COMMUNIA

THE POST-DSM COPYRIGHT REPORT

Teresa Nobre

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TABLE OF CONTENTS

1 INTRODUCTION

2 RESEARCH RIGHTS
- 2.1 Research exceptions beyond text and data mining
- 2.2 Sources of legal uncertainty for researchers
- 2.3 Models to address technological barriers to access

3 EDUCATION RIGHTS
- 3.1 Education exceptions beyond digital education
- 3.2 Licence priority as a structural weakness of Article 5
- 3.3 Limited uptake of compensation

4 CULTURAL HERITAGE RIGHTS
- 4.1 Preservation copying beyond permanent collections
- 4.2 Inconsistencies in the scope of the out-of-commerce works exception
- 4.3 Divergent approaches to CMO representativeness
- 4.4 Divergent criteria for determining out-of-commerce status

5 PROTECTIONS AGAINST CONTRACTUAL AND TECHNOLOGICAL OVERRIDE
- 5.1 Fragmented protection against contractual overrides
- 5.2 Limited effectiveness of protection against technological overrides

6 PUBLIC DOMAIN SAFEGUARD
- 6.1 Implementation of the Public Domain safeguard
- 6.2 Cultural heritage laws as a barrier to reuse

7 LIMITS TO THE PRESS PUBLISHERS' RIGHT
- 7.1 Limited deviations in the definition of press publications
- 7.2 Uneven compliance with mandatory limits
- 7.3 Incomplete application of copyright exceptions

8 USER RIGHTS SAFEGUARDS IN ONLINE CONTENT-SHARING SERVICES
- 8.1 Overview of ex ante user safeguards
- 8.2 From abstract requirements to concrete user protections
- 8.3 Limited harmonisation of the caricature, parody and pastiche exception

9 CROSS-CUTTING FINDINGS

10 CONCLUSION: LESSONS FOR THE DSM REVIEW

EXECUTIVE SUMMARY

This report analyses how Member States have implemented key user rights provisions of the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive). By examining national implementation across the European Union, the report identifies emerging trends and implementation gaps that are relevant for the forthcoming review of the Directive.

The DSM Directive introduced several important reforms intended to modernise EU copyright law and strengthen access to knowledge, culture, and information. However, while many of its provisions establish mandatory rules, they also leave Member States varying degrees of discretion in implementation. National legislative choices therefore play a decisive role in determining whether the Directive's objectives are realised in practice. The comparative analysis reveals several findings.

First, in the area of research, most Member States recognise that the mandatory **text and data mining (TDM) exception introduced by Article 3** does not fully capture the needs of contemporary research practices. A clear majority therefore complement it with broader national scientific research exceptions covering a wider range of activities. At the same time, legal uncertainty persists, particularly regarding the ability to share research materials and the application of TDM to AI development. Targeted national solutions in a small number of Member States show that these barriers can be addressed through more effective legislative design.

Second, the national copyright framework for education reveals that the mandatory **digital education exception introduced by Article 5** provides only a partial solution to the needs of the education community. Many Member States maintain or introduce broader education exceptions covering non-digital teaching activities or additional categories of users.

Third, the implementation of **cultural heritage rights under Articles 6 and 8** reveals inconsistencies. The out-of-commerce works regime, in particular, shows significant divergences in both the scope of the fallback exception and the criteria for determining out-of-commerce status and CMO representativeness. These differences create uneven entry points into the regime and may hinder large-scale digitisation and cross-border access to cultural heritage.

Fourth, the **protections against contractual and technological overrides introduced by Article 7** have not been implemented consistently across the Union. National laws rely on different legal formulations with varying effectiveness against contractual override, and in several Member States, users are only partially protected, or not protected at all, from the restrictive effects of technological protection measures.

Fifth, the **Public Domain safeguard introduced by Article 14** has been widely implemented, confirming broad recognition of the importance of preventing the re-appropriation of Public Domain works through digitisation. However, in some jurisdictions cultural heritage legislation continues to restrict the reuse of faithful reproductions of Public Domain works, creating legal uncertainty and potentially undermining the effectiveness of the safeguard.

Sixth, the introduction of the **press publishers' right under Article 15** has not been matched by consistent implementation of the mandatory limits intended to contain its scope. Despite the largely prescriptive nature of the Directive, a significant number of Member States have failed to fully implement these safeguards. In addition, some jurisdictions have chosen not to apply existing copyright exceptions to the new right, resulting in a broader scope of protection for press publishers than for other rightholders and further contributing to fragmentation across the internal market.

Seven and last, the implementation of **user rights safeguards under Article 17** reveals a predominantly minimalist approach across the Union. Most Member States have limited themselves to restating the Directive's requirement that lawful uploads must not be blocked, leaving the practical balancing of copyright enforcement and freedom of expression largely to platforms and courts. While a small number of jurisdictions have introduced stronger safeguards — such as ex ante protections against overblocking, transparency obligations, and mechanisms to address abusive claims – these remain the exception. As a result, the level of protection for lawful user expression continues to vary across Member States.

Taken together, divergences risk undermining its objective of creating a well-functioning Digital Single Market in areas such as research, education, access to cultural heritage, and the exercise of user rights. The forthcoming DSM review therefore provides an opportunity to address these structural gaps and ensure that EU copyright law effectively supports these objectives.

1

INTRODUCTION

The DSM Directive introduced some of the most significant reforms to EU copyright law in recent decades. Adopted in 2019, the Directive sought to modernise the European copyright framework in response to the rapid digitalisation of cultural production, distribution, and access. Among its objectives were strengthening the position of rightholders in the digital environment while also improving legal certainty for activities central to research, education, cultural heritage preservation, and online participation.

Although the DSM Directive establishes a number of mandatory rules, it leaves Member States varying degrees of discretion in its implementation. In several areas, national lawmakers may complement the Directive with broader copyright exceptions, shape the conditions under which mandatory exceptions operate, or define key concepts. These implementation choices are therefore particularly important.

This report examines how Member States have implemented key user rights provisions of the DSM Directive and identifies emerging trends and implementation gaps across the European Union. It focuses on seven areas of particular relevance for access to knowledge and culture: research rights, education rights, cultural heritage rights, protection against contractual and technological overrides, the Public Domain safeguard, limits to the press publishers' right, and user rights safeguards under Article 17. By highlighting both positive national practices and structural divergences, the report aims to inform the forthcoming review of the DSM Directive and contribute to ongoing discussions on how EU copyright law can better support access to knowledge, culture and information in the digital environment.

The findings presented in this report are based on desk research and a comparative analysis of national legal provisions implementing the DSM Directive across the EU Member States. Where official English versions were unavailable, the analysis relied on automated translations of national legislation in order to enable cross-country comparison. The findings have not been systematically validated through consultation with national experts and should therefore be understood as indicative of legislative trends rather than definitive interpretations of national law.[1]

[1] A compilation of the national legislative sources used for this analysis is available here.

2

RESEARCH RIGHTS

Research increasingly depends on the ability to analyse large volumes of digital content and data. Before the adoption of the DSM Directive, copyright laws across the EU offered uneven support for such activities. These disparities created obstacles for researchers and research institutions operating in the European Research Area. Articles 3 and 4 of the DSM Directive responded to this fragmentation by introducing a harmonised legal framework for text and data mining (TDM).

While Member States are required to implement both TDM exceptions, they nevertheless retain some discretion in designing their national copyright frameworks for research. Article 4, which applies to TDM for general purposes, is largely self-contained and allows little deviation from the Directive. By contrast, Article 3, governing TDM for scientific research, does not preclude Member States from providing broader protection under optional scientific research exceptions in EU copyright law. National implementation choices under Article 3, and their interaction with pre-existing exceptions, are therefore particularly revealing of how far national copyright laws support scientific research activities and where structural gaps remain.

