

# Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 3 to 7 of Directive (EU) 2019/790 on Copyright in the Digital Single Market

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## EXECUTIVE SUMMARY

The Directive on Copyright in the Digital Single Market (DSMD)<sup>1</sup> introduces new mandatory exceptions and limitations (Arts 3-7). When implemented, these provisions will supplement and update the existing regime of exceptions and limitations on text and data mining (Arts 3 & 4), digital and cross-border teaching activities (Art 5) and the preservation of cultural heritage (Art 6).

The European Copyright Society has previously emphasised the crucial balancing role played by exceptions and limitations in any copyright system. Exceptions and limitations ensure that the law of copyright and related rights operates compatibly with fundamental constitutional norms, including freedom of information and expression, freedom of arts and sciences and freedom to conduct a business. They also allow vital space for other general interests, including competition and technological and economic development.

The ECS applauds the European legislature's efforts to extend and update the existing regime of exceptions and limitations to promote cross-border uses and to ensure that the system functions more effectively in today's technological environment.

We welcome the fact that the new exceptions are mandatory and that they are generally protected against contractual over-ride (as befits user rights). Unfortunately, equivalent protection is not provided against the over-riding of these new exceptions and limitations through the application of Technological Protection Measures (TPMs). It is therefore particularly important that implementing measures in Member States ensure the enjoyment of these exceptions and limitations where TPMs are applied.

Arts 3-6 grant a mandatory minimum level of freedom to users and, as such, should not be interpreted restrictively. Member States are not prevented from allowing greater scope for exempted use under existing provisions of the European copyright *acquis*.

### **Text and Data Mining (Arts 3 & 4)**

The new TDM mandatory provisions (Arts 3 and 4) aim to provide a harmonised basis for lawful TDM analysis in the EU, but they contain significant restrictions.

National lawmakers have a substantial challenge in ensuring the efficacy of the new provisions; in particular, in safeguarding their application against TPMs and in interpreting the prerequisite of "lawful access" for the enjoyment of both provisions.

It should be clear that the TDM research exception cannot be contractually overridden by rightholders, that the uses covered by the exception shall not be subject to compensation and that the exception cannot be neutralized by the application of TPMs. Member States should take steps to ensure that prior contracts do not render the TDM exception useless; for example, by providing that prior subscription contracts must be adjusted to accommodate the principle of non-compensation for non-profit scientific research within a reasonable period after the implementation of the DSMD.

The imposition of a compensation system should certainly also be avoided also in the context of the broader TDM exception under Art. 4 DSMD, since it would significantly jeopardise the

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<sup>1</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, Official Journal of the European Communities 2019 L 130, 92.

effectiveness of that provision, which is already de facto compromised by the opt-out mechanism available to rightholders.

The opt-out clauses should be constructed in a way that ensures that reservations are clear, transparent, precise, easily identifiable, and expressed in unambiguous terms.

The principles posed by the ‘Open Data Directive’ should be understood as restricting the freedom of public sector bodies falling within the scope of the Directive 2019/1024 to opt-out of the data mining exception.

### **Digital and Cross-Border Teaching Activities (Art 5)**

Article 5 DSMD introduces a mandatory “exception or limitation” to the rights of reproduction and communication to the public (including the making available online) of works and other protected subject matter for digital and cross-border teaching activities, provided that the use is for the sole purpose of illustration for teaching, and to the extent justified by the non-commercial purpose to be achieved. Fair compensation is not formally required, but Member States may provide for it, in order to comply with the three-step-test.

The development of digital and online cross-border education in the internal market has been hampered by legal uncertainty (resulting from excessively restrictive and heterogeneous implementations of the teaching exceptions and limitations in Art 5.3(a) ISD), by insufficient availability of licences in most countries, by disproportionate clearing costs and, ultimately, by the lack of cross-border effect of exceptions and limitations and licensing schemes. The mandatory exception and limitation in Art 5 aims to overcome this situation.

Despite its mandatory nature, and its rather generous scope, Member States have considerable leeway in setting restrictions for different types of works. However, such restrictions should only be implemented as necessary “in a balanced manner” and in relation to specific categories of work.

Member States may even set aside this mandatory provision “as regards specific uses or types of works” when “suitable licences authorising the acts ... and covering the needs and specificities of educational establishments are easily available on the market.” This derogation option was set to avoid negative economic effects in some countries, where licensing of digital teaching uses was already available (such as in the Nordic countries, the UK and Ireland). However, the very existence of the derogation option opens Member States up to further national lobbying that may ultimately endanger the unifying goal pursued by a mandatory exception and limitation.

The effective implementation of this mandatory exception and limitation lies now in the sole hands of Member States and they should be vigilant that the public interest and the harmonizing goal sought by Art 5 is duly satisfied. Additionally, national legislators should revise the pre-existing exceptions and limitations to secure the coherent and seamless exemption of works for teaching purposes, regardless of the means (digital or otherwise) employed, thus avoiding an unnatural accumulation of different sets of provisions regulating digital and analogue teaching uses.

Last, but not least, in order to overcome the challenge of territoriality and to facilitate the development of online teaching across the EU, online cross-border teaching uses “shall be deemed to occur solely in the Member State where the educational establishment is established.” This “legal fiction” is meant to link these activities to one body of applicable law only; a single applicable law that remains decisive because, despite the mandatory nature

of Art 5 DSMD, national exceptions and limitations for digital and online teaching uses will remain foreseeably different in scope and conditions across the EU.

### **Preservation of Cultural Heritage (Art 6)**

Art 6 provides a mandatory exception permitting cultural heritage institutions to make copies of works, or other subject-matter, for the purposes of preservation. Cultural heritage institutions play a vital role in protecting our history and in promoting our culture. Their activities are supported by the Charter rights to freedom of expression and information and the arts and sciences, amongst others.

National provisions have sometimes placed inappropriate limits on the preservation activities of cultural heritage institutions; for example, by excluding the reproduction of online works or works held on licence, by precluding digital reproduction or by permitting otherwise infringing acts in exceptional circumstances only. The introduction of a mandatory exception, protected against contractual over-ride, is therefore to be welcomed.

As the preservation activities of cultural heritage institutions present little or no risk to the legitimate interests of rightholders, the exception under Art 6 should not be interpreted narrowly by courts or national legislatures. It must also be read alongside existing (non-mandatory) provisions in the Union's copyright *acquis* granting Member States a broader power to introduce exceptions and limitations for the benefit of cultural heritage institutions. The implementation of Art 6 should not result in the curtailment of existing exceptions and limitations for cultural heritage institutions in national law.

### **Conclusion**

As users' rights, exceptions and limitations are now recognised as promoting vital social, economic and cultural interests and as protecting fundamental rights under the Union's Charter of Fundamental Rights. As such, they have equal status to the rights granted to authors and other rightholders. However, exceptions and limitations remain one of the least harmonised areas of the EU copyright *acquis* and there is therefore a significant diversity of practice across the Union, with adverse consequences for the cross-border use of works. For this reason, the introduction of these mandatory exceptions and limitations in the Directive on Copyright in the Digital Single Market is welcomed. We hope that this is the beginning of a new trend towards further harmonization of exceptions and limitations across the EU.

Mandatory exceptions and limitations may serve to overcome legal uncertainty and market fragmentation caused by diverging national laws and licensing practices. However, the achievement of that outcome depends very much on the implementation of these provisions. In some instances, Member States may make valuable use of the flexibility that the Directive provides for them. However, at the same time, they should be vigilant to ensure that the mandatory effect of these exceptions and limitations is not undermined in their implementation, particular on crucial issues, such as the prohibition of contractual provisions contrary to the mandatory exceptions, the relationship with TPMs (Art 7), "lawful access" (Art 3-4) and the question of the existence of "suitable licences easily available on the market" (Art 5).

## A. Introduction

The main elements of the European legislative *acquis* on exceptions and limitations are now almost twenty years old. This aspect of the Union's regime on copyright and related rights remains one of the least harmonised and is in clear need of reform in the light of technological development. While some exceptions and limitations are mandatory,<sup>2</sup> most are optional and, as a result, there is significant diversity of practice across the Union, with a consequent adverse impact on the cross-border use of works<sup>3</sup>.

Against this background, the Directive on Copyright in the Digital Single Market (DSMD)<sup>4</sup> introduces new mandatory exceptions and limitations (Arts 3-7). When implemented, these provisions will supplement and update the existing regime of exceptions and limitations to protect and encourage socially valuable activities in the areas of text and data mining (Arts 3 & 4), the use of protected subject-matter in digital and cross-border teaching activities (Art 5) and the preservation of cultural heritage (Art 6).

### 1. Significance of exceptions and limitations

The European Copyright Society (ECS) has previously emphasised the crucial balancing role played by exceptions and limitations in the copyright system.<sup>5</sup> They ensure that the laws of copyright and related rights operate compatibly with fundamental constitutional norms, including the freedom of information and expression, the freedom of arts and sciences and the freedom to conduct a business. Furthermore, they allow vital space for other general interests, including competition and technological and economic development. Empirical studies demonstrate that exceptions and limitations provide important social, cultural, political and economic benefits.<sup>6</sup> Accordingly, the ECS welcomes the European legislature's efforts to extend and update the existing regime to promote cross-border uses and to ensure that the system functions effectively in today's technological environment. However, while the introduction of the exceptions and limitations established under Arts 3-7 represents an important step in the right direction, it remains a modest one. The problems of technological obsolescence and interference with cross-border activity apply also in other areas covered by exceptions and limitations in the *acquis*. The ECS encourages the Union legislature to be

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<sup>2</sup> See, Directive 96/9 on the legal protection of databases, Art 6(1); Information Society Directive, Art 5(1); Directive 2012/28/EU on certain permitted uses of orphan works, Art 6; Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Arts 3 & 4.

<sup>3</sup> This unsatisfactory situation has been previously noted by members of the European Copyright Society, as well as by many other scholars.

<sup>4</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, Official Journal of the European Communities 2019 L 130, 92.

<sup>5</sup> See, for example, European Copyright Society, "Limitations and exceptions as key elements of the legal framework for copyright in the European Union Opinion on The Judgment of the CJEU in Case C201/13 *Deckmyn*," 20<sup>th</sup> October 2014, 2-4.

