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5 Applications of Limitations and Exceptions in Higher Education in the European Union

Abstract: Copyright law in the European Union (EU) asserts the interests of rightsholders in the internal and digital single markets, balancing them with the legitimate concerns of consumers in their uses of creative output. The balance is struck through a framework of exceptions and limitations to the general economic property right, which has emerged progressively from the EU's legislature and judiciary over the last three decades. The framework is built both on essential international principles and on common practices laid down in more detailed national regimes, refashioned to accommodate emerging technologies and business models. Academic libraries have been adapting to both the everyday shift to digital content and accompanying regulatory changes, ensuring that print and online resources continue to be delivered fairly and efficiently to staff, students and researchers. This chapter focuses on the exceptions and limitations relating to academic libraries in their internal operations, and in the wider use of collections and services within their parent establishments. Particular attention is drawn to the provisions facilitating individual study and research, education practices in group and class environments, library services for users, and collective interventions to manage the remuneration of rightsholders. The more granular approach in national regimes, and the interrelationship with EU law is illustrated through an examination of the detailed system of exemptions operating in Ireland. The chapter concludes with an assessment of potential future developments, with specific regard to academic concerns and practices.

Keywords: Academic libraries; Copyright; Education, Higher; European Union; Fair use (Copyright); Ireland

Introduction

Copyright legislation strikes a complex balance between the rights and interests of creators of works and those who obtain and use them. In the academic context, as in the trade generally, publishers put the main emphasis on how authors and other producers are recognised and remunerated for their output, and on how that output can be effectively organised as property and distributed. The general rights around reproduction, communication and distribution are counterbal-

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anced with public interest exceptions and limitations to vindicate the interests of academic consumers. The earliest iterations of international copyright principles and exceptions were introduced in the Berne Convention of 1886 (Berne Convention 1886), the most recent amended revision of which was settled in 1979 (Berne Convention 1979). The impact of modern communication technologies was addressed in the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 (WIPO 1996) and the concerns of specific users recognised in the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled [hereinafter the Marrakesh Treaty] of 2013 (WIPO 2013).

From the academic user perspective, higher education libraries, and the educational establishments in which they reside, occupy a key position in this balance of interests. They assign substantial financial and human resources, often publicly funded, to the acquisition of information in a variety of formats for research, study, and teaching purposes, and to the storage, circulation, and preservation of information resources. Educational establishments are also, in their own right, direct employers and funders of creators and their works, sometimes acting as publishers themselves, and in other cases as sponsors of open access platforms. Academic libraries in educational establishments are frequently repositories of published memory, not least through legal deposit schemes and historic collections, and they invest heavily in maintaining works for posterity, at considerable cost. Libraries take account of the challenges posed by various formats, and, in more recent times, the issues posed by the emergence of the digital sphere. In recent decades, higher education has had to adapt to the costly business of online distribution of content, accompanied by investment in secure digital infrastructures for mediating access to users.

The European Union was founded in 1957 and has been variously known as the European Economic Community, the European Communities and latterly the European Union. Its highest court has been known as the European Court of Justice and more recently the Court of Justice of the European Union (CJEU). The EU produces three primary types of legislation: the regulation, the directive, and the decision. The main instruments of EU copyright legislation are the directive. They lay down general principles and provisions to be implemented at national level. However, if any provision is sufficiently clear and precise, it can be applied directly. International copyright provisions have changed in response to social and technological developments and been progressively implemented in national regimes, and also in the EU system particularly since the establishment in 1992 of its single market. The Berne Convention as revised has been acceded to by all 27 current EU Member States (WIPO n.d.). The Members are the founding parties of Belgium, France, Germany, Italy and Spain (contracting in 1886); Luxembourg

(1888); Denmark (1903); Sweden (1904); Portugal (1911); Netherlands (1912); Austria, Bulgaria, Finland, Greece, Hungary, Ireland, Poland, and Romania in the 1920s; Cyprus (1960); Malta (1968); and certain successor states of the former Czechoslovakia and Yugoslavia (Croatia, Czech Republic, Slovakia and Slovenia), Estonia, Latvia and Lithuania in the 1990s. The WIPO Copyright and Marrakesh Treaties have been implemented in EU directives and through them executed in the Member State systems.

Since 1993, the EU has adopted laws to support the production and dissemination of copyrighted works in the context of a single market. Its primary method for performing the task is to adopt directives, which lay down provisions which are then implemented in the Member State regimes. There might be divergences between different national regimes but where directive provisions are clear and unambiguous, they must be respected nationally. For instance, the provision in the Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights [hereinafter Harmonisation Directive] (Council Directive 93/98/EEC 1993) harmonised the term of copyright at 70 years and had to be directly implemented nationally.

The principal developments at EU level have essentially been threefold. The first substantial step was the adoption of 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 [hereinafter the InfoSoc Directive] (Directive 2001/29 2001) establishing an outline framework of rights and exceptions to be harmonised in national systems with a view to developing an information society in the EU single market. The InfoSoc Directive resulted in a number of significant cases finding their way to the Court of Justice of the European Union (CJEU), many relating to exceptions and limitations concerning, for instance, compensation for private copying in *Padawan SL v. Sociedad General de Autores y Editores de Espana (*hereinafter *Padawan v. SGAE)* [1] (2010), digitisation of works for user access on terminals in *Technische Universität Darmstadt v. Eugen Ulmer KG* (hereinafter *TU Darmstadt v. Ulmer*)[2] (2014) and the use of hyperlinks in *GS Media BV v. Sanoma Media Netherlands*[3] (2016).

Other cases have developed the concept of exceptions and limitations as a form of user right with fundamental principles being applied to underpin stated lists of exceptions as with *Funke Medien NRW GmbH v. Bundesrepublik Deutsch-*

1 Padawan SL v. Sociedad General de Autores y Editores de España (SGAE) C-467/08 ECLI:EU:C:2010:620.

2 Technische Universität Darmstadt v. Eugen Ulmer KG, C-117/13, ECLI:EU:C:2014:2196.

3 GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, C-160/15. ECLI:EU:C:2016:644.

*land (*hereinafter *Funke Medien)*[4] (2019) and *Spiegel Online GmbH v. Volker Beck (*hereinafter *Spiegel Online)*[5] (2019). The third phase could be characterised as a transition from the InfoSoc Directive listed exceptions approach to a more detailed set of mandatory provisions applying to specific, substantial scenarios as laid out in the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC [hereinafter DSM Directive] (Directive (EU) 2019/790 2019).

