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### **EU COPYRIGHT LAW: DEVELOPING EXCEPTIONS AND LIMITATIONS SYSTEMATICALLY – AN ANALYSIS OF RECENT LEGISLATIVE PROPOSALS**

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**ABSTRACT**

In the European Union, Copyright law is not uniform. There are a number of EU Directives concerning copyright law, which form an exhaustive list of limitations and exceptions, most of which are optional. The optional nature of limitations and exceptions is a significant obstacle to effective harmonisation in the Member States, which creates legal uncertainty for rightsholders and users. The aim of this article is to examine limitations and exceptions under the current EU copyright law, to analyse what efforts the European Commission, the Council and the Parliament have undertaken in order to reform EU copyright and to present other possible options for reform regarding exceptions and limitations in the EU.

**KEYWORDS**

EU copyright law, Information Society Directive 2001/29/EC, exceptions and limitations, teaching exception, text and data mining, preservation of cultural heritage

**NOTE**

The views and opinions expressed in this article are those of the author and do not necessarily reflect the official position of the European Court of Justice

## INTRODUCTION

Knowledge is power, which must be acquired.<sup>1</sup> Individuals acquire knowledge through education in educational establishments as well as through the study of information sources such as books, newspapers, journals in libraries, and through the Internet and digital media.<sup>2</sup> Copyright protects the creators of intellectual works, embodied in books, paintings, musical notes, etc. According to Art. 27(2) of the 1948 Universal Declaration of Human Rights (UDHR), "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."<sup>3</sup> As the process of creation takes place in a social context, the creator needs his audience, and at the same time, the audience needs works of intellect. Following Art. 27(1) of the UDHR "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."<sup>4</sup> Under Art. 26(1) s. 1 of the UDHR "everyone has the right to education."<sup>5</sup> Copyright law tries to establish a balance of these interests. It provides exclusive rights to the creator and so-called limitations or exceptions to the creators' exclusive rights. To achieve a fair balance is difficult and the balance has to be adjusted constantly. What is considered a fair balance of interest today must not necessarily be a fair balance tomorrow.<sup>6</sup>

In the European Union (EU) copyright law exceptions and limitations are influenced by international copyright law. There are a number of EU Directives concerning copyright law, which provide the exhaustive list of limitations and exceptions, most of which are optional for Member States. Not surprisingly, Member States' national copyright laws differ greatly in this respect.<sup>7</sup> This is the main obstacle to what the European Commission has defined as one major milestone for future copyright law: the establishment of a Digital Single Market.<sup>8</sup> In

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<sup>1</sup> Brian Vickers, "Francis Bacon and the Progress of Knowledge," *Journal of the History of Ideas* 53 (3) (1992): 495.

<sup>2</sup> Philipp Usadel, *Copyright law and the access to education and knowledge in the digital age: matching limitations and exceptions in Portugal, Brazil and Mozambique*. Dissertation (Maastricht University: Shaker, 2016), 1.

<sup>3</sup> *Universal Declaration of Human Rights*, UN General Assembly, United Nations, 217 (III) A, 1948, Paris, art. 27(2).

<sup>4</sup> *Ibid.*, 27(1).

<sup>5</sup> *Ibid.*, 26(1).

<sup>6</sup> Philipp Usadel, *supra* note 2, 8.

<sup>7</sup> Thomas Dreier, "The Wittem project of a European copyright code": 292; in: Christophe Geiger, ed., *Constructing European intellectual property* (Cheltenham: Edward Elgar, 2013).

<sup>8</sup> Reto M. Hilty and Kaya Köklü, "Limitations and exceptions to copyright in the digital age: four cornerstones for a future-proof legal framework in the EU": 283; in: Irini A. Stamatoudi, ed., *New developments in EU and international copyright law* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016).

order to make a single digital market reality, it has become obvious that reform of EU copyright law is needed.<sup>9</sup>

The aim of this paper is to examine limitations and exceptions under the current EU copyright law, to analyse what efforts the European Commission, the Council and the Parliament have undertaken in order to reform EU copyright and to present other possible options for reform regarding exceptions and limitations in the EU.

## 1. LIMITATIONS AND EXCEPTIONS UNDER CURRENT EUROPEAN COPYRIGHT LAW

In the European Union copyright law is not uniform. It is based on the principle of territoriality. The EU Member States have different national copyright laws, which are partially harmonised.

Under Art. 114 of the Treaty on the Functioning of the European Union (TFEU), the EU has the competency for legislation in the field of copyright. According to this provision, the EU can “adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market.”<sup>10</sup> In 2009 Art. 118 of the TFEU was introduced. It states that:

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union.<sup>11</sup>

This provision is the legal basis for the creation of a uniform EU copyright law.

Until now the EU has enacted two regulations and eleven Directives, the so-called *acquis communautaire*, in the field of Copyright law: Satellite and Cable Directive (93/83/EEC)<sup>12</sup>, Database Directive (96/9/EC)<sup>13</sup>, Information Society

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<sup>9</sup> Christophe Geiger, “Limitations and exceptions as key elements of the legal framework for copyright in the European Union: opinion of the European Copyright Society on the judgment of the CJEU in case C-201/13, Deckmyn,” *International review of intellectual property and competition law* 46(1) (2015): 3.

<sup>10</sup> *Consolidated Version of the Treaty on the Functioning of the European Union*, OJ C 326, 26.10.2012, p. 47, art. 114.

<sup>11</sup> *Ibid.*, art. 118.

<sup>12</sup> *Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*, OJ L 248, 6.10.1993, p. 15.

<sup>13</sup> *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases*, OJ L 77, 27.03.1996, p. 20-28.

Directive (2001/29/EC)<sup>14</sup>, Resale Right Directive (2001/84/EC)<sup>15</sup>, Rental and Lending Right Directive (2006/115/EC)<sup>16</sup>, Copyright Term Directive (2006/116/EC)<sup>17</sup>, Computer Programs Directive (2009/24/EC)<sup>18</sup>, Orphan Works Directive (2012/28/EU)<sup>19</sup>, Collective Rights Management Directive (2014/26/EU)<sup>20</sup>, Enforcement Directive (2004/48/EC)<sup>21</sup>, Directive implementing the Marrakesh Treaty in the EU (2017/1564/EU)<sup>22</sup>, Regulation implementing the Marrakesh Treaty in the EU (2017/1563/EU)<sup>23</sup> and Portability Regulation (2017/1128/EU)<sup>24</sup>. Some of these Directives establish limitations and exceptions to copyright and related rights, which enable the use of protected works without obtaining authorisation from the rightsholders. The majority of these limitations and exceptions are optional. The limitations are established in the Computer Programs Directive (2009/24/EC), in the Database Directive (96/9/EC), in Art. 5(1) Information Society Directive (2001/29/EC), in the Orphan Works Directive (2012/28/EU) and in the Directive implementing the Marrakesh Treaty in the EU (2017/1564/EU). In the context of limitations and exceptions, the Information Society Directive 2001/29/EC is of particular interest and should be examined in greater detail.

