Copyright exceptions and limitations for research and education

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Abstract

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From the first written copyright act, widely known as the “British Statute of Anne” (1710), the encouragement of learning and dissemination of knowledge have been the essential means to enhance the mankind’s welfare. Until today, still the main scope of any copyright regime is to provide the necessary initiatives in order to promote creativity and innovation and at the same time to protect fundamental freedoms, such as the freedom of expression.

The main challenge that international copyright system has to face is to find the fine balance between the conflicting interests of all the parties involved. This may accomplished only by the adoption of certain exclusive rights and exceptions or limitations to them, which undoubtedly constitute an integral part of any efficiently functioning copyright system.

All of the international copyright agreements, including for example the Berne Convention, permit countries to introduce into their national legal system certain exceptions and limitations to copyright rights and most countries have accepted this possibility, although in fact they are aiming at different purposes. In general, due to the fact that exceptions are deemed as significant as copyright and related rights, sometimes it is said that exceptions are those which actually create “user rights”.

In the light of the above, the present dissertation is intended as a very brief overview of the legal framework in international, European and Greek context regarding copyright exceptions and limitations and more specific those that relate to research and education. The underlying philosophy of the existence of copyright exceptions in general will be presented and how they are linked to the fundamental right of freedom of expression. Furthermore, there will be a review of the two systems of exceptions and limitations to copyright, as well as the meaning and impact of the three-step test of the Berne Convention and other relative legal texts.

More specific, the exceptions and limitations in the field of research and education are analyzed under the Berne Convention, the Rome Convention, the TRIPS Agreement, the WCT, the WPPT, the InfoSoc Directive and the Greek Copyright Act. Additionally in a distinct section, the present dissertation shall examine what Text and Data Mining (TDM) is and how it is linked with the exception of scientific research under the InfoSoc and Database Directive.

Finally, a short presentation is attempted of the degree of harmonization between the Member States as well as of the very recent effort of the European Commission to promote the modernization of three different fields of copyright law in order to make the EU copyright rules more compatible with the real needs of the Digital Single Market (DSM).

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I. Chapter I: Introduction

1.1 General Remarks

The copyright regime tries to balance the interests between the rights of the authors or other rights holders to have the total control and the economic benefits of their creations on the one hand and the competing interests of the general public to have access to information and the dissemination of knowledge. But first of all, let’s define what copyright is.

Generally speaking, copyright is the author’s right to the original works of his mind expressed in any “perceptible” form, which actually grants two main categories of rights to him: the first category includes all economic rights, which allow him to commercially exploit his work and the second category includes all moral rights, which actually protect the author’s personal interest or bond with his work.

All the economic rights are exclusive rights, (the exclusive rights give the power to the author to take legal action against anyone who infringes his rights leading even to criminal penalties), exist without the need of any formalities and they are also contractually transferable. On the other hand, moral rights apart from being exclusive, (in the sense we explained above), they are, also, absolute rights, simply meaning that they belong exclusively to the author. Furthermore, even though they are not contractually transferable during his lifetime due to the fact that they are linked to his personality, the author may give his authorization to actions or omissions, concerning one particular work. Last but not least, moral rights exist independently of any economic rights following their own distinctive path.

1.2 The underlying philosophy of copyright’s exceptions and limitations.

Copyright law has as main scope the promotion of growth and progress, through the dissemination of existing knowledge and culture for the advancement and further promotion of education, research and culture for the benefit of the society as a whole. Furthermore, it creates the necessary conditions to facilitate the access, use and interaction with the copyrighted work for everyone under certain circumstances, without the need of any further authorization of the copyright owner or the any kind of payment.

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5 Koumantos,G. and Stamatoudi,I, supra note 5, p.72.
The main problem that the copyright system has to confront is that it must reach a compromise regarding the interests of all the parties involved, in an effort to find the desirable balance between the personal interest of the author to enjoy the economic benefits of his creation on the one hand and on the other the public interest to access and use such creations, without the rightsholder’s permission and thus have access to education and information. So, it is evident that the underlying philosophy of the existence of exceptions and limitations to copyright law is mainly based on the belief that copyright is granted to authors by society, in order for the latter to derive cultural or scientific “benefits” from it.\[8\]

Limitations and exceptions to copyright and related rights vary among nations due to many different factors, such as the particular social and economic conditions, which exist each time, the historical and political circumstances which derive from them and the legal jurisdiction concerned. International treaties, such as the Berne Convention, give general directions for their proper implementation, giving to national legislators the ample discretion to decide whether a particular exception or limitation is to be applied and, if so, to determine its exact scope.\[10\] At the national level, each State should take all the necessary measures to introduce into its national legal system exceptions and limitations to copyright infringement, oriented mainly to the balance of conflicting interests.\[12\]

France is the only country that appears to be an exception to the acknowledgement of this balance of interests in favour of society as a whole. French copyright law gives priority to the author’s creative work and the creator himself. According to Desbois,\[13\] “In accordance with French tradition, Parliament has rejected the view that intellectual works are protected by virtue of considerations of opportunity in order to stimulate literary and artistic activity” and that “on the contrary, the French tradition is imbued with individualism”.

1.3 Protection of freedom of expression

The Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights guarantee the fundamental right to freedom of expression, both found in Article 19 of each legal text.\[14\]

Freedom of expression among many other fundamental rights constitutes an integral part, of any society, which desires to be considered democratic.\[15\] At an individual level, freedom of expression constitutes a way to achieve development and fulfillment\[16\] and at a national level constitutes a way to economic, technologic and social improvement.\[17\]

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\[8\] Lepage, A., supra note 6.
\[9\] Firth, A. & Pereira B., supra note 7, p. 6.
\[10\] Lepage, A., supra note 6.
\[12\] Firth, A. & Pereira B., supra note 7.
\[13\] Lepage, A., supra note 6, p.4.
\[15\] Guibault, L., supra note 1, p. 5.
\[16\] Ibid.
\[17\] Supra note 14.
Freedom of expression does not only include the right to speech but also the right in education and research through which anyone can express freely themselves. Given that exclusive rights due to their nature actually put obstacles on the freedom of expression and on the right to information, we realize the reasons why specific exceptions and limitations have been generally recognized in a global scale in the field of copyright law.  

1.4 The systems of exceptions and limitations to copyright

In the first written Copyright Act, widely known as “the British Statute of Anne” (1710), the encouragement of learning and dissemination of knowledge was not only the main driving force for the creation of copyright law itself but has also opened the way for the creation and the establishment of exceptions and limitations.  

Since today, the main challenge that international copyright system is dealing with is to bridge the differences between the conflicting interests of all the parties involved. This may become true only by the adoption of exceptions and limitations to copyright, which undoubtedly constitute an integral part of any efficiently functioning copyright system.

In the following section and in the light of the above, we will first examine the two systems of exceptions and limitations to copyright. The first one concerns open systems and the second involves closed systems.

1.4.1. Open System of Exceptions – the notion of “fair use”

The open system of exceptions and limitations to copyright actually contains only a general “clause” outlining exceptions, according to which a work protected by copyright may be lawfully used, under certain circumstances, without any prior authorization or payment. This simply means that fair use has to be determined on an ad hoc basis, giving to it the advantage of flexibility. However, its main disadvantage is that it is inevitably less precise than an exhaustive list. The most characteristic example of an open system of fair use is the one used by the United States.

The U.S. Copyright Act of 1976, in an effort to codify 150 years of common law case, in Section 107 adopted four non-exhaustive statutory factors, which actually define whether a particular use is fair or not. The first factor concerns “the

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18 Guibault, L. supra note 1, p. 5.
20 Lepage, A., supra note 6, p. 3.
21 Ibid, p. 5.
22 Ibid.
23 Attorney-General’s Department (2005) “Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age Issues Paper”, available at: https://www.google.gr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=27&ved=0ahUKEwj2kornN3QAhXLIrRoKHXC3DKg4FBAWCEowBg&url=http%3A%2F%2Fwww.copyright.org.au%2FFace_prod%2FAsiCommon%2FControls%2FBSA%2FDownloader.aspx%3FiDocumentStorageKey%3D7dbe6c97-6a51-410c-b0d2-462205d03531%26iFileTypeCode%3DPDF%26iFileName%3DAttorney-General&usg=AFQjCN1RMAMxaywS88nKeROp39vHPZyrmQ&sig2=MUB3iZKuXK-RAx5jx-tJg&bvm=bv.139782543,d.d2s&cad=rja, p. 18 [Accessed 15 February 2017]
purpose and character of the use”

25, which in reality examines whether such use is of a commercial nature or for non-profit educational purposes. Where the use is for non-profit educational purposes, there are a lot more chances for Courts to make a positive judgement for the existence of fair use. 26 The second factor concerns “the nature of the copyrighted work” 27. It is believe that a certain use is more likely to be fair, if the copyrighted material is not creative. 28 As regards to the third factor, namely “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” 29, it is undoubtedly that the court will agree on fair use if the amount of the work used is small or insignificant in proportion to the overall work. 30 Finally there is “the effect of the use upon the potential market for or value of the copyrighted work” 31. So, if the court finds that the newly created work is not a substitute product for the copyrighted work, it will be more likely to weigh this factor in favor of fair use. 32 Additionally, in the Act 1976 more explicit statutory exceptions were added (enumerated sections 108 to 122) ranging from library and archive exceptions to educational exceptions. 33 It is worth to be mentioned that these factors are merely illustrative, given that the relative provision provides that “[...]In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include [...]” 34.

