# The CJEU and the Educational Exception in *Renckhoff*: Permitted to view but not to share?

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## I. Introduction

Copyright law is all about balance; it is a balancing act. Its ultimate goal lies in reconciliation of two seemingly conflicting objectives: to guarantee a just reward for creators of works of arts and intellects and to safeguard public access to those works.[1] This balance is pursued through various modalities which include the idea-expression dichotomy, limited terms of protection, collective rights managements, and limitations and exceptions like fair use and fair dealing. The application of these modalities in striking a balance between competing rights has never been straightforward. This delicate balance has been further threatened by the digital technology. Expectedly, copyright owners revived the usual hostility which normally accompanies introduction of a new technology and become more vociferous in ensuring that the advantage gained in the age analogue technologies was is not lost in the digital sphere. Lawmakers' responses have often represented a capitulation to this lobby and failed to take account of the public interest.

By ensuring public access, the copyright system fosters learning and dissemination of information. Examples may be found in exceptions supporting teaching, research and criticism and allied activities. When teaching, tutors use copyrighted works to illustrate their point (e.g. showing a painting or playing part of a broadcast). Also, learners engage in transformational usages sharing acquired information with peers. Through blended or hybrid learning, technology supported learning is becoming the norm while fast internet broadband has created an environment for distance learning to thrive. Students listen to recorded lectures or learn in real-time interacting with instructors and peers around the world. However, it appears the CJEU might have jeopardised this innovative way of learning in favour of copyright protection when it fails to fill the lacunae in the InfoSoc Directive with its decision in *Renckhoff*.

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[1] 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 T Synodinou (ed). *Codification of European Copyright Law: Challenges and Perspectives* (Kluwer Law International 2012)

From its inception, the InfoSoc Directive has been steeped in controversy. The Directive is a product of the "mother of all battles," an attempts to harmonise copyright laws of EU Members States.[2] While the Directive may have provided an enabling environment for new business models, there have also been calls from those who think it needed recasting.[3] To its critics, the offences of InfoSoc Directive are many and grievous. This is not limited to undefined terminologies[4] and its ambition to marry the copyright systems of heterogeneous legal traditions. The uncertainty around some of the vague provisions are compounded by supposedly innovative decisions of the CJEU. Among them are the amorphous concepts of "communication"[5] and the novel "new public".[6] When it comes to the utilisation of copyrighted materials in the digital sphere, compared to the right of reproduction, the right of communication to the public (including making available) has been shrouded in a high level of controversy which the drafters of InfoSoc Directive never contemplated.[7]

This chapter investigates the impact of Directive 2001/29/EC exception to teaching and education on the right to education in the light of CJEU decision in *Land Nordrhein-Westfalen v Dirk Renckhoff*. It argues that the decision in *Renckhoff* will have serious implications for Internet-based teaching especially concerning the incorporation of Internet-available images into teaching materials. The chapter examines the relationship between copyright and the right to education and how the teaching and educational exception could preserve this right. Later, the work examines the reasoning in *Renckhoff* and its implication for in the digital environment.

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[2] Ted Shapiro "Directive 2001/29/EC on copyright in the information society" Brigitte Lindner and Ted Shapiro (eds), *Copyright in the Information Society: A Guide to National Implementation of the EU Directive* 2nd edition (Edward Elgar 2018)

[3] Bernt Hugenholtz, et al *The Recasting of Copyright and Related Rights for the Knowledge Economy* Final Report Institute for Information Law, University of Amsterdam (2006)

[4] Tanya Aplin "The Impact of the Information Society Directive on UK Copyright Law" Brigitte Lindner and Ted Shapiro (eds), *Copyright in the Information Society: A Guide to National Implementation of the EU Directive 2nd edition* (Edward Elgar 2018)

[5] Birgit Clark and Julia Dickenson "Theseus and the labyrinth? An overview of "communication to the public" under EU copyright law: after Reha Training and GS Media Where are we now and where do we go from here? 2017 European Intellectual Property Review 2017 39(5) 265-278

[6] Stavroula Karapapa "The requirement or a new public in EU copyright Law" 2017 42(1) European Law Review 63-81

[7] Justin Koo *The Right of Communication to the Public in EU Copyright Law* (Hart Publishing 2019)

## II. The EU Copyright System and the Educational Exception

Limitations and exceptions are integral part of the copyright system. They are one of the fulcra in maintaining the balance between the rightsholders and the society. From an economic angle, their function is not confined to guaranteeing public access to creativity, but their effectiveness also drives future innovation.[8] Limitations are useful instruments when determining the zones in which use, experimentation and innovation can occur. Another justification is that limitation and exceptions support access to culture and education. As Reyman explains "[c]opyright encourages a democratic structure in public process by encouraging the dissemination of works and ensuring that participants in democratic society have the information they need to participate."[9] In other words, copyright law fosters a participatory culture where readers, listeners and viewers have the opportunities to read, listen, enjoy, learn and explore the creative works.

In ensuring the functioning of the EU Internal Market and counter the challenges posed by the internet technology, one of the primary objectives of the InfoSoc Directive is to harmonize the legislation of its members. Understandably, harmonisation of rights of authors will be beneficial in a digital environment which defies national borders. Another central objective of the Directive is to resolve the rivalry between author's right and user right in the digital age.[10] However, the outcome was a resolution which prioritises author's rights over public interest.

Arguably, the exception in Art 5 pays lip service to public access for two mains. First, if one excepts the only mandatory exception in Art5(1), members States are not obliged to implement the other exceptions in Art5. The freedom in the implementation of limitations and exception has contributed to the fragmentation of the EU acquis in the field of copyright law.[11] In fact, this defeats the so much touted higher degree of harmonisation considered as the bedrock for the functioning of the internal market.[12] On one hand, the breadth of users'

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[8] William Landes and Richard Posner An Economic Analysis of Copyright Law: An Economic Analysis of Copyright Law (1989) 18 J. Leg. Stud. 325

[9] Jessica Reyman *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (Routledge 2010) 51

[10] Christophe Geiger and Franciska Schönherr "Limitations to copyright in the digital age" in Andrej Savin and Jan Trzaskowski *Research Handbook on EU Internet Law* (Edward Elgar 2014)110

[11] Bernt Hugenholtz, 'Why the Copyright Directive Is Unimportant, And Possibly Invalid' (2000) 22(11) EIPR 499.

