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The European Commission's public consultation on the review of EU copyright rules: A response by the CREATE Centre

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Abstract: *The European Commission consulted between December 5, 2013 and March 5, 2014 on a wide-ranging review of EU copyright rules.^[2] This response by the CREATE Centre attempts to make two contributions: (1) the process of policy formation matters for the evolution of the EU legal framework, and so we offer a short critique of the consultation format; (2) we summarise available evidence in seven thematic areas where CREATE has developed or is developing research (term of protection, libraries and archives, disabilities, text and data mining, user-generated content, fair remuneration for authors and performers, and respect for rights). CREATE understands evidence here as empirically grounded, but open to historical and comparative approaches.*

Introduction: format of the consultation

The consultation follows a structured survey format more familiar from social science research. This appears congruent with ambitions for evidence-based policy-making. The questionnaire becomes a "fact finding" mission in 80 detailed questions rather than an invitation to collect pre-written "position papers" by organised stakeholders. As an independent, empirically minded research centre we should welcome this.

The questionnaire is mostly organised in a closed format that will allow responses to be reported in percentage numbers, a useful device for framing future policies: "x percent agree that the scope of the 'making available' right in cross-border situations is sufficiently clear" (Q8). However, taking the social science perspective seriously, we are not optimistic that the findings will be valid; that is: the percentage numbers may not measure what they are trying to measure. Let us briefly outline some common problems in collecting and reporting survey data in this form.

Many survey questions follow technical legal categories to which only a small number of experts (typically trained as lobbyists) have access. So, in many cases, answers will be a sample of an already highly selective population. The consultation may not elucidate what is empirically happening but what, for example, collecting society representatives see (or want to see). Artists, consumers, non-profit memory institutions and digital innovators in particular will find it difficult to see the world through the lenses offered in the survey, and are unlikely to be able to contribute meaningfully.

If the aim of the consultation was to attract a wide range of potential policy solutions, a format aiming for participation beyond organised groups would be recommended. Here a form of content analysis might be an appropriate form of reporting responses (Favale and Kretschmer, 2012).

If the aim of the consultation was to establish facts, a survey of attitudes may not be the best starting point. Q1 asks: "[In particular if you are an end user/consumer:] Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?" Commissioned research, using scraping techniques to test streaming services and online stores, would be able to create this evidence quickly, and robustly.

It should also be noted that many questions are not looking for empirically grounded evidence but normative solutions. For example: (1) Q11/12: "Should the provision of a hyperlink/viewing of a web-page ... be subject to authorisation of the rightsholder?"; (2) Q19: "What should be the role of the EU role in promoting the adoption of identifiers ...?"; (3) Q22: "Should ... exceptions be made mandatory ...?"; (4) Q27: "[H]ow should the question of 'fair

compensation' be addressed ...?"

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In order to respond meaningfully within the constraints outlined above, we group answers to a range of questions around areas where empirical knowledge is emerging and should, hopefully, influence any future legislative action. No one benefits from a distorted worldview. We attempt to follow the broad themes of the consultation.^[3]

Term of protection

In this section we respond to question 20

20. Are the current terms of copyright protection still appropriate in the digital environment?

It is the consensus among economists and intellectual property scholars that the current term of copyright protection far exceeds what is necessary to incentivise creative production and imposes unnecessary costs on innovators.

The four main arguments used by incumbent right holders to seek longer terms have been rehearsed extensively in the context of the recent term extension directive for performers and sound recordings (Directive 2011/77): (1) artists will earn more as a result of copyright extension; (2) more (and more diverse) works will be produced; (3) consumers will not pay more; (4) jurisdictions with a longer term will have a competitive advantage.

The empirical evidence points against each of these arguments (*Joint Academic Statements on Term Extension, 2008*).

