

An innovative approach to the future of copyright in the digital era

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In June 2010, I gave a seminar about copyright in Cambridge, England. The audience included around 30 British and Chinese managers. One of these Chinese managers asked me if laws such as the UK Digital Economy Act or the French Hadopi law would solve the challenge of copyright in the digital era. Instinctively, I answered "No". He then asked me "Why not?" I said "Because a technical disruption requests first a technical answer, not a legal one". This was a spontaneous statement. Intrigued, we started to discuss the matter.

In September 2010, while the European Parliament was discussing Marielle Gallo's report, Frédérique Chabaud, advisor of Helga Trüpel MEP, and I discussed the sequence of a response to the digital disruption: first technology, then business and finally policy and law, whereby this is in reality a circle: without an initial, strong political commitment the sequence cannot be triggered.

In April 2011, Helga Trüpel and I shared the view that only a balanced approach is appropriate – supporting at the same time the right of access and the right of property, but that most political debaters are biased towards one or the other.

In May 2011, there were a lot of announcements. The White House published its strategy for cyberspace, Her Majesty's Government published its review of intellectual property and growth, President Sarkozy convened the eG8 forum and the European Commission published a Citizen's summary and a Commission's communication about the single market for intellectual property rights.

A single market for intellectual property rights

The summary stipulates that the objectives of a single market for intellectual property rights are, on one side, the access to information and knowledge as well as the preservation of Europe's cultural heritage and, on the other side, the generation of income from business and individual creation. We take this as balanced objectives.

The communication explains that the Commission will launch a series of initiatives to build a comprehensive framework for copyright in the digital market. It lists eight of them, some with a broad scope and some with a narrow scope, some long programmes and some quick wins. We take that as a political commitment.

In May 2011, the European citizens received a political commitment to balanced objectives. It is one of the few powerful commitments which matter for the moment: one from Brussels and one from Washington. As the digital world doesn't have borders, national initiatives won't solve anything.



a single market for intellectual property rights

... covers various actions on trademarks, patents, copyright and enforcement,

- §1 so that consumers and commercial users are able to **access** information and knowledge-based products and Europe's rich cultural heritage is preserved,
- §2 so that businesses and individuals can **generate income** from their work.



Citizens' summary – May 2011

a comprehensive framework for copyright

... a series of Commission initiatives will be proposed to make this goal a reality –

1. European copyright governance and management
2. technology and database management
3. user-generated content
4. private copying levies
5. access to Europe's cultural heritage and fostering media plurality
6. performers' rights
7. audio-visual works
8. artists' resale right

Commission's communication – May 2011

We were very young when John Kennedy said “Ask not what your country can do for you; ask what you can do for your country... ask what you can do for the freedom of man”. But we heard it so many times, that we can feel having been there and listened to the President. My colleagues and I have defined an innovative approach to the future of copyright in the digital era. It could be very useful for citizens and creative industries. Therefore, we must share it; that's what we can do for the freedom of man.

The triple challenge

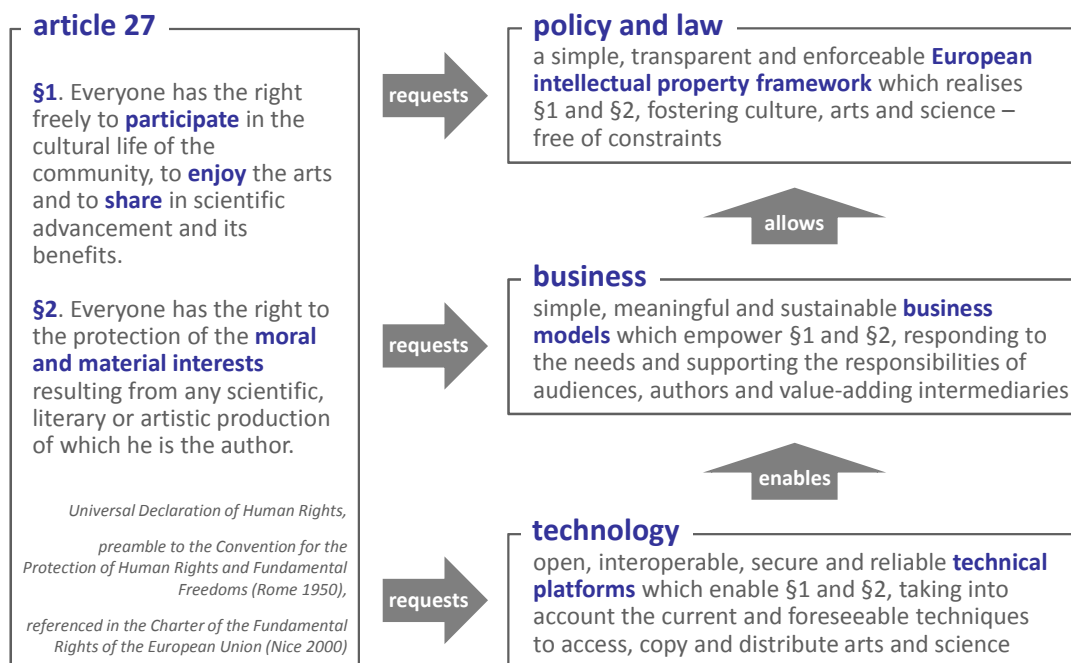
Article 27 of the Universal Declaration of Human Rights is the legal base of arts, science and culture. It is binding for the 193 members of the United Nations. It explicitly balances the rights to participate, enjoy and share with the rights to protect moral and material interests. Defending one set of rights against the other can be rhetorically easier, but it does not protect or foster civilisation as we know it.

