

Kluwer Copyright Blog

How a licence-based copyright proved to be crisis-proof and fulfilled societal needs

Quentin Deschandelliers (Federation of European Publishers (FEP)) · Wednesday, December 6th, 2023

In 2019, the European Union (EU) adopted its most important copyright reform in the past 20 years with the Copyright in the Digital Single Market (DSM) Directive. This ambitious reform sets a precedent that, given the EU's status as the world leader in digital regulation and the resultant "Brussels Effect", may be followed elsewhere.



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Book publishers followed closely the adoption of this legislation as the vast majority of its provisions concern them directly, from new copyright exceptions to contractual rules between authors and their partners.

A core goal of the DSM Directive was to adapt EU copyright law to the digital era, ensuring it could address new practices.

The questions of distance learning, remote access and other digital uses of copyright protected works were part of the copyright discussions in the past and solutions were found to allow these uses, whether through licences or exceptions. For example, the new education exception creates a legal fiction to allow distance and even crossborder learning (Article 5.3), while the out-of-commerce mechanism provides a new copyright exception applicable where there are no representative collective management organisations to provide licences for the works concerned (Article 8.3).

Barely a year after the DSM Directive was adopted, EU Member States went into lockdown and many people became stuck in their homes because of the COVID-19 pandemic, relying more than ever on digital tools.

This relaunched debates on whether copyright rules and rightholders could be agile and responsible enough to fulfil the needs of society in times of crisis, or whether only extensive and open

copyright exceptions could be an effective answer. While debate is healthy and necessary, it is our view that using exceptional crises to promote fundamental changes in the copyright framework appears cynical. Likewise, we consider questionable that such efforts ignore the equally exceptional and temporary response of rightholders to these crises. Looking at how publishers reacted to different crises may therefore constitute a useful test to assess whether current copyright rules have proved successful in addressing the needs for access to content.

1. Copyright flexibility in the Covid-19 crisis

The unprecedented COVID-19 lockdowns initially cut people off from their bookshops, their libraries, their schools, reducing the possibilities to access cultural and educational content.

For authors and publishers, the repeated lockdowns created a precarious situation: public events were cancelled, new releases had to be postponed and rightholders faced massive financial losses due to the closure of physical bookshops, the collapse of entire markets (for instance travel books) and the imbalanced nature of online sales (which mostly benefited already established authors/best sellers).

At the same time, cultural content became essential for the mental health of people stuck at home, children still needed an education and research more than ever had to continue. Fortunately, solutions were already available on the market to allow people to access the content they needed online in the form of licences.

Despite the difficult economic situation they were in and the uncertainty about how long the pandemic would last, publishers quickly acted to ensure that people could still access content: licences with users were modified to facilitate and increase access, and content, especially educational, was temporarily made accessible for free.

This came at a cost for publishers and could only be done on a temporary basis (particularly in cases where content was made accessible for free). Indeed, it would not be sustainable for the publishing sector and for the normal exploitation of works to make these emergency measures the rule.

This quick reaction happened because copyright gave publishers the tools and flexibility to do this, in conjunction with authors and public authorities. Licences could be modified or offered in a swift manner, without uncertainty on the legality of the access provided, and, combined with the already existing copyright exceptions, they ensured a balance between all the fundamental rights involved.

Should a similar crisis arise in future, these licensing schemes could be actioned again. For certain uses, with the DSM Directive, pan-European uses can be covered through licences granted by the relevant collective management society.

In short, it is our view that copyright rules and the market proved to be flexible enough to allow for exceptional measures to be adopted quickly and successfully fulfil the needs of the public for the duration of the crisis. Publishers and authors embraced their societal responsibility without the need for external intervention or additional legal framework. The increased access permitted by licences came at considerable cost for publishing houses and can only be triggered by the rightholders themselves in such exceptional circumstances. While libraries and schools have been

facing a loss of public support for their budgets in many countries, which the pandemic only aggravated, copyright and the remuneration of authors should not become the variable used to allow them to continue to acquire educational content, beef up their collections, etc.

A similar willingness to facilitate access to protected works arose in another, on-going, crisis: the war in Ukraine.

2. Ukraine: a successful cooperation between publishers and government in times of war

The current war in Ukraine has also placed an exceptional strain on publishers. Beyond the conflict's dramatic impact on the population, the book sector was a target of the Russian invader, with books in the Ukrainian language (particularly on Ukrainian history and literature) being destroyed in occupied cities.