Research on the effects of the copyright term is hampered by the methodological difficulty of comparing like with like; that is, two works that only differ in copyright status and nothing else. Following the recent extension for sound recordings from 50 to 70 years (that came into force in EU Member States before the end of 2013), there is now an opportunity for a natural experiment: comparing the market for 1962 recordings (which are now out of copyright) with the market for 1963 recordings (protected for another 20 years). The CREATE consortium is conducting such a study.

Given that the copyright term affects all three pillars of European copyright policy (the single market, innovation and economic growth, and cultural diversity: Consultation, p.2) it would be appropriate for the Commission to issue a statement on the onus of proof for any future change.^[4]

Libraries and archives

In this section we respond to questions 28 to 41

28. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?

(b) [In particular if you are a right holder:] Have you experienced problems with the use by libraries, educational establishments, museum or archives of the preservation exception?

29. If there are problems, how would they best be solved?

30. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?

31. If your view is that a different solution is needed, what would it be?

<p>32. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to negotiate agreements with rights holders that enable you to provide remote access, including across borders, to your collections (or parts thereof) for purposes of research and private study?</p>
<p>(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to consult, including across borders, works and other subject-matter held in the collections of institutions such as universities and national libraries when you are not on the premises of the institutions in question?</p>
<p>(c) [In particular if you are a right holder:] Have you negotiated agreements with institutional users that enable those institutions to provide remote access, including across borders, to the works or other subject-matter in their collections, for purposes of research and private study?</p>
<p>33. If there are problems, how would they best be solved?</p>
<p>34. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?</p>
<p>35. If your view is that a different solution is needed, what would it be?</p>
<p>36. (a) [In particular if you are a library:] Have you experienced specific problems when trying to negotiate agreements to enable the electronic lending (e-lending), including across borders, of books or other materials held in your collection?</p>
<p>(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to borrow books or other materials electronically (e-lending), including across borders, from institutions such as public libraries?</p>
<p>(c) [In particular if you are a right holder:] Have you negotiated agreements with libraries to enable them to lend books or other materials electronically, including across borders?</p>
<p>37. If there are problems, how would they best be solved?</p>
<p>38. [In particular if you are an institutional user:] What differences do you see in the management of physical and online collections, including providing access to your subscribers? What problems have you encountered?</p>
<p>39. [In particular if you are a right holder:] What difference do you see between libraries' traditional activities such as on-premises consultation or public lending and activities such as off-premises (online, at a distance) consultation and e-lending? What problems have you encountered?</p>
<p>40. [In particular if you are an institutional user, engaging or wanting to engage in mass digitisation projects, a right holder, a collective management organisation:] Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. [E.I.P.R. p.549] the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?</p>
<p>41. Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters' archives)?</p>

Although the questions in this part of the consultation ostensibly are concerned with stakeholders' opinions on limitations and exceptions that benefit all types of cultural institution (libraries, museums and archives), in reality they are principally directed at copyright rules as they impact the use of and access to library collections. For

example, when considering the challenges posed by mass digitisation projects, the Consultation presents the *2011 Memorandum of Understanding on key principles on the digitisation and making available of out of commerce works* as a partial solution to this generalised problem: "the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries, will be digitised and made available to everyone" (p.22). The MoU is a partial solution but only for library collections. Indeed, this evident preoccupation with the digitisation of library collections shapes the way in which the archive is conceptualised within the Consultation itself: that is, as a space *within a library*, a repository of rare books.

Library collections and archive collections are two very different phenomena. Libraries aggregate, organise, enable access to and assist users in navigating the world's accumulated knowledge. In this regard, library collections are primarily concerned with commercially published material. Archive collections, however, are primarily concerned with the unique records produced by organisations, families and individuals during their day-to-day activities or business. And while these records have considerable social, cultural, academic and historic significance, the nature of these records is such that they are rarely created for the purposes of commercial exploitation, and only a very small proportion of these works have any intrinsic commercial value. Indeed, it is the organic nature of the records selected for inclusion within an archive that makes these records so reliable, authentic and trustworthy (ISO 15489-1 (2001), para.7.2).