2.1 RESEARCH EXCEPTIONS BEYOND TEXT AND DATA MINING

Research activities commonly involve acts that go beyond automated analysis. A central issue raised by the implementation of Article 3 is, therefore, whether national lawmakers confined scientific research rights to reproductions and extractions of protected works carried out by research organisations and cultural heritage institutions for the purpose of automated analysis, or whether they chose to protect research uses more broadly, namely under Article 5(3)(a) of the InfoSoc Directive. The figure below illustrates how Member States have used this policy space.

Figure 1

Do Member States protect research uses beyond TDM?

A clear majority of Member States do not limit research rights to TDM alone: twenty Member States provide copyright exceptions for non-commercial scientific research purposes that extend beyond TDM. In eight of these jurisdictions, national law includes open and flexible scientific research exceptions that apply to all acts of use by all categories of users, in line with the InfoSoc prototype. The remaining twelve Member States provide more specific research exceptions that nevertheless cover a wider range of research activities than Article 3 alone.

The comparative picture confirms that, in practice, most Member States recognise that a narrow focus on TDM does not adequately reflect the needs of the scientific research community. Still, a significant minority of Member States has focused primarily on transposing the DSM provisions. In these jurisdictions, research activities that fall outside the scope of TDM remain vulnerable to legal uncertainty and transactional barriers.

2.2 SOURCES OF LEGAL UNCERTAINTY FOR RESEARCHERS

While these mandatory TDM exceptions aim to reduce legal uncertainty for data-driven research and innovation, a number of uncertainties remain, as documented in several studies commissioned by the European Commission. This section focuses on two particularly significant sources of uncertainty. First, it is unclear to what extent researchers are permitted to share materials used or generated in the course of TDM activities. Second, questions persist as to whether and how the TDM exceptions apply to the development of artificial intelligence (AI), particularly in the context of training machine learning models.

The ability to share materials used or generated in the course of research with other researchers, institutions, or the public is a core element of scientific practice. Reproducibility, peer review, and collaborative research all depend on the possibility to share datasets, corpora, and research outputs. Since Article 3 only covers acts of reproduction, national approaches to this issue play a decisive role. Figure 2 shows whether national frameworks allow researchers to share materials used or generated in the course of scientific research.

Figure 2

Do Member States allow researchers to share materials?

The comparative analysis shows the emergence of sharing rights in the majority of Member States. A total of twenty Member States allow researchers to share copyrighted materials under their national scientific research exceptions, whether through extended TDM provisions (as in Austria, Germany, Hungary, Ireland, Italy and Slovenia) or through broader scientific research exceptions. Where sharing rights are derived from extended TDM provisions, national laws typically restrict sharing to specific categories of materials – either the copies used for TDM or the results of TDM – and often confine it to defined groups of users, such as research collaborators or reviewers. By contrast, broader scientific research exceptions generally provide more flexible frameworks for sharing across a wider range of materials and contexts.

While this represents a particularly positive development, researchers still face restrictions on sharing materials in approximately one quarter of Member States. These limitations reduce the effectiveness of the TDM framework and sit uneasily with broader EU policy objectives promoting open science and cross-border research collaboration.

A second source of legal uncertainty concerns the application of the TDM exceptions to AI development. While Articles 3 and 4 are technology-neutral, and despite efforts at EU level to clarify the relationship between TDM and AI – including through guidance by the European Commission and subsequent legislative developments under the AI Act – uncertainty persists within the research community as to whether the training of AI models, particularly generative AI, falls within the scope of permitted TDM activities. In practice, conflicting legal interpretations and restrictive licensing practices, particularly contractual limitations on TDM and AI uses, contribute to a chilling effect, discouraging researchers and institutions from relying on the rights granted under EU law.

A noteworthy development in this regard is the approach taken by Italy, which explicitly clarifies that TDM encompasses reproductions and extractions carried out for the purposes of developing AI models and systems, including generative AI. By explicitly linking TDM to AI development, the Italian implementation provides greater legal certainty for emerging forms of research and illustrates how copyright law can address persistent uncertainty at EU level.

2.3 MODELS TO ADDRESS TECHNOLOGICAL BARRIERS TO ACCESS

Beyond the scope of copyright exceptions themselves, the effectiveness of research rights also depends on researchers' ability to access protected materials. Two types of protective measures are particularly relevant in this context: technological protection measures (TPMs), protected under Article 6 of the InfoSoc Directive, and measures ensuring the security and integrity of the networks and databases where works are hosted, as recognised in Article 3(3) of the DSM Directive. In both cases, their application can significantly impair the effective exercise of TDM for scientific research.

Against this backdrop, Slovenia and Bulgaria stand out as notable positive examples of how to address technological barriers to access, in particular through time-bound response mechanisms. The Slovenian law directly operationalises the safeguard embedded in Article 3(3) by requiring rightholders to provide access to works within 72 hours where security measures impede lawful uses, thereby ensuring that such measures do not undermine the practical effectiveness of the exception. The Bulgarian law provides a parallel mechanism to mitigate the restrictive effects of TPMs by establishing a clear obligation for rightholders to grant users access to protected content within 72 hours where TPMs prevent the exercise of the TDM exception.

3

EDUCATION RIGHTS

Education is one of the policy areas where the DSM Directive explicitly sought to correct long-standing fragmentation in EU copyright law. Prior to the DSM, educational exceptions were optional under EU law, resulting in widely divergent national rules that undermined legal certainty for educators and learners, particularly in digital and cross-border contexts. In practice, this fragmentation limited digital teaching, reinforced inequalities between learners, and created legal uncertainty for cross-border education.

Article 5 of the DSM Directive introduced, for the first time, a mandatory exception for digital and cross-border teaching activities. However, this harmonisation effort was deliberately partial. While Article 5 establishes a minimum level of protection, it also leaves Member States significant discretion to go further or to neutralise the exception through licensing mechanisms. As a result, national implementations reveal both encouraging trends and structural weaknesses that are highly relevant for the forthcoming DSM review.

3.1 EDUCATION EXCEPTIONS BEYOND DIGITAL EDUCATION

One of the key questions raised by the implementation of Article 5 is whether Member States confined themselves to the narrow category of digital and cross-border teaching activities required by EU law, or whether they chose to protect educational uses more broadly, including uses that are non-digital or that take place in non-institutional learning contexts, as permitted by pre-existing optional educational exceptions in EU law, notably Article 5(3)(a) of the InfoSoc Directive. Figure 3 shows that most Member States did not limit their reforms to the strict boundaries of Article 5. Instead, the majority relied on existing education exceptions or introduced new provisions that extend protection beyond digital and cross-border teaching activities.

Figure 3

Do Member States protect education beyond digital uses?

The comparative picture illustrates that Article 5 has not displaced the need for broader education exceptions. Educators and learners continue to rely on national discretion to secure meaningful protection for educational activities. Among the nineteen Member States that go beyond the digital education exception, seven have introduced or maintained open education exceptions that apply to all educational uses by all categories of users, subject only to the requirement that the use is made for non-commercial educational purposes. The remaining twelve implemented the

digital education exception alongside pre-existing education exceptions that extend beyond Article 5 by covering additional acts of use (such as distribution), a wider range of users (including public institutions, technical staff of educational establishments, or any user), or broader purposes (such as research, professional training, or lifelong learning).

At the same time, a non-negligible group of Member States chose a minimalistic approach, limiting education rights to the scope explicitly mandated by Article 5. In these eight jurisdictions, educational activities that fall outside the specific conditions of the digital education exception remain unprotected and subject to rightholders' authorisation.