[12] S von Lewinski "Article 5 exceptions and limitation" in MM Walter and S von Lewinski (ed) *European Copyright Law: A Commentary* (Oxford University Press 2010)

access faces the same uncertainty attributed to the common law's open system. On the other hand, in a cross-border infringement scenario, an additional burden is imposed on rightsholders of periodically ascertaining available exceptions under the national law(s) concerned before instituting an action. Like Hugenholtz observed, the Directive has failed to achieve enough harmonisation and left the most important copyright problems of the digital environment unresolved.[13] Second, the exceptions are listed in exhaustive manner.[14] Among the most important for our purposes, permissible usages are confined among others to private copying, illustrations for teaching or scientific research, for the purpose of research or private study, to individual members of the public by dedicated terminals. Hart argued that this limitation system lacks much flexibility.[15]

Admittedly, any new method of exploitation which does not fall within the enumerated category will outrightly infringement author's exclusive right. Besides, the so-called grandfather clause gives a false hope of flexibility. Article 5(3)(o) permits usages in cases where they are of minor importance. Even if Article 5(3)(o) appears to support some flexibility,[16] this is undermined by two key restrictions. Firstly, the exception maintains the status quo of permitted usages pre-InfoSoc Directive. Secondly and worse is that it is confined to analogue usages. So, Article 5(3)(o) is redundant because it lacks the adaptability needed in the digital environment.[17] As a result, in the United Kingdom, the Hargreaves Review suggested an additional exception which would allow EU Copyright Law to accommodate future technological change where it does not conflict with copyright owners right.[18] Similarly, the Rapporteur Julia Read of the Parliament Committee on Legal Affairs called for the adoption of an open norm that allows flexibility in the interpretation of exceptions and limitations.[19] Such flexibility must ensure the technological neutrality and future-compatibility of exceptions and limitations.[20]

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[13] Bernt Hugenholtz, 'Why the Copyright Directive Is Unimportant, And Possibly Invalid' (2000) 22(11) EIPR 499.
[14] Recital 32
[15] Michael Hart, 'The Copyright in The Information Society Directive: An Overview' (2002) 24(2) EIPR 58.
[16] HP Bernt and Martin Senftleben "Fair Use in Europe: In Search of Flexibilities" (November 14, 2011). Available at SSRN: https://ssrn.com/abstract=1959554
[17] Lucie Guibault, "Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC" 1 (2010) JIPITEC 55
[18] I Hargreaves "Digital Opportunity: A Review of Intellectual Property and Growth" May 2011 p 5
[19] Committee of Legal Affairs Draft Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI)) <https://www.europarl.europa.eu/doceo/document/JURI-PR-546580_EN.pdf?redirect> Jan 2015 See Ibid Recommendation 13
[20] Ibid Recommendation 14

**Copyright and Right to Education**

In the light of its perceived lack of flexibility, to what extent does EU copyright law accommodate a right to education? As Gervais has noted, copyright can live with human rights provided the discourse moves away from property-based rhetoric to a human right framework that treats author's protection and users access as complementary objectives.[21] Access to education and copyright are separate yet have interdependent relationship. Access to relevant teaching materials is critical to the actualisation of right to education. Disappointedly, the provenance of this relationship, Art 10(2) of Berne Conventions which permits "illustrations for… teaching" is capable of different meanings.[22]

By nature, the right to education is an economic right. Access to universal primary education was one of the Millennium Development Goals.[23] Understandably, education plays an important role in enabling upward socioeconomic mobility.[24] Beyond the mere aspiration of Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires States Parties to recognise right of everyone to education under Articles 13 and 14. This obligation is crucial to the realisation of economic right, social right, cultural right, civil right and political right.[25] This explains the reason for making primary education compulsory. Primary education is defined as "the basic learning of needs of all children as satisfied and take into account the culture, needs and opportunities of the community."[26]

Within the EU, the European Charter of Fundamental Rights grant European citizens and residents the right to education.[27] This right includes the possibility to receive free compulsory education. However, unlike ICESCR, it is unclear which stage of education

[21] DJ Gervais, "Intellectual Property and Human Rights: Learning to Live Together" in Paul L.C. Torremans, ed, Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights (The Netherlands: Kluwer Law International, 2008) 3

[22] R Xalabarder 'WIPO Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' WIPO Doc SCCR/19/8. Available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_8.pdf>

[23] United Nations Millennium Declaration available at <https://undocs.org/A/RES/55/2>

[24] <https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/02/4_Why-It-Matters-2020.pdf>

[25] SE Foster "The Conflict between the Human Right to Education and Copyright" in Paul L.C. Torremans (ed) *Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights* (Kluwer Law International 2008) 287-306

[26] Committee on Economic, Social and Cultural Rights, The right to education (Art13): 08/12/99, E/C.12/1999/10, Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment 13 at para 9

[27] European Charter of Fundamental Rights Art 14

should be made free. The Praesidium to the Charter explains that free compulsory education means that 'each child has the possibility of attending an establishment which offers free education. Educational service providers are under no obligation to provide free services. Also, it does not exclude certain specific forms of education having to be paid for, if the State takes measures to grant financial compensation.' In summary, the term 'possibility' clarifies that free compulsory education has to be possible, not that all compulsory education has to be free.[28]

Although States bear the responsibilities for the actualisation of this right, simultaneously, stakeholders such as corporations and individual authors share in this obligation. Indubitably, right to education is more than schooling but covers access to materials that facilitates learning.[29] Apparently, both traditional lending and e-Lending by libraries play a significant role in this. Hence, the obligation of corporations and individual authors lies in the willingness to permit the utilisation of their literary and artistic works by way of illustrations in publications, broadcasts or sound or visual recordings for teaching. That said, in granting access to their work, educational material must be adaptable to the needs of changing societies and communities and respond to the needs of students within diverse social and cultural settings.