This chapter focuses primarily on EU copyright exceptions and limitations as they apply to the operations of higher educational establishments and their libraries. Typically, these entities are involved in teaching and research, on a not-for-profit basis, driven by public interest missions. Of course, the EU exceptions and limitations regime applies to a much broader range of actors, including public libraries, archives, cultural and heritage institutions, public sector entities, media and broadcasting concerns, and producers and distributors of audiovisual works and recognises the wider context of technology, new access models and cross-border uses. However, a substantial proportion of relevant EU provisions is specific to libraries or to their parent institutions and attracts the bulk of attention here.

National copyright provisions are frequently more detailed and relevant to local operational practices. National systems are not discussed in detail. However, the extensive and detailed provisions on copyright and exceptions and limitations in the legislation of Ireland are examined to illustrate the interrelationship of national and international law. The Irish Free State acceded to the Berne Convention in 1927 at a time when it had produced its own limited provisions on copyright as part of a law on industrial and commercial property (Ireland 1929). A standalone copyright act was enacted in 1963 (Ireland 1963), but it was only in 2000 that Ireland adopted a comprehensive regime which incorporated the provisions of the framework copyright EU legislation then at an advanced stage of preparation (Ireland 2000).

Exceptions and Limitations in the International and EU Context

The earliest reference to an exception and limitation in an international context which specifically relates to education is to be found in the Berne Convention

4 Funke Medien NRW GmbH v. Bundesrepublik Deutschland, C-469/17 ECLI:EU:C:2019:623.

5 Spiegel Online GmbH v. Volker Beck, C-516/17 ECLI:EU:C:2019:625.

(1886). Article 8 permitted the "liberty of extracting portions from literary or artistic works for use in publications intended for educational or scientific purposes". The convention went through several iterations until it settled on the text in the Paris Act of 1971. Under Article 10 of the 1971 act, amended in 1979, the exception formulation was extended in Paragraph (2) to "permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice" (Berne Convention 1979). Paragraph (1) also permitted "quotations from a work which has already been made lawfully available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries". In both cases, sources are to be mentioned, including the author if the name appears on the work.

While the convention provides for mutual recognition of the rights of authors of works, and permitted uses, it also introduced in its 1967 Stockholm revision a formulation to enable reproduction exceptions in national regimes, but in a controlled manner, the so-called three-step test. Article 9(2) of the 1967 revision, which is unchanged in the 1979 revised and amended text provides that "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". Contracting States are permitted to introduce specific, limited exceptions which do not subvert the essential rights attaching to a work or its creator.

For the purposes of this chapter, the net contribution of the Berne Convention as revised and amended is to permit countries to provide for reproduction exceptions for users of copyrighted works under strict conditions. It also provides for a specific exception for teaching purposes. National regimes have developed limited exceptions over time to accommodate uses of works. Around the time of the 1967 Stockholm revision, for instance, the now repealed French law no. 57–298 (France 1957) provided in Article 41 for the making of copies for strictly private use, and for short quotes to be used for educational, scientific, or other purposes, among various other exceptions. In Ireland, the defunct Copyright Act, 1963 permitted in Section 12 "fair dealing", uses of copyrighted works for research, private study and criticism or review (Ireland 1963). Fair dealing uses were also permitted for press reporting in print, broadcast, or cinematic form. Other specific uses outside fair dealing terms were listed.

By the time the EU acted to address copyright in light of expanding economic activities in its new single market established in 1992 pursuant to the Single Euro-

pean Act, 1986, there was already a wide range of familiar exceptions and limitations operating in many national legal systems. Early EU directives on copyright addressed specific issues, such as Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs [hereinafter Computer Programs Directive] (Council Directive 91/2501991) which addressed the protection of computer programmes subject to limited exceptions and the previously mentioned Harmonisation Directive establishing of a 70-year copyright term for all Member States (Council Directive 93/98 1993). The introduction by the EU of legislation on computer programmes also found wider international expression in the WIPO Copyright Treaty of 1996 (WIPO 1996) which recognised computer programmes and databases as protected works in Articles 4 and 5, allowing for national exceptions and limitations complying with the three-step rule in Article 10 (WIPO 1996).

The first systematic EU approach to rights and permissible exceptions appeared in 2001 in the InfoSoc Directive. The legislation attempted to provide a framework for exceptions and limitations, listing the full extent of permitted classes which various users of copyrighted works could avail themselves of, with a view to encouraging harmonisation between national regimes over time in order to avoid distortions in the operation of the overall single market. The directive did not intent to create a codified system, but to ensure that any national provisions would conform to the exhaustive list of classes, with further exceptions permitted in pre-existing cases of "minor importance" concerning non-market distorting analogue uses.

The InfoSoc Directive could be described as the EU's first decisive step in staking out its regulatory territory in reconciling the interests of creators and users of copyrighted works. Several disputes arose from the Directive which enabled the CJEU to develop case law on balances of interests of concerned parties, and the impacts of developments in technology and the marketplace. A renewed contribution at international level was made by the Marrakesh Treaty, implemented in turn by the EU. The EU itself independently introduced two further pieces of legislation aimed at resolving identifiable issues in some detail, such as orphan works, text and data mining, and digital and cross-border teaching. The cumulative effect of these developments has been the emergence of a more coherent EU framework of permitted uses of copyrighted works, complemented by a suite of laws mandating obligations and solutions concerning clearly identified types of work or uses of them.

Approaches to Exceptions and Limitations in EU directives

The 2001 InfoSoc Directive – A Framework for Exceptions and Limitations

The intention and approach of the InfoSoc Directive (Directive 2001/29/EC 2001)), is explained in detail in the recitals appearing in the earlier part of the instrument's text. Recitals are preliminary explanatory paragraphs in EU legislative acts designed to assist in the understanding of the legally applicable provisions appearing after them as laid out in the Interinstitutional Style Guide, 2.2(b). They can provide practical context and explain policy considerations. They are not legally binding in themselves although they are, for instance, frequently referred to in, and incorporated into the reasoning of cases at the CJEU.