How do we enable – at the same time – §1 and §2 in the digital era?

First, it has to be feasible, I mean technically feasible. We need an open, interoperable, secure and reliable infrastructure to enable participation and sharing and – at the same time – protect moral and material interests. The digital networks have not been built for this purpose. An adequate transformation of the existing infrastructure will require substantial efforts.

Second, Article 27 requires meaningful and sustainable business models. These business models are enabled by technology, they must be technically feasible. They must respond to the needs and support the responsibilities of audiences, authors and value-adding intermediaries.





Third, Article 27 requires a simple, transparent and enforceable framework for Intellectual Property Rights (IPR). The policy and legal framework is allowed by meaningful business models, which are themselves enabled by technology. It is a triple challenge, at the technology level, at the business level and at the policy and law level. Practically, it can only be solved from the bottom to the top. But it is also a circle. Without some political and business commitments – from the top – the limited resources of capable researchers will not be invested – at the bottom – to solve the challenge.

I suggest to stop speechifying about an article which has been ratified by the assembly of civilised nations, but to implement it for the sake of this civilisation. In the digital era, the implementation must be digital.

A six-point methodology for a thrice-iterative approach at three levels

What are the differentiating characteristics of our approach?

The first one is already covered. Bottom-up. It is up to technical platforms to enable business models, which then allow policies.

Distinctive. Reading many articles and documents, we noticed a lot of confusion around copyright. Some people confuse technical, commercial and legal issues. Some people label quickly and speak about piracy when a more thorough observation would uncover a disrupted royalty collection. Some people put in the same bag what they call piracy and what is counterfeiting or plagiarism. We need distinctions instead of confusions.

Clean slate. An English musician needs hours to understand how royalties are collected by the English agencies, and a French author needs hours to understand how SACD, a French agency, works. Some graphics should help them to get it. These graphics look like spaghetti plates. French plays are produced in England. English songs are played in France. Now it gets interesting. Let's connect the threads of the French spaghetti with the threads of the English spaghetti. Besides experts, no one can do that.





Let's continue and add the process flows of the UK Digital Economy Act and the French Hadopi law to our two connected spaghetti plates. Do the experts still understand? Real life looks like this: Les Misérables, a musical written by Frenchmen, originally staged by Englishmen, is produced by Americans in Singapore. Real digital life is when this very production of Les Misérables is streamed in Malaysia and shared with someone living in Thailand. Now, let's collect the royalties!

Some collecting agencies, in some cases, are working very close to absurdity. Absurdity occurs when it costs more than 100 to collect 100. A bit more complication – implied by one new law or the other – and here we are, royalty collection doesn't make sense anymore. Many current attempts to build a future for copyright in the digital era are based on enhancements of the existing complexity. This cannot bring us closer to the solution.

Predictive. If the only technical response we plan is the response to the current state of technology, by the time the response is deployed, it will have become obsolete. This is why the response must predict what the state of the digital networks will be, let's say, in 10 or 15 years from now. The interesting by-product is that by doing so, the responders can take the technological lead of these digital networks.

Balanced – we already touched this.

