

EU Copyright in the Digital Single Market (“DSM”) Directive Transposing the Article 5 teaching exception into national law

1 | WHAT IS THE SCOPE OF ARTICLE 5?

Article 5 of the EU’s DSM Directive introduces a mandatory teaching exception for educational establishments. **EU Member States’ national laws will have to provide for an exception** or limitation to various rights (such as reproduction, communication and making available to the public) to allow the **digital use** of copyright-protected content for the *sole purpose of illustration for teaching*, for **non-commercial** purposes. [Art. 5(1)]

— PURPOSE

The exception is **for the sole purpose of illustration for teaching**, meaning it only covers teaching activities. Recital 21 specifies “to enrich or complement the teaching, including learning activities”. Recital 22 also mention use during examinations. Leisure or recreational activities are not included. Uses shall also be carried out for a **non-commercial purpose**. Recital 20 clarifies that use must be for a non-commercial purpose stating “the means of funding of an educational establishment should not be a decisive factor”, so that private schools recognised by the Member State can benefit from the exception.

— USES

Article 5 concerns **digital uses** of copyright protected content such as books, journals, images, music, audiovisual works as well as databases protected by sui generis rights.

— BENEFICIARIES

The beneficiaries are **pupils/students and teachers**. Administrative staff of educational establishments and the general public are not covered by this exception.

— VENUE

One condition for the use of works under the exception [under Art. 5(1)(a)] is that the use takes place **under the responsibility of an educational establishment**, on its premises or at other venues. It includes digital on-site uses as well as **distance learning through a secure** electronic environment, “accessible only by the establishment’s pupils or students and teaching staff”. So, any communication via the Internet that is accessible by others falls outside the scope of the exception. The exception extends to **cross-border uses** as provided for by Art. 5(3), as uses under the responsibility of the establishment are “*deemed to occur solely in the Member State where the educational establishment is located*”.

— INDICATION OF SOURCE

The second condition for use of works under the exception [under Art. 5(1)(b)] is that the use is accompanied by the indication of the source of the content, including the author’s name, unless it turns out to be impossible.

Two further **optional provisions** are provided for by the Directive **to help ensure a balanced exception** to copyright:

- **Member States may provide that the exception or limitation under Article 5(1) does not apply or does not apply for specific uses or types of works or other subject matter, such as material primarily intended for the educational market or sheet music, to the extent that suitable licences authorising the acts foreseen in Art. 5(1) and covering the needs and specificities of educational establishments are easily available on the market.** Where Member States take this approach, they must take *necessary measures* to ensure that those licences are available *and visible in an appropriate manner for educational establishments*. [Art. 5(2)]

This provision, importantly, recognises the situation in many EU countries where successful educational licensing schemes are already in place, covering uses under the exception (and more), which benefit teachers and students, as well ensuring remuneration for authors and publishers when their works are reproduced (e.g., copied, scanned or up/downloaded). Crucially, it keeps open the possibility for EU Member States to allow for educational licensing schemes to continue or be introduced where none currently exist.

- Under **Art. 5(4)**, Member States may provide for **fair compensation** for rightsholders for the use of their works under Art. 5(1). This importantly allows for the possibility for authors to receive remuneration for uses of their works, as well as publishers for their investment.

2 | WHAT IS THE RELATIONSHIP BETWEEN THE EXCEPTION FOR ILLUSTRATION FOR TEACHING UNDER ART. 5(3)(a) OF DIRECTIVE 2001/29 (THE “INFOSOC DIRECTIVE”) AND THE EXCEPTION FOR ILLUSTRATION FOR TEACHING UNDER ART. 5 OF THE DSM DIRECTIVE?

Before the DSM Directive was adopted, the InfoSoc Directive already provided for an exception for the sole purpose of illustration for teaching, but it was not mandatory for Member States to implement it. The DSM Directive (Recital 19) explains that the Article 5 exception was introduced as it is unclear whether the InfoSoc exception applies to digital uses, especially distance learning and across borders.

The Article 5 illustration for teaching exception is therefore narrower than the InfoSoc exception, as it applies only to digital uses but, unlike the InfoSoc exception, it is mandatory to improve legal certainty. It doesn't replace the InfoSoc exception but complements it specifically in relation to digital uses.

Recital 23 emphasises that a number of Member States have developed arrangements (exceptions or licensing) based on the InfoSoc Directive, pertaining to digital uses or otherwise. All those schemes are still valid. Member States are encouraged to **“build on the existing arrangements concluded at national level”**.

3 | ARE THERE LIMITATIONS TO THE DIGITAL USES AUTHORISED UNDER THE EXCEPTION?

