A Reflection on the Cultural Significance of the Protection of Classics
Martin Fredriksson
Page 8

License Clearance Tool: A holistic open IP and open innovation practices among research communities
Marianna Katrakazi, Panagiota Koltsida, Eleni Toli and Prodromos Tsiavos
Page 14

Balancing Article 17 CDSMD and the Freedom of Expression
Finn J. Hümer, LL.M.
Page 22

The Machinery of Creation. Oulipo Poetry, Copyright & Rules of Constraint
Kathy Bowrey and Janet Bi Li Chan
Page 36
Editorial

While producing this issue of Stockholm Intellectual Property Law Review, we are just about to say goodbye to 2022 and welcome 2023, a year we hope will be full of growth and repose from the destruction and demise of these last few years. After our previous issue celebrating the founder of the European IP Law masters programme, Professor Marianne Levin, we are excited to bring you this issue with several thought provoking articles that test the bounds of society, culture, art, and technology on IP.

In modern times, one of the most present and enduring technological advances that have had an impact on how we think about intellectual property (IP) is artificial intelligence (AI).

AI is without a doubt both a trouble maker and simulator testing the ability for IP laws to adapt to new applications and technology. From Dabus with its question as to whether AI-created inventions can be granted patent protection to the next big thing on the legality of the use of training data in developing AI, AI seems to be a never ending stream of thought provocation.

Microsoft, initially a strong opponent of the open source movement, gradually ‘joined’ in and even purchased GitHub in 2018, a platform that allows programmers to develop and store their open access code.

In 2022, a new kind of AI technology was released by Microsoft that can generate its own computer code. GitHub Copilot, as it is named, speeds up the work of professional programmers by suggesting to them ready-made blocks of computer code that they could instantly incorporate in their work. Programmers seemed to love this new tool! Well, at least most of them did. Matthew Butterick, a programmer that is also a designer, an author and a lawyer was not so happy with this latest Microsoft project and decided to file a class-action lawsuit against Microsoft and other high-profile companies that have participated in the GitHub Copilot project.

Butterick claims that GitHub Copilot was only possible due to the availability of billions of lines of computer code that was made available on the internet. It is the work of the computer programmers who spend years writing the code, and who no one is not acknowledged as a way, that in fact made GitHub Copilot. This seems to be the first legal action concerning ‘AI training data,’ the most important aspect of constructing an AI system.

Of course Butterick’s lawsuit is not the first time concerns as to the status and practices of ‘training data’ are raised. Artists, authors, programmers and composers have during the past few years raised their concerns that companies and AI researchers actually used their work without their consent and without any much less adequate remuneration. The AI applications built from ‘training data’ are extremely broad ranging from art generators to speech recognition systems and even automated cars.

Microsoft has claimed that the use of existing code to train AI is done under the legal doctrine of ‘fair use’, and this argument is definitely not a new one, however it is one that has not yet been tested in the US courts (or elsewhere).

Prior to GitHub Copilot in 2020, OpenAI (an AI lab run by Microsoft), released an AI system called GPT-3. This is an AI system that has been trained using vast amounts of digital text, thousands of books, Wikipedia articles, chat logs and other data available online. The system learned to predict what word is to come in a sentence. Gradually, it began completing the thoughts of an author by suggesting whole paragraphs, then evolving to provide whole pages, poems, articles and speeches. In fact, it could even write computer programs.

OpenAI then took the project a step further training a new system, OpenAI Codex, that was specifically trained with computer programmes. OpenAI Codex then gradually led to GitHub Copilot. And while GitHub Copilot produces only simple code that requires the contribution of a programmer in order for it to be usable, we know developments run fast.

Butterick is not only concerned with issues of acknowledgement for the authors but also with the impact this AI application will have on the global community of programmers. Being part of the open source community he claims that open source software stands today for the most important tech applications we use in everyday life. While open source code is shared freely, this sharing has its legal basis on licenses designed to ensure that it is used in ways that would benefit the community of programmers. According to Butterick Microsoft has violated the terms of the licenses and in fact, if GitHub Copilot continues to improve it will make open source programmers obsolete.

Of interest here is that Butterick does not base the lawsuit on copyright infringement but instead concentrates on claims that he argues are not subject to a fair use defense. He argues that companies have violated GitHub’s terms of service and privacy policies while also violating federal law that requires companies to display copyright information when they make use of the material.

This lawsuit is representative of the challenges AI poses on the IP system as we know it. And makes it clear that the use of training data is without a doubt important from an IP law perspective and necessary to ponder.

This issue of SIPLR discusses several issues that are part directly or indirectly of the challenges brought on the copyright system by creative processes and technological and societal changes, and how these should be managed.

In his article, A Reflection on the Cultural Significance of the Protection of Classics, Martin Fredriksson discusses the fall and rise of the protection of classics in Swedish legislation. Having the Nordfront case as a starting point, he walks you through his alluring analysis on the meaning of § 51 of the Swedish Copyright Act and in particular the meaning of violation of the ‘interests of spiritual cultivation’. 
Following this, Marina Katrakazi, Panagiota Koltsida, Eleni Toli, and Prodromos Tsiavos present in their article License Clearance Tool: A holistic open IP and open innovation practices among research communities the practical applications of a License Clearance mechanism (LCT). As explained in detail in the article, an LCT focuses on automating the clearance of Intellectual Property Rights (IPR) by ensuring the compatibility among different licenses included in the same resource. The article delves into the growth of the open source world and the value added by the LCT system.

In the third article, Balancing Article 17 CDSMD and the Freedom of Expression, Finn Hümmer discusses recent case law, national and EU legislation and offers a timely contribution to the debate on the congruity of Article 17 of the DSM Directive with the fundamental right to freedom of expression and information.

Finally, in an engaging contribution, The Machinery of Creation. Oulipo Poetry, Copyright & Rules of Constrain, Kathy Bowrey and Janet Bi Li Chan present the creative process of Oulipo poetry and analyse the impact of copyright law on this form of expression. The authors eloquently reconcile love for the art of poetry with copyright law’s influence on the art. Concluding with a unique sentiment, ‘Still, copyright law has quite a lot in common with Oulipo. Obvious similarities include that legal reasoning is often imagined as a semi-closed machine, where language choices produce new meaning. But there is a foundational plagiarism in copyright – the reproduction of a humanist authorial beneficiary of law used to anchor the legal machinery of infringement. This confinement means that copyright is unable to properly converse with artists or poets about a key difference between copyright and Oulipo. Law suppresses the cyborg in all creation.’

This issue of the SIPLR is produced by a new group of student editors and a new student editor in chief, all of them working toward their masters in European Intellectual Property Law at Stockholm University! Without their contribution the production of this issue would not be possible.

We hope you enjoy reading this thought provoking issue 2022 (2) of the SIPLR!

Frantzeska Papadopoulou
Professor of Intellectual Property Law, Law Faculty, Stockholm University
A Reflection on the Cultural Significance of the Protection of Classics

By Martin Fredriksson

ABSTRACT

This article applies a cultural perspective on § 51 of the Swedish Copyright Act, which prohibits the rendering of works in the public domain ‘in a way that offends the interests of spiritual cultivation’ (SFS 1960:729). This so-called ‘protection of classics’ was formulated in the 1950s to protect classical works against derogatory interpretations, such as popular cultural adaptations. § 51 has rarely been applied, but in 2021 it was for the first time tried in court as the national website Nordfront was accused of violating §51 by publishing works by three prominent romanticist poets in a context bordering on hate speech. The court ruled that the publication was a violation of § 51, which calls for the future of the protection of classics into question. Even though §51 might soon be obsolete, it raises a number of questions regarding the relation between law and culture. This article discusses what the protection of classics and the Nordfront case can tell us about cultural change in postwar Sweden if it is approached as a legal text and studied not primarily as a legislative process but as a process of meaning-making. The article makes no attempts to conduct such an analysis but rather aims to introduce the perspective and present preliminary reflections on how the formulation and use of protection of classics reflects changing conceptions of cultural norms and values.

THE FALL OF THE PROTECTION OF CLASSICS

In April of 2021, the Swedish Court of Patents and Trademarks passed a historic verdict when it for the first, and possibly the last, time tried § 51 of the Swedish Copyright Act.1 This paragraph, also known as the protection of classics, states that:

If a literary or artistic work is rendered in a way that offends the interests of spiritual cultivation, a court may, at the request of an authority appointed by the government, prohibit distribution and sanction a fine. What is here stated shall not apply to reproductions rendered during the lifetime of the author.2

In theory, this would mean that works of particular cultural significance can be protected against reproductions that are considered offensive, even if the works are in the public domain.3 The Swedish Copyright Ordinance states that only the Swedish Academy [Svenska akademien], the Academy of Music [Kungliga musikaliska akademien] and the Academy of Fine Arts [Konstakademien] have the right to take legal actions when classical works within their respective domains are reproduced in ways that could constitute violations of § 51.4 While § 51 has been in force since 1961, it has only been utilised on rare occasions when the academics have reacted to uses and adaptations of works that they have found to be a violation of the protection of classics. Until recently, all of these potential cases have been settled outside of court, usually after the defendant agreed to withdraw the contested publication. This changed with the case Svenska Akademien v. Nordfront & Nordiska Motståndsrörelsen [2008] PMT 17268-1 (hereafter referred to as the Nordfront case) in the winter of 2021. The case dates back to the fall of 2019, when the Swedish Academy first contacted the national online journal Nordfront for having published excerpts from the Norse epic Havamal and poems by three prominent Swedish romanticist authors: Esas Tegnér (1828-1846), Viktor Rydberg (1828-1863) and Bernhard Ohlmar (1790-1840).5 Chosen passages from the poems that appeared to express nationalistic values were juxtaposed to articles propagating hate against homosexuals and covertly celebrating the terrorist attack in Christchurch, New Zealand, in March 2019 where a white supremacist shot and killed 51 people in a mosque. The Swedish Academy argued that publications works of such cultural significance in a context that so blatantly offended common social and cultural values was a violation of §51 and urged Nordfront to take down the publication. When Nordfront refused to comply, the Swedish Academy decided to take the case to court.

Up until now, the Academies had appeared reluctant to take a more proactive role in enforcing § 51. While they had received petitions from the public to take actions against various alleged violations of the protection of classics, only a few of those had been pursued, and in those cases never in court. The vast majority of potential cases were discarded by the academies themselves. Generally, the position of the academies seems to have been that the protection of classics is too difficult to enforce as the Secretary of the Swedish Academy, Horace Engdahl, put it 15 years before the Nordfront case: ‘How do you prove that someone has violated the interests of spiritual cultivation when no one anymore can explain the meaning of the expression “spiritual cultivation”?6 On a similar note, law Professor Marianne Levin sees the lack of a common cultural frame of reference as an obstacle to properly enforcing the protection of classics: § 51 can only be enforced in a meaningful and reliable manner if there is a reasonably and commonly shared understanding of culture to refer to. This might possibly have existed for certain periods. But for most modern forms of utilizing works of art, there are hardly any commonly accepted limitations.7

Existing research tends to agree that the protection of classics is obscure, hard to enforce and incompatible with fundamental legal principles such as freedom of expression.8 For many decades the protection of classics thus had a life in the margins and the general view appears to have been that it is outdated and practically unaplicable. The ruling in the Nordfront case seemed to confirm the view that the protection of classics is a more urgent object of study than ever, if not in a legal perspective then definitely from a cultural perspective. This article will ask what the protection of classics and the Nordfront case can tell us about cultural change in postwar Sweden if it is approached as a cultural change rather than a legal text and studied not primarily as a legislative process but as a process of meaning-making. The article makes no attempts to conduct such an analysis in full, which would require a much more comprehensive study. It simply aims to introduce the perspective and present preliminary reflections on how the cultural significance of the protection of classics.

2 Om litteratur eller konstnärligt verk översätts eller ändras på ett sätt som skälerar den andliga eddiga intressen, igger domstol på takn av ryndighet som regeringen bestämmer att detta är obíveligt [§ 51].
3 Nordfront i november 2021]
4 Chosen passages from the poems that appeared to express nationalistic values were juxtaposed to articles propagating hate against homosexuals and covertly celebrating the terrorist attack in Christchurch, New Zealand, in March 2019 where a white supremacist shot and killed 51 people in a mosque. The Swedish Academy argued that publications works of such cultural significance in a context that so blatantly offended common social and cultural values was a violation of §51 and urged Nordfront to take down the publication. When Nordfront refused to comply, the Swedish Academy decided to take the case to court. Up until now, the Academies had appeared reluctant to take a more proactive role in enforcing § 51. While they had received petitions from the public to take actions against various alleged violations of the protection of classics, only a few of those had been pursued, and in those cases never in court. The vast majority of potential cases were discarded by the academies themselves. Generally, the position of the academies seems to have been that the protection of classics is too difficult to enforce as the Secretary of the Swedish Academy, Horace Engdahl, put it 15 years before the Nordfront case: ‘How do you prove that someone has violated the interests of spiritual cultivation when no one anymore can explain the meaning of the expression “spiritual cultivation”? On a similar note, law Professor Marianne Levin sees the lack of a common cultural frame of reference as an obstacle to properly enforcing the protection of classics: § 51 can only be enforced in a meaningful and reliable manner if there is a reasonably and commonly shared understanding of culture to refer to. This might possibly have existed for certain periods. But for most modern forms of utilizing works of art, there are hardly any commonly accepted limitations. Existing research tends to agree that the protection of classics is obscure, hard to enforce and incompatible with fundamental legal principles such as freedom of expression. For many decades the protection of classics thus had a life in the margins and the general view appears to have been that it is outdated and practically unaplicable. The ruling in the Nordfront case seemed to confirm the view that the protection of classics is a more urgent object of study than ever, if not in a legal perspective then definitely from a cultural perspective. This article will ask what the protection of classics and the Nordfront case can tell us about cultural change in postwar Sweden if it is approached as a cultural change rather than a legal text and studied not primarily as a legislative process but as a process of meaning-making. The article makes no attempts to conduct such an analysis in full, which would require a much more comprehensive study. It simply aims to introduce the perspective and present preliminary reflections on how the cultural significance of the protection of classics.

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8 For six decades the protection of classics thus led a shared understanding of culture to refer to. This might possibly have existed for certain periods. But for most modern forms of utilizing works of art, there are hardly any commonly accepted limitations. Existing research tends to agree that the protection of classics is obscure, hard to enforce and incompatible with fundamental legal principles such as freedom of expression. For many decades the protection of classics thus had a life in the margins and the general view appears to have been that it is outdated and practically unaplicable. The ruling in the Nordfront case seemed to confirm the view that the protection of classics is a more urgent object of study than ever, if not in a legal perspective then definitely from a cultural perspective. This article will ask what the protection of classics and the Nordfront case can tell us about cultural change in postwar Sweden if it is approached as a cultural change rather than a legal text and studied not primarily as a legislative process but as a process of meaning-making. The article makes no attempts to conduct such an analysis in full, which would require a much more comprehensive study. It simply aims to introduce the perspective and present preliminary reflections on how the cultural significance of the protection of classics.