### 1.1. THE INFORMATION SOCIETY DIRECTIVE 2001/29/EC

Regarding limitations and exceptions, the most important Directive is the Information Society Directive 2001/29/EC (Directive 2001/29). According to its

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<sup>14</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>15</sup> Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OL L 272, 3/10/2001, p. 32 – 36.

<sup>16</sup> Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28–35.

<sup>17</sup> Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OL L 372, 27.12.2006, p. 12.

<sup>18</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ L 111, 5.5.2009, p. 16–22.

<sup>19</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5–12.

<sup>20</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72–98.

<sup>21</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45.

<sup>22</sup> 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, OL L 242, 20.9.2017, p. 6.

<sup>23</sup> Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies 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, OL L 242, 20.9.2017, p. 1–5.

<sup>24</sup> Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OL L 168, 30.6.2017, p. 1–11.

recital 32, "this Directive provides for an exhaustive enumeration of exceptions and limitations to the right of reproduction and the right of communication to the public."<sup>25</sup> This means that EU Member States cannot introduce other exceptions to the rights harmonised at the EU level. The exhaustive list disadvantages copyright users in the future because it is hardly likely that individual exceptions, in order to adapt to changes in society or technology, can be introduced quickly in an EU of 28 Member States.<sup>26</sup>

Art. 5(1) of Directive 2001/29 contains the only mandatory exception. It states that temporary acts of reproduction which have no independent economic significance shall be exempted from the right of reproduction.<sup>27</sup> Member States must implement this exception into their national law. Art. 5(2) contains exceptions, which are only applicable to the right of reproduction.<sup>28</sup> The exceptions contained in Art. 5(3) apply to the right of reproduction and to the right of communication to the public.<sup>29</sup> According to Art. 5(4), in certain cases an exception or limitation to the right of reproduction could be extended to the right of distribution.<sup>30</sup> All these exceptions are non-obligatory and can be implemented by the national legislators at their discretion.

Art. 5(5), which stipulates that "the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightsholder"<sup>31</sup>, has adopted the "three-step" test<sup>32</sup> of the Berne Convention<sup>33</sup> and TRIPS<sup>34</sup> in a slightly different version.<sup>35</sup>

Art. 5 of Directive 2001/29 is strongly criticised by academics. The criticism most commonly lies in the fact, that limitations and exceptions of Art. 5 lack the flexibility to adapt to the new technological development and that the majority of them are optional.<sup>36</sup> The optional nature of limitations and exceptions is a

<sup>25</sup> Directive 2001/29, *supra* note 14, rec. 18.

<sup>26</sup> Bernd Justin Jütte, *Reconstructing European copyright law for the digital single market: between old paradigms and digital challenges* (Nomos, 2017), 244.

<sup>27</sup> Directive 2001/29, *supra* note 14, art. 5(1).

<sup>28</sup> *Ibid.*, art. 5(2).

<sup>29</sup> *Ibid.*, art. 5(3).

<sup>30</sup> *Ibid.*, art. 5(5).

<sup>31</sup> *Ibid.*, art. 5(5).

<sup>32</sup> The "three-step" test provides that exceptions shall only be applied in certain special cases which do not conflict with a normal exploitation of a work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightsholder.

<sup>33</sup> *Bern Convention for the Protection of Literary and Artistic Works*, opened for signature 9 September 1886, 1161 UNTS 30 (entered into force 29 January 1970).

<sup>34</sup> *Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization*, Opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 27 January 1994).

<sup>35</sup> Bernd Justin Jütte, *supra* note 26, 242.

<sup>36</sup> *Ibid.*, 243.

significant obstacle to effective harmonisation which creates legal uncertainty for rightsholders and users.

## 1.2. THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) JURISPRUDENCE

The case-law of the CJEU has a huge impact on the development of European copyright. The ECJ establishes basic principles of European copyright law. These principles are codified in the copyright Directives. By interpreting the copyright Directives, the CJEU harmonises the EU copyright law and fills its gaps. The copyright Directives, especially Directive 2001/29, have generated many preliminary references. Different limitations and exceptions have also been subject to preliminary references.<sup>37</sup> In the judgement in *Infopaq I*<sup>38</sup>, the CJEU stated that “the provisions of a Directive which derogate from a general principle established by that Directive must be interpreted strictly”, and that Article 5(1) of Directive 2001/29 “is a derogation from the general principle established by that Directive, namely the requirement of authorisation from the rightsholder for any reproduction of a protected work.”<sup>39</sup> The exceptions must be interpreted in the light of the three-step test, enshrined in Art. 5 (5) of Directive 2001/29.<sup>40</sup>

The strict interpretation of limitations and exceptions the CJEU restated in the judgments in *Painer*<sup>41</sup>, *Infopaq II*<sup>42</sup> and *ACI Adam*<sup>43</sup>. In *Padawan*<sup>44</sup>, the CJEU added that restrictive interpretation is necessary to ensure a functioning internal market.<sup>45</sup>

The principle of strict interpretation was softened in *FAPL/Murphy*.<sup>46</sup> With regards to Art. 5(1) of Directive 2001/29 the CJEU stated that “the interpretation of those conditions must enable the effectiveness of the exception”<sup>47</sup>, and that the exception “must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of rightsholders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other.”<sup>48</sup>

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<sup>37</sup> *Ibid.*, 121.

<sup>38</sup> *Infopaq International A/S v Danske Dagblades Forening*, CJEU, Judgment in Case C-5/08, EU:C:2009:465.

<sup>39</sup> *Ibid.*, para. 57.

<sup>40</sup> *Ibid.*, para. 58.

<sup>41</sup> *Eva-Maria Painer v Standard VerlagsGmbH and Others*, CJEU, EU:C:2011:798.

<sup>42</sup> *Infopaq International A/S v Danske Dagblades Forening*, CJEU, Judgment in Case C-302/10, EU:C:2012:16.

<sup>43</sup> *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding*, CJEU, EU:C:2014:254.

<sup>44</sup> *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)*, CJEU, EU:C:2010:620.

<sup>45</sup> *Ibid.*, para. 35.