And finally: focused. Once in a discussion about copyright, I heard the question: what about the place of the artist in society? The question is of course pertinent. But building a future for the copyright in the digital era requires so much skills and so much efforts that I would rather suggest to focus the research and development team on enabling Article 27 – and nothing else.

These six points – if you take them all together – make this approach unique and worth trying. I wrote about the need of a multidisciplinary approach at three levels, technology, business and policy. Let's discover now the three iterations of this approach.



The first iteration > sketches

policy and law

build a **framework** of policy principles related to §1 and §2 and based upon fundamental texts > sketch **guidelines** to regulate the value chains between authors and audiences > search for **metaphors** – successful regulations of human activities impacted by disruptive technical innovations



business

describe **value chains** between authors and audiences, for various contexts (arts, science, info), various distributions (ownership, access, experience), and various economic models (commercial, subsidised) > sketch **business models**, incl. **contract needs** and **money flows**



technology

formulate technical **hypotheses** to realise §1 and §2 > conduct predictive technical **intelligence** > **analyse the gaps** between hypotheses and intelligence > develop **Requests for Innovation** to fill the gaps > sketch a **feasible and sustainable realisation** of §1 and §2

The first iteration produces clarity and sketches. It can be done within 12 months.

On the technology level, first, one formulates hypotheses to realise §1 and §2 at the same time. Probably, one focuses on few necessary functions, such as digital fingerprinting, detecting, metering, reporting and billing. The comparison between the hypotheses and a predictive technical intelligence will show gaps – which will call for innovations. Finally, at that level, technologists sketch the realisation of the open, interoperable, secure and reliable infrastructure I mentioned before.

On the business level, one analyses value chains between authors and audiences for various contexts, distributions and economical models. It also means that one describes these value chains under various paradigms, such as legally protected, open source, creative commons, and criminal. In fact, IPR crimes, and the incentives for IPR crimes, must be thoroughly understood if one seriously wants to defuse incentives and reduce crime. When one will have sketched the value chains, one will be able to sketch theoretical business models and simulate the necessary contractual relationships and money flows.

Finally, on the policy and law level, first, one builds a framework of commonly accepted principles necessary to balance access and rights. And then, one applies these principles to the value chains sketched by the team at the business level. I would call this the *clinical* work. But according to me it is not sufficient, and I would suggest a parallel work, which could be called *political*.

It is not the first time that our democracies are facing a major technical disruption. Let's think about the automobile, the railways or the electricity. At the beginning, these activities were not regulated at all. But – step by step – activities which were *free*, such as driving a car between A and B, became regulated for the common good. Step by step, the citizens accepted that one has to choose to drive on the right side or the left side of the road and stick to that choice, that speed cannot be unlimited, that seatbelts have to be fastened, that a car must not pollute too much and that there is also a choice between driving and



drinking. Metaphorically, one can compare the necessary legislation of the World Wide Web to the Highway Code, the Railways Act or the regulation of the national grid – they are all networks for the common good, they are all the results of major technical disruptions. There must be *political* best practices about how to regulate things which were previously not regulated. Searching for appropriate metaphors and borrowing from them should already be done at this stage.

The second iteration > roadmaps

policy and law

sketch the legal framework for a **Single Market of Intellectual Property Rights** covering all aspects of §1 and §2 > **scenario testing** > analyse **enforcement feasibility** > explore the **legal relationships** between the European digital single market and the rest of the world > **regulation roadmap**



business

sketch the business model of a **European royalty collection system** covering all aspects of §1 and §2 > **scenario testing** > explore the **commercial relationships** between a European royalty collection system and the rest of the world > **commercial roadmap**



technology

study the **feasibility** of requested technical innovations > **design** a digital platform for rights protection and royalty collection > define **work breakdown structure** (who does what by when) of **technical roadmap** [*“who” = “type and list of institutions to contact during the next iteration”*]

The second iteration produces roadmaps. It can be done within 18 months.

On the technical level, we were left with Requests for Innovation. Their feasibility must now be studied and lead to the design of a platform for copyright protection and royalty collection. It is also the time to develop a detailed work breakdown structure, to find out the type of organizations to be contacted during the next iteration and to shortlist them. This is another key differentiating factor of our approach. It needs a programme, not a centre. Its resourcing strategy must be open, not closed. Today, before iteration 1, we cannot know who will be needed for iteration 2. And, as just mentioned, it is only during iteration 2 that organizations will be shortlisted to be contacted during iteration 3, and potentially work after the R&D iterations, i.e. on the deployment the solution.

