

Copyright in the Digital Single Market: Analysis and Implementation of the new Directive

E&L for teaching purposes

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BERNE CONVENTION Article 10

Certain Free Uses of Works

1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be **a matter for legislation in the countries** of the Union, and for special agreements existing or to be concluded between them, to permit the **utilization**, to the **extent justified by the purpose**, of literary or artistic works **by way of illustration** in publications, broadcasts or sound or visual recordings **for teaching**, provided such utilization is **compatible with fair practice**.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.

EU *acquis*: Fragmented approach to E&L

➤ Computer programs (D 91/250EEC)

Art.5: necessary acts (unless contracted out), back-up copy, study & testing, interoperability

➤ Rental and Lending (D 92/100/EC)

Art.6 (copyright): public lending (in exchange for remuneration)

CJEU: Vereniging Openbare Bibliotheken (C-174/15): e-books under “public lending” E&L

Art.10 (related rights): private use, reporting of current events, ephemeral recording for broadcast, **teaching & scientific research**, other limitations as copyright // *Two-step-test*

➤ Databases (D 96/9/EC)

Art.6 (copyright) : access by lawful user (compulsory) // private copy, **illustration for teaching & scientific research**, public security & administrative or judicial procedure, other “traditional” limitations // *Two-step-test*

➤ Info Soc (D 2001/29/EC)

Art.5.1: Temporary (transient or incidental) copies (*Infopaq I+II, PRCA, FAPL...*)

Art.5.2: Reproduction (+ Distribution)

- ✓ Reprography (fc)*
- ✓ Private use (any means) by a natural person (fc)*
- ✓ Libraries, educational inst., museums, archives (*Darmstadt*)
- ✓ Ephemeral recordings for broadcast & preservation
- ✓ Broadcast copying by hospitals & prisons (fc)*

Art.5.3: Reproduction (+Distribution) & Comm. to public

- ✓ **Illustration for teaching and research** (*Renckhoff*)
- ✓ People with disability
- ✓ Use by press & reporting of current events
- ✓ Quotations (*Painer, Pelham*)
- ✓ Public security or official proceedings
- ✓ Public lectures
- ✓ Panorama (works permanently in public places)
- ✓ Research or private study in dedicated terminals in library premises (*Darmstadt*)
- ✓ Minor existing limitations in national laws (analogues uses only)
- ✓ Religious & Official events
- ✓ Incidental inclusion
- ✓ Art catalogues (sale, exhibition)
- ✓ Parody (*Deckmyn*)
- ✓ Repair & Demonstration of equipment
- ✓ Building reconstruction

Subject to fair compensation* or for free –Rec.35-36: allowed in other cases

Recital 32: exhaustive (closed) list (*Pelham*) // **Non-mandatory (optional)**

“Autonomous concepts of EU law” CJEU Padawan (C-620/10) #33 / Deckmyn (C-201/13) #15 : MS may choose to implement a limitation, but cannot define its borders

Narrower national limitations are “pre-empted” by EU law (Art.5 InfoSoc)

Little harmonization ... off-line and on-line!

- All MS have implemented Art.5.3(a) InfoSoc, but with different terms (WD: “restrictive implementation”)
- Even when “copy-paste”, different readings and solutions are implemented in practice

Exception	Implementation in Member States	Main differences in the implementation in Member States
Teaching	<ul style="list-style-type: none"> • Exception implemented in all MS • Implemented through extended collective licensing in DK, FI, SE • Exception subject to the availability of licences in UK, IE 	<ul style="list-style-type: none"> • Application of the exception to digital uses • Categories of beneficiaries (public or private education bodies, teachers and students, etc.) • Exclusion of certain types of works (e.g. sheet music or cinematographic works) • Exclusion of textbooks or other works made explicitly for educational purposes • Extent of works that can be used under the exception (fragments, extracts, specific limitation, etc.) • Payment of a compensation or remuneration under ECL/licence (required – at least partially – in 16 MS)

InfoSoc Dir. Art.5.3(a): Member States may provide for exceptions or limitations to the rights provided for in **Articles 2 and 3** in the following cases:

- (a) use for the sole purpose of **illustration for teaching or scientific research**, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and **to the extent justified** by the **non-commercial purpose to be achieved**;

Recital (42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

SWD: restrictive implementation resulting in a “suboptimal use of protected content in the **digital environment”**

Why is it a problem?

- **Legal uncertainty... as to digital uses and online and distance.** National E&L with different scope (restrictive). Not fit for digital & online uses.
- **Lack of cross-border effects.** Hamper development of distance and cross-border learning (mostly, university).
- **Insufficient licensing of teaching activities.** Disproportionate **transaction costs** (clearance).
- Recital 19 CDSM
- EU Commission - STAFF WORKING DOCUMENT IMPACT ASSESSMENT, SWD(2016) 301 final (14.9.2016)
- WIPO Development Agenda – an Int'l Treaty?

DSM Directive 2019/790/UE

Text and data mining for Scientific Research (Art.3)
+ Optional one (Art.4)

Digital & cross-border teaching activities (Art.5)

Preservation of cultural heritage (Art.6)

Out-of commerce works (Art.8-11)

MS shall provide... mandatory!

