

The New Copyright Directive: Digital and Cross-border Teaching Exception (Article 5)

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Introduction



The CDSM Directive introduces exceptions or limitations (E&L) for three different purposes. These are (as already outlined [here](#)) text and data mining (Articles 3 and 4), cross-border teaching (Article 5) and the preservation of cultural heritage (Article 6). The specific E&L are flanked by a general provision that prohibits contractual derogations from these mandatory rules and which makes reference to Article 5(5) of Directive 2001/29/EC (InfoSoc Directive), the so-called three-step test. There is much to be said about the systematic impact of the new members of the E&L family. However, this post will focus on the substantive rules of Article 5.

Article 5 introduces a requirement for Member States to introduce an E&L to permit the use of works and other subject matter in digital cross-border activities. Existing Directives of the EU copyright *acquis* already contain E&L for the purpose of illustration for teaching. The InfoSoc Directive includes such an optional E&L for the rights of reproduction, communication to the public and making available in Article 5(3)(a), which applies to the rights harmonized by that directive. Similarly, Directive 96/9/EC provides for a mandatory exception to the database right for the sole purpose of teaching or scientific research (Article 6(2)(b)).

The introduction of this new mandatory rule is, first of all, intended to clarify the application of these exceptions in a digital environment, and also extends the application with a cross-border element (Recital 19). It also includes within the scope of the new E&L the exclusive rights of Directive 2009/24/EC (Software Directive) and the new rights for the online use of press publications introduced by Article 15 of the CDSM Directive. All this is to benefit educational establishments that engage in digital cross-border teaching activities, by providing them with legal certainty.

Beneficiaries

Article 5 is reserved for teaching activities under the responsibility of educational establishments (Article 5(1)(a)). The term is not defined in the substantive part of the directive but Recital 20 indicates that an educational establishment within the meaning of the directive must be "recognised by a Member State". This includes all levels of education, including vocational training. The purpose of the *teaching activity* must be of a non-commercial character, which could imply that even private educational establishments, such as private boarding schools and private universities, can avail themselves of this provision. This is also supported by Recital 20, which states that "[t]he organisational structure and the means of funding of an educational establishment should not be the decisive factors in determining whether the activity is non-commercial in nature." Establishments that provide training exclusively on a for-profit basis will most likely not benefit from Article 5.

Substantive Scope

Article 5 is limited to activities for the purpose of illustration for teaching. This includes digital uses that "support, enrich or complement the teaching, including learning activities." (Recital 20). These examples cover a large range of activities for the use of protected works and other subject matter. Direct face-to-face teaching activities are certainly covered, but also learning resources provided to students and pupils as part of their learning experience. This is also supported by the relatively wide range of activities that are referred to in Recital 22, which includes activities such as classroom use, digital whiteboards or secure electronic environments which complement a course. As a general rule, Article 5 only permits the use of parts or extracts of works for teaching activities, which is inherent in the concept of illustration. Thereby, the use within the scope of Article 5 should not serve as a substitute for the original work, i.e. the purchase of a literary work or an entire textbook. The precise extent of a work that can be used for the purposes of Article 5 is to be determined by the Member States when implementing the provisions. They can also distinguish between different types of material when determining the quantity or the proportion of a work that can be used for illustration in teaching.

Besides on-site uses, educational establishments can also make works available in "secure electronic environments". This option is limited to learning platforms such as Moodle, access to which is restricted to teachers and students, who have to authenticate their status before accessing the material.

In all cases, unless infeasible, the source of the work must be indicated, including the name of the author (Article 5(1)(a)).

Geographic Scope: country of origin rule

Whereas the geographic scope is naturally limited in cases of classroom use, the use of material in electronic environments and online classes can raise problems of a territorial nature. The potentially differing implementation in Member States might still create uncertainty whether the use of a certain proportion of a work would be legal in every Member State in which the work could be accessed via, for example, a secure electronic environment. For this purpose, the directive introduces a country of origin rule for such environments in particular. According to Article 5(3) the use of works and other subject matter under the respective national rule will be considered to occur solely in the Member State where the educational establishment is established. This will greatly facilitate the use of protected material not only for institutions with an international student body, but also for pure distance learning programs, which rely on online learning platforms to provide teaching material.

