

WIPO



SCCR/19/8

ORIGINAL: English

DATE: November 5, 2009

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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

Nineteenth Session
Geneva, December 14 to 18, 2009

STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS
FOR EDUCATIONAL ACTIVITIES IN NORTH AMERICA, EUROPE, CAUCASUS,
CENTRAL ASIA AND ISRAEL

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* The views and opinions expressed in this Study are the sole responsibility of the Author. The Study is not intended to reflect the views of the Member States or the Secretariat of WIPO.

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SCOPE OF THE STUDY

The present Study intends to present the “state of the art” regarding the copyright and related rights exceptions and limitations for educational activities provided for in national legislation, as well as any other relevant provisions in international treaties.

The Study is of a descriptive nature and does not attempt to offer any recommendations or prescriptions for action by policy makers at international, regional or national level. Nonetheless, the Study does identify policy issues related to, or affecting, copyright and related rights that public authorities, including Governments of WIPO Member States, may be called upon to address at some point in the future, including distance education and the trans-frontier aspects thereof.

The scope of the Study includes 57 countries of Europe and North America (México not included) as listed¹: Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, United States of America, Uzbekistan, Vatican City State.

The Study takes into account the previous studies commissioned by WIPO in the area of limitations and exceptions².

The goals of the present Study are:

- a) Examine the existing copyright exceptions and limitations that may affect educational activities, including scope, rights involved and beneficiaries;
- b) Analyze the interplay of existing exceptions with provisions on technological measures of protection;
- c) Analyze alternative ways of addressing the identified copyright problems, whether under exceptions, under voluntary agreement or any other options, with particular emphasis on distance education and the unsolved issue of applicable law.

¹ No current copyright statute could be located for Monaco, San Marino and Turkmenistan. Italian Copyright Law applies to the Vatican City State (by virtue of Law N.XII on Copyright of January 12th 1960). The States of Serbia and Montenegro currently share the same Copyright Law.

² Four studies available under: < <http://www.wipo.int/copyright/en/> > as WIPO Documents SCCR/9/7, SCCR/14/5, SCCR/15/7 and SCCR/17/2

ACKNOWLEDGEMENTS

The author would like to thank the WIPO Secretariat and the professionals at the WIPO Library and CLEA-Collection of Laws for Electronic Access Database (available at <http://www.wipo.int/clea/en/>) for supplying most of the information and national laws used in this Study.

Special acknowledgement is due to IFRRO President, Magdalena Vinent, and Chief Executive & Secretary General, Olav Stokkmo, for the helpful information provided on the models of operation of Reproduction Rights Organisations (RROs) under national exceptions and limitations regarding educational activities.

Special acknowledgement is also due to Teresa Hackett Programme Manager at the Electronic Information for Libraries (eIFL.net <http://www.eifl.net/>) for circulating a questionnaire among the eIFL and IFLA-International Federation of Library Associations networks which was answered by several librarians from all over the world providing insight comments and experiences on the application of exceptions and limitations for educational purposes in their countries.

PART I: INTRODUCTION

Educational purposes were already present in the first version of the Berne Convention of 1886,³ and have remained there (although under revised language) ever since, as a public interest that justifies an exception or limitation⁴ to copyright. The WIPO Copyright Treaty of 1996⁵ expressly referred to education in its Preamble, when ‘Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly *education, research and access to information*, as reflected in the Berne Convention’. And more recently, the EU Directive on Copyright in the Information Society⁶ stressed its goal ‘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*’ (Recital 14).

Despite being widely accepted as a fundamental right to be balanced against the authors’ exclusive rights, domestic laws fail to grant a uniform and complete treatment of education as a copyright exception or limitation. As we will see, the extent and conditions of the exceptions provided for educational purposes vary, sometimes widely, among domestic laws. The *lack of normative consensus* is far more acute when we consider digital formats and online teaching. As we will see, teaching exceptions or limitations are far from meeting the needs of online teaching and cover the use of works as part of educational activities conducted online.

All along this Study it is important to bear in mind the *multiple technological contexts* where educational activities may take place: “face-to-face” within the walls of a classroom, by broadcast or any other transmission which enables students to receive the teaching activity in a place other than the place of emission, and more recently over the Internet which enables each student not only to receive the activity synchronically or non-synchronically (at a time of his own choosing) but also to interact with other students and teachers (instructors) as he would within the walls of a classroom. Over history, technology has been defining the way we educate: the means used to convey the teaching activity itself as well as the teaching

³ See Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886, as revised at Paris on 24 July 1971 and amended in 1979 [hereinafter, Berne Convention or BC].