The United States Copyright Office, in an effort to resolve any uncertainty concerning the fair use of a work, provides some examples that courts have regarded as fair use, such as “quotations of excerpts in a review or criticism for purposes of illustration or comment”, “quotations of short passages in a scholarly or technical work”, “for illustration or clarification of the author’s observations”, “use in a parody of some of the content of the work parodied”, “summary of an address or article, with brief quotations, in a news report”, “reproduction by a library of a portion of a work to replace part of a damaged copy”, “reproduction by a teacher or student of a small part of a work to illustrate a lesson”, “reproduction of a work in legislative or judicial proceedings or reports”, “incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported”. 35

Finally, we should also mention, that in case of United States, although the open system of exceptions applies, fair use exception is separate from educational and library exceptions. 36

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27 Supra note 25.
29 Supra note 25.
31 Supra note 25.
34 Supra note 25.
35 Attorney-General’s Department, supra note 23, pp 19-20.

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Apart from the open system of exceptions, there is also a closed system, which is not so widespread and will be examined in the following section.

1.4.2. Closed system of exceptions

Civil law copyright systems generally meet the treaty obligations by including specific statutory exceptions into their national laws. Civil law countries, like France, or common law, like England and Ireland, have chosen to adopt this kind of system.

Taking the English law as an example, it can be observed that the Copyright, Designs and Patent Act of 1988 of English Law establishes a series of exceptions to copyright, some of which have to do with criticism, information or educational purposes. When a dispute arises, the courts should interpret these exceptions in accordance with the fair dealing, which is the main tool for assessing their validity.

Additionally, for reasons of further clarification, English courts have determined that their assessment must be made every time ad hoc, taking for example into account the proportion of the work that was used, while ensuring that the used part did not prevent normal exploitation of the work or damage financially the copyright owner.

Thus, fair dealing is similar in spirit to America’s fair use, although it does not restrict in an absolute way author’s rights in contradiction to the latter, considering that its application is linked to certain exceptions.

Additionally, there are international texts, which set certain factors in order to limit the legislative freedom to introduce more exceptions and limitations to copyright and may be appropriate for both closed and open systems.

In the following section, we will examine the three-step test, which is included not only to the Berne Convention but also to other international legal texts.

1.4.3. The Three-Step Test

In order to examine if a certain use of a copyrighted work, without the prior authorization of the author and without any kind of payment, is lawful, the Berne Convention has introduced a test in article 9 par. 2, widely known as the three-step test, which constitutes an integral part of the most national legislations concerning copyright and related rights. Its main purpose is not only to provide flexibility and to adapt to new technological developments but also to limit the legislative freedom

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37 Schwartz, E., supra note 33, p. 3.
38 Lepage, A., supra note 6, p.5.
39 Ibid
40 Ibid
41 Ibid
42 Ibid, p.6.
43 According to article 9.2 of the Berne Convention: “It 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”. 
44 Lepage, A., supra note 6, p.7.
by introducing exceptions and limitations to the author’s exclusive rights and to incorporate its terms into national laws either directly or indirectly. 47 Thus, it serves as a ceiling for courts and regulators to interpret the specific statutory exceptions, as well as a tool for ensuring treaty compliance. 58

Currently, many international legal texts include the three-step test, such as article 9(2) of the Berne Convention, article 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights, article 10 of the WIPO Copyright Treaty (WCT) and finally article 16 of the WIPO Performances and Phonograms Treaty (WPPT). The test 49 is also included in several European Directives. Despite its undeniable importance, there is not to this day today a definition of its terms. In addition, although article 33 (1) of the Berne Convention enables any Member State to recourse before the International Court of Justice for any arising dispute as regards its interpretation and implementation, this provision has never been used. 50

Despite the test’s importance, until today there is only one decision in international level, which in reality deals with the interpretation of the three step test, providing useful guidance not only to legislatures for future legislation, but also to all those who wish to interpret the existing provisions. 51 This decision was taken by the WTO dispute resolution Panel, which analyzed each of the test’s steps over a dispute between the European Union and the United States of America as regards an exception to the right-holders’ copyright in US copyright law (case WT/DS160). 52

For the implementation of the test, three different requirements should be met cumulatively. The first requirement, according to article 9.2 of the Berne Convention, concerns “certain special cases”. The Panel interpreted the notions of “certain”, “special” and “case”. Briefly, the Panel said that the term “certain” means that “an exception or limitation in national legislation must be clearly defined” but “there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularized”. 53 According to the second requirement of the test “[such reproduction] does not conflict with the normal exploitation of a work”. Concerning the aforementioned factor, the Panel said that this factor would be fulfilled “if they [the exceptions or limitations] are confined to a scope or degree that does not enter into economic competition with non-exempted”. Although this provision refers only to reproduction, both article 13 of the 1994 TRIPs Agreement and article 10(1) of the 1996 WCT extended the scope of the aforementioned article not only to all existing exclusive rights but also to any future exceptions that the Member States may introduce into their national laws. 54 Additionally, article 5.5 of the EU Copyright Directive also introduces the three-step test. 55

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47 Griffiths, J., supra note 45.
48 Schwartz, E., supra note 33, p. 3.
50 Ibid
51 Ibid.
52 Ibid.
53 Ibid
54 Ibid
56 According to article 5.5 of the EU Copyright Directive: “The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a
Finally, the third requirement is the following: “[such reproduction] does not unreasonably prejudice the legitimate interests of the author”. According to the Panel’s view, the use of the copyrighted work reaches “an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner”. 56 Additionally, the Panel stated that the phrase “legitimate interests” does not only apply to actual or potential pecuniary interests 57 and that the term “legitimate” is also linked to legitimacy according to the following excerpt: “a more normative perspective, in the context of calling for the protection of interests that are justifiable in the lights of objectives that underlie the protection of exclusive rights”. 58

In any case, the aforementioned views of the Panel are not legally binding for the Member States but they set the general lines for the interpretation of the test, which will undoubtedly influence national courts when making their decisions. 59

Where the “three-step test” has been incorporated in national legal systems, courts are obliged to test the compatibility of existing legislative exceptions with the “three-step test” in any arising case. 60

Chapter II: Exceptions and limitations to copyright for research and education

2.1 General remarks

In the original text of the Berne Convention of 188661 (it is worth mentioning that it has been revised since then five times) using material for educational purposes appeared as an exception to copyright. In the Preamble of the WIPO Copyright Treaty of 1996, also, there is an explicit reference to education, research and access to information by “Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention”. Furthermore, Recital 14 of the EU Directive on Copyright in the Information Society 62 foresees that its main scope is ‘to promote learning and culture by protecting works and other subject-matters while permitting exceptions or limitations in the public interest for the purpose of education and teaching’. 63

Due to the decisive fact that each jurisdiction exercises its judicial discretion according to the social or political circumstances which exist each time and according

normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right-holder.”

56 Firth, A. & Pereira B., supra note 7, p.9.
57 Schonwetter, T., supra note 49.
58 Ibid
59 Firth, A. & Pereira B., Supra Note 7, p.9.
60 Griffiths, J., supra note 45, pp. 1-2.
61 See Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886, as revised at Paris on 24 July 1971 and amended in 1979 [hereinafter, Berne Convention or BC].
to its unique historical background and its public policy principles, it is understood why a uniform framework concerning copyright exceptions and limitations in general and more specific in the field of research and education\(^{64}\) has not yet been established.

Although the main goal of copyright law is to compromise the interests of the parties involved for the benefit of the global community in order to promote the dissemination of knowledge, the means to be chosen are left to the judicial discretion of each jurisdiction.\(^{65}\) This consequently leads to diversity due to the fact that there is a different treatment regarding particular issues among each State. It should be noted that in legislations containing provisions regarding “limitations to rights of authors”, it appears that user rights are of primary importance, while in some others containing provisions regarding “defense to copyright infringement”, it can be concluded that user rights are of less importance.\(^{66}\)

### 2.2 The Berne Convention (1886)

#### 2.2.1. The Teaching exception [article 10 (2)] in the Berne Convention

Although the adoption of exceptions and limitations to the exclusive rights of the copyright owners in the international treaties is relatively recent compared to the fair use in the USA, which originates from 1840,\(^{67}\) the Berne Convention constitutes one of the most important international agreements concerning copyright law and related rights. Even in its original edition at 1886 there was in article 8\(^{68}\) an explicit provision as regards educational purposes, which proved to be really controversial.\(^{69}\)

The aforementioned article, after several years of continuing negotiations and discussions was finally amended and received its current form at the 1976 Stockholm Revision,\(^{70}\) as article 10 (2).\(^{71}\) This article simply draws the outline, leaving the determination of the exempted use of works for teaching purposes to national legislators.\(^{72}\)

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\(^{65}\) Ibid, pp.180-183.

\(^{66}\) Ibid, pp.180-183.

\(^{67}\) Schwartz, E., supra note 33, p. 7.

\(^{68}\) Article 8 of the Berne Convention in its original edition (1886): “With regard to the right to make lawful borrowings from literary or artistic works for publications intended for education or of scientific character, or for chrestomathies, the effect of the legislation of the countries of the Union and of special arrangements existing or to be concluded between them is reserved”.


\(^{70}\) Xalabarder, R., On-line Teaching and Copyright: Public Policy or Market Power? available at: atrip.org/wp-content/uploads/2016/06/Xalabarder.doc p.9 [This presentation has been prepared on the basis of an international research project on “Copyright and Digital Distance Education”, the Universitat Oberta de Catalunya (2002-2003)] [Accessed 15 February 2017].

\(^{71}\) According to article 10(2) of the Berne Convention: “It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, 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 utilization is compatible with fair practice”.

\(^{72}\) Xalabarder, R., supra note 70.
Even in the field of educational or research activities, any unauthorized use of a copyrighted material constitutes an infringement of copyright, unless there is a limitation or exception to it. Based on the assumption that the real common scope of the existence of a number of limitations is aimed at encouraging the dissemination of existing knowledge and information at any field as well the progress of research, it is surprising that, in general, limitations for the benefit of educational and research institutions are not harmonized among Member States.  