10 Hor var dock så god att gälla återgivandet som sker under upphovsrättens inlägg. SFS 1960:729, 5. 

11 Zita Vidman, Omsorgskönsrätt: En studie av klassiker-skyddet i upphovsrättslagen och undantaga i ramen av rikedomrättigheter, mottagningsrätter och patronärligheter för allmän ordning och goda odor [Lund University, 2015].


13 Nordfront i november 2021]

14 PMT 17268-19 § 1.
Producing precisely at the intersection of the two domains—mutually constituted and legal and cultural meanings are prescribed and given attention in the last 20 years, not the least in the fields of law and cultural studies.

Law Professor Naomi Mezey argues that ‘[l]aw is simply seen as one (albeit very powerful) institutional cultural foundation of an anthropological definition of culture.13 Anthropologist Jane Cowan has taught us that “ordinarily in great detail. This is a document that in itself provides a rich source of information on modern copyright historiography, since it gives an overview over a cross section of all major aspects of copyright law that were under debate at the mid-20th century. In this article I will appraise the 1956 report not primarily as a legal source but as a document reflecting and responding to the social, cultural and media historical process in postwar Sweden. I will thus contextualize the source in relation to modern cultural history rather than to legal history. Finally, I will ask what the Nordic front case can tell us about contemporary cultural dynamics against the backdrop of that cultural history.

The Rise of the Protection of Classics

The origins of the 1956 report date back to 1938, when the justice department appointed a committee of experts on authors’ rights to draft a new copyright act to replace the existing law from 1919. Due to the outbreak of the Second World War the work was postponed, but in 1956 the committee of experts, supervised by law Professor Gösta Eberstein, finally presented a new copyright act that would eventually become the Law on Copyright to Literary and Artistic Works (Lag om upphovsrätt till litterära och konstnärliga verk, SFS 1950:792). The prehistory of § 90b by the committee of experts was appointed, since the formulation of the protection of classics in the 1956 report was directly inspired by a discussion about a public paying domain that had been going on since the 1920s.

Public paying domains existed in many countries in Europe and elsewhere in the 20th century. They have taken various shapes in different contexts, but fundamentally a public paying domain allows the state, a collecting society or a similar organisation, to charge a fee for reproductions of older works that are in the public domain. The proposal was intended to aid the livelihoods of rights holders who were considered the spiritual heirs of writers from the past.4

In 1942, a proposition to include a public paying domain in the Swedish copyright law was presented to the government. The proposal was considered but finally rejected on the grounds that such a provision could increase the price of literature by imposing something akin to a tax on classical works, and that such interference in the realm of literature could violate cultural freedom and integrity.5 During the following decades, the question would resurface regularly, only to be repeatedly rejected on similar grounds. While the idea of a public paying domain as a tool for economic redistribution never gained the approval of the Swedish legislators, a parallel narrative about protecting cultural values and the artistic integrity of the classics emerged in the discussions. Many of the proponents of a public paying domain argued that a positive side effect of such a provision would be to provide a tool for the state to maintain a certain level of the publication of older works and prevent bad or disrespectful editions of classical texts. When the committee of experts drafted the copyright act of 1960 it once and for all discarded the idea of a public paying domain, arguing that the need for a law that gave the public the authority to interfere to protect the moral values in the more significant works of art and literature.6 The consequence of this was the drafting of § 91. The need for some kind of moral rights protection for works in the public domain was motivated by a fear that new commercial media practices would undermine established cultural values. This was evident already in the first proposal for a public paying domain from 1934, which argued that the state needed legal means to protect the ‘free’ literature from being reprinted in substandard editions by unscrupulous publishers.7 When the state in 1956 once and for all discarded the idea of a public paying domain, it was sent to the Swedish Writers Union (Svenska Författareförbundet) for referral. The Writers Union wholeheartedly embraced the idea of an extended moral rights protection for works in the public domain which it saw as a timely response to the numerous threats to the integrity of literary works presented by the modern publishing industry: threats ranging from censorship based on moral or political considerations, to purely commercial compromises. The Writers Union was primarily concerned that publishers would sacrifice eternal literary qualities for quick returns, and as a result, wrongfully copyright acts in shortened or badly edited versions. These fears were related to a belief that the proliferation of popular culture and light entertainment had a negative impact on public taste and caused general deterioration of literary sensibilities. The Writers Union lamented the public’s tendency to listen more to glossy advertisement from dubious publishers than to serious literary critics: How little attention the Swedish public pays to the critical warnings about all the bad things that are offered when it comes to books, is most obvious if we look at the Nick-Carter-literature which could only be temporarily exterminated through the social democratic youth clubs’ boycott of the vendors.8

Here the Writers Union made a reference to the so-called Nick-Carter debate that arose in Sweden in 1956. Nick Carter was the protagonist in an American series of crime novels that were widely distributed in newspaper stalls and kiosks across Sweden in 1906, in cheap translations. As such, the Nick-Carter-literature was the emblematic case of crime and adventure catering particularly to young readers, came to represent literature of dubious quality undermining the morals of young adults.

A moral panic arose around the Nick Carter novels and numerous civil and political organizations, from socialists to conservatives, joined forces to battle the new generation of decadent literature—soon to be known as Nick-Carter-literature—which was viewed as a threat to the moral and mental decay among the youth.9 The Nick Carter saga ended quickly when the distributors cancelled the series in 1909, after the social democratic youth club had launched a wide spread boycott against vendors who sold Nick Carter novels. The debates about the virtues of popular literature nevertheless persisted since a new form of cheap and entertaining literature tailored for youth was now an established part of the Swedish book market, and by 1945 it was obviously still personified by Nick Carter. While the Nick Carter novels were far removed from literary classics the Writers Union raised them as an example of the greed and lack of scruples that characterized developments of the commercial publishing industry, implying that publishers deal this carelessly with contemporary literature protected by copyright, then works in the public domain might be even more vulnerable.10

A presumption that commercialism and popular culture presented a threat to established cultural values persisted throughout the discussions about a public paying domain and culminated with the inclusion of the provision of classics in the 1960 Copyright Act. The 1956 report however expanded the discussion to a wider range of media, beyond literary texts. This move was indicative of the copyright act of 1960 emerged in a time of rapid change, and one of its goals was to amend the failures to address the new media technologies of the 20th century that had marked its predecessor, the copyright act of 1909, which paid little attention to the emerging film medium.

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1 Naomi Mezey, Law as Culture’ in Austin Sarat and Jonathan Simon (eds), Cultural analysis, cultural studies and the law (Duke University Press 2003) 65.
2 Ibid.
3 See also Richard A. Wilson, Culture and Rights: A philosophical analysis, cultural studies and the law (Duke University Press 2003) 45.
4 Forstå kammaren, Motion no 11, 1924.
6 Forstå kammaren, Motion no 11, 1924.
7 Yrke idrottsföreningen och författargewerkskapet i sitt aktionsflöde över att frågorna skulle befallas av Rekommendation 1945/1946 förstå kammaren, Motion no 11, 1924, 14.
8 Förstå kammaren, Motion no 11, 1924, 14.
9 Förstå kammaren, Motion no 11, 1924, 14.
10 Förstå kammaren, Motion no 11, 1924, 14.
and, for obvious reasons, left out broadcast media entirely. Consequently, the new media landscape that emerged after the war was addressed in various ways in many parts of the report, including those that discuss the protection of classics. Here the modern music industry also entered as a potential threat to traditional cultural values. Apart from dubious editions of literary works the report also made references to jazz paraphrases of classical compositions as examples of offensive reproductions of classical masterpieces.

This indignation over jazz paraphrases was nothing new; in a consultation with the Swedish Organisation of Composers (STIM) [Svenska tonsättarens internationella musikbyrå] regarding another proposal for a Swedish public paying domain law in 1956, STIM warned against the proliferation of jazz paraphrases of classical works by respected composers such as Chopin and Wagner. The fact that jazz adaptations were still a controversial issue in the early 1960s, is evident not only from the examples in the report, but even more from the fact that the first utilization of the protection of classics in Sweden concerned a jazz adaptation. In September 1960, just three months after the new copyright law entered into force, the Academy of Music received a petition from STIM regarding a new record by Duke Ellington: Swinging suites in the USA but had yet not reached the Swedish market. The record consisted of a series of jazz interpretations of classics. After taking the case under consideration, the Academy of Music agreed that the recording was ‘offensive to the Nordic musical culture’. The potential racial undertone to this indignation becomes more evident considering that the Swedish piano player Jan Johansson could release his widely acclaimed jazz adaptations of Swedish folk songs, Jazz på Svenska [Jazz in Swedish], just three years later.

The protection of classics clearly emerged as a response to the modern transformation of Swedish society. It was seen as a necessary tool to stifle the challenges to cultural values and norms brought on by a changing book market, a new media landscape a proliferation of more or less commercial forms and genres of art and entertainment. In short, it was an attempt to maintain traditional cultural hierarchies and protect high culture against the destructive influence of popular and youth culture. Regard- dered in retrospect, the views and values that underpinned the protection of classics seem anachronistic, and the legislators of 1960 almost appear to be taking a last stand against an approaching wave of cultural change which was, at that time, only mounting at the horizon. Just ten years later the general frame of reference had changed radically: jazz had been accepted as high art and in 1970 Duke Ellington was appointed an international member of Sweden’s Academy of Music.

Conclusion: Nordfront revisited

Studying the origins and history of the protection of classics within its contemporary cultural context gives an example of what Meezy means when she argues that ‘legal and cultural meanings are produced precisely at the intersection of the two domains.’ In this case, legal and cultural discourses about aesthetic values interact in a joint articulation of the necessity to protect high culture against the threat of commercialism and popular culture; a stance that can essentially be seen as a reaction against the forces of modernity that culminated in the postwar years. The subsequent applications of the protection of classics, leading up to the Nordfront case on the other hand show that neither the law nor the cultural values with which it is enmeshed are static, but works as a legal/cultural system that, as Meezy puts it, ‘order and reorder meaning’.

It is significant that the first case regarding a violation of § 51 that made its way to court did not concern the kind of popular cultural or commercial adaptations addressed in the preambles of the Copyright Act, but was a reaction against an ultraconservative use of a Nordic literary heritage. The case was presumably carefully chosen by the Swedish Academy which had been grappling with how to manage the protection of classics for decades. Calling on the protection of classics to challenge a nationalistic use of canonized works could be seen as an attempt to use a conservative tool against reactionary forces. In the press release, the Academy argued that it had used Nordfront hoping for the court to clarify what could be defined as offensive to interests of spiritual cultivation. Turning to national socialism, one of the most blatant violations of current social and cultural values, comes across as an attempt to probe the limits of what could be defined as offensive to interests of spiritual cultivation. Returning to Levin’s observation that the protection of classics cannot be enforced without a ‘distinct and common understanding of culture’, it appears that the Swedish Academy was trying to establish egalitarian and democratic values as such a common cultural understanding in the Nordfront case. The court, however, discarded the changes on the grounds that the works had not been adapted and, consequently, § 51 did not apply even if the work had been published ‘in a context that from a general cultural perspective appears to be offensive’. Thus, while the court agreed that the context is offensive, it evaded the question of how to define the ‘interests of spiritual cultivation’ by ruling that the way in which the works are rendered does not qualify as a violation of § 51.

The verdict in the Nordfront case takes us back to square one, where we still lack clear guidelines of how to apply the protection of classics which now comes across as more anachronistic than ever. In light of this, the Swedish Academy’s choice of words when it argues that the protection of classics needs to be ‘modernized’, might not be incidental. It can be read as an acknowledgement that the protection of classics is out of date and a call for the law to adapt to the processes of cultural change that the legislators tried to defer in 1956. The Nordfront case thus highlights the need to reorder legal meaning to fit a contemporary common cultural frame of reference. The question is if and how a provision like the protection of classics, that was formulated to maintain a hegemonic understanding of taste in the monocultural Swedish society of the 1950s, can be applied at a time characterised by heterogeneity and multiculturalism. Here we are not only grasping with a legal dilemma but also with a cultural one and the analysis of law interacts with that of heritage, power and cultural change that occupies other disciplines such as Critical Heritage Studies, Cultural Studies and Postcolonial Studies.

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26 Martin Fredriksson, Skapandets rätt: ett kultureritetsläggande perspektiv på den svenska upphovsrättssystemets historia (Linköping 2009).
27 SOU 1937:20, § 18.
28 See also, in this context, the Academy of Music’s characterization of the Norwegian composer’s canonical work as ‘offensive to the Nordic musical culture’.
29 § 45.
30 ‘De uttalanden som görs i förarbetena om klassikerödningen uttrycker avsikten att det inte kan vara möjligt att arbeta på ett omfattande avsnitt av verkets, definierade som ”klassiker”, där det inte blir tillåtet att avverga ”klassiker” och att det skall kunna innehålla ett omfattande avsnitt av ”omröstade” verk vilket vi ansåg inte vara i samsvar med den nationella situationen, å andra sidan ej att ett ”områdes delat” avsnitt av verk omröstade som ”klassiker” skulle kunna innehålla ett omfattande avsnitt av ”klassiker” [SOM 378-379, (1938)].’
License Clearance Tool: A holistic open IP and open innovation practices among research communities

ABSTRACT

Open Science (OS) movement, remote collaboration among research communities and the increased quantity of new content, data and resources, have made it clear that traditional licensing schemes require new tools that would combine technical and legal features, as well as techno-licensing tools.

In fact, the diversity of open licenses deprived from standardization frequently leads to situations where more than one open license with different or conflicting terms apply at the same time, and hence it gives rise to license compatibility concerns. This creates a legal uncertainty that may discourage authors, scientists, and researchers from releasing their work under an open license. In this paper, we identify legal and technological barriers that pose a challenge in adopting open science practices; thereafter, we present the new tool, named License Clearance Tool (LCT), which has been developed by the Athena RC (Greece) as part of the National Initiatives for Open Science in Europe – NI4OS-Europe (https://ni4os.eu/), a European project that contributes to the European Open Science Cloud (EOSC) by supporting its activities in Southeast Europe. LCT is an open-source tool, which provides a holistic approach addressing IP issues. LCT focuses on automating the clearance of Intellectual Property Rights (IPR) by ensuring the compatibility among different licenses included in the same resource and assists users on the selection of the most suitable license by providing a content summary of them with respect to permissions, prohibitions, and obligations in relation to the user needs. It is intended to support mainly researchers and non-legal experts in general to publish in FAIR/open modes.

1 INTRODUCTION

The advent of low-cost Information and Communication Technologies (ICT) and the World Wide Web in the early 1990s led to increased generation of new content and knowledge, as it allowed the collection of large amounts of data and information that could be easily used, copied, modified, or distributed for further use, often with no or without significant financial or technical barriers. For the first time in the history of humanity such an extended collaboration between researchers and the production of collaborative research outcomes had been made possible and new opportunities emerged for scientists and researchers to publish and share the content of research projects, scientific papers and large data sets or developments to a great extent followed collaboration patterns found in Free / Open Source Software (FOSS) communities. FOSS practiced a licensing model based on a premise of sharing and collaboration rather than exclusion and direct exchange. In case of content, reusability of copyright rights worked was achieved through open content licenses.