<sup>6</sup> See Bartolomeo Meletti, "A review of empirical evidence on copyright exceptions", CREATe Working Paper 2021/9. Available at: [https://zenodo.org/record/5705970#.YnD\\_uPPMIQJ](https://zenodo.org/record/5705970#.YnD_uPPMIQJ).

more ambitious and to move swiftly to update and extend the regime of exceptions and limitations more generally, providing mandatory rules to protect user interests across the board<sup>7</sup>.

## 2. Mandatory nature of exceptions and limitations

Unlike most provisions relating to exceptions and limitations in the *acquis*, the exceptions and limitations established under Arts 3-6 are mandatory.<sup>8</sup> This is to be welcomed, as a fully harmonised regime requires mandatory exceptions and limitations. However, the harmonisation achieved by Arts 3-6 is relatively minimal. The ECS has previously called for the introduction of a mandatory, fully harmonised regime of exceptions and limitations<sup>9</sup> and we consider that this project should be pursued as a matter of urgency. Variations between national solutions and a diversity of licensing practices create legal uncertainty that deters (if not prevents) the provision of services within the digital internal market, thus harming the fundamental rights (research, education, and access to culture) safeguarded by these exceptions. The introduction of exceptions and limitations that must be implemented by Member States can be expected to overcome legal uncertainty and market fragmentation caused by diverging national laws and licensing practices that vary from state to state<sup>10</sup>. However, the achievement of that result depends very much on the manner of implementation by Member States.

## 3. Member state freedom in implementing provisions.

The scope of Member State flexibility in implementing the optional provisions on exceptions and limitations in European copyright law is limited.<sup>11</sup> The Court of Justice has increasingly exerted authority over the interpretation of the exceptions and limitations in the *acquis* (predominantly through the doctrine of the “autonomous concept of EU law”).<sup>12</sup> To the extent that Member States retain discretion to shape national provisions within the parameters drawn by the *acquis*, it is evident that such discretion is restricted<sup>13</sup> and ought to be highly circumscribed in the case of the new mandatory exceptions established under Articles 3-6. Beyond situations in which the provisions make

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<sup>7</sup> Encouraging the EU legislator to be more ambitious, see European Copyright Society, *General Opinion on the EU Copyright Reform Package*, 24 January 2017, p. 2, emphasizing that “the Commission’s shift towards mandatory exceptions raises the question why many other exceptions that equally deserve universal implementation across the EU, such as those for the purposes of quotation and criticism, parody and personal use, should remain optional. The introduction of only a handful of mandatory exceptions, while the extensive ‘shopping list’ of Art 5(2) and (3) of the Information Society Directive is left intact, will do little for the Digital Single Market”.

<sup>8</sup> Although there has been a movement towards the introduction of mandatory exceptions and limitations in EU law. See, for example, the Orphan Works Directive and the Marrakesh Directive, n 1. As some ostensibly optional exceptions within the *acquis* must be implemented if a Member State is to ensure compliance with the Charter of Fundamental Rights, they must effectively be regarded as mandatory (in certain instances, at least). See the Opinions of Advocate General Szpunar in (C-476/17) *Pelham* EU:C:2018:1002 [77]; (C-469/17) *Funke Medien NRW* EU:C:2018:870 [38]-[39].

<sup>9</sup> See European Copyright Society, *Letter to Mr Günther Oettinger, Commissioner for Digital Economy, on the Unification of Copyright Law*, December 2014; European Copyright Society, *General Opinion on the EU Copyright Reform Package*, 24 January 2017, p. 2; European Copyright Society, *Limitations and exceptions as key elements of the legal framework for copyright in the European Union Opinion on The Judgment of the CJEU in Case C201/13 Deckmyn*, 20<sup>th</sup> October 2014, 7-10

<sup>10</sup> See European Copyright Society, *Comment on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National Law*, <https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs-comment-article-17-cdsm.pdf> -

<sup>11</sup> See (C-469/17) *Funke Medien NRW* [45]-[53] EU:C:2019:623 [45]-[53]; (C-516/17) *Spiegel Online GmbH v Beck* EU:C:2019:625 [30]-[38].

<sup>12</sup> See, for example, (C-467/08) *Padawan* EU:C:2014:2132; (C-201/13) *Deckmyn* EU:C:2014:2132 [14]-[17].

<sup>13</sup> See n 9 above.

explicit reference to implementation choices, Member States would be well advised not to stray far from the terms of the Directive in implementation. In particular, they should be wary of imposing specific restrictive conditions at national level. However, it should be noted that, while the provisions set out in Arts 3-6 grant a mandatory minimum level of freedom for users, they do not prevent Member States from allowing greater scope for exempted use, as long as such use is covered elsewhere in the *acquis*. This is explicitly indicated in Art 25 of the Directive. In several situations, some of which are outlined in this Comment, Member States can make valuable use of that flexibility.<sup>14</sup>

#### 4. Interpretation of the provisions

The Court of Justice has progressively departed from an approach under which exceptions and limitations must always be interpreted strictly.<sup>15</sup> It has recognised that these provisions must be interpreted in a manner that secures a fair balance between the competing fundamental rights, and interests, of rightholders, users and third parties.<sup>16</sup> The ECS has welcomed this inevitable development.<sup>17</sup> Courts interpreting and applying the new mandatory exceptions and limitations under Arts 3-6 must ensure that a fair balance is secured between the fundamental rights of rightholders and the fundamental rights of users and third parties.

The CJEU now considers exceptions and limitations to be *user rights*. In *Funke Medien* and *Spiegel Online*, it held that, “although Article 5 of Directive 2001/29 is expressly entitled ‘Exceptions and limitations’, it should be noted that *those exceptions or limitations do themselves confer rights on the users of works or of other subject matter*”.<sup>18</sup>

Article 7(2) confirms the application of the “three-step test” to the exceptions and limitations under Arts 3-6.<sup>19</sup> Given the mandatory nature of these exceptions and limitations, there appears to be relatively little scope for the application of this test in the national implementation of these mandatory exceptions and limitations. Where relevant, the test should not be viewed as imposing an unreasonably rigid framework on the application of the provisions.<sup>20</sup>

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<sup>14</sup> “Member States may adopt or maintain in force broader provisions, compatible with the exceptions and limitations provided for in Directives 96/9/EC and 2001/29/EC, for uses or fields covered by the exceptions or limitations provided for in this Directive.” (Art 25).

<sup>15</sup> See, initially, (C-5/08) *Infopaq* ECLI:EU:C:2009:465 [56]-[59].

<sup>16</sup> See, for example, (C-201/13) *Deckmyn* ECLI:EU:C:2014:2132 [26]-[28], (C-145/10) *Painer* ECLI:EU:C:2011:798 [132]; (C-620/10) *SGAE* ECLI:EU:C:2010:620 [43]. In addition to “fair balance”, the CJEU has also stressed the need for “the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed”; see (C-145/10) *Painer* ECLI:EU:C:2011:798 [133]; (C-429/08) *FAPL* ECLI:EU:C:2011:631 [162 – 163].

<sup>17</sup> See, for example, European Copyright Society, *Limitations and exceptions as key elements of the legal framework for copyright in the European Union* Opinion on The Judgment of the CJEU in Case C-201/13 *Deckmyn*, 20<sup>th</sup> October 2014, [13]; European Copyright Society, *Sound sampling, a permitted use under EU copyright law? Opinion of the European Copyright Society in relation to the pending reference before the CJEU in Case C-476/17, Pelham GmbH v Hütter*, 2018 [4.4].

<sup>18</sup> CJEU, Judgments in (C-469/17) *Funke Medien*, ECLI:EU:C:2019:623 [70], and (C-516/17) *Spiegel Online* ECLI:EU:C:2019:625 [54] (emphasis added), with further references to CJEU, Judgment in (C-117/13) *Ulmer* ECLI:EU:C:2014:2196 [43]. See also CJEU, Judgment in (C-314/12) *UPC Telekabel* ECLI:EU:C:2014:192[57].

<sup>19</sup> See also Recital 6 DSMD.

<sup>20</sup> See the ‘Declaration on a balanced interpretation of the three-step test in copyright law’, *IIC* 707 (2008).

## 5. Prohibition on contractual override

Under Art 5 of the Information Society Directive (ISD), exceptions and limitations are vulnerable to contractual over-ride.<sup>21</sup> Nevertheless, it has been recognised that some exceptions and limitations protect fundamental public interests and therefore ought not to be susceptible to over-ride.<sup>22</sup> The situation under the DSMD is very clear. Art 7(1) provides that any contractual provision contrary to the exceptions provided in Arts 3, 5 & 6 is unenforceable.<sup>23</sup> The ECS welcomes this prohibition, which promotes the harmonisation of copyright rules within the Union and protects the public interests secured by these exceptions and limitations. In implementing Art 7(1), Member States should ensure that the prohibition on contractual over-ride cannot be subverted. More generally, the Union legislator should take steps to extend this principle explicitly to other exceptions and limitations within the *acquis* as appropriate.<sup>24</sup> As already stated by the ECS, “Exceptions reflect policy choices and values. Their benefit should not be dependent on the market decisions of copyright owners, particularly for exceptions grounded in fundamental rights or public interests like research and education”.<sup>25</sup>

## 6. TPMs still applicable

Unfortunately, and rather incoherently, equivalent protection is not provided against the over-riding of the exceptions and limitations in Arts 3-6 through the application of Technological Protection Measures (TPMs). Rightholders remain free initially to determine the means by which beneficiaries make use of works and other subject-matter within the scope of the exceptions and limitations.<sup>26</sup> However, the protection against TPMs available for some of the optional exceptions under Art 6(4) ISD is also applied to these new provisions.<sup>27</sup> Under this mechanism, in the absence of voluntary measures to assist users, Member States must take appropriate steps to ensure that rightholders make available the means of benefiting from an exception or limitation to the beneficiaries of that exception or limitation. This approach is not harmonising, and mechanisms established in Member States sometimes offer inadequate support for the beneficiaries of exceptions or limitations, with consequent risk to the important interests protected by these provisions. It is important that implementing measures in Member States succeed in “ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and limitations provided for in this Directive.”<sup>28</sup>

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<sup>21</sup> See Directive 2001/29/EC on Copyright in the Information Society of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, (ISD), Art 9. National laws may provide some protection against contractual over-ride.

