dealings with publishers of scientific articles, without changing copyright law. Unsurprisingly, the Senate’s text was polarising. [*Page 31 in the original] Publishers welcomed it and promised to improve promptly both contractual terms and TDM tools for their customers.⁵⁰ The reaction from users was unanimously negative. An open letter penned by digital entrepreneurs, public research centres and public figures testified to the strength of support for a copyright exception.⁵¹ Amongst the signatories were many members of the Digital Council, including its former and current presidents, Benoît Thiéulin and Mounir Mahjoubi. This vocal opposition to the Senate proposal and support for a copyright exception weighed in on the parliamentary debate, especially at the crucial stage when the parliamentary joint committee (*Commission mixte paritaire*) was appointed to reconcile the position of the lower house, in favour of a copyright exception, with that of the Senate, in favour of a much narrower statutory provision focused on scientific publications. Eventually, the joint committee adopted a compromise which enshrined the principle of an exception, but an exception strictly confined to the context of research.

January 2016) [Tombé] ; Christian Paul et al., Amendement n° 616 (Assemblée nationale, 15 January 2016) [Tombé].

⁴⁶ [Projet de loi pour une République numérique, adopté en 1ère lecture par l’Assemblée nationale le 26 janvier 2016, TA n° 663, article 18 bis \(nouveau\).](#)

⁴⁷ [Colette Mélot, ‘Avis n° 525 \(2015-2016\) fait au nom de la commission de la culture, de l’éducation et de la communication sur le projet de loi, adopté par l’Assemblée nationale après engagement de la procédure accélérée, pour une République numérique par Mme Colette Mélot’ \(Sénat, 5 April 2016\), p. 47.](#)

⁴⁸ [Colette Mélot, ‘Amendement n° COM-408 présenté en commission des lois du Sénat par Mme Colette MÉLOT au nom de la commission de la culture du le 5 avril 2016’.](#)

⁴⁹ [Texte n° 131 \(2015-2016\) Projet de loi pour une République numérique modifié par le Sénat le 3 mai 2016.](#)

⁵⁰ [‘Communiqué - Fouille de textes et de données \(FTD\) / Text & data mining : la position des éditeurs scientifiques du Syndicat National de l’Edition \(SNE\) et de la Fédération Nationale de la Presse d’Information Spécialisée \(FNPS\)’ \(SNE & FNPS, 15 June 2016\), p. 2.](#)

⁵¹ [‘Data mining : la loi ne doit pas enterrer la recherche française’ Les Echos, 25 April 2016 ; See further critical comments by Mounir Mahjoubi in Christopher Bys, “Exclusif : l’avis du président du CNNum sur le ‘text data mining’ qui oppose chercheurs et éditeurs”, L’Usine Digitale \(19 April 2016\) and in the press release of the Digital Council : ‘Le Conseil national du numérique dresse un bilan mitigé de l’examen au Sénat du projet de loi pour une République numérique’ \(Conseil National du Numérique, 3 May 2016\).](#)

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B. Two narrow exceptions whose implementation is suspended and long-term survival in doubt

The 2016 Loi République Numérique modified the Intellectual Property Code by adding a copyright exception for “the mining” (in French ‘*exploration*’) of data and a *sui generis* right exception for the “search” (in French ‘*fouille*’) of data.⁵² The TDM exception for copyright authorises “The digital copies or reproductions [done] from a lawful source, for the mining of texts and of those data included in or associated with scientific texts for the purpose of public research, excluding any commercial activity.”⁵³ As we can see, the French exception is more limited than its British equivalent,⁵⁴ mainly because it applies only to public research and only to certain types of content. The French exception applies to “texts” and “those data included in or associated with scientific texts”. Therefore, it does apply to all the types of texts, including non-scientific ones. On this specific point, we can refer to the clarification made during the debate in the joint committee,⁵⁵ when a proposed amendment to apply the exception only to scientific texts had been rejected.⁵⁶ However, the exception applies only to texts (or data included in scientific texts) and not to other works such as pictures, musical or audio-visual works. Many members of parliament had wished to exclude as many types of works as possible in order to protect associated cultural industries such as broadcasting and the press.⁵⁷ The Intellectual Property Code then specifies that “a decree [executive order] sets out the requirements to implement text and data mining, as well as the procedures for storing and communicating the files produced during the research activities ...”.⁵⁸ The TDM exception to the *sui generis* right of database producers is structured in a similar fashion and leaves it to a decree to set much of its implementation procedures.⁵⁹

