The exceptional mismatch of copyright teaching exceptions in the post-pandemic university

– insights from Germany, Bulgaria, and Ireland

by **Alina Trapova** *

Overview

Keywords: copyright, exceptions, education, digital, teaching

Recommended citation: Alina Trapova, The exceptional mismatch of copyright teaching exceptions in the post-pandemic university – insights from Germany, Bulgaria, and Ireland, JIPITEC 14 (2023) 307 para 1.

A. Introduction

1 The pandemic days are over, or so it feels for the moment. During the last two years, the educational sector underwent an immense transformation. What used to be an almost futuristic business model—the delivery of education irrespective of the physical locations of teachers and learners—became not only the norm for instruction across all levels, but also essential for any sort of teaching to be delivered.[1]

* Alina Trapova is Lecturer in Intellectual Property Law, University College London (UCL)

1 F Haider Alvi and others, '4 Lessons from Online Learning That Should Stick after the Pandemic' (*The Conversation*, 1 May 2022) <https://theconversation.com/4-lessons-from-online-learning-that-should-stick-after-the-pandemic-179631> accessed 27 October 2022; Alberto Muñoz-Najar and others, 'Remote Learning during Covid-19: Lessons from Today, Principles for Tomorrow' (World Bank Group 2021) <https://documents1.worldbank.org/curated/en/160271637074230077/pdf/Remote-Learning-During-

An integral part of education, via distance, or face-to-face in brick-and-mortar classrooms, is the use of material that illustrates and supports teaching and learning. Much of this material is protected by copyright. Historically, such material had been reproduced and distributed in physical form as photocopies or other types of graphical reproductions or accessed by learners in libraries. In reality, already long before the pandemic the provision of such materials had increasingly shifted to digital spaces, with various platforms for collaboration, exchange of materials and online teaching at the disposal to both students and teachers. However, it was the physical impossibility to access and circulate teaching materials during the pandemic that brought many copyright problems to light and with that (legal) uncertainty to educators. Whether it was the closure of libraries, the mere inability to (lawfully) travel to them, or the logistical barrier to distribute physical class handouts to large groups of students, digital access to education materials became the norm.

2 At the EU level, the copyright rules aimed at facilitating access to digital material in the context of teaching were already under discussion before the pandemic started.[2] In September 2016, the European Commission proposed a new directive focusing on copyright and related rights in the Digital Single Market ("CDSM Directive").[3] After a strenuous legislative process, the Directive was eventually adopted in 2019, leaving Member States time until 7 June 2021 to implement its provisions into national law. That said, many Member States did not transpose the CDSM Directive on time.[4] One of the new provisions, Article 5, addresses the use of works and other subject matter in digital and cross-border teaching activities.[5] Although the inception of this new provision pre-dates the Pandemic highlighted the importance of an express digital teaching exception. What was missing, and what Article 5 CDSM Directive seeks to provide, are express exceptions that cover digital and cross-border teaching activities, thus closing a perceived gap in the copyright legal framework in this respect. This shortcoming is a result of the earlier regime for copyright exceptions established by Article 5 of the 2001 Directive of copyright and related rights in the information society ("InfoSoc Directive").[6] Within its scope of application, Article 5 CDSM sought to remedy the legal uncertainty surrounding the use of works and other protected subject matter for modern, or one might argue perfectly normal, necessary and pedagogically absolutely appropriate, educational practices. Nonetheless, as will be argued below, its sectoral approach has failed to achieve its goal and thus creates additional legal uncertainty, or at least moderate confusion, since the provision relates solely to specific (digital and cross-border) teaching activities.

3 Indeed, the adoption of the CDSM Directive by the EU legislator was far from the last step in this legislative endeavour. As per usual, the devil lies in the details. Member States have notoriously implemented directives with diverging results, which sometimes (effectively) defeats the purpose of legislative harmonisation altogether. This provision is one such example. This contribution turns to the German, Irish and Bulgarian implementations of Article 5 CDSM Directive. Following this introduction, the next section will set out the legal context, providing an overview of both the regime under the old InfoSoc Directive, as well as the new provisions as per the CDSM Directive. This will be followed by a critical examination of the setting in which educational establishments would have to manoeuvre in the post-pandemic digital teaching environment in the three jurisdictions. While Ireland and Germany have implemented the texts that will be analysed below (respectively in November 2021 and May 2021), the Bulgarian version is still at a proposal stage.[7]

4 In an ideal world, the copyright laws across Member States would provide for a universal cross-border exception in the context of education with little conditions. However, this is far from what the current implementations reflect—there are

COVID-19-Lessons-from-Today-Principles-for-Tomorrow.pdf> accessed 27 October 2022.

