TDM Exception or Limitation – Methodology of Implementation in the EU Member States: Creating Cohesion or Diversion?

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ABSTRACT

This article examines the margin of appreciation of the EU Member States on the choice and formulation of the E&Ls when implementing them into their national law. It does so, firstly by explaining the methods and terminology used to assess implementation of directives. It then continues with the cartography of E&Ls prior to and after the enactment of the DSM Directive in the research sector. Finally, this article concludes with remarks on the future viability of the TDM exception.

1. INTRODUCTION

The main reason for the introduction of the text and data mining (TDM) exception within Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (DSM Directive)[1] was to support the European research organisations' scientific work. The problem that the research organisations *were* and *are* facing – all over the globe and not exclusively in Europe, is the legal uncertainty as to whether TDM activities are infringing copyright. The problem is mostly vested in the diverging national solutions that address this problem in a form of the existence – or lack – of exceptions that cover such activities.

For clarification purposes, the activities of TDM – in a broader sense, could be understood as different types of computational processes that aim at discovering patterns in large databases and/or collections of textual content, as well as extracting information from previous sources (e.g., existing dataset and collection of journal articles) and transforming it into information that can be used for further purposes (e.g., analysis or pattern discovery). From a copyright perspective, these types of activities forming part of the computational process can attract several different economic rights of rightsholder – be it in copyright or related rights. These economic rights can be right of reproduction – right to copy parts or whole items of protected objects; adaptation right to change and transform protected objects; translation – right to translate from one language to another; extraction and re-utilisation of the *sui generis* database right– parts of database sets; and making available – creating and enabling access online to protected objects. copyright framework, to some extent, can shield users from copyright and related rights infringement claims by providing exceptions or limitations (E&L) to these rights.

The margin of appreciation in the choice of creating E&Ls – as well as formulating them in national laws, is the bedrock in the aforementioned TDM activities problem. On the European Union (EU) level, the margin of appreciation of the EU Member States on the choice and formulation of the E&Ls is somewhat bound within the EU-wide harmonisation measures. This article aims to explore the boundaries of the 'margin of appreciation' –by examining how harmonisation measures, specifically directives, are assessed and implemented into the national laws of the EU Member States. In order to achieve this, this article first explains the methods and terminology used to assess an implementation. It then continues with the cartography of E&Ls prior to and after the enactment of the DSM Directive in the research sector. Finally, this article concludes with remarks on the future viability of the TDM exception.

2. METHODS AND TERMINOLOGY FOR ASSESSING IMPLEMENTATION

On the EU level, harmonisation of copyright has been predominantly achieved by the use of directives by the EU

1 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 ('DSM Directive').

legislator. The EU directives, by virtue of Art. 288 (3) of the Treaty on the Functioning of the European Union,[2] bind EU Member States regarding the result to be achieved, but they leave it to national authorities to choose the form and methods for implementation. These 'results' – of implementation – need to be the same for the territory of the EU, but form and method of implementation is in the national purview of the EU Member States.[3] Generally speaking there are two ways of assessing whether these countries have achieved the 'results' aimed by the directive. The first one is the *prima facie* assessment, where the result is measured on the contextual analysis of the national law. The second one is the *impact assessment,* where the result is measured on the 'law in action, to put it differently, on how the implemented directive operates in practice. This article focuses on the first type of assessment—the *prima faciae*

In the *prima faciae* assessment, the two most prominent methods of contextual assessment are one of literal transposition and one of a flexible approach. A provision of a directive has been literally transposed, if it has been adopted verbatim into national law, meaning 'copied and pasted'. The provisions most likely to be transposed in that manner are provisions which should be exactly or to a high degree worded the same as in the directive. These provisions are the ones consisting of definitions contained in the directive, start with 'shall', or contain full harmonisation and/or maximum standards.

The flexible approach, as the name suggests, provides leeway to EU Member States with the wording and framing of the provision of a directive when transposed or reflected into national law. These are the provisions that start with 'may'; allow EU Member States to provide 'more detailed or stricter rules', and contain partial harmonisation and/or minimum standards. The flexible approach hides a danger of EU Member States going beyond the 'results to be achieved' by providing more favourable terms in the form of gold-plating provisions.