The DSM Directive (under Recital 21) provides guidance, explaining that “*for the sole purposes of illustration for teaching*” should be understood as covering “**digital uses of works or other subject matter to support, enrich or complement the teaching, including learning activities.**” It further clarifies: “*In most cases, the concept of illustration would, therefore, imply the use only of parts or extracts of works, which should not substitute for the purchase of materials primarily intended for the educational market.*”

So, it is clear that the intention is to enrich courses with extracts of various publications and not to replace the purchase of a book or other publication. The concern is that without clear boundaries this could lead to damaging practices. It is vital that EU Member States set objective criteria and limits when transposing the Directive into national law. In fact, the great majority, prior to the adoption of the DSM Directive, already limited reproduction of written works for education to “**extracts**” or “**short extracts**” either in law or under licences.

Member States should also bear in mind that under EU and international law, including the Berne Convention Art. 9(2), exceptions and limitations should 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 rightholder (known as the “three-step test”).

Recital 21 clarifies that “*Member States should remain free to specify, for the different types of works or other subject matter, in a **balanced manner, the proportion of a work** or other subject matter that can be used for the sole purpose of illustration for teaching.*” Limits might therefore be applied differently to different categories of works (e.g., written works, audiovisual, music).

4 | WHEN WILL THE “LICENCE OVERRIDE” MECHANISM APPLY?

Article 5(2) states that “*Member States may provide that the exception or limitation adopted pursuant to paragraph 1 does not apply or does not apply as regards specific uses or types of works or other subject matter, such as material that is primarily intended for the educational market or sheet music, to the extent that suitable licences authorising the acts referred to in paragraph 1 of this Article and covering the needs and specificities of educational establishments are easily available on the market*”. As this provision is optional, **Member States must clearly specify in their national law transposing the DSM Directive the principle of prevalence of licences** and if it is general or specific to certain uses.

Member States must also ensure that the licences authorising the acts referred to in Art. 5(1) are “available and visible in an appropriate manner for educational establishments”.

Licences will then prevail if they authorise at least the same uses as those allowed under Art. 5 (digital uses of works for the sole purpose of illustration for teaching).

It is also possible for a licence to partially cover the uses allowed under the exception, for example limiting it to specific types of works such as “material primarily intended for the educational market or sheet music”, as referred to under Art. 5(2).

Different kind of licences, issued either by rightholders or by collective management organisations, which have developed collective licensing schemes across Europe, can prevail as long as they **cover the educational establishment’s “needs and specificities”** and are “**easily available on the market**”.

5 | DO LICENCES REALLY PROVIDE LEGAL CERTAINTY FOR THE USER?

Yes. Assuming there is legislation in place permitting the prevalence of licences, licences will only apply when they cover the digital uses as described in Art. 5(1).

Recital 23 of the DSM Directive also clarifies that “where the licences cover only partially the uses allowed under the exception or limitation, all the other uses remain subject to the exception...”. So, there is no grey area for the user.

One advantage of licences is that they are negotiated with users to **respond to their specific needs** and can easily be adapted as those needs evolve, as they are regularly renegotiated. Licences can – and often do - allow more than what is in the exception. Digital uses, for example, were being included in collective licences long before the DSM Directive was agreed.

Licences also provide **more clarity** as regards what is allowed and under which conditions, as the licensing agreement clearly defines this.

When a licence is managed by a collective management organisation (referred to as Reproduction Rights Organisations (“RROs”) in the text and image field), permitted uses are clearly communicated to establishments and teachers, so there is no need for them to make a legal analysis of their national law.

In addition, where collective licensing is used, the educational establishment will have the benefit (as well as the legal certainty) of getting the authorisation for at least the same uses as provided by the law through a convenient “**one-stop shop**” covering a whole repertoire. Voluntary collective licensing schemes usually represent most of their national repertoire (i.e., the works of the mandating rightholders, including those represented through bilateral agreements with other RROs), with extended collective licensing and compulsory collective licensing schemes further extending this representation to non-mandating rightholders.

6 | SHOULD MEMBER STATES PROVIDE FOR “FAIR COMPENSATION” FOR RIGHOLDERS WHERE THE ART. 5 EXCEPTION IS APPLIED?

Art. 5(4) states that “*Member States may provide for fair compensation for rightholders for the use of their works*”. When transposing the DSM Directive into their national laws, EU Member States will therefore have to decide whether or not to include a provision allowing rightholders to be compensated whenever their works are used under the exception.

The compensation is essential for maintaining diversified and quality educational content and ensuring a **balanced approach** where an exception is applied. It allows authors and publishers to continue creating and investing in new works, which is vital for our democratic societies.

Many Member States already (before the adoption of the DSM Directive) recognise the **importance of rightholders being remunerated when their works are used** or copied and have made provision for this in their national laws e.g., when implementing the optional illustration for teaching exception under the InfoSoc Directive, which also included the possibility for fair compensation under the exception (Recitals 35 and 36). This recognition also explains why there continues to be the possibility for Member States to provide for fair compensation for rightholders under Art. 5 of the DSM Directive.

