The Reform of EU Copyright law - a success or a failure?

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Introductory remarks

- What is the copyright directive?
- What does it mean for educational publishers?
- What are the next steps for implementing it into law?
- Why is it an important step to safeguard intellectual property?
- Why in many countries people were so upset about the directive and feared the end the free internet?
1. Overview of the process of harmonization of copyright laws of EU member states

The creation of the internal market is an area of shared competence between the EU and the Member states, meaning that both the EU and its Member States may adopt legally binding acts in the area concerned.

The body of EU law regulating the minimum standard of protection of copyright throughout the Union consists of the following directives:


Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property


The European Union’s first attempt to unify copyrights in light of digital technologies was adopted in 2001 as the Information Society Directive 2001/29/EC.

The harmonization process started though as early as 1994 when the European Council meeting at Corfu stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe.

The Counsel acknowledged that copyrights and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of creative content.
The 2001 Information Society Directive's major objectives were:

- to harmonise EU legislation with international law as set by the 1996 World Intellectual Property Organization treaties;
- to strengthen intellectual property protection;
- to reduce conflicts in copyright laws between member states, and
- to assure adequate remuneration to content producers.

At the time of its conception 2001 there was no social media, no museums digitalising their art and no teacher recording online classes. This led to the need to rethink and adjust the existing system of harmonization at EU level to the new digital era.
Timeline of the copyright reform at EU level:

- **2012** - European Commission announced that they would be reviewing the 2001 Directive
- **End 2013 - March 2014** - the Commission took public comments on the state of affairs
- **July 2014** - the Commission published its first report on the state of the EU copyright law
- **End 2015** - the Commission began working on establishing the new legal framework
- **September 2016** - the Commission issued a proposed draft of the Copyright in the Digital Single Market Directive
- **May 2018** - Following revisions, the Council of the European Union's Committee of Permanent Representatives (COREPER) approved of the proposed draft Directive without the support of Germany, Finland, the Netherlands, Slovenia, Belgium and Hungary
- **5 July 2018** - Members of the European Parliament voted not to proceed to the negotiation stage, but instead to reopen the directive for debate in September 2018.
- **12 September 2018** - a revised proposal was approved by the Parliament
- **13 February 2019** - the final version negotiated at formal trialogue meetings between Commission, Counsel and Parliament, was presented to the Parliament
- **26 March 2019** - the Directive was approved by a tight vote of 338 to 284 MPs. The main support came from the centre-right European People’s party.
- **15 April 2019** - the Directive was approved by the Council of the European Union
VOTING IN THE COUNSEL ON 15 APRIL 2019 BY COUNTRIES

source Wikipedia
The new Digital Single Market Copyright Directive will enter into force 20 days after being published in the official journal which is expected shortly. Once published, the Directive will receive its official reference number.

Member states will have 24 months as from the date of its entry into force to pass appropriate legislation to meet the new Directive's requirements.

- The Digital Single Market Copyright Directive is based upon, and complements, the rules laid down in the Directives currently in force in this area.

- Its provisions build upon the copyright rules, exceptions and limitations already in place in the existing EU legislation, as transposed in the national copyright laws of individual member states.

- Therefore, the proper understanding of the extended scope of regulation introduced by the new Digital Single Market Copyright Directive requires an overview of the current state of affairs under the Information Society Directive 2001/29/EC.
The Information Society Directive 2001/29/EC fully harmonises the key exclusive rights of authors and other rights holders:

- the reproduction right;
- the right of communication/making available to the public;
- the distribution right.

To a lesser degree, the Information Society Directive harmonizes the exceptions and limitations to these exclusive rights in order to facilitate the use of protected content in specific circumstances. The Directive introduces:

- **One mandatory exception** to the right of reproduction for certain temporary acts of reproduction which are integral and essential part of a technological process (temporary copies), and which aim to enable a lawful use or a transmission in a network between third parties by an intermediary, of a work or other subject-matter, and

- **20 optional exceptions** relating to the rights of reproduction, communication and distribution, left at the discretion of the Member States to decide whether to implement them or not. The exceptions and limitations seek to strike a balance between the rights of creators to exercise control of their works and the rights of the public to access culture and information.
The current exception for the purposes of illustration for teaching or scientific research is based on the following rationale:

- **Recital 14**: This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

- **Recital 34**: Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

- **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.
Article 5(2)(c)

Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.