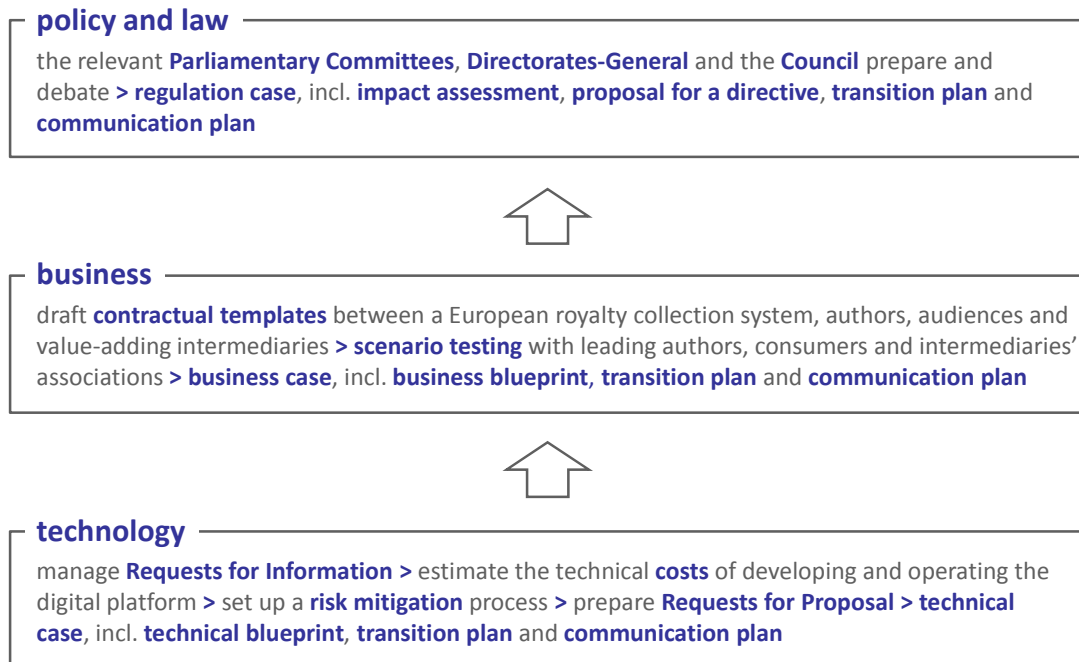
On the business level, based on the value chains and business models of the first iteration and based on the preliminary technical results of the second iteration, one can now sketch the business model of a European royalty collection system, test it with multiple scenarios and explore the relationships between such a European system and the rest of the world. This will define the commercial roadmap.

On the policy and law level, one sketches the legal framework for a Single Market of Intellectual Property Rights. It covers all aspects of §1 and §2. This framework is submitted to rigorous scenario testing. One has to analyse the feasibility of its enforcement and explore the legal relationships between a European digital market and the rest of the world.



After the second iteration, we have a set of three interrelated roadmaps, on the technology, business and policy levels.

The third iteration > blueprints



The third iteration produces blueprints. It can also be done within 18 months.

On the technical level, one launches Requests for Information followed by Requests for Proposal. The answers from the organizations which have been shortlisted during the previous iteration are necessary to estimate and then to refine the estimates of the costs of developing and operating the digital platform. It is also the moment to set up a robust risk mitigation process which will permit to deliver the platform on time, on budget and on specifications. The technical case, result of the three technical iterations includes the technical blueprint of the platform, the transition plan and the communication plan.

On the business level, one drafts the contractual templates between a European royalty collection system, authors, audiences and value-adding intermediaries; just like there are templates for the bye-laws of companies or for leasing contracts. It is the moment to simplify; it is also the moment to remind the Internet its promise and disintermediate. Then, all the results of the three business iterations are submitted to a series of tests with leading authors', consumers' and intermediaries' associations. Finally, the business case includes – besides the economic justification – the business blueprint, a transition plan and a communication plan.

Now is the time, at policy and law level, to organise all required necessary preparations and debates – now, because now these preparations and debates can be *informed*. Now, because impact assessments and evidence-based policy making require first research and then rhetoric. So I assume that the relevant Parliamentary Committees, Directorates-General and the Council will prepare a *regulation* case, which – in parallel to the technical and commercial strands – will include a regulation blueprint, a transition plan and a communication plan.