2 The Republic of Ireland already significantly reformed its relevant rules in 2019 (Copyright and Other Intellectual Property Law Provisions Act 2019).

3 Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market Official Journal L 130.

4 'Copyright: Commission Urges Member States to Fully Transpose EU Copyright Rules into National Law' (*European Commission*, 19 May 2022) <https://ec.europa.eu/commission/presscorner/detail/EN/IP_22_2692> accessed 27 October 2022.

5 For a systematic critique, see Bernd Justin Jütte, 'Uneducating Copyright: Member States Can Choose between "Full Legal Certainty" and Patchworked Licensing Schemes for Digital and Cross-Border Teaching' (2019) 41 EIPR 669.

6 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 Official Journal L 167.

7 As it currently stands, considering the political instability in Bulgaria, it is unlikely that the directive will be implemented any time soon. For an up to date tracker with all reference documents in all Member States with respect to the implementation process, see 'CDSM Implementation Resource Page – CREATe' (*CREATe*) <https://www.create.ac.uk/cdsm-implementation-resource-page/> accessed 29 January 2023.

significant incoherencies both externally, i.e., when comparing the manner in which the exception has been transposed in the various Member States, as well as internally—within the same national framework when it comes to the interaction with the old exception deriving from the InfoSoc Directive. This article illustrates that the harmonisation purpose across the different Member States has been somehow defeated since the newly introduced exception relates to inherently local activities and includes a country-of-origin principle. Secondly, turning more specifically to how the provisions operate nationally, it becomes clear that there has been little to no effort to render the copyright regimes coherent even within one single legal system. All these substantive and systemic concerns once again lead to an exceptional mismatch between promises from the EU for a harmonised internal market in the context of copyright exceptions and a rather messy legal reality for educational establishments and their teaching staff.

B. The legal context

5 The tools that allow teachers to share material that falls within copyright protection with their students without prior authorization are the exceptions and limitations to copyright. Since 2001 these have been exhaustively harmonized by the European legislator. Most prominent amongst the relevant legal instruments are the 2001 InfoSoc Directive and the 2019 CDSM Directive. The former contains a general exception "for the sole purpose of illustration for teaching or scientific research",[8] while the latter introduced in 2019 an exception for the "[u]se of works and other subject matter in digital and cross-border teaching activities".[9]

6 Prior to the adoption of the CDSM Directive, all Member States had some sort of a teaching exception already as part of their copyright laws—either one that predates the adoption of the InfoSoc Directive, or one that was included in the course of the directive's implementation.[10] The CDSM Directive forces Member States to rethink, modernize or clarify their existing teaching exceptions—or to confirm that their existing exceptions were already compliant with the 'new' requirements of Article 5 of the CDSM Directive. Whilst the process of transposing the CDSM Directive is still ongoing in many Member States,[11] the effects of this legislative intervention can already be observed. What becomes apparent is the complete lack of coordination.

7 The aim of Article 5 CDSM Directive was to clarify the scope of application of the existing teaching exceptions[12] "as they apply to digital uses" and specify how "those exceptions or limitations would apply where teaching is provided online and at a distance."[13] In addition, the legislator appreciated that the copyright framework for cross-border teaching is problematic. With this new provision it ostensibly seeks to facilitate indispensable aspects of modern education, namely the digital use of protected material in the context of teaching activities.

8 In pursuing this aim at national level, by transposing Article 5 of the CDSM into their respective national laws, the Member States succeeded to different degrees. To illustrate the different implementation approaches, this article examines the German, Irish and Bulgarian transpositions. The approach of this paper is not to comparatively and exhaustively examine and scrutinise the implementation in these three Member States. This has been done elsewhere.[14] Instead, on the basis of these three implementations, this paper extracts good and bad practices to distil

8 InfoSoc Directive, art. 5(3)(a).

9 CDSM Directive, art. 5.

10 Jonathan Griffiths, Tatiana-Eleni Synodinou and Raquel Xalabarder, 'Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 3 to 7 of Directive (EU) 2019/790 on Copyright in the Digital Single Market' (European Copyright Society 2022) 17 <https://europeancopyrightsociety.org/2022/05/03/https-europeancopyrightsocietydotorg-files-wordpress-com-2022-05-ecs_exceptions_final-1-pdf/> accessed 25 August 2022; 'Assessment of the Impact of the European Copyright Framework on Digitally-Supported and Training Practices' (PPMI 2016) <https://op.europa.eu/es/publication-detail/-/publication/1ba3488e-1d01-4055-b49c-fdb35f3babc8> accessed 25 August 2022; Jean-Paul Triaille, 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society' (De Wolf & Partners 2013) 368 <https://op.europa.eu/en/publication-detail/-/publication/9ebb5084-ea89-4b3e-bda2-33816f11425b.> accessed 25 August 2022.

