

# Kluwer Copyright Blog

## The last in line: Bulgaria implements the CDSM Directive

Ana Lazarova (Sofia University; Digital Republic) · Wednesday, December 27th, 2023

More than two years after the transposition deadline, and with another [infringement proceeding](#) under its belt, Bulgaria is one of the last Member States to now implement the [CDSM Directive](#).



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On the tail end of a political crisis that forced the country into multiple consecutive early general elections and led to a string of short-lived parliaments not being able to come through with the adoption of the proposal, the long-awaited [amendments](#) to the Bulgarian Copyright and Neighbouring Rights Act ([CNRA](#)) were promulgated on the 1st of December 2023. Here are some of the highlights:

### Copyright Exceptions

The Directive contains seven [exceptions](#) (not counting the carve-out to the press publishers' right for "very short extracts") of which two – for the purpose of [text and data mining](#) (TDM) – are novel at the EU level; two – for the purpose of [teaching](#) and preservation – represent an attempt of the EU legislator to introduce a mandatory minimum for digital uses in the context of pre-existing [InfoSoc](#) exceptions; one is a "fall-back" exception for the benefit of Cultural Heritage Institutions within the [out-of-commerce works mechanism](#); and two are mandatory use cases for the purpose of quotation, parody, caricature and pastiche specifically within the use on online platforms as per [art. 17 of the Directive](#).

Although Bulgaria didn't have a parody exception, most of the InfoSoc model clauses were already implemented in a technology neutral way. This is why the main drawback of the implementation of the new exceptions under arts. 3 to 6 of the Directive is that they were introduced outside the general "Free use" regime in art. 24 et seq. of the CNRA – in a new Section 11a, named "Special provisions for *certain digital uses* of works and other subject-matter". Although it strictly follows

the Directive, this solution artificially separates cases of digital use from the technology-neutral pre-existing exceptions. In particular, the provisions of the new arts. 26h and 26i on education and preservation create a regime parallel to and partially overlapping with that under the existing exceptions in art. 24, items 3 and 9. In addition, in the new art. 26h the legislator exercised the option as per art. 5(2) of the Directive to exclude some types of subject matter from the scope of the digital teaching exception, introducing a derogation for musical notation, musical scores and works intended primarily for teaching. Such carve-out from permitted educational uses never existed in Bulgaria. The provision does not offer a mechanism ensuring the visibility and accessibility of licences as required by the Directive. The exception thus applies to the use of these works whenever the user cannot *obtain the necessary permission after making reasonable effort*.

Other than that, the national legislator's overall approach to permitted uses can be commended as quite consistent. The exceptions for TDM under arts. 3 and 4 of the Directive are transposed into new arts. 26f and 26g in the CNRA. The provisions mostly follow the Directive's prescriptions literally. However, in the case of TDM for the purposes of scientific research, an obligation on rightsholders to provide the necessary access to users (who have lawful access to the materials) within 72 hours following a request is imposed. However, the provision does not enter into more detail to set a specific mechanism for the requests to be made, nor does it provide for any consequences for rightsholders in the event of non-compliance. Furthermore, the Bulgarian general TDM exception expands on the way rightsholders can exercise their right to prohibit mining as per art.4 of the Directive. It requires rightsholder's reservations be established prior to making the works available to the public and "by technical means recognisable by the software carrying out the automated analysis". Between the first and second readings in Parliament, on the initiative of music industry representatives, the Ministry of Culture withdrew the word "immediately" from the originally proposed text, which had required the reservation be "*immediately* recognisable".

In addition, the Bulgarian legislator used this legislative initiative to further revise the regime of permitted uses. Previously untransposed InfoSoc exceptions – such as parody and incidental inclusion – were introduced and pre-existing ones – such as the press review and the reporting of current events exceptions – were broadened in scope. Most importantly, all exceptions in the law were proclaimed mandatory by a new general provision. Although until now the CNRA did not explicitly define the nature of exceptions, the Bulgarian doctrine traditionally perceived norms protecting the public interest as imperative by design. The Parliament acknowledged that with the implementation of arts. 3, 5 and 6 of the Directive, the explicit prohibition of contractual override for these new exceptions specifically could have called into question the effect of all pre-existing ones. At present, according to a new para 2 in art 23 of the CNRA, "Any arrangement which impedes or restricts the right of free use is null and void unless otherwise provided by law."