Moreover, the type of material held within archives typically does not fall within the repertoire of collecting societies. For this reason, encouraging and enabling mass digitisation initiatives on the basis of voluntary licensing schemes between cultural institutions and collecting societies will skew Europe's accessible digital cultural record towards commercially published material held in libraries.

European copyright policy should, of course, address the challenges presented by e-lending and off-premises access to library collections, and in ways that enable the widest possible access to Europe's library collections for the purposes of research and private study, while at the same time appropriately protecting the commercial interests of publishers. But our copyright framework must also be responsive to the needs and interests of different cultural institutions in making their collections digitally accessible (Deazley and Stobo, 2013). Devising and implementing copyright policy to facilitate mass digitisation initiatives must draw on a research base that extends beyond studies of diligent search and rights clearance within the publishing and library sectors. There is a policy need to understand the way in which the work of different institutions within the cultural heritage sector is shaped by the copyright regime. CREATE is committed to developing this research base (Stobo et al., 2013; Deazley and Stobo, 2014), and we advocate further research within this domain.^[5]

Disabilities

In this section we respond to questions 50 to 52

<p>50. (a) [In particular if you are a person with a disability or an organisation representing persons with disabilities:] Have you experienced problems with accessibility to content, including across borders, arising from Member States' implementation of this exception?</p>
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<p>(b) [In particular if you are an organisation providing services for persons with disabilities:] Have you experienced problems when distributing/communicating works published in special formats across the EU?</p>

<p>(c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the application of limitations or exceptions allowing for the distribution/communication of works published in special formats, including across borders?</p>

<p>51. If there are problems, what could be done to improve accessibility?</p>
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<p>52. What mechanisms exist in the market place to facilitate accessibility to content? How successful are they?</p>

The Information Society Directive (2001/29) has given Member States "the option of providing for certain exceptions or limitations for cases such as ... for use by people with disabilities". Making disability exceptions merely optional creates the obvious danger of creating free movement barriers for EU citizens with disabilities. More research is needed to establish the variance with which Member States made use of this permission, and if, as a result, movement of citizens with disability between EU Member States was impeded.

A similar fragmentation may have happened in the market for assistive technologies and products. The consultation refers to the Marrakesh Treaty. While the Treaty is welcomed in principle, the exclusive focus on

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it further entrenches another fragmentation, this time between different forms of disability, for which there is no convincing rationale. The Marrakesh Treaty focuses exclusively on visual impairment. This partly reflects the fact that the visually impaired have experienced the most obvious access barriers caused by copyright (and they have effective representation through the European Blind Union (EBU)). Potential copyright barriers exist also for other media. For citizens with hearing impairment for instance, timely provision of caption services is as important. In this field there is at least some evidence that Member States differ in their treatment of "unofficial" caption providers of films and videos, who supply the material before the right holder has issued their own version (which can be much later, if at all). Another example identified during CREATe research are copyright barriers to modify audio and music files for tinnitus sufferers, where legal uncertainty creates barriers for innovation in medical products for the disabled.

Particularly large groups which have so far received little consideration in the debate are citizens with mental health problems and those with learning disabilities. For the latter group in particular, focus on format is less relevant than "easy read" versions with simplified language (also relevant for some deaf citizens), modified sentence structure or symbol support. Memory impairment represents another significant constituency, and one which, owing to an ageing population in Europe, will continue to grow in the future. For them, search facilities that supplant their own memory can be important, as might be a right to create a recording of live events and performances which they attend. Some assistive technologies such as Sensecam may inadvertently violate copyright when used this way in a memory enhancing function.