11 At the time of writing some Member States had not completed the implementation of Directive (EU) 790/2019, in May 2022 the European Commission issued reasoned opinions to 13 of them due to their failure to implement the directive within the 7 June 2021 deadline.

12 Directive 1996/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77 Articles 6(2)(b) and 9(b); InfoSoc Directive Article 5(3)(a).

13 Recital 19 CDSM Directive.

14 Ana Lazarova, 'Bulgaria Falls into All the Traps Set by Article 5 of the CDSM Directive' (2022) 17 Journal of Intellectual Property Law & Practice 407; Giulia Priora, Bernd Justin Jütte and Péter Mezei, 'Copyright and Digital Teaching Exceptions in the EU: Legislative Developments and Implementation Models of Art. 5 CDSM Directive' (2022) 53 IIC - International Review of Intellectual Property and Competition Law 543.

the elements of, not necessarily and ideal clause, but an implementation of Article 5 that more likely than not fulfils the vision (if there indeed was one) of the European legislature. Importantly, such an approach would provide educational institutions and teachers the legal certainty to use learning and teaching material flexibly and across various platforms and channels.

I. The old teaching exception: Article 5(3)(a) InfoSoc Directive

9 The background to Article 5(3)(a) dates to 1995, when the European Commission published its Green Paper on Copyright and Related Rights in the Information Society.[15] The Commission rightly identified education as a relevant area for new services in the information society. It listed "tele teaching", the point-to-point, i.e., on demand, delivery of educational services, as an emerging type of service and "information and education" and as one of the most relevant areas in which markets were most likely to develop.

10 With this in mind, Article 5(3)(a) InfoSoc Directive was drafted in a technologically neutral way. Neither does it state that the exception applies to digital uses, nor does it exclude digital uses from its scope. Not least given the title of the InfoSoc Directive itself, Member States could have assumed that some digital uses would come within the scope of the provision. Even then, the sheer array of digital uses that we know today could not have been anticipated more than two decades ago when the InfoSoc Directive was conceived. The extremely broad margin of appreciation was indeed used by the transposing Member States to come up with great variety of implementation models.[16]

11 Nonetheless, all exceptions in Article 5 of the InfoSoc Directive suffer from systematic deficiencies. First, the catalogue of exceptions is not mandatory (aside from one),[17] meaning that Member States are free to decide whether they would adopt any of the exceptions in their national copyright regimes. Secondly, the exceptions provided for in the directive are phrased in general terms, leaving Member States even more margin of discretion as to the specifics of how the national corresponding norm would look like. Having said that, when turning to the national provisions it quickly crystalises that while all Member States implemented the teaching/scientific research exception in Article 5(3)(a) in one or the other way into their national laws, the broad margin of discretion resulted in varying implementation models.[18]

II. The new digital teaching exception: Article 5 CDSM Directive

12 The broad margin of discretion left by Article 5(3)(a) InfoSoc Directive was reduced by Article 5 CDSM Directive, albeit only to a certain extent. The first choice that the EU legislator made in this respect is to ensure that, different to Article 5 of the InfoSoc Directive, Article 5 CDSM Directive had a mandatory nature, namely taking away from Member States the discretion as to whether to implement or not.

13 Substantively, several differences are notable. To begin with, it is much more detailed than its 2001 predecessor. The new provision provides more precise rules for "digital and cross-border teaching activities". For this purpose, "works and other subject matter" can be used "for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved".[19] Such uses are either limited to the premises of an educational establishment or other places where such establishment exercises its authority, e.g., rented venues, or a secure electronic environment. For uses in such secure electronic environments, a country-of-origin rule applies to the effect that relevant legal acts are presumed only to occur in the Member States where the educational establishment under which such acts are performed is established.

14 Even with these qualifications, the types of uses permitted under this new exception are significant. Member States could use this broad scope to revise their existing exception that permitted the use of works and other subject matter for the illustration of teaching. As it will become clear in the next section, this has now always been the case and the legal regime in most Member States can be better described as a poor patchwork effort than bringing clarity for the post-pandemic modern digital teaching environment.

15 With this in mind, it should be underlined that the 'new' exception does not replace the 'old' exception—

15 'Green Paper on Copyright and Related Rights in the Information Society' (1995) COM(95) 382 final 19–20.

16 Teresa Nobre, 'Educational Resources Development: Mapping Copyright Exceptions and Limitations in Europe' (Creative Commons 2004) <http://oerpolicy.eu/wp-content/ uploads/2014/07/working_paper_140714.pdf> accessed 12 April 2017.