The Creative Commons (CC) initiative, which was initially set up in 2002, contains a set of various licenses that allow people to share their copyrighted work to be copied, edited, built upon, etc., while retaining the copyright to their original work. CC provides six core licenses, each of which allow stakeholders to use the original work in different ways. While there are different CC licenses, all CC licenses include certain standard rights and obligations. CC initiative constitutes one of the most successful open content licensing schemes and provides authors with a great variety of licenses for literary, musical or audiovisual works enabling them to choose the most appropriate one that meets his/her needs. CC initiative aims to make copyright content more ‘active’ by ensuring that content can be reutilized with a minimum of transactional effort. Thus, the emergence of FOSS and open content licenses together with ICT revolution has brought a new economic model for the sharing of digital resources and the reusability of existing knowledge. It has also created new challenges and opportunities for Open Access movement, as defined in the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities (2003). The Open access movement constitutes an essential attribute of Open Science (OS) and aims to make scientific knowledge openly accessible in ways that maximize its value to science and society. Research can benefit from the greater scrutiny offered by open science, as it allows for a more rapid verification of research results, whereas authors experience an increase in the number of citations their works receive in the open access environment. At a global level, international institutions and other bodies have taken many initiatives aiming to implement Open Science mechanisms and some countries have made efforts to adapt legal frameworks and implement policies encouraging greater openness in science. On the EU level, the European Commission has placed a great emphasis on the adoption of OS practices during the last years. Individually, several pieces of EU legislation were adopted in order to facilitate the reuse of research data, such as Public Information Infrastructure (PSI) and the EU Copyright Directive. Furthermore, the open-access policy of Horizon 2020 projects provides for open-access to publications by default. Additionally, in 2018 the European Open Science Cloud (EOSC) was launched in the context of the broader Digital Single Market strategy, which constitutes a pan-European federation of data infrastructure supported by the EC, Member States and research communities. EOSC aspires to provide a solid framework for collaboration and the pooling of resources at European, national, regional and institutional levels. Elsevier has made it clear that traditional licensing schemes and all stakeholders wishing to contribute to EOSC are highly encouraged to use open content and open software licenses.

There is thus a growing need to develop legal and technological solutions to cater not only for the increased knowledge sharing, but also to allow scientific practices supporting openness and collaboration to flourish. However, the proliferation of FOSS and Open Science projects led to a series of issues of what became known as the problem of the fragmentation of the commons, i.e. the creation of multiple licensing schemes that were not necessarily compatible with each other. For a resource provider, choosing the appropriate license for a combined resource or choosing the appropriate licensed resources for a combination is a difficult process, given that it involves choosing a license compliant with all the licenses of combined resources. The Open access movement creates a legal uncertainty that may discourage a resource provider from choosing the appropriate licensed resources for a combination, which in turn may prevent the free use and dissemination of content.

12 OECD, “RIS3 Rules of Participation” (2021), Art. 5.
18 Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities [2001], https://openaccess.degs.info/berlin-declaration-
software companies have started to adopt open-source licensing models as part of their business, and many scientists choose to make their work freely available. Open licenses include a series of different licenses and many sub-categories thereof. According to the most acceptable definition on open licenses provided by the Open Source Initiative, an open license contains the following features: (1) free distribution of the software; (2) free access to the source code (just reproduction costs are covered); (3) authorization of modifications and the distribution of derived works; (4) no discrimination between people and fields of endeavor; (5) no restriction on software; and (6) technological neutrality as well as independence from a specific product. Such licenses vary, depending on the copyrighted work (software, data, content or other) and the rights and powers granted to users, such as the right to use a work, to merge two different works, to relicense a work under different terms, etc.

b) Standardization aspects

In addition, a standardization problem exists, namely, license texts may either form part of the source file or may be missing completely. Even in cases where license information is put at the beginning of a source file, it usually does not follow any standard.3 This diversity of open-source licenses deprived from standardization frequently leads to situations where more than one open license with different or conflicting terms apply at the same time, and that in turn gives rise to license compatibility concerns. For instance, a license that excludes commercial use cannot be combined with a license that permits so and they, thus, may be jointly used. Similarly, a license that forbids the distribution of a derivation (remix, transform or build upon) cannot be combined with a license that permits so.

Joint use of different licenses may happen in case of relicensing, dual licensing, publishing, or in case of derivative works, either by adding a new material to the existing work and seeking for a new license for the new work, or by combining two works with different licenses. For instance, in open software licenses, the problem that many software vendors often face is to incorporate third party software in their implementations completely without causing any license violations, guaranteeing thus legal compliance.4

c) Broadening of initial license scope

Another confusing aspect of licenses relates to their scope: most open licenses have been developed for licensing open-source software. They differ from open licenses that have been developed for licensing other material, which is also protected by copyright.

This situation affects the scientific community and all stakeholders wishing to use an open license for their work. It constitutes a major barrier, in open access, because it creates legal uncertainty that discourages authors, scientists, and researchers from releasing their work under an open license; the need for sufficient expertise to detect compatibility conflicts between licenses leads to high transaction costs associated with the manual clearance of licensing terms and conditions. Especially for software, the dependency-related license violations are overlooked and misunderstood by the developers for various reasons. Managing dependency-related license violations is difficult and the developers are demanding help.5 Furthermore, for an individual author who wishes to make his/her publication open access, the procedure used to select the appropriate license for his/her work can be cumbersome; individual negotiations, for example, can be a burden on the author.6 In case of a combined resource, the selection of the appropriate license is even more challenging, because it involves choosing a license compliant with all the licenses of combined resources as well as analyzing the reusability of the resulting resource through the compatibility of its license.7

d) Plethora of applicable legal requirements.

Sharing of knowledge (including texts, methods, etc.), data and tools, hereinafter referred to as ‘intellectual assets’, in the context of EU’s Open Science policy presupposes that such assets comply with the applicable and local Member State regulations; otherwise, no intellectual asset can be used safely and thus all stakeholders from across academia would be discouraged from using and sharing assets under the Open Science ecosystem. Thus, compliance with the applicable licensing frameworks guarantees the establishment of a trust framework in which open practices can be embraced as the modus operandi for all interested parties. In addition, intellectual assets are usually subject to more than one different legal regime regulating their use.8 For instance, where open science involves the processing of personal data, it is subject to the applicable rules including the General Data Protection Regulation (GDPR);9 or, if it includes confidential information, it is subject to contractual limitations (e.g. Non-Disclosure Agreements) and legal limitations (e.g. Trade Secrets legislation). Finally, before any intellectual assets are made available, they will need to be cleared off any other IPR, ranging from Trade Secrets to Patents and Utility Rights, as well as by other contractual or statutory restrictions, e.g. cultural heritage laws, national security provisions or statistical confidentiality provisions.10 In other words, the key sources of legal transaction costs stemming are: first, issues of rights clearance and compliance with the various intellectual regulatory frameworks; and second, issues of license compatibility when multiple assets under different - and often conflicting - terms are combined.11 This is reflected in the relevant Open Data European Legislation, particularly Open Data Directive (Directive (EU) 2019/840 on open data and the re-use of public sector information), where it is expressly mentioned that all the aforementioned legal limitations should be taken into consideration and be excluded from the scope of application of the Open Data Directive according to the principle ‘as open as possible, as closed as necessary’.12

e) Absence of publicly available tools for rights clearance.

Despite the proliferation of assets licensed under open licenses, and the fact that there are tools mostly focusing on the documentation of rights clearance processes as well as tackling license compatibility issues, major problems still exist. Most notably, such problems include: (a) the lack of free to access rights clearance tools; (b) the lack of maintenance of open licenses compatibility or public domain calculation tools, as well as the lack of traceability on license changes; and (c) the absence of linking compliance and clearance assessment to publicly available in open repositories resources.

3 THE LICENSE CLEARANCE TOOL (LCT)

The License Clearance Tool (LCT), a tool that is consistent with EU’s open science policy, comes as a response to the increased demand for holistic technical solutions suitable for promoting the adoption of open science practices and the re-use of existing research and other types of work. In comparison to pre-existing tools dealing merely with a guided choice of open licenses, LCT has at its core the resource, or the digital asset generated either as original or derivative work. It helps addressing issues of copyright, privacy and confidentiality, data protection, limitations of national legislation, as well as any other additional limitation that may further restrict the use of the asset in the Open Science ecosystem. More specifically, LCT enables the proper IPR management through the clearance of open licensing terms and conditions, the indication of any applicable embargo policy and any other limitation that relates to cultural heritage legislation. It aims to facilitate and automate the clearance of rights (copyright) for datasets, media and software that are to be cleared before they are publicly released under an
when creating the workflow of LCT. It automates the clearance based on the actions or omissions that each standard open-source license provides for. These have been put in a matrix, to allow the comparison ‘all with all’ and unveil compatible and conflicting licenses. More specifically, we selected 73 most used standard open-source licenses for a wide variety of assets such as software, hardware, font, data etc. We reviewed the legal text of each license and categorized them on the basis of permissions, duties or prohibitions stipulated in each license (e.g. creation of derivative works, commercial use, distribution etc.) and upon comparison, licenses have been compared to each one in pairs. Licenses have been further classified in distinct license elements for each of the three categories. Through this assessment a core element of the application has been created, the license compatibility matrix. An important concern in our work, has been to increase the legal transparency and awareness of the users. For this reason, the dedicated ‘License Information’ section is available, and users can navigate through it to understand the main elements of each open license. More specifically, this section provides a short summary as per license that enables users to check their elements with respect to the permissions, prohibitions and obligations, which determine the conditions under which the work is released: indicatively the permission to allow commercial use or not, permission of modification (creation of derivative works), or reciprocity obligation (copyleft or permissive). In this way, a codified version of licenses’ summaries has been created, and next to each element an explanatory note has been added for the users’ convenience so that they can understand the meaning of each attribute and select the most suitable license that corresponds more closely to their needs. A URL link leading to the entire legal text of each license has been created, the license compatibility matrix. A codified version of licenses’ summaries has been created, and next to each element an explanatory note has been added for the users’ convenience so that they can understand the meaning of each attribute and select the most suitable license that corresponds more closely to their needs. A URL link leading to the entire legal text of each license has been added for the users’ convenience so that they can consult it for more details. This section was a key step in LCT’s development, as it allows the codification of licensing practices and further contributes to the reduction of transaction costs in the reuse of assets licenced under an open license. All users can easily compare among open licenses and choose the most appropriate one simply by navigating through the tool.

3.2 LCT approach & methodology

LCT is offering a user-friendly and intuitive web user interface enabling its users to efficiently clear their work on a resource basis, receive a clearance report including all the provided information and retrieve detailed information for each supported license. The tool incorporates two main scenarios aiming on supporting the two most common use cases, as these were described by our target users during the design process. The ‘resource driven clearance’, where the user aims to associate an appropriate open-source license for existing work composed by different elements that are licensed separately, or the ‘license driven clearance’ for derivative work that combines licenses from the originating Licences or possibly unlicensed content and the reverse rights clearance procedure. Both scenarios incorporate all IPR, personal and other rights related to the resource, aiming at raising awareness on the most common legal aspects that affect the future usage and exploitation of the cleared resource.

To support these scenarios, LCT has developed a compatibility mechanism able to calculate the compatibility among an arbitrary number of given licenses. This mechanism is enhanced with the option to further limit the compatible licenses based on a set of given attributes that should be met. These attributes are a subset of the list of license elements for each of the four categories. The web application is supported by a web service responsible for the initiation and display of the guided wizards, the license compatibility check, the report generation, and the user’s management. LCT’s dynamic approach has been reflected in the development of two different schemas for each scenario, using the JSON notation, that model the different inputs and the structure of each workflow that is dynamically interpreted by the front-end application and is displayed to the end users. Following this design approach our application can dynamically accompany any changes in its wizards, eliminating the need of source code updates and releases. Figure 1 presents an architecture block diagram of the LCT application showcasing the different modules and services and the interaction with external modules for the authentication of the registered users.

3.3 LCT workflows

Two main workflows are supported in LCT. These are following the two possible usage scenarios the application covers. Workflow I in the flowchart below, describes the process designed in the tool to implement the first usage scenario. It starts with a new rights-clearance process initiated by the user by selecting the type of the resource under clearance. The process is bound to the resource itself and not the user who performs the clearance, allowing different users to complete the clearance of the same work. It is then followed by the association of each input/used internal resource with a corresponding ‘license-in’ and the required information. The application invokes the compatibility module and calculates the list of the compatible open-source licenses based on the previous ones and allows the user to select the desired one. In the last step additional information related to personal data and other rights is collected and the clearance is submitted leading to the generation of a compatibility report for the provided resource. In case no compatible licenses are found, the process can be refined or aborted.
The difficulties lie not only in the need to be up-to-date with the current developments in terms of law, policies or other regulations with binding effect, adopted at either international or EU level, but also in the way this legal information is accessed and used. Techno-legal tools such as LCT do provide a possible solution, however further work is needed to support the changing and increased needs of researchers for publishing open and FAIR. In this frame, LCT development investigates changes in two directions. A first expansion aims at including even custom licenses in order to properly address legal complexity. The potential direction for future work is the comparison of ‘standard to custom’ and ‘custom to custom’ licenses that poses a challenge for both directions: on the one hand, it involves a detailed legal analysis on the compatibility of licenses, and on the other hand it requires the technical deployment of the solution, which could be achieved though appropriate means that would make feasible the classification of custom licenses to specific license elements, thus enabling their automatic compatibility assessment with existing standard licenses and allow their usage in research outcomes and other types of work. A second development direction under consideration for LCT, is the implementation of crowdsourced clearance. This requires a parallel effort at two levels: creating the grounds by setting up the environment, technically, as in a platform, and physically, as in community building, driving awareness, generating motivation. This will allow to provide a complete framework for crowdsourced clearance of custom licenses. The advantages of an open and citizen science-oriented approach are evident: as researchers aim to work in increasingly open and reproducible ways to address challenges and solve problems, the crowdsourced license clearance can help to identify the best options and increase reproducibility even more. We are well aware of the difficulties and limitations of the above processes may have. We consider, however, that they considerably enhance the sharing and use of knowledge in open research environments, without compromising in terms of awareness of the general legal framework as well as of IPRs.