Art. 5 – Digital & cross-border teaching

- ✓ Exception or Limitation (**fair compensation *allowed***)
 - ✓ To rights of **reproduction** and **comm. to the public (including MAOL)** – ... and Transformation?
 - ✓ **Digital use** of works & other PSM (Databases + *sui generis*)
 - ✓ For the sole purpose of **illustration for teaching**
 - ✓ To extent justified by the **non-commercial purpose**

 - ❖ **In school premises, other venues** (exams, museums), *via electronic whiteboards or digital devices...*
 - ❖ Through **(secure) e-networks** (accessed only by pupils, students, teaching staff, *via passwords, authentication*)
 - ✓ Indicating source and author (if possible)
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Educational establishment (rec.20): recognized by MS, including **primary, secondary, vocational and higher education ... non-commercial purpose of educational activity**
(*Organizational structure and means of funding should not be decisive factors*)

Should benefit all...

Teaching and learning activities (rec.21): to support, enrich or complement the teaching, including learning activities, exams ... limited to what is necessary for that purpose // illustration

Should include all...

Works and Quantity (rec.21): **In most cases**, the concept of illustration would... imply the **use only of parts or extracts** of works, ... should **not substitute for the purchase of materials primarily intended for the educational market**. MS should remain free to specify, for the different types of works or other subject matter, in a balanced manner, the proportion of a work ... that can be used.

Fair Compensation (rec.24): MS should remain free to provide ... fair compensation ... In setting the level of fair compensation, due account should be taken, inter alia, of Member States' **educational objectives and of the harm to rightholders**. MS... should encourage the use of systems that do **not create an administrative burden** for educational establishments

MANDATORY E&L but ... SCOPE NOT FULLY HARMONIZED

Art. 5.2 – Digital & cross-border teaching

- **MS may not apply E&L** (as regards specific uses or types of works...) when “*suitable licenses ... are easily available on the market*”
- ✓ TYPES OF WORKS: “such as material that is primarily intended for the educational market or sheet music”
- ✓ SUITABLE: “covering the **needs and specificities** of educational establishments” and “covering **at least the same uses** as those allowed under the exception or limitation” (recital 23).

When MS use this possibility:

- ✓ MS shall take “*necessary measures to ensure licenses are available ... and visible in an appropriate manner*”
- ✓ MS must avoid “legal uncertainty or an administrative burden for educational establishments” (rec.23) → mandatory CMO, ECL ...
- ✓ MS should ensure that where licences cover only partial uses allowed under E&L ... all other uses remain subject to E&L (rec.23)

Why?

- **To avoid negative economic effects in a few countries** where licensing for digital teaching uses is available and working, based on voluntary agreements: via ECL systems (DK, FI, SW) or incentivated by fall-back E&L (UK, IR).
- **A real danger** that digital uses may end up subject to voluntary licensing ... in nat'l implementation?



- Other **better solutions**, less dangerous that preserve a uniform (mandatory) scope of exempted uses & allows further agreements

Art. 7 – Common provisions

- ✓ Art.5.5 InfoSoc (**Three-step test**) shall apply
- ✓ **Any contractual provision to the contrary ...shall be unenforceable** → *good step (mandatory E&L) ... let's do it for all E&L!*
- ✓ The first, third and fifth subparagraphs of **Article 6(4)** InfoSoc ...shall apply.

Art.6(4) InfoSoc → relation between TPM and E&L

- 1) **In the absence of voluntary measures – MS SHALL take appropriate measures to ensure limitations** (like library copying, research, museums, hospitals, disable persons) → E&L for digital & cross-border is “safeguarded”
- 2) **NOT APPLICABLE** (private copying) -- MS MAY... / TPMs to restrict number of copies / OK
- 3) **TPM implemented must be enforced** – Inconsistent with mandatory E&L!
- 4) **NOT APPLICABLE** (works available on agreed contractual terms) / OK → **E&L cannot be contracted-out**
- 5) Applicable to **Databases and Computer programs**

Final comments:

- **Co-existence of E&L regimes ... or a “natural” convergence?**
 - analogic (Art.5.3(a) InfoSoc → not harmonized)
 - digital uses classroom + online uses → mandatory E&L

(same treatment should apply to analogic v. digital uses in classrooms)

 - **Mandatory E&L for digital & online, but not fully harmonized:**
 - *Nat'l laws may decide on: exclude some works, what amounts, fair compensation, management regime*
 - *Nat'l laws may exclude Art.5.1 when licensing is available → DANGER of defeating mandatory E&L at nat'l implementation!*
 - *Other better solution: A mandatory Art.5.1 that cannot be overridden by contract (nuclear EU-uniform scope of exempted uses preserved), but it can be complemented by parties agreement (accommodating licensing in Nordic countries and UK).*

 - **CROSS-BORDER online teaching uses *deemed to occur only in country of establishment* (not a PIL criteria but a “legal fiction”?)**
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- Any danger of “online teaching heavens”?

Thanks !

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