However, more than two years after the adoption of the law those decrees have yet to be issued by the government. In May 2017, the government did submit a proposal of decree for approval to the *Conseil d’État*, the highest administrative jurisdiction in France which not only adjudicates cases but also advises the government on the preparation of legal

⁵² [Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique](#), article 38.

⁵³ [French Intellectual Property Code](#), article L. 122-5, 10° (Translation in English by the author. Original in French : “Les copies ou reproductions numériques réalisées à partir d’une source licite, en vue de l’exploration de textes et de données incluses ou associées aux écrits scientifiques pour les besoins de la recherche publique, à l’exclusion de toute finalité commerciale »).

⁵⁴ For a very good overview of the French TDM provisions as well as a comparative analysis with the UK and US see: Lionel Maurel, ‘L’exception TDM dans la loi numérique: mérites, limites et perspectives’ *S.I.Lex*, 11 November 2016.

⁵⁵ See the clarification from Luc Belot in the joint committee report: ‘Rapport n° 743 (2015-2016) de MM. Christophe-André FRASSA, sénateur et Luc BELOT, député, fait au nom de la commission mixte paritaire chargée de proposer un texte sur les dispositions restant en discussion du projet de loi pour une République numérique, déposé le 30 juin 2016 (numéro de dépôt à l’Assemblée Nationale : 3902)’, p. 16.

⁵⁶ *Id.*, p. 15.

⁵⁷ *Id.*, p. 16, see the comments by Emeric Bréhier and by Catherine Morin-Desailly.

⁵⁸ [French Intellectual Property Code](#), article L. 122-5, 10°; Translation in English by the author. Original in French : “Un décret fixe les conditions dans lesquelles l’exploration des textes et des données est mise en œuvre, ainsi que les modalités de conservation et de communication des fichiers produits au terme des activités de recherche...».

⁵⁹ [French Intellectual Property Code](#), article L. 342-3, 5°.

instruments such as statutes and decrees.⁶⁰ The *Conseil d'État* rejected the decree proposal.⁶¹ Since its opinion has not been published, it is risky to speculate on the reasons for this rejection. However, it would not be surprising if the *Conseil d'État*, like most other French legal institutions before it, felt it was wiser to wait until the end of the legislative process at EU level before assessing the French framework. Without decree, the French exception remains largely inapplicable and unapplied. As we will explain, it also seems that the exception being discussed at EU level will be broader than the French one in its current form. Therefore, France needs to ready itself for a probable modification of the provisions of its Intellectual Property Code to comply with the future directive.

In any case, the adoption by France of a TDM exception marks a turning point in the European debate. It signals the end of the contractual option as a potential solution to the issues raised by TDM. France had been very opposed to the idea of an exception, notably after receiving sound legal advice that such an option was not available under current EU rules. The government, as well as the culture committees in Parliament, did push for the contractual solution until the end. However, Parliament was responsive to the arguments for an exception put forward by researchers, librarians and innovators. The notion that French researchers would be at a disadvantage compared not only with US researchers but also with those in the UK, had a significant impact on the discussion. In the end, France enacted a TDM exception, albeit a much narrower one than the UK. So, as the European Commission was about to unveil its proposal for a new copyright directive, two major European countries had already adopted a TDM exception even in the absence of an explicit provision in EU law. This lack of a specific provision did not deter the UK which applied a broad interpretation of the existing EU framework to enact a broad exception. Surprisingly, it did not deter France either, even though its own analysis was that such an exception was not allowed under EU law.

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IV. Policy options at European level and dialogue with member states

The publication of the directive proposal in September 2016, which is the outcome of a process launched by the European Commission in 2013 with a public consultation on the reform of copyright law, is an important milestone in the debate. It seems to ensure that the principle of a TDM exception will be recognized at EU level and it opens the discussion in the European institutions on the scope of such an exception (A). In parallel, more member states have adopted their own exception whilst others experience great political changes, such as Brexit, which could have an impact on the discussion on the TDM exception (B).