<sup>22</sup> See, for example, Computer Programs Directive (CPD), Art 8.

<sup>23</sup> Instead, regarding Art 4, any exceptions or limitations provided for in national laws authorizing TDM beyond the scope of Art 3 “shall apply on condition that the use ... has not been expressly reserved by their rightholders in an appropriate manner”.

<sup>24</sup> In this regard, the European legislator can take inspiration from the legislation in some Member States. See, for example, Copyright Act (Belgium), Art XI.193.

<sup>25</sup> See European Copyright Society, *General Opinion on the EU Copyright Reform Package*, 24 January 2017, p. 4.: “Exceptions reflect policy choices and values. Their benefit should not be dependent on the market decisions of copyright owners, particularly for exceptions grounded in fundamental rights or public interests like research and education”.

<sup>26</sup> See Recital 7 DSMD.

<sup>27</sup> DSMD, Art 7(2). By comparison with the ISD, this is also the case “where works and other subject matter are made available to the public through on-demand services” (Recital 7 DSMD).

<sup>28</sup> Recital 7 DSMD

## 7. A note on terminology.

The use of the terms, “exceptions” and “limitations” is often ambiguous, both in general commentary on copyright law and in the Union’s copyright *acquis*. In Art 5 ISD, no explicit distinction is drawn between “exceptions” and “limitations”. However, in *VG Wort*,<sup>29</sup> the Court of Justice traced a distinction between the two concepts, employing “exception” to describe a provision under which the application of exclusive rights is excluded entirely and using “limitation” to describe a provision under which exclusive rights are limited, rather than completely excluded (for example, where a rightholder is required to accept use on payment of compensation). To some extent, Arts 3-7 DSMD maintain this distinction.<sup>30</sup> Arts 3 and 6 are described as “exceptions” (as “free uses”). By contrast, Arts 4 and 5 are described as “exceptions or limitations” (meaning that, under certain circumstances, remuneration may apply to take care of the interests of rightholders).<sup>31</sup> However, this naming convention appears to be abandoned entirely in Art 7(1), where the provisions established under Art 3, 5 and 6 are all described as “exceptions”. The terminology is certainly not neutral and there has been an important doctrinal debate on the legal nature of “exceptions and limitations”. In any case, the ECS considers that “exceptions and limitations” to copyright are important legislative tools to secure fundamental rights and the public interest. An approach under which these provisions are merely granted “exceptional” status would be inconsistent with CJEU’s characterisation of “exceptions and limitations” as user’s rights<sup>32</sup>.

## B. Text and Data Mining (Arts 3 & 4)

Articles 3 and 4 DSMD establish two new mandatory copyright provisions for text and data mining (TDM). This is an important step toward the establishment of a harmonized legal framework for copyright-related TDM activities, since the unharmonized implementation of exceptions and limitations at the national level is amongst the most problematic issues for researchers in performing TDM research in Europe.<sup>33</sup> Furthermore, existing TDM exceptions or limitations in the legislation of some Member States present significant divergences and do not cover the full spectrum of rights which may apply in the context of TDM activities<sup>34</sup>. The new provisions aim to enhance cross-

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<sup>29</sup> See (C-457/11 to C-460/11) *VG Wort*, ECLI:EU:C:2013:426 [33]-[38]

<sup>30</sup> See, for instance, Recital 17 DSMD only referring to “exception” when explaining that “Member States should, therefore, not provide for compensation for rightholders as regards uses under the text and data mining exceptions introduced by this Directive.”

<sup>31</sup> National copyright laws tend to use different terminology to refer to Exceptions and Limitations.

<sup>32</sup> See above n.16.

<sup>33</sup> Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market-Legal Aspects, In depth analysis*, Policy Department for Citizens’ Rights and Constitutional Affairs Directorate General for Internal Policies of the Union, PE 604.941-February 2018.

<sup>34</sup> See: Articles L.122-5, 10 and L.342-3, 5 of the French Code de la propriété intellectuelle (reproduction from ‘lawful sources’ is permitted, thus of materials lawfully made available with the consent of the rights holders, and the preservation and communication of technical copies made during this process for the purpose of text and data mining included or associated in a scientific publication for the purpose of public research, excluding commercial exploitation); Article 19 par. 3 of the Estonian law amended the country’s Copyright Act of 1992 and, as of 1 January 2017 (processing for the purposes of text and data mining is permitted on the condition that such use does not have a commercial objective, post-TDM communication for the purpose of quality assurance is not covered); Section 60d of the German Copyright Act of 9 September 1965, as last amended by Article 1 of the Act of 1 September 2017 (reproduction and communication to a specifically limited circle of persons for their joint scientific research, as well as to individual third persons for the purpose of monitoring the quality of scientific research is permitted for non-commercial purposes). A TDM exception is also found in the UK Copyright and Designs Act, section 29A (Copies for text and data analysis for non-commercial research permitted

jurisdictional research collaboration<sup>35</sup> by reducing legal uncertainty<sup>36</sup> surrounding the possibility and the extent to which TDM activities may be performed for the purpose of scientific research (Art 3). More broadly, they aim to unlock TDM potential for all purposes (Art 4)<sup>37</sup>.

## 1. What is TDM?

TDM is a term commonly used to describe “the automated processing (‘machine reading’) of large volumes of text and data to uncover new knowledge or insights”<sup>38</sup> or, more generally, any activity where computer technology is used to index, analyse, evaluate and interpret content.<sup>39</sup>

The DSM Directive establishes a broad definition of TDM, which is not restricted to “text analysis” or “text analytics”, as the process of deriving high-quality information from text, including information derived through the identification of patterns and trends through means such as statistical pattern learning. According to Art 2(2), ‘text and data mining’ is defined as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes, but is not limited to patterns, trends and correlations”. Recital 8 makes it clear that TDM covers the automated computational analysis of information in digital form, such as text, sounds, images or data<sup>40</sup>.

The Directive emphasizes the significant potential of TDM, which is likely to become an increasingly important research tool over time, as technology improves and becomes more widespread and as researchers acquire new skills and digital research sources increase.<sup>41</sup> TDM is applied in a wide range of research fields (social sciences, humanities, natural sciences, such as pharmaceutical and medical research) and in many business fields (including forestry, marketing, fashion,<sup>42</sup> journalism, financial industries and market research).<sup>43</sup> Among other things, TDM techniques may be used to ‘train’ Artificial Intelligence (AI) and improve AI applications, which require vast volumes of raw text and data to ‘self-learn’ complex tasks.

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to the lawful user, while the exception does not cover reproduction of databases); For an overview, see Geiger, Frosio, Bulayenko, *op.cit.*

<sup>35</sup> See Geiger, Frosio, Bulayenko, *op.cit.*

<sup>36</sup> European Commission (2016), Commission Staff Working Document, *Impact Assessment on the modernisation of EU copyright rules, Part I*, Brussels, 14.9.2016 SWD(2016) 301 final, p. 105. See also Recital 8 of the DSM Directive.

<sup>37</sup> Recitals 11 and 18 of the DSMD.

<sup>38</sup> See *Impact Assessment, op.cit.* §4.3.

<sup>39</sup> Baseline report on policies and barriers to TDM in Europe, Reducing Barriers and Increasing Uptake of Text and Data Mining for Research Environments using a Collaborative Knowledge and Open Information Approach, Future TDM, 2016.

<sup>40</sup> See also: Jean-Paul Triaille, Jérôme de Meeûs d’Argenteuil, Amélie de Francquen, *Study on the legal framework of text and data mining (TDM)*, March 2014, Funded by the EU Commission.

<sup>41</sup> See *Impact Assessment, op.cit.* p. 106.

<sup>42</sup> E. Rosati, *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market-Technical Aspects*, Policy Department for Citizens' Rights and Constitutional Affairs, February 2018, p.3.

<sup>43</sup> Reto Hilty and Heiko Richter, *Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules Part B Exceptions and Limitations (Art 3 – Text and Data Mining)* (January 14, 2017). Max Planck Institute for Innovation & Competition Research Paper No. 17-02, Available at SSRN: <https://ssrn.com/abstract=2900110> or <http://dx.doi.org/10.2139/ssrn.2900110>.

## 2. Mandatory nature

The ECS welcomes the introduction of the new TDM provisions, which aim to provide a harmonized legal regime of TDM exceptions and limitations in the EU and to provide a basis for lawful TDM analysis. Without such provisions, TDM analysis would potentially be seriously undermined through the application of copyright and the *sui generis* database right (as the analysis would be likely to entail acts of reproduction, and possibly also of communication to the public and/or as acts of extraction or/and reutilization of the whole or a substantial part of a database). The introduction of mandatory TDM exceptions or limitations is helpful, since voluntary TDM research exceptions and limitations at the national level can be rated high among the critical issues for researchers in performing TDM research in Europe.<sup>44</sup>

At the same time, the ECS recalls that not all TDM processes involve acts of reproduction<sup>45</sup> and that some acts of reproduction may fall within the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of the ISD.<sup>46</sup> Furthermore, some TDM acts will be covered by exceptions to the *sui generis* right (normal use of the database, use of insubstantial parts). In all these instances, neither the exception in Article 3 DSMD nor the provision in Article 4 DSMD would come into consideration. The ECS also emphasizes that TDM can also be carried out in relation to mere facts or data that are not protected by copyright, and in such instances no authorization is required under copyright law<sup>47</sup>.

The establishment of the new EU TDM provisions is an important step, given the patchwork of national approaches on this issue. However, the EU TDM provisions contain significant restrictions, while some of the core concepts of these provisions are source of uncertainty. Together, the overall approach of the DSMD is more restrictive than what would have been needed to create a legal framework boosting innovation.

## 3. Lawful access

National lawmakers will have a significant challenge in ensuring the efficacy of the new provisions, which depends heavily on the safeguarding of their application against technological protection measures (TPM) and on the interpretation of the prerequisite of “lawful access” for the enjoyment of both provisions.

As has been emphasized in the ECS’s General Opinion on the EU Copyright Reform Package, the restriction of a TDM exception to works to which a research organization has “lawful access” subjects TDM research to private ordering since “*the exception can effectively be denied to certain users by a right holder who refuses to grant ‘lawful access’ to works or who grants such access on a conditional basis only*”<sup>48</sup>. Under such a regime, publishers might price TDM into their subscription fees and, as a consequence, few research organisations would be able to acquire licences for all databases that are

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<sup>44</sup> Geiger, Frosio, Bulayenko, *op.cit.*, p. 21.

