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The New Greek Teaching Limitation after the Implementation of the DSM Directive: A New Era for Teachers, Students and Educational Establishments?

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Introduction

In November 2022, almost 18 months after the transposition deadline, Law 4996/2022 (Of. Gov. Gaz. A 218/24.11.2022) implemented into the Greek legal order Directives (EU) 790/2019 (hereinafter DSMD) and 789/2019 (as well as Directive 2006/115 on the public lending right, but this is another (lengthy) story...). In doing so, it amended [Law 2121/1993](#), the Greek Copyright Law, as well as [Law 4481/2017](#), the law that regulates the collective management of copyright and related rights. A major part of the amendments concerns [Chapter 4](#) of Law 2121/1993, which regulates exceptions and limitations to copyright. [Article 21](#) of Law 2121/1993, which in the pre-existing law addressed the ‘analogue’ teaching exception, was expanded from one to six paragraphs in order to include the digital teaching activities, as [Article 5](#) of the DSMD dictates. It should be noted that the final version of Article 21 as adopted



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by the Greek Parliament has changed considerably in comparison to the Draft Law with regard to numerous issues, substantially affecting the characteristics of the limitation in crucial aspects, as we will see below.

The ‘old’ analogue exception for teaching

Until the enactment of Law 4996/2022 the teaching exception was exclusively regulated by Article 21(1). This provision, which has been retained with minor changes, covers only analogue uses and applies only to the reproduction right. According to this provision, the *printed* reproduction of lawfully published articles, short excerpts of a work, parts of a short work or work of applied art is allowed without the author’s authorization and without paying remuneration, provided that the reproduction takes place exclusively for teaching activities or exams in an educational establishment, to the extent that the use is justified by the intended *non-commercial* purpose, is in line with morality and does not prevent the normal exploitation. To benefit, a reproduction must be accompanied by an indication of the source and the names of the author and of the publisher, unless this is impossible. The recent amendments have clarified that Article 21(1) refers only to ‘printed’ reproductions and that the purpose must be ‘non-commercial’ (although this is included in Article 5(3)(a) of the Infosoc Directive, the Greek legislator had previously omitted the ‘non-commercial’ requirement).

The ‘new’ digital limitation for teaching

Digital uses for teaching purposes are regulated for the first time in Greece in the new provisions of Article 21(2)-(6). These shall be analysed below.

Scope

The limitation for digital uses for teaching purposes covers the reproduction right, the communication right and the making available to the public right, provided that the following conditions (taken almost verbatim from the relevant conditions of Article 5 of the DSMD) are met, namely that the use of the work or the subject matter:

1. a) is allowed to the extent justified by the intended non-commercial purpose;
2. b) takes place under the responsibility of the educational establishment, on its premises or in other places or through a secure electronic environment to which only the pupils or the students or the teaching staff of the educational establishment have access; and
3. c) is accompanied by a reference to the source, including the names of the author and the publisher, unless it is determined that this is not possible.

The limitation also applies to certain rights in relation to software (Article 42(7) Law 2121/1993), copyright in databases (Article 3(5) Law 2121/1993), the *sui generis* right for databases (Article 45A(6) Law 2121/1993) and all related rights, including the new press publishers right.

The Greek legislator has permitted the digital use of the works for the sole purpose of illustration not only for teaching, but also explicitly for exams, something referenced in Recital 22 DSMD and not within the wording of Article 5.

Furthermore, although the Greek legislator did not use the discrepancy allowed by the DSMD to specify different types of work or other subject matter that can be used for the sole purpose of illustration for teaching and exams, it opted in favour of specifying the permitted proportion of a work (or other subject matter) that may be used within the context of this limitation. In particular, only 5% of the total extent of a work, an article lawfully published in a newspaper or a periodical, a poem or a work of visual arts, including photographic works, is permitted to be used within the allowed ambit of this limitation. This means that whatever exceeds the aforementioned limits falls outside the scope of the limitation and a license is needed for the legitimacy of this use. This condition was added during the discussion of the Draft Law in the Greek Parliament and resembles the Cypriot implementation of Article 5 DSMD (Article 7(2)) Regarding Copyright and Related Rights Law of 1976 (59/1976)).

Fair compensation

It has to be mentioned that, although the initial plans of the legislator, as they were reflected in the relevant Draft Law that was published for a 15-day public consultation, were to establish an exception for digital uses for teaching purposes (i.e., not to opt for fair compensation for these uses), ultimately it was decided to institute fair compensation paid by the users to the rightholders of these works (Article 21(5)). The compensation must be proportional to the extent of the use taking place within the framework of the exception and to the value of the works which are used (note that, although Article 21(5) talks about the ‘works which are reproduced’, this wording should be expansively interpreted to align with the breadth of the exception). The Greek legislator takes into account the ‘harm (caused) to the rightholders’, but not the ‘Member States’ educational objectives’, as dictated in the Preamble to the DSMD (Recital 24 DSMD). The fair compensation is mandatorily collected by the competent collective management organizations in each case at issue, probably in order to avoid imposing an administrative burden on educational establishments (Recital 24 DSMS). There is no further consideration in Article 21 of how the compensation should be set, *i.e.*, as an annual fee per student or as a lump sum.