**Teaching and Educational Exception**

Article 5(3)(a) InfoSoc Directive allows Member States to exempt any 'use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by non-commercial purpose to be achieved'. Albeit different phraseology, Article 5(3)(a) reflects the objective of Article 10(2) Berne Convention.

Provided the three-step test is complied with, Article 5(3)(a) should be broad enough to cover digital reproduction and communication to the public that supports teaching.[30] The exception covers not only traditional forms of using protected material but also exempt certain uses in

[28] Roland Winkler, "The Right to Education according to Article 14 of the Charter of Fundamental Rights of the European Union" (2005) 1 Intl J for Education L & Policy 60.

[29] Margaret Chon "Copyright and capability for education: An Approach 'from below'" in Tzen Wong, Graham Dutfield *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge University Press) 218

[30] MD Papadopoulou, "Copyright Limitations and Exceptions in an E-Education Environment" European Journal of Law and Technology, Vol. 1, Issue 2, 2010.

the context of on-demand delivery of works and other protected matter.[31] Regarding the extent and nature of the works, there is no limitation. It is possible to use small part or the entire work to the extent justified by its non-commercial purpose.

However, neither the Directive nor the Berne Convention offer any explanation on the meaning of "illustration for teaching". Papadopoulou argues that 'illustration for teaching' means any use of a work is allowed, if it is being used as part of an educational activity.[32] On the concept teaching, this should be broadly construed as including various activities in support of teaching and learning.[33] This can be produced during or after teaching and may be for future use.[34] Teaching should encompass any use of a work as part of a lesson either used to prepare the lesson or for the purpose of examination.[35]

On the eligibility of qualifying institutions, emphasis is on the non-commercial character of the educational activity; and the organisational structure and the means of funding of the establishment concerned is irrelevant.[36] It appears reasonable that the commercial nature of the institution should also be a relevant factor. An argument that favours this is that private institutions that charge tuition may be solvent enough to compensate rightsholders for the exploitation of their work. A counter argument is that this will be unfair to citizens that choose to attend such institutions who may have to share the cost of compensation. It is submitted that education is a fundamental right and the aspiration of attending a fee-paying institution should not incur any penalty. One way or the normally, Member States are left with the latitude to decide whether they would want to adopt different compensation regime for private and public institution.[37]

As the exception is not mandatory, Members States are giving the freedom to exempt reproduction and communication to the public undertaking in support of teaching and

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[31] Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, COM(97)628 final 40,
[32] Maria Papadopoulou, "Copyright Limitations and Exceptions in an E-Education Environment" (2010) Vol 1(2) EJLT 1; R Xalabarder 'Copyright and digital distance education: the use of pre-existing works in distance education through the internet', (2003) Columbia Journal of Law & the Arts 101.
[33] §110(2)(B) US Copyright Act - US TEACH Act)
[34] T Dreier and PB Hugenholtz (ed) *Concise European Copyright Law* (Kluwer Law International 2006) 378
[35]Raquel Xalabarder 'On-line teaching and copyright: any hopes for an EU harmonized playground?' in P Torremans *Copyright Law: A Handbook of Contemporary Research* (Cheltenham, Northampton: Edward Elgar 2007) 384
[36] Recital 42
[37] Xalabarder (n35) 373

research. Expectedly, the implementation across Member States varies enormously. According to a WIPO study on Teaching and Research Exceptions, there is uncertainty on the state of online use of teaching exceptions in Cyprus, Estonia, Latvia and Poland whereas countries Malta, the Netherlands, Poland and Slovenia allow translation for teaching purposes.[38] Some Member States require the payment of a fair compensation for the use of works for educational or research purposes while they are treated as exceptions in others.

Another notable divergence relates to the possibility of making teaching materials available to students through distance learning networks. Rightsholders in France have always argued that *droit d'auteur* tradition and educational uses exception are incompatible.[39] This perceived incompatibility delayed the inclusion of the educational uses into the Intellectual Property Code.[40] The IP Code now allows the use of short works or excepts for purposes of illustration or analysis where the work is strictly confined to circles of students, teachers or researchers.[41] In 2016 when France revised its IP Code, there was no attempt to amend the educational exception. Nonetheless, some scholars have asserted that subject to non-commercial exploitation of the work and payment of compensation to the collecting society the French teaching exemption covers both face-to-face and online exploitation.[42]

The German educational exceptions also have a chequered history.[43] The German Copyright Act was amended in 2003 to pave way for the implementation of Art 5(3)(a). The former Article 52(a) exception applied to digital copies more like traditional copies. It allowed *small portions* of copyrighted work be made available to the public exclusively for purposes of illustration for teaching in structured academic establishments and other and non-commercial career-training institutions.[44] Like France, access is limited to the circle of participants. There was confusion on what would constitute *small portions*. While some authors posited that 20%

[38] R Xalabarder (2009) 'WIPO Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' WIPO Doc SCCR/19/8. Available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_8.pdf>
[39] A. Lucas, *Droit d'auteur et numérique*, Paris: Litec 1998
[40] Article L122-5, 3°, e) of the CPI. It was added to the French IP code (CPI) in 2006 by Article 1 of the Loi n° 2006-961 du 1 août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information.
[41] Ibid Article L122-5, 3°, e)
[42] RJ Congleton and SQ. Yang "A Comparative Study of Education Exemptions to Copyright in the United States and Europe" (2017) Vol 3 Issue 1 Athens Journal of Law 47-60
[43] Silke Ernst & DM. Haeusermann "Teaching Exceptions in European Copyright Law – Important Policy Questions Remain" Berkman Center Research Publication No. 2006-10 available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=925950>
[44] German Copyright Law Art52a (1) no. 1 Emphasis supplied.