Recital 31 of the InfoSoc Directive states that there must be a fair balance of rights and interests between rightsholders and users. The balance must take into account digital developments, with an ongoing need to reassess relationships, rights, and exceptions and limitations in light of the "new electronic environment". Although the formulation is two decades old, the injunction to be mindful of developments in digital content and its mediation is explicit. Regarding the academic environment, recital 14 recognises the public interest in promoting learning and culture through permitting exceptions or limitations on the general property rights of authors and performers for the purposes of education and teaching. Recital 32 recognises the specific traditions in Member States and makes clear that the directive respects the way laws on copyright have evolved in various countries, and that the EU approach is iterative and not necessarily intended to introduce a fully codified regime. However, recital 32 asserts a constraint on national autonomy by characterising the directive's list of exceptions and limitations as an "exhaustive enumeration" requiring "coherent application" by the Member States. When read alongside the Berne Convention three-step test formally introduced into the directive by Article 5(5), it becomes clear that national legislators have a "much narrower margin of appreciation to determine their copyright policies" than the largely optional nature of the language in Article 5 might suggest (Sganga 2020, 314).

The Legal Provisions of the Directive Relating to Education and Libraries

Articles 2 to 4 of the InfoSoc Directive specify the rights of authors and performers of creative works, namely rights on the authorisation and prohibition of reproduction, communication to the public, and distribution. The reproduction and communication rights are subject to a lengthy enumeration of exceptions and limitations, formulated to take account of the legitimate interests of users. The Berne Convention three-step-test is incorporated into the directive by Article 5(5) which states that the exceptions and limitations provided for in the article shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter, and which do not unreasonably prejudice the legitimate interests of the rightsholder. Article 5 proceeds to list the classes of exceptions and limitations which can be applied by EU Member States, although only a minority apply to the typical activities of academic institutions. Those that have substantial practical academic application are outlined below in relation to reproductions rights only, and to reproduction and communication rights.

Reproduction Rights

Pursuant to article 5(2), Member States may provide for exceptions or limitations concerning:

- Reproductions on paper or any similar medium, with the exception of sheet music, provided rightsholders receive fair compensation
- Reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightsholders receive fair compensation which takes account of the application or non-application of technological measures, and
- Specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.

The activity class most directly relevant to educational establishments and libraries is "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage", as provided for under Article 5(2)(c). The acts concerned are not themselves specified in the Directive, but as they relate to reproduction, and not access, they are clearly of an internal nature. Academic libraries would understand them to include, for instance, copying for pres-

ervation purposes, or for replacing items missing from their collections. There is no reference to any form of compensation for rightsholders, so there is no need to make financial provision for such activities.

Educational establishments and their libraries need to be mindful of Article 5(2)(a) and (b) "reproductions on paper or similar medium" and of "reproductions on any medium made by a natural person for private use" for non-commercial ends. The provisions are generally applicable and underpin copying to paper in any environment, and all manner of copying, including digital, by individuals. They are clearly distinguishable from Article 5(2)(c) copying by academic libraries for non-commercial purposes including for library users in limited circumstances. However, they can apply in an academic library or educational establishment environment where copying to paper is by persons other than library staff, or where copying in any form is made by an individual for private, non-commercial purposes. Where Member States provide for exceptions or limitations relating to reproductions, they must also make provision for the receipt of fair compensation by rightsholders in relation to such uses of their works. Appropriate compensation is discussed below.

Various copying scenarios have been the subject of case law in the EU. The Article 5(2)(a) "reproductions on paper" category was referred to as the "reprography exception" in paragraph 29 of *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*[6] (hereinafter *Hewlett-Packard v. Reprobel*) (2015). Those affected are not specified and accordingly paragraph 30 stated they "must be regarded as covering all categories of users, including natural persons, whatever the purpose of the reproductions, including those made for private use and for ends that are neither directly nor indirectly commercial". Article 5(2)(b) "reproductions on any medium", the so-called "private copying exception", includes "those made onto paper or a similar medium" and was reinforced in paragraphs 31 and 32 as "not excluding from its scope reproductions effected by the use of any kind of photographic technique or by some other process having similar effects". *Copydan Båndkopi v. Nokia Danmark A/S*[7] (2015) tested the nature of the medium, referring to "DVD, CD, MP3 player, computer, etc" and files from the internet or other sources (paragraph 16). Accordingly, it is clear that the court is prepared to adopt wide interpretations of both users and methods of copying, adapting to new technological means as they arise.

Both the exceptions discussed above cover activities which can be performed in educational establishments concerning works accessed through their libraries, whether for private research or study purposes. The reproductions are subject to

6 Hewlett-Packard Belgium SPRL v. Reprobel SCRL C-572/13 ECLI:EU:C:2015:750.

7 Copydan Båndkopi v. Nokia Danmark A/S C-463/12 ECLI:EU:C:2015:144.

the fair compensation clause. The CJEU has determined that fair compensation is an autonomous concept of EU law to be interpreted uniformly in Member States applying the private copying exception, and "calculated on the basis of the criterion of harm caused to the author" as noted in *Padawan v SGAE*, paragraphs 37, 40 and 42. The interpretation also applies to the reprography exception and all other article 5 exceptions for which fair compensation is required as noted in *Hewlett-Packard v Reprobel*, paragraph 37.

Reproduction and Communication Rights

Article 5(3) of the InfoSoc Directive provides for an extensive list of classes of exception and limitation within which Member States may operate. Only three are of specific relevance to educational establishments and their libraries. The most obvious educational category is Article 5(3)(a) use of material "for the sole purpose of illustration for teaching or scientific research" for a non-commercial purpose. The source must be cited unless this is not possible. Materials may also be used to the "benefit of people with a disability". Such use must be directly related to the disability and to the extent required by the specific disability, and non-commercial in nature (Article 5(3)(b)).