For ease of clarity regarding the terminology used in the previous paragraphs, the scope and intensity of harmonisation requires explanation, as well as what does a gold-plating provision entail. Harmonisation is 'full' in scope when there is comprehensive or exhaustive harmonisation in a specific area; harmonisation will otherwise be 'partial' in scope.[4] Partial harmonisation can be vertical or horizontal in scope.[5] The former referring to harmonising rules for specific products or services, for example databases in copyright in Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.[6] The latter referring to a legal act covering all or several different products and services, for example Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive).[7] In addition, the notion of targeted harmonisation refers to measures that provide only very selectively for harmonised rules. An example of this can be found in Art. 17 of the DSM Directive – which is a specific *sui generis* liability regime for platform copyright infringement liability.

Distinct from the scope of harmonisation, the standard(s) set may also vary in their intensity. They may provide for 'full' (or 'maximum' or 'total') harmonisation, in the sense of setting standards which nation-states cannot derogate from, or they may provide for 'minimum' harmonisation only, leaving some discretion to nation states to go beyond.[8] A nation-state implementing this standard can go above it, but not below.[9] Conversely, when implementing a standard of maximum harmonisation, nation-states may not introduce stricter rules. A maximum standard therefore serves as a regulative limit.[10]

Last, the term gold-plating describes a transposition or implementation EU directives in its national law, where the EU Member State uses the opportunity to impose additional requirements, obligations, or standards on the addressees of its national law that go beyond the requirements or standards foreseen in the EU directives.[11]

In a situation where a directive is an amendment directive or a part of the legislative package/series of directives, and even more so if it implements and/or reflects international obligations of the EU and/or the EU Member States (or both), the case law of the Court of Justice of the European Union (CJEU) is incorporated in the contextual assessment. The case law that is incorporated in such contextual assessment is the one that defines words that are found in the directives – and these words are found in the new amendment directive. These words defined by the CJEU can be seen in the case law labelled

2 Treaty on the Functioning of the European Union [2008] OJ C 326/47 (the 'TFEU').

3 For a detailed account on form and method see Richard Král, 'On the choice of methods of transposition of EU Directives' (2016) 41(2) ELR 220.

4 Marcus Klamert, 'What We Talk About When We Talk About Harmonisation' (2015) 17 CYELS 360, 362–363.

5 Ibid, 362.

6 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20 ('Database Directive').

7 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 ('InfoSoc Directive').

8 Klamert (n 4) 362.

9 Stephen Weatherill, 'Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market' in Niamh Nic Shuibhne and Laurence W Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (OUP 2012) 175, 176.

10 Ibid.

11 European Commission 'Better Regulation Guidelines' SWD (2017) 350 1, 88.

Table 1

State-of-the-art of E&L prior to the DSM Directive in the research sector (The legislative landscape for E&L for research activities)

Object of Protection	Rightholder	Economic Right	E&L
Original Database (copyright)	Author	Reproduction (CJEU defined autonomous legal concept concept)[16] Translation, adaptation, arrangement and any other alteration Distribution (CJEU defined autonomous legal concept concept) [17] Any communication, display or performance to the public	Art. 6(2)(b) Database Directive 'sole purpose of illustration for teaching or scientific research'
Sui Generis Database (CJEU defined concept) [18]	Database rightsholder	Extraction (CJEU defined concept)[19]	Art. 9(b) Database Directive 'sole purpose of illustration for teaching or scientific research'
Original works (CJEU defined autonomous legal concept concept)[20]	Authors	Reproduction (CJEU defined autonomous legal concept concept)[21] Communication to the public including making available (CJEU defined autonomous legal concept concept) [22]	Art. 5(3)(a) InfoSoc Directive 'sole purpose of illustration for teaching or scientific research'
Fixations of performances Phonograms Original and copies of films-Fixations of broadcast	Performers (CJEU defined concept) [23] Phonogram producers Producers of the first fixations of films Broadcasting organisations	Reproduction (CJEU defined autonomous legal concept concept)[24] Making available (CJEU defined autonomous legal concept concept) [25]	Art. 5(3)(a) InfoSoc Directive 'sole purpose of illustration for teaching or scientific research'
Fixations of performances Phonograms Fixations of broadcast	Performers (CJEU defined concept) [26] Phonogram producers Broadcasting organisations	Communication to the public (CJEU defined autonomous legal concept concept) [27]	Art. 10(1)(d) Rental and Lending Rights Directive[28] 'solely for the purposes of teaching or scientific research'

as concepts,[12] autonomous legal concepts of EU law,[13] and as principles.[14]

Thankfully in copyright we have the whole set. The DSM Directive is the add on to the existing series of directives. Art. 3 and 4 of the DSM Directive – the new mandatory TDM exceptions contain the concept of 'lawful access' (through recital 8 and 11) which resembles the CJEU's defined concept of 'lawful use'[15] from the transient copy exception found in Art. 5 (1) (b) of the InfoSoc Directive.