It is generally accepted that this article covers only uses within elementary, advanced and distance education, provided that it further leads to an “official” degree. For example, when a program does not lead to an “official degree”, as happens for example in the case of “adult education facilities”, obviously it does not fall under this provision. Moreover, the crucial elements in this article are firstly “by way of illustration [...] for teaching”, which in reality refers to the amount of the work used. More specific, it imposes some limitation, but it does not exclude the use of an entire copyrighted work under certain circumstances.

Secondly, it should be emphasized that the phrase “publications, broadcast or sound or visual recordings”, constitutes an open list and tries to include all available technologies. Another important issue is that the reference to “publications...” has caused much discussion concerning its interpretation, based mainly on the necessity of some kind of fixation. It is evident by the wording of the exception, that it includes teaching compilations (anthologies) only “to the extent justified by the purpose” and “provided such utilization is compatible with fair practice.” This precondition has to be examined each time ad hoc. However, if this provision required some kind of fixation, it would leave out with such an interpretation simple instructional uses, which is real hard to be implemented. Besides, in any case, these

73 Guibault, L., supra note 1, p. 14.
74 The most common limitations to be found in various national legislations (such as in Australia, Chile, Japan, and Mexico) regarding schools or other educational institutions and with respect to scientific research indicatively include:
- “The right to make compilations of only short works or of short passages of works by one and the same author and, in the case of artistic works, photographs or drawings, only a small number of those works, for purposes of teaching;”
- “The right to reproduce parts of works in publications for use as illustrations for teaching, or for the purposes of scientific, literary or artistic criticism, and research;”
- “The right to annotate and collect in any form by those to whom they are addressed, lectures given either in public or in private by the lecturers of universities, higher institutes of learning and colleges provided that no person may disclose them or reproduce them in either a complete or a partial collection without the prior written consent of the authors;”
- “The right to communicate to the public parts of works by broadcasting a radio or television programme made to serve as an illustration for teaching purposes or for scientific research purposes;”
- “The right to perform and display a work in the course of teaching activities;”
- “The right to reproduce a work already made public in questions of an entrance examination or other examinations of knowledge or skill, or such examination for a license”. 
75 Guibault, L., supra note 1, p. 14.
76 Xalabarder, R., supra note 54, p.5.
77 Xalabarder, R., supra note 70, p.9.
79 Xalabarder, R., supra note 70, p.9.
80 Xalabarder, R., supra note 54, p. 6.
82 Xalabarder, R., supra note 54, p. 6.
83 Ibid.
84 Xalabarder, R., supra note 70, p.9.
85 Ibid.
teaching practices fall under article 10 (1) of the Berne Convention, which is also expressly referred to teaching purposes and more particular to exceptions for quotations.  

However the Berne Convention remains silent about exceptions in the digital field, all of which were added in later treaties, notably the WIPO treaties (1996).

2.2.2. Exception for Quotations (Article 10(1) Berne Convention)

The belief that the author does not create ex nihilo and therefore that the creative process is based inevitably on preexisting works originates from the early 19th century and it is valid until today. Among the various limitations to copyright and related rights, which were adopted for safeguarding the user’s freedom of expression, the right to quote is believed to be among the most important.

This right has very broad scope, which extends from scientific and educational purposes to critical and informatory purposes and it is based on Article 10 (1) of the Berne Convention, actually the only mandatory limitation.

Indeed, there are no specific restrictions for the use of quotations concerning neither the category of works nor the amount of allowable quotations. That means that any kind of work falls under this provision and not just certain uses, under the precondition that the works have “already been lawfully made available to the public”. Quotations made as part of any teaching activity, as well as any other kind of work are also included. In this sense, unpublished works and those which are not “compatible with fair practice” and ‘exceed that justified by the purpose’ are inevitably excluded. Furthermore, there is no any restriction for the amount of allowable quotations. Additionally, given that the Berne Convention sets only the general framework, national legislators may set more requirements for the fulfillment of the above criterion. An additional requirement may be, for example, the indication in the quotation of the name of the author and the source of the work.

One of the most important limitations on copyright, especially in academia, is the right to quote due to the fact that an author would not be able to create without the opportunity of making quotations. For instance, according to the German law, someone may reproduce legally not just a part but an entire copyrighted protected work for scientific purposes provided that the author wishes to explain the content of his work.

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86 Ibid.
87 Schwartz, E., supra note 33, p. 7.
88 Guibault, L., supra note 1, p. 6.
89 Ibid
90 According to article 10 (1) of the Berne Convention: “It shall be permissible to make quotations from a work which has already been lawfully made 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”.
92 Ibid.
93 Ibid.
94 Guibault, L., supra note 1, p. 6.
95 Ibid.
96 Papadopoulou, M.D., supra note 91, p.8.
97 Ibid.
Additionally we should bear in mind that quotations should also be compatible with the 'fair practice', in the sense that they are used to support the author’s ideas, to explain or to criticize someone else's work, but not as a substitute for the use of the original work.98

Given that the exception of article 10(1) includes quotations made as part of any kind of work, including teaching activity, as already explained, there is further discussion whether there is a real need for an additional exception concerning teaching purposes, which actually already exists in article 10 (2) of the Berne Convention.99

The answer lies in the following conclusion. The exception for quotations is mandatory, leaving no discretion to Members States whether or not to introduce this limitation into their national laws.100 In contrast, the exception for teaching purposes of article 10(2) leaves ample room for discretion to Member States to decide whether they will apply it or not to their national legislation.101 Additionally, the wording of the exception for quotation requires that “quotations ... in the form of”. This provision sets the requirement that the quoted work should be incorporated into a new work and consequently only some teaching uses would comply with it.

As a result, the two exceptions are complementary to each other, in the sense that under the mandatory exception for quotations fall educational purposes and other teaching uses while those which do not fall under the quotation exception are also included in the teaching exception of Article 10(2) of the Berne Convention.102

2.2 The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (The Rome Convention 1961)

The article 15(1)(d)103 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hence the Rome Convention) actually regulates the limitation of the neighboring rights concerning teaching and scientific purposes in the international legal framework.104 According to this provision, any Member State has the ample discretion not only to introduce into its national law exceptions concerning uses based solely on the purposes of teaching or scientific research but also to limit its scope by putting more requirements and conditions.105

Furthermore, the second paragraph of article 15106 provides Member States with the potentiality to extend the scope of the existing exceptions in literary and artistic

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98 Ibid.
99 Ibid.
100 Ibid.
101 Ibid.
102 Ibid.
103 According to article 15(1)(d) of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations: “1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards: [...] (d) use solely for the purposes of teaching or scientific research”.
104 Papadopoulou, M.D., supra note 91, p.8.
105 Ibid.
106 According to article 15 (2) of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations: “Irrespective of paragraph 1 of this Article,
works to the rights which fall under the protection of the Rome Convention (such as fixation, reproduction and communication to the public), provided they are compatible with it.

Finally, although the term 'teaching' is not further specified in the Convention, it should promote the dissemination of copyrighted material as part of the general educational process, either in schools of all levels or universities.  

### 2.3 The TRIPs Agreement (1994)

The 1994 Agreement on Trade-Related Aspects of Intellectual Property, administered by the World Trade Organization (WTO) obliges all WTO Member States to implement its ‘minimum standards’ relating to all relevant areas of Intellectual Property including copyright and related rights.  

It is real crucial to mention that it further raises the standard for copyright protection beyond the Berne Convention in various different ways, for example by making mandatory the copyright protection for computer programs (software) as well as for compilations of data (databases), by extending the scope of the ‘three step test’ of art. 9 (2) of the Berne Convention to any exclusive right and additionally by including comprehensive obligations with regard to Intellectual Property enforcement.

Article 13 of the TRIPS Agreement uses the formula of the three step test of the Berne Convention with three significant changes. Concerning the exceptions and limitations to copyright, the TRIPS agreement includes just a sole, general provision in article 13, which actually diminishes the Members States’ discretion to impose or maintain limitations to exclusive rights by the implementation of the three-step test. Furthermore, the scope of the three-step test of the Berne Convention is extended to encompass not only the author of a work but any right-holder, and not just the right of reproduction but also all exclusive economic rights. Finally, the fact that the three-step test was incorporated in TRIPs increased its importance by being subject to WTO dispute settlement and sanctions.

The proper implementation of the TRIPS agreement is subject to the rules of the WTO Dispute Settlement Understanding (DSU) which allow WTO Panels or the Appellate Body to rule over the compliance of national Intellectual Property laws with any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention”.