It is thanks to the willingness of Ukrainian authors and publishers to support their government and the war efforts, that schoolbooks were made available online so children could still have access to education not because of broad copyright exceptions as it had been [implied by activists](#). Hence this initiative cannot be taken out of the war context and additionally was undertaken as part of the Ukrainian system for schoolbooks that was already in place long before the war and in full respect of the copyright of authors and their publishers.

Under the Ukrainian system, schoolbooks are ordered, printed and provided to schools by the State but the copyright ownership of these books remains with the authors and publishers (who can also offer these schoolbooks on the market). Since the start of the war, and according to information provided to us by Ukrainians, publishers voluntarily agreed temporarily to not be paid for the creation of their schoolbooks and to provide them in an electronic format under the following guarantees from the Ukrainian government: 1) that the State funds normally allocated to pay for the printing of schoolbooks would instead fund the war effort and 2) that the costs of creating the schoolbooks would be "reimbursed" to publishers and authors at a later stage (through the normal budget or international contributions) in full respect of the contracts that were in place between publishers and the Ukrainian government.

At no point in Ukraine were copyright rules suspended, or the copyright ownership of schoolbooks transferred to allow an [answer to the crisis](#). Solutions were found on the basis of the on-going cooperation between publishers and the government, without threatening the copyright of rightholders, and were motivated by a willingness to ensure continued education for Ukrainian children and as a form of voluntary contribution to the war effort.

3. A crisis is not reason to weaken copyright

The pandemic and the war in Ukraine, both extreme and exceptional situations that presented (and continue to present) serious challenges, have showed in our opinion 1) that copyright rules and licences have so far been flexible enough to allow swift and efficient answers to unexpected crises, ensuring that students, researchers and consumers have access to content, and 2) that publishers fulfil their societal responsibilities in a way that prevents market failure, answers societal needs and respects the fundamental rights of all.

Considering the above, facing times of crisis should not require broader interpretations of copyright exceptions or similar interventions using [other fundamental rights](#) as a limitation to copyright. The protection of copyright is a fundamental right under European law (Article 17.2 of the European Charter of Fundamental Rights) and, while it must work in balance with other fundamental rights, this balance is directly reflected in EU law within a closed list of copyright exceptions (found primarily in the 2001 InfoSoc Directive and the new DSM Directive).

Additionally, as recently reminded by the ECtHR (*Safarov v Azerbaijan*), rules meant to protect copyright cannot be arbitrarily bent through an overly flexible application of copyright exceptions relying exclusively on their object and purpose. Clear conditions must be attached to exceptions (in application of the three-step test) and cannot be ignored or interpreted in such a way that makes them irrelevant.

While a crisis will, by definition, challenge any existing framework, resilience can only be achieved if actors have the willingness, the tools and the capacity to be flexible and address the crisis. This was achieved in the recent crisis because rightholders showed responsibility, could alter licences in cooperation with all actors involved and could temporarily sustain the financial efforts.

On the contrary, a copyright framework based on extensive exceptions would weaken the ability viably to create content in normal circumstances (for instance, it has been argued that the [introduction in Canada of a fair dealing exception severely crippled the educational publishing sector](#)) and could only lead to a collapse in times of crisis, as [content producers would lack the capacity to sustain the shock of the crisis](#) and ultimately reduce the amount of content available. This would be the exact contrary of what society needs from its copyright framework.

Through these examples, it seems clear that copyright rules and licences proved to be much more flexible and pragmatic than what is often portrayed, being able to sustain some of the worst crises in the past decades, without sacrificing the interests of any of the actors involved. As such, the past 3 years should be viewed as an example of good practice and proof that there is no failure in the European copyright framework.

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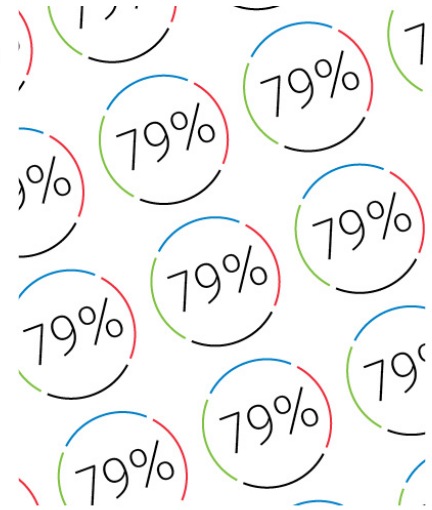
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