Notwithstanding the above explanation of terminology, it is relevant to examine the types of E&Ls contained in the EU copyright framework that shield users from TDM activates infringing copyright. More importantly, the *prima faciae* assessment provides valuable clues on their uniformity and viability.

3. CARTOGRAPHY OF E&LS PRIOR TO AND AFTER THE ENACTMENT OF THE DSM DIRECTIVE

According to a very simple portrayal, there first needs to be – in order to attract the protection of copyright or a related right – an object of protection linked with the

12 See 'extraction' and 're-utilisation' in Judgment in *The British Horseracing Board and Others*, C-203/02, EU:C:2004:695 paras 47–53.

13 See fair compensation in Judgment in *Padawan*, C-467/08, EU:C:2010:620 para 33.

14 See exhaustion in Judgment in *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:856 paras 58–59.

15 See Judgment in *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08)*, C-403/08 and C-429/08, EU:C:2011:631 paras 167–173; Judgment in *Stichting Brein (Filmspeler)*, C-527/15, EU:C:2017:300 paras 64–71.

16 See Judgment in *Infopaq International (I)*, C-5/08, EU:C:2009:465 para 27.

17 See Judgment in *Dimensione Direct Sales and Labianca*, C-516/13, EU:C:2015:315 para 22.

18 See Judgment in *Apis-Hristovich*, C-545/07, EU:C:2009:132 paras 62–73.

19 See Judgment in *Directmedia Publishing*, C-304/07, EU:C:2008:552 paras 22–47.

20 See Judgment in *Cofemel*, C-683/17, EU:C:2019:721 paras 29–35.

21 See Judgment in *Infopaq International (I)* (n 16).

22 See Judgment in *Circul Globus București*, C-283/10, EU:C:2011:772 para 32.

23 See Judgment in *Recorded Artists Actors Performers*, C-265/19, EU:C:2020:677 paras 49–54.

24 See Judgment in *Infopaq International (I)* (n 16).

25 See Judgment in *Circul Globus București* (n 22).

26 See Judgment in *Recorded Artists Actors Performers* (n 23).

27 See Judgment in *Circul Globus București* (n 22).

28 Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376/28 ('Rental and Lending Rights Directive').

Table 2

State-of-the-art of E&L prior to the DSM Directive in the research sector (The legislative landscape for L&E with a research activities flavour)