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107 Papadopoulou, M.D., supra note 91, p.8.
110 Goldstein, P., supra note 4, p. 58.
111 According to article 13 of the TRIPS agreement: “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder”.
112 Papadopoulou, M.D., supra note 91, p.8.
113 Kallinikou, D., supra note 2, p. 241.
114 Papadopoulou, M.D., supra note 91, p.8.
TRIPS obligations.\footnote{Ruse-Khan, Henning Grosse, supra note 108, p.577.} This system of dispute settlement is believed to be much more effective than the option of bringing a violation of, for example, the Berne Convention to the International Court of Justice, an option which has actually never been used.\footnote{Ibid.}

Furthermore, articles 41 to 61 set minimum standards as regards the enforcement of intellectual property rights, always in the spirit of finding a balance between copyright-exporting countries, which desire the establishment of ample remedies and countries, which believe that these remedies would improperly impact on the national courts’ decisions.\footnote{Goldstein, P., supra note 4, p. 59.}

\section{2.4 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) 1996}

On December 20, 1996 after three weeks of continuing discussions and negotiations, approximately 120 countries, which had participated in a Diplomatic Conference on certain copyright and neighboring rights, adopted the WIPO Copyright Treaty (hence WCT), relating to copyright together with the WIPO Performances and Phonograms Treaty (hence WPPT), relating to related rights.\footnote{Ibid, p. 32.}

The WCT is a special agreement under the Berne Convention having as its main objective the protection of works and the rights of their authors in the digital environment.\footnote{World Intellectual Property Organization, Summary of the WIPO Treaty (1996) available at: http://www.wipo.int/treaties/en/ip/wct/summary_wct.html [Accessed 15 February 2017].} According to the WCT, computer programs in any form and compilations of data or other material ("databases") also in any form, which fulfil the condition of being intellectual creations, should be protected by copyright.\footnote{Ibid.}

Article 10 of the WCT\footnote{According to article 10 of the WCT: “(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”} actually incorporates the so-called "three-step" test to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention, although extending its application to all rights not just the right of reproduction. According to it and more specifically according to the Agreed Statement concerning article 10, Member States may introduce into their national laws new exceptions and limitations, which may deal with the digital environment, such as digital distance education, under the precondition that they are compatible with the "three-step" test. This precondition is fulfilled when the exceptions and limitations do not conflict with the normal exploitation of the work and do not unreasonably limit the legitimate interests of the author.\footnote{Supra note 119.}

In the light of the above, the contracting states have an ample discretion to insert into their national legal systems new exceptions and limitations to copyright concerning uses of digital distant education and learning according to their priorities
and social needs, although until today very few states used this possibility.\textsuperscript{123} We should, also, mention that although the WCT is the first copyright treaty in the digital technology environment, there is not an explicit teaching exception.\textsuperscript{124}

By considering the wording of the article 10(2) of the Treaty and the relative Agreed Statement, which accompanies it, stating that “[…] Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention”, we first reach the conclusion that when we want to apply the teaching exception of Berne Convention, besides the requirements of this specific article we should also examine that all the requirements of the three step test are met cumulatively and secondly we acknowledge that the real scope of the three step test is to give some guidelines as regards some of the Berne’s provisions.\textsuperscript{125}

Another international treaty in the field of digital environment is the WIPO Performances and Phonograms Treaty (hence WPPT), which deals with the rights of two particular categories of beneficiaries: The first one concerns performers (actors, singers, musicians, etc.) and the second producers of phonograms (natural persons or legal entities that take the initiative and have the responsibility for the fixation of sounds).\textsuperscript{126}

Similar to the WCT the WPPT, in article 16, uses the same formula borrowed from article 9 (2) of the Berne Convention concerning the calibration of limitations and exceptions\textsuperscript{127}. According to article 16 (1) of the WPPT, it’s left to Member State’s discretion to adopt the same kind of limitations concerning the protection of the traditional rightholders of neighboring rights, as they do in their national legal system in relation to the protection of copyright in literary and artistic works\textsuperscript{128}. Once again, the three step test applies to all the possible limitations and exceptions provided for in the WPPT.\textsuperscript{129}

Finally, the Agreed statement concerning Article 16 states: “The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable mutatis mutandis also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.\textsuperscript{130}

Accordingly, the Member States may extend their limitations and exceptions, which are based on the Berne Convention, to the digital environment as well. Additionally, although there is not an explicit exception for teaching purposes, the

\begin{footnotesize}
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  \item \textsuperscript{123} Papadopoulou, M.D., supra note 91, p.8.
  \item \textsuperscript{124}Ibid.
  \item \textsuperscript{125}Ibid.
  \item \textsuperscript{126}Supra note 119.
  \item \textsuperscript{127}According to article 16 of the WPPT: “(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram”.\textsuperscript{128} Papadopoulou, M.D., supra note 91, p.8.
  \item \textsuperscript{129}Ibid
  \item \textsuperscript{130}The text of the agreed statement concerning Article 10 of the WCT reads as follows: “It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”
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Member States may introduce into their national legal system new exceptions and limitations concerning the digital environment and could extend the teaching exception to the networked environment.  

2.5 The Directive 2001/29/EC

2.6.1. Introduction

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, generally known as the Information Society Directive or the InfoSoc Directive, provided a 19 months period to the Member States to introduce it in their national legislation, but only Denmark and Greece met the 22nd December 2002 deadline. Finally, all EU countries adopted the Directive in 2006, but the debate on the InfoSoc Directive continues, and many doubts are raised about the effectiveness of its harmonization and the achievement of its objectives, mainly due to the fact that the final version of the Directive actually gives to Member States the ample discretion to decide if and how they implement the limitations contained in Article 5 of the Directive.

The main aim of the Directive, as implied by its title, is to not harmonize the whole area of copyright and related rights, but only specific aspects of them, which relate to the Internal Market and some of its provisions, in contrary to its title, are also valid in the analogue world.

In a nutshell, the main objectives, pursued by the InfoSoc Directive, as defined in its preamble, include the improvement of the functioning of the Internal Market for copyrighted works and the establishment of adequate incentives to boost the competitiveness of the EU creative content industry in order to “foster the development of the information society in Europe” (Recital 2 of the InfoSoc Directive).

Although the InfoSoc Directive has a very broad scope, it does not deal with several aspects of copyright protection, in the sense that it does not affect the Directives, which exist in the field of computer programmes and databases. Furthermore, the InfoSoc Directive did not adopt a single standard of originality for

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131 Papadopoulou, M.D., supra note 91, P. 8.
137 Ibid, p. 397
139 Ibid, p. 32
all the creative works, as previous Directives on the protection of computer programmes, photographs and databases did in their specific fields of application.\textsuperscript{140} Finally, there is no any specific provision with regard to harmonization measures for the transformative uses, in the sense of translation, adaptation or modification of copyright works.\textsuperscript{141}

Even though the initial purpose of the infoSoc Directive was well-meant, there are two main reasons which led to its failure.\textsuperscript{142} First, the Member States cannot create new limitations and exceptions and they must confine themselves to those which included in the Directive’s list, due to the fact that this list is exhaustive.\textsuperscript{143} Secondly, the Member States have the ample discretion with respect to whether and how they implement all the limitations and exceptions\textsuperscript{144}, apart from the one which is mandatory and provided in article 5(1)\textsuperscript{145}

Additionally, most Member States implement the provisions of articles 5(2) to 5(5) of the Directive in a different way, due to the fact that they interpret them according to their own political and social traditions and not simply reproduce the exact wording of the Directive.\textsuperscript{146}

However, the choice of a directive as a legal instrument is very interesting and controversial, because according to article 288 TFEU, Directives are only binding as to the intended result and by nature leave the choice of form and methods up to the Member States,\textsuperscript{147} in contrary to Regulations, which are binding as to the whole procedure including the form and the methods, which are to be selected and the intended result.

2.6.2. Exhaustive list of limitations

The list of limitations on copyright and related rights provided in Article 5 is exhaustive, according to the Information Society Directive (In Recital 32). That means that the Member States cannot introduce in their national legislation other limitations than those which are already included in the Directive.\textsuperscript{148} However, according to Article 5(3)o), Member States are allowed to adopt further limitations but only under certain circumstances i.e. certain uses of exclusively minor importance. These limitations must already be in existence under national law they only concern analogue uses and finally do not prejudice the free circulation of goods and services within the Community.\textsuperscript{149}

The use of an exhaustive list is generally believed not to be a wise choice, due to many factors, ranging indicatively from the general belief that harmonization does

\textsuperscript{140} Ibid.
\textsuperscript{141} Ibid.
\textsuperscript{143} Kallinikou, D. supra note 2, p. 498.
\textsuperscript{144} Ibid.
\textsuperscript{145} Hilty R.M. & Koklu K., supra note 142, p. 285.
\textsuperscript{146} Guibault, L., supra note 135.
\textsuperscript{147} Geiger, Ch., Schonherr, F., The Information Society Directive (articles 5 and 6(4)], In: Irini Stamatooudi and Paul Torremans, ed. 2014, EU Copyright Law, a Commentary, Elgar Commentaries, Ch.11, p. 446.
\textsuperscript{148} Kallinikou, D., supra note 2, p. 498.
\textsuperscript{149} Guibault, L., supra note135, p. 56.
not necessarily mean uniformity, in the sense that there may be distinctive features in national legislations as long as they do not put obstacles to the internal market to the fact that previous exhaustive catalogues of limitations on copyright and related rights at the international level have consistently failed. Perhaps the most decisive argument against an exhaustive and inflexible list of limitations is that it could not be able to adapt to any technological developments that may appear in the future.

A famous example of the inflexibility of an exhaustive list of limitations on copyright and related rights is the recent case involving the Google Image Search Service. Just in a few words, an artist, who displays her own works in her website, complained that Google had displayed her works as thumbnails whenever her name had been entered as a search term into Google's search engine and brought against Google a copyright infringement case before the German courts. According to the competent court, the reproduction of the images as preview pictures, was not unlawful because Google could interpret the claimant’s actions as consent to the display of her works in Google's image search results, given that the claimant had made the content of her website accessible to search engines and had not made use of the technical possibilities available to her that would have allowed her to exclude her works from being searched and displayed by search engine providers.

Pertaining to the above, it is evident that the German Copyright Act did not foresee and therefore did not include the above mentioned type of activity under the list of exceptions and limitations. This is not surprising, given that the law cannot follow the rapidly evolving technology. Furthermore, it can be concluded that a list of exceptions and limitations on copyright should not be set exhaustive and therefore inflexible but should rather ensure some flexibility in its application, as to adapt to any technological developments that may appear in the future.