17 See Article 5(1) InfoSoc Directive.

18 Andrea Renda and others, 'The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society' (Centre for European Policy Studies (CEPS) 2015) Nr. 120 80.

19 CDSM Directive art 5(1).

nowhere in the CDSM Directive does the legislator indicate priority of one over the other. Quite on the contrary—in Recital (3), the Directive emphasises that the existing exceptions and limitations in Union law should continue to apply. It explicitly refers to the exception education and states that those pre-existing measures continue to apply "as long as they do not limit the scope of the mandatory exceptions or limitations provided for in this Directive, which need to be implemented by Member States in their national law." Furthermore, Article 1(2) of the CDSM Directive stresses that, except if specifically indicated in Article 24 of the CDSM Directive, the new regime "shall leave intact and shall in no way affect existing rules laid down in the directives currently in force in this area." One of the directives the provision explicitly refers to is the InfoSoc Directive. Interestingly, Article 24 of the CDSM Directive refers specifically to the teaching exception in the InfoSoc Directive. While it maintains its general language which has been elaborated above, it once again reiterates that the old exception should operate "without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790". This is easier said than done. Unsurprisingly, Member States have thus approached their national CDSM Directive transpositions in very different ways. While the German legislator chose to consolidate its existing exception without significantly distinguishing between digital and analog uses, the Irish and Bulgarian legislators both adopted models that establish binary and layered regimes with specific rules and conditions for different types of uses. What is striking in the latter cases is the absence of meaningful coordination between the old teaching exception as per the InfoSoc Directive and the new digital teaching exception introduced by the CDSM Directive. That said, the German implementation, even though mindful of the pre-existing legal regime, equally fails at effectively modernising the setting in which educators would have to manoeuvre when it comes to copyright. All of this leads to an exceptional mismatch between old and new laws, as well as theory and practice.

C. Failed attempts to reach legal certainty

I. The well-known problem with directives

16 With the exception of two regulations in the field, harmonisation of EU copyright law has almost always been driven by directives.[20] This can be attributed to the fact that finding an agreement on copyright issues between the Member States has always been very difficult. This is evident in many copyright initiatives (both European and international). A recent example is the legislative process behind the CDSM Directive—the EU Commission's proposal dates back to September 2016,[21] while the final text, following numerous amendments (86 as per the agreed Parliamentary Position for the trilogue meetings),[22] was adopted in April 2019.[23] Still, some Member States have not implemented the directive, regardless of the deadline having passed on 7 June 2021.[24]

17 The making of EU law in the form of directives inherently sacrifices full harmonization for a certain degree of normative diversity, which is to say that full harmonization is often not achieved, but for various reasons divergences in transposition are tacitly accepted. A directive leaves Member States room for implementation,[25] which, if used carefully, respects the important balance between the Union and the Member States as sovereign entities.[26] Yet, many times, the general language of the directive is copied literally into the national law without specifying further the operation of the newly introduced provisions and their significance in the already existing legal framework. Other times, Member States use their margin of discretion—this is the case with the Irish and German transpositions

20 Directive 93/83/EEC; Directive 96/9/EC; Directive 2001/29/EC; Directive 2006/115/EC; Directive 2006/116/EC; Directive 2001/84/EC; Directive 2004/48/EC; Directive 2009/24/EC; Directive 2011/77/EU; Directive 2012/28/EU; Directive 2014/26/EU; Directive 2017/1564; Directive 2019/790; Regulation 2017/1563; Regulation (EU) 2017/1128.

21 European Commission, "Proposal for a Directive on copyright in the Digital Single Market" COM(2016) 593 final (14 September 2016).

22 'Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (European Parliament 2018) <https://www.create.ac.uk/wp-content/uploads/2018/09/Amendments_DSMCopyright_12Sep.pdf?x24425> accessed 29 January 2023.

23 For a comprehensive overview of the legislative history of the CDSM Directive, see 'EU Copyright Reform – Evidence on the Copyright in the Digital Single Market Directive' (*CREATe*) <https://www.create.ac.uk/policy-responses/eu-copyright-reform/> accessed 29 January 2023.

24 For a tracker of the implementation process in each EU Member State, see 'CDSM Implementation Resource Page – CREATe' (n 8).