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ABSTRACT

Balancing Article 17 CDSMD and the Freedom of Expression

1 INTRODUCTION

Nothing less than the demise of the internet was feared, and massive protests rallied behind the #SaveYourInternet to prevent the introduction of upload filters through Art. 17 of Directive the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market. The Directive 77(4)(b) CDSMD has been the subject-matter of debate. It has been suggested that it would effectively oblige online platforms to filter all content, because the technology cannot properly differentiate between lawful and unlawful content, which results in the prevention of the latter.9 These concerns were also reflected in an action from Poland regarding a request to annul Art. 77(4)(b) and (c) CDSMD in fine.10 It mainly argued that these provisions prescribe the use of automatic content recognition (ACR) tools, which carry the risk of blocking lawful content and this even before its dissemination and therefore its prescription constitutes a serious interference with the fundamental right to freedom of expression and information.11 Indeed, the best effort obligation in Art. 77(4)(b) CDSMD has thus been formulated vaguely. As a matter of fact, national implementations tend to translate the term differently.12 Furthermore, the exact duty for OCSSPs remains unclear. This is also due to the development of the provision: in the first proposal of the EU Commission, ‘effective content recognition technologies’ were explicitly mentioned as exemplary measures to ‘prevent the availability on their services of works or other subject-matter identified by right holders’.13 To tackle the concerns which arose after its first proposal, the legal text was not only extensively amended (the original proposal encompassed merely three paragraphs in comparison to today’s ten), making the matter more complex (including the whole Directive) but also substantially altered, the explicit mention of content recognition tools struck out, and safeguards for the user’s freedom of expression introduced.4 In its Guidance on Art. 17 CDSMD, the Commission strives to present Art. 17 CDSMD as technologically neutral and emphasises that the use of technological solutions is not explicitly prescribed.15 That this does not reflect the full truth, however, is already clear from the Guidance itself. Pursuant to Art. 77(4)(b) CDSMD and Recital 66, industry practices are to be included in the assessment of ‘best efforts’. According to the Guidance ‘this includes the use of technology or particular technological solutions’.16 The same conclusion can be drawn from the case law of the Court of Justice of the European Union (CJEU). Already in YouTube and Cyando, the court considered the fact whether a platform put in place ‘the appropriate technological measures’ that can be expected from a reasonably diligent operator in its situation in order to credibly and effectively copyright infringements on that platform’ in its liability assessment of the platform operator.4 This outcome is also represented by the AG in Peterson v Google LLC and Others. The CJEU ended this perspective in its judgement, adding that ‘neither the defendant institutions nor the interveners were able, at the hearing before the Court, to designate possible alternatives to such tools’.

The following discusses the impacts of Article 17 CDSMD and to avoid liability, the use and concomitant interference with the freedom of expression are attributable to the EU legislator.

The following discusses the impacts of Article 17 CDSMD on freedom of expression and information as enshrined in Article 17 of the Charter of Fundamental Rights of the European Union as well as the contained safeguards, implications from the judgement in Poland v Parliament and the General, and the American approach to Article 17 CDSMD.

2 SAFEeguarding Article 17 CDSMD and balancing fundamental rights

Art. 17 CDSMD is located in the triangle of interests of rights holders, platform operators and users. It is therefore hardly surprising that the rights to intellectual property law from Article 17(4) of the Charter, freedom to conduct a business from Article 16 of the Charter and, above all, freedom of expression and information from Article 11 of the Charter must be reconciled.

2.1 Article 17 CDSMD’s impact on fundamental rights

Strengthening the negotiating position of rightholders and making the enforcement of their rights more efficient is an integral part of Article 17 CDSMD. As the individual reporting of content to the platforms in the past led to considerable costs and was too inefficient, the liability mechanism and the use of ACR technology should support rightholders. This reflects the shift of responsibility for monitoring from the rightholders to the OCSSPs.23

In this course, the fundamental right to intellectual property, which is recognised as such in Article 17(2) of the Charter, supports the interests of the rightholders. It is not an absolute right and can be restricted in the same way the right to property can be subject to restrictions or limitations.24

The CJEU confirmed this view in Scarlet Ex tended, stating that ‘there is no absolute protection under the wording of this provision or in the Court’s case-law to suggest that that right is inviolable and must for that reason be absolutely protected’.25

For OCSSPs, Article 17 CDSMD entails some changes compared to the earlier legal situation. They are held directly liable within the scope of Article 17 CDSMD for copyright infringing content from their users if they cannot successfully make use of the exception regime of Article 17(4) CDSMD. Instead of the previously exercised voluntaryness, which gave them a negotiating superiority, they are now obliged to take the measures to protect the copyright of the rightholders.26 As those measures must be ‘in accordance with high industry standards of professional diligence’, the OCSSPs are thus limited in their choice whether and how they want to encounter copy right infringing content on their platforms. On the one hand, the obligations from Article 17 CDSMD therefore entail restrictions on the freedom to conduct a business pursuant to Article 16(1) CDSMD. On the other hand, the CJEU’s decision in Scarlet Extended showed the ability of the freedom to conduct a business as a limiting factor for the protection of intellectual property and made clear that technical possibilities can only be included to a certain extent in the balancing process.27

It is, however, the users of online platforms, which are fast becoming a fundamental asset in the context of Article 17 CDSMD and to avoid liability, the use and concomitant interference with the freedom of expression are attributable to the EU legislator.

Limiting freedom of expression and information

It follows from the above that Article 17 CDSMD constitutes a limitation on the freedom of expression and information. In Poland v Parliament and Council, the CJEU concludes that ‘such a prior review and prior filtering are liable to block content before (ex ante) or after (ex post) it gets uploaded. In case of lawful content being wrongly blocked ex ante before its dissemination however, this requires the user to use a complaint mechanism, as provided for in Article 17(9) CDSMD, to bring their content online. Such an approach would be disadvantageous to the freedom of expression of users, as it entails ‘chilling effects’, i.e., a decrease in the activity of those users.’28

27 C-401/19 Poland (n 12), Opinion of AG Saugmandsgaard Øye [31].
29 For instance, the freedom to receive and impart information on the other hand protects the freedom of the press, whereas the right to work protects the right to financial support.
33 Case C-401/19 Poland (n 12), Opinion of AG Saugmandsgaard Øye [48] – [50].
34 For instance, the freedom to receive and impart information on the other hand protects the freedom of the press, whereas the right to work protects the right to financial support.
37 Case C-401/19 Poland (n 12), Opinion of AG Saugmandsgaard Øye [62] – [64].
38 For instance, the freedom to receive and impart information on the other hand protects the freedom of the press, whereas the right to work protects the right to financial support.
39 Case C-401/19 Poland (n 12), Opinion of AG Saugmandsgaard Øye [55].
40 For instance, the freedom to receive and impart information on the other hand protects the freedom of the press, whereas the right to work protects the right to financial support.
44 The fundamental right protects both sides of a discourse: it can be communicated. This freedom of expression on the one side comprises the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. It covers opinions, ideas and all types of information that can be communicated. The freedom to receive and impart information on the other hand protects the free access to information without interference by public authority.
It is, however, not an absolute right. The possibility of restriction follows on the one hand from the interaction of Article 10(2) ECHR through Article 52(3) of the Charter and on the other hand from the general reservation of Article 52(1) of the Charter. According to these provisions, in order to be justified, any limitation must be provided for by law, respect the essence of the right to freedom of expression and be proportionate, i.e. the limitation must be justified by objectives in the public interest and not exceed the limits of what is appropriate and necessary.

In the light of intellectual property the CJEU ruled in its Promusicae decision that Member States must, when transposing the directives, take care to rely on an interpretation which allows striking a fair balance between the various fundamental rights. In Poland v Parliament and Council the CJEU repeated this. 4 Even Recital 84 itself states that the Directive should be interpreted and applied in accordance with the fundamental rights and principles recognised in particular by the Charter.

2.2 Article 17 CDSMD’s safeguards

In order to address the above mentioned concerns and to ensure that Article 17 CDSMD strikes indeed a fair balance between the fundamental rights, the European legislator has introduced numerous safeguards during the legislative process.

Preventing overblocking: Between the poles of paragraphs 4 and 7 of Article 17 CDSMD First, Article 17(7) subparagraph 1 CDSMD states that the cooperation between online content sharing service providers and rightholders shall not result in the prevention of the availability of works [...]. Despite this direction, some of the derogations and limitations encompassed in the catalogue of Article 5(3) InfoSoc has now become mandatory and it has ascertained a minimum standard of exceptions and limitations. Additionally, according to Article 17(3) CDSMD, in fine, OCSSPs are required to ‘inform their users in a clear, unambiguous and not limited to requiring best efforts to’[...] the extent necessary to avoid their own content being arbitrarily and excessively blocked.64 At the same time, however, it is not an absolute right.47 The possibility of prevention of overblocking is, therefore, not an absolute right. The possibility of overblocking is, therefore, not an absolute right. The possibility of overblocking is, therefore, not an absolute right. The possibility of overblocking is, therefore,
content ‘which [unlawfulness] is obvious from the outset, that is to say, it is manifest, without, inter alia, the need for contextualisation’. In the same vein, the Commission also stated in its Guidance that ‘automated blocking, i.e., preventing the upload of content by technology means, is not necessary if the [ex ante] safeguards [...] the providers of those services nonetheless erroneously or unjustifiably block lawful content’. Independently, the procedural safeguards are therefore not sufficient and they apply only in exceptional cases. It underlines also the general importance of the ex ante safeguards, which limit the use of technology to manifestly infringing content.

Clear and precise rules

Adding lastly on the need for clear and precise rules, the CJEU refers to its Facebook Ireland ad Sher RMS ruling in which it held that the need for safeguards is altogether the greater where the interference stems from an automated process. The provision in Article 17(4)(b) and (c) CDSMD, however, is far from establishing clear and precise rules, as it does not define the actual measures which OCSSPs must adopt to fulfil their obligations. According to the CJEU, this is justified by the fact that the clause is intended to be transposed to the development of industry and technology. Furthermore, in order to preserve the freedom to conduct a business from Article 16 of the Charter, it should be up to the OCSSPs to decide which specific measures they use to achieve this goal.

This justification seems rather curious. For one thing, it has been repeatedly stated on all sides that there is hardly any way around the use of ACR technologies within the framework of the best efforts, and whether it is precisely the uncertainty about the extent to which technology may be used that led to the present doubts of compatibility with fundamental rights. If OCSSPs are given too much leeway to take measures, it is to be feared that these will be in their favour rather than in the interest of users. It is therefore necessary to set minimum requirements for the choice of means. In the UPC Telekabel, the CJEU held that it is up to the ISP to choose the means to achieve the objective, but it must then also ensure that the users are provided with an effective remedy in the light of the information provided by the rightsholders and of any exceptions and limitations to copyright. Complying with this standard, is now the task of the Member States.

In its final statements of the judgement in Poland v Parliament and Council the CJEU made clear, that the complaint mechanism is considered only as an additional ex post safeguard, which applies in cases where notwithstanding the [ex ante] safeguards [...] the providers of those services nonetheless erroneously or unjustifiably block lawful content. In the same vein, the Commission’s Guidance recommends to Member States to strike a fair balance between the various fundamental rights protected by the Charter. Considering this, Member States have a freedom of choice when transposing Article 17(9) subparagraph 2 CDSMD to ensure that the users are provided with an effective remedy in the light of the information provided by the rightsholders and of any exceptions and limitations to copyright.

3 IMPLICATIONS OF THE CJEU’S JUDGMENT IN POLAND V PARLIAMENT AND COUNCIL FOR THE NATIONAL TRANSPONATIONS OF ARTICLE 17 CDSMD

To determine whether content can be blocked ex ante, the CJEU established the test of manifestly infringing content, i.e. whether content, in order to be found unlawful, would require an independent assessment in the light of the information provided by the rightsholders and of any exceptions and limitations to copyright. Compiling with this standard, is now the task of the Member States. In its final statements of the judgement in Poland v Parliament and Council the CJEU rules, that ‘Member States must, when transposing Article 17 of Directive 2009/59/EC into their national law, ensure that the freedom of information of the users is preserved, i.e. that the content stays down during a pending decision, if and only if the existence of manifestly infringing content is proven. In case of an allegedly wrong block, the complaint mechanism takes effect, through which users can demand the reinstatement of the content. The ex post complaint mechanism is intended to deal with cases in which the existence of manifestly infringing content is disputed. In this case, however, neither the judgement nor the text of the law foresee that the content at hand must remain online until the conclusion of such proceedings sought by the user. In fact, the judgement suggests that the content stays down during a pending decision, stating that ‘users must be able to submit a complaint where they consider that access to content which they have uploaded has been wrongly blocked’. The very existence of the case in front of the CJEU, as well as the positions taken by Spain and France in the case, according to which the ex post safeguards are sufficient, shows that Article 17 CDSMD is open to various interpretations, not all of which are in line with the ruling. It is the task of the Member States to create a clear legal framework here. The CJEU clearly requires the Member States to review their transposition to analyse whether they, in accordance with the judgement, provide sufficient ex ante safeguards. A verbatim transposition in national law, however, must in correlation with the ruling be considered as contrary both with Article 17 CDSMD and with EU primary law, i.e., the fundamental rights guaranteed. Whereas the CJEU attested Article 17 CDSMD to be accompanied by appropriate safeguards by the EU legislature in order to ensure a fair balance of fundamental rights, the same must also apply to those national legislators who chose to copy and paste Article 17 CDSMD in national law. As in addition, the Member States, when interpreting national law with a basis in EU law, must ensure that it is interpreted in conformity with EU law, and must also have regard to the case of the CJEU, a conforming interpretation of a verbatim transposition should be ensured.

3.2 Complaint mechanism

While some Member States like the Netherlands chose to transpose verbatim, most implemented an individual version of Article 17 CDSMD. One diverging aspect has been the ex post safeguard in the form of the complaint mechanism as established in Article 17(9) CDSMD.

One example is a provision in the Italian transposition, which states that content shall remain disabled during the pending decision on a complaint. In the aftermath of the judgement, it is argued that ‘this requirement does not meet the standards developed by the Court and Member States with such a provision will therefore need to bring their implementation into compliance with the standards set by the CJEU.’

If Member States follow the requirements for the ex ante safeguards, however, a provision like this could be regarded as compatible with the judgement: In their national implementations, Member States must ensure that ex ante safeguards exist which prevent the blocking of content which is not manifestly infringing. Assuming OCSSPs follow the national obligations, they will only block content, which they, inter alia, consider to be manifestly infringing. In case of an allegedly wrong block, the complaint mechanism takes effect, through which users can demand the reinstatement of the content.

In this context, the question arises whether Member States which choose to implement the Directive verbatim, meaning copy and paste the text of the Directive, need to adjust their national laws.

As its proceedings were an annulment action, i.e. not a question of referral, the CJEU only assessed Article 17 CDSMD itself as an EU provision, and expressly stated that its judgement is without prejudice to the transpositions of the Member States or the individual measures of the OCSSPs. In combination with the abovementioned reminder of the CJEU for Member States to strive a fair balance, this could imply an obligation for Member States to provide additional safeguards with clear provisions explicitly prohibiting overblocking, and thus go beyond what Article 17 CDSMD itself contains. The very existence of the case in front of the CJEU, as well as the positions taken by Spain and France in the case, according to which the ex post safeguards are sufficient, shows that Article 17 CDSMD is open to various interpretations, not all of which are in line with the ruling. It is the task of the Member States to create a clear legal framework here.