Then there is a vote, then there is a technical, commercial and legal deployment, then everyone participates in the cultural life of the community, enjoys the arts and shares the benefits of science, and the authors' moral and material interests are respected.

A great success or a little success > no risk

If we complete the third iteration, we get –

- the blueprints for a balanced, technical, commercial and legal enablement of Article 27, which will boost –
 - interactive access to arts, culture and science
 - transferability of knowledge
 - creation of arts, culture and science through protection of creators' moral and material interests
- the knowledge that can give Europe a leadership role in a strategically important sector of human activity
- an almost complete blueprint for a technical solution against counterfeiting and plagiarism of textual, musical and audio-visual work, as well as elements to build a technical solution against illegal contents

If the hypotheses are not confirmed, we get –

- fact-based scientific (in)validation of hypotheses
- knowledge for informed further, technical, commercial, legal and political discussions about the enablement of Article 27 in the digital era
- exclusion of *culs-de-sac* for future technical, commercial, legal and political approaches to the future of copyright in the digital era

The economic principle of iterative research and development is that you launch a next iteration only if the previous one is successful because you need the outputs of the previous one as inputs for the next one. It also means that one can stop the R&D as soon as an iteration doesn't bring enough results. There is no major risk.

Let's assume that we complete successfully the third iteration.

We get the technical, commercial and legal blueprints. A blueprint means that you know what to do, how to do it, who will do it, what it will cost and how long it will take.

Few years after the blueprints, we would have a fundamentally new situation. Everyone would have an interactive access to art, culture and science. Knowledge would be easily transferable. The creation of art, culture and science would be fostered by the protection of creators' moral and material interests. We would have stilled the non-constructive fight which currently opposes the partisans of *§1-only* to the partisans of *§2-only*.

But we would gain more. The technologies and business models which are necessary to assure the balance between access and rights – a base for growth and jobs – would give to their developers a substantial, leadership role in what is probably the most important sector of human activity – intellectual development.

Finally, the technological blueprint for copyright would almost completely cover the technical requirements to fight counterfeiting and plagiarism of textual, musical and audio-visual works. It would also cover elements which would be useful to counter illegal contents.

Now what happens if we cannot confirm during the iterations 2 or 3 the hypotheses formulated during iteration 1?



Well, at least we have a fact-based scientific validation of some hypotheses and invalidation of others. We gain knowledge for *informed*, further, technical, commercial, legal and political discussions of copyright in the digital era. We will be able to avoid some thinking pitfalls and development culs-de-sac.

Revamping intellectual property rights in the European Union

actions	goals	timetable
Green paper on Audiovisual productions	To determine how the delivery of audio-visual media services, in particular on a cross-border basis, can be developed and improved for the benefit of rights holders and consumers alike.	17 July 2011
Report on the Resale Right Directive	This report will examine whether a hereditary resale right has negative repercussions on smaller and mid-sized art galleries. The aim is to assess the effect of the Directive on the competitiveness of art markets in the European Union with regard to markets which do not apply the resale right.	4 th Quarter 2011?
Legislative proposal on collective rights management	To provide a clear and stable framework for cross-border services which rely on clearing a variety of copyrights.	11 July 2012
Review of the Directive on the enforcement of intellectual property rights	In particular to deliver solutions for rapidly developing IPR infringements on the Internet which were not envisaged when the Directive was first adopted.	2 nd Quarter 2012?
Legislative initiative on mutual recognition of orphan works	The legislative initiative will provide a legal base to allow EU libraries to scan and display 'orphan' works.	4 October 2012
Sketches/roadmaps/blueprints for the future of copyright	To define the future Europe's intellectual property framework, more efficient, effective and fit for the online world.	?

At the end of the brochure "Revamping IPR in the European Union", one can find this work plan. It covers – for what directly concerns copyright – the quick wins listed in the Commission's communication but not yet the blue-framed research programme needed to truly revamp copyright in the digital era and outlined in this document.