<sup>45</sup> TDM tools involving minimal copying of few words or crawling through data and processing each item separately could be operated without running into a potential liability for copyright infringement. See: Geiger, Frosio, Bulayenko, *op. cit.* p. 9; Triaille, de Meeüs d’Argenteuil, de Francquen, *op.cit.*

<sup>46</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19.

<sup>47</sup> Recital 9 DSMD.

<sup>48</sup> European Copyright Society, *General Opinion on the EU Copyright Reform Package*, 24 January, 2017, p. 4. Available at: <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>.

relevant for a TDM research project<sup>49</sup>. Consequently, the DSM Directive does not provide an answer for those research organisations and cultural heritage institutions that have insufficient means to afford subscriptions and/or for those citizens or entities that do not have “lawful access” to the content<sup>50</sup>. Margoni and Kretschmer argue that the TDM provisions paradoxically favour the development of biased AI systems, due to price and accessibility conditions for training data that offer the wrong incentives. To avoid licensing, it may be economically attractive for developers to train their algorithms on older, less accurate, biased data, or to import AI models already trained on unverifiable data<sup>51</sup>.

“Lawful access” is a key concept in the EU TDM provisions, but is not defined in the main text of the DSMD. Member states could further clarify this concept by promoting a flexible understanding of “lawful access.” An understanding of “lawful access” as necessitating a “lawful source” of copies or extractions of works and other protectable subject matter would substantially jeopardize the possibility of performing TDM activities on content available online without technical access restrictions. This would be at odds with the wording of Recital 14 of the DSMD, which makes it clear that such access should be considered to be lawful. Moreover, analysed from the perspective of fundamental rights<sup>52</sup>, it would be unreasonable to expect automated mining tools to perform checks on the lawfulness of content being mined. Therefore, in the case of content that is freely available on the net without technical restrictions, no liability for TDM activities shall arise for mining unlawful “sources”.

Furthermore, it should be recalled that, according to the EU Directive 2013/40 on attacks against information systems, access to an information system is considered to be unlawful “only where committed by infringing a security measure”<sup>53</sup>. *A contrario*, it can be argued that free access to an open information system should be deemed lawful, and that “lawful” should not mean “authorised by rightholders” only.

#### 4. Policy options for the implementation of Article 3

##### a) *General national implementation principles*

Art 3 of the DSMD establishes a new mandatory exception for text and data mining for the purposes of scientific research. Specifically, Art 3(1) states that:

*“Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural*

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<sup>49</sup> European Copyright Society, *General Opinion on the EU Copyright Reform Package*, *op.cit.*; Geiger, Frosio, Bulayenko, *op.cit.*, p. 34.

<sup>50</sup> R. Ducato and A. Strowel, “Ensuring Text and Data Mining: Remaining Issues with the EU Copyright Exceptions and Possible Ways Out,” (2021) 43 *EIPR*, Issue 5, p. 330; Hilty and Richter, *op.cit.*

<sup>51</sup> Thomas Margoni and Martin Kretschmer, “A deeper look into the EU Text and Data Mining exceptions: Harmonisation, data ownership, and the future of technology”, CREATE Working Paper 2021/7. Available at: <https://zenodo.org/record/5082012#.YgT53u7P0QJ>.

<sup>52</sup> Both the right of information (Art 11 of the EU Charter on Fundamental Rights) and the freedom to conduct business (Art 16 of the EU Charter on Fundamental Rights) would be compromised.

<sup>53</sup> Article 3 of Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 218, 14.8.2013, p. 8–14.

*heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access”.*

At the same time, Art 25 DSMD enables Member States to adopt broader provisions, compatible with the exceptions and limitations provided for in Directives 96/9/EC and 2001/29/EC, for uses or fields covered by the exceptions or limitations provided in the DSMD. In this context, TDM uses covered by other provisions in the EU *acquis* on limitations and exceptions, such as the research and education exception of Art 5 (3) (a) ISD<sup>54</sup>, can be maintained or introduced as long as they do not limit the scope of the mandatory exceptions or limitations introduced by the DSMD (see above Introduction, A.3). Together, it is crucial that the effectiveness of the minimum standard of Art 3 DSMD is guaranteed by the Member States, especially against contractual and technical overrides.

*b) No contractual or technical override*

The ECS emphasizes that national implementing laws shall expressly and clearly provide that this exception cannot be contractually overridden by rightholders and that uses covered by the exception shall not be subject to compensation for rightholders, as it is limited to entities carrying out scientific research and therefore any potential harm to rightholders through the application of the exception would be minimal.<sup>55</sup>

Publishers of scientific and scholarly journals should not be able to use their contractual power to limit researchers’ ability to engage in text and data mining by imposing restrictions on access and use of their content in exchange for making this content available<sup>56</sup>. Additionally, the application of TPMs might significantly interfere with the effective enjoyment of the new TDM exceptions or limitations<sup>57</sup>. The DSMD did not provide any balanced solution for the regulation of the relationship between the TDM provisions and the protection of TPMs and it does not grant any effective protection against TPMs.<sup>58</sup> It is vital that TPMs should not be applied in a manner that makes TDM unnecessarily difficult or even de facto impossible<sup>59</sup>. When implementing Art 3, Member States should make it clear that the TDM research exception cannot be neutralized by the application of TPMs. TPMs cannot prevent the enjoyment of the new mandatory research exception and effective means should be made available to users to secure the removal of such TPMs.<sup>60</sup> Therefore, Member States are strongly encouraged to establish efficient, transparent and quick procedures for the reporting and removal of

<sup>54</sup> “(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”;

<sup>55</sup> Recital 17 DSMD.

<sup>56</sup> Michael W. Carroll, “Copyright and the Progress of Science: Why Text and Data Mining Is Lawful,” (December 1, 2019). 53 *UC Davis Law Review* 893, 2019, Available at SSRN: <https://ssrn.com/abstract=3531231> .

<sup>57</sup> For the problematic coexistence of copyright exceptions and limitations with TPMs, see: Severine Dusollier, (2003), “Tipping the Scale in Favour of the Right Holders: The European Anti-Circumvention Provisions”, in Becker, E., Buhse, W., Günnewig, D. and Rump, N. (eds.), *Digital Rights Management. Technological, Economic, Legal and Political Aspects*, Berlin, Germany: Springer, pp. 462-478.

<sup>58</sup> Thomas Margoni and Martin Kretschmer, “A deeper look into the EU Text and Data Mining exceptions: Harmonisation, data ownership, and the future of technology”, CREATE Working Paper 2021/7. Available at: <https://zenodo.org/record/5082012#.YgT53u7P0QJ>; Marco Caspers and Lucie Guibault, “A right to ‘read’ for machines: Assessing a black-box analysis exception for data mining,” 27 December 2016, <https://doi.org/10.1002/pra2.2016.14505301017>.

<sup>59</sup> Hilty, Richter, *op.cit.*

<sup>60</sup> Geiger, Frosio, Bulayenko, *op.cit.*

TPMs under the supervision of an appropriate governmental body if rightholders fail to remove TPM within a specific reasonable time period.

Rightholders remain free to “apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. However, such measures shall not go beyond what is necessary to achieve that specific objective.”<sup>61</sup> In this context, it would be useful to explicitly implement Recital 16 of the DSMD, which further clarifies that “*such measures are justifiable only for reasons of systems or database security and integrity (e.g. “in view of a potentially high number of access requests to, and downloads of, their works or other subject matter”), not for purely commercial reasons*”.

c) *Not-for-profit scientific research*

Those entitled to the benefit of the exception must be either research organisations regardless of their legal forms and structures<sup>62</sup> or cultural heritage institutions. As stated in Recital 12, it is important to have a common understanding of the concept of a research organization covered by the exception, which should cover entities such as research institutes and hospitals that carry out research, in addition to universities or other higher education institutions and their libraries. Recital 13 clarifies that “*Cultural heritage institutions should be understood as covering publicly accessible libraries and museums regardless of the type of works or other subject matter that they hold in their permanent collections, as well as archives, film or audio heritage institutions. They should also be understood to include, inter alia, national libraries and national archives, and, as far as their archives and publicly accessible libraries are concerned, educational establishments, research organisations and public sector broadcasting organisations*”.

Recital 11 of the Directive expressly provides that research organisations should be “*able to rely on their private partners for carrying out text and data mining, including by using their technological tools*”. Therefore, the beneficiaries of Article 3 should be entitled to the protection of the TDM exception when their research activities are carried out under a public-private partnership. In this context, Member States are encouraged to implement Recital 11 in their legislation and to consider further some principles facilitating the emergence of a workable and solid foundation for public-private partnerships for TDM research, such as enabling such agreements on the sole condition that the beneficiary institution has a “decisive control” over the purpose, extent and process of the TDM analysis conducted by a private partner on its behalf.

The exception set out in Art 3 covers only TDM activities performed by research organisations which act on a non-for-profit basis or which reinvest all profits in its scientific research or in the context of a public-interest mission recognised by the State.<sup>63</sup> Such a mission could, for example, arise as a consequence of public funding or through provisions in national laws or public contracts<sup>64</sup>. On the contrary, commercial research institutes are excluded from the scope of Art 3. Regrettably, therefore, a journalist’s use of TDM techniques on the online archives of journals, libraries and collections or other online resources to verify the historical accuracy of certain facts and thus to combat fake news, is not covered by Art 3 because journalists are not research organizations operating for research

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<sup>61</sup>Art 3(3) DSMD.

<sup>62</sup> Recital 12 DSMD.

<sup>63</sup> Art 2(1) DSMD, which provides that “‘*research organisation*’ means a university, including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research: (a) on a not-for-profit basis or by reinvesting all the profits in its scientific research; or (b) pursuant to a public interest mission recognised by a Member State;”.

<sup>64</sup> Recital 12 DSMD.

purposes.<sup>65</sup> Such uses could be covered by Art 4, but that provision is subject to a rightsholder's opt out. This situation is problematic in terms of fundamental rights; in particular, with regard to the right to research which is based on the right of information and includes a right to search for effective and objective information by the use of TDM techniques on existing sources<sup>66</sup>.