<sup>46</sup> *Karen Murphy v Media Protection Services Ltd* CJEU, Judgment in Case C-429/08, EU:C:2011:631.

<sup>47</sup> *Ibid.*, para. 163.

<sup>48</sup> *Ibid.*, para. 164.

The CJEU continued to apply this balance-oriented approach in *Painer*<sup>49</sup>, *TU Darmstadt/Eugen Ulmer*<sup>50</sup>, *Deckmyn*<sup>51</sup>.

The change in the CJEU approach to interpreting limitations and exceptions is to be welcomed because it gives the otherwise inflexible system under Art. 5(1) of Directive 2011/29 the possibility to react to changes in technology and society.<sup>52</sup>

## 2. EU COPYRIGHT REFORM. THE RECENT LEGISLATIVE PROPOSALS REGARDING LIMITATIONS AND EXCEPTIONS TO COPYRIGHT LAW

As Directives are the main instruments of copyright harmonization at EU level and Member States have certain discretion to implement EU law, national legislation differs widely. This is particularly evident in the field of limitations and exceptions. Since its entry into force, Art. 5 of Directive 2001/29 has been criticised. As was mentioned above, the significant number of preliminary references on the provisions of Art. 5 of Directive 2001/29 shows that current rules are unclear and create uncertainty among the legislators and the courts. Also, Directive 2001/29 is criticised because its provisions do not take into account the technological developments and the potential of the Internet.

The European Commission faced the need to reform and to harmonise copyright law and to establish a legal framework which would meet the requirements of the digital era appropriately.<sup>53</sup>

In December 2013, the European Commission started a public consultation on the review of EU copyright rules<sup>54</sup>, which lasted until March 2014. This consultation was addressed to different stakeholders including end users, institutional users, rightsholders, industry, collective management organisations, public authorities, Member States and others. One group of the questions in this consultation was related to the limitations and exceptions. The stakeholders were asked questions regarding access to content libraries and archives, teaching, research, disabilities, text and data mining, user-generated content. The goal of this public consultation was to identify difficulties arising from the fact that limitations and exceptions are optional, to understand whether a higher level of harmonisation in this field is needed, and whether it is necessary to make limitations and exceptions mandatory, in order to add to or remove some of them from the existing list. Also, the

<sup>49</sup> *Eva-Maria Painer v Standard VerlagsGmbH and Others*, *supra* note 41.

<sup>50</sup> *Technische Universität Darmstadt v Eugen Ulmer KG*, CJEU, EU:C:2014:2196.

<sup>51</sup> *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, CJEU, EU:C:2014:2132.

<sup>52</sup> Bernd Justin Jütte, *supra* note 26, 253.

<sup>53</sup> Philipp Usadel, *supra* note 2, 104.

<sup>54</sup> *Public Consultation on the Review of the EU Copyright Rules* // [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf).

stakeholders were asked to give their opinion whether the EU has to establish a single EU Copyright Title<sup>55</sup>, which would entirely harmonise limitations and exceptions in the EU and replace national laws.

The report on this consultation, which generated more than 9500 replies, was published by the European Commission in July 2014.<sup>56</sup> This report shows that opinions of different stakeholders are divided on the subject of limitations and exceptions. For example, the end users take the position that the optional nature of limitations and exceptions creates legal uncertainty. They want to preserve existing exceptions and limitations or even introduce new ones. Institutional users consider the optional nature of limitations and exceptions to be problematic and argue that they should be mandatory or harmonised. Many of them are in favour of an open-ended norm, which could complete the list of exceptions in Directive 2001/29. Authors and performers see no need to change the current list and are against any harmonisation or the inclusion of new exceptions. They argue that licensing can provide faster solutions than legislation. Some Member States consider that limitations and exceptions should remain optional. Other Member States see value in making them mandatory and harmonising certain parts. Representatives of academia consider the optional nature of the exceptions and limitations to be problematic and argue for the further harmonisation. Some of them note that the CJEU could contribute to harmonisation significantly. The end users, institutional users, and the majority of academics support the idea of a single EU copyright title. The majority of other respondents view an EU copyright title more critically.

On the basis of this report, the European Commission prepared the Digital Single Market strategy, which was presented in May 2015.<sup>57</sup> One of the objectives of this strategy was to reduce differences between national copyright legislations. The first step in this field was made in December 2015, when the European Commission presented an action plan for the modernisation of EU copyright rules.<sup>58</sup> At the same time the Regulation on cross-border portability of online content services was proposed by European Commission.<sup>59</sup> In September 2016, in line with

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<sup>55</sup> The idea of a single EU copyright title was presented in 2002 when a group of copyright scholars launched Wittem Project "European Copyright Code". The project was diminished by the lack of comprehensiveness. Despite the criticisms, it can serve as a background for the future copyright reform at the European level.

<sup>56</sup> *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules* // [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf).

<sup>57</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe*, COM(2015) 192 final, 6.5.2015.

<sup>58</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework*, COM(2015) 626 final, 2.12.2015.

<sup>59</sup> *Regulation (EU) 2017/1128*, *supra* note 24.

the Digital Single Market strategy, the European Commission presented the legislative package<sup>60</sup> of two Directives<sup>61</sup> and two regulations<sup>62</sup> for the modernisation of EU copyright law. Regarding the limitations and exceptions, the Proposal for a Directive on copyright in the Digital Single Market and Proposal for a Directive on certain permitted uses of 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 are of interest and should be analysed in more detail.

## **2.1. PROPOSAL FOR A DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET**

As previously mentioned, limitations and exceptions are set out in different EU copyright Directives. Limitations or exceptions to an exclusive right authorise an individual or an institution to use protected content without prior authorisation from copyright holders.

### **2.1.1. DIGITAL AND CROSS-BORDER USES IN THE FIELD OF EDUCATION (THE TEACHING EXCEPTION)**

The teaching exception already exists in Art. 5(3)(a) of Directive 2001/29, in Art. 6(2)(b) of Database Directive (96/9/EC) and Article 10(1)(d) of Rental and Lending Right Directive (2006/115/EC). In this article, only the provision offering a teaching exception of Directive 2001/29 will be discussed.

In 2013 a study on the application of Directive 2001/29/EC was carried out<sup>63</sup>. This study analysed the implementation of the teaching exception in 11 Member States: Spain, Germany, the UK, France, Italy, Poland, Hungary, Denmark and the

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<sup>60</sup> *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market*, COM(2016)592.

<sup>61</sup> *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, COM(2016) 593, and *Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of 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*, COM(2016) 596.

<sup>62</sup> *Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes*, COM(2016) 594, and *Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies 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*, COM(2016) 595.

