



COMMUNIA Policy Paper on fundamental rights as a limit to copyright during emergencies

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Exceptions and limitations to copyright should support education, research and other public interest activities that need to take place remotely during emergencies that fundamentally disrupt the normal organization of society. National copyright laws that do not have flexibility to temporarily adjust to new modes of living imposed by emergencies such as the COVID-19 pandemic cannot be deemed to have properly internalized the fundamental rights enshrined in the EU Charter of Fundamental Rights. In such cases, the rights to freedom of information, freedom of science and education should be relied upon to allow derogations from the exclusive rights. The derogation should have the extent necessary to safeguard activities that either mimic or translate those conducted on the premises of educational institutions, research organizations and cultural heritage institutions, during the periods when the physical premises of those institutions are forced into closure.

Interpreting flexible exceptions in the light of fundamental rights

The EU Directives provide for a number of broad and flexible exceptions and limitations to copyright that, if interpreted in the light of their fundamental rights justifications, would permit the transposition of education, research and other public interest activities from public locations to private homes during government-imposed lockdowns.

The most relevant EU exceptions in this context are:

- a. the “optional” educational and research exceptions and limitations provided for in Article 5(3)(a) of the InfoSoc Directive and in Articles 6(2)(b) and 9(b) of the Database Directive, which are only limited by their purpose, leaving open the beneficiaries, the types of uses, the location, the technological context or the categories of works or other subject-matter covered by the exceptions;

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- b. the mandatory educational exception and limitation provided for in Article 5 of the Copyright in the Digital Single Market Directive (CDSM Directive), which was designed to deal with remote teaching; and
- c. the “optional” public lending exception provided for in Article 6(1) of the Rental and Lending Rights Directive, which covers e-lending.

These exceptions are justified by the fundamental rights to freedom of information, freedom of science and education, foreseen at the EU level, respectively, in Articles 11/1, 13 and 14/1 of the [EU Charter of Fundamental Rights](#)².

According to the Court of Justice of the European Union (CJEU), when interpreting the EU exceptions, courts must strike a balance between copyright and user rights, having regard to all the circumstances of the case and fully respecting the fundamental freedoms enshrined in the Charter³. We argue that, in a lockdown context, that balance would favour the exercise of the fundamental rights to freedom of information, freedom of science and education over the fundamental rights of the author in being able to prevent the use of her work.

Certainly, not every single educational, research or public interest activity carried out without the permission of authors and rightholders would be justified during the COVID-19 pandemic lockdowns. The balancing exercise undertaken by courts, in order to reach an equitable solution for each dispute, requires that the exceptions are interpreted in a way that secures their effectiveness and permits their purpose to be observed⁴, without imposing unjustified harm to the author and rightholder.

We maintain that a balanced interpretation of those exceptions would lead to the conclusion that activities that are equivalent to those conducted on the premises of educational institutions, research organizations and

² Recital 3 of the InfoSoc Directive states that this Directive “relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.” Recital 84 of the CDSM Directive reads as follows: “This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.”

³ The fact that Article 17/2 of the Charter also protects copyright with fundamental rights does not mean that “that right is inviolable and must for that reason be protected as an absolute right” (see e.g. CJEU judgments of 24 November 2011, [Scarlet Extended, C-70/10](#), para. 43; of 16 February 2012, [SABAM, C-360/10](#), para. 41; and of 27 March 2014, [UPC Telekabel Wien, C-314/12](#), para. 61). See e.g. CJEU judgments of 29 January 2008, [Promusicae, C-275/06](#), para. 70; of 16 July 2015, [Coty Germany, C-580/13](#), para. 34; and UPC Telekabel Wien, C-314/12, para. 46.

⁴ See e.g. CJEU judgments of 4 October 2011, [Football Association Premier League, C-403/08 and C-429/08](#), para. 163, and of 3 September 2014, [Deckmyn, C-201/13](#), para. 23.

cultural heritage institutions are allowed remotely at least during periods when those institutions are forced into closure. This would permit, for example:

1. teachers to display works and other subject-matter during a streamed or recorded online class accessible only to the school's students or pupils⁵;
2. librarians and other facilitators to read aloud entire books to children, and display the respective illustrations, during a library's live streamed story-time session⁶;
3. libraries, archives and other cultural heritage institutions to make available, for the purpose of research or private study, to individual members of the public by secure electronic environments copies of works and other subject-matter which are contained in their collections, on the condition that the access occurs on the basis of the one-copy-one-user model⁷; and
4. online lending by libraries, archives and other cultural heritage organizations of digital copies of entire works or other subject matter, on the condition that the lending occurs on the basis of the one-copy-one-user model.