of a work should fit within this requirement,[45] others argued for a flexible assessment.[46] For example, if the portion copied could substitute for the entire work, then this is no longer a small portion. A German court concluded that a 10% portion of the entire material qualifies as a small portion.[47] Furthermore, potential users are subject to payment of remuneration to a collective licensing society.[48]

In 2017, Germany passed an "Act to Align Copyright Law with the Current Demands of the Knowledge-based Society" (*Urheberrechts-Wissensgesellschafts-Gesetz – UrhWissG*) which came into effect in March 2018. The Act replaced ss. 52a, 52b and 53b with new sections 60a-60h. Article 60a exempts all educational activities (either digital or non-digital) undertaken by educational establishments for non-commercial purposes.[49] The amendment clearly laid to rest the controversy surrounding the quantity that may constitute *small portion* by providing a ceiling of 15%.[50] Unlike the UK exception that restricts communication to dedicated terminals of the institution, it appears the amendment allows materials to be used at any location.[51] Also, the repealed Article 52(a) emphasized that communication shall be limited to "circle of participants", this qualification has been replaced with other phraseologies like "teachers and participants", teachers and examiners, and "third parties." The choice of "third parties" has somehow widen the scope of recipients. Considering the context of the provisions,[52] this should cover students, parents, guardians and other visitors to the establishment, or any portal being used to showcase its activities.

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[45] Ulrich Loewenheim, in: Gerhard Schricker, Urheberrecht, 2nd Edition, 1999, § 53 para. 31
[46] Ute Decker, in: Möhring/ Nicolini, Urheberrechtsgesetz, 2nd Edition, 2000, § 53 para. 28.
[47] Decision of the Appelate Court of Karlsruhe, May 27, 1987 U 31/86 „Referendarkurs", published in Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1987, 818-822.
[48] Article 52a (4) of the Act 2003
[49] Act to Align Copyright Law with the Current Demands of the Knowledge-based Society" Available at <https://www.gesetze-im-internet.de/urhg/__60a.html>; Educational institutions are defined as "early childhood educational institutions, schools, universities as well as institutions of vocational education or other training and further education". See Article 60a(4)
[50] For personal scientific research, the part that may be reproduced amounts to 75 percent. See Article 60(c)
[51] Teresa Nobre "Germany sets bad example with the proposed implementation of the new education exception" Available at <https://www.communia-association.org/2020/03/02/germany-sets-bad-example-proposed-implementation-new-education-exception/>
[52] Article 60a (1) provides that "(1) To illustrate teaching and teaching at educational institutions, up to 15 percent of a published work may be reproduced, distributed, made publicly available and otherwise publicly reproduced for non-commercial purposes… For third parties, insofar as this serves to present the lessons, teaching or learning outcomes at the educational institution.

In the United Kingdom, the Copyright Designs and Patent Act (CDPA) contains myriad provisions that concern educational uses like permitting illustration for instruction,[53] educational anthologies,[54] performance at educational establishment,[55] recording and showing of educational broadcast,[56] exception for reprographic copying[57] and lending of copies by an educational establishment.[58] These exceptions complement the educational licensing schemes.[59] The exceptions permit fair dealing by the instructor while preparing for teaching and persons receiving instructions in the teaching environment.[60] For example, the acts of taking notes during lectures, recording of lectures, singing a song and answering examination questions will constitute fair dealing.

In 2014, the UK Government proposed to widen the "permitted acts for education so that they apply to all types of copyright work and all types of modern technology, making the rules for using these works more flexible, and allowing more types of educational establishment to benefit from them".[61] This proposal was aimed to allow educational establishments to use technology such as interactive whiteboards and distance learning platforms. However, this proposal was opposed by groups who argued that the "introducing or broadening certain permitted acts would put the UK out of step with the rest of Europe and therefore leave the UK isolated."[62]

At the end, logic prevailed over politics. The former s32 which permitted non-reprographic copying for the purpose of instruction and copying for the purpose of examination was replaced with a single non-commercial fair dealing exception for teaching, which will permit the use of copyright works to the extent necessary by way of illustration in order to teach about a subject.[63] Expectedly, this exception will permit the copy and display of copyrighted work on interactive whiteboard presentation to students on the educational establishment's

[53] CDPA s32
[54] Ibid s33
[55] Ibid s34
[56] Ibid s35
[57] Ibid s36
[58] Ibid s36A
[59] UK Intellectual Property Office Modernising Copyright: A modern, robust and flexible framework (2012)
[60] CDPA s 32(1)
[61] Consultation of Copyright <https://webarchive.nationalarchives.gov.uk/20140603102613/http://www.ipo.gov.uk/consult-2011-copyright.pdf>
[62] UK Intellectual Property Office Modernising Copyright: A modern, robust and flexible framework (2012)
[63] In its original version, Section 32 (1)Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying— (a)is done by a person giving or receiving instruction, and (b)is not by means of a reprographic process.

intranet.[64] The scope of s36 appears to be boarder than s32 and more suitable for online learning. In fact, s36 was amended to accommodate materials being used for distance learning education.[65] However, this exception will apply if it occurs over secure distance learning networks controlled by educational establishments and can be accessed only by the establishment's pupils and staff.[66] Unfortunately, while these provisions support the integration of technology into delivery of education, they lack the foresight of the practice of uploading academic work on external platforms like SSRN, LinkedIn, Academia.edu. It is unclear whether uploading materials on these platforms will be covered by this exception simply because they are not controlled by educational establishments.