25 Treaty on the Functioning of the European Union (OJ C 326) art 288.

26 Peter Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community? Columbia Law Rev 99': (1999) 99 Columbia Law Review 628, 706.

of Article 5 CDSM Directive, which will be explored below. At times, Member States have mistakenly copied the implementation of others without considering whether its own national legal setting realistically reflects the same issues and requires the same solution. This seems to be the case in Bulgaria where the national legislator following France's lead introduced an optional licensing carve-out under Article 5(2), without appreciating that such licensing practice and models practically do not exist in Bulgaria.[27]

18 The discrepancies between national implementations could, of course, have been avoided had the CDSM Directive been passed as a regulation instead. Arguably, in the case of cross-border digital, online, and offline teaching it is imperative that all Member States are on the same page in order to provide for a clear setting of operation for educational establishments. Yet, reaching a political agreement on regulations in the field of copyright law would have been very difficult. This status quo of the law, while understandable, is not surprising. However, this passes the the challenging task of installing coherence in the teaching exception from the hands of the European to those of the of the national legislators.

II. Interaction with earlier InfoSoc exception

19 Even though not always explicitly framed in the form a teaching exception, at the time the CDSM Directive was approved all Member States had a pre-existing exception which would cover teaching in one way or another. This derives either from Article 5(3)(a) of the InfoSoc Directive or a pre-existing national clause. Article 5 of the CDSM Directive was an excellent opportunity to revise the operation of that earlier exception, which would have neatly responded to calls by international academia for "coherent and seamless provisions exempting the use of works for teaching purposes regardless of the means (digital or otherwise) employed to achieve those purposes".[28]

20 Bulgaria and Ireland, however, have failed in this respect. Both Member States have decided to introduce a new layer of rules on top of the pre-existing exception, which unnecessarily and unjustifiably compromises legal certainty for its beneficiaries. This essentially has the effect of retaining one regime for offline teaching and another one for digital cross-border teaching. Such a setup is at least counter-intuitive, especially in the light of the mixed hybrid teaching models that have been widely adopted in various institutions in the post-pandemic reality. Unfortunately, as they currently stand the copyright regimes of Ireland and Bulgaria, instead of consolidating the conditions under which teaching, digital, cross-border or not, would take place, introduce yet another layer of complexity in this respect.

21 For example, in Bulgaria the legislator makes a distinction between the type of educational establishments with respect to the old and the new exception. To that end, non-formal education such as private tutoring would fall within the old regime as per Article 24(3) of the Bulgarian Copyright and Neighbouring Rights Act,[29] while formalised education as defined within the new provision would benefit from the new exception as per Article 26h(6) of the same Act.[30] The new exception benefits solely institutions in the pre-school and school education system, institutions entered into the registers maintained under the Vocational Education and Training Act and higher education institutions established in accordance with the Higher Education Act. This bifurcation complicates the legal framework in which all educational institutions—public, private and hybrid—would have to operate.[31] It should be borne in mind that these sectors are already very rich in numerous bureaucratic hurdles, which makes not only for a very complicated legal setting, but one that lacks transparency.

22 Similarly in Ireland, Sections 53 to 57 of the Copyright and the related Rights Act 2000 correspond to the old exception, while Section 57A of the same Act introduces the new provision. As it will become apparent in the analysis below, the mismatch between the two clauses materialises most clearly when it comes to the amount permitted to be copied. Section 57) reflects the old exception—in particular, reprographic copying by educational establishments of certain works for the sole purpose of illustration for education, teaching or scientific research. Section 57(3) states that not more than 5 per cent of any work can be copied under in any calendar year. There is no corresponding maximum threshold when it comes to the new exception. This leads to practical issues when hybrid teaching, education and research is concerned. For example, if a guest speaker is invited to deliver a lecture remotely, while another instructor is in the classroom with the student cohort, how much of the student handouts can be projected and/or printed to distribute to students in the classroom?

27 Lazarova (n 15) 411.

28 Griffiths, Synodinou and Xalabarder (n 11) 25.

29 See more at <https://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=6348> accessed 29 October 2022.

30 Ibid.

31 Lazarova (n 15) 412.

23 Germany instead has taken the opposite direction—it revised its existing exception to include digital and cross-border activities. The revised provision is situated in Article 60a of the Germany Copyright Act. The German legislator wisely appreciated that the manner in which the earlier provision was drafted originally was technologically neutral. Thus, it already covers digital cross-border teaching activities. As a consequence, the only two amendments to the educational exception deriving from the CDSM Directive related to the introduction of a licensing option for certain uses and the country-of-origin approach.[32]

24 On a more general level, the new CDSM Directive exception relates solely to digital and cross-border teaching activities, while the old InfoSoc one covered teaching *and* research. This leads to difficult questions for hybrid activities, going beyond teaching in its traditional sense. For instance, scientific international conferences, hosting both in person and remote speakers, where students are invited (and sometimes, obliged to) attend create difficulties. Which legal regime applies to these hybrid activities that combine teaching and research? It appears that in these cases the only safe way forward would be to obtain a licence for the use of copyright protected material or restrict access. The latter is entirely counterintuitive to the notion of inclusive education.