Article 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: 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 it turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.
While the exclusive rights have been largely harmonised across the 28 EU member states, the exceptions and limitations are a patchwork. The teaching exception is one of the less controversial and is widely introduced in national laws of EU member states.

Source: [http://copyrightexceptions.eu/#Art.%205.2(e)](http://copyrightexceptions.eu/#Art.%205.2(e))

CopyrightExceptions.eu is a project by Kennisland and is supported by a grant from the Information Program of the Open Society Foundations.
For comparison, the exception under art. 5.2 (e) for reproductions of broadcasts made by social institutions pursuing non-commercial purposes is less recognized throughout the EU.

Source: [http://copyrightexceptions.eu/#Art.%205.2(e)](http://copyrightexceptions.eu/#Art.%205.2(e))
The Bulgarian implementation of the optional exception for teaching and scientific research has the following wording:

- Article 24.1 (3) of the Copyright and neighbouring rights act

No permission from the author and no compensation shall be due in the case of use of parts of published works or of a limited number of small works in other works in a volume that is required for the purposes of preparing an analysis, commentary, or other scientific research; such use shall be admissible only if it is done for scientific or educational purposes and if reference is made to the source and name of the author, if this is not impossible.

The text does not explicitly require non-commercial purpose to be achieved.
3. New exceptions and limitations for education and teaching introduced by the Digital Single Market Copyright Directive

- PREAMBLE 86 Recitals
- TITLE I - GENERAL PROVISIONS
  Article 1 Subject matter and scope
  Article 2 Definitions
- TITLE II - MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT
  Article 3 Text and data mining for the purposes of scientific research
  Article 4 Exception or limitation for text and data mining
  Article 5 Use of works and other subject matter in digital and cross-border teaching activities
  Article 6 Preservation of cultural heritage
  Article 7 Common provisions
TITLE III - MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT

Chapter 1 Out-of-commerce works and other subject matter
Article 8 Use of out-of-commerce works and other subject matter by cultural heritage institutions
Article 9 Cross-border uses
Article 10 Publicity measures
Article 11 Stakeholder dialogue

Chapter 2 Measures to facilitate collective licensing
Article 12 Collective licensing with an extended effect

Chapter 3 Access to and availability of audiovisual works on video-on-demand platforms
Article 13 Negotiation mechanism

Chapter 4 Works of visual art in the public domain
Article 14 Works of visual art in the public domain
TITLE IV - MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

Chapter 1 Rights in publications
Article 15 Protection of press publications concerning online uses
Article 16 Claims to fair compensation

Chapter 2 Certain uses of protected content by online services
Article 17 Use of protected content by online content-sharing service provider

Chapter 3 Fair remuneration in exploitation contracts of authors and performers
Article 18 Principle of appropriate and proportionate remuneration
Article 19 Transparency obligation
Article 20 Contract adjustment mechanism
Article 21 Alternative dispute resolution procedure
Article 22 Right of revocation
Article 23 Common provisions

TITLE V - FINAL PROVISIONS
Article 24 Amendments to Directives 96/9/EC and 2001/29/EC
The Recitals of the Directive describe the necessity for the reform as follows:

**Recital 5:** In the fields of research, innovation, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the existing Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 96/9/EC, 2001/29/EC and 2009/24/EC in those fields could negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, innovation, teaching and preservation of cultural heritage should be reassessed in the light of those new uses. Mandatory exceptions or limitations for uses of text and data mining technologies, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. *The existing exceptions and limitations in Union law should continue to apply*, including to text and data mining, education, and preservation activities, as long as they do not limit the scope of the mandatory exceptions or limitations provided for in this Directive, which need to be implemented by Member States in their national law. Directives 96/9/EC and 2001/29/EC should therefore be amended.
**Recital 19:** Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public of works or other subject matter in such a way that members of the public may access them from a place and a time individually chosen by them, for the sole purpose of illustration for teaching. In addition, Articles 6(2)(b) and 9(b) of Directive 96/9/EC permit the use of a database and the extraction of a substantial part of its contents for the purpose of illustration for teaching. The scope of those exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and at a distance. Moreover, the existing legal framework does not provide for a cross-border effect. This situation could hamper the development of digitally supported teaching activities and distance learning. Therefore, the introduction of a new mandatory exception or limitation is necessary to ensure that educational establishments benefit from full legal certainty when using works or other subject matter in digital teaching activities, including online and across borders.
Recital 20: While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should therefore benefit all educational establishments recognised by a Member State, including those involved in primary, secondary, vocational and higher education. It should apply only to the extent that the uses are justified by the non-commercial purpose of the particular teaching activity. The organisational structure and the means of funding of an educational establishment should not be the decisive factors in determining whether the activity is non-commercial in nature.
Recital 21: The exception or limitation provided for in this Directive for the sole purpose of illustration for teaching should be understood as covering digital uses of works or other subject matter to support, enrich or complement the teaching, including learning activities. The distribution of software allowed under that exception or limitation should be limited to digital transmission of software. In most cases, the concept of illustration would, therefore, imply the use only of parts or extracts of works, which should not substitute for the purchase of materials primarily intended for the educational market. When implementing the exception or limitation, Member States should remain free to specify, for the different types of works or other subject matter, in a balanced manner, the proportion of a work or other subject matter that can be used for the sole purpose of illustration for teaching. Uses allowed under the exception or limitation should be understood to cover the specific accessibility needs of persons with a disability in the context of illustration for teaching.
Recital 22: The use of works or other subject matter under the exception or limitation for the sole purpose of illustration for teaching provided for in this Directive should only take place in the context of teaching and learning activities carried out under the responsibility of educational establishments, including during examinations or teaching activities that take place outside the premises of educational establishments, for example in a museum, library or another cultural heritage institution, and should be limited to what is necessary for the purpose of such activities. The exception or limitation should cover both uses of works or other subject matter made in the classroom or in other venues through digital means, for example electronic whiteboards or digital devices which might be connected to the internet, as well as uses made at a distance through secure electronic environments, such as in the context of online courses or access to teaching material complementing a given course. Secure electronic environments should be understood as digital teaching and learning environments access to which is limited to an educational establishment’s teaching staff and to pupils or students enrolled in a study programme, in particular through appropriate authentication procedures including password-based authentication.
Recital 23: Different arrangements, based on the implementation of the exception or limitation provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject matter. Such arrangements have usually been developed taking account of the needs of educational establishments and of different levels of education. While it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the arrangements for implementation can vary from one Member State to another, to the extent that they do not hamper the effective application of the exception or limitation or cross-border uses. Member States should, for example, remain free to require that the use of works or other subject matter respect the moral rights of authors and performers. This should allow Member States to build on the existing arrangements concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the availability of suitable licences, covering at least the same uses as those allowed under the exception or limitation. Member States should ensure that where licences cover only partially the uses allowed under the exception or limitation, all the other uses remain subject to the exception or limitation.
Recital 24: Member States should remain free to provide that rightholders receive fair compensation for the digital uses of their works or other subject matter under the exception or limitation provided for in this Directive for illustration for teaching. 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. Member States that decide to provide for fair compensation should encourage the use of systems that do not create an administrative burden for educational establishments.
Article 5 Use of works and other subject matter in digital and cross-border teaching activities

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC and Article 15(1) of this Directive in order to allow the digital use of works and other subject matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, on condition that such use:

(a) takes place under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment accessible only by the educational establishment’s pupils or students and teaching staff; and

(b) is accompanied by the indication of the source, including the author’s name, unless this turns out to be impossible.
Article 5 Use of works and other subject matter in digital and cross-border teaching activities

2. Notwithstanding Article 7(1), Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works or other subject matter, such as material that is primarily intended for the educational market or sheet music, to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market.

Member States that decide to avail of the first subparagraph of this paragraph shall take the necessary measures to ensure that the licences authorising the acts referred to in paragraph 1 of this Article are available and visible in an appropriate manner for educational establishments.