The requirement that TDM activities should be non-for-profit may become problematic within a changing academic field, where the border between what is academic and what is commercial is blurring<sup>67</sup>. Indeed, research using TDM analysis conducted in a non-profit institution may lead to a research output which might later have a commercial exploitation under a partnership with a private partner. Such a situation might present difficulties if the non-profit criterion is restrictively construed, since the TDM analysis was made for scientific research, while the research output, which might not be solely or significantly based on the TDM analysis, may be found subsequently to be commercially exploitable. Such use may be considered as not primarily commercial, on the condition that the potential for commercial exploitation is secondary, exceptional or *de minimis*, in relation to the beneficiary institution's primary goal of conducting scientific research on a non-profit basis or through the reinvestment of any profit in pursuit of the primary goal of non-commercial scientific research. In this context, a flexible understanding of the non-profit criterion of the beneficiary institutions should be promoted, in order not to exclude such research from the scope of the exception, provided that the primary non-profit scientific research or educational goal is fulfilled.

The exception does not cover scientific research conducted by independent researchers who are not affiliated to universities or cultural institutions, such as researchers between two short-term employment contracts<sup>68</sup>. Since Art 25 DSMD allows Member States to adopt or maintain a broader scope for the uses covered by Art 3 DSMD, as long as the latter are compatible with the existing EU *acquis* on copyright exceptions (namely the research and teaching exception of Art 5 (3) (a) ISD), Member States could enlarge the scope of Art 3 DSMD so that it also covers non-profit scientific research conducted by independent researchers.

*d) Acts covered by the exception: restrictions and loopholes*

Art 3 DSMD provides that the research TDM exception refers to the rights provided for in Article 5(a) and Article 7(1) Database Directive 96/9/EC (reproduction right and extraction and/or re-utilization of the whole or of a substantial part of a database), Article 2 Information Society Directive 2001/29/EC (reproduction right), and the press publishers' right (Art 15 (1) of the DSMD). While the making of copies is an essential component of TDM techniques, researchers may also need to perform acts that implicate the rights to communicate or make works available to the public (such as sharing the TDM database with other researchers) or to undertake activities where the right of adaptation is involved, for instance to ensure that materials are in machine readable format.<sup>69</sup>

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<sup>65</sup> Margoni, Kretschmer, *op.cit.*

<sup>66</sup> Christophe Geiger, "The Missing Goal-Scorers in the Artificial Intelligence Team: Of Big Data, the Fundamental Right to Research and the failed Text and Data Mining limitations in the CSMD Directive" (2021), p.7, PIJIP/TLS Research Paper Series No. 66. <https://digitalcommons.wcl.american.edu/research/66> .

<sup>67</sup> Caspers, Guibault, *op.cit.*

<sup>68</sup> Ducato, Strowel, *op.cit.*, p. 327, 332.

<sup>69</sup> Sean Flynn, Christophe Geiger, João Pedro Quintais, Thomas Margoni, Matthew Sag, Lucie Guibault, and Michael W. Carroll, "Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action" (2020). Joint PIJIP/TLS Research Paper Series. 48, p. 9, available at: <https://digitalcommons.wcl.american.edu/research/48>; *EIPR* 2020, No. 7, p. 393.

Art 3(2) DSMD provides that copies of works or other subject matter shall be stored and may be retained for the purposes of scientific research, including for the verification of research results. However, the wording of this provision does not specify whether the verification of research results can be conducted by third parties external to the organisation.<sup>70</sup> In this context, Member States are encouraged to make it clear that the copies of works or other subject matter deriving from the TDM analysis can be reviewed and verified by independent researchers<sup>71</sup> and that the material can be adapted when TDM is conducted for scientific research.

The TDM research exception does not create a limitation to the application of copyright in computer programs. While it is possible that TDM for research on computer programs can be performed on the grounds of Art 5 (3) of the Computer Programs Directive (the so called “black box” analysis),<sup>72</sup> that provision does not cover acts of translation and adaptation. Contrary to Art 3 DSMD, Art 4 DSMD allows TDM activities, including acts of translation, adaptation, arrangement and any other alteration of a computer program.<sup>73</sup> National lawmakers are encouraged to eliminate the disparities regarding the scope of application of the provisions of Art 3 and 4 DSMD and specifically to provide that TDM for research purposes on computer programs is also allowed<sup>74</sup>.

*e) Best practices*

According to Art 3(4), Member States shall encourage rightholders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning the application of the obligation and of the measures referred to in paragraph 2 (storage and of copies produced when performing TDM with an appropriate level of security) and paragraph 3 (measures taken by rightholders to ensure the security and integrity of networks and databases) respectively. For this purpose, Member States are encouraged to set out the fundamental principles underpinning these best practices in their implementing laws, covering, for example, the principle of proportionality (as regards the measures taken by rightholders to ensure the security and integrity of networks and databases and the permissible period of retention of copies for the purposes of scientific research, including for the verification of research results) and of efficacy (regarding the appropriate level of security).

*f) No compensation*

Art 3 DSMD establishes a mandatory exception. Exempted TDM uses shall not be subject to compensation for rightholders. As the exception is limited to entities carrying out scientific research for non-profit purposes, it is understood that any potential harm to rightholders would be minimal.<sup>75</sup>

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<sup>70</sup> Ducato, Strowel, *op.cit.*, p. 327.

<sup>71</sup> Ducato, Strowel, *op.cit.*, p. 332.

<sup>72</sup> “The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do”.

<sup>73</sup> “Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining”.

<sup>74</sup> Ducato, Strowel, *op.cit.*, p. 328, 329, 332.

<sup>75</sup> Recital 17 DSMD.

Member States are encouraged to provide explicitly in their laws that no compensation is due for TDM, under Art 3, as provided for in recital 17. At the same time, Member States should take steps to ensure that prior contracts do not render the TDM exception useless by, for example, providing that prior subscription contracts must be brought into line with the principle of non-compensation for non-profit scientific research within a reasonable time of the implementation of the DSMD.

## 5. Policy options for the implementation of Article 4

Art 4 of the DSMD Directive establishes a further mandatory provision covering TDM activities for any other purposes, including commercial TDM activities. As is stated in Recital 18, “*This exception or limitation should leave intact the mandatory exception for text and data mining for scientific research purposes provided for in this Directive, as well as the existing exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC*”.

### a) *Shaping Art 4 at a national level: Free or remunerated use for TDM purposes?*

Art 4 DSMD provides for an additional TDM “exception or limitation”. The reference to “exception or limitation” appears to provide Member States with the freedom to decide whether to implement the provision without compensation (e.g., when mining data that are available on the Web without technical restrictions) or with compensation (e.g., statutory licensing, provided that harm can be demonstrated on the basis of relevant empirical data<sup>76</sup>). However, the imposition of a compensation system should be strongly avoided, since it would significantly jeopardise the effectiveness of this provision, which is already compromised by the opt-out mechanism available to rightholders.

### b) *Unless “reserved”: Exception or Limitation subject to private ordering*

The exception set out in Art 4 applies only where the use of works or other subject matter has not been expressly reserved by rightholders. This system, under which TDM is subject to private ordering and the number of its potential beneficiaries is limited through the opt-out mechanism, has significant drawbacks, since it fails to provide an EU legal framework that is comparable with other jurisdictions that have adopted opening clauses or fair use models to allow a broader number of research players to perform TDM research<sup>77</sup>.

The opt-out clause of Art 4 allows right holders to decide whether TDM activities for-profit is possible. This puts AI developers, journalists, commercial research labs, and other innovators at a competitive disadvantage in comparison with those in the United States, Canada, Singapore, South Korea, Japan and Israel, where text and data mining is deemed fair use, even where carried out for profit.<sup>78</sup>

An important condition of the opt-out mechanism is that the reservation should be expressed in an appropriate manner, such as machine-readable means, including metadata (such as robot.txt type metadata) and terms and conditions of a website or a service in the case of content made publicly available online.

<sup>76</sup> Geiger, Frosio, Bulayenko, *op.cit.*, p. 25.

<sup>77</sup> Geiger, Frosio, Bulayenko, *op.cit.*, p. 31.

<sup>78</sup> Bernt Hugenholtz, “The New Copyright Directive: Text and Data Mining (Articles 3 and 4),” [http://copyrightblog.kluweriplaw.com/2019/07/24/the-new-copyright-directive-text-and-data-mining-articles-3-and-4/?doing\\_wp\\_cron=1591338002.2949459552764892578125](http://copyrightblog.kluweriplaw.com/2019/07/24/the-new-copyright-directive-text-and-data-mining-articles-3-and-4/?doing_wp_cron=1591338002.2949459552764892578125), Posted on July 24, 2019; Sean Flynn, Christophe Geiger, João Pedro Quintais, Thomas Margoni, Matthew Sag, Lucie Guibault, Michael Carroll, “Implementing user rights for research in the field of artificial intelligence: a call for international action”, EIPR 42(7), 2020, 393–398.

Data in a “machine-readable” format can be made directly available to applications that request that data over the Internet. The term “machine readable” is also found in other pieces of EU legislation, such as in Art 2 of the PSI-II Directive<sup>79</sup>, which states that: “*machine-readable format means a file format structured so that software applications can easily identify, recognize and extract specific data, including individual statements of fact, and their internal structure.*”.

Member States are encouraged to clarify the condition that the reservation should be expressed appropriately, since in situations in which the reservation is expressed inappropriately, the reservation should normally have no effect. A technologically neutral, albeit restrictive<sup>80</sup>, understanding of the appropriate means of reservation should be promoted.

Member States could usefully provide some guidance on the means which are to be considered inappropriate for content that is publicly available online, such as reservations not expressed in code (for instance when TDM restrictions are found in website terms and conditions in PDFs, images or as website text). Member States should provide that reservations made by contractual agreements or by unilateral declaration are clear, transparent, precise, easily identifiable, and expressed in unambiguous terms.<sup>81</sup>

Art 4 DSMD should be interpreted in combination with the PSI-II Directive on open data and the re-use of public sector information,<sup>82</sup> also known as the ‘Open Data Directive’, which concerns data held by the public sector, including research data<sup>83</sup>. TDM falls within the broad definition of “re-use” of documents.<sup>84</sup> While a full comparative analysis of the potential interactions between the TDM exception of the DSMD and the ‘Open Data Directive’ would go beyond the purpose of this Comment, the principles posed by the ‘Open Data Directive’ should be understood as restricting the freedom of the public sector bodies falling within the scope of the Directive 2019/1024 to opt-out of the data mining exception<sup>85</sup>.