## III. The *Renckhoff* Case and its implication for Learning in Digital Environment

In the EU, the Preamble of InfoSoc Directive affirms its intention to "promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching." Therefore, in interpreting the exception, the CJEU is obliged to find a balance between the protection of author's exclusive rights and public interest in a way that gives effect to the provisions on exception. This obligation may require a broad interpretation that promotes the effectiveness of the exception.[67]

Until *Renckhoff,* in the CJEU jurisprudence attention has not been given to the educational exception, compared to the exceptions concerning parody,[68] quotation[69] and private copying.[70]

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[64] UK Intellectual Property Office Modernising Copyright: A modern, robust and flexible framework (2012) page 40< https://www.mpaonline.org.uk/wp-content/uploads/2017/09/Modernising_Copyright_-_a_modern_robust_and_flexible_framework_-_Government_response.pdf> page 40

[65] S. 36 substituted by the Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (S.I. 2014/1372), regs. 1, 4(3)

[66] CDPA 1988 s36(3)

[67] European Copyright Society "Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion on the Judgment of the CJEU in Case C-201/13" Deckmyn (2015) 46(1) IIC 93-101

[68] *Deckmyn and Vrijheidsfonds* C-201/13

[69] *Painer* C-145/10

[70] *Amazon.com International Sales and Others*, C-521/11, EU:C:2013: EU:C:2017:913; *Stichting de Thuiskopie,* C-462/09, EU:C:2011:379; *Padawan* C-467/08, EU:C:2010:620

*Land Nordrhein-Westfalen v Dirk Renckhoff*, C-161/17, was a reference for a preliminary ruling from the German Higher Regional Court in Hamburg concerning the resharing of a freely available picture on another website. Mr Renckhoff, a photographer had authorised a travel operator to upload one of his photographs on their freely accessible website. This photograph was downloaded by a pupil of a secondary school in Land of North Rhein-Westphalia in Germany and was included in a presentation made for his coursework assignment in the language workshop. The presentation containing this picture was later published by the school on its own website with an acknowledgment of the website where the picture was downloaded.

In an action before the German court, Mr Renckhoff claimed the infringement of his copyright. He contended that the right to use the photograph was granted exclusively to the travel website operators and the publication by the school on their website was a violation of his communication to the public right. He sought the court to prohibit the reproduction and the making available of the photograph to the public in addition to damages of EUR 400.

In the court of first instance, the complaint of the claimant was upheld by the court who asked the Land of North Rhein-Westphalia to remove the photograph from its website and pay EUR300 in damages plus interest. However, on appeal by both parties to the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), the court found for the claimant and decided that the posting of photograph on the school's website infringed the reproduction right and the making available right of the claimant. According to the court, it was immaterial that the photograph was already in the public domain without unrestricted access because the sharing by the defendant had disconnected the photograph from its original source.

At the appeal to the Bundesgerichtshof (Federal Court of Justice, Germany), the court reasoned that the interpretation of Article 3(1) of the InfoSoc Directive would affect the outcome of the appeal. It therefore deemed it necessary to refer the case to CJEU.

**CJEU Decision**

The question before the CJEU was that "whether the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, must be interpreted as covering the posting on one website of a photograph which has been previously published

without restriction and with the consent of the copyright holder on another website."[71] The CJEU answered this question positively. In its decision, the CJEU reaffirmed its interpretation of the concept of communication to the public as provided under Article 3(1) of the InfoSoc Directive as containing two cumulative criteria that is an act of communication of the work and the communication of that work to a public.

**An Act of Communication**

Before deciding whether the sharing of the photograph constituted an act of communication, the court maintains its earlier position on the meaning of communication to the public.[72] In the absence of a definition in the Directive, the concept must be interpreted considering the objective it aimed to achieve and the context of the provision being interpreted. The principal objective of the Directive remains to establish a high level of protection for authors to ensure they could obtain appropriate reward for the use of their works.[73] This is feasible when the concept of communication is given a broad interpretation in accordance to recital 23.[74]

In regard of this first constitutive element, it was not difficult for CJEU to reach its conclusion. The CJEU reasoned that the work of the claimant had been communicated to the public within the Art 3(1) because visitors to the website could access the photograph.[75] It suffices that the work has been disseminated in a manner the members of the public may have access to it. It is immaterial whether those members of the public accessed the work or not. The mandate of Art 3(1) is for Member States to provide authors with the exclusive right to authorise or prohibit *any communication* to the public of their works unless such communication is exempted by article 5. In this regard, the reposting on a website of a previously available image must be treated as "making available" and should be regarded as an act communication within the meaning of Article 3(1) of the InfoSoc Directive.[76] It is worth nothing that rather than considering both the right of reproduction and the communication to the public, the CJEU somewhat prefers a comprehensive approach by focusing on the latter right. This approach tends to concentrate on the most impactful right and avoids separate analysis of each right. Gervais has suggested that emphasis should be

[71] *Renckhoff* para 13
[72] For example, see *SAEG*, C-306/05, EU:C:2006:764; *Svensson and Others* C-466/12, EU:C:2014:76 *Stichting Brein* C-610/15, EU:C:2017:456
[73] *Renckhoff* para 18
[74] ibid
[75] *Renckhoff* para 21
[76] ibid

given to the effect of use as opposed to its technical nature.[77] Such practice would provide much-required clarity in the highly fragmented corpus of economic rights.[78]

What the CJEU decision suggests is that the reposting on a separate platform allows new internet users or the visitors to the secondary website to access the photograph. The act of communication extends to any user that could access the photograph on the website either they were entirely new or had already seen the image on the originating website. Admittedly, this "new" access right falls within communication to the public, even though both communications were undertaken through the same technical means. The position of the CJEU is that an image is freely available in public domain without any technical restriction does not constitute a permission to share. Rather, the implied permission this open access guarantees is limited to viewing. One major concern which the decision leaves behind is that students or other internet users who use openly available images to illustrate their presentation may need to be watchful where they could not obtain any prior permission to use the image. Without doubt, the anxiety of likely litigation and liability will only stifle the innovative ways of thinking and dissemination that copyright should aim to promote.