2.6.3. Optional character of the limitations

In addition to the mandatory exception for transient or incidental copies, laid down in article 5(1) of the Information Society Directive, there are also in the same article twenty more optional exceptions or limitations. Member States may not provide for any further exceptions other than those enumerated in Article 5, given that the list, as we have already aforementioned, is exhaustive, but at the same time it is also optional, in the sense that they may choose to implement at their ample discretion those they wish according to their legal tradition or social and political background.

This has as a direct consequence, stakeholders to be confronted, in regard to similar situations, with different norms, due to the different implementation of the limitations and exceptions across the various Member States. This kind of policy did not finally have the desirable harmonizing effect.

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150 Ibid, p. 57.
151 Ibid.
152 Case reference I ZR 69/08 – Vorschaubilder of 29 April 2010
154 Ibid.
155 Ibid.
156 Ibid.
157 Guibault, L., supra note 135, p. 56.
158 Geiguer, Ch., Schonherr, F., supra note 147, p. 441.
159 Ibid.
160 Guibault, L., supra note 135, p. 56.
More specific, the article 5(2)\(^1\) of the Directive contains five optional exceptions or limitations to the reproduction right, while the article 5(3) lists 15\(^2\)

\(^1\) According to article 5(2) of the InfoSoc Directive: Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of 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 rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of 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;

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

\(^2\) According to article 5(3) of the InfoSoc Directive: Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author’s name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informative purpose and as long as the source, including the author’s name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informative purpose and provided that the source, including the author’s name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.”
optional exceptions or limitations to both the right to reproduce and the right to communicate to the public or make available to the public. Among the several exceptions listed in this article, there is one specific exception devoted to teaching and research.\(^{163}\)

The article 5(3)(a)\(^{164}\) of the InfoSoc Directive enables Member States to adopt exceptions and limitations to copyright “for the sole purpose of illustration for teaching or scientific research” without commercial purposes.\(^{165}\) According to the article, such uses require, if possible, the indication of the source and the author’s name. Although optional, this exception has been introduced into the national laws by most EU countries.\(^{166}\)

The prerequisites for the application of the aforementioned provision are briefly the following: First, scientific research should be the exclusive purpose of the use, second, the purposes to be achieved should be for non-commercial use and last, the source, including the author’s name, should be indicated. On top of all, the three step test applies.\(^{167}\)

Moreover, there are some more points to be further clarified. First of all, there is a question whether the word illustration is linked just to teaching or to scientific research too. Considering that scientific research is usually an in depth analysis in a structured manner in order to extract data, knowledge and information regarding a specific topic, we can inevitably reach the conclusion that the requirement of illustration applies only to teaching rather than to scientific research.\(^{168}\) Also, an additional argument towards this view can be derived from the wording of art. 6(2)(b) of the database directive, which introduces an equivalent exception and in which there is no mention of the word “illustration”.\(^{169}\) The formulation of Article 5(3)(a) is quite open, giving to the Member states the opportunity for different implementation among them.\(^{170}\)

This limitation concerning the use of works for educational or research purposes is subject to many different interpretations among the various Member States. Some Member States consider this limitation to be a pure exemption while others, treat it as subject to some kind of payment to the right holders.\(^{171}\) Furthermore, in some Member States, this limitation is applied narrowly, while in others, such as in the Netherlands, there is a specific provision which gives permission to educational institutions to make course packs and anthologies for teaching purposes, provided that certain conditions are met.\(^{172}\)

Similarly, in the various national legal systems, there is no a homogenous provision regarding the length of the reproduction from articles and books, that educational institutions are permitted to use as well as the available options to make

\(^{163}\) Xalabarder, R, supra note 54, p. 7.

\(^{164}\) According to article 5 (3)(a) of the InfoSoc Directive: “(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved”.


\(^{167}\) Ibid, p. 273.

\(^{168}\) Ibid.

\(^{169}\) Ibid.


the copyrighted material accessible to students through distance learning networks. Additionally, under Article 5(2)(a), Member States may decide to allow for example only ‘reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the right holders receive fair compensation’. The teaching exception includes the right of reproduction and communication to the public and applies, according to Recital 42 of the Directive to both face to face and distance education.

The Directive grants to Member States the large discretion to introduce into their national legal system or maintain limitations as regards the reproduction or communication of material protected by copyright for the only purpose of illustration for teaching or scientific research, including “the right to record broadcast works for use in the classroom”, “the right to make anthologies of works”, “the right to perform a work in the course of activities of educational establishments” and “the right to reproduce a work for purposes of instruction or examination”.

The real scope of the limitations on educational use to copyright among the Member States is a subject of unending discussions, which focus mainly on what is permissible and what is not under the national laws, which implement the Directive.

The main question is whether the existing legal framework may adapt to the constant technological developments so as to allow educational establishments to be compatible with them, mainly by adopting distance education programs, given that “teaching, learning and research is becoming increasingly international and cross-border, enabled by modern information and communication technologies. Access and use of information is no longer limited to physical space. Therefore limiting teaching and research to a specific location is considered to be contrary to the realities of modern life.”

The exception of Article 5(3)(a) may be an obstacle to the functioning of the Internal Market for what concerns distance learning in general and more specific its cross-border dimension. A problem might arise in this case due to either the diverging transportation of Article 5(3)(a) between Member or by different interpretations by national courts. Given that in e-learning services usually the educational establishment and the student are located in different States, there is always the risk of copyright infringement to occur each time a student follows classes or get access to copyrighted works in a Member State other than the country where

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173 Ibid.
175 According to Recital 42 of the InfoSoc Directive: “[w]hen applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organizational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.”
176 Xalabarder, R., supra note 54, p. 7.
178 Ibid.
179 Ibid.
181 Ibid.
184 Ibid.
the educational establishment is based. 184 So, in the case that a university wishes to organize a multi-territorial e-learning service it is necessary a priori to map the legal framework of each concerned Member State in order to take all the necessary measures to avoid copyright infringement. 185 Thus, any effort for the establishment of cross border e-learning education at the EU level is facing many obstacles. 186 In addition, differences in the implementation of this exception to the area of research activities might have a negative impact on the dissemination of research results as well as on cross-border cooperation in research activities within the EU. 187 The functioning of the European Research Area may be influenced by this, 188 as long as researchers in different Member States can benefit from a different set of exceptions and limitations to copyright and related rights. 189

The Information Society Directive, as finally adopted, provides for a right to “fair compensation” to the right holder for certain of the uses covered by the limitations of Article 5, in the following cases: for reprographic reproduction (Art.5.2(a)), for private copying (Art. 5.2(b)), and for reproduction of broadcast programs by social institutions (Art. 5.2(e)). 190

Additionally, Recital 36 states that “The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation”. According to Recital 35 191, “fair compensation” could be “evaluated by the criterion of possible harm to the right holders resulting from the act in question”. 192 The drafters of the Directive thought that “fair compensation” would bridge the gap between those Member States, which have a levy system that provides for “equitable remuneration”, and those that have so far resisted levies altogether. 193

In some Member States’ legislation, the limitations on copyright have not received the broad scope of the Information Society Directive, given that they did not use the exact wording of the provision but they rephrased it according to each member state’s legal tradition. 194

The result is that Member States have implemented specific categories of the Articles 5(2) and 5(3) in diverse ways, 195 which further led to a variety of different

184 Ibid.
185 Ibid.
186 Ibid.
187 Ibid.
188 Ibid.
190 Guibault, L., supra note 135, p. 56.
191 According to Recital 35 of the Directive 2011/29EC: “In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.”
192 Geiger, Ch., Schonherr, F., supra note 147, p. 471
193 Guibault, L., supra note 135, p. 58.
194 Ibid.
195 Ibid.
rules applicable for the same case across the European Community. As a result many difficulties and obstacles arise as regards the establishment of cross-border services, as for example the conclusion of the necessary licensing agreements per territory, which cost a lot to make this effort worthwhile.\textsuperscript{196} Indeed, if Member States had the obligation to introduce into their national legal system only a minimum level of limitations and exceptions, allowing them to go beyond it if they wish, this would be the first step towards the desirable harmonization.\textsuperscript{197}

After the Green Paper on Copyright in the Knowledge Economy was published, the European Commission began the discussions whether an approach based on a list of non-mandatory exceptions was still sufficient, in the light of evolving Internet technologies.\textsuperscript{198} Furthermore, the Communication gives emphasis on many different exceptions, including those for teaching and research.\textsuperscript{199}

\subsection*{2.6.4. The three step test of article 5(5) of the Directive}

All uses contained in article 5 of the InfoSoc Directive, should in addition comply with the three step test in article 5(5),\textsuperscript{200} which was the outcome of much discussion and criticism, due to the fact that it further restricts the scope of limitations and exceptions to copyright.\textsuperscript{201} According to it, limitations shall only apply in “certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder”.

It is evident that according to the test, the exceptions and limitations should not affect unreasonably the market for the copyrighted protected work. What still remains unanswered is whether national parliaments should treat the test just as a set of mandatory requirements, which actually codify their own national exceptions under their laws or whether national courts should implement the test as a binding text, when they apply the exceptions, deriving from Article 5 of the InfoSoc Directive.