A. TDM exceptions in the directive proposal and the European institutional debate

In article 3 of the directive, the Commission proposes a mandatory exception “for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the

⁶⁰ ‘Projet de décret sur l’exploration de textes et de données pour les besoins de la recherche publique’, *Sciences communes*, May 2017.

⁶¹ Pierre-Carl Langlais, ‘L’exception TDM sans décret d’application...’ *Sciences Communes*, May 2017 ; Michèle Battisti and Joachim Schöpfel, ‘Quel paysage juridique pour l’exploration de données ?’ *Paralipomènes*, 27 July 2017.

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purposes of scientific research”.⁶² Regarding the recognition of such an exception and on the question as to whether European law already authorises TDM, the Commission offers a diplomatic answer. Although it considers that Union law already provides certain exceptions that “may apply” to TDM, it acknowledges that they “are optional and not fully adapted” to TDM.⁶³ It thus seems that a specific exception is desirable to secure TDM practices at EU level. It is worth noting that this exception is mandatory, the Commission wishing to avoid the harmonisation issues due to the optional nature of the exceptions in the 2001 directive.

The exception only benefits research organisations which act in the public interest such as universities or research institutes.⁶⁴ However, it applies to any type of research activity, including commercial research, the proposal specifying that “research organisations should also benefit from the exception when they engage into public-private partnerships”.⁶⁵ Thus, the Commission chooses the applicability without distinction advocated by the Expert Group chaired by Professor Hargreaves.⁶⁶ The exception applies to all types of works and it cannot be excluded by contract.⁶⁷ The interests of the rightsholders are guaranteed by the requirement of lawful access to the content, which particularly aims to secure the relevant revenue streams such as academic journal subscriptions. As a consequence, the proposal specifies that “there is no need to provide for compensation for rightholders” because “in view of the nature and scope of the exception the harm should be minimal”.⁶⁸ Rightsholders are entitled to apply proportionate measures to ensure the security and integrity of their networks and databases.⁶⁹ Lastly, this exception is meant to apply to three rights:⁷⁰ two that are very familiar, copyright and the right of database producers, but also a new right, the ancillary right for press publishers, which the Commission has included in its proposal, in article 11, and which is very controversial.

The discussions about the directive are ongoing in the relevant European institutions where the debate focuses on whether to extend it to more beneficiaries. In the European Parliament, the MEP Therese Comodini Cachia handed a draft report to the Committee on Legal Affairs (JURI) in which she proposed to extend the benefit of the exception to everybody and not just to research institutions and also to extend it to all uses and not just for scientific research.⁷¹ We are reminded that the MEP Julia Reda had already argued, in her 2015 draft report, for a broad TDM exception open to everyone, but that this proposal had been softened during the discussions in the legal affairs committee; the resolution eventually

⁶² [COM\(2016\) 593 final](#), supra note 1, article 3(1).

⁶³ Id, recital 9.

⁶⁴ Id, recital 11.

⁶⁵ Id, recital 10 ; see also [European Commission, ‘Impact Assessment on the Modernisation of EU Copyright Rules, Accompanying the Document “Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market” {COM\(2016\) 593} - SWD\(2016\) 301 Final \(Part 1/3\)’ \(14 September 2016\)](#), p. 116-19, where the impact assessment highlights as the favoured option for TDM “Option 3 - Mandatory exception applicable to public interest research organisations covering text and data mining for the purposes of both non-commercial and commercial scientific research”.

⁶⁶ [Expert Group Report](#), supra note 4, p. 7.

⁶⁷ [COM\(2016\) 593 final](#), supra note 1, article 3(2).

⁶⁸ Id, recital 13.

⁶⁹ Id, article 3(3).

⁷⁰ Id, article 3(1).