**Communication of the work to the public**

On the second constitutive element, the communication must be to a public, that is, an indeterminate and fairly large number of recipients. The CJEU consolidated its earlier innovative but controversial definition of "public".[79] For the CJEU, a "new public" is a public that does not fall within the audience taken into account by the author when he consented to publication of his work. The "first public" is the one the author contemplated when he consented to the use of the work and were solely those that visited or that would visit the original website where it was published. Thus, users on other websites which were not within the contemplation of the copyright holder constitute a "new public".[80]

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[77] Daniel J Gervais (Re)structuring Copyright: A Comprehensive Path to International Copyright Reform (Edward Elgar Publishing 2017) 207-215

[78] T E Synodinou "The Renckhoff case: 6 Degrees of separation from the lawful user" (2019) 20 ERA Forum 21–33 (2019) available at <https://link.springer.com/article/10.1007%2Fs12027-019-00558-w>

[79] Stavroula Karapapa, 'The Requirement of a "New Public" in the EU Copyright Law' (2017) 42(1) E.L. Rev 63; See PB Hugenholtz and SC van Velze, 'Communication to a New Public? Three Reasons Why EU Copyright Law Can Do Without A New Public' (2016) 47(7) IIC 797; see also Jan Rosen, 'How Much Communication To The Public is 'Communication to The Public'?', in Irini Stamatoudi (ed) *New Developments in EU and International Copyright Law* (Kluwer Law International 2016) 331

[80] Joined cases C-431/09 and C-432/09, *Airfield NV and Canal Digitaal BV v SABAM and Airflied NV v Agicoa Belgium* [2012] E.C.D.R. 3

In this instance, it was reasoned that although the photograph was shared with the same technical means, they were targeting a "new public".[81] The CJEU reasoning rejected the Advocate General's position. The Advocate General had posited that the intention of the pupil and the teacher was to communicate the presentation and not the infringing photograph. Significantly, the photograph plays a trivial role in the entire communication.[82] Even where the public accessing the photograph from the school's website could be a new public since the photograph was available without any restriction on the originating platform and would not require any intervention of the pupil or her teacher. He explained that

> The logic of the internet is that, where access to images posted on the internet with the author's consent is available freely and free of charge, and there are no indications or warnings to the contrary, it is impossible to segment the number or categories of potential visitors, or to envisage that only some, and not others, will be able to see those images.[83]

In other words, the AG reasoning suggests an implied permission to share as part of the permission to view. However, the CJEU was weary of the AG argumentation. Instead, it preferred an all or nothing approach. In its usual mind reading analysis and telepathic posture, the CJEU opined that the author somehow built a unique imaginary pathway only through which the image can be accessed.[84] The court reasoned that a contrary decision would weaken the preventative nature of the right guaranteed by the Directive. The right holder would (i) lose the ability to control the immediate and future use of his work; (ii) will exhaust the right guaranteed the author's right of communication and (iii) be deprived the copyright holder of the opportunity to receive reward from the exploitation of his work.

## IV. The Many Sins of *Renckhoff*

### Closed Access and Open Access: The expansion of new public

*Renckhoff* expands the "new public" requirement and further shackles freedom of communication on the internet. It should be recalled that the earlier decision in *Svensson* had courted controversies from its inception.[85] *Svensson* related to the provision of hyperlink to a

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[81] *Renckhoff* paras [29]-[30]
[82] Opinion of Advocate General Campos Sánchez-Bordona delivered on 25 April 2018 in Case C-161/17 Land Nordrhein-Westfalen v Dirk Renckhoff para [67] – [68]
[83] Ibid para [101]
[84] *Renckhoff* para 35
[85] ALAI [2014] 'Opinion on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public' available at <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>; European Copyright Society,

work hosted on a third-party website. The Svea Court of Appeal in Sweden had enquired of the CJEU whether the provision of a hyperlink to a work lawfully made available on a certain website where it is freely accessible is to be regarded as an act of communication to the public within Article 3(1) of the InfoSoc Directive.[86] In its response, the CJEU concluded that the provision of hyperlink to a work lawfully and freely accessible on a third party website did not infringe Art 3(1). The provision of a hyperlink to a copyrighted work on links that circumvent the restriction measure would widen the scope of targeted audience. The impression given in *Svensson* was that providing access to a freely available work would not infringe copyright whereas access to restricted work without permission infringes copyright, and a key element of the difference between open access and closed access.

So, it was not out of place to expect *Renckhoff* to follow *Svensson* because the concerned image work was *lawfully* acquired and was *freely available*. Instead, the court adopted an economic and fundamental rights rationale – positing that the reposting of author's work, despite its open access would weaken the right's the effectiveness of its preventive nature.[87] Whereas hyperlinking allows the author to retain control over the exploitation of his work, reposting on a separate platform eviscerate the power of the author to demand the cessation of his work. Moreover, the loss of control can result in economic harm because the rightsholder is prevented from obtaining appropriate reward. The CJEU departure from *Svensson* consolidated the strong propertisation of copyright ownership that characterises the *droit d'auteur* tradition.

Making a work lawfully and freely available online provides an *open access* to internet users. Such reasoning is consonant with *Svensson* that because the initial act of communication released the works without any restrictive measures suggests that all internet users could have free access to it.[88] However, *Renckhoff* blurred the access rule in *Svensson*. It seems it mandated users of every copyrighted work to obtain an authorisation even where the work is openly accessible.[89] In this case, what happens when a right holder cannot be identified or located? First, the user can approach the site operator that hosts the work. However, this may

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'The Reference to the CJEU in Case C-466/12 *Svensson*' University of Cambridge Legal Studies Research Paper Series No. 6/2013; A. Tsoutsanis, 'Why Copyright And Linking Can Tango' (2014) 9(6) JIPLP 495

[86] *Svensson and Others v Retriever Sverige AB* C-466/12, EU:C:2014:76

[87] *Renckhoff* para 30

[88] *Svensson* paras 25-26

[89] Bianca Hanuz "Liability implications of extending the communication to the public right to third-party re-posting of images already freely available online with right holder permission" (2019) 41(3) EIRP 190-196

not be easy especially where the work has been passed from one platform to another. Apart from compromising the neutrality of internet intermediaries as required under the E-Commerce Directive, unscrupulous parties may pass themselves off as right holders to charge for a licence. Second, where a right holder is untraceable the work cannot be reused outside the permissible exception.[90] Undoubtedly, this will hinder freedom of expression and the opportunity to innovate.