III. The ideal clause that no one aced

25 Arguably, an ideal forward-looking and fully technologically neutral clause on teaching exceptions for copyright in the context of offline, as well as digital and/or cross-border activities, does not exist. Technology would continue not only to challenge the modern classroom, but to also provide new tools in making education more inclusive, interactive and accessible for various groups. Therefore, at the heart of a sound teaching exception meant to operate well in the Digital Single Classroom, but also beyond, must lie legal certainty for rightsholders, beneficiaries of the exception, educational and research institutions.

26 The following depicts the most important facets of such a clause. It does not engage in a comprehensive analysis of all aspects of the implementations of the three jurisdictions concerned here, but instead it pinpoints the good and bad practices. For that purpose, four features will be studied: the beneficiaries, the moment when the exception arises, the amount that can be copied and the type of activities covered.

32 Priora, Jütte and Mezei (n 15) 555.

1. Who are the beneficiaries?

27 Article 5 CDSM applies only to digital uses "under the responsibility of educational establishments", where such uses take place either on the educational establishments' premises or through secure electronic environments to which only teaching staff and students have access.

28 From the three jurisdictions subject to the analysis in this paper only Bulgaria seems to have confused matters further. As it mentioned above, Bulgaria's suggested transposition arbitrarily divides formal from non-formal educational establishments, leaving the latter outside the scope of a digital and cross-border teaching exception. On the other hand, in Germany, already prior to the CDSM Directive the education exception benefited the following three categories: (i) teachers and participants at the respective event; (ii) teachers and examiners at the same educational establishment; and (iii) third persons insofar as this serves the presentation of lessons or lectures or the results of tuition or training or learning outcomes at the educational establishment.[33] In Ireland, the law does not define "educational establishments" any further, but the newly introduced Section 57A(1)(a) adds the specification that any uses take place "under the authority of an educational establishment, on its premises or at other venues, or through a secure electronic environment access to which is limited to an educational establishment's teaching staff and to pupils or students enrolled in a study programme, in particular through appropriate authentication procedures including password-based authentication." The reference to "in particular" indicates that this is just one example of how an electronic environment could be secured. This reflects rather accurately the manner in which most educational establishments currently operate. In the past five years, authenticator systems have been widely introduced to target the security of personal data.[34]

29 Hence, when it comes to beneficiaries, the German and Irish approaches can be taken as examples of good practices.

33 German Copyright Act, section 60a(1), available in English here: https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html

34 Elizabeth Kennedy and Christopher Millard, 'Data Security and Multi-Factor Authentication: Analysis of Requirements under EU Law and in Selected EU Member States' (2016) 32 Computer Law & Security Review 91.

2. When does the exception arise?

30 One of the aspects stemming directly from the CDSM which aligns the three jurisdictions is the fact that the use is done for the sole purpose of illustration for teaching, and to the extent justified by the non-commercial purpose to be achieved. The non-commercial aspect is present and uncontroversial in all three transpositions. An important caveat is that the private nature of the institution should not deprive the applicability of the exception. Recital 20 of the CDSM Directive restates the rationale from Recital 42 InfoSoc Directive, whereby "the organisational structure and the means of funding of an educational establishment should not be the decisive factors in determining whether the activity is non-commercial in nature." Thus, the public interest that justifies the analog and/or digital teaching exception should be separated from the organisation of the educational establishment as such.[35]

31 What is more interesting is the definition of "illustration for teaching". The German Copyright Act maintains this terminology as it is its legacy from its old exception. The Bulgarian implementation proposal uses the term "necessary for the purpose of illustration for education" to qualify the exempted activities. The available documents on the Irish implementation currently point to no specific purpose specification when it comes to the cross-border digital exception.[36] Nonetheless, following the spirit of the legacy provisions (Sections 53 to 58 of the Irish Copyright Act),[37] one can safely assume that since the new provision will fall within the same Part of the act, Section 57A, it is most likely that it will also be addressed at uses "in the course of instruction or of preparation for instruction" as per Sections 53(1) and 53(3) and/or "for the purposes of an examination by way of setting questions, communicating questions to the candidates or answering questions" as per Section 53(5).

32 All in all, this terminology should make little difference. Like the European Copyright Society reminds, the meaning of "illustration for teaching" must be understood broadly and interpreted flexibly in accordance with 10(2) of the Berne Convention.[38] Therefore, it is safe to say there should the national implementation be interpreted appropriately, none of the three jurisdiction can be examples of bad practices, despite the seemingly narrow specification of purposes in the Irish implementation.

