
Article 5

Educational

Exception

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What is at issue in Article 5?

Currently, EU countries do not allow the same educational uses under existing exceptions.

This fragments and severely limits education in the EU region. Online and cross-border activities are not possible.

Article 5 tries to solve some of these issues, but (partially) fails.

What is at issue in Article 5?

MS may permit also this

MS shall permit at least this

InfoSoc: optional ceiling	DSM: mandatory floor
illustration for teaching	illustration for teaching
all uses	digital uses
all materials	all materials
to the extent needed	to the extent needed or X% (MS decide)
all venues, all technologies	all venues, some technologies
by anyone	(anyone or specific people) under educational establishment authority
for NC education	for NC education
for free or paid (MS decide)	for free or paid (MS decide)
not subject to license availability	MS decide if it applies when licenses exist

Breaking down Article 5

- **What can be done? Digital uses onsite and at distance (communication to the public, making available to the public, reproduction)**
- **In which places? Onsite: any venue**
- **Using which technologies? At a distance: secured electronic environment accessible only by the establishment's pupils, students or teaching staff**

Breaking down Article 5

- **Who can make those uses?**
Onsite: **anyone under the responsibility of an educational establishment**
At a distance: **educational establishment's pupils, students or teaching staff**
- **For which purposes?**
Illustration for Teaching (incl. learning activities, uses that support/enrich/complement the teaching, examinations)

Breaking down Article 5

- Which works can be used?
Works and other subject matter protected by EU laws (performances, phonograms, fixations of films, broadcasts, databases, software, press publications)
- To what extent? MS decide
- For free or paid? MS decide

Breaking down Article 5

- Is the use allowed if there are licenses for the same use? **MS** decide, *but* if they allow licenses to take precedence:
 - (1) licenses must cover the needs and specificities of the educational establishment
 - (2) licenses must be easily available in the market (and MS must take measures to ensure that establishments are aware)
 - (3) licenses must authorise those uses only (not more)

Breaking down Article 5

- **Covers cross-border and online uses? **Yes.****

Fictions that uses made through secured electronic environments are taking place where the educational establishment is located.

Works great when there's a single establishment; less straightforward when multiple educational establishments.

Breaking down Article 5

- Is it protected against contractual overrides? **Yes.** Contract terms that limit the rights of users under the exception are not enforceable.
- Is it protected against technological overrides? **Yes.** The lawfull user has the right to *seek the means* to remove TPMs from the material.

How to deal with Article 5?

If MS are up here, MS shall not go down there

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How to deal with Article 5?

- **Move beyond Article 5:**
adopt or maintain educational exceptions that are as open as the InfoSoc
- **Implement Best Version of Article 5:**
respect the conditions but do not use the harmful options
- **Mitigate the Worst Version of Article 5:**
mitigate the effects of the harmful options (defensive)

The Best Version of Article 5

- **No license priority:** no one is denied the right, no one is forced to buy licenses
- **No compensation** (at least in MS that currently have no compensation): exception is not a free pass, uses should cause minimal or no harm
- **No quantity limitations:** let practice define what is right
- **Broad definition of secured electronic environments**

The Worst Version of Article 5

- Any **licensing offers** made available by copyright owners replace the exception
- All educational uses have to pay **compensation**, even when the amount of protected content used is minimal
- Any **quantity limitations**, and even worst not allowing the uses of full images and short works

Mitigating the effects of the Worst Version of Article 5: License Availability

- Give priority to license **agreements**, not to offers
- Do not subject to licenses **content that is freely accessible online (no paid access)**
- Do not subject to licenses **content that is not intended for the educational market**
- Do not subject to licenses **content use that is within a reasonable percentage**
- Affordable mediation and litigation to **challenge licenses**

Mitigating the effects of the Worst Version of Article 5: Compensation

- Do not pay for **content that is freely accessible online**
- Do not pay for **content use that is within a reasonable percentage**
- **Fixed fee**, that doesn't vary with the usage (to avoid monitoring uses)
- **Collective administration** of the fee (reduces transaction)
- **Waivable**; safeguard right to grant **free licenses**

Mitigating the effects of the Worst Version of Article 5: Quantity Limitations

- Define floor, not ceiling
- If defining ceiling, allow the use of a reasonable percentage (e.g. 20%) of content
- Allow the use of entire indivisible works (eg images)
- Allow the use of entire short works
- Allow the use of entire single articles in periodicals, newspapers, compilations

The Ideal National Educational Exception

- Cover **all uses** and **all materials** protected in the MS, incl. adaptation and non-digital uses (e.g. performance, distribution)
- Clearly cover joint educational activities and programmes by **multiple establishments**
- Cover **any individuals** (incl. **parents, video producer, editor**)
- Cover **all education providers** or at least add **GLAMs**

How to adapt this locally?

- **Avoid any overlaps** between existing educational exceptions and the new one
- **Do not replace broader exceptions** which already exist
- Use “including, but not limited to” if there is lack of clarity
- Legal assessment of the scope of the existing exception to know how to implement Article 5 in a way that doesn't make things worse for the national educational community

Thank you!

See more on
guides.communia-association.org

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