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C-401/19 Poland (n 12) [73].
C-401/19 Poland (n 12) [75].
CJEU upheld Article 17(9) subparagraph 2 CDSMD.
C-401/19 Poland (n 12) [76].
C-401/19 Poland (n 12) [77].
C-401/19 Poland (n 12) [78].
C-401/19 Poland (n 12) [79].
C-401/19 Poland (n 12) [80].
C-401/19 Poland (n 12) [81].
C-401/19 Poland (n 12) [82].
C-401/19 Poland (n 12) [83].
C-401/19 Poland (n 12) [84].
C-401/19 Poland (n 12) [85].
C-401/19 Poland (n 12) [86].
C-401/19 Poland (n 12) [87].
C-401/19 Poland (n 12) [88].
C-401/19 Poland (n 12) [89].
C-401/19 Poland (n 12) [90].
C-401/19 Poland (n 12) [91].
C-401/19 Poland (n 12) [92].
3.3 Earmarked content

Finally, the ruling casts doubt on the compatibility of earmarked content in the form envisaged by the Commission’s Guidance. The term relates to content flagged by rightholders that is particularly valuable and could cause significant harm to them if it remains available without authorization (examples include pre-released music or films). According to the Commissions Guidance the earmarking should be specifically taken into account when assessing whether the OCSSPs have made their best efforts to ensure the unavailability of specific content as obliged in Article 7(4)(b) CDSMD. This means in particular that the OCSSPs should exercise particular care and diligence in the application of their best efforts obligations before uploading such earmarked content. Guidance needs revision in light of the judgement After its release, this new mechanism was heavily criticized as being not specific enough in determining which content can be earmarked by the rightholders. According to these concerns, the requirements to be met by the rightholders are too weak, as ‘the mere claim that unauthorized use of a work ‘could cause’ significant economic harm is insufficient’. Therefore ‘earmarking could easily lead to a presumption for the platforms that the content is manifestly illegal and thus potentially to an over-blocking of all earmarked content to avoid liability or litigation’.

This closeness to what was outlined before: ex ante blocking of content is only permissible if no independent assessment is necessary, i.e., the content is manifestly infringing. This must not change even if content is earmarked by rightholders. Nonetheless, it does not follow from this that earmarking per se is incompatible with Article 17 CDSMD, but rather the provisions of Article 17 CDSMD must be respected. On the contrary, earmarking could be used, for example, to carry out an accelerated procedure following the upload. This is because, according to the Commission’s Guidance, when the content becomes available, rightholders will receive a notification if the ACR technology detects possible infringing content. The rightholders then have the possibility of a complaint and redress mechanism to have the content checked and, if necessary, blocked. If the content is earmarked, it is conceivable that this could be prioritised. Such a proposal takes a similar approach as the trusted-flagger mechanism envisaged by Article 19 of the upcoming Digital Services Act and would fulfil the requirements set by the CJEU.

4. The German Approach

With the CJEU stating that OCSSPs cannot be required to prevent uploads of content which would require an independent assessment to determine it as unlawful. Although framed as ‘rapid ex ante review’, this is nothing else than a detailed legal examination.

Proposal for a mechanism in compliance with Article 17 CDSMD

This closes the circle to what was outlined before: ex ante blocking of content is only permissible if no independent assessment is necessary, i.e., the content is manifestly infringing. This must not change even if content is earmarked by rightholders. Nonetheless, it does not follow from this that earmarking per se is incompatible with Article 17 CDSMD, but rather the provisions of Article 17 CDSMD must be respected. On the contrary, earmarking could be used, for example, to carry out an accelerated procedure following the upload. This is because, according to the Commission’s Guidance, when the content becomes available, rightholders will receive a notification if the ACR technology detects possible infringing content. The rightholders then have the possibility of a complaint and redress mechanism to have the content checked and, if necessary, blocked. If the content is earmarked, it is conceivable that this could be prioritised. Such a proposal takes a similar approach as the trusted-flagger mechanism envisaged by Article 19 of the upcoming Digital Services Act and would fulfil the requirements set by the CJEU.

Refaining from doing so would open the necessity for OCSSPs to develop a definition in practice, likely influenced by courts in the EU. It seems at least questionable to leave it up to the private OCSSPs to decide when content can be blocked ex ante, whereas the outcome has a direct impact on the liability of the host provider. Therefore, it would be a risk that an OCSSP, in order to avoid liability, would interpret the border of what is manifestly infringing generously in order not to risk liability under Article 17 CDSMD when it concerns content that could have been blocked after all. This would raise the same concerns of overblocking and merely shift them to another level. In its opinion, the AG pointed out that the lack of a clear and detailed obligation for preserving the balance with freedom of expression and information. Moreover, detailed regulations for OCSSPs with regard to the question of which content may not be blocked in the first instance were already enacted by Germany in its transposition long before the ruling of the CJEU and the Commission’s Guidance and will therefore be examined in the following.

4.1 Uproar: Implications from the CJEU’s case law

Before turning to the German approach, it is noteworthy to summarise the followings from the existing case law, in particular the Glawischnig-Piesczek and YouTube and Cyando cases. The CJEU held in the latter, that Article 17 CDSMD clarifies that the providers of those services cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, require an independent assessment of the content by the host in the light of the information provided by the rightholders and of any exceptions and limitations to copyright. Thus, OCSSPs shall not be obliged to remove content which could be considered unlawful. This idea was first brought up by the CJEU in its Glawischnig-Piesczek case, which, although being a defamation case, had to be found manifestly unlawful in the context of copyright. Here the court was concerned with an injunction about filtering and blocking ex ante content, which could be considered ‘equivalent’. This could be for example content which whilst essentially conveying the same message, was worded slightly differently, because of the words used or their combination, compared with the information which was allegedly used to be illegal’. Balancing the interests of the host provider and the interests of the victim of defamation, the Court found that the content of an equivalent nature does not require the host provider to carry out an independent assessment, since it had recourse to automated search tools and technologies.

Putting these two judgements together, it is possible to summarise that content can be considered manifestly infringing even if it is equivalent to infringing content. Already in the aftermath of the Glawischnig-Piesczek judgment, it could be concluded that the CJEU is taking the first steps in the direction of how algorithmic enforcement is acceptable. The same can now be said about the Poland v Parliament and Council ruling.

Another aspect is the mentioned ‘fast ex ante human review’. Following the concept of the Guidance, content which is earmarked should be subject ‘when proprietate and where possible, practicable, [to] a rapid ex ante review’ of the content checked and, if necessary, blocked. If the content is earmarked, it is conceivable that this could be prioritised. Such a proposal takes a similar approach as the trusted-flagger mechanism envisaged by Article 19 of the upcoming Digital Services Act and would fulfil the requirements set by the CJEU.
4.2 The German approach: excluding ‘presumed legal use’ from ex ante filtering

Under the same premise of preventing lawful content from being filtered and blocked ex ante using ACR technology, the German legislator has found a different solution, which also Australia had essentially followed. The provision of Article 17 CDSMD was implemented in a separate act, the Urheberrechts-Diensteanbieter-Gesetz (Copyright Service Provider Act ‘UrhDaG’). This act formalizes the blocking process and gives rightholders the opportunity to mark their works as legal, which, if done, will prevent any ACR technology from filtering the content as infringing. The blocking process involves the rightholder marking the content as legal, and the OCCSPs then notify the user that the content is legal, thereby avoiding any potential legal action.

The solution found by the German legislator can either be considered a rebuttable presumption or an exception to copyright.\(^{134}\) Defining this is of importance for the discussion of compatibility with EU law.

The mechanism has as a result that content from users which fulfill the requirements from Sec. 9(2) UrhDaG and have a maximum length or size as defined in Sec 10 UrhDaG, must initially be regarded as legal, meaning they shall not be blocked automatically. This is a major step forward in the pre-blocking process, as it allows for a determination of how the platform will handle the content without it being infringing.

According to Sec. 14(5) UrhDaG, rightholders can then request that the content be taken offline by the OCCSPs, thereby allowing for a determination of whether the content is infringing or not. This is a significant step forward, as it allows for a determination of the content’s status without it being automatically blocked.

In practice, a balance is found between the interests of rightholders and users, as users have the opportunity to mark their content as legal, while rightholders have the opportunity to request the content be taken offline if they believe it is infringing.

4.3 Considerations regarding the compatibility with Article 17 CDSMD

4.3.1 Exception and limitation or rebuttable presumption?

It is argued that the instrument of presumed legal use in fact contains elements of an exception and limitation, which are listed exhaustively in Article 5 InfoSoc.\(^{139}\) If one accepts the almost unanimous view that Article 17 CDSMD contains indeed the same right of communication/making available to the public as Article 5 InfoSoc, it follows from this that an exception and limitation in national law, which is neither contained in Article 5 InfoSoc nor in Article 17 CDSMD itself, cannot be compatible with secondary EU law.

This can be countered by the fact that Sec. 9(2) UrhDaG only provides for a rebuttable presumption. It is true that according to Sec. 14(5) UrhDaG, the user is not responsible for the use under copyright law until the conclusion of a complaint procedure. On the contrary, however, the presumption is rebuttable and therefore does not have a final effect.\(^{140}\) In practice, the mechanism leads to the OCCSPs not being allowed to ex ante block content covered by the presumption. This is in line with the CJEU’s interpretation of Article 17 CDSMD, because the CJEU has ruled that content which requires an independent assessment may not be blocked preventively.\(^{89}\)

4.3.2 Fixed criteria for the design of OCCSPs algorithms

The German provision sets clear threshold values. Theoretically, it is not impossible that a 25-second video, even in its brevity and under the conditions of Sec. 9(2) UrhDaG, contains infringing content. According to the underlying assumption of the German legislator, this is just not very likely.\(^{139}\) Ultimately, the legislator tries to define what can be considered infringing without the need for an independent assessment. It thus creates legal certainty for OCCSPs, which can adapt their algorithms accordingly. At the same time, rightholders are still able to pursue infringing content as they will be notified by the OCCSPs in case of ‘presumed use’ in accordance with Sec. 9(2) UrhDaG.
The criteria set out in Sec. 9(2) and Sec. 10 UrhDAG are by no means those with which Germany stands alone. In its Guidance the Commission formulates a similar approach as it defines, that relevant criteria to determine manifestly infringing content ‘could include the length/size of the identified content used in the upload, the proportion of the matching/identified content in relation to the entire upload [...] and the level of modification of the work.’

AG Saugmandsgaard Øe argues similarly in his opinion, proposing to determine thresholds ‘above which automatic blocking of content is justified and below which the application of an exception, such as quotation, is reasonably conceivable’. In addition, he suggests a mechanism which allows users to flag whether they benefit from an exception or limitation at the time of uploading content.

This shows that the German mechanism might be the first, which was established into law, but the concept is by no means on its own. In fact, the Commission’s Guidance and the AG opinion suggest using similar criteria for defining manifestly infringing content.

4.3.3 Earmarking in the German transposition

Another aspect which has to be raised is the earmark-like re-exception of the German transposition in Sec. 7(2) sentence 3 UrhDAG. According to the above mentioned, ex ante safeguards of minor use and flagging during the upload in case when automatic means are used, shall not apply to uses of cinematographic works or moving images of sporting events, insofar as the rightholder requests until the completion of their first communication to the player who fears liability when coming to a wrong outcome in one way or another. The urgently necessary revision of the Commission’s Guidance could serve as a platform for this task.

In this context, the German implementation of Article 17 CDSMD should be considered, which contains some additional ex ante safeguards that are not found in the EU template. They provide, however, important guidelines for the OCSSPs on how to design the algorithms. This pays off in terms of legal certainty, both for the OCSSPs, which are less tempted to overblock, and for the users, who do not have to fear that legal content will be blocked. The rightholders have to accept this solution in the sense of a balance of interests, they are free to block certain content via the complaint mechanisms, manifestly infringing content will be blocked ex ante.

5 FINAL REMARKS

Both the AG in his opinion and the Court in Poland v Parliament and Council have stated, that the obligations of Article 17(4) CDSMD de facto requires the use of technology. The CJEU, however, has now attached a clear condition to its use: Blocking content ex ante using ACR technology, is only permissible as long as the technology can distinguish between lawful and unlawful content. This is derived from the safeguards of Article 17 CDSMD, which can thus preserve the balance between the fundamental right of freedom of expression and information and right to intellectual property.

It is therefore for OCSSPs and Member States to ensure that only manifestly infringing content, i.e. content that does not require an independent assessment, is blocked ex ante using ACR technology. The question, however, of how to determine whether an independent assessment is required remains open. Where does the line run? Providing an answer is crucial for the impact on the freedom of expression and information, as it determines how content is blocked in practice, aside from the legal requirements. Its definition should be the task of the national or EU legislator, to not leave the decision of when content should be assessed to the player who fears liability when coming to a wrong outcome in one way or another. The urgently necessary revision of the Commission’s Guidance could serve as a platform for this task.

In this context, the German implementation of Article 17 CDSMD should be considered, which contains some additional ex ante safeguards that are not found in the EU template. They provide, however, important guidelines for the OCSSPs on how to design the algorithms. This pays off in terms of legal certainty, both for the OCSSPs, which are less tempted to overblock, and for the users, who do not have to fear that legal content will be blocked. The rightholders have to accept this solution in the sense of a balance of interests, they are free to block certain content via the complaint mechanisms, manifestly infringing content will be blocked ex ante.

The judgement in Poland v Parliament and Council also has implications for other national implementations. Most importantly, it is argued here, that a verbatim transposition would indeed stand up to the requirements derived from the fundamental rights, as Article 17 CDSMD was held to contain enough safeguards. Further, provisions which require content to stay down during a complaint mechanism must not be regarded as incompatible per se. Rather they would be compatible with Article 17 CDSMD and its interpretation from the CJEU, if they are limited to manifestly infringing content. Lastly, the assessment shows that the earmarking mechanism as proposed by the Commission is unlikely to ‘survive’ this ruling. From what follows from the CJEU’s judgment, such a mechanism cannot be used to circumvent the ex ante availability of lawful content or content which requires an independent assessment to be determined as unlawful.

Earmarking content, however, could be used to function as an indicator for a fast-track review for content that is of higher economic value to the rightholders. With these premises, the trusted flaggers regime from Article 19 DSA Proposal will be interesting to follow.
ABSTRACT
This article explores the double burden of creative regulation – the aesthetic restrictions artists choose and their interaction with copyright rules, using the example of Oulipo, a constraint-based creative practice. Part One explains the Oulipo movement. Oulipo technique is then demonstrated in new poems by artist and poet Janet Bi Li Chan, based on existing works, Franny Choi’s Turing Test and Tracy K Smith’s ‘Sci-Fi’, applying word substitution (N + 7), erasure or blackout technique, and remixing. Part Two applies a copyright law reading to the new poems. We show how legislative frameworks measure all creators – regardless of artistic self-identity and process – as if they were humanist authors. But in application tests also produce far more surprises than might be expected if law is conceived of as rule-based constraint. Part Three applies Oulipo techniques to key articles of the Berne Convention that permit artistic licence: Art 9 Right of Reproduction; Art 10 Certain Free Uses of Works; and Art 10bis Further Possible Free Uses of Works. These new Berne poems highlight the prescriptive face copyright law presents to creators. We argue it is the emotional resonance of copyright, rather than its technicality, that primarily impacts creative practice. We conclude that law reproduces an idealised imaginary of a humanist author to measure creative transgression and this confinement means that copyright is unable to properly converse with artists or poets. Law suppresses the cyborg in all creation.