⁵ This activity falls under the broad education exception provided for in article 5(3)(a) of the InfoSoc Directive, and it is also protected under the mandatory digital education exception provided for in article 5 of the CDSM Directive.

⁶ This activity is covered by the broad education exception provided for in article 5(3)(a) of the InfoSoc Directive, which does not limit the potential beneficiaries of the exception and covers any uses for the purpose of "illustration for teaching". Clearly, libraries have an education mission and can benefit from this exception when providing educational services. Reading aloud, insofar as it serves a number of educational purposes [it "models reading skills for students, it equalizes the experience between different leveled readers, and it provides a shared jumping off point for further individual inquiry" (Reading Aloud: Fair Use Enables Translating Classroom Practices to Online Learning by Meredith Jacob et al, available at <https://tinyurl.com/read-aloud-online>)], fits within the scope of the exception. Indeed, although the term "sole purpose of illustration for teaching" is not defined by the InfoSoc Directive, it is now clarified in the CDSM Directive that it should be understood as covering uses that "support, enrich or complement the teaching, including learning activities" (Recital 21).

⁷ We believe that framing this activity within the scope of the education and research exception conforms to the letter of article 5(3)(a) of the InfoSoc Directive and to the spirit of the EU lawmaker when devising the existing list of exceptions. In fact, the exception in article 5(3)(n) of the InfoSoc Directive, which covers similar activities but on dedicated terminals on the premises of those institutions, demonstrates that the lawmaker intended to facilitate access to works and other subject-matter contained in the collection of these institutions for purposes of research or private study. But whereas the wording in article 5(3)(n) covers premises-only access, article 5(3)(a) covers remote access. The suggested conditions are not imposed by the letter of article 5(3)(a). They are inspired by (i) an exception that was specifically designed to deal with online activities, the mandatory exception for digital and cross-border teaching activities provided for in article 5 of the CDSM Directive ("secure electronic environments"), and (ii) the "optional" public lending exception provided for in Article 6(1) of the Rental and Lending Rights Directive (one copy, one user), since the CJEU has already defined the conditions to apply that exception in the with regards to digital copies. We argue that the activity should be permitted, at least, if those conditions are respected.

The activity listed in 4 would fall under the public lending exception, as established in the case-law of the CJEU⁸, whereas the activities listed from 1 to 3 above would fall under the mentioned education and research exceptions and limitations. What we suggest is simply to take full advantage of the flexible wording of the education and research exceptions to allow those activities. We maintain that making use of that breathing space to easily adjust those activities to new and temporary circumstances is not only possible, but it is also *required* to fully respect the fundamental rights enshrined in the Charter.

Applying fundamental rights as an external limit to copyright, in the absence of flexible exceptions at national level

Applying and interpreting the flexible exceptions that exist in EU law in the light of fundamental rights is the only mechanism needed to safeguard most remote research, education and other public interest activities, during emergencies, in Member States that have such exceptions in place. The problem is that no Member State has yet implemented the mandatory exceptions provided for in the CDSM Directive and not every Member State has transposed the “optional” exceptions provided for in the InfoSoc Directive, in the Database Directive and in the Rental and Lending Rights Directive with the same flexibility that is given in those Directives.

In fact, in the majority of Member States of the EU, education and research exceptions and limitations to copyright have not much elasticity. While the EU provisions tend to be drafted in broad and flexible terms, the national provisions are not always technologically neutral; sometimes they are limited to certain physical spaces (the premises of the libraries or schools); other times they have quantity restrictions predefined in the law; or are only for the benefit of specific users (students enrolled in a school’s program, and no other students, or the teaching staff of the school, and no other teachers). Furthermore, the national provisions do not always cover the acts of use needed to perform remote activities (i.e. reproduction, communication to the public and/or making available to the public).