Article 5(3)(n) on "communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals" on their premises is relevant to educational establishments and their libraries, insofar as those acts relate to materials in their collections and no purchase or licensing terms are contravened. The exception would appear to apply to acquired or licensed digital products and to items in a library's collections lawfully digitised locally. The CJEU has ruled that the provision entitles an establishment to digitise a work in its collections to make it accessible through a terminal, on the understanding that the ancillary right does not extend to entire collections. Indeed, Article 5(3)(n) would be meaningless if there was no ancillary right to digitise the works in question. The offer by the publisher of the opportunity to acquire a licence for the publisher's digital version does not override this right as found in *TU Darmstadt v. Ulmer*, paragraphs 30, 43 to 45, 47 and 49.

There are two other uses permitted under Article 5 which may be of relevance to educational institutions and their libraries. They are Article 5(3)(i) "incidental inclusion of a work or other subject-matter in other material" and Article 5(3)(o) "cases of minor importance" already excepted or limited under national law.

Of the remaining exceptions listed in Article 5, four classes of use could be reasonably expected to be invoked by persons from educational establishments in their private capacities outside of direct teaching and research duties, namely

in the course of publishing activities, for quotation for criticism or review, for political speeches or public lectures, or for caricature, parody, or pastiche. Where any activity involves the use of works sourced in the library of an educational establishment, and not for conventional teaching or research purposes, academic or other educational establishment, users need to be mindful of the liabilities which may devolve on them personally for any breaches of copyright, especially of conditions specifically attached to uses such as proper attribution. Libraries themselves are advised to draw to the attention of potential users to the types of reproduction and communication which might fall within academic and non-academic purposes. None of the article 5(3) scenarios makes any specific mention of compensation for rightsholders.

The 2012 Directive on Orphan Works

It is not always possible to identify all rightsholders for a published work. If none of a work's rightsholders can be identified or located, despite a diligent search, the work is considered an orphan work. There are problems for educational establishments and other similar entities in managing and making such works available, particularly through digitisation. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works [hereinafter Orphan Works Directive] (Directive 2012/28/EU 2012) addresses the issues. The recitals in the Orphan Works Directive explicitly refer to large scale digitisation activities and the problems of managing materials for which no rightsholders can be identified or located. They suggest practical approaches on permitted uses of orphan works bearing in mind existing national solutions for digitising out-of-commerce works and recognise the need for due diligence in searching for ownership, recording outcomes in a centralised publicly accessible database, and for a process to vindicate rightsholders should they subsequently come forward, including the ending of orphan status, and compensation for any uses made up to that point. The recitals also recognise the value of not-for-profit entities in managing collections in, for instance, educational establishments, and the need for an exception or limitation to enable public interest work in preserving and providing access to orphan works.

Article 6 of the Directive provides for the right of reproduction and making accessible orphan works by educational establishments and other entities, including digitisation. The use is restricted to public interest missions and specifically for the preservation, restoration, and provision of cultural and educational access to material in the library's collections. The specified uses are primarily non-commercial, although revenue may be generated to cover the costs of digitisation and

making the results available to the public. For as long as a work retains orphan status, no compensation is due to rightsholders. However, if a rightsholder becomes known and puts an end to an orphan status, as is provided for under Article 5, "fair compensation" will be due as determined at a national level.

The directive sets out criteria for searching for rightsholders, provides for authorisation by a rightsholder of use as an effective orphan work, and establishes mutual recognition within the EU. It also requires the outcome of searches determining works to have orphan status to be recorded through Member State offices in a single publicly accessible online database, currently in operation as the European Union Intellectual Property Office (EUIPO) Orphan Works Database.

The Directive features a review clause to facilitate the inclusion of additional matters, most notably photographs and other images, to assess the development of digital libraries, and to permit Member States to notify the Commission of undue interference in national management of rights (Article 10). The review clause arguably suggests that the orphan works regime is to some extent experimental, particularly considering the juxtaposition of a clear property right with a desired public interest outcome. The Directive is founded on non-commercial principles, yet not-for-profit entities must conduct a relatively costly investigative item-by-item search process; fund digitisation activities, storage, and access management systems; and make provision for commercially related compensation should rightsholders subsequently emerge.

The 2017 Directive on Blind, Visually Impaired and Print-Disabled Users

Exceptions and limitations concerning access to materials in accessible formats to blind, visually impaired or otherwise print-disabled persons were extended by Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on Certain Permitted Uses of Certain Works and Other Subject Matter Protected by Copyright and Related Rights for the Benefit of Persons Who Are Blind, Visually Impaired or Otherwise Print-disabled and Amending Directive 2001/29/EC on the harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [hereinafter the Marrakesh Directive] (Directive (EU) 2017/1564 2017) bringing the provisions of the Marrakesh Treaty into force within the EU. The recitals in the Directive refer to the access barriers to books and other printed materials experienced by people who are visually impaired. It is mandatory for the production and dissemination throughout the EU of suitable copies of materials for use by visually impaired people, including from digital

and audio sources in educational establishments and libraries. Where harm to a rightsholder is minimal, no compensation obligation arises.

The provisions of the Marrakesh Directive expand on the reproduction and communication exception for visually impaired users already provided for in Article 5(3)(b) of the InfoSoc Directive. The actors authorised to use the Directive comprise the disabled beneficiary concerned, a person acting on her or his behalf, and "authorised entities". The range of permitted uses is expanded, specifically on the making of copies in accessible formats for visually impaired users and how such copies may be communicated to them, including across borders within the EU. As originally provided for under the 2001 InfoSoc Directive, the use must relate to the disability concerned and to the extent required by it.

The authorisation of the rightsholder concerned for the permitted uses under the Marrakesh Directive is not required. However, the Directive does place obligations on authorised entities when they become involved, reflecting wider distribution capacities, particularly in cross-border lending between entities in the various member states. The obligations include the maintenance of records on works and copies, and the provision of lists of works copied into accessible formats to interested parties and reporting on exchange of copies. The Directive is clear that authorised entities are required to limit such services to visually impaired users and other authorised entities, must take steps to prevent copies entering the public domain, and be accountable in terms of compliance. Finally, under Article 3(6), it is left to each Member State to decide whether it wishes to require authorised entities within its jurisdiction to subscribe to a compensation scheme, and where it does, the scheme must be limited to the terms of the directive. Recital 14 gives substantial guidance, including a statement that any such scheme must not require payment by beneficiary persons.