3.2 LICENCE PRIORITY AS A STRUCTURAL WEAKNESS OF ARTICLE 5

One of the most controversial features of Article 5 is the option for Member States to give priority to licences over the exception. Where this option is implemented, educational institutions lose the right to rely on the exception as soon as suitable licences are deemed to be easily available on the market. The following figure highlights the extent to which Member States diverge on this point.

Figure 4

Does the digital education exception apply when licenses are available?

More than half of the Member States have chosen not to activate the licence-priority mechanism, ensuring that the digital education exception applies unconditionally. Among the thirteen Member States that favour licences, seven subject *all* uses permitted under the digital education exception to licence availability. The remaining six, however, allow licensing schemes to take precedence over the exception *only* for a limited category of works, namely teaching materials and/or music scores.

This divergence has significant consequences. In the jurisdictions that have subjected *all* uses covered by the digital education exception to the existence of licensing offers, the core function of the EU's mandatory education exception can be fully neutralised through licensing agreements. This decisively shifts bargaining power towards rightholders and, over time, risks the gradual disappearance of statutory education rights.

Even more concerning, six Member States (Belgium, Bulgaria, Czech Republic, Spain, France and Hungary) have chosen to exclude certain categories of materials – again, teaching materials and/or music scores – from the scope of the exception altogether, irrespective of whether adequate educational licences are actually available on the market. This approach is incompatible with Article 5 of the DSM Directive, which only permits Member States to limit the application of the exception *where* and *when* suitable licences are easily available.

3.3 LIMITED UPTAKE OF COMPENSATION

Another key condition attached to the digital education exception concerns whether educational uses are subject to compensation. While Article 5 introduced a mandatory exception for digital and cross-border teaching activities, it did not harmonise the question of compensation. Instead, the Directive explicitly gives Member States the freedom to decide whether uses made under the exception should be subject to the payment of fair compensation to rightholders.

Prior to the DSM Directive, education exceptions in many Member States were wholly or largely uncompensated. The introduction of the digital education exception therefore raised concerns that national reforms might lead to the expansion of compensation requirements to new categories of educational uses, particularly in Member States with a tradition of uncompensated education exceptions. The figure below shows how Member States have approached this issue.

Figure 5

Is the digital education exception subject to compensation?

Overall, the comparative picture indicates that nineteen Member States have chosen not to attach compensation requirements to the digital education exception, while eight Member States subject some or all uses permitted under the exception to compensation. Among the six Member States that require compensation in all cases, four – Cyprus, Greece, Malta and Slovenia – introduced compensation obligations for the first time, marking a significant shift in these national education frameworks that had previously allowed educational uses to take place without compensation.

4

CULTURAL HERITAGE RIGHTS

Articles 6 and 8 of the DSM Directive introduce a set of complementary measures aimed at supporting the core public-interest missions of cultural heritage institutions in the digital environment. Article 6 establishes a mandatory exception allowing cultural heritage institutions to make copies of works and other subject matter permanently in their collections for preservation purposes, thereby strengthening legal certainty for activities essential to safeguarding Europe's cultural heritage. Unlike other areas of the Directive, Member States have limited discretion in implementing this provision.

Article 8 addresses a different but closely related challenge: the legal uncertainty surrounding the online dissemination of works that are no longer commercially available. The dual mechanism introduced by the Directive – extended collective licensing where a sufficiently representative collective management organisation (CMO) exists, and a mandatory exception where it does not – aims to enable cultural heritage institutions (CHIs) to make an out-of-commerce work (OOCW) available online for non-commercial purposes across the Union. The effectiveness of this framework depends, however, on how Member States define key elements of the regime, including the standards for identifying out-of-commerce status and the criteria for determining whether a CMO is "sufficiently representative."

4.1 PRESERVATION COPYING BEYOND PERMANENT COLLECTIONS

Article 6 of the DSM Directive permits cultural heritage institutions to make copies of works or other subject matter that are permanently in their collections for preservation purposes. While this condition is reflected in the Directive, national implementations reveal different approaches as to whether preservation copying should be limited to materials forming part of an institution's collection.

Czech Republic, Denmark, France, Hungary, Luxembourg and Sweden do not make preservation copying dependent on whether the material forms part of the institution's collection, thereby allowing preservation copying of any works or other subject matter. In Belgium, this approach applies broadly across works and most categories of related rights, although limitations remain for software and sui generis database rights. By contrast, Estonia, Finland and Germany do not refer to a "permanent collection" but still require that the work or other subject matter be part of the institution's collection.

These approaches go beyond the minimum framework established by Article 6 and are consistent with the policy space preserved under Article 25 of the DSM Directive, which allows Member States to adopt or maintain broader provisions compatible with EU copyright law. In particular, preservation copying may also fall within the scope of Article 5(2)(c) of the InfoSoc Directive, which permits the reproduction of any works or other subject matter by cultural heritage institutions for non-commercial purposes. By relaxing or omitting the "permanent collection" condition, these jurisdictions avoid interpretative uncertainties associated with the concept and, in practice, enable a broader and more flexible framework for preservation activities.

In jurisdictions that do restrict preservation to works in permanent collections, a notable development is the approach taken by Croatia. Croatian law clarifies that works and other subject matter are considered to form part of a permanent collection not only where they are owned by the institution, but also where they are held on the basis of licences, deposit, or permanent lending arrangements, as well as under "similar contractual relationships." This open-ended formulation aligns with Recital 29 of the DSM Directive while providing additional flexibility in interpreting what qualifies as a permanent collection. Such clarification is particularly relevant in the digital environment, where access to works is increasingly governed by contractual arrangements rather than ownership.

4.2 INCONSISTENCIES IN THE SCOPE OF THE OUT-OF-COMMERCE WORKS EXCEPTION

Article 8(2) requires Member States to provide an exception allowing cultural heritage institutions to make out-of-commerce works available for non-commercial purposes. The exception covers reproduction and communication to the public, including the right of making available to the public, as well as certain rights concerning databases, computer programs and other subject matter as referenced in the Directive. Figure 6 shows, however, that the exception has not been implemented uniformly across the Union.

Figure 6

What acts are permitted under the OOCW exception?

Eighteen Member States have transposed the exception in a manner that reflects all the acts covered by the Directive. However, five Member States do not explicitly authorise the acts necessary to create digital copies of works, constraining the practical usefulness of the exception. Since digitisation is typically a necessary precondition for making works available online, this omission risks leaving cultural heritage institutions without a secure legal basis for the initial act of copying, thereby undermining the operational effectiveness of the OOCW regime. Even where such acts might be inferred or covered by other provisions, the absence of explicit authorisation introduces legal uncertainty and results in an incomplete transposition of Article 8(2).

At the other end of the spectrum, four Member States have extended the scope of the exception beyond what is provided in Article 8(2). Bulgaria adds translation and public performance, recitation or display rights. These rights are not harmonised at EU level, meaning that Member States remain free to extend national exceptions to cover them. By contrast, Greece, Lithuania and Spain

extend the exception to the distribution right. Unlike translation or public performance, the distribution right is harmonised at EU level, and Member States may introduce exceptions to it only where EU law expressly permits this. Extending the OOCW exception to distribution therefore goes beyond the harmonised framework and also raises questions as to its compatibility with EU law.

4.3 DIVERGENT APPROACHES TO CMO REPRESENTATIVENESS

Article 8(2) makes the exception conditional upon the absence of a CMO that is "sufficiently representative" of rightholders in the relevant category of works and rights. The Directive does not define this notion in detail, leaving Member States considerable discretion in how to operationalise it. As a result, determining what constitutes a "sufficiently representative" CMO became one of the key questions in the national implementation of the OOCW regime. However, the comparative analysis shows that most Member States have not adopted concrete criteria to clarify this concept. In many jurisdictions, the Directive's language has been transposed with little or no further elaboration.