⁸ The CJEU already clarified that the lending of electronic books may be treated in the same way as the lending of traditional books, in its judgment of 10 November 2016, [Vereniging Openbare Bibliotheken, C-174/15](#). According to the court, the concept of ‘lending’ covers “the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user” (para. 54).

This means that, in many Member States, the proposed interpretation would not be consistent with the wording of the national provisions. In other words, if we rely exclusively on the exceptions and limitations to copyright that are expressly prescribed by national laws, the educational, research and public interest activities that need to be performed remotely due to a lockdown measure might not be legal in many Member States without permission from the relevant rightholders. We need therefore to apply, in those Member States, legal mechanisms outside of the national copyright system to reach an equitable solution that fully respects the fundamental freedoms enshrined in the EU Charter of Fundamental Rights.

We assert that if, due to the absence or insufficiency of legislative action, the exceptions and limitations existing in a certain EU Member State have no flexibility to cover educational, research and other public interest activities that take place remotely because of lockdown, the national copyright law cannot be deemed to have properly internalized the fundamental rights enshrined in the EU Charter of Fundamental Rights. Therefore, it should be possible to invoke the rights to freedom of information, freedom of science and education as a limit to the exclusive rights of authors and rightholders. We maintain that courts should apply those freedoms directly⁹ when analysing cases concerning education, research and other public interest activities that take place when educational institutions, research organizations and cultural heritage institutions are closed due to an emergency.

We believe that this position is in line with what is argued by various academics¹⁰ and also with the case law of the European Court of Human Rights (ECtHR). Superficially, this position conflicts with the case law of the CJEU, but the next section explains how it can be reconciled with it.

⁹ The source of law would not be, in that case, the EU Charter of Fundamental Rights, whose application is limited to the EU institutions and bodies and to the Member States (when they implement EU law), but the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or the constitutions of EU member states, from which the Charter draw inspiration. Indeed, the above-mentioned fundamental rights are listed in Article 10/1 second sentence and in Article 2 first sentence of Protocol 1 to the ECHR, as well as in the constitutions of many EU Member States, and these can be applied in conflicts between private persons in the Member States that recognize the horizontal application of those international and national norms that protect fundamental rights.

¹⁰ See e.g. Geiger, Christophe, *Reconceptualizing the Constitutional Dimension of Intellectual Property – An Update* (November 29, 2019). Forthcoming in: P. Torremans (ed.), “Intellectual Property and Human Rights”, 4th ed., Austin/ Boston/ Chicago/ New York, The Netherlands, Kluwer Law International, 2020 ; Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2019-11. Available at SSRN: <https://ssrn.com/abstract=3496779> or <http://dx.doi.org/10.2139/ssrn.3496779>

The case law of the ECtHR and of the CJEU

While the ECtHR has opened the door to the possibility of the fundamental rights laid out in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) being used to limit the exclusive rights of authors and rightholders in copyright infringement cases¹¹, the CJEU rendered in the summer 2019 three judgments where it rejected the possibility of invoking the fundamental rights laid out in the EU Charter of Fundamental Rights as an external limit to copyright, apart from the existing EU exceptions¹².

According to the CJEU, the principles enshrined in the Charter are internalized by the EU law, namely the InfoSoc Directive, which contains in itself the mechanisms (the exclusive rights and the exceptions and limitations to those rights) that allow the interests of rightholders, on the one hand, and the interests and fundamental rights of users and of the public, on the other, to be balanced¹³. This means that whilst Member States (when implementing the rights and exceptions) and subsequently courts (when applying the national provisions that incorporate those rights and exceptions) must ensure consistency with the Charter, they cannot rely on the fundamental freedoms foreseen in the Charter to allow derogations from the exclusive rights that go beyond the exceptions and limitations provided in the Directive¹⁴.

This interpretation assumes that those balancing mechanisms (namely the exceptions) are contained in the legislation that is in place in Member States. However what is the situation when Member States have not (fully) implemented the exceptions that allow the interests and fundamental rights of users, as well as the public interest, to be balanced with the exclusive rights? What is the situation if the exceptions, as implemented, do not fully adhere to the fundamental rights enshrined in the Charter, as mandated by the CJEU?

