

# Building Castles in the Sand: A Critical Analysis of the EU Nomotechnique Framework for Copyright Protection Online

## Background

Copyright protection in the European Union ('EU'), although consisting of a large number of legislative instruments, remains fragmented.<sup>1</sup> The main building block of that protection is the InfoSoc Directive.<sup>2</sup> This directive can be described as a minimum harmonisation measure with an aim at providing harmonisation of copyright and related rights, not in its entirety, but only aspects of it which are relevant for the functioning of the internal market.<sup>3</sup> However, due to the structure of the copyright regime, when one harmonises property rights in copyright, one needs to harmonise the exceptions and limitations to it, in order to achieve a fair balance between rightsholder's and users interests. In line with that, the InfoSoc Directive provides for one mandatory exception and limitation, and a closed list of optional ones. The main critique of this way of structuring of a legal instrument, is that the aim of harmonisation is not met, since the optional exceptions and limitations have a minimal harmonising character. Member States are free to choose whether and how will they implement them, and without implementation guidelines, have often implemented a narrower scope of copyright protection than was foreseen by the InfoSoc Directive.<sup>4</sup>

Currently, the EU is in the process of adopting the DSM Directive,<sup>5</sup> an updated version of the InfoSoc Directive. It introduces new mandatory exceptions to copyright. For the purposes of this paper education exception will be observed in both instruments, in order to exemplify the difficulties of building a new legal instrument on the basis of one that did not fulfil its purpose.

Against this background, the InfoSoc Directive provides for an education exception as an optional provision, and in the *Cordoba* case it was confirmed that it is on the Member States to define the scope of this exception in the confinement of the criteria stipulated by the InfoSoc Directive's provision.<sup>6</sup> This creates the uneven scope of this exception across the EU, and problematic insofar as the new proposed mandatory exception in the DSM Directive is viewed to be an add-on on the already existing one in the InfoSoc Directive.

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<sup>1</sup>Mireille van Eechoud, Bernt P. Hugenholtz, Stef van Gompel, Lucie Guibault, Natali Helberger, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009) Chapters 1 and 9.

<sup>2</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 (the 'InfoSoc Directive').

<sup>3</sup> Irini Stamatoudi, Paul Torremans, *The Information Society Directives* in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A commentary* (Edward Elgar 2014) p 399.

<sup>4</sup> Christophe Geiger and Franciska Schönherr, 'Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis regarding Limitations and Exceptions' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012) p 139.

<sup>5</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM (2016) 593 final, 2016/0280 (COD) (hereinafter: the 'DSM Directive').

<sup>6</sup> Case C-161/17, *Land Nordrhein-Westfalen v Dirk Renckhoff* ECLI:EU:C:2018:634 para 43.

## Research Question

The main question in this paper is to analyse whether the DSM Directive is capable of achieving the aim of harmonisation through the example of education exception.

This exception was chosen to exemplify the problem of harmonising exceptions and limitations<sup>7</sup>, since it is the most used one, and it affects every person in the EU (be it the provider of educational services or the recipient), that is undergoing primary, secondary, tertiary or any other form of education, offline or online.

## Methodology

Since the legal analysis is based on the EU legal instruments, the overarching method used will be the European legal method.<sup>8</sup> However, in order to analyse the scope of exceptions in national law, comparative legal method<sup>9</sup> will be used to provide understanding on the scale of difference in the employment of this exception.

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<sup>7</sup> See: Thomas Dreier, *Limitations: The Centerpiece of Copyright in Distress*, JIPITEC (2010), p 50-54; Lucie Guibault, *Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC*, JIPITEC (2010), p 55-66.

<sup>8</sup> See: Ulla Neergaard and others, *European Legal Method - Paradoxes and Revitalisation* (Djøf Forlag 2011), Ulla Neergaard and Ruth Nielsen, *European Legal Method - in a Multi-Level EU Legal Order* (Djøf Forlag 2012), Ulla Neergaard and Ruth Nielsen, *European Legal Method - towards a New European Legal Realism* (Djøf Forlag 2013).

<sup>9</sup> Mark van Hoecke, 'Deep Level Comparative Law' in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart 2004) p 165.