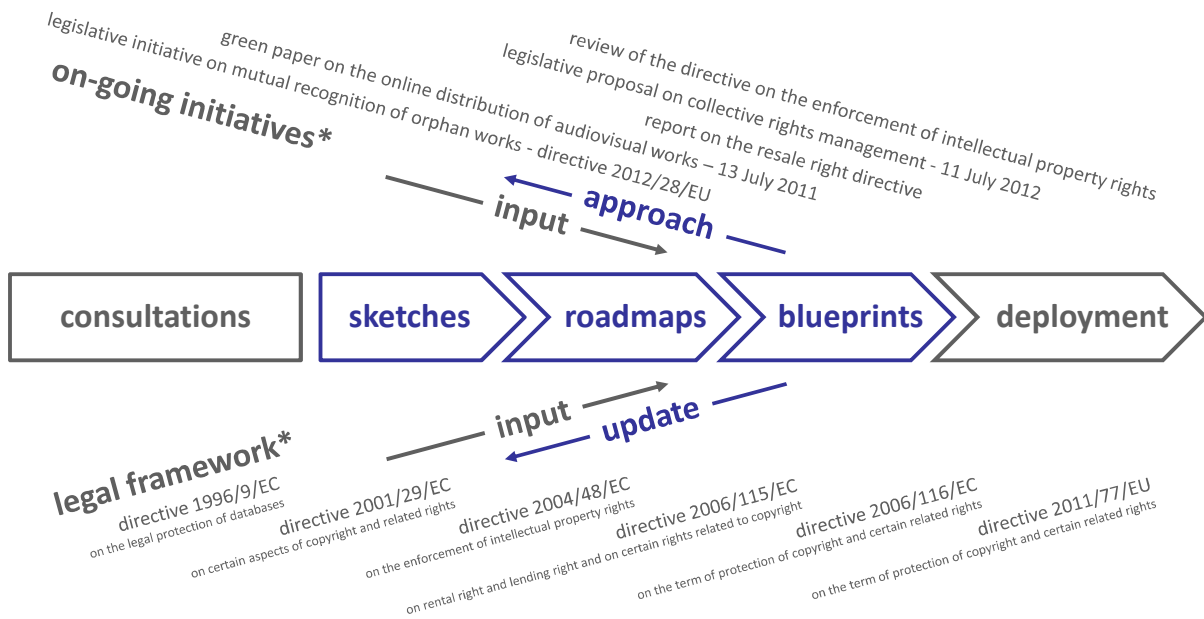
During our meeting on 15 November 2011, Commissioner Michel Barnier stipulated four conditions for an innovative approach for the future of copyright in the digital era:

- 1) it has to embrace the **Internet**,
- 2) pass by the **European Union** (EU),
- 3) be **swift**, and
- 4) be **compatible** with the legal framework (*acquis communautaire*) and on-going initiatives of the European Commission.

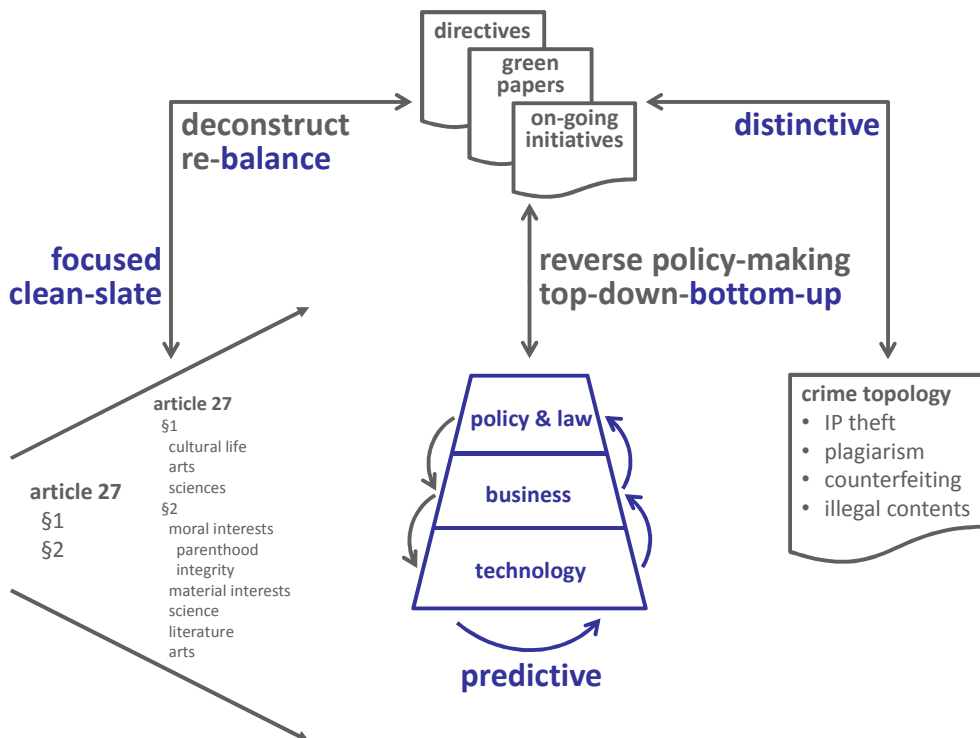
The four conditions can be met. The conditions 1) and 2) have been sufficiently addressed above. The condition 3) depends essentially on the political will to speed up the research. And the following sketches and paragraphs summarize how condition 4) could be met.