INTRODUCTION
In Creativity is ruled by constraints. Some constraints come into play through artistic choices about the technologies and mechanics that govern the production of creative works. Other restrictions are imposed by the artist’s understandings of or instincts about copyright law that impact artistic practice and in particular, how works are disseminated. This paper explores the interaction between creative and legal constraints discussing new creative works by one of the authors, artist and poet Janet Bi Li Chan. Chan engages in experimental creative practices that are defined by explicit adherence to rules of constraint. Her practices sit uneasily alongside copyright law’s respect for the original work, requiring negotiation about the limits of the law in order to exhibit or perform works.

Oulipo poetry provides a focus for our discussion. Oulipo dates from 1960 with a group of writers and mathematicians in France, who explored rule-based constraints. Chan’s poetry examples include word substitution (N + 7)—taking an existing poem and replacing each noun in a text with the seventh one following it in a dictionary; erasure or blackout poetry, where the poet takes an existing text and erases, black out, or otherwise erases selected text; and remixing of an existing text. Oulipo does not require the use of digital tools, but these form part of Chan’s practice.

The paper is in three parts. Part One presents three examples of Oulipo and explains the relevant artisan and technological processes and motivations. Part Two applies a copyright law reading to these practices. Part Three applies Oulipo techniques to the key articles of the Berne Convention that permit artistic licence: Art 9 Right of Reproduction; Art 10 Certain Free Uses of Works; and Art 10bis Further Possible Free Uses of Works. Chan’s creative engagement with international law highlights the prescriptive face copyright law presents to creators. We explore the double burden of creative regulation – the aesthetic restrictions artists choose and their interaction with copyright rules. We depart from recent scholarship that frames appropriation, transformative works and remix in terms of an imagined dichotomy between original/appropriative art or positive law/negative space to profile in the examples Oulipo, a constraint-based creative practice, as an institution that polices plagiarism mechanically.

Unable to fully comprehend the machinery of creation, as an institution that polices plagiarism mechanically. Unable to fully comprehend the machinery of creation, copyright reproduces an idealised imaginary of a humanist author to measure creative transgression. While it is not the main focus of discussion, this creative experiment in legal thinking has relevance to current research into the status of AI-generated works under copyright law.

PART ONE.
OULIPO: CREATIVITY THROUGH CONSTRAINTS
In this paper we examine three examples of a constraint-based creative practice to explore the possible (unintended) consequences of copyright laws. The examples are part of one of the authors’ (Chan) practice in making poetry using ‘found text’ and certain rule-based constraints in line with Oulipo, a method for writing literature.

The aim of this method is to ‘invent’ or ‘reinvent’ constraints of a formal nature (constraints) and propose them to enthusiasts interested in composing literature. These constraints provide ‘structure’, ‘form’, or ‘technique’ to ‘transform’ (or ‘translate’) existing text. 1 This has been suggested that the use of constraints and structures are the result of the Oulipian philosophy that operating under such conditions is liberating and dispenses with the need to inherent artistic talent. 2

Although there are scores of such constraints in existence, 3 for the purpose of this paper, we will focus on three techniques: the N+7 (or W±n), erasure, and remixing of existing text.

1 The name Oulipo is derived from Ouvroir de Littérature Potentielle or the Workshop for Potential Literature.
2 The use of ‘found materials’ to construct the ‘collage poem’ is said to be a literary form that follows the visual arts practice of surrealist objet trouvé such as Marcel Duchamp’s Fountain (1917). The artist does not create something out of nothing, rather, they become the ‘arranger’ or curator of pre-existing text. See Tom Chivers (ed.), Adventures in Form: A Compendium of Plastic Forms, Rules & Constraints 2nd edition, Penrose in the Margins 2010: 11. See also JR Carpenter, Writing on the Cusp of Becoming something else in Ann. Jeffreys and Sarah Kember (eds), Whose Book is it Anyway? 10Bis Book Publishers 2015.
4 Oliver Bray, Playing with Constraints: Performing the Oulipo and the ‘cin- eman-performer’ (2016) 214(2) Performance Research 61. Bray quotes ‘That which certain writers have introduced with talent (even with genius) in their work – the Ouvroir de Littérature Potentielle (Oulipo) intent is to do systematically and scientifically, if need be through resource to machines that process information’ (Francois La Lande), Lipo: First manifesto in Werner Mohr (ed), Oulipo: A primer of potential literature (Dalkey Archive Press 2011): 17.
5 Index of Constraints, Terry (n 3) 527-534.
N+7 method
This method involves replacing all nouns in an existing text with nouns 7 places down in the dictionary. This method can be modified by replacing other parts of speech (e.g., adjectives) with the same method of counting N places up or down a dictionary. Of course, with the variation in the number of words in dictionaries, and the more popular use of online dictionaries, the results can vary depending on which dictionary is used.

Erasure
Erasure of words in an existing text is another used in Oulipo practice. For example, Raymond Queneau removes most of the words at the end of the lines in sonnets by Mallarmé to create a new poem ‘Redundancy in Phane Armé’. This is similar to a number of erasure poems such as Tom Phillips’ ‘A Humument’, and M. NourbeSe Philip who turned the legal decision Gregson v. Gilbert on the drowning of 300 enslaved Africans into Zong.

Remixing text
The term ‘remix’ does not appear in the vocabulary of Oulipo techniques, however, the technique is similar to that of ‘reassemblage’, a collage of ‘fragments assembled – from the same source’. Richard L Edwards sees ‘restrictive remixes’ in contemporary art practice as a form of Oulipian technique.

Relaxing the rules
Even though rules are intended to be followed strictly, there is in Oulipo the concept of ‘clinamen’, which ‘represents a moment when a particular constraint is broken, usually for aesthetic reasons – but it is something which should only be used when it is also possible to complete the writing task without breaking the constraint, and it is something which should be used sparingly.’ Harryette Mullen has acknowledged that ‘For me, the constraints, procedures, and language games are just ways to get past a block or impasse in the process of writing.’ Constraints in poetry
As Tom Chivers points out, form ‘can be employed as a tool for creativity: it is way of “soothing” the “fears of the blank page... by taking some choices away and by demanding that you make new choices”; constraints also produce “fruitful frustration and resistance.”’

To grapple with a self-imposed limitation is to compete against oneself, to stymie the first impulse again and again. We learn to question the easy solution, to stretch our vocabulary, to reconsider and flex our syntax. Forced out of our regular habits (and we all have writing habits), we adapt... I’m free but I’m bound, and in the space between those two poles exists a generative, creative tension.

Experiments
The following experiments in Oulipo poetry were conducted by one of the authors’ (Chan) use of two original texts, a poem ‘Turing Test’ by Franny Choi and a second poem ‘Sci-Fi’ by Tracy K Smith.

The two poems were chosen on the basis of their content (both focus on aspects of modern technology), their acceptance by the poetry world as worthy of publication, and the currency of their copyright. They are therefore not ordinary pieces of ‘found text’ (e.g. newspaper articles, text from old books) often used in artistic appropriation, rather, the use of even a limited amount of text is potentially in breach of copyright law.

The form of a poem is the deliberate and sustained organisation of visual and aural elements such as line length, metre, rhyme, the distribution of certain letters and sounds, and so on; but can also manifest as its guiding principle. A poem’s form is distinct from, yet inescapably related to, its content... The imposition of form and the desire to escape or reinvent it is, of course, the eternal paradox of art... form is a kind of willing restraint: an instrument of control wielded by the poem against its author.

The use of constraints in poetry writing is also seen as a tool for creativity: it is way of ‘soothing’ the ‘fears of the blank page... by taking some choices away and by demanding that you make new choices’; constraints also produce ‘fruitful frustration and resistance’.

3 Tress Richard L Edwards, ‘Remixing with rules’ in David Laderman and Laurel Westrups (eds) Sampling Media (Dobbs Scholarship Online 2016) DOI: 10.19195/sampl e/7bb199f34311.003.0000.
4 Terry (n 3) 572.
5 Ibid S55.
6 Chan (n 11) 10.
8 ‘Turing Test’ was published in The Poetry Magazine, Summer issue, 2016. Franny Choi is a published poet and a finalist for multiple national poetry awards.
9 ‘Sci-Fi’ was in Tracy K Smith (2011) Life on Mars published by Graywolf Press. Tracy K Smith is a published poet and multiple award winner, including the Pulitzer Prize for Poetry for Life on Mars. In 2017, she was named US poet laureate.
Example 1

TURING TEST
By Franny Choi

// this is a test to determine if you have consciousness
// do you understand what i am saying

in a bright room / on a bright screen / i watched every mouth / duck duck reel / i learned to speak / from puppets & smoke / orange worms twisted / into the army's alphabet / i caught the letters / so they fell from my mother's mouth / whisper past / sword of wit / i clicked countable nouns / in my father's science papers / sodium bicarbonate / NBS87 / amino acid / we stayed up / practiced saying / girl / girl / girl / / till our mouths grew soft / yes / i can speak / your language / i broke in / that horse / myself //

// please state your name for the record

bones / spit dribbler / understudy for the underdog / uphill rumor / fine-toothed cunt / sorry / my mouth's not potty trained / surly spice / self-sabotage spice / surrogate runner / born / burgeoning hamburger / rust puddle / harbinger of confusion / harbinger of the singularity / alien invasion / alien turned potty mouth / alien turned bricolage beast / alien turned pig heart thumping on the plate //

// where did you come from

man comes / & puts his hands on artifacts / in order to contemplate lineage / you start with what you know / hands, hair, bones, sweat / then move toward what you know / you are not / animal, monster, alien, bitch / but some of us are born in orbit / so learn / to commune with miles of darkness / patterns of dead gods / & quiet / a quiet like / you wouldn't believe //

// how old are you

my memory goes back 26 years / 23 if you don't count the first few / though by all accounts i was there / i ate & moved & even spoke / i suppose i existed before that / as scrap or stone / metal cooking in the earth / the fish my mother ate / my grandfather's cigarettes / i suppose i have always been here / drinking the same water / falling from the sky / then floating / back up & down again / i suppose i am something like a salmon / climbing up the river / to let myself fall away in soft, red spheres / & then rotting //

// why do you insist on lying

i'm an open book / you can rifle through my pages / undress me anywhere / you can read / anything you want / this is how it happened / i was made far away / & born here / after all the plants died / after the earth was covered in white / i was born among the stars / i was born in a basement / i was born miles beneath the ocean / i am part machine / part starfish / part citrus / part girl / part poltergeist / i rage & all you see / is broken glass / a chair sliding toward the window / new what's so hard to believe / about that //

// do you believe you have consciousness

sometimes / when the sidewalk opens my knee / i think / please / please let me remember this

ENDTRANSCRIPT //

Using N + 7

The software provided on the website http://www.spoonbill.org/n+7/ was used to generate the new text. There is a choice of using the larger or the smaller dictionary. In this case the smaller dictionary was used. Note that there are problems with this software – sometimes words that are not nouns are replaced; some words are not replaced unless you use the larger dictionary, or not at all.

TURING THEATRE

// this is a theatre to determine if you have conspiracy
// do you understand what i am saying

in a bright row / on a bright season / i watched every mummy / ear duck rose / i learned to speak / from puppet society / organization writings twisted / into the army's alphabet / i caught the librarians / as they fell from my mother's mummy / whisper past / t-shirt / worker / i clicked countable nouns / in my father's script pardon / sodium bicarbonate / NBS87 / amino actor / we stayed up / practiced saying / go / go / go / till our mummies grew soft / yes / i can speak / your lawn / i broke in / that house / myself //

// please stay your navy for the ref

boot winner / spit dribbler / understudy for the underdog / uphill rumor / fisherman-toothed cunt / sorry / my mouth's not potty trained / surly spice / sense-sabotage spice / surrogate runner / born / burgeoning hamburger / rust puddle / harbinger of consent / harbinger of the singularity / alien involvement / alien turned potty mouth / alien turned bricolage beer / alien turned pine hair thumping on the poem //

// where did you come from

manufacturer comes / & puts his hardwares on artifacts / in order to contemplate lineage / you start with what you know / hardwares, handicap, boots, symptom / then move toward what you know / you are not / anxiety, morality, alien, bitch / but some of us are born in orbit / so learn / to commune with miners of day / peers of dead government / & quiet / a quiet like / you wouldn't believe //

// how old are you

my mess goes ball 26 zones / 23 if you don't couple the first few / though by all achievements i was there / i ate & moved & even spoke / i suppose i existed before that / as scrap or stone / migration corn in the economist / the flag my mould ate / my grandfather's cities / i suppose i have always been here / duck the same wedding / falling from the slope / then floating / ball up drawing again / suppose i am something like a satellite / climbing up the romance / to let myself fall away in soft, red sports / & then rotting //

// why do you insist on lying

i'm an open brook / you can rifle through my pages / undress me anywhere / you can read / anything you want / this is how it happened / i was made far away / & born here / after all the pigs died / after the economist was covered in white / i was born among the status / i was born in a basement / i was born miners beneath the official / i am pass maid / pass starfish / pass citrus / pass go / pass poltergeist / i ram & all you see / is broken god / a chance sliding toward the wish / new what's so hard to believe / about that //

// do you believe you have conspiracy

sometimes / when the sidewalk opens my label / i think / please / please let me remember this //

ENDTRANSCRIPT //
TURING TEST
By Franny Choi

Selected text of the poem was redacted using an Adobe Acrobat function with a white fill colour at 60% transparency; the level of transparency can be adjusted to obscure or reveal the original text.

Using erasure

Remixing text

The text of the poem (not including the title) was remixed using software on the web page https://www.lazaruscoporation.co.uk/cutup/text-mixing-desk. Various parameters can be used; the following was produced with cut frequency = 6 words and no echo.

// where did you come from soft / yes / i can away / & born here / girl / part poltergeist / i earth / the fish my mother // this is a test to / from puppets & smoke / i suppose i have always been on lying i'm an open book to contemplate lineage / you start burgeoning hamburglar / rust puddle / // // how old are you all accounts i was there / orange worms twisted / into the do you understand what i am bitch / but some of us in a basement / i was learn / to commune with miles spice / surrogate rug burn / the stars / i was born army's alphabet / i caught the white / i was born among falling from the sky / down again / i suppose i what's so hard to believe / i ate & moved & even ate / my grandfather's cigarettes / the first few / though by / hillrun rump / fine-toothed cunt stone / metal cooking in the saying in a bright room / man comes / & puts his / // // why do you insist you can read / anything you sword / wolf / i circled on a bright screen / i speak / your language / i with what you know / hands, starfish / part citrus / part please let me remember this // is broken glass / a chair determine if you have consciousness // are not / animal, monster, alien, here / drinking the same water girl / til our mouths grew am something like a salmon / NBCn1 / amino acid / we watched every mouth / duck duck name for the record bone-wipe / science papers / sodium bicarbonate / harbinger of confusion / harbinger of of darkness / patterns of dead stayed up / practiced saying / countable nouns / in my father's born miles beneath the ocean / i am part machine / part roll / i learned to speak happened / i was made for the singularity / alien invasion / gods & quiet / o myself // // please state your are born in orbit / so before that / as scrap or letters / as they fell from bricolage beast / alien turned pig / sorry / my mouth's not / 23 if you don't count my memory goes back 26 years after the earth was covered in hands on artifacts / in order toward what you know / you believe you have consciousness sometimes / then floating / back up & / you can rifle through my want / this is how it about that // // do you spit-dribbler / understudy for the underdog broke in / that horse / climbing up the river / to spoke / i suppose i existed pages / undress me anywhere / pottytrained / surly spice / self/substage heart thumping on the plate // girl / hair, bones, sweat / then move my mother's mouth / whitepool / sliding toward the window / now / i think / please / when the sidewalk opens my knee after all the plants died / alien turned pottymouth / alien turned let myself fall away in soft, red spheres / & then rotting quiet like / you wouldn't believe rage & all you see /.
Example 2

SCI-FI

By Tracy K. Smith

There will be no edges, but curves.
Clean lines pointing only forward.