Additional Exceptions and Limitations Under the 2019 DSM Directive

The DSM Directive (Directive (EU)2019/790 2019), was adopted to take account of developments in digital and cross-border uses of content, with accompanying exceptions and limitations. Two aspects relate to educational establishments.

The first concerns text and data mining (TDM) of lawfully accessed works by a "research organisation", meaning "a university including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research". Secure copying and retention of text and data in digital form are permitted to generate "information". Rightsholders and research organisa-

tions are encouraged to agree on "best practice" in relation to various activities. An exception and limitation provided for by a Member State may be overridden in the case of an express reservation of use of a work by a rightsholder in an appropriate manner with no requirement to compensate the rightsholder.

The second aspect concerns the use of works in non-commercial digital and cross-border teaching activities. An educational establishment is to ensure such uses are at a venue it controls, or in a secure electronic environment accessible only to its students and teaching staff, and that the source is indicated. Works do not extend to materials primarily intended for the educational market or to sheet music where either is easily available on the market. Fair compensation for rightsholders may be provided for. The provision is in stark contrast with the provisions on illustration for teaching or scientific research purposes in article 5(3)(a) of the InfoSoc Directive where citation, but no compensation is required, and to the Berne Convention where fair use of works or quotations for teaching requires only mention of the source or author.

In addition, the DSM Directive provides for two other exceptions and limitations not specifically aimed at educational establishments or their libraries: the preservation of works in the collections of cultural heritage institutions, and cultural heritage projects relating to out-of-commerce works.

Fair Compensation in EU Directives

It is important for academic libraries and their parent establishments to understand the costs that potentially flow to rightsholders from using copyright exceptions and limitations. The two InfoSoc Directive Article 5(2) reproduction exceptions relevant to education establishments and their libraries provide for "fair compensation", as does the Orphan Works Directive where previously unknown rightsholders emerge. The DSM Directive allows Member States to provide for fair compensation for the use of works in digital and cross-border teaching activities. The Marrakesh Directive permits Member States to impose compensation schemes on authorised entities under limited circumstances, but, consistent with Article 5(3)(b) of the InfoSoc Directive, not on users themselves, with no reference to "fair compensation".

As a rule, compensation is not due for the use of the InfoSoc Directive Article 5(3) reproduction and communication exceptions and limitations, for the provision of accessible formats for visually impaired users, or for TDM. In the latter cases, it should be reiterated that the free use of works is conditional on their reproduction only to the extent justified by the authorised act, in a manner that

does not conflict with the normal exploitation of the work, and which does not unreasonably prejudice the legitimate interests of the rightsholder.

Although Articles 5(2)(a) and (b) of the InfoSoc Directive provide for "fair compensation" for resort to the reprographic and private copying exceptions, they contain no criteria to assess the level of compensation, and it has fallen to the CJEU to provide guidance. First, as "fair compensation" is an autonomous concept of EU law, it must be interpreted uniformly in all the Member States that have introduced a private copying exception, as indicated in *Padawan v SGAE* paragraph 37(2010). The concept of private, non-commercial use has been brought into play for both reprographic and private copying even though the criterion is strictly present only in the private copying exception. CJEU case law has determined that as copying on paper is common to both exceptions, the criterion of private, non-commercial use can be used to help assess the level of harm caused to authors in determining the level of fair compensation in the reprography exception. The court made direct reference to the different levels of harm suffered as a result of non-commercial versus commercial use in *Padawan v SGAE*, paragraphs 40 and 42 (2010) and in, *Hewlett-Packard v Reprobel*, paragraphs 41 and 42 (2015).

The manner of the method and calculation is relevant to the practical assessment of fair compensation. In *Hewlett-Packard v. Reprobel*, the court was asked to consider two forms of remuneration, lump sums levied in advance on equipment based on reproduction speed, and a unit price applied to numbers of copies made in real time. The court in *Padawan v. SGAE* acknowledged in paragraphs 46, 48, 55 and 56 the practical difficulties in identifying users, and deemed it more practicable to apply a levy to the persons making the copying equipment available to users, and to pass on the cost of the levy to them. The court in *Hewlett-Packard v. Reprobel* went on to acknowledge in paragraphs 83 to 86 that Member States could introduce systems combining lump sums on equipment and proportional remuneration after the fact so long as such remuneration did not result in overcompensation to the detriment of particular categories of user thereby upsetting fair balance between the interests of rightsholders and users.

In contrast, the delivery of fair compensation in relation to the Article 5(2)(b) of the InfoSoc Directive private copying exception through a particular mechanism in Spain financed from a general state budget was precluded by the court in paragraph 42 of the case of *Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Derechos de Autor de Medios Audiovisuales (DAMA), Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v. Administración del Estado, Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los conteni-*

dos Digitales (Ametic)[8] (2016), on the grounds that the scheme overall was set up in such a way "that it is not possible to ensure that the cost of that compensation is borne by the users of private copies" (paragraph 42).

While it is difficult to ascertain precise quantums of harm and appropriate compensation, the solutions offered by the CJEU are reasonable and point to an approximation of fair balances of interests in which practical technical considerations are applied. The court has inferred solutions from limited legislative guidance, but in doing so has indicated clear paths to arrangements negotiated between interest groups and aligned with legislation and case law.