Compatibility and mutual enrichment



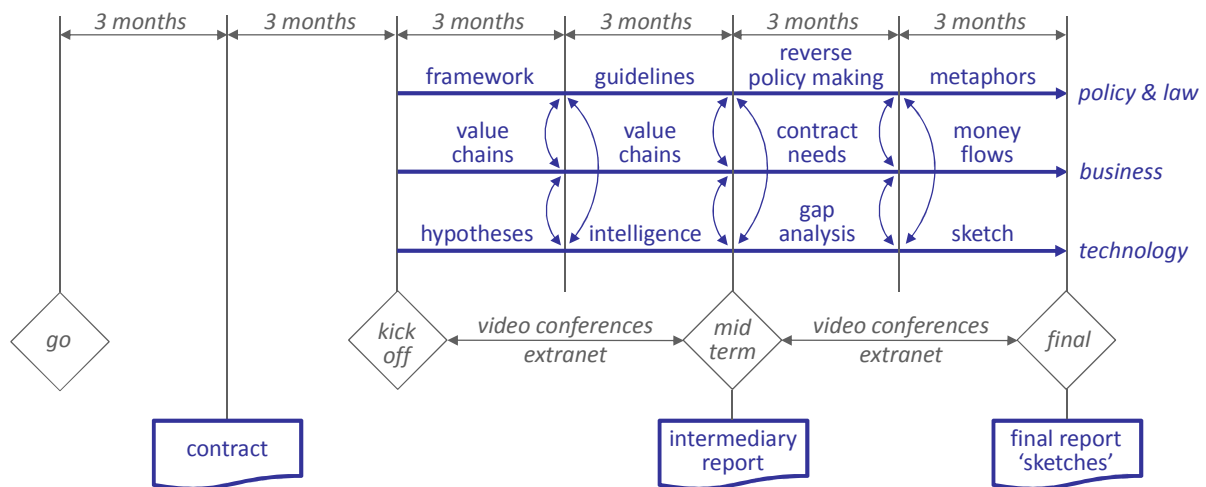
All EU directives would be inputs to be immediately considered at the policy and law level of the innovative approach. On the other hand, the final results of the innovative approach would be the base for "revamping intellectual property rights in the EU" as programmed by the Commission, i.e. the base to revamp the existing directives.



All on-going initiatives could be considered as quick wins of the programme to fundamentally revamp intellectual property rights in the EU. All of them would benefit from the application of the six characteristics of the innovative approach.



A swift, first iteration



On 5 December 2012, the European Commission agreed on a way forward for modernising copyright in the digital economy and on two parallel tracks of action –

- immediate issues for action: launch of stakeholder dialogue
- medium term issues for decision-making in 2014

It is probably the first time since the Convention of Berne in 1886 that such a thorough endeavour is planned. Now is the time for an innovative approach to the future of copyright in the digital era.

When John Kennedy chose to go to the Moon, he said: "I realise that this is in some measure an act of faith and vision, for we do not now know what benefits await us". In that respect, the situations are not comparable. We know what benefits await us if we reach the objective of balancing access to and rewards from intellectual property. And we know that these benefits can be much larger than the benefits of the space programme – that decreases the risk.

The President also said: "If [we go] to the Moon, and do all this, and do it right, and do it first before this decade is out – then we must be bold". In this respect, the situations are comparable. The sum of the skills and efforts needed are comparable, but the budget probably not – and that increases the return. If we want a future for copyright in the digital era, and do all this, and do it right, and do it first before this decade is out – then we must be bold.

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