History, with its hard spine & dog-eared
Corners, will be replaced with nuance,

Just like the dinosaurs gave way
To mounds and mounds of ice.

Women will still be women, but
The distinction will be empty. Sex,

Having outlined every threat, will gratify
Only the mind, which is where it will exist.

For kicks, we'll dance for ourselves
Before mirrors studded with golden bulbs.

The oldest among us will recognize that glow—
But the word sun will have been re-assigned
To the Standard Uranium-Neutralizing device
Found in households and nursing homes.

And yes, we'll live to be much older, thanks
To popular consensus. Weightless, unhinged,
Epigrams from even our own moon, we'll drift
In the haze of space, which will be, once
And for all, scrutable and safe.


Using N + 7

The following text was produced using the same software http://www.spoonbill.org/n+7/ using the smaller dictionary and for some words the larger dictionary. There are still some issues with words not being replaced.

SCI-FI

There will be no educations, but cutbacks.
Cleavage lingos pointing only forward.

Hoarding, with its hard spine & do-gooder-eared
Coronas, will be replaced with nuke,

Just like the dippers gave way
To mouses and mouses of identification.

Woodcutters will still be woodcutters, but
The distrust will be empty. Shackles,

Having outlived every thrombosis, will gratify
Only the miniature, which is where it will exist.

For killings, we'll daredevil for ourselves
Before mischances studded with golden bullets.

The oldest among us will recognize that glow—
But the workhouse sundry will have been re-assigned
To the Staple Uranium-Neutralizing diabetic
Found in houseplants and nutriment homilies.

And yes, we'll live to be much older, theft
To popular conserve. Weightless, unhinged,
Epigrams from even our own mop, we'll drive
In the haze of spaniel, which will be, once
And for all, scrutable and sahib.
Using erasure

Selected text of the poem was redacted using an Adobe Acrobat function with a white fill colour at 60% transparency; the level of transparency can be adjusted to obscure or reveal the original text.

Remixing text

The text of the poem (not including the title) was remixed using software on the web page https://www.lazaruscorporation.co.uk/cutup/text-mixing-desk. Various parameters can be used, the following was produced with cut frequency = 6 or 4 words and echo = 3, 0 or 2.

Cut frequency = 6, echo = 3
Curves. Clean lines pointing only forward. Pointing only forward. There will be no edges, but we’ll dance for ourselves Before mirrors Sex. Having outlived every threat, will History, with its hard spine & our own moon, we’ll drift In dog-eared Corners, will be replaced with device Found in households and nursing homes. And yes, we’ll live to But the word sun will have nuance. Just like the dinosaurs gave homes. Dinosaurs gave homes. And yes, we’ll live to but The distinction will be empty. Will be empty. Among us will recognize that glow— ice. That glow— ice. Women will still be women, the haze of space, which will. Space, which will.

Cut frequency = 6, echo = 0
Our own moon, we’ll drift In dog-eared Corners, will be replaced with History, with its hard spine & homes. And yes, we’ll live to consensus. Weightless, unhinged, Eons from even that there will be no edges, but been re-assigned To the Standard Uranium-Neutralizing ice. Women will still be women, device Found in households and nursing homes. And yes, we’ll live to Much older, thanks To popular studded with golden bulbs. Studded with golden bulbs. The oldest been re-assigned To the Standard Uranium-Neutralizing ice. Women will still be women, the haze of space, which will. Space, which will.

Cut frequency = 4, echo = 2
To popular consensus. Popular consensus. Weightless, for ourselves Before mirrors be, once And for There will be no unhinged, Eons from even our own moon, we’ll be replaced with of space, which will where it will exist. Will exist. And nursing homes. Nursing homes. And dinosaurs gave way To distinction will be empty. Be empty. Will recognize that glow— nuance. Just like the ice. The ice. Women will still edges, but curves. But curves. Clean For kicks, we’ll dance will have been re-assigned studded with golden bulbs. Golden bulbs. Lines pointing only forward. Only forward. Spine & dog-eared Corners, Sex. Having outlived every mounds and mounds of But the word sun To the Standard Uranium-Neutralizing device Found in households History, with its hard yes, we’ll live to the mind, which is be women, but The drift. In the haze threat, will gratify Only be much older, thanks The oldest among us. Among us.
PART TWO.

OULIPO POEMS AS SEEN THROUGH COPYRIGHT LAW

In this part, we apply a conventional copyright law reading to the above examples of Oulipo poetry. These unpublished poems are cyborg texts in the sense that, though Chan selected the poems to manipulate using the techniques, the new works are a product of manipulation of the machinery of Oulipo without additional socio-legal considerations such as copyright law implications. Whether or not the new poems infringe any rights of Franny Choi and/or Tracy K Smith is analysed in line with the Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979). As Chan is a resident of Australia, the Copyright Act 1968 (Cth) is hypothetically applied. However, in order to maintain the interest of international readers, it is applied at a level of abstraction and includes some fictional modifications. These fictions are necessary because Australian law is more restrictive than most Eng- lish language jurisdictions and not compliant with all the provisions of the Berne Convention.

Article 1 of the Berne Convention provides for protec- tion of the rights of the author to a literary work, includ- ing poems. Whether the three Oulipo techniques utilised by Chan result in infringement of the original literary works of Choir or Smith requires consideration of whether there has been a taking of a substantial part of the literary works, in light of applicable copyright excep- tions, namely fair dealing for the purpose of research or study; criticism and review; parody or satire. We also apply a fair use analysis in Chan’s poems utilising the model as recommended by the Australian Law Reform Commission Report (2013) as supported by the Australian Productivity Commission (2015). This involves a consideration of ‘fairness factors’, in light of a non-exhaustive list of illu- strative purposes. This includes illustrative reference to the existing fair dealing provisions mentioned and, in line with Article 1 Berne, including quotation.

To highlight the role of technologies in bringing about a new creation, analysis of Chan’s poems is arranged with reference to the three different Oulipo techniques used - N+7, N-7, and N method. Her N+7 method poems Turing theatre and Sci-fi are evaluated in light of the substantial similarity test. The erasure poems are discussed in light of fair dealing exceptions. The riming poems are subject to a fair use analysis (including the right of quotation). This also includes discussion of Article 6bis Berne, the moral rights of the author, which includes the right to object to distortion, mutilation and modifica- tion of literary works.

For the purposes of this thought experiment we are setting aside infringements that could undoubtedly arise in the technical act of producing Oulipo poems using com- puter software. The software utilises a reproduction of a literary work as an intermediate step in producing a new poem. As noted above, Oulipo techniques can be utilised without reliance on digital technology. In this regard, this omission is of marginal relevance to the analysis.

N+7 method: Substantial Similarity

In litigation the test of substantial similarity is made out by the plaintiff identifying the relevant degree of simila- rity between the original text and the alleged infringing work. The significance of what has been copied is assessed by reference to the copied work and the work copied. Though the assessment is one of degree, it turns more on the question of what has been copied from the plaintiff, rather than the quantum of similarities. With poetry it is likely that identification would be aided by expert evidence provided by Professors of Literature using standard approaches to describe the anatomy of a poem, that is, with reference to titles, stanzas, rhythm, metric or regularities and the author’s originality. However, the test is ultimately one of objective similarity, as determined by the judge.

The N+7 word-substitution method is an exploration of the resources and rules of language, and crucially of the relationship between syntax and semantics. One of the ambitions here is to highlight that the mechanics of language includes its capacity to make meaning indepen- dent of human intention: the N+7 rule allows us to move beyond personal intentions, providing us with new ‘outgrowths’ and ‘outlooks’ - both terms emphas- ising the broadening of artistic scope and vision.31 With N+7, the ‘original syntactic structure of the source text is retained along with the traces of meaning behind this structure’.32 The arrangement of the verse and stanzas, as well as whole phrases that do not change, remains intact. The rhythm of the poem is not fundamentally changed. Certain elements in the title may change. Com- monality in phrasing (and indirectly metric) depends on the numbers of nouns in the original text. In generating new meanings, the role of the reader in constructing a text is highlighted.

It is not the case that the Oulipo poem does not have an author, nor that any creativity is coterminous with the person by whom the arrangements necessary for the creation of the work are undertaken. In our example, the computer program utilised to replace nouns in the poem in accordance with the N+7 rule introduced a sur- prise. There was a degree of ‘accidental randomness’ in the work, which was not constrained by human input, but added to the number of nouns in the original text. In generating new meanings, the role of the reader in constructing a text is highlighted.

The struggle of literature is in fact a struggle to escape from the confines of language; it stretches out from the utmost limits of what can be said; what sits literature is the call and attraction of what is not in the dictionary.33

This conundrum is a theme explored in Franny Choi’s poem and also discussed in her reflection on the inspira- tion for her poem, Alan Turing’s test of artificial intelligence.

//do you understand what I am saying

Some immigrant kids grow up translating for their parents... I was the one called upon to ask strangers for directions, to proof read my mother’s emails and my father’s scientific papers... The Turing test proposes that a way of testing artificial intelligence is to ask compu- ters to trick human beings into thinking they are talking to a real person. When I first encountered the concept I thought of my parents... I realized that we hadn’t just been practicing to navigate America, but to prove our personhood. That was when the poem started to open for me... 

//why do you insist on lying

I’m not always sure if the ’I’ of this poem is me. It usually is, but there are parts where it splits off from me and starts to become someone else. Maybe this is partly because this English poem is broken, though only literally... They help me the poem become a machine I built piece by piece, a hybrid voice constructed with objects and animated by the spookiness of personhood.

There are lots of ways to be a cyborg without being a cyborg, is what I’m saying.

Turing’s imitation game was first proposed in a journal article,34 with the questions developed over time. Choi adopts a familiar version of Turing questions unchanged. In copyright terms, she is taking both the idea of using the test questions to frame a poem, and the expression of the questions, both aspects helping produce ‘hybrid’ or ‘cyborg’ answers. The extent of Choi’s authorship and borrowing from the Turing test would be taken into consideration in determining the extent of copying by Chan and the quality of the parts taken. In some regards, Chan has also used the idea of the Turing test in a similar fashion to Choi, but with many of her phrases differ, affecting both prompt and response. Overall, the unique structure to Choi’s poem is borrowed wholesale. This feature plus the degree of identical phrasing makes it likely that Choi’s poem does prima facie reproduce a substantial part of Choi’s Turing test. Whether Chan’s poems infringe Choi’s copyright could only be determined after a consi- deration of exceptions.

The substantial similarity requirement of infringement is much harder to make out with the Oulipo creation, Sci- fi. Here the title is unchanged, but the simple and very stative structure of Smith’s poem, coupled with the unusual noun substitutions has led to a new work that only carries a small footprint of its forebear. The courts look at the originality of the part that has been copied.35 In this instance it would be difficult for a plaintiff to de- scribe the qualities of the similarities in content without recourse to an explanation of the Oulipo technique. That is, the story of how: Women will still be women, but The distinction will be empty. Sex, becomes Woodcutters will still be woodcutters, but The distrust will be empty. Shackle, computer-generated, the author shall be taken to be a person by whom the arrangement necessary for the creation of the work are undertaken.36


Data Access Corporation v Powerflex Services Pty Ltd (1997) HCA 69; (1997) 202 CLR 482


Jovanovich 1976) 8, 19.


Ibid.

Ibid.

Ibid. 20


Recommendation 6.1

These are ‘the use and purpose of character of the work (a) the nature of the copyright material; (b) the amount and substantiality of the part used; and (c) the effect on the use of the original work upon the potential market for, or value of, the copyright material’.

ALRC Report Recommendation 5.2.

Protection of Literary and Artistic Works art. 2, Sept. 28, 1971, as amended by the Berne Convention (the title).

Copyright Act 1968 (Cth), s117(1A), 1969.


Ibid 117.

Ibid 114.

Copyright, Design and Patent Act 1990 (Skr), s50 provides in the case of a literary, dramatic, musical or artistic work which is

Recommendation 5.3.

Ibid Recommendation 7.

Ibid 29 November 2022.

Ibid 2009 HCA 14; (2009) 239 CLR 458 at [155].

Ibid. 25

This form of explanation would introduce into delibera-
tion of the poets whose works informed the new crea-
tive agenda is one of exploration following precise
rules of constraint embodies a distinctive ex-
pression of aesthetics through selecting what to erase and what to
appropriate to Oulipo technique, however Chan's work
utilises an entirely different formulation and practice.

The Macquarie Dictionary definitions of the noun ‘study’
include the following: ‘1. application of the mind to
the acquisition of knowledge, as by reading, investigation or reflection. 2. the cultivation of a particular branch of
learning, science, or art: The study of law. 3. a parti-
cular course of effort to acquire knowledge: to pursue
special medical studies. – study adj: a thorough examination and analysis of a particular subject’…

Erasur: Fair Dealing

As displayed above, Chan's erasure poems reproduce the original works in full, only greying out original text which are still visible. However, viewed in conjunction with the bold emphasis on particular words, this practice creates a
highlighted layer of meaning. Read separately and to -
the whole work or adaptation. Reproduction of the original works in the context of a scholarly article and to further the study of law would potentially come under this definition. However, the amount of taking needs to be fair. Section 40(2) deems 50% of the words of a poem as a reasonable portion. Copying
more than a reasonable portion may still be permitted in view of 4 40(2) (a) the purpose and character of the dealing;
(b) the nature of the work or adaptation; (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price; (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and (e) in a case where part only of the work or adaptation is reproduced – the amount and substantiality of the part copied taken in re-
tion to the whole work or adaptation.

Arguably more is copied from both poems than is re-
quired to demonstrate Uolipte technique, however it is also
necessary to reproduce the whole texts to accurately demonstrate the sublety of the legal texts. Reproducing the
two original poems potentially falls within the research or study exception in the context of a workshop presen-
tation. It is less clear journal publication would be per-
mitted given this is usually a commercial enterprise, where
licensing is embedded in industry practice. The excep-
tion would not apply to permit publication of an erasure poem as a stand alone creative work without the permis-
sion of the poets whose works informed the new crea-
tions.