How compensation is to be effected is largely left to the discretion of national regimes, necessitated by resistance in the preparation of the InfoSoc Directive to the proposed adoption of an EU-wide levy system (Ulmer-Eilfort 2003, 454). The recitals to the InfoSoc Directive provide useful background on how rightsholders are to be compensated for defined uses, including through a licence fee, and through national reprography schemes. Factors to weigh in determining the application of compensation include possible harm to rights, and any prior payment made, such as a licence fee. Where prejudice would be minimal, no obligation for payment may arise. In practice, levies can by imposed on equipment which can be used to reproduce works, at levels which reflect the rate at which reproduction can take place. For instance, Austria, Belgium, Germany, and Sweden have applied equipment levies to copiers and scanners, and Germany to printers (Ulmer-Eilfort 2003, 448–450) assuming that costs will be passed on by operators of the equipment to end users. Costs can be applied directly on a usage basis, although perhaps to do so is administratively impractical. Finally, educational establishments, and other user classes, can enter into licensing arrangements with collection management organisations. Such licences provide an opportunity to administer compensation for various classes of exception and limitation through a single negotiated instrument and are considered in more detail in the following section.

8 Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Derechos de Autor de Medios Audiovisuales (DAMA), Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v. Administración del Estado, Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (Ametic) C-470/14 ECLI:EU:C:2016:418.

Collective Management Organisations

Organisations constituted to represent the interests of authors and other creators of works, and to collect fees on their behalf are arrangements of long standing in EU Member States and known as collective management organisations (CMOs), subject to the provisions of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Use in the Internal Market [hereinafter the Collective Rights Management Directive] (Directive 2014/26/EU 2014). CMOs represent the interests of distinct classes of rightsholders and manage the collection of rights revenues from users of copyrighted works for distribution to the rightsholders subject to the terms of licences negotiated with users. The Collective Rights Management Directive recognises the operation of CMOs at Member State level and provides for national rules for copyright management. The directive does not mandate the creation of CMOs, which is at the discretion of Member States. Neither does it supplant the determination of fair compensation at national level for the application of exceptions and limitations to the reproduction right in Article 5(2) of the InfoSoc Directive.

The Collective Rights Management Directive does, however, lay down essential provisions to be respected by CMOs constituted in the Member States, including membership rules, treatment of non-member rightsholders, CMO/user licences, user obligations and public disclosure. Concerning licences, Article 16 stipulates that they are to be negotiated by CMOs and users "in good faith", with tariffs being "reasonable" and "in relation to economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work". CMOs negotiate arrangements with various sectoral users, including in higher education.

The CMO in the Netherlands is the Stichting Reprorecht/Reprographic Reproduction Rights Foundation which was appointed by ministerial regulation in 1985. §6 Article 15 of the Netherlands *Auteurswet*/*Copyright Act* (The Netherlands 1912) provides mechanisms for the collection by agencies of fees for reprography by libraries and educational institutions. The counterpart organisation in Ireland is the Irish Copyright Licensing Agency (ICLA)) which commenced as a trade entity in 1992, and was established in its current form pursuant to section 149 of the *Copyright and Related Rights Act, 2000* (Ireland 2000). The activities have expanded over the years copying fuller ranges of resources and formats, broadening the range of reprography to include scanning, and facilitating online learning through licensing access to digital resources on virtual learning platforms.

The terms of the licence scheme for higher education institutions are set down by ministerial order in Statutory Instrument No. 277/2020 (Ireland 2020)

which established a scheme for educational establishments covering sections 57, 57A and 57B of the 2000 Copyright Act with respect to illustration for education, teaching or scientific research, distance learning and use of work available through the internet. The terms are clear reflections of the language of Article 5(3)(a) of the InfoSoc Directive and Article 5 of the DSM Directive. The order sets out quantitative limits for the copying of works and uses in courses of study, including through virtual learning environments (VLEs). The terms of the licence override equivalents in the 2000 Act itself, albeit in certain instances more generously, and are binding on the educational establishments concerned.

Lending Information Resources in Educational Establishments

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property [hereinafter Rental and Lending Rights Directive] (Directive 2006/115/EC 2006) requires Member States to provide for a right to authorise or prohibit lending of works, subject to a possible derogation for lending by "establishments which are accessible to the public", broadly understood as public libraries. Where a member state takes up this derogation, remuneration must be provided for authors.

The status of lending by libraries in educational establishments is not specifically addressed. Is educational lending covered by the directive? The reference to public lending in both the recitals and the active legal provisions, and to the provision of "a right" could infer the existence of other rights concerning other forms of lending, of which educational lending is a clear instance. Author rights and exceptions arguably remain within the realm of national legislation operating within the constraints of the Berne Convention, principally the three-step test.

The Case of Ireland

Although general copyright principles and exceptions have existed at the international level for well over a century, and the EU approach has evolved over the last thirty years, exceptions and limitations have tended to be drafted in greater detail at the national level and the copyright regime in Ireland has been chosen to illustrate how one European country has reacted. Traditionally, the Irish legal system is heavily influenced by the common law approach, with copyright exceptions based on fair dealing and other specified limited uses in the United Kingdom

Copyright Act of 1911 (United Kingdom 1911) carried forward into the legal system of the independent Irish state by the *Copyright (Preservation) Act, 1929* (Ireland 1929). A more comprehensive statute was introduced in 1963 (Ireland 1963), which was in turn replaced by the Act of 2000 (Ireland 2000), which forms the basis of current Irish copyright law. The principal legislation in Ireland is the *Copyright and Related Rights Act, 2000* as amended in the Acts of 2004, 2007 and 2019 (Ireland 2004; 2007; 2019). One of the features of the 2000 Act, and the instruments which have amended it since, is the clear influence of EU law. The provisions of the InfoSoc and DSM Directives, to name the most prominent, are closely reproduced in the Irish legislation in substantial detail in the 2000 and 2019 Acts respectively. The 2000 Act was effectively a reworking and augmenting of domestic provisions in light of the draft provisions of the InfoSoc Directive which was at an advanced stage in the EU legislative process. The 2019 Act was a major piece of amending legislation which incorporated the spirit and the letter of the new approaches being introduced by the DSM Directive. While common law principles, such as fair dealing, are still retained in the language of the Irish legislation, they have been progressively overlain by more specific provisions.