⁷¹ [Therese Comodini Cachia, ‘Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market \(COM\(2016\)0593–C8-0383/2016–2016/0280\(COD\)\)’ \(Committee on Legal Affairs - European Parliament, 10 March 2017\)](#), p. 27, amendment 32.

adopted by the Parliament would only provide for the need to assess the enablement of TDM.⁷² It will be interesting to see if the Parliament will, this time, be more welcoming to a broad exception like the one proposed in the Comodini report. In the Council of the European Union, the Estonian presidency submits, in September 2017, a compromise proposal on the TDM exception.⁷³ It contains some amendments, which although more limited than those discussed in Parliament, still indicates a willingness to extend the benefit of the exception, by opening it up to cultural heritage institutions.⁷⁴ The debate in the European institutions is likely to continue at least throughout 2018.

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B. Developments in some Member states

Since the publication of the directive proposal, Ireland, Estonia and Germany have changed their copyright laws or have proposed to do so, thus weighing in on the TDM debate (1). For France (2) and the UK (3) significant political changes could influence the future of TDM.

1. Ireland, Estonia, Germany

In Ireland, the 2013 report by the Copyright Review Committee recommends the creation of a TDM exception for research.⁷⁵ In summer 2016, the government had prepared a bill to reform copyright accordingly,⁷⁶ but it was not submitted for discussion, seemingly because of the debate started at EU level by the Commission's directive proposal.

In Estonia, a TDM exception came into force in January 2017.⁷⁷ According to the English translation of the exception enshrined in a new article § 19(3)(1), it applies to "processing of an object of rights for the purposes of text and data mining and provided that such use does not have a commercial objective". This TDM exception seems very broad, being arguably applicable to all the uses listed under the header of § 19, namely 'Free use of works for scientific, educational, informational and judicial purposes'. Like all the exceptions listed

⁷² Compare Julia Reda, 'Draft Report on the Implementation of 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 (2014/2256(INI))' (Committee on Legal Affairs - European Parliament, 15 January 2015), point 18: "Stresses the need to enable automated analytical techniques for text and data (e.g. 'text and data mining') for all purposes, provided that the permission to read the work has been acquired" and 'European Parliament Resolution of 9 July 2015 on the Implementation of 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 (2014/2256(INI)) - P8_TA(2015)0 273', point 48: "Stresses the need to properly assess the enablement of automated analytical techniques for text and data (e.g. 'text and data mining' or 'content mining') for research purposes, provided that permission to read the work has been acquired".

⁷³ Estonian Presidency, 'Revised Presidency Compromise Proposal Regarding Articles 2 to 9 of the Directive on Copyright in the Digital Single Market' (12533/17, Council of the European Union, 26 September 2017).

⁷⁴ *Idem*, article 3.

⁷⁵ Irish Copyright Review Committee [Eoin O'Dell, Patricia McGovern and Stephen Hedley], 'Modernising Copyright' (Department of Jobs, Enterprise and Innovation, October 2013), pages 85-88 and p. 157.

⁷⁶ Irish Government, 'General Scheme of a Copyright Bill Approved by Government' (Department of Business, Enterprise and Innovation, 4 August 2016).

⁷⁷ 'Estonian Copyright Act (Consolidated Text of January 1, 2017)', WIPO Lex, article 19(3)(1). For a description of the early stages of the legislative history of the Estonian exception and the influence of the British experience see: Liis Lindström, *Automated Processing of Copyrighted Works in the European Union - a Way Forward?* (University of Tartu - Faculty of Law, 2014), p. 13.

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in § 19, the TDM exception “is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication.”

Lastly, the German copyright law was modified in 2017 to include a TDM exception.⁷⁸ It applies only to non-commercial scientific research, and only to “a specifically limited circle of persons for their joint scientific research, as well as to individual third persons for the purpose of monitoring the quality of scientific research”.⁷⁹ It applies to all types of works. The law provides that “once the research work has been completed, the corpus and the reproductions of the source material shall be deleted”; however it is possible to transmit the corpus and the reproductions of the source material to designated institutions for long-term storage.⁸⁰