According to the CJEU, Member States might simply have no discretion as to whether to implement or not the “optional” exceptions that are aimed to observe fundamental freedoms. In other words, those exceptions might be **mandatory** for Member States. The court states that these exceptions “may, or even *must*, be transposed by the Member

¹¹ See the judgments of 10 January 2013 [Ashby Donald v. France, no. 36769/08](#), and of 19 February 2013 [Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden, no. 40397/12](#) (“The Pirate Bay”).

¹² See the judgments of 29 July 2019 [Funke Medien, C-469/17](#); [Pelham, C-476/17](#); and [Spiegel Online, C-516/17](#).

¹³ See [Funke Medien](#), paras. 57 and 58; [Pelham](#), paras. 59 and 60; and [Spiegel Online](#), paras. 42 and 43.

¹⁴ See [Funke Medien](#), paras. 64, 67 and 68; and [Spiegel Online](#), paras 51 and 52.

States”, since those balancing mechanisms “*must* nevertheless find concrete expression in the national measures transposing that directive and in their application by national authorities” (emphasis added)¹⁵.

This judgment is reassuring, but what are the legal solutions to ensure that the fundamental rights enshrined in the Charter are respected while those balancing mechanisms have not yet found full expression in the national law? As we know, the EU Directives can only have direct vertical effect, which means that a EU citizen cannot invoke the EU exceptions in relation to authors and rightsholders, even if they are mandatory for Member States. Can courts apply fundamental rights directly when the transposition of the exceptions has not achieved the level of protection of fundamental rights provided for in the Charter?

The options available to national courts

It is settled in the CJEU case-law that rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of a Member State¹⁶. But the national courts remain free to apply national rules that protect fundamental rights, “provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not compromised”¹⁷.

In our view, the three judgments of 29 July 2019 only negate the possibility of applying national rules that protect fundamental rights insofar as they *extend* the scope of the exceptions and limitations exhaustively set out in EU law. According to the Court, that would endanger the effectiveness of the harmonisation of copyright and related rights laid out by the InfoSoc Directive.

However, if the only way to ensure the balance of interests foreseen by EU copyright law is through the direct application of national standards of protection of fundamental rights, then national courts should be able to resort to those. The CJEU does not seem to negate the possibility of applying rules outside of copyright when those are precisely the legal mechanisms available to ensure the effectiveness of EU law. National courts would just need to ensure that they do not allow derogations from the exclusive rights that go *beyond* the scope of permitted uses foreseen by the existing EU exceptions.

¹⁵ See [Funke Medien](#), para. 58; [Pelham](#), para. 60; and [Spiegel Online](#), para. 43.

¹⁶ See e.g. judgment of 26 February 2013, [Melloni, C-399/11](#), para. 59.

¹⁷ See e.g. [Melloni, C-399/11](#), para. 60.

Finally, it should be noted that allowing uses that go beyond the EU exceptions, while conflicting with the CJEU case law, would still be permitted by the ECtHR case law. The ECtHR accepts that, in exceptional situations, fundamental rights can function as an external limit to the exclusive rights of authors and rightholders, mandating a case-by-case approach. The fact that the CDSM Directive extends the list of exceptions permitted in the EU reveals that the InfoSoc Directive had not exhausted the fundamental rights considerations and that it is still possible to justify new uses under the EU Charter of Fundamental Rights. In other words, to negate in any circumstance a use that extends the scope of existing exceptions on the basis that the principles of the Charter are already *fully* internalized by the EU copyright law does not seem justifiable. Over and above that, it is probably incompatible with the EU treaties and the fundamental rights order in the EU, including the ECtHR case law¹⁸.