3. How much can be taken?

33 A common misperception among educators (even among certain legal academics) suggests that the reproduction of a specific percentage or a number of words from a specific work does not infringe copyright or is at least permitted under some sort of permitted use or exceptions.[39] Most of the times, these are unfounded claims. Yet, when it comes to the German and Irish teaching exceptions, there are references to certain fixed percentages. Such an approach to teaching exceptions is highly formalistic. Instead, "the kind and amount of works authorised under the exception or limitations will be decided *in casu*, "to the extent justified" by the teaching purpose".[40] At times, the teaching purpose can only be successfully achieved if the entire work is reproduced. The classic examples are copyright law lectures demonstrating the notion of copyright infringement. These have paradoxically led to some unjustified take-down notices.[41]

34 The German Copyright Act is very clear in this respect—the teaching exception permits the use of up to 15 percent of the published works (Section 60a(1)). This is not pre-empted *per se* by the CDSM Directive. On the contrary, Recital 21 CDSM permits Member States "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." It is fair to state that in Section 60a(2) the Act states that illustrations, individual articles from the same professional or scientific journal, other small-scale works and out-of-commerce works may be reproduced in their entirety. This second qualification, however, is far from reflective of the balanced approach encouraged by the recital. On the contrary, it once again reflects a very rigid and formalistic approach.

35 Griffiths, Synodinou and Xalabarder (n 11) 22.

36 Consult the European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021, < **https://www.irishstatutebook.ie/eli/2021/si/567/made/en/pdf> accessed 31 January 2023.**

37 See more here: https://www.irishstatutebook.ie/eli/2000/act/28/enacted/en/print.html.

38 ibid 20–21; Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond Two Volume Set* (Second Edition, Oxford University Press 2006), §13.45.

39 Bernd Justin Jütte and others, 'Zooming in on Education: An Empirical Study on Digital Platforms and Copyright in the United Kingdom, Italy, and the Netherlands' (2022) 13 European Journal of Law and Technology, see section 4.

40 Griffiths, Synodinou and Xalabarder (n 11) 21.

41 Mike Masnick, 'Sony Music Issues Takedown On Copyright Lecture About Music Copyrights By Harvard Law Professor' (*TechDirt*, 16 February 2016) <https://www.techdirt.com/2016/02/16/sony-music-issues-takedown-copyright-lecture-about-music-copyrights-harvard-law-professor/> accessed 30 October 2022.

35 As it was mentioned above, the analog provision in the Irish Copyright and Related Rights Act in Section 57(3) states that not more than 5 percent of any work can be copied under this section in any calendar year. No such corresponding percentage is introduced for the digital use. The rationale behind such differential treatment is not clear. Interestingly, the new cross-border digital teaching provision in section 57A further states that where the exception beneficiary "has legal access to the relevant protected work or subject matter, the relevant author or performer shall ensure that that beneficiary has the means of benefiting from that exception or limitation to the extent necessary to do so." This specification is certainly welcome in ensuring the proper functioning of the exception and that the rightholders cannot in fact circumvent its applicability. In particular, this may prevent rightholders from claiming that beneficiaries are entitled to copy only 5 percent of a given work.

36 To this end, the Bulgarian implementation could be referred to as the best practice among the three since it omits any reference to a fixed amount. Reflective of the spirit of the CDSM Directive, it merely repeats the already familiar reasoning that the use of the works must be made only to the extent justified by the non-commercial purposes to be achieved. This clarification is also present in the Irish analog exception (yet, with the caveat of the 5 percent, which entirely defeats the purpose of a balanced teaching exception). In this respect, the proposal in the Bulgarian implementation is welcoming to all modes of teaching and effectively achieves its goals of inclusive digital and cross-border teaching.

4. What kind of activities are covered?

37 Looking at the scope of exempted uses, the CDSM Directive is very clear and perhaps there is no need for any creative implementation on behalf of the Member States. The Directive states that the rights affected by the exception are:

- the exclusive rights of reproduction in digital formats and of communication to the public, including making available online (Articles 2 and 3 Information Society Directive 2001/29/EC);
- the exclusive rights granted in databases, including the *sui generis* right (Articles 5 and 7 Database Directive 96/9/EC);
- the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole (Article 4(1) Computer Programs Directive[42])
- the new exclusive rights of reproduction and making available online of press publications granted to press publishers by Article 15(1) of the CDSM Directive.