### C. Digital and Cross-Border Teaching Activities (Art 5)

Article 5 DSMD introduces a mandatory “exception or limitation” to the rights of reproduction and communication to the public (including, the making available online) of works and other protected

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<sup>79</sup> Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, OJ L 172, 26.6.2019, p. 56–83.

<sup>80</sup> Geiger, “The Missing Goal-Scorers...” *op.cit.*

<sup>81</sup> Recital 18 DSMD.

<sup>82</sup> Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, OJ L 172, 26.6.2019, p. 56–83.

<sup>83</sup> According to Article 2 (9) of Directive (EU) 2019/1024 “‘research data’ means documents in a digital form, other than scientific publications, which are collected or produced in the course of scientific research activities and are used as evidence in the research process, or are commonly accepted in the research community as necessary to validate research findings and results”;

<sup>84</sup> According to the Study on the legal framework of text and data mining (TDM), “The definition of re-use given by the PSI Directives is very broad as it includes all kinds of uses of documents, including use for data analysis”. See: Triaille, de Meeûs d’Argenteuil, de Francquen, *op.cit.* p. 24.

<sup>85</sup> It might even be argued that Directive 2019/1024 of 20 June 2019 on open data and the re-use of public sector information establishes an obligation for public sector bodies/ rightholders not to “opt out”.

subject matter for digital and cross-border teaching activities, provided that the use is done for the sole purpose of illustration for teaching, and to the extent justified by the non-commercial purpose to be achieved. Fair compensation is not formally required but Member States may impose an obligation to pay such compensation in order to comply with the three-step-test (hence, the formal reference to “exception or limitation”).

## 1. Why is it needed?

Unlike the TDM exception, teaching uses already benefit from an exception or limitation under Art 5(3)(a) ISD,<sup>86</sup> as well as, specifically, under Art 6(2)(b) and Art 9(b) Database Directive.<sup>87</sup> As far as computer programs are concerned, despite the fact that the Computer Programs Directive does not include an exception or limitation for teaching purposes, Member States remain free to provide further exceptions and limitations for teaching purposes in accordance with Art 10(2) of the Berne Convention.<sup>88</sup>

Exceptions and limitations for teaching uses are currently found in all national copyright laws, but the scope of the rights and works affected, as well as the applicable conditions, are far from uniform.<sup>89</sup> As an optional provision, Art 5(3)(a) ISD failed to secure full harmonization of exempted teaching uses across the internal market.<sup>90</sup> Specifically, although digital and online teaching uses were clearly covered by Art 5(3)(a) ISD,<sup>91</sup> major divergences and a lack of legal clarity persist across national laws.<sup>92</sup>

As identified by the Commission,<sup>93</sup> the development of online cross-border education in the internal market was hampered by legal uncertainty resulting from excessively restrictive and heterogeneous

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<sup>86</sup> According to Art 5.3(a) Directive 2001/29/EC (ISD), Member States may provide for exceptions or limitations ... “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.”

<sup>87</sup> According to Art 6.2(b) and Art 9(b) Directive 96/9/EC (Databases), Member States may authorize the use of a database as well as the extraction and reuse of a substantial part of its contents “for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.”

<sup>88</sup> According to Recital 19 Directive 2009/24/EC (Computer Programs), this Directive does not affect derogations in national laws in accordance with the Berne Convention “on points not covered by this Directive.”

<sup>89</sup> See J-P. Triaille et al “*Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*,” De Wolf & Partners, (2013) p.368 et ss: <https://op.europa.eu/en/publication-detail/-/publication/9ebb5084-ea89-4b3e-bda2-33816f11425b>. See also “*Assessment of the impact of the European copyright framework on digitally-supported and training practices*,” PPMI (2016): <https://op.europa.eu/es/publication-detail/-/publication/1ba3488e-1d01-4055-b49c-fdb35f3babc8>.

<sup>90</sup> Differences among national exceptions and limitations relate to the types of works that could be used (the use of publications is more easily exempted for teaching purposes, than of music and audiovisual works), the exclusion of textbooks or other works intended for educational purposes, the amount of work that can be used (fragments, extracts, percentages, 1 chapter of a book, 1 article of a journal, etc.), the beneficiaries (public or private education bodies, teachers and students, etc) and educational levels benefiting from the exceptions and limitations and, of course, the requirement of fair compensation or remuneration (only 16 Member States require, at least partially, compensation or remuneration).

<sup>91</sup> See Recital 42 ISD: “including distance learning”.

<sup>92</sup> See Recital 19 DSMD: “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*.” (Emphasis added)

<sup>93</sup> See EU Commission Staff Working Document (2016), *Impact Assessment on the modernization of EU copyright rules*, SWD(2016) 301 final, 14.09.2016, accompanying the Proposal for a Directive on Copyright in the Digital Single Market,

implementations of teaching exception and limitations, by insufficient licensing in most countries, by disproportionate clearing costs and ultimately, by the lack of cross-border effect of exceptions and limitations and licensing schemes. The mandatory exception and limitation in Art 5 aims to overcome this situation, which “could hamper the development of digitally supported teaching activities and distance learning” and “to ensure that educational establishments benefit from full legal certainty when using works or other subject matter in digital teaching activities, including online and cross borders.”<sup>94</sup>

## 2. Scope of exempted uses

The scope of rights affected by the mandatory provision consists of:

- the exclusive rights of reproduction in digital formats and of communication to the public, including making available online (Arts 2 and 3 Information Society Directive 2001/29/EC);
- the exclusive rights granted in databases, including the *sui generis* right (Arts 5 and 7 Database Directive 96/9/EC);<sup>95</sup>
- the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole (Art 4(1) Computer Programs Directive 2009/24/EC);
- and the new exclusive rights of reproduction and making available online of press publications granted to press publishers by Art 15(1) of this Directive.

Member States are obliged to implement exceptions or limitations to exempt these acts of exploitation for digital and online teaching purposes. Of course, since this mandatory provision is formulated under the principle of subsidiarity, Member States may choose to extend it to other exclusive rights, such as the right of translation (as long as it does not endanger the functioning of the internal market).

## 3. Works and other subject matter <sup>96</sup>

This mandatory provision applies, in general, to all works and other subject matter, including computer programs and databases, as well as to press publications. The mandatory exception or limitation in Art 5 has a wider scope than its predecessor in Art 5(3)(a) ISD (which does not apply to computer programs and databases<sup>97</sup>). However, full harmonization may be hampered as a result of the flexibilities granted to Member States (see below); different conditions may end up applying to different kind of works and subject matter, and exclusions of specific works are allowed in specific cases (such as, where licences are available).

## 4. For the sole purpose of illustration for teaching

This provision covers digital and online uses done “for the sole purpose of illustration for teaching.” Even though Art 5 covers only digital uses, the meaning of “illustration for teaching” is exactly the

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COM(2016) 593 Final (14.09.2016); available at <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF> [hereinafter, *Impact Assessment*], pp.87-90.

<sup>94</sup> See Recital 19 DSMD.

<sup>95</sup> Any form of distribution (in tangible copies) under Art 5(c) Database Directive is, obviously, excluded from the scope of this provision.

<sup>96</sup> From now on, we will refer only to work and works.

<sup>97</sup> Although, as we saw, Art 6(2)b and Art 9(b) Database Directive already provide for an “optional” exception and limitation for teaching purposes.

same as that under Art 5(3)(a) ISD<sup>98</sup> and, as Recital 44 ISD confirms, must be read “in accordance with international obligations”; that is with Art 10(2) BC.<sup>99</sup> “Illustration for teaching” includes any (digital) uses to “support, enrich or complement the teaching, including learning activities” (Recital 21, DSMD).<sup>100</sup> The exempted activities under “illustration for teaching” must go beyond uses already exempted as quotations (Art 5(3)(d) ISD), otherwise there would be no need for a specific exception and limitation covering this activity. In summary, the provision must be read in a broad and flexible manner, so as to cover the use of works to prepare and deliver teaching, to set exercises or exams, comments or debates, and to study: any use that is directly related and of material assistance to the teaching content.<sup>101</sup> It also includes “the specific accessibility needs of persons with a disability in the context of illustration for teaching,”<sup>102</sup> hence “closing” any possible gap that may exist between the teaching exceptions or limitation and any exception or limitation in favour of people with a disability (i.e., Art 5(3)(b) ISD and the Marrakesh Directive 2017/1564).

The concept of “illustration” will often<sup>103</sup> imply “the use of only parts or extracts of works, which should not substitute for the purchase of materials primarily intended for the educational market” (Recital 21 DSMD). However, as a rule, the kind and amount of works authorised under the exception or limitations will be decided *in casu*, “to the extent justified” by the teaching purpose.

Recital 21 allows Member States some freedom “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.” However, Member States should remember that, rather than general pre-set restrictions, flexibility should remain the norm. Restrictions should only be implemented when necessary, should be directed at specific kinds of works and should be applied “*in a balanced manner*.” For instance, one might arguably exclude schoolbooks, exercise books or treatises from the scope of the exception or, alternatively, subject their exempted use to further restrictions or even compensation.

Art 5 DSMD covers “all education levels” and “should, therefore, benefit all educational establishments recognised by a Member State, including those involved in primary, secondary, vocational and higher education.”<sup>104</sup> This definition, together with the interpretation of “non-commercial purpose” (see below), covers a broad range of educational establishments and teaching activities.

## 5. To the extent justified by the non-commercial purpose to be achieved

This proportionality requirement should be given the same meaning as it has in Art 5(3)(a) ISD. Confirming this, Recital 20 DSMD repeats the terms of Recital 42 ISD, which states that “the

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<sup>98</sup> ‘Illustration for teaching’ in Art 5.3(a) ISD is also explained as ‘for the purpose of education and teaching’ (Recital 14 ISD) or ‘educational purposes’ (Recital 34 ISD).

<sup>99</sup> See Ricketson, Sam and Ginsburg, Jane C. (2006), *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Oxford, UK and New York, US, Oxford University Press, §13.45.