Licensing carve-out

The general, and horizontal rule for all E&Ls of the CDSM Directive, is that contractual provisions that undermine an exception are unenforceable. Article 5 makes an exception to the exception to the effect that, subject to the availability of suitable licenses, Member States may provide that Article 5(1) does not apply (Article 5(2)). This means that if licenses are available for specific types of work or specific uses of works, then educational establishments must license the works or other subject matter they use in class or on their learning platforms. This carve-out is optional, but it can be assumed that most larger Member States with a strong textbook market will make use of this provision. When implementing Article 5(2), Member States must ensure that suitable licenses covering the needs of educational establishments are easily available on the market. To facilitate the clearing of material and to keep the administrative burden on educational establishments low, such licensing schemes may also be implemented on the basis of collective management (Recitals 23 and 24). In the absence of suitable licenses on a particular national market, or when licenses only cover parts of a specific use, an educational establishment should be able to rely on the basic exception. This can still, pursuant to Article 5(4), be subject to the requirement of fair compensation.

Conclusion

The reach of Article 5 (then Article 4) has changed significantly from its first appearance in the 2016 draft, and had initially been criticized for failing to achieve full harmonization (see [here](#), summarized [here](#), and [here](#)). It has also been argued that the exception does not go far enough by limiting its scope to educational institutions. During the negotiation process the draft of the CDSM Directive approved by the European Parliament had also included museums and libraries as beneficiaries of the exception when they pursue an educational objective (see [here](#), for a comparative breakdown of the different drafts see [here](#)).

The new E&L for the purposes of illustration for teaching undoubtedly clarifies and extends the application of existing teaching exceptions in the various directives of the *acquis*. It provides for a relatively concise, albeit very narrow, framework for educational establishments to use digital content in classrooms and on online teaching platforms. Understandably, and within the general spirit of the CDSM Directive, purely commercial teaching offers, such as for-profit teaching platforms and online courses, will not fall within the scope of Article 5. Thus, the scope is limited to genuine and recognized educational institutions, but will also extend to course offers that are provided against fees or even remuneration.

The licensing carve-out, as much as one might oppose the general idea, makes sense for publishers on the education market. This might even enable educational establishments to negotiate an increase in the proportion of a given category of works that might be made available. Theoretically, this might even have the effect that institutions might be able, provided an applicable license is available and has been acquired, to make entire textbooks available for students of a specific course (although large publishers already have offers for digital textbook collections in place) and in a secure online environment. In order to avoid further dissemination of such content beyond the secure teaching environment, the provisions on technological protection measures in the InfoSoc Directive will still apply and technological protection measures could also be embedded in such environments (Recital 7 CDSM Directive), including the safeguard contained in Article 6(4) InfoSoc Directive to enable the effective exercise of E&L overprotection (Article 7(2)). Whether publishers will be creative and flexible is then another question.

However, it is unlikely that publishers will voluntarily erode their printed textbook markets without asking for a hefty price to compensate for the potential losses in print sales. And when licenses are made available for specific types of material this will most likely impact on the amount and variety of accessible material on online learning platforms – simply because license fees will be too expensive for most educational institutions.

Nevertheless, the encouragement to make licenses for online uses available and easily accessible, coupled with the new country-of-origin rule, will make the use of material in teaching – distance teaching in particular – easier, but not necessarily cheaper. This might be a good trade-off against the potential risk of litigation, albeit one that will require creativity from teachers to direct their students to relevant (digital) learning material. The effect might not necessarily be positive in the eyes of a liberal-minded copyright lawyer. But from a teacher's perspective, the effort required from students to find learning resources by themselves might even better fulfil the educational mission of an educational institution.

This post is part of a series on the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive):

[The New Copyright Directive: A tour d'horizon – Part I](#) by João Pedro Quintais

[The New Copyright Directive: A tour d'horizon – Part II \(of press publishers, upload filters and the real value gap\)](#) by João Pedro Quintais