<sup>63</sup> *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society* // [http://ec.europa.eu/internal\\_market/copyright/studies/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/studies/index_en.htm).

Benelux countries. It shows that this exception, although optional, has been transported into all these Member States; however, national transpositions vary widely. In some cases the implementation is not clear, the type of works and educational uses covered by this exception differ significantly. According to the Impact Assessment on the modernisation of EU copyright rules<sup>64</sup>, the implementation of the teaching exception in certain Member States is narrow. For example, in Hungary, Greece, Poland and Slovenia, the implemented exception allows reproduction on paper, and it is not clear whether digital uses are allowed. In Italy, online publications of images for educational purposes are allowed only in law resolution. In Spain and Austria the use of textbooks is not allowed under the exception. In Belgium, Luxembourg and Italy the exception applies only to extracts or parts of works. Moreover, even if recital 42 of Directive 2001/29 explicitly includes distance learning within the scope of the teaching exception<sup>65</sup>, national rules in this field are different and the cross-border effect of this exception is not always clear. Also, the compensation for use under the teaching exception is different per Member State. In Greece, Bulgaria, Latvia, Lithuania and Malta, compensation is not provided for at all; in Sweden, Finland or Denmark, the use of protected work for teaching is permitted under different types of licensing schemes or agreements. As the licence mechanisms are often insufficient, inadequate or unreasonable, they are considered to be a big obstacle to digitally-supported education.

Differences in the transposition create legal uncertainty for teachers and students because copyright-protected content (images, video, music, text) is often used in teaching activities to illustrate or complement teaching material. A survey<sup>66</sup> shows that only 34% of educators consider that the conditions for using protected works in digital or online teaching are clear. This causes the limited use of copyright-protected content in digital teaching activities. As 82% of higher education institutions offer online courses, the uncertainty of the cross-border effect of the exception negatively impacts the development of digitally-supported

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<sup>64</sup> Commission Staff Working Document - Impact Assessment on the modernisation of EU copyright rules - Accompanying the document "Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market" and "Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes", SWD(2016)301 // <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1512824918056&uri=CELEX:52016SC0301>.

<sup>65</sup> Directive 2001/29, *supra* note 14, rec. 42.

<sup>66</sup> Survey in the context of the study on "Assessment of the impact of the European copyright framework on digitally-supported education and training practices" // <http://bookshop.europa.eu/en/assessment-of-the-impact-of-the-european-copyright-framework-on-digitally-supported-education-and-training-practices-pbNC0115883/>.

teaching and distance learning practices and limits access to teaching sources for online students.

A solution to this problem, related to the use of protected content in the digitally-supported teaching process, in particular cross-border, was proposed by the European Commission in the Proposal for a Directive on copyright in the Digital Single Market.<sup>67</sup> In the Impact Assessment on the modernisation of EU copyright rules<sup>68</sup> these policy options and their impacts for adapting the teaching exceptions to the digital and cross-border environment were considered: Option 1 - Guidance for Member States on the use of protected works for teaching in the digital environment; Option 2 - Mandatory exception with a cross-border effect covering the digital use of illustration for teaching; Option 3 - Mandatory exception with a cross-border effect covering the digital use of illustration for teaching, giving the option for Member States to make it subject to the possession of a license. These options were compared against the criteria of effectiveness, efficiency, impact on the different stakeholders, and coherence with regard to other EU policies. Option 3 was chosen as the most proportionate one.

Art. 4 of the proposed Directive states that:

Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EC and Article 11(1) of this Directive in order to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use: (a) takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff; (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.<sup>69</sup>

The European Commission proposes to introduce a mandatory exception in national laws, which will cover digital uses of protected works for the purposes of illustration for teaching. According to the Impact Assessment on the modernisation of EU copyright rules, it should enable educational establishments to provide teaching material to students in the other Member States through their digital learning environment.<sup>70</sup> The proposed Directive would ensure legal certainty for digital uses of copyright-protected content, including across borders. If the Member States take the appropriate measures to ensure the visibility of licenses, the legal

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<sup>67</sup> *Proposal for a Directive on copyright in the Digital Single Market, supra* note 61.

<sup>68</sup> *Commission Staff Working Document - Impact Assessment, supra* note 64.

<sup>69</sup> *Proposal for a Directive on copyright in the Digital Single Market, supra* note 61, art. 4.

<sup>70</sup> *Commission Staff Working Document - Impact Assessment, supra* note 64, 90.

certainty for educational establishments will be guaranteed. Of course, depending on the choice made by the Member State, licensing costs for educational establishments are possible, but they are expected to be limited. A positive impact on cultural diversity, the right to education, development of digital learning, and cross-border education is expected.<sup>71</sup>

The proposal was referred to the European Parliament. The Internal Market and Consumer Protection Committee (IMCO) adopted an opinion on 14 June 2017.<sup>72</sup> The IMCO Committee considers that the teaching exception should apply not only to formal educational establishments but also to libraries or other institutions, providing non-formal or informal education. The IMCO Committee believes that a single and mandatory exception is needed for all types of teaching, digital and non-digital, formal and informal.

### 2.1.2. TEXT AND DATA MINING IN THE FIELD OF SCIENTIFIC RESEARCH

The volume of information available in a digital format is growing. It is becoming very difficult to find and read all relevant information. Text and Data Mining (TDM) is the automated processing of the large volume of data used to analyse scientific publication and research datasets. TDM is a nascent tool, which is being used more and more for research. This process could consist of several steps: obtaining sources, the transformation, loading and analysis of data, and drafting a report. During these steps, TDM implies the reproduction of the content temporarily (caching the content) or permanently (creating a database).<sup>73</sup> There are also TDM techniques which allow the analysis without making copies (website crawling, screen-scraping).<sup>74</sup> In certain cases, the mandatory exception for temporary acts of reproduction in Art. 5(1) of Directive 2001/29 could apply to TDM techniques. If TDM is carried out for non-commercial purposes, it could be exempted from the authorisation requirement under the optional scientific research exceptions in Art. 5(3)(a) of Directive 2001/29 and in Art. 6(2)(b) and 9(b) of the Database Directive (96/9/EC). As this exception is not mandatory for Member States, it has not been implemented at all, or it has been implemented differently.<sup>75</sup> Sometimes the

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<sup>71</sup> *Ibid.*, 100.

<sup>72</sup> *The opinion on the proposal for a Directive on copyright in the Digital Single Market of the Committee on the Internal Market and Consumer Protection* // <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-599.682+02+DOC+PDF+V0//EN&language=EN>.