3. The use of works and other subject matter for the sole purpose of illustration for teaching through secure electronic environments undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

4. Member States may provide for fair compensation for rightholders for the use of their works or other subject matter pursuant to paragraph 1
Article 24 Amendments to Directives 96/9/EC and 2001/29/EC

2. Directive 2001/29/EC is amended as follows:

(a) In Article 5(2), point (c) is replaced by the following:
"(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exceptions and limitations provided for in Directive 2019/.../EU of the European Parliament and of the Council of ... on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC”;

(b) In Article 5(3), point (a) is replaced by the following:
"(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, without prejudice to the exceptions and limitations provided for in Directive 2019/.../EU of the European Parliament and of the Council of ... on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC”
4. Other significant amendments introduced by the new Copyright DSM Directive

The Copyright Reform aims to:

- Provide more cross-border access to copyright-protected content online.
- Expand the opportunities to use copyrighted material for education, research, cultural heritage purposes.
- Establish fair rules of the game for a better functioning copyright marketplace, which stimulates creation online and support high-quality journalism.
Article 3 introduces a copyright exception for text and data mining (TDM) for the purposes of scientific research. Depending on whether it acknowledges the public domain status of facts and information, the TDM exception could increase or decrease restrictions compared to the status quo.

Article 4 introduces a mandatory exception for the use of copyrighted works as part of "digital and cross-border teaching activities". This article clarifies that educational establishments can make non-commercial use of copyrighted works for illustrative purposes.

There have been worries from the educational sector that the exception proposed in article 4 is too limiting. The most debated part of the article is 4(2), under which the exception would not be available if there are "adequate licenses“ available in the market.

Article 14 rules that reproductions of works of visual art that are in the public domain cannot be subject to copyright or related rights, unless the reproduction is an original creative work.
Article 15 (Draft Article 11) known as the "link tax", gives newspapers more direct control and re-use of their product, which may impact some Internet services like news aggregators.

Press publishing, "whose purpose is to inform the general public and which are periodically or regularly updated", is distinguished from academic and scientific publishing (Recital 33)

Under current EU law, publishers rely on authors assigning copyright to them and must prove rights ownership for each individual work;

The new provision grants publishers direct copyright over online use of their press publications by information society service providers alid 2 years after the publication.

The final text contains exemption for the act of hyperlinking and legitimate private and non-commercial use of press publications by individual users.

The new right does not have retroactive effect and will apply to materials published after the entry into force of the Directive.
Article 17 (Draft Article 13) tasks service providers that host user-generated content to employ "effective and proportionate" measures to prevent users from violating copyright. It directs Member States to consider the size of the provider, the amount of content uploaded, and the effectiveness of the measures imposed "in light of technological developments". It also mandates an appeals process and requires content hosts to share "information on the use of content" with the content's owner, the lack of which has been a point of contention in the past.

Article 17 target commercial web hosts which "store and give the public access to a large amount of works or other subject-matter uploaded by its users which [they] organise and promote for profit-making purposes".

The provision this does encompass private cloud storage services, non-profit encyclopaedias (such as Wikipedia), nor non-profit educational or scientific repositories.

The article also extends any licenses granted to content hosts to their users, as long as those users are not acting "on a commercial basis".

Tech companies expressed concern that this would require uploading filters at their current scales. A broad concern is effect of this mechanism on the freedom of speech.
The notion of ‘OCSSP’ does **not** include providers of services like: not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, electronic communication service providers as defined in Directive (EU) 2018/1972, online marketplaces, B2B cloud services and cloud services that allow users to upload content for their own use.

**If your service (i) has been available in the EU for less than 3 years and (ii) has an annual turnover below €10m, then you only need to comply with (a) and (c). If, in addition to (i) and (ii), (iii) the average number of monthly unique visitors exceeds 5 million, then you also need to comply with (d).**

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Articles 18 through 22 improve the bargaining position of authors and performers. Such rules are already in place in some member states.

- Article 18 sets the principle of appropriate and proportionate remuneration.
- Article 19 creates a transparency obligation to licensees.
- Article 20 provides for a contract adjustment mechanism allowing authors to increase their remuneration where it is disproportionately low.
- Article 21 introduces an alternative dispute resolution procedure.
- Article 22 stipulates a right of revocation in case the work is not put in use.

Prior to the Trilogue negotiations, Article 12(a) proposed granting sports event organisers copyright over recordings of their events. The proposal was not accepted. Instead, the Commission made the following legal statement:

“The Commission acknowledges the importance of sports events organisations and their role in financing of sport activities in the Union. In view of the societal and economic dimension of sport in the Union, the Commission will assess the challenges of sport event organisers in the digital environment, in particular issues related to the illegal online transmissions of sport broadcasts.”
5. Practical difficulties in enforcing harmonized copyright laws across the EU


  “In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party’s infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.”

- **Article 8.3 of Information Society Directive 2001/29/EC**

  Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.
6. Conclusion

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Thank you for your attention

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