We should, also, mention that in several judgments, the CJEU had the opportunity to clarify that the three step test of article 5(5) of the Directive should not be interpreted broadly.\textsuperscript{202}

\subsection*{2.6.5. Incorrect Implementation of the Information Society Directive}

Given that the InfoSoc Directive does not grant Member States the freedom to legislate autonomously concerning its field of application, the remaining question is whether someone, who believes that his rights have been violated, due to the incorrect implementation of the related exceptions and limitations, has the right to recourse before the national courts of the Member State. The answer is based on Articles 2 to

\begin{itemize}
\item \textsuperscript{196} Ibid.
\item \textsuperscript{197} Hinty R.M. & Koklu K., supra note 142, p. 291.
\item \textsuperscript{198} Guibault, L., supra note 135, p. 60.
\item \textsuperscript{199} Ibid.
\item \textsuperscript{200} Geiger, Ch., Schonherr, F., supra note 147, p. 442.
\item \textsuperscript{201} Ibid.
\item \textsuperscript{202} Renda, A., Simonelli,F., Mazziotti, G., Bolognini, A. and Luchetta, G., supra note 138, p. 32.
\end{itemize}
5, which impose on Member States, well-defined obligations as to the result to be achieved.\textsuperscript{203}

Concerning the proper implementation of the InfoSoc Directive we may take into account, as an example, the opinion of Advocate General Sharpston in Case C-351/12 OSA (14 November 2013),\textsuperscript{204} who finally concluded that an inconsistent with the Directive interpretation of national law is not permissible in the light of the case law.\textsuperscript{205} More specific, she did not come to a direct conclusion what the legal consequences would be,\textsuperscript{206} but she appeared to agree with OSA’s suggestion that this would be disapplication of incorrect national provisions.\textsuperscript{207}

To conclude, Advocate General Sharpston’s opinion stands as a guideline, according to which, the adoption of Directive 2001/29/EC has preempted national initiatives in the area of harmonized exclusive rights and related exceptions and limitations.\textsuperscript{208}

\textbf{Chapter III: Text and Data Mining}

\textbf{3.1. Introduction}

Text and Data Mining (hence TDM) is a research technique, which includes gathering and analyzing knowledge and information from the exponentially increasing store of digital data (‘Big Data’).\textsuperscript{209} ‘Big Data’ focuses on certain words, themes or subject matter with the help of an automated tool.\textsuperscript{210} This technique is useful to researchers in both the public and private sector\textsuperscript{211} and nowadays seems to have been established as an essential tool for research.\textsuperscript{212}


\textsuperscript{204} In points 44 to 46 of the opinion the Advocate General in Case C-351/12 OSA (14 November 2013) argued that “[...] when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and purpose of any relevant directive, in order to achieve the result sought by the directive. That obligation is inherent in the system of the Treaty on the Functioning of the European Union. It enables those courts to ensure the full effectiveness of EU law when they determine disputes within their jurisdiction”. Furthermore she added that “only if such an approach is not possible – for example, if it would lead to an interpretation contra legem – is it necessary to consider whether a relevant provision of a directive has direct effect and, if so, whether that direct effect may be relied on against a party to the national dispute. It will therefore be for the referring court to do whatever lies within its jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, with a view to ensuring that Directive 2001/29 is fully effective and to achieving an outcome consistent with the objective pursued by it”. See in \url{http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CC0351&from=EN}, [Accessed 15 February 2017].


\textsuperscript{206} Rosati, E., supra note 203.

\textsuperscript{207} Ibid.

\textsuperscript{208} Ibid.


\textsuperscript{210} Stamatoudi, I., supra note 166, p. 251.

\textsuperscript{211} Supra note 209.

\textsuperscript{212} Stamatoudi, I., supra note 166, p. 251.
Although many scientific publishers across Europe have recently proposed the use of licensing terms in order to make their own archives easily accessible in an effort to encourage the wider use of TDM, many researchers were opposed to that, due to their belief that these efforts are insufficient. Based on the above scientific publishers’ proposal they argued that ‘the right to read is the right to mine’ and that “effective research demands freedom to mine all public domain databases without additional restriction.”

According to the copyright law, the processing, extraction and copying of the information mined, which actually constitute the prerequisites of the Text and Data Mining are acts which fall within the author’s exclusive and absolute rights and require his prior authorization, as it is not for granted that the aforementioned acts are covered by an exception or limitation under the existing EU legal framework. The arising problems are evident and relate to the fact that such issues have not been properly dealt with when the Information Society Directive was drafted and secondly that EU Law has a closed and not flexible list of exceptions. Among the exceptions, which are relevant to copyright law, is scientific research, as it is provided in the information society Directive and in the Database Directive.


The research exception, based on the article 5(3)(a) of the Information Society Directive, is generally vague and unequally implemented at national level, thus putting some researchers in a disadvantaged position.

Since many issues concerning TDM have not been yet sufficiently clarified, for example whether the existing EU provision on scientific research may fulfill the needs of TDM or whether research should be scientific or not with regard to TDM, a study dedicated exclusively to such issues would provide more information regarding the applicability of the research exception and the impact of the existing legal framework on TDM activities.

It should nevertheless be emphasized that the main issue regarding TDM is based on the fact that research should be the only or at least the main purpose of the mining. Therefore, although the prerequisites for scientific and non-commercial use are distinguishable, they are used complementary for the implementation of this exception.

In addition, article 6(2) of the Database Directive, which is optional, gives Member States the ample discretion to introduce into their national legal system limitations on the copyright owner’s exclusive rights, including the right to make reproduction of a non-electronic database for private purposes and to use it for the only purpose of illustration for teaching or scientific research, provided that the three step test of article 6(3) applies.

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213 Supra note 209.
214 Ibid.
215 Stamatoudi, I., supra note 166, p. 252.
216 Ibid.
218 Supra note 209, pp.50-51.
219 Stamatoudi, I., supra note 166, p. 273.
220 Ibid.
221 Supra note 209, pp. 50-51.
Furthermore, Article 9(b),\textsuperscript{222} which is also optional, recognizes generally the same optional exceptions as Article 6, but limited to the right of extraction, meaning that \textsuperscript{223} in the case of research, is allowed even the substantial extraction of the content of a database.

What needs to be noted here is that in the exception Article 9(b) the word “sole” is missing and therefore we conclude that this exception has a broader scope compared to the exceptions of articles 6(2) and 8(1) respectively. Since the sui generis right is not linked to authorship, as to the indication of the source, the maker of the database should be mentioned.\textsuperscript{224} Another argument refers to the place where the database is found and that it should be additionally mentioned.\textsuperscript{225} The application of Articles 6 and 9 is based on the concept that only a lawful user may benefit from the exceptions of Article 6(1)\textsuperscript{226}, 8(1) and 9, while the Article 6(2) extends to anyone.

The main differences between the InfoSoc Directive and the Database Directive concerning the exception for research and education are briefly the following:

Firstly, the word “Illustration” is absent from the Database Directive. According to what is believed, there is not actually a difference, since this specific term in the Information Society Directive refers exclusively to teaching and not to scientific research.\textsuperscript{227} Secondly, there is no reference in the Database Directive to the author’s name. The leading view seems to be that the term source also includes the term author since a work primarily originates from its author\textsuperscript{228} and secondly that according to the right of paternity, as is enshrined in the Berne Convention, one must include the author’ name in any case.

\subsection{3.2.1. Further Steps}

On May 2015, the European Commission published a communication entitled “A Digital Single Market Strategy for Europe”. According to it, a package of measures should be taken, aiming mostly at reducing or neutralizing the negative effects of disparities in the national copyright laws of the Member States, through the unification of the digital market.\textsuperscript{229} In the light of the above “greater legal certainty for the cross-border use of content for specific purposes e.g. research, education etc through harmonized exceptions would be envisaged.\textsuperscript{230}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{222} According to article 9(b) of the Database Directive: “Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents [...] b. in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved.”
\item \textsuperscript{223} Supra note 209, pp. 50-51
\item \textsuperscript{224} Stamatoudi, I., supra note 166, p. 276.
\item \textsuperscript{225} Ibid.
\item \textsuperscript{226} According to article 6(1) of the Database Directive: “1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.”
\item \textsuperscript{227} Stamatoudi, I., supra note 166, p. 274.
\item \textsuperscript{228} Ibid.
\item \textsuperscript{229} Supra note 209, p. 3.
\item \textsuperscript{230} Ibid.
\end{itemize}
\end{footnotesize}
A few months later, on 9 December, 2015, the EU Commission published another Communication entitled “Towards a modern, more European copyright Framework”. According to the Commission, there are four complementary pillars, in order for copyright law to adapt to technological challenges and become more European and digital-friendly. These four complementary pillars are briefly the following:

a) Ensure wider online access to content across the EU, including the results of the review of the Satellite and Cable Directive.231

b) Adapt exceptions to a digital and cross-border environment, focusing in particular on the exceptions and limitations in the area of education, research - including text and data mining - and access to knowledge, which are the key areas for the effective functioning of the digital single market and the pursuit of public policy objectives.232

c) Create a well-functioning marketplace for copyright-protected content233 and last,
d) Make an effective enforcement system.234

Specifically, in the field of exceptions and limitations, the Commission made the following proposals: 1) to take legislative initiatives, regarding the implementation of the Marrakesh Treaty, by introducing a mandatory, harmonized through EU exception, which will allow for the creation and dissemination of special formats of print material for people with print disabilities across borders.235 2) to make legislative proposals to a) allow public interest research organizations to carry out text and data mining of content they have lawful access to for scientific research purposes,236 b) provide clarity on the scope of the EU exception for "illustration for teaching", and its related application,237 c) provide a clear space for preservation by cultural heritage institutions and/or support remote consultation, in closed electronic networks, of works held in research and academic libraries and other relevant institutions, for research and private study238 and finally d) clarify the current EU exception of the so-called "panorama exception".239

Last but not least, it has to be noted that as regards the possible exception for text and data mining, the definition of both the beneficiaries, i.e. public interest research organizations and purpose i.e. for scientific research purposes is extremely limited.240 This limitation leads inevitably to the underestimation of the transformative potential of these technologies, and consequently puts obstacles to the competitiveness of Europe in this expanding field.241