<sup>73</sup> *Study on the legal framework of text and data mining*, 42 // [http://ec.europa.eu/internal\\_market/copyright/docs/studies/1403\\_study2\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf).

<sup>74</sup> *Ibid.*, 74.

<sup>75</sup> *Study on the application of Directive 2001/29/EC*, *supra* note 63, 397.

beneficiaries and users differ from Member State to Member State. For example, in Poland, scientific research exception applies to research and educational institutions, but not to individual researchers.<sup>76</sup> In France, this exception applies to students, teachers or researchers.<sup>77</sup> Sometimes the works concerned differ significantly. In France, Germany, Italy and Belgium, the use provided under this exception is limited to extracts of works.<sup>78</sup> This diverging implementation constitutes an obstacle for TDM activities. Because of the legal uncertainty, less than 20% of researchers in Europe had used TDM techniques. Researchers do not always know whether an exception covers TDM or whether the rights-holder's authorisation is required. Subscriptions to scientific publications sometimes include the authorisation to perform TDM, sometimes prohibit it or leave it unclear. Often prior authorisation for TDM is needed in addition to the authorisation to access the content. It was evident that without intervention at EU level the legal uncertainty and fragmentation of the Single Market will persist.

In the Study on the legal framework of text and data mining<sup>79</sup> a specific TDM exception was suggested. According to this study, the main reasons to add a separate TDM exception to the existing list of exceptions are the following: scientific research exceptions in Directive 2001/29 and in the Database Directive are not harmonised; they can be waived by contract; it is not clear how to understand the "scientific research"; the exceptions in Directive 2001/29 are limited "solely for scientific research."<sup>80</sup> The separate TDM exception should be limited not solely, but mainly, to scientific research. Also "scientific research" should be understood more broadly. The TDM exception should apply only to users having a lawful access to the data, should not be overridden by contractual terms, and should not be optional.<sup>81</sup>

In the Impact Assessment on the modernisation of EU copyright rules the European Commission analysed various options to resolve this problem. Option 1 consisted of self-regulation initiatives from the industry without changes to the EU legal framework.<sup>82</sup> Option 2 consisted of the mandatory exception, covering TDM for non-commercial scientific research purposes.<sup>83</sup> Option 3 consisted of the mandatory exception, applying to public interest research organisations covering TDM for purposes of both commercial and non-commercial scientific research.<sup>84</sup>

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<sup>76</sup> *Commission Staff Working Document - Impact Assessment, supra* note 64, 319.

<sup>77</sup> *Ibid.*, 361.

<sup>78</sup> *Ibid.*, 362.

<sup>79</sup> *Study on the legal framework of text and data mining, supra* note 73.

<sup>80</sup> *Ibid.*, 104.

<sup>81</sup> *Ibid.*, 110.

<sup>82</sup> *Commission Staff Working Document - Impact Assessment, supra* note 64, 107.

<sup>83</sup> *Ibid.*, 108.

<sup>84</sup> *Ibid.*, 109.

Option 4 consisted of the mandatory exception, which applies to anybody who has lawful access covering TDM for any scientific research purposes.<sup>85</sup> Option 3 was chosen as the most proportionate one.

The European Commission proposes to introduce a new mandatory exception permitting research organisations, who act in the public interest, “to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.”<sup>86</sup> That means, for example, that they can carry out TDM of scientific publications, which they have subscribed to, and that they do not need prior authorisation. The exception should not be subject to payment as the lawful access condition (e.g. subscription) allows rightsholders to keep revenues. Under Art. 2(1) of the proposed Directive on copyright in the Digital Single Market:

“Research organisation” means a university, a research institute or any other organisation the primary goal of which is to conduct scientific research or to conduct scientific research and provide educational services: (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>87</sup>

The new TDM exception will not apply to commercial companies, but it will apply to research organisations carrying out research in the public interest, even if scientific research has a commercial purpose. As the EU encourages research organisations to develop a partnership with the private sector, this exception should also apply when they participate in public-private partnerships.<sup>88</sup>

According to the Impact Assessment on the modernisation of EU copyright rules, the TDM exception should boost cross-border research projects and increase researcher productivity.<sup>89</sup> The selected option would ensure the legal certainty for public interest research organisations and reduce transaction costs for researchers. It would, though, increase the cost of rightsholders because of the need to adapt licenses. Also, it could have a limited negative impact on the right of property of the rightsholders. However, it would have a positive social impact on the EU’s attractiveness as a scientific research area.<sup>90</sup>

The Netherlands House of Representatives criticises a proposition to introduce a mandatory exception allowing TDM only for scientific research without copyright impediments. It argues that the proposed exception should apply to research

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<sup>85</sup> *Ibid.*, 109.

<sup>86</sup> *Proposal for a Directive on copyright in the Digital Single Market, supra* note 61, art. 3.

<sup>87</sup> *Ibid.*, art. 2(1).

<sup>88</sup> *Commission Staff Working Document - Impact Assessment, supra* note 64, 108.

<sup>89</sup> *Ibid.*, 115.

<sup>90</sup> *Ibid.*, 110.

purposes in a broader sense and not only to scientific research. The Netherlands House of Representatives considers that such a limitation may hamper innovation since it is often initiated by private companies as well.<sup>91</sup>

### 2.1.3. PRESERVATION OF CULTURAL HERITAGE

90% of cultural heritage institutions (CHIs) such as libraries, archives, museums and other institutions declare that they have a lot of works which need preserving for the future.<sup>92</sup> Preservation requires copying the original works because of their degradation or because of the disappearance of the technologies which allow their readability. Today technology enables the creation of digital copies of works originally on analogue supports. Born-digital works and works in digital form resulting from digitisation degrade quicker than works in analogue form. For their preservation, media migration or format-shifting is needed.<sup>93</sup> For example, the British Library estimates that if action is not taken, a significant part of its sound collection will become unreadable.<sup>94</sup>

An optional exception to the reproduction rights is set out in Art. 5(2)(c) of Directive 2001/29. It covers "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage."<sup>95</sup> The implementation of this optional exception varies from one Member State to another. In many cases, the national exceptions are narrow, unclear and not adapted to cover preservation in the new technological environment. For example, format shifting is explicitly allowed only in the Netherlands.<sup>96</sup> In Italy, the number of copies is limited to one. This requirement contrasts with the need for multiple copies in case of digital preservation.<sup>97</sup> Where this exception is not applicable, CHIs have to obtain authorisation from rights-holders. The time and costs required to find rightsholders and obtain their authorisation can be disproportionate. The lack of harmonisation creates an obstacle to any collaborative digitisation projects in the single market.

