

IVIR - EU Copyright Data Improvement Workshop  
6 may 2021

# Text and data mining under a purposive view of the copyright infringement test

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## 2019 © DSM dir.: two text & data mining (TDM) exceptions

### For research purposes (art. 3)

- Available to **research organisations and cultural heritage institutions**
  - non-for-profit
  - Lawful access



**Contracts cannot override** the exception (art. 7(1))



**TPM can override** the exception



**Mandatory exception**

### For other beneficiaries (art. 4)

- Available to **anyone** for any purpose
- Lawful access



the use of works/other subject matter has not been **expressly reserved** by their rightholders (including by machine readable means)



**Contracts can override** the exception

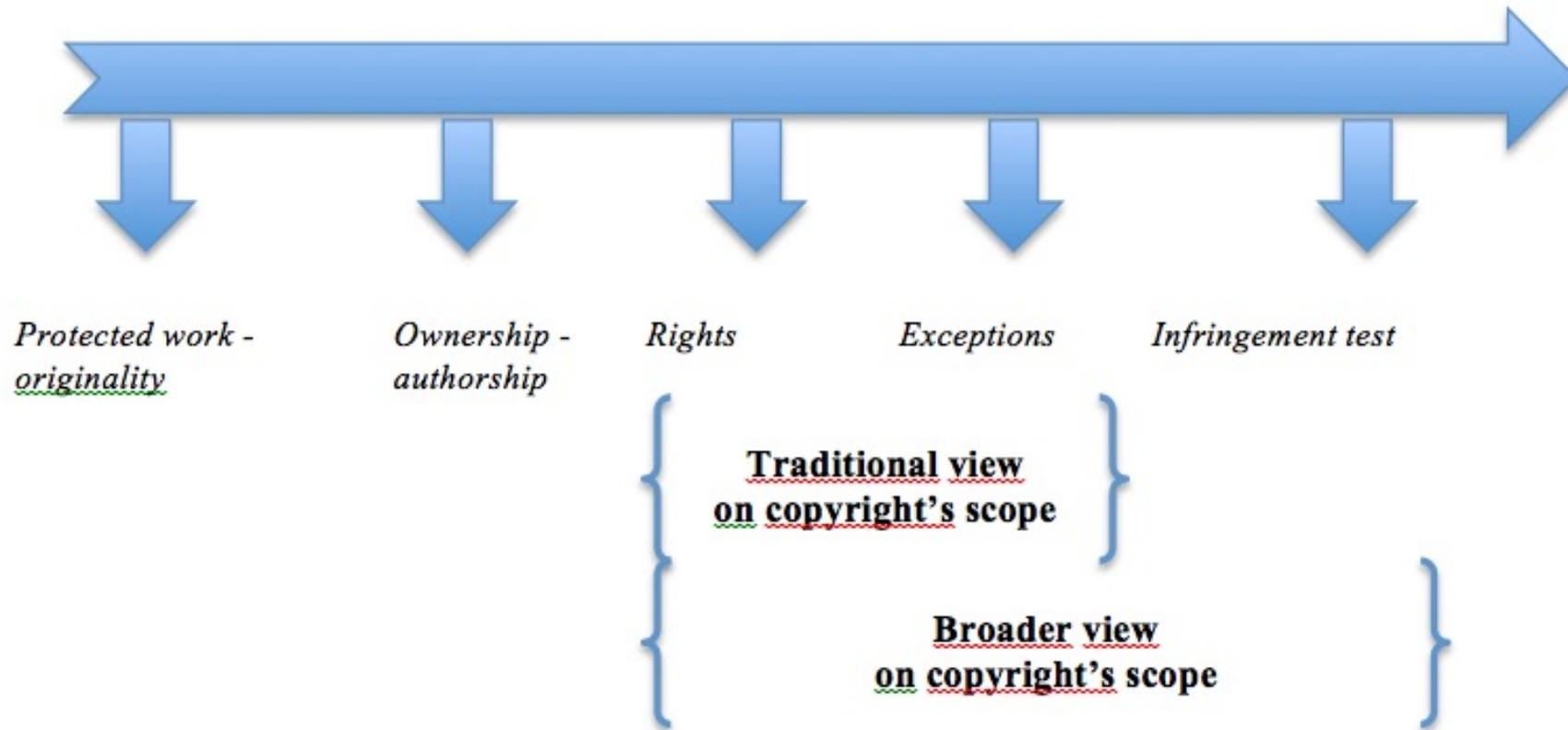


**TPM can override** the exception



**Mandatory exception**

# Scope of © protection: includes the infringement test



# Rethinking the infringement test for reproduction: a purposive view

- Infringement test: requires i) substantial similarity + ii) copying (presumed if access is proven)
- Requirement to ‘use the work as a work’ >< TDM = ‘use of a work as data’
  - See TM infringement test: ‘use as a TM’
    - Old standard in case law: no infringement if TM used in a non-branding way
      - But still works as a filter for technical uses (ex. keyword sale)
  - © : ‘use as a work’: nexus for a communication between the author and a public
    - Not in case of technical copies
    - Not in the case the work/portion of the work cannot be perceived by the audience (criterion of CJEU in *Pelham*: no reproduction if “unrecognizable to the ear”), etc.

# Thanks for your attention

## Additional references:

- R. Ducato & A. Strowel, *Ensuring Text and Data Mining: Remaining Issues With the EU Copyright Exceptions and Possible Ways Out*, *European Intellectual Property Review*, 2021, p. 322-337
- R. Ducato & A. Strowel, , *Limitations to Text and Data Mining and Consumer Empowerment: Making the Case for a Right to “Machine Legibility”*, *IIC*, 2019, Vol. 50/6, p. 649-684
- A. Strowel, *Big data and data appropriation in the EU*, in T. Aplin (ed.), *Research Handbook on Intellectual Property and Digital technologies*, Edward Elgar, 2020, p. 107-134

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