While more research into the empirical impact of copyright on various groups of disabilities is therefore needed, from a normative-conceptual perspective, harmonised and uniform exceptions for disability purposes that are neutral towards the technology in question and also neutral with regard to the disability seem desirable.^[6]

Text and data mining

In this section we respond to questions 53 to 57

<i>53. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?</i>
<i>(b) [In particular if you are a service provider:] Have you experienced obstacles, linked to copyright, when providing services based on text or data mining methods, including across borders?</i>
<i>(c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the use of text and data mining in relation to copyright protected content, including across borders?</i>
<i>54. If there are problems, how would they best be solved?</i>
<i>55. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?</i>

56. *If your view is that a different solution is needed, what would it be?*

57. *Are there other issues, unrelated to copyright, that constitute barriers to the use of text or data mining methods?*

Text and data mining are acknowledged to have enormous potential both for European industry and non-commercial research. As things stand, European copyright law represents a sizeable barrier to exploitation by both camps since no current fair dealing exemption clearly applies. This was acknowledged partially in the UK Hargreaves Review, where a statutory exemption for "data analysis for non-commercial research" was proposed. A statutory instrument implementing an exception for "text and data analysis for non-commercial research" (Copyright, Designs and Patents Act 1988, new section 29A) has come into force on 1 June 2014. In the EU, a voluntary industry-based licensing solution seems to be currently favoured rather than adding an exemption to the list permitted in the Information Society Directive (2001/29), though negotiations have been troubled and so far inconclusive.

CREATE takes the view, after a multi-jurisdictional survey, that a Hargreaves-like exemption needs urgently implemented as part of an EU regulatory instrument, but that consideration should *also* be given to taking text mining entirely out of the copyright arena (in particular mass digitisation projects where the textbase is solely used to create new products, not to allow full or partial public access to the original text). Discussion also needs to be had as to whether an equivalent exemption needs developed for the database right regime, and if so, exactly what shape that should take.

There are two main arguments behind this, one practical, one principled. First, the United States has effectively legalised (pending appeals) text mining as a matter of transformative use in the *HathiTrust* (2012) and *Google Book* (2013) cases. This will allow their data and text mining industries an enormous advantage over European counterparts; and the *Google Book* judgment acknowledges as one of its foundations the enormous potential data mining has to create new research of societal and economic value. Secondly, from a principled point of view there are severe doubts that copying and mining text should be regarded as an infringement of copyright at all. Copyright famously protects expression, not ideas, and data and text mining exploit data and metadata, not the expressive value of the texts. As

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Matthew Sag, a leading scholar in the field, commented at a recent CREATE symposium: "Copyright is ultimately about the communication of expression to someone, to the public, and so when things are copied purely for internal computational reasons, and not to convey their expression to the public, then that is something that should not be recognized as copyright infringement" (Deazley and Stobo, 2014, p.91).^[7]

User-generated content

In this section we respond to questions 58 to 63

58. (a) *[In particular if you are an end user/ consumer:] Have you experienced problems when trying to use pre-existing works or other subject matter to disseminate new content on the Internet, including across borders?*

(b) *[In particular if you are a service provider:] Have you experienced problems when users publish/ disseminate new content based on the pre-existing works or other subject-matter through your service, including across borders?*

(c) *[In particular if you are a right holder:] Have you experienced problems resulting from the way the users are using pre-existing works or other subject-matter to disseminate new content on the Internet, including across borders?*

59. (a) *[In particular if you are an end user/ consumer or a right holder:] Have you experienced problems when trying to ensure that the*

<i>work you have created (on the basis of pre-existing works) is properly identified for online use? Are proprietary systems sufficient in this context?</i>
<i>(b) [In particular if you are a service provider:] Do you provide possibilities for users that are publishing/ disseminating the works they have created (on the basis of pre-existing works) through your service to properly identify these works for online use?</i>
<i>60. (a) [In particular if you are an end user/consumer or a right holder:] Have you experienced problems when trying to be remunerated for the use of the work you have created (on the basis of pre-existing works)?</i>
<i>(b) [In particular if you are a service provider:] Do you provide remuneration schemes for users publishing/ disseminating the works they have created (on the basis of pre-existing works) through your service?</i>
<i>61. If there are problems, how would they best be solved?</i>
<i>62. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?</i>
<i>63. If your view is that a different solution is needed, what would it be?</i>

The CREATE consortium is undertaking research to respond to the policy need to understand how online user communities interact with and are impacted by copyright. Within the UK context, we are specifically interested in measuring the impact of user-created works on the economic exploitation of corresponding copyright works. Early results have shown an economic benefit to allowing more liberal user uptake of copyright materials in online, networked settings (Erickson et al., 2013; Erickson and Kretschmer, 2014).