In the Impact Assessment on the modernisation of EU copyright rules, the European Commission analysed various options to resolve the problem, relating to

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<sup>91</sup> *The Netherlands House of Representatives answers to the questions about the package of new EU rules on copyright*, 3 // [http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/parlements\\_nationaux/com/2016/0593/NL\\_CHAMBER\\_CONT1-COM%282016%290593\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2016/0593/NL_CHAMBER_CONT1-COM%282016%290593_EN.pdf).

<sup>92</sup> *Commission Staff Working Document - Impact Assessment*, *supra* note 64, 104.

<sup>93</sup> *Ibid.*, 121.

<sup>94</sup> *Ibid.*, 120.

<sup>95</sup> *Directive 2001/29*, *supra* note 14, art. 5(2)(c).

<sup>96</sup> *Commission Staff Working Document - Impact Assessment*, *supra* note 64, 121.

<sup>97</sup> *Ibid.*, 121.

the preservation of cultural heritage. Option 1 consisted of guidance to Member States and a peer review mechanism on the implementation of the exception.<sup>98</sup> Option 2 included a mandatory exception for preservation purposes by CHIs. This option was the preferred option.<sup>99</sup> Art. 5 of the proposed Directive states, that:

The Member States shall provide for an 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 the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.<sup>100</sup>

Under Art. 2(3) the cultural heritage institutions englobe “publicly accessible libraries, museums, archives and film or audio heritage institutions.”<sup>101</sup> According to the Impact Assessment on the modernisation of EU copyright rules, it would allow the CHIs to outsource preservation activities to technical service suppliers. This mandatory exception will cover all types of works in permanent collections of the CHIs, and it will allow them to perform all acts of reproduction. CHIs would be able to make many copies in any format.<sup>102</sup> This option would provide legal certainty and a large space for preservation, including in digital environments and cross-border settings. It would reduce potential costs related to authorisations and would have a positive impact on cultural diversity, scientific research, and education. As the exception is not subjected to fair compensation, rightsholders could lose some revenue from copies, which, in the absence of this exception, could have been bought in the market.<sup>103</sup>

In the Opinions on the proposal for a Directive on copyright in the Digital Single Market, the Committee on Industry, Research and Energy<sup>104</sup> and the Committee on the Internal Market and Consumer Protection<sup>105</sup> proposed a modification of the exception to permit not only CHIs, but also research organizations and educational institutions to reproduce works for purposes related to the implementation of their public interest mission in research preservation, education, culture and teaching.

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<sup>98</sup> *Ibid.*, 122.

<sup>99</sup> *Ibid.*, 121.

<sup>100</sup> Proposal for a Directive on copyright in the Digital Single Market, *supra* note 61, art. 5.

<sup>101</sup> *Ibid.*, art. 2(3).

<sup>102</sup> *Commission Staff Working Document - Impact Assessment*, *supra* note 64, 131.

<sup>103</sup> *Ibid.*, 128.

<sup>104</sup> *The opinion on the proposal for a Directive on copyright in the Digital Single Market of the Committee on Industry, Research and Energy* // <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-592.363+03+DOC+PDF+V0//EN&language=EN>.

<sup>105</sup> *The opinion of the Committee on the Internal Market and Consumer Protection*, *supra* note 72.

## 2.2. DIRECTIVE IMPLEMENTING THE MARRAKESH TREATY IN THE EU

There are about 285 million blind and visually impaired people in the world. 26 million of them live in the EU.<sup>106</sup>

In April 2014 the EU signed the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or otherwise Print Disabled.<sup>107</sup> The aim of this treaty is to facilitate the availability and cross-border exchange of books and other material in particular formats that are accessible to persons with print disabilities. The parties of the Marrakesh Treaty have to establish in their laws exceptions or limitations for the benefit of print-disabled people.

The EU is a party to this treaty and has to implement it. In order to implement the Marrakesh Treaty, the European Commission proposed a Directive on certain permitted uses of 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.<sup>108</sup> This proposal was a part of the legislative package, which was presented by the European Commission for the modernisation of EU copyright law. No specific consultation was carried out, and no expertise was collected specifically for the purposes of the proposed Directive. The Commission took into account the Public consultation carried out in 2013-2014<sup>109</sup>, and the Study on the application of Directive 2001/29 carried out in 2013.<sup>110</sup> The Directive (EU) 2017/1564 was signed 13 September 2017 and entered into force on 10 October 2017.

Until that time, the accessibility needs of print disabled people were provided by Art. 5(3)(b) of Directive 2001/29 which lacks cross-border effect. Under this provision, Member States were allowed to introduce limitations "for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability."<sup>111</sup> The Directive (EU) 2017/1564 introduces the mandatory exception to the rights of reproduction, making available to the public, communication to the public, distribution and lending, in order to make books and other printed material in accessible formats for the blind, visually impaired or otherwise print-disabled,

<sup>106</sup> World Health Organization, "Global data on visual impairment 2010" (January 2012) // <https://www.who.int/blindness/GLOBALDATAFINALforweb.pdf>.

<sup>107</sup> *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or otherwise Print Disabled*, opened for signature 27 June 2013, 52 ILM 1309.

<sup>108</sup> *Proposal for a Directive on certain permitted uses*, *supra* note 61.

<sup>109</sup> *Public Consultation on the Review of the EU Copyright Rules*, *supra* note 54.

<sup>110</sup> *Study on the application of Directive 2001/29*, *supra* note 63.

<sup>111</sup> *Directive 2001/29*, *supra* note 14, art. 5(3)(b).

including dyslexic persons more available.<sup>112</sup> The goal of this exception is to guarantee the availability of digital or analogue books, including e-books, newspapers, and other kinds of writing, notation, also in audio form, online or offline, in formats which are accessible to those persons, for example Braille, adapted e-books, large print, audiobooks, radio broadcasts.<sup>113</sup> This exception should apply to the making of accessible format copies by authorised entities, beneficiaries, or by a natural person who acts on behalf of a beneficiary. Any contractual provision limiting the application of this exception is illegal. The Directive allows the authorised entities to disseminate online and offline accessible format copies within the EU.<sup>114</sup> Beneficiaries can access these copies throughout the EU. Member States have limited possibility to provide compensation schemes for such use. The Directive allows the exchange of accessible format copies between the EU and other parties to the Marrakesh Treaty.<sup>115</sup>