Where Member States do specify criteria, they adopt markedly different approaches. Some rely on qualitative formulations. Estonia requires that a CMO represent a "*vast majority*" of rightholders in the relevant type of works; France and Malta refer to a "*significant number*" of rightholders; and Germany requires coverage of a "*sufficiently large number*" of rightholders in the relevant type of rights.

Other Member States do not use the term "sufficiently representative" in the exception trigger and instead refer simply to a "representative" or "authorised" organisation. This departure from the Directive's wording may create legal uncertainty, as it is not always clear whether the national standard corresponds to the threshold required under EU law. Whether such systems are compliant depends on how the authorisation regime is designed, in particular, whether authorisation requires demonstrable coverage of the relevant repertoire and whether competing organisations may operate in the same field.

Bulgaria offers a noteworthy approach to situations where more than one representative organisation exists. In such cases, users are expressly exempted from liability, and the organisations must settle their relations among themselves. This mechanism reduces legal risk for users and ensures that uncertainty surrounding representativeness does not translate into exposure to infringement claims.

4.4 DIVERGENT CRITERIA FOR DETERMINING OUT-OF-COMMERCE STATUS

Determining whether a work or other subject matter is out of commerce constitutes another central operational element of the OOCW regime. Article 8(5) DSM Directive establishes a flexible standard centred on a good-faith presumption of non-availability following reasonable efforts to verify whether a work or other subject-matter is available through customary commercial channels.

Member States have implemented this standard in different ways. In fifteen jurisdictions, the DSM "reasonable efforts" formula has been transposed largely verbatim, although in some (Belgium, Bulgaria, Denmark, Germany and the Netherlands) the law provides that additional rules may be specified through secondary legislation. Eight Member States – Czech Republic, Estonia, France,

Germany, Greece, Italy, Malta and Portugal – combine the reasonable-efforts test with time-based rules. A smaller group relies on alternative standards: Finland bases the determination exclusively on time-based rules, while Hungary and Poland require due diligence or diligent search in combination with time-based rules, thereby setting a higher evidentiary threshold than that envisaged by Article 8(5). At the opposite end of the spectrum, Sweden does not define specific statutory criteria for determining out-of-commerce status.

Although eleven Member States have introduced time-based rules in their OOCW regimes, these rules, as reflected in figure 7, differ not only in duration but also in their legal effect: in some systems, the lapse of time triggers a presumption of unavailability; in others, it operates as an eligibility condition; elsewhere, it functions as a preclusive condition that delays qualification before a minimum period has elapsed.

Figure 7

Time-based rules in national OOCW regimes

MEMBER STATE	WORKS OR OTHER SUBJECT MATTER	NO. YEARS	FROM	EFFECT ON OOCW DETERMINATION
Czech Republic	Literary works	20	Publication	Eligibility condition
	Periodical publications	10	Publication	Eligibility condition
Estonia	Works and other subject matter	50	Creation	Presumption of unavailability
	Serial publications	20	Creation	Presumption of unavailability
	Small print publications	5	Creation	Presumption of unavailability
Finland	Computer and video games	7	Release	Eligibility condition
	Works never made commercially available	5	Inclusion in permanent collection	Eligibility condition
	Works of which only a single copy exists	—	After the year of the author's death	Eligibility condition
France	Works	30	First publication or communication to the public	Eligibility condition
Germany	Published works	30	Last publication	Eligibility condition
Greece	Works and other subject matter	10	1 January of the year following publication	Eligibility condition
Hungary	Literary works	—	Last publication on or before 31/08/1999	Eligibility condition
	Literary works	8	Last publication	Preclusive condition
Italy	Works	10	Period of non-availability	Presumption of unavailability
Malta	Works and other subject matter	10	Last commercial availability	Preclusive condition
Poland	Works	20	First dissemination	Preclusive condition
Portugal	Works and other subject matter	—	Publication or communication prior to 01/01/1980	Eligibility condition (applicable to exception only)

Where temporal rules support a presumption of unavailability, they can be particularly advantageous for cultural heritage institutions. They facilitate OOCW determinations, reducing the evidentiary burden for older materials without excluding the possibility that more recent works may also qualify following reasonable efforts. However, as the comparative table shows, the lapse of

time only triggers a presumption of unavailability in two Member States: works created fifty years before use in Estonia (with shorter periods for certain categories), or works not commercially available for at least ten years in Italy, are presumed to be out of commerce.

In most other systems, time operates as an eligibility condition or a preclusive barrier. In Finland, France, Germany and Greece, works must date back a certain number of years before OOCW status can arise. In Hungary, only works last published on or before 31 August 1999 may qualify as OOCW, and in Portugal the exception applies only to works published prior to 1 January 1980. Hungary also bars qualification before a specified number of years have elapsed; similar preclusive conditions exist in Malta and Poland. In these cases, temporal rules condition or delay eligibility regardless of actual market absence.

Taken together, these approaches create a varied landscape in which the pathway to OOCW qualification differs significantly across the Union, creating uneven entry points into the regime. Time-based rules can enhance legal certainty, but their benefits depend on whether they operate dynamically, proportionately, and in a manner that genuinely eases the assessment burden for cultural heritage institutions rather than merely postponing eligibility.

5

PROTECTIONS AGAINST CONTRACTUAL AND TECHNOLOGICAL OVERRIDE

The effective functioning of copyright exceptions in the digital environment depends not only on their formal recognition in law, but also on their resilience against private ordering and technological constraints. The increasing reliance on licensing models and access-controlled environments risks rendering exceptions ineffective where users are prevented, whether contractually or technologically, from relying on them. Against this background, Article 7 of the DSM Directive introduces a minimum harmonisation framework aimed at safeguarding certain mandatory exceptions from contractual override and requiring Member States to put in place mechanisms enabling users to benefit from those exceptions despite the presence of technological protection measures (TPMs).

At the same time, the protection afforded by the Directive leaves significant discretion to Member States and raises questions as to whether the intended balance between rightholders and users has been fully achieved in practice.

5.1 FRAGMENTED PROTECTION AGAINST CONTRACTUAL OVERRIDES

Article 7(1) of the DSM Directive establishes a key safeguard by providing that any contractual provision contrary to the exceptions for scientific TDM (Article 3), digital education (Article 5), and preservation of cultural heritage (Article 6) shall be unenforceable. Figure 8 shows how Member States have implemented this safeguard.

Figure 8

Are the exceptions protected against contractual override?

The comparative analysis shows that seventeen Member States have implemented Article 7(1) in a manner that protects all three exceptions against contractual override. However, this protection is only partial in eight Member States, where the safeguard does not extend to all covered exceptions or to all categories of protected subject matter. In two Member States – Latvia and Spain – no

explicit protection against contractual override has been identified. Poland has likewise not explicitly transposed Article 7(1), on the basis that its general provisions on permitted use already prevail over contractual terms. While this suggests functional equivalence, the absence of an explicit rule may still create legal uncertainty. Taken together, these results indicate that, despite the mandatory nature of Article 7(1), its implementation remains uneven across the Union, leaving gaps in the protection of user rights.

