

Hungary's fast tracked implementation of Article 5 CDSM directive in response to the pandemic

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Last Tuesday, Hungary somewhat unexpectedly became the second EU member state to implement part of the Copyright in the Digital Single Market (CDSM) Directive into national law, after France, which implemented Article 15 (the new press publishers' right) back in October last year. Hungary has now passed a law implementing Article 5 of the DSM directive (on the use of works and other subject matter in digital and cross-border teaching activities) into national law.

Articles 323 to 327 of the new law "on transitional arrangements and health preparedness for the cessation of emergencies" contain modifications and additions to the Hungarian Copyright act of 1999 that expand the scope of the existing exceptions for educational use in §34 and §35 of the Copyright Act to allow digital uses of works both onsite and through secure electronic environments. On the surface this seems to be a fairly straightforward implementation of Article 5 of the CDSM Directive. The Hungarian law does not make use of the options to allow "suitable licences" to override the exception (Art 5(2)) or the ability to require fair compensation for uses made under the exception (Art 5(4)).

I will leave a deeper analysis of the actual provisions to someone better qualified for this task. Instead, I will focus on the most interesting element of the Hungarian implementation, which is its legislative genesis. How does the expansion of the scope of a copyright exception end up in a law on transitional arrangements and health preparedness for the cessation of emergencies?

The expanded copyright exception has its roots in the state of emergency declared by Hungary on the 11th of March in response to the Coronavirus pandemic. On the 30th of March, in a move widely criticised by opposition parties, human rights observers and members of the European Parliament, the Hungarian Parliament subsequently granted the prime minister power to rule by decree without parliamentary involvement. Two weeks later, the prime minister issued Decree 125/2020 which temporarily modified the existing educational exception to include the digital uses enabled by Article 5 of the DSM directive.

This modification of an exception to copyright is notable for a number of reasons. First, it is most likely the first time a primary copyright law provision in an EU member state has been modified without any parliamentary involvement. Secondly - and more interestingly - it is remarkable that a government has turned to adjusting copyright as a response to the emergency caused by the coronavirus pandemic.

Early in the pandemic, some civil society organisations had issued calls for a more flexible approach to copyright to ensure the continuation of educational and research activities under the conditions of widespread lockdowns. On the 9th of April, LIBER issued a statement urging that...

...the European Commission and member state governments should ensure that libraries and educational establishments are enabled to support education and research and to serve their users by (1) issuing flexible time-limited guidance on the interpretation of existing limitations and exceptions in law, or other public interest defences aimed at our institutions, and / or (2) passing emergency legislation ...

It now seems that, of all the EU member states, only Hungary - enabled by the highly controversial ability to rule by decree - has taken action in line with the LIBER call and a subsequent [policy paper issued by COMMUNIA](#)^[1] that argues for exploring the full scope of copyright exceptions in response to the emergency (the COMMUNIA paper was published after the Hungarian decree). In the circumstances of the Coronavirus emergency, the fast tracking of legislation that facilitates online education within the contours of an already-adopted EU directive seems like a sensible policy choice. On the other hand, the fact that such a move was made by an autocratic ruler under the conditions of suspended democratic procedures should give rise to some uncomfortable questions here.

So far, the fact that the Hungarian government has implemented Article 5 of the CDSM Directive via decree seems to have garnered relatively little attention outside Hungary (aided by the fact that the modifications to the education exception were part of a consultation proposal for the full implementation of the directive, which was available for consultation until the 8th of this month).

The fact that Hungary has in fact already implemented Article 5 of the DSM directive brings us back to the law "on transitional arrangements and health preparedness for the cessation of emergencies", which was adopted by the Hungarian parliament last Tuesday in anticipation of the lifting of the state of emergency later that week. As the name implies, the law contains a large number of provisions (so many that it is apparently referred to as a "mixed salad law") that transform interventions passed by decree into permanent laws. As part of this law, the contents of Decree 125/2020 have been enacted as Articles §§323-327 which, all of a sudden and without any substantial parliamentary discussion, make Hungary the 2nd EU member state to have implemented a part of the DSM directive (see also [here](#))^[2]. While on substance the new exception improves the Hungarian copyright act, it will be forever marked by its questionable legislative genesis.

^[1] The author has contributed to this position paper and endorses its contents

^[2] Thanks to Péter Mezei (University of Szeged) for [spotting and highlighting this on twitter](#).