### 3. OTHER POSSIBLE OPTIONS FOR REFORM REGARDING EXCEPTIONS AND LIMITATIONS

Over the last twenty years, the European Institutions undertook efforts towards harmonisation. As mentioned before, up until now there have been eleven copyright Directives and two regulations, and one proposal for a Directive is currently being debated. Significant differences between the copyright laws of Member States were removed; nevertheless, no real harmonisation was achieved regarding the exceptions and limitations. The need to reform the exceptions and limitations under Directive 2001/29 was evident. The Digital Single Market Strategy started the reform, which does not reflect a wish to make systematic changes. The cosmetic reform of Art. 5 of Directive 2001/29 with the addition of four mandatory exceptions (teaching and research, TDM, preservation of cultural heritage and exception for the benefit of print-disabled persons) put back a more significant reform, which is needed to enable the effectiveness of the exceptions and limitations in the digital environment.<sup>116</sup>

In academic literature, various options for the reform have been suggested. One of them was to extend the current list of exceptions and limitations in Art. 5 of Directive 2001/29. But this option would provoke stakeholders to suggest further amendments. It could lead to the more frequent addition of limitations and would

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<sup>112</sup> Directive (EU) 2017/1564 on certain permitted uses, *supra* note 61, rec. 7.

<sup>113</sup> *Ibid.*, rec. 7.

<sup>114</sup> *Ibid.*, rec. 10.

<sup>115</sup> *Ibid.*, rec. 14.

<sup>116</sup> Bernd Justin Jütte, *supra* note 26, 357.

reduce the legal certainty with regard to existing limitations because their interpretation and scope could change.<sup>117</sup> There were some suggestions to make all exceptions under Art. 5 of Directive 2001/29 mandatory.<sup>118</sup> Another option was to replace the exhaustive list of Art. 5 of Directive 2001/29 by an open norm, which could react to technological developments adequately. The weakness of an open norm is the fact that interpretation by the judiciary is needed. Only after many years of jurisprudence, the open norm-based system could replace the current system and provide legal certainty. One of the options suggested by scholars was to complement the existing list of limitations with an open norm. This norm would give flexibility for unforeseen uses and at the same time would conserve legal certainty provided by the closed list of the exceptions and limitations. The introduction of an open norm, in any case, would shift the centre of balance in favour of the user.<sup>119</sup>

It was also suggested to reinterpret Art. 5(5) of Directive 2001/29, which contains a “three-step” test. Until now there is no consistency in the application of the three-step test in the jurisprudence of the CJEU. In general, the CJEU prefers a narrow interpretation. The academics suggest a “reverse reading” of the test giving each element the same weight and consider them together.<sup>120</sup>

One of the possible options could be a codification of copyright in the EU. The public consultation shows that the idea of a single EU copyright title is favoured by end users and the majority of academics.<sup>121</sup> Even if European copyright codification is likely to be expected under the current Digital Single Market Strategy, this idea could be the background for the futures initiatives.<sup>122</sup>

Until now a lot of changes in EU copyright law were provoked by the CJEU ruling. This ex-post intervention does not demonstrate flexibility and does not guarantee any legal certainty. The EU legislator should enact legislation which provides legal certainty and reacts flexibly to technological development.<sup>123</sup>

## CONCLUSIONS

In the European Union, Copyright law is not uniform. There are a number of EU Directives concerning copyright law, which form an exhaustive list of limitations and exceptions, most of which are optional. The optional nature of limitations and

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<sup>117</sup> *Ibid.*, 274.

<sup>118</sup> *Ibid.*, 351.

<sup>119</sup> *Ibid.*, 551.

<sup>120</sup> *Ibid.*, 293.

<sup>121</sup> *Report on the responses to the Public Consultation*, *supra* note 56, 34.

<sup>122</sup> Bernd Justin Jütte, *supra* note 26, 516.

<sup>123</sup> *Ibid.*, 517.

exceptions is a significant obstacle to effective harmonisation in the Member States, which creates legal uncertainty for rightsholders and users. In the context of limitations and exceptions, Directive 2001/29 is of particular interest. Art. 5 of Directive 2001/29, which includes an exhaustive list of exceptions and limitations, has often been strongly criticised by academics. The criticism most commonly lies in the fact that Art. 5 lacks the flexibility to adapt to any new technological development. A significant number of preliminary references on the provisions of Art. 5 of Directive 2001/29 shows that current limitations and exceptions are unclear and create legal uncertainty. The case law of the CJEU is essential in clarifying the scope of limitations and exceptions. By explaining general principles which apply to all limitations and exceptions, the CJEU harmonises EU copyright law and fills its gaps.

In May 2015 the European Commission presented the Digital Single Market strategy. One of the objectives of this strategy was to reduce any differences between national copyright legislations. In September 2016, in line with the Digital Single Market strategy, the European Commission presented the legislative package for the modernisation of EU copyright law. The European Commission has identified four areas where modernising the exceptions and limitations on copyright is necessary: digital and cross-border uses in the field of education (the teaching exception), text and data mining (TDM) in the field of scientific research, preservation of cultural heritage, and dissemination of accessible formats for people with disabilities.

Directive 2001/29 already includes an optional teaching exception. Member States have implemented this exception differently. Differences in the transposition negatively impact the development of digitally-supported teaching and distance-learning practices. The proposed Directive on copyright in the Digital Single Market introduces a mandatory exception with a cross-border effect covering the digital use of illustration for teaching, giving the option for Member States to make it subject to the availability of a license.

No clear exception exists for TDM in the current European regulatory framework. The proposed Directive on copyright in the Digital Single Market includes a mandatory exception which should boost cross-border research projects and increase researcher productivity.

The current Directive 2001/29 provides an optional exception to the right of reproduction, which allows CHIs to make copies of the works from their collections. However, the implementation of this optional exception varies from one Member State to another. In many cases, national exceptions are narrow, unclear and not adapted to cover preservation in the new technological environment (digital copying

or format shifting are not allowed). The proposed Directive on copyright in the Digital Single Market introduces a new mandatory exception which allows the use of digital technology for the preservation of works.

Directive 2001/29 provides an optional exception for the benefit of print-disabled people, but this exception lacks cross-border effect. The mandatory exception provided by the Directive implementing the Marrakesh Treaty in the EU allows authorised entities to disseminate online and offline accessible format copies within the EU.

Scholars argue that a cosmetic reform of Art. 5 of Directive 2001/29 with the addition of four mandatory exceptions (teaching and research, TDM, preservation of cultural heritage and exceptions for the benefit of print-disabled persons) put back a more significant reform which is needed to enable any real effectiveness of the exceptions and limitations in the digital environment. In academic literature various options have been suggested for the reform: extension of the current list of exceptions and limitations, making all of them mandatory, replacing the exhaustive list by an open norm or adopting a single EU copyright title.