Beyond the scope of protection, Member States have adopted significantly different legal formulations to give effect to Article 7(1), with potentially important consequences for the strength of user rights. Only four jurisdictions – Cyprus, Ireland, Malta and Romania – follow the wording of the Directive and provide that conflicting contractual provisions are "unenforceable," meaning that such clauses remain valid but cannot be relied upon in court. Others declare such provisions "null and void" (Bulgaria, Croatia, Hungary, Italy, Lithuania, Portugal and Slovenia) or "void" (Estonia and France), which generally suggests that the clause is deprived of legal effect from the outset. A closely related but distinct group – Greece and Sweden – treat conflicting clauses as "invalid," a formulation that also points to their lack of legal effect, although its precise consequences may depend on national contract law.

A fourth group shifts the focus from the validity of individual contractual clauses to the continued applicability of the exception itself, potentially offering stronger protection in practice. Austria, Denmark, Finland and the Netherlands provide that the relevant exception cannot be derogated from by agreement. Slovakia states that contracts may not exclude the application of the exception, the Czech Republic that conflicting agreements shall be disregarded, and Germany that rightholders may not rely on agreements that restrict or prohibit permitted uses. Finally, Belgium and Luxembourg characterise the exceptions themselves as "mandatory."

Beyond the context of user rights safeguards under Article 7(1), one Member State – Hungary – provides a useful model for addressing the risk of circumvention through choice-of-law agreements. Although developed in the context of author protection, the Hungarian approach ensures that mandatory protections cannot be displaced through contractual choice of foreign law. By explicitly providing that such provisions continue to apply notwithstanding a choice-of-law clause, it offers a useful model for strengthening the effectiveness of statutory rights under Article 7(1).

5.2 LIMITED EFFECTIVENESS OF PROTECTION AGAINST TECHNOLOGICAL OVERRIDES

Article 7(2) of the DSM Directive seeks to ensure that the exceptions for TDM (Articles 3 and 4), digital education (Article 5), and preservation of cultural heritage (Article 6) can be effectively exercised in environments where access to works is controlled through TPMs. This provision builds on the framework established in Article 6 of the InfoSoc Directive, requiring Member States, in the absence of voluntary measures by rightholders, to take appropriate steps to ensure that beneficiaries can access the means necessary to benefit from the exception, provided they have lawful access to the protected content. Figure 9 shows how Member States have implemented this safeguard.

Figure 9

Can the exceptions be exercised despite TPMs?

The comparative analysis reveals a mixed picture. Fourteen Member States – including the Netherlands, where the implementation remains contingent on further specification through secondary legislation – have implemented Article 7(2) in a manner that covers all four exceptions. In eleven Member States, protection is only partial, meaning that one or more of the relevant exceptions, or certain categories of protected subject matter, are not effectively safeguarded against technological restrictions. In two Member States no such protection has been identified. As with contractual overrides, these findings indicate that, despite the mandatory nature of Article 7(2), the ability of users to rely on these exceptions in practice remains uneven across the Union.

A key factor shaping the effectiveness of the protection against technological overrides is how Member States address the fourth subparagraph of Article 6(4) of the InfoSoc Directive, which introduces a limitation to the access-enabling mechanism for works made available to the public on agreed contractual terms, such as on-demand services. While Article 7(2) does not explicitly require the application of this on-demand limitation to the DSM exceptions, national approaches vary considerably.

Among the twenty-five Member States that provide at least some protection against technological overrides, eleven have chosen not to apply the on-demand limitation to the four DSM exceptions covered by Article 7(2). Two additional Member States limit the application of the on-demand limitation only to some of the relevant exceptions. By contrast, the remaining Member States continue to apply the on-demand limitation to these exceptions.

These divergences have significant practical implications. Where the on-demand limitation is maintained, users may be formally entitled to rely on an exception, but unable to exercise it in technologically controlled environments. By contrast, Member States that set aside the on-demand limitation provide a more robust framework for ensuring that exceptions remain effective in contemporary digital markets.

6

PUBLIC DOMAIN SAFEGUARD

The DSM Directive introduced, for the first time, an explicit protection of the Public Domain, aimed at giving effect to the principle that Public Domain works must remain free from barriers to access or reuse typically associated with copyright protection. Prior to the DSM Directive, this principle was increasingly undermined by claims of new rights over faithful reproductions of Public Domain works, particularly in the context of digitisation by cultural heritage institutions.

Article 14 addresses this problem by clarifying that reproductions of works of visual art that are in the Public Domain cannot themselves be protected by copyright or related rights, unless the reproduction is original. While this provision establishes a clear rule at EU level, its effectiveness depends on how it interacts with other areas of national law, in particular cultural heritage legislation. The national implementation of Article 14, and its interaction with other legal frameworks, therefore offers important insights into whether the objective of preventing the re-appropriation of Public Domain works through digitisation has been fully realised in practice.

6.1 IMPLEMENTATION OF THE PUBLIC DOMAIN SAFEGUARD

Article 14 of the DSM Directive is primarily directed at Member States that grant exclusive rights protection to non-original photographs. While EU copyright law protects only photographs that meet the originality threshold, Article 6 of the Term Directive allows Member States to extend related rights protection to “other photographs” at national level. A limited number of Member States have made use of this policy space, resulting in dual systems that protect both original photographic works and non-original photographs.

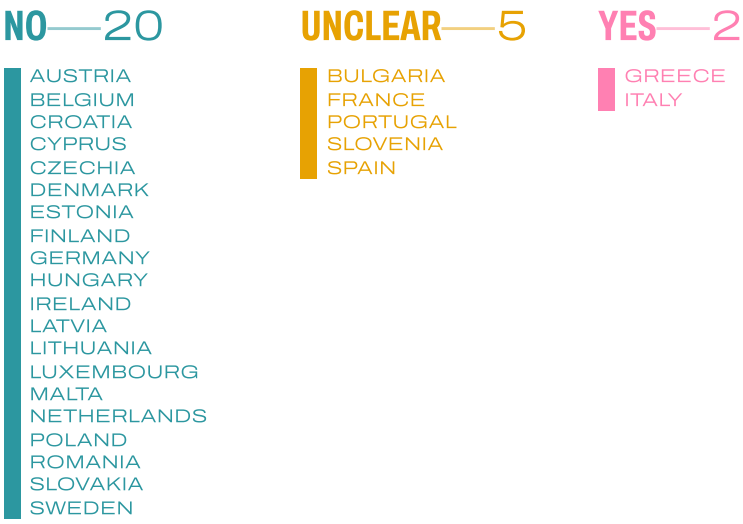
This structural divergence explains why the practical relevance of Article 14 varies considerably across the Union. Only seven Member States maintain a system that grants protection to non-original photographs and have therefore transposed Article 14 in a way that directly curtails existing related rights. By contrast, among the Member States that protect only original photographs, implementation choices are evenly split: ten transposed Article 14, albeit with limited practical effect, while ten chose not to implement it at all.

6.2 CULTURAL HERITAGE LAWS AS A BARRIER TO REUSE

In several Member States, cultural heritage laws regulate access to, and reuse of, materials held in public collections. While formally distinct from copyright, these regimes often function in a similar way by granting public authorities or cultural heritage institutions control over the reuse of reproductions of works, including works that are already in the Public Domain, particularly for commercial purposes. These legal frameworks typically require prior authorisation (and, in many cases, the payment of a fee) for the reuse of the faithful reproductions of Public Domain works, potentially undermining the *effet utile* of Article 14. Figure 10 illustrates how Member States have addressed the relationship between cultural heritage laws and the Public Domain safeguard.

Figure 10

Do cultural heritage laws restrict the reuse of faithful PD reproductions?



The comparative picture shows that in most Member States no clear restrictions on the reuse of public domain reproductions stemming from cultural heritage laws have been identified. Among those jurisdictions that have cultural heritage legislation in place that restricts the use of faithful reproductions of Public Domain works, only two Member States, Italy and Greece, explicitly include, in its implementation of Article 14, a carve-out for, respectively, the Italian Cultural Heritage Code and the Greek Legislation for the Protection of Antiquities and Cultural Heritage in General. In the remaining six Member States the relationship between the Public Domain safeguard remains unresolved.