Contrary to the proposition put forth in the Consultation (p.29), user-generated content (UGC) is not flourishing in all cases. Particularly with respect to the uptake and re-use of copyright material by consumers, the European position is unknown, ambiguous or unenforced.

There are three domains where our research has identified problems, but these are indicative of a wider lack of legislative innovation. First, while many Member States have adopted copyright exceptions for the purposes of parody, data show that European and UK user parodies continue to be removed from platforms such as YouTube at a higher rate than parodies of US material (Erickson and Kretschmer, 2014). Secondly, "machinima" creators (videographers who use third-party video game engines to create new animation storylines) have encountered legal roadblocks in their efforts to commercialise their new content, despite attracting large and viable audiences on internet platforms (Haefliger et al., 2010). Thirdly, research into fan video game production demonstrates that consumers unable to license use of original source code have sometimes reproduced new, open-source versions of old software, meeting a market demand (Mavridou and Sloan, 2013). This activity is often blocked by right holders ex post facto, although further research is required to understand the economic cost/benefit of allowing fan works to exist parallel to commercial reissues.

We advocate a rigorous programme of empirical research to identify the contributions of user creativity to the information businesses in the common market and to explore ways to support innovation and growth. For example, new research is required in order to: (1) map the processes by which value is generated from user activities involving copyright works; (2) understand the scope for impact of EU law on digital platforms that are frequently designed for one large, undifferentiated mass of users; (3) identify areas for social and commercial innovation to the competitive advantage of European creative industries.

Dissemination of this research and policy stance should stake a competitive position for the EU, which sets a high bar for the protection and encouragement of user creativity.^[8]

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Fair remuneration of authors and performers

In this section we respond to questions 72 to 74

72. *What is the best mechanism (or combination of mechanisms) to ensure that you receive an adequate remuneration for the exploitation of your works and performances?*

73. *Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts)?*

74. *If you consider that the current rules are not effective, what would you suggest to address the shortcomings you identify?*

The available data on authors' and artists' earnings come from three different sources: government statistics (census, labour market surveys, tax); questionnaire surveys of specific professional groups; and collecting society payments. For the purposes of assessing the link between copyright and contract regulation, two aspects are of particular interest: (1) the level and distribution of earnings of creators, compared with other professions; (2) earnings from the principal artistic activity compared to other sources of earnings. There is now a robust body of evidence regarding both these matters which should form the basis for any legislative intervention (Atlodotir et al., 2013; Thomson and Cook, 2012–14; Kretschmer et al., 2010; Kretschmer et al., 2011).

Key findings include: (1) creators' occupational profiles reveal risky, often stuttering careers; (2) earnings from non-copyright, and even non-artistic activities are an important source of income for most creators; (3) many more creators attempt to embark on artistic careers than are able to sustain them; (4) the more copyright related the income stream, the more extreme is the distribution of income, reflected in very high Gini coefficients (a measure of inequality); (5) a small number of very high earners earn a disproportionate share of total income.

The Commission needs to be clear if they envisage any attempted regulation of copyright contracts to be effective against this underlying "winner-takes-all" current of cultural markets.^[9]

Respect for rights

In this section we respond to questions 75 and 76

75. *Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?*

76. *In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?*

Questions 75 and 76 seem to make the case that the civil enforcement system is insufficient to meet the challenges of the internet revolution. We start by noting that any intervention on the enforcement of intellectual property rights should be based on an understanding of the causes and effects of unlawful behaviour. Using systematic reviewing techniques drawn from the medical sciences, CREATE has undertaken a scoping review of all evidence published between 2003 and 2013 into the welfare implications and determinants of unlawful file sharing (Watson et al., 2014). Articles on unlawful file sharing for digital media, including music, film, television, videogames, software and books, were methodically searched; non-academic literature was sought from key stakeholders and research centres. 54,441 sources were initially found with a wide search and were narrowed down to 206 articles which examined human behaviour, intentions or attitudes.