2. France: new government, new policy?

As we have seen, during the parliamentary debates in France, the position of the government was initially hostile to the idea of an exception. This hostility was echoed at European level. In its 2014 response to the public consultation, the French government questioned the need for an EU-wide exception and argued that such an exception should be optional, strictly limited to non-commercial scientific research, and on a purely voluntary basis.⁸¹ This stance of the French government against an exception was challenged by the French parliament which enacted an exception, albeit a limited one. The French parliament has had the opportunity to comment on the directive proposal via its committees on European affairs. Those committees did welcome what they saw as a limited exception but argued that the limited nature of the exception in the proposal should be guaranteed and even increased for fear the TDM exception would become “a complete exception to the reproduction right”.⁸² In its opinion sent to the European Parliament about the proposal, the French Senate committee even proposed “to limit this exception to only the texts and data with a research purpose and exclude commercial uses”.⁸³ It also asked the French government to pursue this more restrictive policy in its negotiations at EU level.⁸⁴ It will be interesting to see whether the change of government and the revamping of parliament following the presidential and legislative elections of the summer of 2017 will influence French policy not only in the negotiations at EU level but also in the future debates on the implementation of the directive. It is notable that Mounir Mahjoubi, who had been a strong and effective advocate for the

⁷⁸ Act on Copyright and Related Rights (Urheberrechtsgesetz, UrhG) as last amended by Article 1 of the Act of 1 September 2017 (Federal Law Gazette I p. 3346), The Federal Ministry of Justice and Consumer Protection, translation by Ute Reusch, section 60d.

⁷⁹ Id, section 60d (1).

⁸⁰ Id, section 60d (3). Section 60d (3) identifies those institutions designated for archival purposes as those referred to in sections 60e, ie libraries, and 60f, ie archives, museums and educational establishments.

⁸¹ ‘Rapport Karamanli’ n° 3366, supra note 42, p. 42.

⁸² Marietta Karamanli and Hervé Gaymard, ‘Rapport d’information n° 4136 déposé par la commission des affaires européennes sur les propositions législatives relatives à la protection du droit d’auteur dans le Marché Unique du Numérique et présenté par Mme Marietta Karamanli et M. Hervé Gaymard’ (Assemblée nationale, 18 October 2016), pages 11-12 [translated in English by the author].

⁸³ Colette Mélot and Richard Yung, ‘Projet d’avis politique sur le paquet “droit d’auteur” transmis au Parlement européen’ (Commission des affaires européennes du Sénat, 19 January 2017), paragraph 20 [translated in English by the author].

⁸⁴ Id, paragraph 24.

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TDM exception whilst president of the Digital Council (CNNum) and resigned from his position to join the campaign of Emmanuel Macron, was appointed Secretary of State for Digital Affairs. We shall see whether this new French executive will adopt a more pro-TDM stance.

3. Brexit and the scenario of the Americanisation of UK exceptions

The influence of the United Kingdom has been key on the topic of data mining. The works of Professor Hargreaves and their implementation by the government and parliament have set important milestones in the debate within member states and at European level. The UK's ambition was not only to change its national law but also the framework at EU level to authorise a broad exception, especially by making it applicable to commercial research. [*Page 34 in the original] The European Commission seems to have moved in that direction. But the UK exception remains broader in terms of its beneficiaries. As we have explained, one of the key discussion points at EU level is whether the benefit of the exception should be extended beyond research institutions, thus adopting a British approach. However, since the vote on Brexit, the UK is losing influence within the institutional EU framework, so it might not be able to pursue this agenda on the TDM front. And the discussions between the government and the European institutions are focused on much more pressing matters than copyright law. Nevertheless, it is likely that the UK will still be influential on the question of TDM. Paradoxically, the further away the UK will be from the EU, the more influence it could have on the exceptions. Indeed, if the UK were to leave the EU but stay in the single market, then it would eventually need to comply with the provisions of the future directive. If, however, the UK were to leave the single market it would regain a lot of autonomy in shaping its copyright law. It then could, like Japan, adopt a very broad TDM exception for commercial research. It could also decide to remove the requirement of non-commerciality from its research-related exception, thus reverting to the situation before the implementation of the 2001 directive. Lastly, as some commentators have pointed out, in the scenario of a hard Brexit, the UK could adopt a US-style fair use system.⁸⁵ Therefore, when drafting the EU TDM exception, European institutions must consider the scenario in which a post-Brexit Britain would adopt a very broad TDM exception and even become an outpost of fair use in Europe. The EU needs to future-proof its exception to counter a potential competitive advantage for research and innovation from the UK.