7

LIMITS TO THE PRESS PUBLISHERS' RIGHT

Before the adoption of the DSM Directive, press publishers in the EU relied primarily on copyright protection in their original works and on contractual arrangements to control the online use of press publications. Article 15 of the DSM Directive fundamentally altered this landscape by introducing, for the first time, a related right for press publishers.

Although Article 15 formally targets uses by information society service providers, its effects extend beyond the relationship between publishers and platforms. By limiting the ability of intermediaries to display press content, the new right has implications for access to information and the circulation of news within the EU. Article 15 is therefore accompanied by a set of mandatory definitions, exclusions and safeguards intended to limit its scope and prevent overreach. The comparative analysis in this chapter focuses on whether Member States have correctly implemented these elements.

7.1 LIMITED DEVIATIONS IN THE DEFINITION OF PRESS PUBLICATIONS

Most elements of Article 15 are prescriptive, leaving Member States limited discretion in implementation. Nevertheless, national lawmakers have introduced a number of variations, starting with the definition of "press publication" in Article 2(4) of the DSM Directive.

In many cases, these variations appear largely inconsequential. Some Member States have incorporated clarifications drawn from the recitals, such as the exclusion of websites like blogs that do not operate under the editorial responsibility and control of a news publisher. Such additions do not appear to conflict with the Directive and may even contribute to legal clarity.

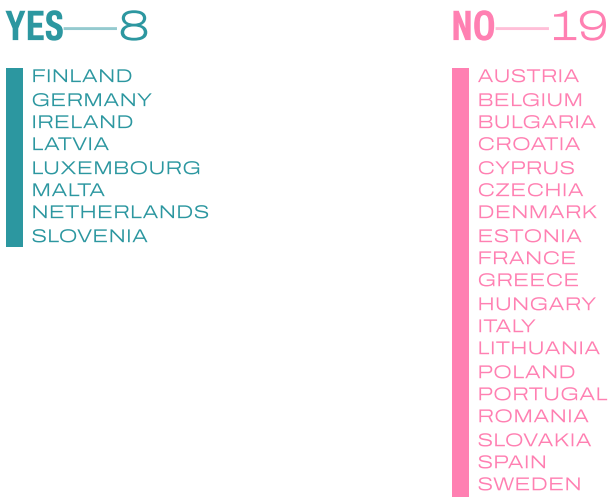
In other cases, however, changes to the definition risk expanding or blurring the scope of the new right. Omissions or modifications affecting core elements of the definition, such as the requirement of editorial responsibility and control, or the exclusion of scientific and academic periodicals, may result in broader protection than intended by the EU lawmaker. While outright non-compliance is not widespread, these divergences illustrate that even highly prescriptive provisions can be reshaped at national level.

7.2 UNEVEN COMPLIANCE WITH MANDATORY LIMITS

From a user rights perspective, the mandatory limits set out in Article 15 play a central role in delimiting the scope of the press publishers' right. Article 15(1) excludes from the scope of the right private or non-commercial uses of press publications by individual users, acts of hyperlinking, and uses of individual words or very short extracts of a press publication. Article 15(2) further provides that the press publishers' right may not be invoked to prohibit uses by other authorised users acting under a non-exclusive licence, nor to restrict uses of works or other subject matter for which protection has expired. The following figure illustrates whether Member States have implemented these mandatory provisions.

Figure 11

Is the press publishers' right subject to all mandatory limits?



The comparative analysis shows that despite their central role, these limits have not been implemented consistently across the EU. Almost two thirds of the Member States have failed to transpose all the limits in a fully compliant manner, risking an expansion of the scope of the press publishers' right beyond what is permitted by EU law.

Looking into the implementation of Article 15(1) in more detail, we note that twenty-two Member States have excluded both private and non-commercial uses by individual users, while five Member States have failed to implement one or both of these exclusions, and one has subjected them to additional conditions not foreseen in the Directive. By contrast, the exclusion of acts of hyperlinking has been implemented uniformly, with only one isolated attempt to narrow its scope. The exclusion of uses of individual words or very short extracts has been transposed by all Member States; however, in three cases, national laws introduced quantitative thresholds that may affect the harmonised interpretation intended by the EU legislator.

With regard to Article 15(2), failures to properly protect uses of Public Domain publications persist in seven Member States, while eight Member States fail to clearly establish that the press publishers right cannot be invoked to prohibit uses authorised under non-exclusive licences.

7.3 INCOMPLETE APPLICATION OF COPYRIGHT EXCEPTIONS

In addition to the mandatory exclusions set out in Article 15(1) and (2), Article 15(3) provides that the press publishers' right is subject to the limitations and exceptions laid down in EU copyright law, including those provided for in the InfoSoc Directive, the Orphan Works Directive, the Marrakesh Directive, and the DSM Directive itself.

While Article 15(3) is mandatory in nature, the underlying limitations and exceptions to which it refers remain largely optional at national level. As a result, the extent to which the press publishers' right is subject to limitations such as quotation, criticism or review depends on national legislative choices. Figure 12 shows whether the press publishers' right is subject to all relevant limitations and exceptions applicable under national law.

Figure 12

Is the press publishers' right subject to all copyright exceptions?

YES—20

AUSTRIA
BELGIUM
BULGARIA
CYPRUS
DENMARK
ESTONIA
FRANCE
GERMANY
GREECE
HUNGARY
ITALY
LATVIA
LUXEMBOURG
NETHERLANDS
POLAND
PORTUGAL
ROMANIA
SLOVAKIA
SLOVENIA
SPAIN

NO—7

CROATIA
CZECHIA
FINLAND
IRELAND
LITHUANIA
MALTA
SWEDEN

The comparative analysis shows that, in the vast majority of Member States, the press publishers' right is subject to the same limitations and exceptions as other related rights. However, in seven jurisdictions, national lawmakers have chosen not to extend all relevant limitations and exceptions to the new right, resulting in a broader scope of protection for press publishers than for other rightholders. Within this group, four Member States – Finland, Ireland, Lithuania and Malta – also fail to apply one or more mandatory DSM exceptions to the press publishers' right. Finland and Lithuania do not extend the digital education exception to press publications, Ireland does not do so for the preservation exception, and Malta fails to apply the digital education, preservation and scientific TDM exceptions. These omissions raise particular concerns, as they affect exceptions that are mandatory under EU law.

8

USER RIGHTS SAFEGUARDS IN ONLINE CONTENT-SHARING SERVICES

The DSM Directive introduced a new liability regime for online platforms hosting user-generated content. Prior to the DSM, these platforms were not directly liable for copyright-infringing content uploaded by users, provided they acted expeditiously upon obtaining knowledge of infringement. Under Article 17, most for-profit content-sharing platforms, now defined as online content-sharing service providers (OCSSPs), are directly liable when making user uploads available. As a result, they must make best efforts to obtain authorisation from rightholders or, failing that, comply with a set of obligations designed to prevent the availability of infringing content.

By shifting responsibility to platforms and encouraging preventive measures, Article 17 significantly increased the role of automated copyright enforcement at upload. To mitigate the risks posed by such automated tools to fundamental freedoms, Articles 17(7) to (9) establish a set of substantive and procedural safeguards aimed at ensuring that lawful user uploads are not blocked or removed. The comparative analysis in this chapter therefore focuses on how Member States have implemented these safeguards and whether national laws give practical effect to user rights in the context of automated copyright content moderation.

