Kluwer Copyright Blog

Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 3 to 7 of Directive (EU) 2019/790 on Copyright in the Digital Single Market

Tatiana Synodinou (University of Cyprus) · Wednesday, July 27th, 2022

Source: European Copyright Society

Almost 3 years after the adoption of the Digital Single Market (Directive (EU) 2019/790) (CDSM Directive), its transposition by the Member States (MS) has proved to be a significant challenge. During a fervent period of failed timely implementation efforts on many fronts (see here), MS need to be vigilant and ensure that the delicate balances expressed in the text of the Directive take the form of efficient and workable legislative provisions.

Against this background, the European Copyright Society (ECS) issued on May 2022 a comment addressing selected aspects of the implementation of the new mandatory exceptions of Articles 3 to 7 of the Directive (drafted by Jonathan Griffiths, Tatiana Synodinou and Raquel Xalabarder).

Exceptions and limitations ensure that copyright law operates compatibly with fundamental constitutional norms, including freedom of information and expression, freedom of arts and sciences and freedom to conduct a business. They also allow vital space for other general interests, including competition and technological and economic development.

In this context, the ECS welcomes the European legislature's efforts to extend and update the existing regime of exceptions and limitations to promote cross-border uses and ensure that the system functions more effectively in today's technological environment. However, while the introduction of the exceptions and limitations established under Articles 3-6 represents an important step in the right direction, it remains a modest one.

In order to give real substance to the new mandatory exceptions, MS need to take into account the nature of the new exceptions established under Articles 3-6, which grant a mandatory minimum level of freedom for users.

Accordingly, the discretion of the MS to shape national provisions within the parameters drawn by the acquis ought to be highly circumscribed. Beyond situations in which the provisions make explicit reference to implementation choices, Member States should be wary of imposing specific restrictive conditions at national level.

Furthermore, the CDSM Directive does not prevent MS from allowing greater scope for exempted use, as long as such use is covered elsewhere in the acquis. This is explicitly indicated in Article 25 of the Directive. In several situations, MS can make valuable use of that flexibility.

Specifically, attention should be given to the following:

Text and Data Mining (Articles 3 & 4)

The condition of "lawful access" for the enjoyment of the TDM exceptions needs to be understood flexibly and in a manner fully compliant with fundamental rights. "Lawful" should not mean "authorised by rightholders" only. In the case of content that is freely available on the net without technical restrictions, no liability for TDM activities shall arise for mining unlawful "sources".

It should be clear that the uses covered by the TDM research exception shall not be subject to compensation and that the exception cannot be neutralized by the application of TPMs. MS are strongly encouraged to establish efficient, transparent and quick procedures for the reporting and the secure removal of such TPMs.

MS should take steps to ensure that prior contracts do not render the TDM exception useless; for example, by providing that prior subscription contracts must be adjusted to accommodate the principle of non-compensation for non-profit scientific research within a reasonable period after the implementation of the Directive.

The imposition of a compensation system should also be avoided also in the context of the broader TDM exception under Article 4, since it would significantly jeopardise the effectiveness of that provision, which is already de facto compromised by the opt-out mechanism available to rightholders. The opt-out clauses should be constructed in a way that ensures that reservations are clear, transparent, precise, easily identifiable, and expressed in unambiguous terms.

The principles posed by the 'Open Data Directive' should be understood as restricting the freedom of public sector bodies falling within the scope of the Directive 2019/1024 to opt-out of the data mining exception.

Digital and Cross-Border Teaching Activities (Article 5)

Article 5 introduces a mandatory "exception or limitation" for digital and cross-border teaching activities.

MS have a leeway in implementing the exception and they may even set aside this mandatory provision (“*as regards specific uses or types of works” when “suitable licences authorising the acts … and covering the needs and specificities of educational establishments are easily available on the market*.)” The possibility of derogation opens MS up to further national lobbying that may ultimately endanger the unifying goal pursued by a mandatory exception and limitation.

MS should be vigilant that the public interest and the harmonizing goal sought by Article 5 is duly satisfied. Any restrictions regarding the scope of Article 5 should only be implemented as necessary “in a balanced manner” and in relation to specific categories of work.

National legislators should revise the pre-existing exceptions and limitations stemming from Article 5 of the InfoSoc Directive (Directive 2001/29/EC) to secure the coherent and seamless exemption of works for teaching purposes, regardless of the means (digital or otherwise) employed, thus avoiding an unnatural accumulation of different sets of provisions regulating digital and analogue teaching uses.

Online cross-border teaching uses “shall be deemed to occur solely in the Member State where the educational establishment is established.” This “legal fiction” is meant to link these activities to one body of applicable law only; a single applicable law that remains decisive because, despite the mandatory nature of Article 5, national exceptions and limitations for digital and online teaching uses will remain foreseeably different in scope and conditions across the EU.

Preservation of Cultural Heritage (Article 6)

Article 6 provides a mandatory exception permitting cultural heritage institutions to make copies of works, or other subject-matter, for the purposes of preservation. Cultural heritage institutions play a vital role in protecting our history and in promoting our culture.

National provisions have sometimes placed inappropriate limits on the preservation activities of cultural heritage institutions; for example, by excluding the reproduction of online works or works held on licence, by precluding digital reproduction or by permitting otherwise infringing acts in exceptional circumstances only. The introduction of a mandatory exception, protected against contractual over-ride, is therefore to be welcomed.

As the preservation activities of cultural heritage institutions present little or no risk to the legitimate interests of rightholders, the exception under Article 6 should not be interpreted narrowly by courts or national legislatures.

The concept of “cultural heritage institution” should be interpreted broadly as covering local and regional, as well as national, institutions, and private and commercial, as well as public, organisations, in so far as their activities are directed at the preservation of works and other subject-matter.

Furthermore, it seems entirely unnecessary for the activities of cultural heritage institutions to be hampered by TPMs. It is particularly important for MS to implement Article 6(4) of the Information Society Directive, as it applies to such activities, in a manner that is both balanced and

efficient and which does not allow rightholder intransigence or delay to hinder the preservation purpose.

The new exception must also be read alongside existing (non-mandatory) provisions in the EU copyright acquis granting MS a broader power to introduce exceptions and limitations for the benefit of cultural heritage institutions. The implementation should not result in the curtailment of existing exceptions and limitations for cultural heritage institutions in national law.

The European Copyright Society (ECS) was founded in January 2012 by academics with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. It has published numerous opinions on the interpretation and development of copyright law in the European Union. The Society is not funded, nor has been instructed, by any particular stakeholders. All ECS opinions are archived here: https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/.

This entry was posted on Wednesday, July 27th, 2022 at 2:29 pm and is filed under Artificial Intelligence (AI), CDSM Directive, Digital Single Market, European Union, Legislative process, Text and Data Mining (TDM)
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.