V. Arguments in favour of the broadest possible TDM exception

The directive proposal already contains many good points on TDM. It recognises the principle of a mandatory exception, opens it to all research uses, including commercial ones, and applies it to all types of works. In doing so, the proposal already lifts many of the restrictions imposed in some member states. But the EU should extend the benefit of the exception beyond research to open it to all uses or, at the very least, extend the benefit of the exception beyond research institutions.

The concerns of rightholders need to be acknowledged. However, they can also be put in perspective and balanced against the potential gains for rightholders currently being

⁸⁵ [Richard Arnold, Lionel Bently, Estelle Derclaye and Graeme Dinwoodie, 'IP Law Post-Brexit' \(2017\) 101\(2\) *Judicature* 65, p. 69.](#)

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discussed in the rest of the proposal. European law already guarantees the interests of rightholders, notably in the digital context. In Europe, rightholders can combat the reproduction and the dissemination of their works through civil and criminal lawsuits, engaging the liability of content platforms, asking for the blocking of streaming websites or even, in some countries, triggering graduated response procedures. In pursuing the legitimate goal of increasing the protection of rightholders, the EU has been innovative notably by creating the sui generis right for database producers or by affording legal protection to DRMs. It proposes to further innovate in this new directive by introducing an ancillary right for press publishers (article 11) or by reinforcing the prerogatives of rightholders against content sharing platforms (article 13 known as the 'value gap' proposal). These two proposals question the existing balances reached between the various players in the culture and technology industries. In contrast, a TDM exception, even a very broad one, would not put in jeopardy the architecture of the copyright law, or the legal arsenal at the disposal of rightholders. By requiring lawful access to the source it secures the payment of the rightholders. By only targeting the reproduction right, it does not affect the communication right, and thus not the possibility to pursue those who disseminate the works without authorisation. For instance, rightholders will still be able to litigate against Sci-hub, the illegal sharing platform for scientific publications, as they have done in the US.⁸⁶

By adopting a TDM exception as broad as possible, the EU would enable European researchers and business to compete with their US counterparts in this promising area of innovation. As we have seen, particularly in the case of the advent of the French exception, this demand from users is very strong and hard to ignore for national lawmakers. Many commentators and advocacy groups have asked for a broad exception at EU level.⁸⁷ The EU must consider the decisions already made by some member states on the topic, but it can also choose to go further than national lawmakers. As such, there is no tradition of TDM exceptions in any member state. [*Page 35 in the original] And the legal analysis upon which member states did think they had the right to create a new exception, can be questioned. At most, there are some recent exceptions that member states attached to a then narrow EU framework. The EU can go beyond those constraints and redefine the framework of its own exception.

Lastly, by enacting a broad exception, capable of competing with the benefits of American fair-use, the EU will also further legitimise the European method of elaboration of exceptions. It will show the reactivity of its legislative, rather than judicial, approach to creating new exceptions. For all those reasons, the EU should seize this opportunity to update its copyright law by adopting a TDM exception applicable to the widest number of beneficiaries and uses.

⁸⁶ David Kravtes, 'Scientific Research Piracy Site Hit with \$15 Million Fine' *Ars Technica*, 23 June 2017.

⁸⁷ See notably: Thomas Margoni and Giulia Dore, 'Why We Need a Text and Data Mining Exception (But It Is Not Enough)' [2016] Zenodo; Christian Geib, 'From Infringement to Exception: Why the Rules on Data Mining in Europe Need to Change' [2016] CREATE Working Paper 2016/07; Rosati, Eleonora, 'An EU Text and Data Mining Exception: Will It Deliver What the Digital Single Market Strategy Promised?' *The IPKat*, 22 May 2017; Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'Opinion of the CEIPI on the European Commission's Proposal to Reform Copyright Limitations and Exceptions in the European Union' (Research Paper 2017-09, CEIPI (Centre for International Intellectual Property Studies), September 2017); European Alliance for Research Excellence, 'Open Letter : Securing Europe's Leadership in the Data Economy by Revising the Text and Data Mining (TDM) Exception', 26 September 2017.

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