Copyright is primarily governed by Part II of the 2000 Act and is characterised as a property right attaching to an owner, section 17(1), being the author creating a work as defined in chapter 2 of the Act, sections 21 to 23. The rights of a copyright owner are set out in chapter 4, the main expression being the exclusive rights of the owner of the copyright in a work having an exclusive right to copy it or make it, or an adaptation, available to the public in section 37(1). "Exemptions" are "acts permitted in relation to works protected by copyright" and schemes for organising them, and are laid out in detail throughout the act. The more typical scenarios found in higher education establishments and their libraries are dealt with in chapter 6 of the Act which describes exemptions in the various classes outlined below. For the sake of comparison, these are categorised where possible under the classes of exception and limitation laid out in EU directives.

Lending and Fair Dealing

By way of preliminary observation, lending of copies of works by educational establishments does not infringe Irish copyright law, section 58 as amended by section 8 of the *Copyright and Related Rights (Amendment) Act 2007*. No provision is made for remuneration. In contrast, lending by public libraries and remuneration due to authors is subject to distinct arrangements made under ministerial regulations from 2008 and 2013 (Ireland 2008; 2013).

Copyright exemptions are introduced through the principle of fair dealing by section 50 of the 2000 Act. Fair dealing is the use of a publicly available work for a purpose and to an extent which does not unreasonably prejudice the interests of a copyright owner. Specifically, the use of copyrighted works is permitted for research or private study. Fair dealing implicitly includes copying on behalf of a researcher or private student but is breached where a librarian exceeds multiple copying limits under section 63, or where another person copies in excess of usage for a single act of research or study. Various changes were made in the *Copyright and Other Intellectual Property Law Provisions Act 2019* (Ireland 2019). Section 12 amends Section 51 which permits fair dealing for the purposes of criticism or review where accompanied by sufficient acknowledgement. The concept of fair dealing appears in other specific scenarios throughout the 2000 Act.

Reproduction and Communication Rights

Where another copy cannot be reasonably purchased, a librarian may copy a work in a permanent collection for preservation purposes (section 65) and undertake copying in a different form for preservation purposes (section 68A). Librarians may make copies of articles and tables of contents from periodicals for supply to a person for the purposes of research or private study subject to quantitative limits (section 61), which are overridden where a section 173 certified licensing scheme is in place (section 57C). Librarians may copy and supply part of a work to a person for the purposes of research or private study (section 62). The extent of the part is not specified and is overridden where a section 173 certified licensing scheme is in place (section 57C). A copy of a periodical article and the whole or part of a work may be supplied between libraries (section 64). A librarian should make reasonable enquiries to obtain consent to do so from a person entitled to authorise copying.

Where another copy cannot be reasonably purchased, a librarian may copy a work in a permanent collection and supply it to replace a lost, destroyed, or damaged work in another library for preservation purposes (section 65).

Copies of works communicated on dedicated library terminals, and brief and limited displays by librarians or in a public lecture in a library are permitted in an amendment to the 2019 Act as fair dealing for education, teaching, research or private study purposes with sufficient acknowledgement (section 69A). Copying and distribution of works for persons with disabilities, including by designated bodies is permitted under section 104 as amended by the 2019 Act. A fixation of a broadcast or cable programme may be made by an educational establishment for its educational purposes, except where a section 173 certified licensing scheme

is in place (section 56). Inclusion in an incidental manner in another work, and copies of same, are not infringements of copyright (section 52).

Orphan Works, Text and Data Mining, Digital and Cross-Border Teaching and Licensing

Various legal changes (Ireland 2014) and sections of the 2019 Copyright Act responded to EU directives and regulations and updated previous provisions. Section 70A of the Act provides for permitted uses of orphan works by educational organisations and other bodies. Such uses include copying, digitisation, preservation, restoration and making output available. Non-commercial computational analysis of a work for research purposes and with sufficient acknowledgement is permitted (section 53A).

Sections 57 to 57B cover a range of uses of works for educational purposes including illustration or reproduction for display, communication for distance education and availability through the internet, again in the absence of a certified licensing scheme.

Licensing schemes are provided for in section 173 of the 2000 Act. Licensing bodies may, subject to ministerial certification, operate on behalf of a substantial representation of rightsholders in a category of works across a wide range of formats. Where so certified, the licence supplants the operation of individual exemptions. Most higher education activities are covered, including education uses, as discussed above.

Future Developments

Full Adaptation of Exceptions and Limitations to Digital Works

In 2001, the EU did not see the need to introduce in the InfoSoc Directive "new concepts for the protection of intellectual property", settling instead for adaptations and supplementations of current law "to respond adequately to economic realities such as new forms of exploitation" (Directive 2001/29/EC 2001, recital 5), and their "harmonisation into a framework" within which action at national level would respond to technical challenges and maintaining the integrity of the EU internal market (recitals 6 and 7). Accordingly, the exceptions and limitations in Article 5 take on the appearance of a classified list of uses from which Member

States are to limit divergences. No attempt was made in the InfoSoc Directive to introduce measures such as quantitative limits, or operational guidance.

However, legislative, and judicial developments since then suggest the EU is responding to changes in technology and publishing, focusing on more specific issues and outlining solutions in substantial detail. For instance, the introduction in 2012 of the Orphan Works Directive was intended to facilitate large-scale digitisation projects by removing the obstacle of not being able to identify rightsholders. Detailed procedural requirements were laid down to regulate the specific problems raised by orphan works. Questions on the success of the Directive aside, the new procedures constituted a clear break with the approach of the InfoSoc Directive.

The Marrakesh Directive built on the 2001 InfoSoc Directive categorisation by providing for an extension of beneficiary rights to include the authorisation of a system for managing reproduction and distribution of relevant works, including by libraries, a broadening of the copying mechanisms for those works, and a recognition of cross-border sharing. The provisions on TDM in the DSM Directive contain conditions on storage purpose and security, and the relationship between stakeholders. On digital and cross-border teaching purposes, the 2001 InfoSoc Directive formula of non-commercial "use for the sole purpose of illustration for teaching" is expanded to include digital uses, subject to provisos on platform security and compliance with specific content licensing constraints.