Whether unlawful file sharing confers a net societal cost or benefit to welfare remains unclear based on the available evidence, with both of the approaches employed—(1) looking at the association between sales and unlawful file sharing, and (2) examining people's willingness to pay with and without the possibility of unlawful file sharing—

suffering from serious limitations. This conclusion casts doubt on approaches which strengthen the enforcement system to meet the challenges of the internet revolution, at least without clearer evidence of demonstrable benefits of specific measures.

CREATe has developed a utility framework to understand potentially relevant factors whether to engage in unlawful downloads, legal purchases (or neither). They include financial and legal utility—where the enforcement system is clearly potentially relevant—as well as unrelated aspects such as experiential utility, technical utility, social utility and moral utility. The findings of our scoping review have been visualised in a cubic space where the number of sources of evidence identified for each proposed determinant of unlawful file sharing are split according to evidence type and specific media. It demonstrates that our current knowledge of file sharing is dramatically skewed by method and sector.

The unlawful file sharing debate seems to have been predominantly determined by evidence from music files. Movies and software are a distant second. There is very little on videogames, books or TV content. However, there is evidence to suggest that the determinants and welfare implications of one medium may not apply equally to another. Therefore there is a danger in basing policy decisions upon evidence heavily biased toward a single medium.

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The vast majority of the studies found in our scoping review employ cross-sectional survey studies which make attributions of causality extremely difficult. Furthermore, our scoping review also shows the comparative scarcity of studies that employ observed behaviour as a measured outcome, whether from the experimental laboratory or from the natural world. This is a problem, particularly as there is often a gap in findings between studies that use behaviour and studies that do not. In the context of financial and legal utility, we find that as new enforcement laws are introduced, there is limited behavioural data which could confirm a causal effect, particularly in the long term.

There is a definite need for more experimental economic and longitudinal samples capable of identifying causality links and starting to assess the potential of policy changes to affect unlawful file sharing behaviour. There is also a need to explore, more systematically, a wider spectrum of markets, as copyright frameworks do not normally differentiate across markets. Policies and assessments purely considered in terms of music files, or even a combination of music files and movies, may not be fit for purpose when considering other markets. Better evidence-based policy is needed.^[10]

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1. Response on behalf of CREATe by Martin Kretschmer, Ronan Deazley, Lilian Edwards, Kristofer Erickson, Burkhard Schafer and Daniel John Zizzo. CREATe (<http://www.create.ac.uk>) is the Centre for Copyright and New Business Models in the Creative Economy, a UK national research hub jointly funded by the AHRC (Arts & Humanities), EPSRC (Engineering & Physical Sciences) and ESRC (Economic & Social Sciences). CREATe is a pioneering interdisciplinary initiative, and globally the first effort to investigate the relationship between Creativity, Regulation, Enterprise and Technology (=CREATe) through the lens of copyright law. The research programme has a strong empirical focus. CREATe is a consortium of seven universities, centred at the University of Glasgow. Martin Kretschmer is Professor of Intellectual Property Law, University of Glasgow, and Director of CREATe; Ronan Deazley is Professor of Copyright Law, University of Glasgow; Lilian Edwards is Professor of Internet Law, Strathclyde University; Kristofer Erickson is Lord Kelvin Adam Smith Research Fellow in Social Sciences, University of Glasgow; Burkhard Schafer is Professor of Computational Legal Theory, University of Edinburgh; Daniel John Zizzo is Professor of Economics, University of East Anglia.
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