<sup>100</sup> Recital 20 DSMD: “to improve and enrich the learning experience”.

<sup>101</sup> Paraphrasing sec.110(2)(B) U.S. Copyright Act.

<sup>102</sup> See Recital 21 DSMD.

<sup>103</sup> The words “by way of illustration” impose some limitation but would not exclude the use of the whole of a work in appropriate circumstances; see Ricketson/Ginsburg, *op.cit.* §13.45, p.791.

<sup>104</sup> See Recital 20 DSMD.

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.” In other words, private educational institutions may (and should) also be covered by the exception or limitation. After all, the public interest that justifies the teaching exceptions and limitations is the same regardless of the institution responsible for it. Needless to say, different conditions (e.g., in terms of compensation) may apply in different scenarios.

## 6. On two conditions

Art 5(1) DSMD identifies two conditions that must apply cumulatively to any teaching use exempted under this mandatory provision. The teaching use:

- (a) must take place “under the responsibility of an educational establishment, on its premises or at other venues, or through a secure electronic environment” accessible only by students and teaching staff; and
- (b) must be accompanied by the indication of the source, including the author’s name, unless this turns out to be impossible.

The reference to “other venues” is meant to enlarge the scope of the exempted teaching activities, including those that take place outside the premises of the educational establishment, “for example, in a museum, library or another cultural heritage institution” (Recital 22), as long as “limited to what is necessary for the purpose of such activities” (Recital 22). However, it should be observed that exempted activities under Art 5 are restricted to those conducted through digital means, “for example, electronic whiteboards or digital devices that may be connected to the internet” (Recital 22), such as tablets, phones or i-pads.<sup>105</sup>

The reference to a “secure electronic environment” is meant to cover any kind of internal or external means or platform (e.g., an intranet, a secured website, an app, etc), either in the context of a fully online course or where access to teaching material complements a face-to-face course (Recital 22). A secure electronic environment is one which is accessed only<sup>106</sup> by those who participate in the teaching activity (that is, students enrolled in the programme and teaching staff). Unlike teaching uses taking place on the “premises,” those taking place through secure electronic environment will always be of a digital nature.

## 7. Fair compensation

Member States may choose to require fair compensation for rightsholders, for all or some of the exempted teaching uses.<sup>107</sup> They may also choose to deny compensation entirely.”<sup>108</sup> Currently, several teaching exceptions and limitations in EU national laws require (at least, partially) some compensation.<sup>109</sup> In leaving this decision to national law, the Union legislator permits adjustment to

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<sup>105</sup> It should not be forgotten that Art 5 DSMD covers only “digital” teaching uses. Thus, paper copies of a work of art to be used as part of the teaching during a museum trip would still need to be exempted under a “traditional” teaching exception, or duly licensed.

<sup>106</sup> See Recital 22: “through appropriate authentication procedures including password-based authentication.”

<sup>107</sup> See Art 5.4 and Recital 24 DSMD.

<sup>108</sup> The same flexibility was afforded under Art 5(3)(a) ISD, which does not require compensation, but does not preclude it either. In fact, Recital 36 ISD expressly allowed Member States to require fair compensation for exceptions and limitations for which fair compensation is not a requirement.

<sup>109</sup> Licensing/compensation schemes for teaching uses exist in France, Germany, Spain, UK, Ireland, Belgium, Denmark, Finland, and Sweden. See and Annex 10C *Impact Assessment* (2016).

the needs and specificities of each market (e.g., language, CMO development, economic and cultural context, etc).

## 8. A “legal fiction”: the law of the country of establishment

In order to overcome the challenge of territoriality, Art 5(3) provides that online cross-border teaching use “shall be deemed to occur solely in the Member State where the educational establishment is established.” Such a rule is justified (and necessary) because of the flexibility granted to Member States when implementing Art 5.

This “legal fiction” is meant to work as a choice of law rule identifying the “country of origin.”<sup>110</sup> This should not come as a surprise. Similar solutions were adopted in Art 1(2)(a) Satellite and Cable Directive (law of the country of uplink) and in Art 4 Orphan Works Directive (“mutual recognition of orphan work status” upon a diligent search conducted in the country of first publication).<sup>111</sup>

The “legal fiction” of the country of establishment facilitates the development of online teaching within the internal market by linking these activities to only one applicable law (the exceptions and limitations in the law of the country of establishment will govern the kind, scope and conditions of the teaching uses exempted) and licence (where necessary) covering all the internal market.<sup>112</sup> Together with the uniform (mandatory) core of the teaching exception or limitation, the legal fiction of the country of establishment will substantially overcome existing legal uncertainty and facilitate the development of online teaching across the EU.

## 9. Derogation permitted when suitable licences are easily available

Art 5(2) allows Member States to derogate from the application of the mandatory exception and limitation “as regards specific uses or types of works”<sup>113</sup> “to the extent that suitable licences authorising the acts ... and covering the needs and specificities of educational establishments are easily available on the market.” Notice here the adjectives “suitable” and “easily” and the safeguard covering the needs and specificities of educational establishments, which aims to preclude abuses<sup>114</sup> that would render the mandatory exceptions and limitations useless. Nevertheless, the very existence of the derogation option opens Member States up to further national lobbying that may ultimately endanger the unifying goal pursued by a mandatory exception and limitation.<sup>115</sup> The effective implementation of this mandatory exception and limitation lies in the hands of Member States.

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<sup>110</sup> Although Art 5(3) is not a formal private international law rule, its interaction with the formal choice of law rules pointing at “the law of the country for which protection is claimed” (i.e., Art 8 Rome-II Regulation, Art 5(2) BC) remains an interesting field of study.

<sup>111</sup> See Art 3(3) Orphan Works Directive for subsidiary alternative countries to conduct the diligent search.

<sup>112</sup> For instance, an online educational establishment will not need to obtain several territorial licences to cover its teaching activities accessible from several different countries where students may reside.

<sup>113</sup> As an example of “types of works” that may be excluded, Art 5(2) formally refers to “material that is primarily intended for the educational market or sheet music.” By contrast, no example of “specific uses” is provided.

<sup>114</sup> Available licences should not only respond to copyright owners’ needs and interest but also meet the needs of educational establishments.

<sup>115</sup> The possibility of derogating from a mandatory exception and limitation perpetuates the existence of non-uniform national solutions and neutralizes the very goal of a mandatory provision: to facilitate the market for cross-border online teaching. Of course, as explained above, the legal fiction of the teaching activity only taking place in the country of establishment of the educational institution will mitigate the foreseeably non-uniform national implementations.

If Art 5 is to be properly implemented, and if the option to derogate from its terms is to be taken up, the rationale underlying the provision and the further explanations in Recital 23 should be clearly understood. The Commission’s Impact Assessment justified the derogation option by reference to the need to avoid negative economic effects in some countries, where licensing of digital teaching uses was already available, be it under Extended Collective Licensing (ECL), as is the case in Denmark, Finland and Sweden, or under “fall-back” exceptions or limitations (that only apply when parties have not reached a licensing agreement) as is the case in the UK and Ireland. This is a very sensible concern. However, as explained in Recital 23, the licensing agreements (in place in a few Member States) do not only cover exempted teaching uses (under exceptions and limitations covered by Art 5(3)(a) ISD), but also “further uses” going beyond the “extent necessary” exempted for the teaching purpose. This fact suggests a less-than-optimal legislative technique, since any possible derogation from the mandatory exception and limitation should have been restricted to the scope of uses exempted under it. In short, there is no need to derogate from exempted uses in order to safeguard the licensing of other non-exempted uses, which will continue to remain subject to exclusive (voluntary) licensing.

Bearing this in mind, let us now examine the scope of the derogation. According to Recital 23:

*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.** Member States could, for example, use this mechanism to give precedence to licences for material that is primarily intended for the educational market or licences for sheet music.*

In other words, Member States may choose to provide for “fall-back” exceptions or limitations<sup>116</sup> or to exclude specific works entirely (e.g. material primarily intended for education or sheet music). However, at all times, any derogation implemented must secure, at least, the same scope of uses exempted under Art 5.

Further safeguards, also provided by Recital 23, are intended to avoid “legal uncertainty or an administrative burden for educational establishments”. Member States “should take concrete measures to ensure that licensing schemes ... are easily available, and that educational establishments are aware of (their) existence ... Such licensing schemes should meet the needs of educational establishments. Information tools aimed at ensuring that existing licensing schemes are visible could also be developed...” Licensing schemes “may be based on collective licensing or on extended collective licensing, in order to avoid educational establishments having to negotiate individually with rightholders.” Member States taking up the option to derogate from the mandatory exception and limitation “should specify under which conditions an educational establishment can use protected works or other subject matter under that exception and, conversely, when it should act under a licensing scheme.”

Of course, as clearly envisioned under the term “limitation”, Member States may also choose to provide for non-voluntary licensing schemes: for instance, subjecting specific uses of some kind of works (exempted by Art 5) to an obligation to pay fair compensation, managed by CMOs. The choice amongst different mechanisms may be the prerogative of Member States, but they are all obliged to secure the uniform scope of exempted uses under Art 5.

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<sup>116</sup> The mandatory exception and limitation will not apply when licenses covering, at least, the same uses allowed under it, are available; yet, it will automatically apply to any other exempted uses not covered by that license. This mechanism is meant to encourage voluntary arrangements while securing the mandatory scope of exempted uses. Its success depends on the specific cultural and market conditions applicable in each country.

In summary, Member States should not simply implement the formal language of Art 5(2),<sup>117</sup> but should also implement specific arrangements to secure its effectiveness in the specific needs and circumstances of their markets “to the extent that they do not hamper the effective application of the exception or limitation or cross-border uses” (Recital 23). If a Member State decides to derogate from the exception or limitation under Art 5, it should do so by taking specific and concrete measures that clearly identify the scope (specific uses and types of works covered) subject to suitable licences (easily available and visible for the educational establishment) and the scope of uses that remain directly exempted by the mandatory exceptions and limitations. At all times, licences (where available and visible) should “add” to the scope of exempted use, not restrict it.