As in Article 5 of the DSMD, no definition of educational establishments is given in Article 21, but the notion is understood to cover primary, secondary, vocational and higher educational establishments recognized by the Greek State. The majority of these establishments are public ones and, consequently, the Greek State has to bear the financial burden of covering the fair compensation. However, no determination was made during the legislative procedure of the amount that is expected to be borne by the State budget to cover the fair compensation (in contrast, an amount of EUR 350,000 is to be paid by the Greek State to the respective collective management organisations as a fair compensation for the public lending right).

A general carve out – license system

Greece chose to give preference to a license-based solution and apply a general carve-out system (see similarly Sweden and Ireland). As a result, the limitation for digital uses for teaching purposes does not apply where appropriate licenses are easily available on the market and respond to the needs and specificities of educational establishments. The licenses may cover all the same uses covered by the limitation. In the draft text of the transposition law, a license scheme was permitted to override the limitation only regarding material that was primarily intended for the educational market or sheet music. In the final adopted version of Article 21, the overall exclusion of the limitation prevailed in the cases where appropriate licenses exist that are easily available on the market and respond to the needs and specificities of educational establishments. The EU legislator found it appropriate to leave to Member States the discretion to decide upon the system to be adopted, striving on the one hand to respect the different legal orders and traditions in the EU and, on the other hand, to achieve the highest level of harmonisation. Nevertheless, it is worth mentioning that Greece is not one of the Member States where extensive license agreements are in place to facilitate educational uses of works or other subject-matter of protection.

The respective collective management organisations shall ensure the availability of these licenses, information about them and ease of access to them for educational establishments by posting them on their websites and notifying them to the Hellenic Copyright Organization in order that they also be uploaded on its website. To date, although it seems that there are some relevant licenses available, none has been notified or subsequently uploaded to the website of the Hellenic Copyright Organization.

The legal fiction

In order to solve the problems of applicable law, the territoriality principle and the cross-border nature of the digital uses, the Greek legislator transposed Article 5(3) DSMD by introducing the legal fiction this establishes into Article 21(4). According to this, the use of works for the sole purpose of illustration for teaching through secure electronic environments is considered to take place exclusively in the Member State where the educational establishment has its registered offices. If nothing further had been added, no issue would have been raised. Nevertheless, the Greek provision continues by adding the following condition: “provided that it [*the use*] takes place in accordance with paragraph 2”. Paragraph 2 sets the conditions of the limitation, including the permitted extent as mentioned above (5% of the work). This addition means that, in order for this legal fiction to apply, all the conditions provided in the Greek legal order have to be met. Needless to say, this contradicts the aim pursued by the introduction of the legal fiction and creates an insuperable impediment to its application. The aim of this country-of-origin rule is precisely to ensure that the material posted online in a secure learning environment in this context shall not be considered as infringing in any Member State of the EU. In addition, it should not be placed under further conditions that would result in a differentiated treatment among EU users on the basis of the territory in which they are situated when a teaching activity takes place. The aim of this legal fiction is to ensure that there is a cross-border effect regardless of whether the use is authorised under an exception/limitation or a license.

Contractual non-overrideability

Finally, Article 21(6) provides that any contractual provision contrary to paras (2), (3), (4) and (5) is void. By *argumentum a contrario* it could be claimed that Article 21(1) that regulates the analogue exception of the Infosoc Directive could be contractually overridden. Nevertheless, this conclusion is not to be adopted without concerns.

Conclusion

Greece decided to favour rightholders in its implementation of Article 5 of the DSMD, leveraging all the possibilities permitted by the Directive so as to opt for a fair remuneration to be paid, for a full carve-out by the licensing system and for a set extent for the permitted uses of the works. It needs to be seen how the limitation will be applied in practice, since it is still premature to draw conclusions about its effectiveness and its suitability to serve the creation of a fair balance, the enhancement of cross-border uses and, of course, legal certainty.

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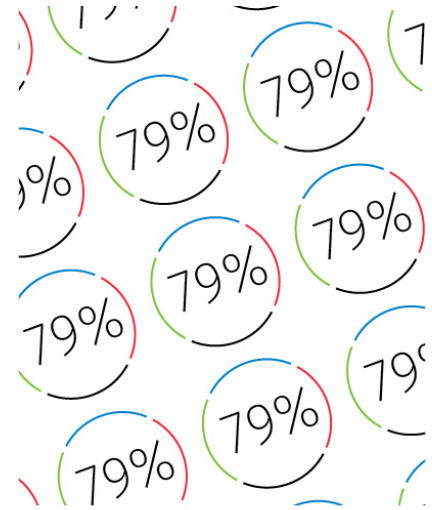
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