232 Ibid.

233 Ibid.

234 Ibid.

235 Ibid.

236 Ibid.

237 Ibid.

238 Ibid.

239 Ibid.


241 Ibid, p. 5.
Finally, the Commission has proposed the implementation of the so-called “three-step” test, in the sense that these exceptions shall be applied only in “certain specific cases which do not conflict with a normal exploitation of a work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder”.242

Chapter IV: Exceptions and limitations to copyright according to national Greek law

4.1. General Information

Greece was the first EU member state to incorporate within the timeframes the Directive 2001/29/EC (hence the Directive) into its intellectual legal framework.243 The Greek Copyright Act244 was finally published on March 3, 1993 in the Official Journal of the Greek Government and from that moment on it came into force.245 This Act, by implementing almost all relative provisions of the European directives, supersedes all prior provisions in this field246 and applies cumulatively with other Greek laws, such as the Greek Civil Code, most notably article 281, which prohibits the “abuse” of any right, article 200 on good faith, article 288 on business usages and the Greek Act on Competition.247

4.2. Exceptions and limitations

4.2.1. The mandatory exception

The mandatory exception provided for in Article 5 paragraph 1 of the Directive was implemented by the insertion into law 2121/1993 of a new section 28B248 which actually reproduces the content of the aforementioned original provision by re-phrasing it.249

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243 Ibid.
245 Koumantos,G. and Stamatoudi,I., supra note 3, p. 18.
246 Ibid.
248 According to article 28B of the Greek Copyright Act: “Temporary acts of reproduction which are transient or incidental, which are an integral and essential part of a technological process and whose sole purpose is to enable: a) a transmission in a network between third parties by an intermediary or b) a lawful use of a work or other protected subject-matter, and which have no independent economic significance, shall be exempted from the reproduction right”.
4.2.2. The optional exceptions

Article 81(2) of Law 3057/2002 added three new articles to Law 2121/1993, which were numbered 28A, 28B and 28C. In Greek Copyright Act there are already many exceptions, which are relevant to most of those mentioned in paragraphs 2, 3 and 4 of the article 5 of the Directive, such as the use for the sole purpose of illustration for teaching (Art. 5 par. 3 letter a of the Directive corresponding to section 21 of law 2121/1993 entitled “Reproduction for Teaching Purposes”), quotations for criticism or review to the extent required by the specific purpose (Art. 5 par. 3 letter d of the Directive corresponding to section 19 of law 2121/1993 entitled “Quotation of Extracts”), use during official celebrations (Art. 5 par. 3 letter g of the Directive corresponding to section 27 of law 2121/1993 entitled “Public Performance or Presentation on Special Occasions”) and use in anthologies used for teaching purposes and in school textbooks (section 20 of law 2121/1993 entitled “School Textbooks and Anthologies”).

Finally, the three step test included in the new article 28C entitled “Clause of general application concerning the Limitation”.

4.3. Greek Copyright Act 2121/1993

4.3.1. Article 19: Quotations of Extracts

The dissemination of knowledge and the free exchange of opinions, through which the scientific progress and dialogue among the members of the global community is promoted, is closely linked to the lawful right to quotation, which is the only mandatory limitation under the Berne Convention, based on article 10 (1).251

The exception of quotations of extracts, under Greek Copyright Law, is based on article 19. According to this article, there are some prerequisites that should be met cumulatively, namely, the quotation should be made only for the purpose of supporting the author’s work or the critique, extracts should be short and not exceed beyond their purpose, the work should be lawfully published and in any case in accordance with fair practice.252

In the light of the above we reach the conclusion that entire works or even longer extracts do not fall under this provision, unpublished works are not included and finally the quotation should be accompanied with an indication of the source of the extract and of the names of the author and of the publisher, if possible.254

As regards exceptions for research purposes, there is no explicit provision in Greek Copyright Act, but it is generally accepted that it can be based on the general

251 According to article 10 (1) of the Berne Convention: “It shall be permissible to make quotations from a work which has already been lawfully made 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”.
252 Art. 19 of the greek copyright law 2121/1993.
253 Kallinikou, D., supra note 2, p. 245.
254 Supra note 252.
exception for quotations in article 19.\textsuperscript{255} Third parties should be informed about the exact origin of an extract by a note, which should include at least the author’s name, the work’s title, the exact page and the publisher’s name, whether it is a natural person or a legal entity.\textsuperscript{256}

Furthermore, it is generally accepted that bibliographic references in a written scientific work do not fall under the scope of protection of copyright,\textsuperscript{257} mainly due to the fact that scientific progress is inevitably based on preexisting works, which cannot be expressed in an original way.\textsuperscript{258}

### 4.3.2. Article 20: School Textbooks and Anthologies

From the wording of article 20 par. 1 of the Greek Copyright Act\textsuperscript{259} we reach the conclusion that reproduction is being permitted exclusively by means of printing of small extracts of the whole production of one or more authors of literary works in textbooks only for primary or secondary education, which are approved by the Ministry of Education and Religious Affairs or other competent Ministry.\textsuperscript{260} In these cases neither the consent of the author is required nor any kind of payment. Consequently academic books for higher education, teachers’ books and students’ companions do not fall under this exception.

Furthermore, according to the second paragraph of article 20 of the Greek Copyright Act\textsuperscript{261}, it is concluded that the law allows the reproduction of an author’s works posthumously in a lawful published anthology of literary works of more than one writer, without the consent of the rightholders and without any kind of payment provided that the aforementioned reproduction constitutes only a small part of the total output of each of the writers.

The last paragraph is based on article 10 par. 2 of the Berne Convention and therefore on the three-step test.

Finally, it is interesting that only few States have introduced into their national legal system an explicit provision, according to which the establishment of educational publications is permitted.\textsuperscript{262}

### 4.3.3. Article 21: Reproduction for teaching purposes


\textsuperscript{256} Ibid, p. 19

\textsuperscript{257} Ibid, p. 20

\textsuperscript{258} Ibid, p. 20

\textsuperscript{259} According to article 20 par. 1. of the law 2121/1993: “The reproduction of lawfully published literary works of one or more writers in educational textbooks approved for use in primary and secondary education by the Ministry of National Education and Religions or another competent ministry, according to the official detailed syllabus, shall be permissible without the consent of the authors and without payment. The reproduction shall encompass only a small part of the total output of each of the writers. The provision is applicable only as it concerns the reproduction by means of printing”.

\textsuperscript{260} Kallinikou, D., supra note 2, p. 248.

\textsuperscript{261} According to article 20 par. 2 of the Greek Copyright Act: “After the death of the author it shall be permissible to reproduce his works in a lawfully published anthology of literary works of more than one writer, without the consent of the right holders and without payment. The reproduction shall encompass only a small part of the total output of each of the writers”.

\textsuperscript{262} Melliou, K., supra note 255, p. 25.
Article 21 of the Greek Copyright Act, in conformity with the exception of article 5(3)(a) of the Directive which is devoted to teaching uses, permits the reproduction, without the prior authorization of the author and without any kind of payment, of short extracts of a work or parts of a short work or a lawfully published work of fine art work exclusively for teaching or examination purposes at an educational establishment. This provision is in accordance not only with the aforementioned purpose but also with morality and the three-step test, provided that the source and the names of the author and publisher appear on the source, if possible.

4.3.4. Article 22: Reproduction by Libraries and Archives

Article 22 of the Greek Copyright Act allows nonprofit libraries or archives to reproduce copyrighted protected works, provided that an additional copy cannot be obtained as happens in cases that it has been lost or damaged and is no longer available in the market. In this case, the prior authorization of the author or any kind of payment is not required. The underlying philosophy of this exception is actually based on the interests of the general public.

In order to examine if a particular reproduction of a copyrighted work is lawful, we should take into account the following key elements, which should be met cumulatively: a) it should be made by a non-profit library or archive, b) the work should belong to a copy of the work already existing in their permanent collection, c) the reproduction should have as a main goal to retain that additional copy or to transfer it to another non-profit library or archive, and finally d) reproduction of the library or archive is deemed necessary since there is no another way to obtain an additional copy from the market promptly and on reasonable terms.

At this point, we should emphasize the legislator's decision not to elaborate upon libraries right for reproduction of a copyrighted work during the process of the transposition of Directive 2001/21/EC into Greek Copyright Act. This issue actually is left to the national judge of the case through the implementation of the provisions of article 18 of Law 2121/1993 and the meaning of the three-step-test.

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263 According to article 5(3)(a) of the Directive 2001/29/EC: “[Member States] exempt any: ‘use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.’”

264 Koumantos, G. and Stamatoudi, I., supra note 3, p. 93.

265 Melliou, K., supra note 255, p. 23

266 According to article 22 of the Greek Copyright Act: “It shall be permissible, without the consent of the author and without payment, for a non-profit-making library or archive to reproduce one additional copy from a copy of the work already in their permanent collection, for the purpose of retaining that additional copy or of transferring it to another non-profit-making library or archive. The reproduction shall be permissible only if an additional copy cannot be obtained in the market promptly, and on reasonable terms.”


268 Ibid.

269 Ibid.

270 Ibid.
4.3.5. Article 27: Public Performance or Presentation on Special Occasions

Article 27 (b) of the Greek Copyright Act does not contain a strictu sensu educational exception. In this provision the term ‘educational establishment’ includes private or public institutions and does not determine the level of education, which could be any. Additionally, the necessary prerequisite in order for this provision to be applied is that the audience should be composed exclusively of parents of pupils or students, persons who are responsible for the care of pupils or students, or persons directly involved in the activities of the educational establishment, namely persons that are connected directly to the educational activities of the said establishment. In this case, as applies in all exceptions, the prior authorization of the author and any kind of payment is not required, provided that it is compatible with the three step test. The underlying philosophy of the above mentioned exception is also based on the need for the promotion of the general public’s interests.