**Educational Use as a Fair Use**

Copyright law is underpinned by its ability to facilitate the dissemination of information, a process realisable through the reprocessing of existing information. According to Litman, "the copyright system works because in addition to encouraging authors to create work and communicate them to the public, it encourages audiences to read, listen, look at, learn from and interact with those works."[91] *Renckhoff* calls into question the foresight and the flexibility of the educational exception provision of the InfoSoc Directive.

While the referring court had not included the issue of limitation and exception in its referral, both the CJEU and AG examined, with different depth, the argumentations put forward by Land of North Rhine-Westphalia. The defendant had argued that considering that the photograph was published in the course of educational activities regard must be had to the right to education guaranteed by Article 14 of the Charter of Fundamental Rights. The Attorney General inspired by Art 26(2) of the UDHR and Art 13(1) of ICESCR advocated a broad interpretation of Article 14 of the Charter of Fundamental Rights. Such interpretation would not confine the exception to scientific investigation but would accord prominence to the need to promote education in addition to applying to uses by teachers and students alike. Circumscribing the pupil's act within Article 5(5) of the InfoSoc Directive and the three-step test, the AG concluded that since the picture was used with no motive for profit making, this act did not conflict with a normal exploitation of the work. Supported by other facts, there is nothing to suggest that parties intended to prejudice any financial benefit that may accrue to the author.

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[90] Ibid 194

[91] Jessica Litman, 'Fetishizing Copies', in Ruth L Okediji (ed) *Copyright Law in an Age of Limitations and Exceptions* (CUP 2017) 80

Despite the conspicuous competition between copyright protection and right to education in the case, in a somewhat surprising posture, the CJEU became taciturn on the lawfulness of the integration of the material into the presentation and the intention behind the publication.[92] Rather, it provided a paltry response which left much uncertainty, merely indicating that the exception to reproduction right and communication right must serve only teaching and or scientific research purpose and not be commercially motivated. The only justification for CJEU silence is that the application of the educational exception does not form part of the referral to the CJEU.

The decision poses more news questions instead of providing the answers it was expected to supply. First, the objective of the Directive is to provide for a high level of protection of intellectual property.[93] The question is how high is the CJEU is willing to raise the level of protection. From the analysis of existing case law, every time the CJEU refers to this standard, the Court ends up adopting an expansive view of economic rights and remedies.[94] Although the CJEU claimed that the cultural and education aspect specific to EU Member States have been recognised when adopting the InfoSoc Directive,[95] *Renckhoff* confirms the existing foundational deficiency and the lop-sidedness of the Directive in favour of authors rights as entrenched in the continental civil tradition. Dusollier has argued for the replacement of the current system with a right of exploitation aligned with function of copyright.[96] Second, it needs to be asked whether the protection of the right to education shares the same status as copyright protection. As already mentioned, the right to education should be defined broadly to include access to materials that facilitate learning and sharing of information received in the process. In this regard, the ECS has called for a flexible and purposive interpretation that will preserve and safeguard copyright's legitimacy.[97] This method is permissible within the jurisprudence of the CJEU and recognised by the Charter of Fundamental Rights of the European Union.

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[92] *Renckhoff* Paragraph 43
[93] See InfoSoc Directive Recitals 4 and 9
[94] Eleonora Rosati *Copyright and the Court of Justice of the European Union* (Oxford University Press 2019) 40
[95] *Laserdisken ApS v Kulturministeriet* C-479/04 EU: C: 2006:549 para 80
[96] Séverine Dusollier, 'Realigning Economic Rights with Exploitation of Works: The Control of Authors Over the Circulation of Works in the Public Sphere', in P Bernt Hugenholtz (ed) *Copyright Reconstructed: Rethinking Copyrights Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International 2018) 167
[97] See Rognstad, Ole-Andreas et al "The Delicate Scope of Economic Rights in EU Copyright Law: Opinion of the. European Copyright Society in light of Case C-161/17, Land. Nordrhein-Westfalen" (2019) 41(6) EIPR 335

**Right to Education and the New Classroom**

To a more practical question: Can students reproduce and communicate works to other fellow students under the teaching exception, in as much it is for teaching purposes? Considering that the work is produced in the course of teaching and the receiving student forms part of the learning group, this answer should be in the affirmative. However, this becomes somewhat complicated when a teacher or student decides to communicate the work outwit the educational establishment platform. For example, inter-institutional collaboration allows teachers to draw on one another's creativity through the exchange of materials incorporating animation, images and sound clips. While this practice could enrich student learning experience and save academics teaching preparation time, some US scholars are concerned that narrow educational exception will frustrate the ability of teachers in different institutions to collaborate through sharing of teaching materials on digital platforms.[98]

In the context of teaching and learning, the InfoSoc exception and its implementations are restricted to the production and making available of materials for use within the educational establishment. This means the educational exception is limited in time and space whereas digital learning thrives outside the traditional educational establishment. For example, learning occurs on class web page, blog, or wiki and other similar platforms. Another legacy of *Renckhoff* might be that, unless there is a prior authorisation, Art5(3)(a) will not exempt any digital learning outside the traditional classroom structure, web-based or open source educational projects, or scholarship. In summary, the "new public" of *Renckhoff* proscribes every form of sharing unless it is strictly within the exception or authorised by the right holder.