Object of Protection	Rightsholder	Economic Right	E&L
Computer programs (original) (CJEU defined autonomous legal concept concept)[29]	Author	Reproduction (CJEU defined autonomous legal concept concept)[30] Translation, adaptation, arrangement and any other alteration	Art. 5 & 6 Software Directive[31] Interoperability and decompilation of software in individual research activities (mandatory exception) Decompilation (CJEU defined concept) [32]
Sui Generis Database (CJEU defined concept) [33]	Database rightsholder	Extraction and re-utilisation (CJEU defined concept)[34]	Art. 8 Database Directive lawful users can extract or re-utilise insubstantial
Original works (CJEU defined autonomous legal concept concept)[35] Fixations of performances Phonograms Original and copies of films Fixations of broadcast	Authors Performers (CJEU defined concept) [36] Phonogram producers Producers of the first fixations of films Broadcasting organisations	Reproduction (CJEU defined autonomous legal concept concept)[37]	Art. 5(1) InfoSoc Directive Transient copies (CJEU defined concept)[38] (mandatory exception)
Original works (CJEU defined autonomous legal concept concept)[39] Fixations of performances Phonograms Original and copies of films Fixations of broadcast	Authors Performers (CJEU defined concept) [40] Phonogram producers Producers of the first fixations of films Broadcasting organisations	Reproduction (CJEU defined autonomous legal concept concept)[41] Making available (CJEU defined autonomous legal concept concept) [42]	Art. 5(2)(b) InfoSoc Directive Private copy exception (CJEU defined concept)[43] Art. 5(2)(c) InfoSoc Directive Reprography exception (CJEU defined concept)[44] For both: Fair compensation (CJEU defined autonomous legal concept) [45]
Original works (CJEU defined autonomous legal concept concept)[46]	Authors	Reproduction (CJEU defined autonomous legal concept concept)[47] Communication to the public including making available (CJEU defined autonomous legal concept concept) [48]	Art. 5(3)(d) InfoSoc Directive Quotation (CJEU defined concept) [49]
Fixations of performances Phonograms Original and copies of films Fixations of broadcast	Performers (CJEU defined concept) [50] Phonogram producers Producers of the first fixations of films Broadcasting organisations	Reproduction (CJEU defined autonomous legal concept concept)[51] Making available (CJEU defined autonomous legal concept concept) [52]	Art. 5(3)(d) InfoSoc Directive Quotation (CJEU defined concept) [53]
Original works (CJEU defined autonomous legal concept concept)[54]	Authors	Communication to the public including making available (CJEU defined autonomous legal concept concept) [55]	Art. 5(3)(n) InfoSoc Directive Use for the purpose of research or private study by dedicated terminals on the premises of establishments (CJEU defined concept) [56]
Fixations of performances Phonograms Original and copies of films Fixations of broadcast	Performers (CJEU defined concept) [57] Phonogram producers Producers of the first fixations of films Broadcasting organisations	Making available (CJEU defined autonomous legal concept concept) [58]	Art. 5(3)(n) InfoSoc Directive Use for the purpose of research or private study by dedicated terminals on the premises of establishments (CJEU defined concept) [59]

rightholders (who are involved in the creation or existence of the object of protection), followed by rights that derive from this protection, and finally limits to these rights. The patchwork of the copyright legislative framework in the EU, together with its interpretation by the CJEU link the aforementioned four broad categories together in an aim to create a coherent system. Prior to the enactment of the DSM Directive, the cartography of E&Ls in the research sector that shielded researchers from TDM activates copyright infringement claims can be seen in Table 1.

Furthermore, there also existed the E&Ls with a research sector 'flavour' that shielded researchers from TDM activates copyright infringement claims and they are listed below in Table 2.

In the *prima faciae* assessment of these provisions, a flexible approach of contextual assessment was taken. This was since the E&Ls with a TDM flavour, are optional – save from the exception on temporary reproduction and the E&Ls contained in the Software Directive. This means that EU Member States are able to cherry-pick the exact scope of the E&L, which has resulted in varying formulation and intensity[60] of the 'TDM flavour' E&L. To put it simply, EU Member States were given an option on linking an E&L with a specific object of protection, rightsholder and economic right and providing a variety of different solutions for essentially the same TDM activity.[61] This, in turn, has been criticised by some scholars,[62] who contend that the aim of harmonising copyright on the EU-wide level has not been met in its full form because the optional E&Ls have only a minimal harmonising character; and without the implementation guidelines, Member States have often implemented a narrower scope than was foreseen by the directives.[63] However, there are two limits to the EU Member State margin of appreciation: The first one is in the form of an interpreted concept by the CJEU, and the second relies on the fact that the list of E&Ls is a closed one. Providing an E&L that is outside of the enumerated list in the copyright harmonisation framework on the EU level could amount to a gold-plating provision.

The introduction of the mandatory TDM E&Ls in Art. 3 and 4 of the DSM Directive adds to the variety of national solutions without bringing uniformity. This primarily relates to the fact that, here as well, the contextual assessment method is one of a flexible approach. More importantly, the flexibility starts with the definition of the TDM in Art. 2(2) of the DSM Directive where the EU Member States can add to it (e.g.by including elements of recital 8 and 11) and/or subtract (by omitting parts of the definition). The problem that arises from this approach is that there is an uneven scope of the definition itself found in the national transposing measures. Nevertheless, this flexible approach becomes more stringent in the assessment of the body of text of Art. 3 and 4 of the DSM Directive. The narrowing of the flexibility in the assessment approach can be seen for example in the approach that rightsholders and economic rights are full harmonisation – Member States have no discretion in defining what they are. On the other hand, broadening or removing the scope of economic rights as well as rightsholders by Member States in instances of full harmonisation, by adding or subtracting could be considered gold-plating provision.