4.3.6. Article 28A: Reproduction for the Benefit of Blinds and Deaf-mute

In 2002 a new article was introduced into the Greek Copyright Act, numbered 28A and entitled “Reproduction for the Benefit of Blinds and Deaf-mute” in compliance with the EU Directive 2001/29. Since then, although there was the need for a provision to regulate the upcoming cases, no such exception had existed in Greek law.

This article incorporates the three criteria found in article 5 paragraph 3 b of Directive 2001/29 and applies only to uses for the benefit of Blinds and Deaf-mute. These uses should be a) directly related to the disability, b) of a non-commercial nature and c) to the extent required by the specific disability. Also, this provision provides for the possibility of future extensions for the benefit of additional categories of disabled people.

Last but not least, the necessary Resolution of the Minister of Culture for the implementation of this exception, enacted in 24 October 2007. The Ministerial Order extended the present exception to all persons with substantial reading disabilities. Apart from the existence of this specific provision, such cases could fall

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271 According to article 27 (b) of the Greek Copyright Act: “The public performance or presentation of a work shall be permissible, without the consent of the author and without payment on the following occasions: […] b) within the framework of staff and pupil or student activities at an educational establishment, provided that the audience is composed exclusively of the aforementioned persons, the parents of the pupils or students, persons responsible for the care of the pupils or students, or persons directly involved in the activities of the establishment”.

272 Kalliniou, D., supra note 2, p. 252.


274 Kalliniou, D., supra note 2, p. 252.

275 According to article 28A of the Greek Copyright Act: “The reproduction of the work is allowed for the benefit of blinds and deaf-mute, for uses which are directly related to the disability and are of a non-commercial nature, to the extent required by the specific disability. By resolution of the Minister of Culture the conditions of application of this provision may be determined as well as the application of this provision for other categories of people with a disability”.


277 Ibid.

278 Kalliniou, D., supra note 2, p. 273.


280 Koumantos,G. and Stamatoudi,I., supra note 3, p. 95.
under the article 281 of the Greek Civil Code, which prohibits the “abuse” of any right.281

4.3.7. Article 28C: Clause of General Application concerning the Limitations

Article 28C of the Greek Copyright Act282 actually incorporates the three-step test. It should be underlined that all limitations provided for in Section IV of the Greek Copyright Act (namely articles from 18 to 28B) may only be applied in certain cases and always be interpreted in compliance with the three step test, as it sets out in article 9 of the Berne Convention.283

Briefly, this test prohibits exceptions to the reproduction rights in cases where they “conflict with the normal exploitation of the work or other protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.284 These two factors should be met cumulatively.285

Chapter V: Modernization of Limitations and Exceptions in EU Copyright Law

On 14 September 2016, the European Commission presented a so called legislative “package”, which consists of two directives287 and two regulations288, in order to make the EU copyright rules more compatible with the real needs of the Digital Single Market (DSM), given that digital technologies arise and create new types of uses, which are not fully covered by the current legal framework. In the light of the above, the existing rules on exceptions and limitations should be reassessed in order to achieve a fair balance between the interests of authors or other rightholders and of users.289 Furthermore, we should bear in mind that these exception and

281 Kallinikou D., supra note 2, p. 274.
282 According to article 28C of the Greek Copyright Act: “The limitations provided for in Section IV of Law 2121/1993, as exists, shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”.
283 Koumantos,G. and Stamatoudi,I., supra note 3, p. 92.
284 Kallinikou Dionysia, supra note 2, p. 277.
285 Koumantos,G. and Stamatoudi,I., supra note 3, p. 92.
286 Kallinikou, D., supra note 2, p. 277.
287 Namely a draft Directive entitled “on copyright in the Digital Single Market” and a draft Directive entitled “on certain permitted uses of 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 harmonization of certain aspects of copyright and related rights in the information society”.
288 Namely a draft Regulation entitled “laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes” and a draft Regulation entitled “on the cross-border exchange between the Union and third countries of accessible format copies 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”.
limitations are in any case a national matter and therefore legal certainty around cross-border uses is not guaranteed.\textsuperscript{291}

The main scope of the European Commission’s legislative “package” was to promote the modernization of three different fields of copyright law, namely the online access to content in the European Union (EU), a review of copyright exceptions in the digital and cross-border environment and reinforcing the functioning of the copyright-related marketplace\textsuperscript{292} by adopting a set of certain measures. This legislative “package” included, among others, a draft Directive entitled “\textit{on copyright in the Digital Single Market}”.

In the explanatory memorandum of the above mentioned draft Directive concerning the exceptions and limitations to copyright and neighbouring rights, three new areas of intervention have been presented, given that the existing exceptions and limitations are optional and are not clearly covered: the first one includes a mandatory exception for digital and cross-border uses in the field of education, which covers digital uses undertaken in the context of illustration for teaching with the flexibility for Member States to make it subject to the availability of adequate licenses\textsuperscript{293}, the second introduces an exception for text and data mining applicable to the field of scientific research purposes within organizations acting in the public interest (e.g. universities, research institutes) and finally the third exception concerns the preservation of cultural heritage by cultural heritage institutions.\textsuperscript{294}

Further, according to article 4 of the aforementioned proposal entitled “\textit{Use of works and other subject–matter in digital and cross–border teaching activities}”, Member States shall provide for an exception or limitation, which allows educational establishments for the digital use of works and other subject-matter for illustrate teaching, and to the extent justified by the non-commercial purpose to be achieved.\textsuperscript{295} However, the change is still limited and, according to the wording of the article 4, subject to the condition that such use is conducted on “the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment’s pupils or students and teaching staff” and that it “is accompanied by the indication of the source, including the author’s name, unless this turns out to be impossible”. At this point, we should also add, that article 2 includes the various definitions, applied for the purposes of it.

Furthermore, according to the second paragraph of article 4 of the Proposal, which caused the reaction of many NGOs, Member States will still have the discretion to implement the exception provided that there are no adequate licenses authorizing the acts described in par. 1 for educational establishments.\textsuperscript{296}

Additionally, the proposed Directive provides, in article 3 entitled “\textit{Text and Data Mining}”, for a specific exception to copyright for “\textit{reproductions and extractions made by research organizations to order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research}”.\textsuperscript{297} This provision makes easier for researchers across the EU to use text

\textsuperscript{291} Ibid, p.2.
\textsuperscript{293} Supra note 290, p.8.
\textsuperscript{294} Supra note 289.
\textsuperscript{295} Supra note 290, p.24.
\textsuperscript{296} Ibid.
\textsuperscript{297} Ibid.
and data mining (TDM) technologies in order to gain new knowledge. At this point we should also mention that the current union law already provides certain optional exceptions and limitations for scientific research purposes, which may apply to acts of text and data mining. Moreover, in cases where researchers do have lawful access to content through subscriptions or open access licenses, they may not be able to use text and data mining due to the fact that the licensing agreement excludes such use.

Having a modernized framework in the field of exceptions and limitations leads to legal certainty and has a variety of different advantages. As regards research and education, researchers will have the opportunity it to use innovative text and data mining research tools and teachers and students will be able to take full advantage of digital technologies at all levels of education.

Last but not least, we should bear in mind that this procedure is time consuming in order to rebound to a final binding text and it may last up to 24 months. So, it will follow the ordinary legislative procedure, which includes the European Parliament (and several of its Committees) and Member States represented in the Council of Ministers. Also, until the relative procedure is completed, we should be hesitant to make our observations, given that the final text may quite differ from the proposal.

Chapter VI: Conclusions

Copyright law has always aimed to serve the public interest, by producing incentives for the creation and dissemination of knowledge for the general public. However, copyright law must bridge the differences, which arise between the interests of authors or other right holders and the interests of the public. The interests of these two often coincide and may come into even direct conflict. In this case, an effort must be made to bring them into the desirable balance, which is contained as general objective in article 7 of the TRIPS Agreement and in the preamble of the WIPO Copyright Treaty, which emphasizes “the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information”.

In order for the copyright regime to achieve the aforementioned balance, specific exceptions and limitations should be adopted, which undoubtedly constitute an integral part of any efficiently functioning copyright system. Without the existence of these exceptions and limitations, copyright protection would put obstacles to social, cultural and economic development, in which inevitably educational uses and uses for

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298 Supra note 289.
299 Supra Note 290, p.14.
300 Ibid, p.2.
301 Supra Note 289.
302 Ibid.
304 Ibid.
305 According to article 7 of the TRIPS Agreement entitled “objectives”: “The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”.
research are included,\textsuperscript{307} and therefore any innovative effort to be made would be prevented.

Although a great number of exceptions and limitations regarding the use of copyrighted protected material specific for educational and scientific purposes on national, European and international level already exist, there is still the need for additional steps to be made.

Since in today’s globalized world, knowledge and information are no more linked with a single jurisdiction and can be disseminated easily around the world beyond national borders, we realize that such cross border activities are restrained, due to copyright restrictions which vary among countries.\textsuperscript{308} Examples of research and education are found in collaborative projects and research cooperation between higher education institutions in different countries.\textsuperscript{309}

Although international copyright law allows certain exceptions and limitations to copyright protection for the purpose of education, their implementation is mainly based on each country’s discretion and interpretation, according to its needs and circumstances. Therefore, different copyright laws among various countries may lead to different outcome regarding the same issue. Copyright balance and its impact on the creation of incentives as regards the production of creative works and on the public interest can no longer be restricted to a purely domestic level.\textsuperscript{310}

\textsuperscript{307} Rangnath R. and Rossini C., supra note 26, p. 1.
\textsuperscript{308} Wahid, R. & Azmi, G., supra note 69, p. 41.
\textsuperscript{309} Ibid.
\textsuperscript{310} Ibid.
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