38 This presents Member States with a rather clear framework. The extended applicability of the exception to other rights on an individual national level is permitted in light of the subsidiarity principle as per Article 5(3) of the Treaty on European Union and Protocol 2 on the application of the principles of subsidiarity and proportionality.[43]

39 While Germany and Bulgaria did not adapt the exempted uses in any particular manner, the situation in Ireland appears to be more problematic and lacks all sorts of transparency. While the official Copyright Act and the the European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 seem to be silent on this point, an Unofficial Consolidated Copyright and Related Rights Act 2000 (as amended up to 14 July 2022) suggests certain caveats.[44] The text is published on the website of the Department of Enterprise, Trade and Employment and specifies two digital uses in the context of teaching that narrow the scope of the uses. First, it states that it is not an infringement if an educational establishment, for the educational purposes of that establishment, communicates a work as part of a lesson or examination to a student of that establishment by telecommunication, and secondly, it is equally not an infringement if a student who has received such a lesson or examination makes a copy of the work in order to be able to listen to or view it at a more convenient time. These are arguably the two most relevant uses of copyright protected material in the context of teaching and learning activities—as part of a lesson, during examination and use "on demand" by students, but these are not the only ones. The 'unofficial' nature of the document should be taken into account. Yet, if this is indeed what the law in Ireland is now, it is arguable that such an implementation with its emphasis on the notion of "lesson" and "examination" once again fails to comprehensively appreciate that teaching no longer follows one single model. In many contexts, students are encouraged to carry out tasks prior to attending lessons. One may wonder whether in their preparation they would fall within the scope of the exception should a student who has not received a

42 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs 2009 268.

43 Griffiths, Synodinou and Xalabarder (n 11) 20.

44 See more at <https://enterprise.gov.ie/en/legislation/unofficial-consolidated-copyright-and-related-rights-act-2000-as-amended-.html> accessed 31 January 2022.

lesson or examination make a copy of a copyright infringing work. Once again, a broad and flexible interpretation should be encouraged to avoid short-circuits of this kind where creative teaching models end up being undermined.

D. Conclusion

40 The different national implementations of Article 5 of the CDSM Directive examined in this contribution differ in substance and in their systematic approaches. It is safe to say that this particular legislative intervention has not contributed to greater harmonization in the Digital Single (education) Market. But this was also not the intention of the legislator. Instead, Article 5 of the CDSM Directive established certain minimum standards to enable activities that are essential for the digital delivery of education (broadly understood) within the Member States.

41 A first criticism is unsurprisingly the diverse implementation models that were adopted in the various Member States. The mandatory nature of the provision has not remedied entirely the possibility for diverging national transpositions. This paper turned to some such discrepancies emerging from the Irish, Bulgarian, and German implementations as case studies. While an ideal implementation comes close to wishful thinking, there are aspects that should have been clear—the quantity of the copied material, the personal scope and the restricted acts all remain blurry leading to confusion.

42 Substantively, the new or revised exceptions are difficult to criticize as they largely reflect justifiable policy decisions. One could take issue with the relatively low threshold of 5 percent for certain reproductions under the Irish Copyright and Related Rights Act and contrast this with the 15 percent permitted under the German Copyright Act. To an extent, these numbers are probably arbitrary, at best, or the outcome of a political bargaining process, at the worst. What precise numbers fail to appreciate are the needs and requirements of educational activities, which might, in many cases, require reproductions of more than a small percentage of a given work—for instance, in the case of media and communication, classics or even copyright law teaching, where reproducing larger chunks is essential to the educational process from both the perspective of the educators and the students. The laws examined reflect concerns in this regard, either by excluding certain types of works from quantitative limitations, or by applying flexible standards that relate to the context of the use, as provided by the revised Bulgarian Copyright Act.[45]

43 A second criticism focuses on Article 5 CDSM's interaction with the old, i.e., analog teaching exception of Article 5(3)(a) of the InfoSoc Directive. Most of the implementations, it seems, maintain differentiated treatments of analog and digital uses. In some cases, the national old provision is broad enough and technologically neutral such as the Bulgarian case, in others, such as in Ireland, the surviving teaching exceptions are limited to specific technological teaching methods. The reality is that nowadays teaching is rarely going to be just offline, or just online. Therefore, coherence when it comes to hybrid teaching and copyright permitted uses is essential. While opinions of educators differ significantly whether digital, hybrid, blended, or otherwise 'modern' teaching methods are 'good' or 'bad', the effects of copyright law on teaching can be severe. The hybrid classroom has opened doors to many disadvantaged groups who could not take part in the education process due to various reasons—from accessibility to caring obligations. In order to maintain this new welcoming and inclusive classroom a reality, the teaching exceptions in the post-pandemic university—offline and online—should talk to each other and work like communicating vessels. Unfortunately, none of the three Member States examined in this article achieve this goal.

45 Lazarova (n 15) 411.