**Right to Education and New Kind of Transformative Use**

Under the US law, a use is "transformative" where it alters "the original with new expression, meaning, or message."[99] The transformative use exception, which forms part of the open-

[98] William McGeveran, and WW Fisher "The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age" Berkman Center Research Publication No. 2006-09, available at https://ssrn.com/abstract=923465

[99] *Campbell v. Acuff-Rose Music,* Inc., 114 U.S. 1164 (1994); Transformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses. See P. Leval, "Toward a Fair Use Standard", (1990)103 Harvard Law Review 1105, 1111

ended fair use notion, enables creators to rework material for a new purpose or with a new meaning. Transformative uses have the tendency to spur creativity and innovation. Such new works can create new value and can even create new markets.[100]

As already noted, the educational exception belongs to the non-mandatory exception category under the InfoSoc Directive and has been variedly implemented by the EU Member States. A close look at the wording of these provisions show that they are not designed to accommodate digital transformative uses despite the prevalence of the use new media such as PowerPoint slides, videos and audio clips to enhance classroom teaching. A scholar observed the that EU law lacks the foresight of emerging educational and scholarly practices where digital tools are used to deliver teaching.[101] Earlier in 2006, the Gower had recommended that InfoSoc Directive be amended to allow for an exception for creative, transformative or derivative works, within the parameters of the Berne Three-Step test. [102] Until the suggested recommendation is considered, this deficiency imposes additional legislative obligation on the CJEU to continue to shoehorn the InfoSoc Directive to fit within the digital environment.

Disappointedly, the CJEU missed an opportunity in *Renckhoff* when it rejected the recommendation of the AG to examine the purpose of the presentation. Understandably, the phraseology "illustration for teaching" sees teaching as a linear exercise where students are passive recipient of information. This is the traditional perspective of the role of student in learning process. Academic pedagogy has moved away from this traditional approach to meaningful learning through active, constructive, intentional authentic and cooperative strategies.[103] Active learning shifts the focus away from instructors to the students. Students participate through question-and-answer sessions, group discussions, peer learning, preparation of lesson materials and engagement in other contribution-oriented activities.[104] According to a research,

> "Learning is facilitated when existing knowledge is activated as a foundation for new knowledge" are directly applied when contribution-oriented activities relate to real-

[100] Gowers Review of Intellectual Property (December 2006) 66
[101] P Bernt Hugenholtz "Flexible Copyright: Can EU Author's Right Accommodate Fair Use?" in Ruth L Okediji Copyright Law in an Age of Limitations and Exceptions (Cambridge University Press 2017)
[102] Gowers Review Recommendation 11
[103] DH Jonassen, KL Peck & BG Wilson *Learning with technology - A constructivist perspective*. (Upper Saddle River, NJ: Prentice-Hall 1999)
[104] R Felder & R Brent, R. (2003) 37(4), Learning by doing. Chemical Engineering Education, 282-309; CC Bronwell & JA Elson *Active learning: Creating excitement in the classroom.* (Washington, DC: School of Education and Human Development, George Washington University 1991)

world problems and *make use of real-world resources found by the learners, via the Web or via direct contacts with real–world settings*."[105]

From the above, the class presentation in *Renchkoff* is a typical example of a transformative use of existing copyrighted image taking place in teaching context. It is submitted that this usage meets the requirements of Article 5(3) InfoSoc Directive and Article 10(2) Berne Convention. First, there is no contention that the presentation is a communication to the public in the digital environment. Second, this is a work produced in the course of learning. However, this is a communication by a student and not an instructor which is not expressly mentioned by either InfoSoc Directive or the Berne Convention. The interpretative guide in Recital 14 supports an expansive interpretation of the provision.[106] Third, Article 5(3) requires that the use of the work be justified by the non-commercial purpose to be achieved. The publication of the student's project on the institution's portal does not have commercial purpose and contain an acknowledgement of the website where the image was taken. It cannot be overemphasised that integration of images and quotation sourced from the internet has become an acceptable practice among scholars and students. The recent amendment of the German Copyright Law examined above supports this type of exploitation. The new Article 60a allows non-commercial reproduction, distribution and communication to third parties "insofar as this serves to present the lessons, teaching or learning outcomes at the educational institution". Cotter proposed that in the application of fair use doctrine, the court should investigate whether unauthorised use resulted in cognizable harm to the copyright owner's exploitation interest.[107] A cognizable harm approach involves a holistic examination of the purposes of copyright, its relationship with freedom of speech and other fundamental rights, and the rationale for the fair use privilege. Considering the facts in *Renckhoff*, there re-use of the photograph on the school website poses no threat to the economic interests of the rightsholder.[108]

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[105] B Collis and J Moonen "The contributing student: Learners as co-developers of learning resources for reuse in Web environments" in D. Hung, & M. S. Khine (Eds.), Engaged learning with emerging technologies. Springer, Dordrecht 2006) 65 Emphasis supplied

[106] This Directive should seek to promote learning and culture by protecting works and other subject matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

[107] Thomas Cotter "Transformative Use and Cognizable Harm" (2010) 12 Vand J Ent & Tech L 701

[108] Rognstad, Ole-Andreas (n97) 338

## V. Conclusion

The right to education is facilitated by access to relevant materials and this right is tus effectively realisable with appropriate limitation and exceptions that supports teaching and learning. Teaching and educational exception is caught in the web of the uncertainty orchestrated by the partial harmonisation by InfoSoc Directive. Unfortunately, the CJEU has left the right to education gasping for recognition in the virtual environment. There were calls to explore but not to copy the openness which characterise the American copyright system's fair use approach. It is suggested that this would pave way for purposive approach in application of copyright principles. Such approach can create an environment where exclusive right of authors can co-exist peacefully with public interest.

Disappointedly, *Renckhoff* demonstrates yet again the author-centric approach which has characterised most of the CJEU decisions except where the conflicting right forms one of the "elite" fundamental rights. It appears that right to education does not form part of or occupies the least of the rung in the pantheon of these rights. It is worrisome that the reticent of the CJEU may threaten the new form of communication in the digital environment by disregarding the innovative way of learning and emerging scholarly practices. Its impact will go beyond area of education where learners are trained to explore innovative ways of expressing themselves. It will extend to human rights activists and platform operators like LinkedIn, Twitter and social media where netizens exploit existing information to generate new content.