8.1 OVERVIEW OF EX ANTE USER SAFEGUARDS

From a user rights perspective, one of the most critical aspects of Article 17 is how national laws reconcile the obligation for platforms to prevent the availability of infringing content under Article 17(4)(b) and (c) with the requirement to ensure that lawful uploads remain available under Article 17(7).

The DSM Directive formulates these safeguards at a high level of abstraction, without specifying the concrete measures platforms must adopt to comply with these obligations. While the Commission has issued guidance under Article 17(10) to clarify how platforms may operationalise this balance, national legislators retain discretion in determining how to translate these abstract requirements into binding legal rules. The figure below shows how Member States have used this policy space.

Figure 13

What ex ante user safeguards are provided against overblocking?

SPECIFIC SAFEGUARDS — 5

- AUSTRIA
- BULGARIA
- CZECHIA
- GERMANY
- SWEDEN

ABSTRACT SAFEGUARDS — 19

- BELGIUM
- CROATIA
- CYPRUS
- DENMARK
- ESTONIA
- FINLAND
- FRANCE
- GREECE
- HUNGARY
- IRELAND
- LATVIA
- LUXEMBOURG
- MALTA
- NETHERLANDS
- POLAND
- PORTUGAL
- ROMANIA
- SLOVAKIA
- SLOVENIA

NONE — 3

- ITALY
- LITHUANIA
- SPAIN

The comparative picture indicates that most Member States have opted for a minimalist transposition of Article 17(7), formally restating the abstract requirement to ensure that lawful uploads are not blocked. Only a small number of Member States – Austria, Bulgaria, Germany, Czech Republic and Sweden – have interpreted this requirement as a basis to go further by introducing concrete mechanisms that operate before content is blocked or removed. As a result, in the majority of jurisdictions, the task of balancing competing fundamental rights is effectively delegated to platforms and, ultimately, to the courts.

8.2 FROM ABSTRACT REQUIREMENTS TO CONCRETE USER PROTECTIONS

As explained in the previous section, a limited group of five Member States have taken a more interventionist approach to translate the abstract requirements of Article 17(7) into effective ex ante safeguards. The national approaches vary, but they all introduce substantive criteria to identify content that should not be automatically blocked. Some Member States rely on concrete thresholds or user-flagging mechanisms, while others formulate broader, abstract standards based on the likelihood of infringement or the equivalence between uploaded and protected content. In these jurisdictions, preventive measures are combined with procedural guarantees intended to ensure that disputed content is not removed without prior human assessment.

A small number of Member States have complemented Article 17 with additional safeguards aimed at improving transparency, accountability, and enforcement of user rights. These include obligations requiring platforms to provide users with information about their content moderation practices (available in Austria, Lithuania and Sweden), as well as mechanisms allowing users or user organisations to seek collective redress where lawful content is repeatedly blocked or removed (available in Germany, Hungary and Sweden).

Some Member States have also introduced sanctions and enforcement mechanisms to address abuses of the cooperation mechanisms established under Article 17, both by platforms (Austria, Czech Republic, Estonia, Finland, Germany and Sweden) and by rightholders (Germany, Finland and Lithuania). These measures range from administrative fines and supervisory interventions to judicial remedies and damages claims. While such safeguards can create meaningful incentives against systematic overblocking and abusive ownership claims, they remain the exception rather than the rule across the Union.

Taken together, these approaches reflect different attempts to translate the abstract safeguards of Article 17 into a coherent system of ex ante and ex post user protections. Where such systems exist, they demonstrate that it is possible to operationalise Article 17 in a way that both enables copyright enforcement and safeguards fundamental rights. Elsewhere, the lack of concrete rules and effective enforcement mechanisms leaves user rights largely theoretical and contributes to fragmentation across the Union.

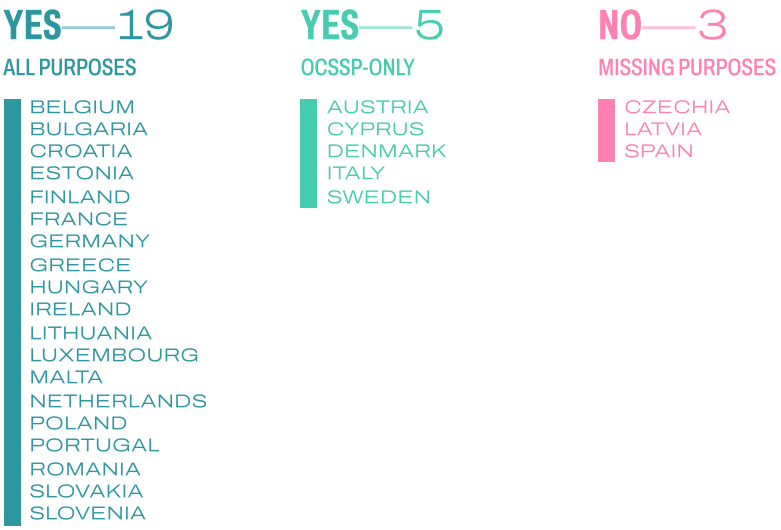
8.3 LIMITED HARMONISATION OF THE CARICATURE, PARODY AND PASTICHE EXCEPTION

Among the user rights safeguards introduced by Article 17 is a new mandatory exception for the purposes of caricature, parody, or pastiche. Under the second paragraph of Article 17(7), Member States are required to ensure that users can rely on this exception when uploading and making available user-generated content on OCSSPs.

Prior to the DSM Directive, an exception for caricature, parody, or pastiche was already foreseen in Article 5(3)(k) of the InfoSoc Directive, but its optional nature led to fewer than half of the Member States having such an exception in place, while many relied on narrower formulations or on the direct application of fundamental rights by national courts to safeguard such uses. The implementation of the DSM Directive has significantly altered this landscape, as shown by the figure below.

Figure 14

Do Member States protect parody, caricature and pastiche?



Overall, the comparative picture shows that Article 17 has improved protection for parody, caricature, and pastiche across the EU, but has not resulted in full harmonisation. Most Member States have now introduced an explicit exception covering caricature, parody, and pastiche, reflecting the mandatory nature of Article 17(7). However, three Member States still fail to cover all three purposes, most notably by excluding pastiche or caricature.

In addition, five Member States have limited the exception to uses made on OCSSPs. While this approach formally complies with the minimum requirements of Article 17(7), it leaves equivalent uses outside these platforms, whether online or offline, without explicit protection. This narrow transposition perpetuates fragmentation and fails to reflect the broader role of parody, caricature, and pastiche as modes of cultural participation and artistic expression beyond the OCSSP context. The DSM review therefore offers an opportunity to clarify and extend the scope of this exception, ensuring consistent protection for expressive practices across platforms and Member States.

9

CROSS-CUTTING FINDINGS

Across several areas covered by the DSM Directive, national implementation reveals a recurring issue: exceptions are not consistently extended to all categories of protected subject matter, in particular related rights, as required by EU law. This results in partial transposition of mandatory provisions and undermines the horizontal nature of the exceptions.

In the context of digital education, Finland, Hungary, Ireland, Lithuania and Malta do not extend the exception to all categories of related rights. For the preservation exception, similar gaps can be observed in Austria, Hungary, Ireland, Lithuania, Malta and Poland. In relation to scientific text and data mining, Ireland and Malta do not ensure full coverage. Finally, for the out-of-commerce works regime, incomplete extension can be observed in Malta and Slovakia.

In many cases, these shortcomings appear to stem from legislative technique rather than deliberate policy choices. National laws often rely on cross-references whereby exceptions applicable to copyright works are extended *mutatis mutandis* to related rights. Where specific exceptions are omitted from the list of referenced provisions, the result is an incomplete transposition that creates legal uncertainty and weakens the effectiveness of the harmonised framework established by the DSM Directive.

