

# Kluwer Copyright Blog

## A concerned look on the new copyright teaching exceptions

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Nelson Mandela said that “Education is the most powerful weapon to change the world”, but is it powerful enough to change copyright? A long-standing debate has been going on regarding the supporting, or rather, hindering role of copyright rules in educational settings.

Recent developments shed new hope. With Article 5 of the [CDSM Directive](#), the EU legislator introduced a new mandatory copyright exception for the use of protected works for educational purposes. The new exception is intended specifically for digital and cross-border teaching activities, something that gained major relevance also due to the outbreak of the COVID-19 pandemic (for a previous analysis, see [here](#)).



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In the process of transposition of the CDSM Directive, Member States have the opportunity to review their national legal frameworks and make educational copyright exceptions more modern and more effective. In fact, implementing Article 5 CDSM Directive is not trivial. The new provision diverges in some crucial aspects from the already existing “illustration for teaching” exception (ex Article 5(3)(a) [InfoSoc Directive](#)) as well as from other knowledge-oriented provisions such as private study (ex Article 5(3)(n) [InfoSoc Directive](#)) or public lending (ex Article 6 [Rental Directive](#)).

Ideally, these copyright exceptions should benefit from cohesive legal regimes, capable of consistently achieving the pursued objectives of the law. However, this seems to be hardly ever the case. In several Member States, questions remain regarding overlaps and uncertainties on the permitted uses of protected works by hand of teachers and students.

The introduction of a new EU digital teaching exception has renewed the attention towards such legal inconsistencies. Copyright scholars and experts used the occasion to take a second look into the legal designs embraced by national legislators across Europe. Recently, two articles have been published that critically analyse educational copyright exceptions in light of the new legislative

developments.

[Priora/Jütte/Mezei](#) put together an analysis of Article 5 CDSM Directive based on a broad perspective that focuses on the purpose behind the education exceptions, namely the public interest in access to knowledge. They draw a comparative study between Hungary, Germany, and Italy and their diverging transposition models, reaching the conclusion that Article 5 only partially achieves its intended goals.

They illustrate that Hungary was the first Member State to implement Article 5 CDSM Directive, even before transposing the remainder of the Directive, as a response to new and urgent digital teaching needs during the COVID-19 pandemic. The new copyright exception introduced in the country followed the wording of the Directive closely and also updated existing educational exceptions. A new “teaching-alike” exception was also introduced, which allows for a broad use of some protected works in the course of activities for scientific dissemination of knowledge, by any person, even beyond the scope of institutional education.

Differently, the German transposition of Article 5, which followed track in May 2021, generously exercised the margin of discretion for the licensing option left to national legislators by the EU Directive. If before this new exception German law provided for a teaching exception that could not be applied to certain uses, now any use falls within the scope of the digital teaching exception as long as licenses are not easily available on the market. According to the authors, the German transposition is likely to benefit end-users, compared to the InfoSoc-inspired teaching exception.

The paper looks also at the Italian transposition of Article 5, which came last in November 2021. After the ambitious intention by the Italian Government of a more systemic reform of the existing copyright exceptions for quotation and teaching uses, the final transposition merely introduced an additional provision specifically regulating uses for digital teaching activities. The licensing carve-out option is exercised only regarding sheet music and educational materials, with the authors noting that such regulatory design may actually reduce end-users’ rights due to an inadequate systematization of the existing national provisions.

In another recent and relevant article, [Lazarova](#) analyses the Bulgarian experience with Article 5 CDSM Directive, pointing out how the country has “fallen into all the traps” of the EU provision, thus becoming a particularly meaningful case study. In the Bulgarian transposition proposal, the Government opted for the introduction of a new copyright exception for digital uses of works in educational institutions, while maintaining a broad educational exception from the InfoSoc Directive. This proposal expressly states that the new provision does not affect the application of the former. However, Lazarova points out, this will likely lead to enforcement issues due to the partial overlap of the two regimes and competing systems of conflict-of-law rules. The author identifies two misconceptions that have negatively influenced the legislative process, i.e. a general feeling by the Bulgarian legislator that the pre-existing copyright teaching exception did not cover digital uses, and the assumption that cross-border uses of works were previously not allowed.

In light of the insights shared by both doctrinal analyses, the attempt made by Article 5 CDSM Directive to modernize copyright rules to facilitate educational activities turns out to be too little. By limiting itself to the creation of a new exception just for digital and cross-border teaching activities, it can be said that the EU legislator conveyed to the national Parliaments the idea of a minor, additional change to be made, rather than a big step forward in effectively harmonizing rules and practices.

Ideally, CDSM Directive should have been used to rethink the EU legal framework on teaching exceptions in its entirety. The choice of a narrower intervention created a dual system of regulation that, as both Lazarova and Priora et al highlight, met the objectives of facilitating digital and cross-border activities *per se*, but also “opened a Pandora’s box that has released a number of other curses”.

As a result, fragmentation persists, the scope and beneficiaries of national implementations are different, new legal overlaps arise and so does legal uncertainty. Simply put, the flexibility intended to facilitate uses of protected works at schools and universities ends up being one of the main reasons why the exception fails to foster quality – analogue and digital – education in the EU. A concerning example in this respect is the licensing carve-out model set in Article 5, thought to facilitate the implementation of the new exception in those Member States where licensing practices already existed. Scholars and experts are pointing out that this will likely, instead, reduce users’ freedoms under the new or pre-existing educational exceptions. Likewise, this feature does not seem to contribute to achieve the goal of harmonization.

It is common to point out how the optional nature of most of the InfoSoc copyright exceptions led to a problematic lack of harmonization within the EU, regarding user rights. While such argument is still valid, the experience of Article 5 CDSM Directive teaches us that mandatory exceptions *per se* are not a synonym of harmonization, either. When the mandatory component of an exception refers solely to the mere existence of the provision, while allowing its substance to be susceptible of significant derogation, legal approximation and certainty can hardly be achieved.

In light of these growing focus and mature doctrinal reflections on copyright in the teaching and learning world, the CDSM Directive is arguably a missed opportunity for the EU. While copyright experts can understand how and why such complex legal framework has come to existence, teachers, students, and citizens will likely have a hard time to correctly interpret the applicable rules and understand why there is no single, coherent, and accessible regime regulating their uses of protected materials for educational and study purposes in a growing digital learning era.

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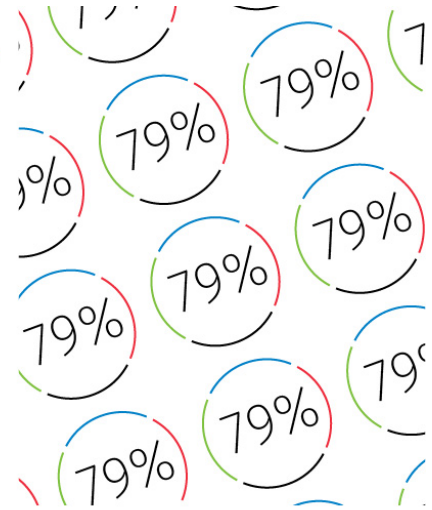
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This entry was posted on Tuesday, July 19th, 2022 at 10:54 am and is filed under [Bulgaria](#), [CDSM Directive](#), [Digital Single Market](#), [European Union](#), [Germany](#), [Hungary](#), [Italy](#)

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