### **The press publishers' right**

The new neighbouring right on press publications was introduced in art. 90d et seq. of the law. Art.15 of the Directive was implemented almost *verbatim*. However, an unusual legal definition of "very short extracts" was adopted. These encompass "the title of the publication, together with the first up to 100 consecutive characters of the text, which may be accompanied by a preview image in small format with a resolution of up to 128 by 128 pixels and part of a sound file or a video clip of up to three seconds". This quantitative approach has already been [criticised by researchers](#) as incompatible with the single market objectives of the Directive and fundamental rights.

The implementation of art.15(5) of the Directive is also somewhat problematic. A new art. 90e allocates a 20 % share of the press publisher's revenue to the authors of works included in the press publication. This ratio however applies "unless otherwise agreed in writing", which in practice leaves room for complete contractual override of authors' right to an appropriate share.

On the bright side, in connection with the introduction of the new right, the scope of the pre-existing "informatory" exceptions under art. 24, items 5 and 6 of the law have also been broadened.

### **The new intermediary liability regime**

The new rules for "online content sharing service providers" are introduced in a new art. 22b of the CNRA. The text of the Directive is, again, implemented almost *verbatim*.

Even though, according to the CJEU judgment in [Case C-401/19](#), it is the responsibility of the Member States to take concrete legislative measures to strike an effective balance between competing rights and obligations in the application of this controversial mechanism, the Bulgarian legislator did not go into additional detail to protect platform users from blocking and taking down lawful content. Despite the instructions in the Commission's [Guidance on Article 17 of the Directive](#), the new national provision does not restrict blocking to "manifestly infringing uploads". More worryingly, there is also no specific procedure by which users can enforce their rights through the courts, as required by art. 17(9) *in fine*. Pursuant to para 15 of art. 22b, in case of disputes "*either party may refer the dispute to the competent court.*" It is however unclear what the procedure would be for users to enforce their rights in court.

A positive development in the context of the implementation of art. 17 is the introduction of a technology-neutral parody exception within the full scope of art. 5.3.k of the InfoSoc Directive. However, the translation of the term "pastiche" as an "imitation of the character or style of another work" can be seen as a shortcoming, especially in light of the expectations for the concept of "pastiche" to soon be interpreted by the CJEU as an autonomous concept of EU law, given the recent [referral of the German Federal Court of Justice](#). In addition, recognising the risk of over-blocking user content online, the legislator introduced in its full scope another previously untransposed InfoSoc exception – that of "[incidental inclusion](#)".

### **Other mechanisms**

The rules mandating fair remuneration in exploitation contracts of authors and performers, turned out to be the main point of contention between stakeholders on the national level. CMOs were attempting to gain as much control as possible over collecting fair remuneration, at one point even suggesting the introduction of an [unwaivable, untransferable right to remuneration](#) for each instance of broadcasting and communication to the public, subject to mandatory collective administration. Exploiters, on the other hand, were focused on [trying to water down](#) the requirement of arts. 18 to 23 of the Directive.

As a result, Bulgarian copyright law, which already contained some mechanisms on additional and proportionate remuneration for authors and performers, was updated according to the requirements

of the Directive without going much further than that. Additionally, although the changes to the law are effective immediately, the entry into force of the new provisions on transparency and accountability implementing art. 19 of the Directive was deferred until the 3rd of December 2024. The amendment does not provide for new instances of mandatory or extended collective licensing except in the case of out-of-commerce works.

Overall, barring some inconsistencies, the implementation is well balanced, if not following the Directive too closely for the more controversial mechanisms. The fact that the amendment was subject to a diligent legislative process, including **extensive public consultations**, is a plus. However, the national legislator does not seem to have fully grabbed the opportunity provided by the otherwise undesired delay to further improve the transposition based on the implementation experience of other Member States and the many legal analyses that were in the meantime produced by EU institutions and the international academic community.

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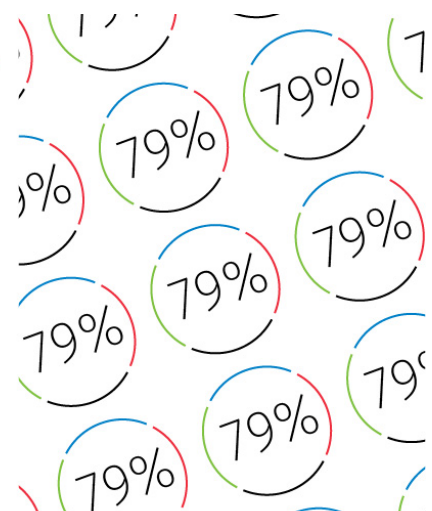
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