10

CONCLUSION: LESSONS FOR THE DSM REVIEW

Taken together, the comparative analysis of the implementation of the DSM Directive across Member States points to a number of structural findings that are highly relevant for the forthcoming DSM review.

RESEARCH RIGHTS

Text and data mining exceptions alone do not accommodate the full range of scientific research activities.

A clear majority of Member States have relied on broader national research exceptions to complement Article 3, recognising that research workflows extend beyond automated analysis. These approaches demonstrate that more comprehensive protection for scientific research is both legally and politically feasible. The DSM review should reassess how EU law can better support the full research lifecycle.

The ability to share research materials remains unevenly protected across the Union.

While most Member States allow some form of sharing under national research exceptions, restrictions persist in a significant minority. Without greater legal certainty around sharing, the ability of researchers to collaborate, verify results, and build upon existing work remains constrained.

Legal uncertainty persists as to whether and how TDM exceptions apply to AI development, particularly for training machine learning models.

Despite efforts at EU level to clarify this relationship, uncertainty within the research community, combined with restrictive licensing practices, continues to have a chilling effect on research. By explicitly linking TDM to AI development, the Italian implementation provides a valuable model for addressing this gap.

The effectiveness of research exceptions depends on their practical usability in the face of technical access controls.

Targeted national solutions, such as those adopted in Slovenia and Bulgaria, demonstrate how two distinct layers of technological control – security measures and TPMs – can be addressed through time-bound access mechanisms. Together, they offer complementary models for strengthening the effectiveness of research rights.

EDUCATION RIGHTS

Most Member States recognise the need for education exceptions that go beyond digital education.

Many national lawmakers have demonstrated that broader education rights, covering non-digital activities, wider educational purposes, and additional categories of educational providers, are both feasible and effective. These national practices provide concrete models for EU law to better protect educational uses beyond narrowly defined digital teaching activities and formal educational establishments.

Licence-priority mechanisms significantly weaken the mandatory education exception and risk rendering it ineffective in practice.

Where licences take precedence over the exception, the core function of the EU's mandatory education safeguard may be neutralised. The DSM review should therefore consider limiting the scope of Article 5(2), ensuring that licensing cannot override the core function of mandatory education exceptions and that a minimum level of statutory protection for education is preserved across the Union.

CULTURAL HERITAGE RIGHTS

Some Member States enable broader preservation activities.

Ten Member States do not explicitly condition preservation copying on works being part of a "permanent collection," thereby avoiding interpretative uncertainties associated with this condition and broadening the scope of the exception. These approaches offer a useful model for strengthening cultural heritage rights.

The out-of-commerce works exception has not been correctly implemented across the Union.

In several Member States the omission of the reproduction right constrains the practical usefulness of the exception, as digitisation is typically a precondition for making works available online.

The criteria used to establish out-of-commerce status vary considerably across the Union.

While some national approaches may enhance legal certainty, others increase the evidentiary burden placed on cultural heritage institutions. The DSM review could address this divergence by clarifying and harmonising this key concept.

Divergences in national approaches to determining the representativeness of collective management organisations create uneven entry points into the out-of-commerce works regime.

This variation affects not only the balance between licensing and exception mechanisms, but also the practical usability of the system for cultural heritage institutions operating across borders. The DSM review should therefore assess whether the dual licensing-and-exception framework foreseen in Article 8 effectively supports large-scale digitisation and cross-border access to Europe's cultural heritage.

PROTECTIONS AGAINST CONTRACTUAL AND TECHNOLOGICAL OVERRIDES

The protection against contractual overrides has not been implemented consistently across the Union.

While a majority of Member States provide protection against contractual override, gaps remain, and national laws rely on different legal formulations with varying degrees of effectiveness. These differences affect the extent to which contracts can be used to circumvent mandatory exceptions, particularly in cross-border contexts.

The protection against technological overrides is even more uneven.

In several Member States, users are only partially protected, or not protected at all, from the restrictive effects of technological protection measures. In addition, the continued application of the on-demand limitation significantly weakens the effectiveness of these safeguards in digital environments.

PUBLIC DOMAIN SAFEGUARD

Article 14 has been widely implemented across the Union, confirming strong recognition of the importance of protecting the Public Domain.

Many Member States transposed the safeguard even where its immediate practical impact is limited. This broad uptake reinforces the normative value of Article 14 within EU copyright law. The DSM review could therefore consider extending the logic of this provision to other categories of works beyond visual art where similar risks of re-appropriation arise.

Cultural heritage laws that restrict the reuse of faithful reproductions of Public Domain works pose a structural challenge to the Public Domain safeguard.

Where the relationship between Article 14 and such legislation remains unclear or unresolved, legal uncertainty persists for users. The DSM review should clarify this relationship, ensuring that the protection introduced by Article 14 is effective in practice and consistent across the Union.

LIMITS TO THE PRESS PUBLISHERS' RIGHT

The introduction of a new exclusive right for press publishers has not been matched by a consistent and faithful implementation of the mandatory limits intended to contain its scope.

Despite the largely prescriptive nature of Article 15(1) and (2), only a minority of Member States have fully implemented all mandatory safeguards.

In some Member States the press publishers' right benefits from broader protection than other related rights.

This occurs where national lawmakers have chosen not to apply existing copyright exceptions to the new right. Such choices expand the scope of protection for press publishers and contribute to fragmentation across the internal market.

USER RIGHTS SAFEGUARDS IN ONLINE CONTENT SHARING SERVICES

Most Member States have opted for a minimalist transposition of Article 17's user safeguards.

National laws often restate the Directive's abstract requirements without introducing concrete rules to prevent the automated blocking of lawful content. As a result, the practical protection of user rights is often delegated to platforms and ex post judicial review, increasing the risk of overblocking and legal uncertainty.

A small group of Member States demonstrates that Article 17 can be implemented in a way that meaningfully protects user rights.

National laws that introduce clear ex ante safeguards, transparency obligations, collective redress mechanisms, and measures against abusive behaviour show that it is possible to operationalise Article 17 without sacrificing freedom of expression or access to information. These approaches provide valuable models for improving the effectiveness and consistency of user protections across the Union.

The mandatory exception for caricature, parody and pastiche has significantly improved legal protection for expressive uses but remains unevenly implemented.

Some Member States limit the exception to uses on online content-sharing service providers, while others exclude certain purposes. This perpetuates fragmentation and undermines the harmonising intent of Article 17. The DSM review should therefore clarify and strengthen this exception, ensuring consistent protection for lawful expressive practices across platforms and Member States.

CROSS-CUTTING FINDINGS

Mandatory exceptions are not consistently extended to all categories of protected subject matter.

This is often due to legislative techniques that fail to properly apply the main copyright exception *mutatis mutandis* to related rights.

OVERALL IMPLICATIONS FOR THE DSM REVIEW

Taken together, these findings reveal a recurring pattern in the implementation of the DSM Directive. In several areas, Member States have demonstrated that stronger and more balanced protections for research, education, preservation and user expression are both legally feasible and already functioning in practice. At the same time, the comparative analysis shows that gaps, inconsistencies, and uneven national implementation continue to undermine the Directive's harmonising objectives. The forthcoming DSM review therefore provides a crucial opportunity not only to correct implementation shortcomings, but also to build on emerging national best practices and strengthen the protection of user rights across the Union.

ABOUT COMMUNIA

The COMMUNIA association advocates for policies that expand the Public Domain and increase access to and reuse of culture and knowledge. It acts as a network of like-minded activists, researchers and practitioners based in Europe and the United States who seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.
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www.communia-association.org
Or contact us at communia@communia-association.org

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