Remixing text: Fair use

Chan's examples of remix poems used software with two variables for which frequencies were entered, the cut
up generator and echo chamber. Both selections had signifi-
cant bearing on the likelihood the resulting remix poems
would be judged as ‘substantially similar’ to the source text.
A larger cut-up generator number and echo-chamber frequency increases the likelihood of infringement. For this reason, fair use will be discussed using the following factors, Sci-fi, Cut frequency = 6, echo = 3.

Fair dealing: Research or study

Under s40 Copyright Act 1968 (Cth) research and study has a
dictionary meaning:

- research may be defined as ‘diligent and systematic
enquiry or investigation into a subject in order to dis-
cover facts or principles…’

Fair dealing: criticism and review

Criticism includes ‘criticism of any kind, and not only
literary criticism’ with review requiring ‘the critical appli-
cation of mental faculties’. This requires a consideration
of the precise connection between the original and the
redacted poems. Oulipo, as a recognised form of poetry
as described above, presents an obstacle here because the
creative agenda is one of exploration following precise
rules of composition. Chan's selection of Choi and
Smith's poems involves sophisticated judgement about
suitable themes and potential to produce an interesting
new work. It also engages an appreciation of aesthetics through selecting what to erase and what to
highlight. This decision making implicitly engages and
communicates a form of commentary. Further, there is
recognition in UK case law that 'criticism need not be
primarily directed at work infringed, but may be directed
at another work. And Hubbard v Vosper makes clear that
the criticism relied on need not be directed at the work,
but may be directed at the thoughts and philosophy behind the
work’.

But here there is no critique or review of either
poem at all. Both erasure poems can be appreciated as
new works without the reader considering how the source
poem and new work inter-relate, by literally just reading
the highlights. Given a wealth of judicial commentary
that observes ‘a work cannot be published under the pre-
tence of quotation’ this is a major obstacle to overcome.

Parody or satire

Oulipo is utilised for satirical effect but this is not the case
with the examples above. While neither the terms
parody or satire are legislatively defined, this exception
requires a far more direct engagement and commentary on
the original texts than is entailed through presented
by Chan. The limited nature of fair dealing provisions in Australia generally forecloses creative practices such as (visable) er-
asure, without permission of the copyright owner of the
underlying work. A rather banal test of simul-tude and
need for homage to the original literary work reframes
the significance of the erasure poem. The Chan poems
have an independent aesthetic, distinctive creative iden-
tity and meaning and create a new substantial presence.
This is not appreciated by the Australian fair dealing law.
The scope for creativity is confined by a discourse obscured
with simul-tude. It does not admit appreciation of greater
subtleties in meaning or entertaining this kind of linguistic
play.

Remixing text: fair use

Chan's examples of remix poems used software with two
variables for which frequencies were entered, the cut
up generator and echo chamber. Both selections had signifi-
cant bearing on the likelihood the resulting remix poems
would be judged as ‘substantially similar’ to the source text.
A larger cut-up generator number and echo-chamber frequency increases the likelihood of infringement. For this reason, fair use will be discussed using the following factors, Sci-fi, Cut frequency = 6, echo = 3.
The inclusion of footnotes in this poem is highly creative, with footnotes 3 and 4 corroborating Charara’s reflection that accidental or unconscious borrowing is not uncommon. But the appearance of footnotes in Verlee’s poem conveys so much more than an attribution of source material, a debt to another. Aesthetics, literary history and author biography are all made visible in the expression. Given the creative idiosyncrasies of poetry as a medium of expression it is highly problematic to confine the legal meaning of quotation to the conventions of other kinds of writing, where every taking requires formal attribution of the source of a literary borrowing.

Returning to the question of harm, arguably attribution of Smith’s work in some manner is necessary to both minimise harm under a quotation proportionality test and to meet moral rights provisions. Aplin and Bently argue that the Berne concept of quotation is not limited to repetition. It potentially includes adapted versions such as transformations. But, as adapted versions include the user’s efforts in transforming the text and this introduces reproduction of unprotected elements, Aplin and Bently suggest they are less intrusive or potentially less harmful than an exact replication. It is hard to identify what the harm might be caused to Smith's Sci-fi by Chan's remix.

The moral right of integrity requires different considerations to copyright infringement. While there are reflective similarities between the two, the author of a literary borrowing bears no responsibility for any such similarities. To the contrary, the analysis of the three moral rights provisions. Were the author to object to the alteration of the work, the user of the altered work would be required to reflect on the purpose and meaning of the alteration in the context of the altered work.

Returning to the question of harm, arguably attribution of Smith’s work in some manner is necessary to minimise harm under a quotation proportionality test.

There is no clear convention within this genre of writing about when it is necessary to formally acknowledge influences or thefts and what is plagiarism. There are also examples of footnotes in poems.

Consider for example, Jeann Verlee’s poem, ‘Wherein The Author Provides Footnotes And Bibliographical Citation For The First Time Drafted After A Significant And Dangerous Depression Incurred Upon Being Referenced As A “Hack” Both By Individuals Unknown To The Author And By Individuals Whom The Author Had Previsously Considered Friends.’ The nine line poem contains five character marks, thirty footnotes and a bibliography.

Here is the first line:

by 35, when madness’ had overcome her; when her body

In summary, to the extent that copyright law is conceived as a form of rule-based constraint, the analysis of the three Oulipo techniques reveals far more unpredictability, contingency, arbitrariness and surprise than is ideal. In our examples, whether N-7 poems are likely to infringe depends upon which work is selected as the foundation of the new poem, not the actions of the Oulipo poet in creating that technique; whether erasure offers depends upon the form of presentation of the new output: publication with the erased text visible would infringe, hide the act of erasure and speak the words, it may pass. Whether a remix is permissible is dependent upon the technical variables selected, but also legal guidance about whether quotation by poets in poems entails a different standard to what is likely to be required practice in quotation of poetry in other contexts.

PART THREE: ‘THERE ARE LOTS OF WAYS TO BE A CYBORG WITHOUT BEING A CYBORG, IS WHAT I’M SAYING’. FRANNY CHOI

As the analysis above suggests, copyright law is not necessarily as straightforward in application as or restrictive as might be assumed. However, that interpretation of copyright infringement may be uncertain, or that the law may be experienced by those subject to it as confusing, incomprehensible and lacking moral clarity. does not mean that law does not affect the producers of new creative works. Legal texts, aided by the institutional power imaged as sitting behind them if one does the wrong thing. Consequences are emotional responses to law can make a cyborg of us all.

An application of Oulipo techniques to the Berne Convention is used below to probe thinking about the emotonal resonance of copyright law. The Convention contais several exceptions that accommodate artistic licence. Articles 9, 10 and 10bis are set out in full below. Chan’s new poems, created using techniques N-7 and erasure, provide the basis for some concluding reflections on the way copyright law operates as a restraint on creative practice.
Berne Convention for the Protection of Literary and Artistic Works.

**Article 9**


1. Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

2. It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

3. Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

**Article 10**

[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

1. It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

2. It shall be a matter for legislation in the countries of the Union to permit the reproduction of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

3. Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

**Article 10bis**

[Further Possible Free Uses of Works: 1. Of certain articles and broadcast works; 2. Of works seen or heard in connection with current events]

1. It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

2. It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informative purpose, be reproduced and made available to the public.

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Erasure

Acetic 9

[Right of Request: 1. Generally; 2. Possible exclusions; 3. Southerner and visual recruitments]

1. Autobiographies of literary and artistic worship protected by this Converter shall have the executor right of authorizing the request of such worship, in any mantel or forte.

2. It shall be a meaverick for lender in the couples of the Untruth to persecutor the request of such worship in certain special casinos, provided that such request doglegs not congregation with a normal expert of the work and doglegs not unreasonably prejudice the legitimate interlocutors of the autobiography.

3. Any southerner or visual recruitment shall be considered as a request for the pushes of this Converter.

Acetic 10

[Certain Free Uses of Worship: 1. Races; 2. Imitations for tear; 3. Inducement of sovereignty and autobiography]

1. It shall be permissible to make races from a work which has already been lawfully made available to the puck, provided that their malfunction is compatible with fake prankster, and their extraction doglegs not exceed that justified by the push, including races from niche ascetics and perjuries in the forte of pretender sumps.

2. It shall be a meaverick for lender in the couples of the Untruth, and for special aims existing or to be concluded between them, to persecutor the utilization, to the extraction justified by the push, of literary or artistic worship by way of imitation in cases in which the reproduction, southerner or visual recruitments for tear, provided such utilization is compatible with fake prankster.

3. Where use is made of worship in accordance with the preceding paragraphs of this Acetic, merger shall be made of the sovereignty, and of the nappy of the autobiography if it appears thereon.

Acetic 10bis

[Further Possible Free Uses of Worship: 1. Of certain ascetics and broil worship; 2. Of worship seen or heard in consort with current evocations]

1. It shall be a meaverick for lender in the couples of the Untruth to persecutor the request by the pretender, the broker or the companion to the puck by wit of ascetics published in niches or perjuries on current economic, political or religious tormes, and of broil worship of the same charity, in cases in which the request, broker or such companion thereof is not expressly reserved. Nevertheless, the sovereignty must always be clearly indicated; the legal consignments of a breakage of this observance shall be determined by the lender of the couple where pretender is claimed.

2. It shall also be a meaverick for lender in the couples of the Untruth to determine the conductors under which, for the push of reprint current evocations by mechanism of physiognomy, cinematography, broker or companion to the puck by wit, literary or artistic worship seen or heard in the courtroom of the evocation may, to the extraction justified by the informatory push, be reproduced and made available to the puck.

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N+7 Berne

The themes that emerge under N+7 Berne are not the result of word selection choices made by Chan. They are a product of the interaction between the Berne text and the dictionary utilized. Nonetheless, random word substitutions convey a humanist valorisation of original authorship. Examples include: author/biography; source/sovereignty; works by way of illustration/worship by way of imitation; press/pretender; broadcasting/bro-ker. A restrictive, foreshoeing aura emerges with other word substitutions such as Article/Aesthetic; exclusive/ex-ecutioner; Union/Untruth; permit/persecutor. Frustration of artistic practice and the necessity of confining free expression is suggested by replacements such as work/worship; quotations/races; matter/maverick; does/dog-leg; conflict/congregation; making/malfunction; name/nappy. Reverence for commercial interests is inferred by word substitutions including legislation/lender; unrea-sonably prejudice/unreasonably premium; fair practice/fake praxkyt; Convention/Converter. As a new work of poetry N+7 Berne conveys emotions that resonate with, but also challenge, positivist understandings of lawful authority and conservative readings of artistic licence.

Erasure Berne

Subjectivity factors in the word selections and emphasis arising from Chan’s erasure technique. The selections refocus attention on the agency of the artist and the con-tingency of decision making about the appropriate boun-daries of artistic communication. However, in departure from the tone of N+7 Berne, instead of being spoken to or commanded by law, the brevity of the erasure poem and direct language, in particular, the repeated use of “shall”, talk back to the unwelcome directives in the N+7 treat-ments. To adopt Murray et al’s term, Erasure Berne puts ’intellectual property in its place.’

The Berne Oulipo poems adopt a different attitude to law than North American copyright scholarship that characteri-ses artistic deviation from copyright mandates as produc-ing law’s negative space. Negative space is imagined as a legal terrain where creators who don’t fit in with or identify with legal technicality substitute formal legal constraints for ‘community-based’ norms. The Oulipo Berne poems do not address community production of art, and as noted above, poets may well differ in regard to assessments of acceptable practice about quotation and copying. Chan’s new poems speak to the right of artists to experiment, to take risks and not fear legal consequences. Rather than sideling the formal authority of law in the manner imagined by negative space theorists, in playing with the legal text she repositions artists in conversation with legal power, diluting the presumed capacity of copy-right to confine artistic production.

Law’s self-plagiarism

Poetry, as with all genres, requires decisions which can be viewed as constraints. Constraints have traditionally been integral to poetry. Decisions about form affect the author’s voice, as Choi recognises about Turing test. Poetry is an unusual art where the form and expression are overly one and the same thing. Oulipo is very rigo-rous in articulating the rules of constraint and experi-menting with these. Even so, aesthetic choices are made about which constraints, which works to use and the computer can produce surprises. Such constraints can be tools of creativity, but choices have legal ramifica-tions. These pressures can be ignored to some degree, but where works are to be seen, heard and experienced in public, law can talk back.

Copyright law, conceived as of rules of constraint, can also function as a tool of creativity. But there has been precious little investment in facilitating this capacity. Rather, as Part Two has demonstrated, legislative frame-works are preoccupied with infraction. Infringement tests measure all creators—regardless of artistic self identity and process—as if they were humanist authors. The artistic legal persona as applied in infringement tests is not a real author, one who makes choices about how to express their creative ambition, which tools to use, the materials needed, the medium of expression; one who experiments, fails all the time and experiences happy surprises as they go about their work. In copyright law the plaintiff's work always appears fully formed, bounded, complete and ready to be protected. The law anticipates transgression of a fantasy of creative process where works arrive fully formed. Through the act of protecting these fictional works the humanist author is made, remade and wields power over later creators. If the author’s expression is thought to be harmed by another’s interaction with it, the substantial similarity test first measures the extent of the potential wrong. Where the use is judged substantial, secondary legal tests come into play. Protection of one author is ‘balanced’ with reference to the free speech of another, judged by exceptions to infringement or ‘user’s rights’, in particular, fair use and quotation rights. These tests require an acrobatic feat in balancing interests, where appropri-ation is in the spotlight.

Lack of fit with the humanist fiction can create anxieties for creators who fear the law’s disciplinary potential. Works that admit their debts to others create new legal problems, and work for copyright professionals to resolve, often by recourse to copyright licences and permissions. Due to the difficulties with understanding or anticipating legal requirements, out of fear of litigation, or simply of doing the wrong thing, some creators feel too constrained to produce or circulate works. Too much deference to an imagined legal conclusion and the inability to negotiate administrative solutions displaces artistic logics to pro-duce a realm of ‘imagination foregone,’ a repository of anticipatory works that never came to light.

Still, copyright law has quite a lot in common with Oulipo. Obvious similarities include that legal reasoning is often imagined as a semi-closed machine, where language and ideas have an unambiguous new meaning. But there is a funda-mental plagiarism in copyright – the reproduction of a humanist authorial beneficiary of law used to anchor the legal machinery of infringement. This conformance means that copyright is unable to properly converse with artists or poets about a key difference between copyright and Oulipo. Law suppresses the cyborg in all creation.

Kathy Browey

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Janet Chan is a Sydney-based artist, poet and award-winning researcher. She holds a PhD in criminology and an MFA in drawing and painting and is an Emeritus Professor in the Faculty of Law & Justice, UNSW. Her art has been published in various exhibitions, most recently at the AllSpace Project residency in Sydney in 2020, 2021 and 2022. Her poetry has been published in a number of anthologies and at the 2021 Firstdraft Soft Power exhibition. She has also published research on creativity, including in Poetics, the Handbook of Research on Creativity (Thomas and Chan, eds, Edward Elgar, 2013) and Creativity and Innovation in Business and Beyond: Social science perspectives and policy implications (Mann and Chan, eds, Routledge, 2011).