29 See Judgment in *Cofemel* (n 20).

30 See Judgment in *Infopaq International (I)* (n 16).

31 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) (Text with EEA relevance) [2009] OJ L 111/16 ('Software Directive').

32 See Judgment *Judgment in Top System SA v État belge,* C-13/20, EU:C:2021:811 para 40.

33 See Judgment in *Apis-Hristovich* (n 18).

34 See Judgment in *The British Horseracing Board and Others* (n 12).

35 See Judgment in *Cofemel* (n 20).

36 See Judgment in *Recorded Artists Actors Performers* (n 23).

37 See Judgment in *Infopaq International (I)* (n 16).

38 See Judgment in *Football Association Premier League* (n 15) paras 161–179.

39 See Judgment in *Cofemel* (n 20).

40 See Judgment in *Recorded Artists Actors Performers* (n 23).

41 See Judgment in *Infopaq International (I)* (n 16).

42 See Judgment in *Circul Globus București* (n 22).

43 See Judgment in *Copydan Båndkopi*, C-463/12, EU:C:2015:144 paras 68–73.

44 See Judgment in *Eugen Ulmer*, C-117/13, EU:C:2014:2196 paras 47–49.

45 See Judgment in *Padawan* (n 13) paras 29–37.

46 See Judgment in *Cofemel* (n 20).

47 See Judgment in *Infopaq International (I)* (n 16).

48 See Judgment in *Circul Globus București* (n 22).

49 See Judgment in *Painer*, C-145/10, EU:C:2011:798 paras 130–137.

50 See Judgment in *Recorded Artists Actors Performers* (n 23).

51 See Judgment in *Infopaq International (I)* (n 16).

52 See Judgment in *Circul Globus București* (n 22).

53 See Judgment in *Painer* (n 49).

54 See Judgment in *Cofemel* (n 20).

55 See Judgment in *Circul Globus București* (n 22).

56 See Judgment in *Eugen Ulmer* (n 44) paras 38–40.

57 See Judgment in *Recorded Artists Actors Performers* (n 23).

58 See Judgment in *Circul Globus București* (n 22).

59 See Judgment in *Eugen Ulmer* (n 56).

60 Thomas Dreier, 'Limitations: The Centrepiece of Copyright in Distress' (2010) 1(2) JIPITEC 50,52.

61 For exact formulation, scope and intensity of national solutions please see de Francquen A, Dusollier S, Triaille J-P, Hubin J-B, Depreeuw S, Coppens F, 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "Infosoc Directive") (2013)'; Brigitte Lindner and Ted Shapiro (eds), *Copyright in the Information Society: A Guide to National Implementation of the European Directive* (2nd edn, Edward Elgar 2019); Caterina Sganga et al, 'Copyright flexibilities: mapping and comparative assessment of EU and national sources' (2023) https://zenodo.org/record/7540511#.Y8Uss3bM.

62 Lucie Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) 1(2) JIPITEC 55; Mireille van Eechoud, Bernt P. Hugenholtz, Stef van Gompel, Lucie Guibault, Natali Helberger, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009) 94–120.

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

4. FINAL REMARKS

Taking a flexible approach in the *prima facie* methodology for assessing the implementation of provisions of mandatory TDM E&Ls does not add to the creation of legal certainty for the researchers that wish to avail themselves to them. This narrow add-on to the existing cartography of 'chaotic' E&Ls with a TDM flavour can be labelled as a missed opportunity to make a narrow yet mandatory provision functionally harmonised in the territory of the EU. This is since the flexible approach provides leeway in the 'form and method' of implementation to EU Member States.

Adding to this, there is still no clear guidance on situations where a computational process of a TDM falls outside of the scope of Art. 3 or 4 of the DSM Directive and into the scope of another E&L – a question that is still quite dependent on the territory of the computational process and its cross-border reach.

Moving forward, we can expect at least three scenarios. The first scenario is that the TDM E&Ls could become redundant by the licensing schemes between publishers and research and cultural heritage institutions. Alternatively, they can also become redundant by open-access initiatives. In both scenarios the publishers benefit from these outcomes since in their role as middle management – between creators and users – they receive remuneration in form of licensee fees and open access fees. The third scenario is that the CJEU interprets the TDM E&Ls in a manner in which such interpretation would not be operational for the researchers.

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