#### **10. The risk of an accumulation of digital and analogue teaching exceptions and limitations?**

The mandatory exceptions and limitations for digital and online cross-border teaching will most likely co-exist with current (and non-harmonized) exceptions and limitations for other “analogue” and face-to-face teaching activities. National legislators should therefore exercise their discretion when implementing both Art 5 DSMD and Art 5(3)(a) ISD to provide for coherent and seamless provisions exempting the use of works for teaching purposes regardless of the means (digital or otherwise) employed to achieve those purposes. Art 5 DSMD’s goal of fostering the development of digital and online teaching across the EU will be poorly served if national legal provisions fail to offer clear and easy rules and thus avoid legal uncertainty regarding the scope of teaching exempted uses.

As proven by the current Covid-19 situation, face-to-face and digital/online teaching uses can no longer be distinguished and treated differently. Different conditions (e.g., compensation) and safeguards may, and must, apply to analogue and digital/online teaching uses to comply with the requirements of the three-step-test (because their impact on the market and risk of infringement are very different). However, teaching use *per se* should be authorised (exempted) by law regardless of the means employed to conduct it. Any teaching use in a face-to-face classroom should also be given the chance to be conducted online (through a secure environment). Any other solution will deny students equal access to education.

#### **D. Preservation of Cultural Heritage (Art 6)**

Art 6 creates a mandatory exception permitting cultural heritage institutions to make copies of any works, or other subject-matter, that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation. National provisions covering preservation activities have sometimes placed inappropriate limits on the preservation activities of cultural heritage institutions; for example, by excluding reproduction of online works or works held on licence, by precluding digital reproduction and/or by permitting otherwise infringing acts in very specific circumstances only.<sup>118</sup> The ECS welcomes Art 6’s establishment of a wide-ranging freedom to make copies for the purpose of preservation across the Member States.<sup>119</sup> It is important to note that Art 6 must be read alongside

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<sup>117</sup> Otherwise, the imprecise terms “suitable” and “easily available” may generate legal uncertainty that is likely to encourage risk-avoiding educational institutions towards licensing agreements that are not always properly and fairly negotiated, forsaking the very existence and goal of the mandatory exception and limitation.

<sup>118</sup> See Recital 40 ISD.

<sup>119</sup> Art 8 of the Directive also promotes the important role of cultural heritage institutions in supporting the freedoms of information, expression, arts and sciences. Art 8(1) requires Member States to provide that, on the satisfaction of certain conditions, collective management organisations may conclude non-exclusive licences for non-commercial purposes with cultural heritage institutions for the reproduction, distribution, communication to the public or making available to the public of “out-of-commerce works or other subject matter” that are permanently in their collections, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation. Where no collective management organisation exists for a particular type of work, Member States must provide an exception or limitation

existing (non-mandatory) provisions in the Union’s copyright *acquis* that grant Member States a broader power to introduce exceptions and limitations for the benefit of certain cultural heritage institutions.<sup>120</sup> The implementation of a specific mandatory exception for preservation purposes should not result in the curtailment of existing exceptions and limitations for cultural heritage institutions in national law.

### **1. Justification for the exception provided under Article 6**

The activities of cultural heritage institutions are supported by the Charter rights to freedom of expression and information (Art 11) and freedom of the arts and sciences (Art 13). Furthermore, in specific instances, preservation activities may also support other important interests recognised within the Union. Recital 26 notes that the absence of a harmonised approach to exceptions and limitations for preservation purposes has led to an inefficient use of resources by cultural heritage institutions. Accordingly, the need not to burden such institutions with unnecessary costs should be taken into account when the application of Art 6 is considered.

### **2. Approach to the interpretation of Art 6**

The fact that the preservation activities of cultural heritage institutions are unlikely to have any adverse impact on the economic interests of rightholders, or the moral interests of creators, suggests that the provision can be interpreted broadly while securing a “fair balance” between competing interests and rights and without breaching the “three-step test”.

### **3. Cultural heritage institutions**

Under Art 2(3), “cultural heritage institution” means a publicly accessible library or museum, an archive or a film or audio heritage institution.<sup>121</sup> Recital 13 confirms that the provision is medium-neutral and explains that the definition includes national libraries and national archives, educational establishments, research organisations and public sector broadcasting organisations.<sup>122</sup> This list is non-exhaustive and the concept of “cultural heritage institution” should be interpreted broadly as covering local and regional, as well as national, institutions, and private and commercial, as well as public, organisations, in so far as their activities are directed at the preservation of works and other subject-matter.

### **4. Works and other subject-matter**

Works and other subject matter are to be considered to be permanently in the collection of a cultural heritage institution when copies are owned or permanently held by that institution, for example as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements.<sup>123</sup> These conditions should be considered to be satisfied where a cultural heritage institution has obtained a copy of a work or other subject-matter under an implied licence or

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permitting cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on the satisfaction of certain conditions (Arts 8(2), 8(3)).

<sup>120</sup> See, for example, Arts 5(2)(c) and 5(3)(n) ISD; the Orphan Works Directive.

<sup>121</sup> Film and audio heritage institutions are not listed specifically as beneficiaries of the parallel non-mandatory provision under the Information Society Directive (Art 5(2)(c)). Member States are encouraged to revisit existing implementing legislation to confirm the beneficiary status of such organisations.

<sup>122</sup> As far as their archives and publicly accessible libraries are concerned.

<sup>123</sup> Recital 29 DSMD.

open access arrangement (for example under a Creative Commons licence) or where a work or other subject-matter owned or held for an institution on a third party server.

## 5. Acts permitted for preservation purposes

Wide-ranging freedom is granted to cultural heritage institutions under Art 6. Acts will be carried out for “preservation purposes” where they are designed to address technological obsolescence or the degradation of the original support of a work or other subject-matter or where necessary to insure such materials.<sup>124</sup> It is important to note that these purposes are purely exemplary. Institutions do not need to wait until a work is endangered before making copies, or organising the making of copies, under Art 6.<sup>125</sup> The very broad definition of “preservation purposes” means that a large proportion of the archival activities of cultural heritage institutions will be covered.<sup>126</sup>

There are no restrictions as to the technological means or formats employed to make copies for preservation purposes, as to the number of copies that are made or as to the manner in which the cultural heritage institution should hold copies made under the provision,<sup>127</sup> as long as the copies are required for the protected purpose. The exception is not restricted to situations in which copies of a work are otherwise unavailable to the cultural heritage institution and there is no specific restriction on the subsequent use of copies made under the provision (as long as such use is otherwise lawful).

Reproduction for preservation purposes can be carried out by third parties acting on a cultural heritage institution’s behalf, including by third parties in other Member States. Importantly, as is made clear in Recital 26, the making of reproductions for the purpose of preservation within cross-border preservation networks is permitted under Art 6. The activities of such third parties should be covered by the exception. Furthermore, cultural heritage institutions should be entitled to authorise the making of copies for preservation purposes by third parties outside the Union without incurring liability for such authorisation.<sup>128</sup>

## 6. No compensation required

Cultural heritage institutions should not be required to pay to make copies under Art 6, which is described as an “exception” throughout the DSMD, makes no reference to the provision of compensation to rightholders and is highly unlikely to have any negative impact on the exploitation of the works or other subject-matter at issue.

## 7. Technological Protection Measures

As noted above, where a work or other subject-matter is protected by TPMs, the beneficiaries of Art 6 are entitled to seek access to those works or other subject-matter in accordance with the relevant

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<sup>124</sup> Recital 27 DSMD.

<sup>125</sup> Recital 27 DSMD (“at any point in the life of a work”).

<sup>126</sup> The exception may, for example, cover such archival uses as the cataloguing of works.

<sup>127</sup> As long as the provisions of the three-step test are satisfied. See Art 7(2) DSMD.

<sup>128</sup> “Cultural heritage institutions do not necessarily have the technical means or expertise to undertake the acts required to preserve their collections themselves, particularly in the digital environment, and might, therefore, have recourse to the assistance of other cultural institutions and other third parties for that purpose. Under the exception for preservation purposes provided for by this Directive, cultural heritage institutions should be allowed to rely on third parties acting on their behalf and under their responsibility, *including those* that are based in other Member States, for the making of copies.” (Recital 28 DSMD, italics added).

national mechanism established under Art 6(4) of the Information Society Directive.<sup>129</sup> Where a cultural heritage institution wishes to undertake a mass digital preservation project, such mechanisms (which frequently include an initial requirement to seek permission from the rightholder) can impede the institution's aims, and thus the public interest underlying exceptions for cultural heritage institutions. Given that preservation purposes present no real risk to the interests of rightholders, it seems entirely unnecessary for the activities of cultural heritage institutions to be hampered by technological protection measures. In any event, it is particularly important for Member States to implement Art 6(4) of the Information Society Directive, as it applies to such activities, in a manner that is both balanced and efficient and which does not allow rightholder intransigence or delay to hinder the preservation purpose.

## **E. Conclusion**

Exceptions and limitations remain one of the least harmonised areas of the EU copyright *acquis* and there is therefore a significant diversity of practice across the Union, with adverse consequences for the cross-border use of works. For this reason, the introduction of these mandatory exceptions and limitations in the Directive on Copyright in the Digital Single Market can only be welcomed. We, at the ECS, hope that this is the beginning of a new trend towards further harmonization of exceptions and limitations across the EU. In this context, the Union legislator is encouraged to move as swiftly as possible to a fully harmonised set of mandatory exceptions and limitations at European level.

It is expected that mandatory exceptions and limitations will serve to overcome legal uncertainty and market fragmentation caused by diverging national laws and licensing practices. However, the achievement of that outcome depends very much on the way in which these exceptions and limitations are implemented. In some instances, Member States may make valuable use of the flexibility that the Directive provides for them, in some instances relying on the possibility to require compensation for the authorized uses. However, they should, at the same time, be vigilant to ensure that the mandatory effect of these exceptions and limitations is not undermined in their implementation. Vigilance is particularly to be exercised when dealing with crucial issues such as the prohibition of contractual provisions contrary to the mandatory exceptions, the relationship with TPMs (Art 7), "lawful access" (Art 3-4) and the question of the existence of "suitable licences easily available on the market" (Art 5).

More generally, it should be reiterated that, as users' rights, exceptions and limitations are now recognised as promoting vital social, economic and cultural interests and as protecting fundamental rights under the Union's Charter of Fundamental Rights. As such, they have equal status to the rights granted to authors and other rightholders under the *acquis*.

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<sup>129</sup> Art 7(2) DSMD.

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