Perhaps the best option would be to follow the idea of “the Wittem project” and to add an open norm permitting other uses that are “comparable to” the uses mentioned in Art. 5 of Directive 2001/29. This option would give the courts more flexibility and the opportunity to adapt the existing law to rapidly changing circumstances.

In any case, the measures taken by the EU legislator should create a system which could be flexible and efficient, and would guarantee the balance between the interest of users and rightsholders.

## BIBLIOGRAPHY

1. Dreier, Thomas. “The Wittem project of a European copyright code”: 292–313. in: Christophe Geiger, ed. *Constructing European intellectual property*. Cheltenham: Edward Elgar, 2013.
2. Geiger, Christophe. “Limitations and exceptions as key elements of the legal framework for copyright in the European Union: opinion of the European Copyright Society on the judgment of the CJEU in case C-201/13, Deckmyn.” *International review of intellectual property and competition law* 46 (1) (2015): 3–101.
3. Hilty, Reto M., and Kaya Köklü. “Limitations and exceptions to copyright in the digital age: four cornerstones for a future-proof legal framework in the EU”: 283–298. in: Irini A. Stamatoudi, ed. *New developments in EU and*

*international copyright law*. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2016.

4. Jütte, Bernd Justin. *Reconstructing European copyright law for the digital single market: between old paradigms and digital challenges*. Nomos, 2017.
5. Usadel, Philipp. *Copyright law and the access to education and knowledge in the digital age: matching limitations and exceptions in Portugal, Brazil and Mozambique*. Dissertation. Maastricht University: Shaker, 2016.
6. Vickers, Brian. "Francis Bacon and the Progress of Knowledge." *Journal of the History of Ideas* 53 (3) (1992): 495-518.
7. World Health Organization. "Global data on visual impairment 2010" (January 2012) // <https://www.who.int/blindness/GLOBALDATAFINALforweb.pdf>.

### LEGAL REFERENCES

1. *ACI Adam BV and Others v Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding*. CJEU, EU:C:2014:254.
2. *Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization*. Opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 27 January 1980).
3. *Bern Convention for the Protection of Literary and artistic Works*. Opened for signature 9 September 1886, 1161 UNTS 30 (entered into force 29 January 1970).
4. *Commission Staff Working Document - Impact Assessment on the modernisation of EU copyright rules - Accompanying the document "Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market" and "Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes"*. SWD(2016)301 // <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1512824918056&uri=CELEX:52016SC0301>.
5. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe*. COM(2015) 192 final, 6.5.2015.

6. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework.* COM(2015) 626 final, 2.12.2015.
7. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market.* COM(2016)592.
8. *Consolidated Version of the Treaty on the Functioning of the European Union.* OL C 326, 26.10.2012, p. 47.
9. *Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.* OJ L 248, 6.10.1993, p. 15.
10. *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.* OL L 242, 20.9.2017, p. 6.
11. *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.
12. *Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art.* OL L 272, 3/10/2001, p. 32 – 36.
13. *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.* OJ L 157, 30.4.2004, p. 45.
14. *Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.* OJ L 376, 27.12.2006, p. 28–35.
15. *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.* OL L 372, 27.12.2006, p. 12.
16. *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.* OJ L 111, 5.5.2009, p. 16–22.

17. *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.* OJ L 299, 27.10.2012, p. 5–12.
18. *Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.* OJ L 84, 20.3.2014, p. 72–98.
19. *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.* OJ L 77, 27.03.1996, p. 20–28.
20. *Eva-Maria Painer v Standard VerlagsGmbH and Others.* CJEU, EU:C:2011:798.
21. *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08).* CJEU, EU:C:2011:631.
22. *Infopaq International A/S v Danske Dagblades Forening.* CJEU, Judgment in Case C-5/08, EU:C:2009:465.
23. *Infopaq International A/S v Danske Dagblades Forening.* CJEU, Judgment in Case C-302/10, EU:C:2012:16.
24. *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others.* CJEU, EU:C:2014:2132.
25. *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or otherwise Print Disabled.* Opened for signature 27 June 2013, 52 ILM 1309.
26. *Padawan SL v Sociedad General de Autores y Editores de España (SGAE).* CJEU, EU:C:2010:620.
27. *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market.* COM(2016) 593.
28. *Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of 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.* COM(2016) 596.
29. *Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes.* COM(2016) 594.
30. *Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of*

- accessible format copies 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.* COM(2016) 595.
31. *Public Consultation on the Review of the EU Copyright Rules //*  
[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf).
  32. *Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.* OL L 168, 30.6.2017, p. 1–11.
  33. *Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies 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.* OL L 242, 20.9.2017, p. 1–5.
  34. *Report on the responses to the Public Consultation on the Review of the EU Copyright Rules //*  
[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf).
  35. *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society //*  
[http://ec.europa.eu/internal\\_market/copyright/studies/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/studies/index_en.htm).
  36. *Study on the legal framework of text and data mining //*  
[http://ec.europa.eu/internal\\_market/copyright/docs/studies/1403\\_study2\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf).
  37. *Survey in the context of the study on "Assessment of the impact of the European copyright framework on digitally-supported education and training practices" //*  
<http://bookshop.europa.eu/en/assessment-of-the-impact-of-the-european-copyright-framework-on-digitally-supported-education-and-training-practices-pbNC0115883/>.
  38. *Technische Universität Darmstadt v Eugen Ulmer KG.* CJEU, EU:C:2014:2196.
  39. *The Netherlands House of Representatives answers to the questions about the package of new EU rules on copyright //*  
[http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/parlements\\_nationaux/com/2016/0593/NL\\_CHAMBER\\_CONT1-COM%282016%290593\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/parlements_nationaux/com/2016/0593/NL_CHAMBER_CONT1-COM%282016%290593_EN.pdf).

40. *The Opinion on the proposal for a Directive on copyright in the Digital Single Market of the Committee on the Internal Market and Consumer Protection //*  
[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-  
//EP//NONSGML+COMPARL+PE-  
599.682+02+DOC+PDF+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-599.682+02+DOC+PDF+V0//EN&language=EN).
41. *The Opinion on the proposal for a Directive on copyright in the Digital Single Market of the Committee on Industry, Research and Energy //*  
[http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-  
//EP//NONSGML+COMPARL+PE-  
592.363+03+DOC+PDF+V0//EN&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-592.363+03+DOC+PDF+V0//EN&language=EN).
42. *Universal Declaration of Human Rights*. UN General Assembly, United Nations, 217 (III) A, 1948, Paris.