The inclusion of a provision for compensation also helps to ensure compliance with the “three-step test” (while a broad, unremunerated exception would be seen as **prejudicing the legitimate interests of rightholders**).

7 | WHAT DOES “FAIR COMPENSATION” MEAN?

Although Member States are given the flexibility to decide, Recital 24 of the DSM Directive provides some guidance. It states that in setting the level of fair compensation, Member States should take into consideration “the harm to rightholders” and “Member States’ educational objectives”.

Recital 24 also encourages the use of “systems that do not create an administrative burden for educational establishments” in order to reach a balance between rightholders and users.

Member States can choose different approaches as regards how the compensation is set (e.g., as an annual fee per student or lump sum). They can rely on RROs to provide an easy solution for both users and rightholders when administering the collection and distribution of the compensation.

8 | HOW DOES THE CROSS-BORDER EFFECT APPLY?

Under Article 5.3, “the use of works (...) shall be deemed to occur solely in the Member State where the educational establishment is established”. This means that any digital uses for illustration for teaching made by a teacher or student under the responsibility of an establishment are deemed to occur on the territory of the establishment, even if the use actually happens outside of that territory, within the EU.

The Directive therefore creates a “**legal fiction**” to facilitate cross-border uses and “ensure that educational establishments benefit from full legal certainty when using works or other subject matter in digital teaching activities, including online and across borders” (Recital 19).

What this means is that the Directive ensures that there is a cross-border effect, whether the use is authorised **under an exception or a licence**. There must be compliance with the relevant “provisions of national law” implementing Article 5, in this regard.

Although contractual-based cross-border licensing solutions were already available prior to the adoption of the Directive, the new rules mean that this cross-border effect will now be automatic for licensing solutions. Member States will have to provide for this legal fiction when transposing Article 5.

9 | WHY IS THE TRANSPOSITION OF ARTICLE 5 A PARTICULAR CONCERN FOR AUTHORS AND PUBLISHERS?

Article 5 strongly impacts authors and publishers, because **written materials, and among them educational materials**, are the resources **most frequently copied**¹ by teachers and pupils under licences provided by RROs.

Article 5 leaves significant flexibility for EU Member States to decide how to transpose the rules into national legislation. The choices that Member States make will have a **significant impact on authors and publishers** whose works are copied and will be a deciding factor in many cases as to whether an author is able to continue **make a living from writing** or a publisher to **invest in new publications**.

Depending on how Member States choose to transpose different aspects of Article 5 (such as the definition of “illustration for teaching”, as explained above), the outcomes for rightholders could be very different.

A Member State could, for example, decide to allow licensing solutions for secondary uses of works to prevail in all or specific cases thereby ensuring remuneration for authors and publishers. A Member State might on the other

¹For example, in Denmark 500 million school book pages are copied each year and in France the equivalent of 2 million books.

hand decide to apply the exception, with no ‘licence override’, but include a provision for compensation for rightholders to ensure that authors and publishers will receive some payment for the digital use of their works.

Alternatively, a Member State could decide that licences will not prevail over the exception and there will be no provision for compensation under the exception. In this case, authors and publishers will have no possibility to be remunerated when their works are copied.

The payments received from **secondary uses or works are a component of the income that creators live on**. By way of illustration, one study in the UK found that 25% of authors receive more than 60% of their income from secondary uses. Payments for secondary uses also provide necessary revenue for a lot of small and medium-sized publishers, which is the great majority (99.4% of European companies active in the book sector are SMEs).

So, no revenue from secondary uses would be devastating for authors and publishers. With over **half a million people working only in the book publishing industry** in Europe, it is clear that the effects of an uncompensated exception will be far-reaching when also taking into account other text and image businesses (newspapers, periodicals etc.).

10 | WHY WOULD A BROAD, UNREMUNERATED EXCEPTION BE BAD FOR TEACHERS AND PUPILS?

Teachers have the delicate task of using their pedagogical skills to build courses and educate our children. It is crucial that they can **rely on a variety of quality, validated expert content**. Teachers (who are also sometimes authors) recognise that the authors of the books, textbooks or journals they use have produced valuable works and that remuneration for uses of those works allows for the continued production of quality content, while allowing publishers to offer diverse, reliable resources for national curricula.

If the transposition of Article 5 opens the door to extensive, unremunerated digital uses this will negatively impact the creation of new educational material.

It is in society’s interest that the creative sector is **sustainable and can continue to innovate and invest in quality materials**. This will help increase access to knowledge and promote cultural diversity across Europe, as well as increasing jobs and growth.

11 | HOW CAN COLLECTIVE LICENSING HELP?

RROs organise the collective licensing of reproduction rights on behalf of authors and publishers when it is impracticable for them to act individually. RROs collect and distribute to authors and publishers the royalties due for uses of their works².