The CJEU has played a decisive role in the development of the balance of copyright interests. Academic authors have posited the nature of exceptions and limitations as user rights in themselves (Geiger and Izyumenko 2019). This is significant insofar as the clear property right underlying the creation of works has some manner of public interest counterpart where certain freedoms of use are specified. For instance, Geiger and Izyumenko emphasised the judgments of the CJEU in the *Funke Medien* and *Spiegel Online* cases that the exceptions and limitations listed in Article 5 of the InfoSoc Directive in themselves "confer rights on the users of works". The same authors highlighted the ruling of the CJEU in the *TU Darmstadt v. Ulmer* case that the communication or making available of works on terminals under article 5(3)(n) of the InfoSoc Directive extended to the ancillary right to be able to digitise works in collections to this end without the rightsholder's consent (Geiger and Izyumenko 2019), implying that the court may tend towards liberal readings of exceptions in coming years.

What this means for academic libraries is that the transition from print to digital is now understood as a seamless development in EU legislation and case law. The principles applying to print are being translated to digital formats, together with mechanisms to ensure that the extent of access is equivalent in order to protect the economic interests of creators, without prejudicing the legit-

imate public policy interests of users. Contractual opt-outs to limit application in the digital sphere are not being accepted. Accordingly, licences for access to digital content cannot override the benefits of exceptions and limitations for users of works.

Legitimate Exploitation of Digital and Digitised Works

The *TU Darmstadt* v *Ulmer* case discussed above concerned the use of works in an academic context, with the court extending the permission already provided for in legislation for communication through terminals in educational establishments to include the digitisation of print items for that express purpose. The consent of the rightsholder was not required and constituted an acceptance by the court of an equivalence in principle between the exploitation of print and digital formats, a matter of considerable practical interest to academic libraries.

The court encountered the question of the equivalence of print and digital lending in the *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*[9] case. The CJEU was asked to consider whether a copy of an ebook obtained through a licensing agreement could be made available for downloading from the server of a public library in a manner equivalent to a physical loan. The court concluded that there was no decisive ground to exclude lending of digital copies from the scope of the Rental and Lending Rights Directive. The court further noted that recital 4 of that Directive states that copyright must adapt to "new economic developments such as new forms of exploitation", and that lending carried out digitally is indisputably such a new form. Consequently, lending under the Rental and Lending Rights Directive also means the lending of a digital copy, so long as there is equivalence in the manner of access rendering the practice of digital lending to be of similar volume and duration to print access.

The facts of this decision related to a public library operating under a specific Directive which does not refer directly to educational establishments and their libraries. However, the principle of equivalence of print and digital lending is explicitly tied to a generally applicable economic context and suggests that the same reasoning would be applied to lending by academic libraries. The ruling in the *TU Darmstadt v. Ulmer* case suggests furthermore that there are strong grounds to support the contention that under CJEU case law, a copy of a print item in an academic library's collections which has been digitised by the library, as opposed to an item available to it by licence, could be placed on a server for the

9 Vereniging Openbare Bibliotheken v. Stichting Leenrecht C-174/15 ECLI:EU:C:2016:856.

purposes of lending, as long as access volume and duration equivalent to print lending is ensured.

Adjustments to Orphan Works and Out-of-Commerce Rules

The rules applying to orphan works place substantial burdens on educational establishments, including making provision for payments to authors emerging to end an orphan status. This onus on not-for-profit academic establishments puts digital access to holdings such as grey literature, pamphlets, or unpublished materials at risk. Without libraries to preserve such content, orphan work holdings are likely to diminish in real time. Perhaps the provisions on use of such works and compensation could be rebalanced to reflect a public interest role, for instance by permitting access to such materials without the requirement to provide compensation if orphan status is ended.

Going a step further, it has even been suggested that the real problem at the heart of digitisation, not just of orphan works, but cultural heritage more widely is "the lack of a rule that allows digitization for specific purposes, regardless of the right holder's authorization" (Montagnani and Zoboli 2017, 210). The exception and limitation on out-of-commerce works could be applied to other entities. The DSM Directive currently permits cultural heritage organisations to enter into arrangements with collective management organisations to reproduce and distribute such works to the public. It will take some time to ascertain the effectiveness of the provision, but should it prove successful, it may be worth considering extending the same facility to educational establishments for holdings in their libraries, at least for their teaching and research audiences, if not for the public at large.

Open Access

The relationship between authors, publishers and users in the various models of open access are already substantially conditioned by the terms of voluntarily applied creative commons licence conditions, and in the EU context by support for open access in research funding programmes such as Horizon 2020 and the promotion of open science principles in its successor Horizon Europe. Open access and open science are also supported by the European Research Council, for instance through its policy of making access to peer-reviewed outputs funded by it freely available shortly after publication, albeit substantially reliant in turn on the support of institutions and their scholars (Koutras 2018, 47).

Solutions mandated through copyright legislation seem unlikely for the foreseeable future. However, as open access voluntarily but fundamentally alters the economic basis of the relationship between rightsholder and user, there may be grounds to base an exception or limitation on reproduction and communication rights concerning openly published works in terms which are centred on author attribution, at least as a statement of principle.

Conclusion

European Union legislation and case law has brought considerable order to the copyright regimes operating in the Member States, building on the substantial foundations laid by the Berne Convention. Both legislators and judiciary are careful to emphasise that the EU is not attempting to codify laws. However, the EU has evolved its approaches, first to delimit the extent to which exceptions and limitations can be placed on creators' rights, and latterly to propose self-contained solutions to address specific problems, such as for orphan and out-of-commerce works. The EU has also been creative in adapting rules to address real-world changes in the marketplace, for instance in the sphere of digital and cross-border education. In doing so it appears to be concentrating regulatory oversight on large-scale activities with substantial ramifications for interested parties, thereby capturing benefits for creators, and providing orderly mechanisms for users to provide due recognition, protections, or compensation. It will be interesting to see if this specific approach succeeds or not, particularly considering the disruptive potential of open access and scholarship, and the application of creative commons-style permissions.

Accordingly, it is reasonable to assume that for the foreseeable future, academic libraries and their parent establishments will have to contend with the realities of commercial, digital delivery of scholarly and research works, and account for the accompanying creative and publishing rights which have to be protected. It is not a given that the increasing influence of open access will completely supplant this model. Accordingly, the interplay between property rights and exceptions to them will continue to be a subject of legislative and judicial consideration and innovation.

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