Conclusion

In conclusion, we defend that:

- The educational and research exceptions and limitations provided for in Article 5(3)(a) of the InfoSoc Directive and in Articles 6(2)(b) and 9(b) of the Database Directive, and the public lending exception provided for in Article 6(1) of the EU Rental and Lending Rights Directive **are mandatory for Member States, due to the fundamental rights that they internalize**, namely those enshrined in Articles 11(1), 13 and 14(1) of the EU Charter of Fundamental Rights.
- In Member States that have education, research and public lending exceptions in place that follow closely the above-mentioned EU prototypes, **applying and interpreting those exceptions in the light of the fundamental rights to freedom of information, freedom of science and education that they internalize** is the only mechanism needed to safeguard most remote research, education and other public interest activities, during emergencies that fundamentally disrupt the normal organization of society, like the COVID-19 pandemic lockdowns.
- In Member States that do not have education, research and public lending exceptions in place that follow closely the above-mentioned EU prototypes, those activities can only be safeguarded, in the absence of permission from the relevant

¹⁸ See e.g. Geiger, Christophe, op. cit.

rightholders, through the **direct application of national standards of protection of the fundamental rights to freedom of information, freedom of science and education**. In those circumstances, applying fundamental rights as an external limit to the exclusive rights of authors and rightholders does not conflict with the CJEU case-law, provided that the activities allowed do not extend the scope of the above-mentioned exceptions. Resorting to national rules that protect fundamental rights should nevertheless be a patch, not a fix, to ensure the balance of interests foreseen by EU copyright law.

- A balanced interpretation of the fundamental rights to freedom of information, freedom of science and education, on the one hand, and the exclusive rights of authors and rightholders, on the other, would lead to the conclusion that educational, research and other public interest **activities that are equivalent to those conducted on the premises of educational institutions, research organizations and cultural heritage institutions are allowed remotely**, at least during the periods when the physical premises of those institutions are forced into closure due to emergencies that fundamentally disrupt the normal organization of society, like the COVID-19 pandemic lockdowns.

Recommendations

In order to reassure the community of educators, researchers, librarians and archivists in the EU that they are able to legally perform their activities remotely, if their institutions are forced into closure due to an emergency that fundamentally disrupts the normal organization of society, we recommend the Commission to issue guidance to clarify the following:

- The educational and research exceptions and limitations provided for in Article 5(3)(a) of the InfoSoc Directive and in Articles 6(2)(b) and 9(b) of the Database Directive, and the public lending exception provided for in Article 6(1) of the EU Rental and Lending Rights Directive are mandatory for Member States, due to the fundamental rights that they internalize, namely those enshrined in Articles 11(1), 13 and 14(1) of the EU Charter of Fundamental Rights. Further clarify that this interpretation is compatible with the CJEU case-law.


- National rules that protect fundamental rights to freedom of information, freedom of science and education can serve as an autonomous ground to limit copyright and related rights in the Member States that have not fully implemented the above-mentioned exceptions and/or that have not yet implemented the exceptions and limitations provided for in Article 5 of the Copyright in the Digital Single Market Directive, to the extent necessary to ensure the effectiveness of EU law in the national territory, at least during emergencies that fundamentally disrupt the normal organization of society, like the COVID-19 pandemic lockdowns. Further clarify that this interpretation is compatible with the CJEU case-law.

- A balanced interpretation of the fundamental rights to freedom of information, freedom of science and education, on the one hand, and the exclusive rights of authors and rightholders, on the other, permits, at least during emergencies that fundamentally disrupt the normal organization of society, like the COVID-19 pandemic lockdowns, remote educational, research and public interest activities that are equivalent to those conducted on the premises of educational institutions, research organizations and cultural heritage institutions. For example:
 1. teachers displaying works and other subject-matter during a streamed or recorded online class accessible only to the school's students or pupils;
 2. librarians and other facilitators reading aloud entire books to children, and displaying the respective illustrations, during a library's live streamed story-time session;
 3. libraries, archives and other cultural heritage institutions making available, for the purpose of research or private study, to individual members of the public by secured electronic environments copies of works and other subject-matter which are contained in their collections, on the condition that the access occurs on the basis of the one-copy-one-user model; and
 4. online lending by libraries, archives and other cultural heritage organizations of digital copies of entire works or other subject-matter obtained from lawful sources, on the condition that the lending occurs on the basis of the one-copy-one-user model.

About Communia

The COMMUNIA International Association is a network of activists, researchers and practitioners from universities, NGOs, and SMEs established in 10 Member States. COMMUNIA advocates for policies that expand the public domain and increase access to, and reuse of, culture and knowledge. We seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

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