These collective management systems - long-established in most EU Member States - have provided **flexible solutions and legal certainty for users**, including across borders, in adapting to new digital uses in education for over fifteen years.

Collective licensing has been expanding across Europe and 38 RROs are now established providing licences in all but one EU Member State (Malta). Most of them, including developing RROs, are developing solutions for the licensing of digital uses.

National laws transposing the DSM Directive should leave open the possibility for authors, publishers and educational establishments to be able to benefit from innovative licensing solutions and not completely close off that possibility.

² In 2018, RROs collected and distributed about 1 billion euros to rightholders worldwide.

12 | WHAT ARE THE ADVANTAGES OF COLLECTIVE LICENCES FOR EDUCATIONAL ESTABLISHMENTS?

Collective licences are the **outcome of negotiations**, generally between the licensor (RRO) and organisations with significant bargaining power such as those representing the education sector (e.g., the Ministry of Education, or federation of universities or schools). Teachers themselves do not have to negotiate.

Licensing conditions are therefore **adapted to the specific needs** of the sector and are usually adapted for the different levels of education (primary, secondary, or higher education), which have different teaching methods. A licence usually defines and **covers a wide range of uses** (scanning, in classroom representation, whiteboard, posting on virtual learning environments, exams, distance learning, cross border uses...).

Collective licensing offers a **one-stop shop** and allows educational establishments to provide **access to a variety of quality content for their students**, in the knowledge that they are fully complying with the law. Teachers are well informed about what they can copy.

For a relatively small fee per student (e.g., the price of a couple of cups of coffee), a collective licence allows teachers to draw upon extracts of quality, reliable resources and share with their students, including digitally (e.g., via the school's intranet) and they don't have to worry about whether they are compliant with the law.

Collective licensing also ensures that authors of works used and the publishers that invest in those works are remunerated for their work / investment. This allows them to continue providing quality, innovative content, to the benefit of students.

The fact that collective licensing in the field of education has been around for so long in many countries is testament to how well it has worked for both educational establishments and authors and publishers. Licences have been adapted over the years, evolving with technology and educational practices, so they continue to meet the needs of the users.

13 | WHERE IS THERE FURTHER INFORMATION ABOUT COLLECTIVE LICENSING SCHEMES?

Details about collective licensing schemes can be found on national RROs' websites.

Details of IFRRO's RRO members, which cover most EU Member States (and beyond), can be found on IFRRO's website: www.ifrro.org. The search facility allows you to search RROs by country (www.ifrro.org/RRO).

For further details of national RROs and collective licensing solutions, see the Content for Education website: www.contentforeducation.org.

14 | HOW CAN MEMBER STATES TRANSPOSING ARTICLE 5 STRIKE A BALANCED APPROACH?

A balanced copyright framework is the key to innovative, diverse, reliable, high quality content for education. 3 key factors in ensuring this are as follows:

CLEARLY DEFINE DIGITAL USE BY LIMITING THE SCOPE OF THE EXCEPTION TO EXTRACTS OF WORKS

It is important that Member States clarify that 'illustration for teaching' means to support, enrich or complement the teaching using only small parts or extracts of works. It is essential to set objective criteria and limits regarding the use of written works. Without clear boundaries, the exception could be interpreted as a green light to make extensive copies of works.

ALLOWING PREVALENCE OF LICENCES

Article 5 gives Member States the possibility not to apply the exception where there are suitable licences easily available on the market. It is important that EU Member States' transposition of Article 5 provides a mechanism to preserve licensing systems between users and RROs (on behalf of authors and publishers), which have already been developed in many Member States. These systems provide flexible solutions for users, including across borders, in adapting to new digital uses, permitting uses that go even beyond what an exception would cover. Importantly, these systems provide the user with legal certainty. The exception should be applied only when licensing agreements are not available.

Furthermore, with collective licensing expanding and more innovative solutions being developed for digital licensing, including by developing RROs in Europe, the law should leave open the possibility for authors, publishers and educational establishments to be able to benefit from licensing solutions and not completely close off that possibility.

FAIR COMPENSATION WHERE THE EXCEPTION IS APPLIED

Article 5 allows Member States to provide for fair compensation where the Article 5 exception is applied. It is vital that Member States include a provision for fair compensation for the loss incurred by authors and publishers. This provision is essential for the sustainability of the sector and maintaining diversified and quality educational content.

It is above all vital to avoid a situation whereby neither the licensing option nor the compensation provision is available in the national law. This would be extremely detrimental to educational establishments and their students, as well as authors and publishers³.

We would encourage Member States to engage with RROs at national level, in order to have up to date information about the availability and development of collective licensing solutions in the educational sector. Further details can be found at www.contentforeducation.org.

³ E.g., 75% or more of the payments to authors and publishers by RROs in Nordic countries are from educational uses.