⁴ In some contexts a distinction is made between ‘limitation’ to refer remunerated uses, and ‘exception’ to refer to free uses. In other cases, ‘limitation’ is used to indicate an exclusion of protection (such as legislative texts –*ex art. 2(4) BC*) and ‘exception’ to indicate any uses (either for free or remunerated) directly authorized by the law. Furthermore, terminology used by national laws to indicate such exempted uses is even more varied: ‘limit’, ‘restrictions’, ‘authorized acts’, ‘free uses’, etc. We are aware of such distinctions. However, for purposes of simplicity (and in order to adjust to the specific title of the commissioned Study) either term ‘exception’ and ‘limitation’ will be used along this Study indistinctively to refer to the statutory provisions which authorize specific exploitation acts (or uses), and will –when applicable– indicate whether the authorized act/use is for free (free uses) or remunerated (usually called a ‘legal or compulsory license’).

⁵ See WIPO Copyright Treaty of 20 December 1996 [hereinafter, WCT]. A parallel clause can be found in the Preamble of the WIPO Performances and Phonograms Treaty of 20 December 1996 [hereinafter, WPPT].

⁶ See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. L-167/10 (22.06.2001) [hereinafter, EUCD].

materials used as part of it. These technological means may substantially differ depending on the economic, social and political structures of each country. In fact, a few important differences may be identified already within the rather culturally-homogeneous scope of covered by the Study. These differences may explain (albeit not necessarily justify) the varied outcome of exceptions and limitations, as well as of licensing systems, provided for educational purposes in national laws.

In face-to-face education, the use of works is ‘self-contained’ -within the walls of a physical classroom- and usually does not have a major economic significance. In fact, as we will see, some face-to-face teaching uses could be indeed exempted by the general doctrine of *de minimis non curat lex* (the law does not care with trifles, or a small non-authorized use does not constitute an actionable infringement, or). This may explain why most teaching exceptions fail to fully address each and every one of the acts that may take place in an educational purposes and why copyright owners and collective societies have not bother (until very recently) to fully enforce their rights in educational scenarios.

In a digital world, however, this holds no longer true. There are hardly any *de minimis* uses in a digital environment; any acts necessary to carry on the teaching activity will qualify as a reproduction or as an act of making available online (even temporary copies need to be excluded in some jurisdictions). The definitions of the exclusive exploitation rights granted to authors (which used to convey some inherent limits) are now only limited by the statutory exceptions and limitations, which -rather than exceptional, as its name indicates- become fundamental.⁷ As a result, teaching exceptions need to be more detailed than ever.

On the other hand, as more and more works become available in digital formats and are contracted on-line, *DRMs and licensing terms* may –depending on national law- prevail over exceptions. The interaction of DRM and licensing terms with exceptions and limitations is a general and complex topic, and still in evolution. We cannot fully address it in this Study,⁸ but we need to consider whether and how it may ultimately affect the amount, variety and scope of works that are available for educational purposes under the exceptions.

Last, but not least, due to the principle of *territoriality of copyright* laws and to the unsolved question of applicable law (specially over digital networks), differences in national laws may become a serious impediment for the development of online education within a lawful framework, especially if we take into account that students receiving the online teaching may well be located in different countries.

The purpose of this Study is to examine the *status quo* and implications of the exceptions and limitations envisioned for educational purposes in Europe and North America.

A variety of activities may be considered “education” for purposes of this Study. The following example (set in the context of online education) might help identify what kind of activities we are referring to.

⁷ The need for a ‘temporary copies’ exception in Art.5(1) EUCD is a clear example of how important exceptions become to counterbalance ‘all-encompassing’ exclusive rights –in this case, the reproduction right.

⁸ See Nic Garnett, *Study on Automated Rights Management Systems and Copyright Limitations and Exceptions*, at <<http://www.wipo.int/copyright/en/>>

Scenario –

After a full day of work, Mark arrives home, turns on his computer, and accesses the homepage of the Virtual University. He enters his user name and password. When he left his law studies unfinished ten years ago, Mark promised himself that he would one day return to complete his law degree. But the long hours at work and the children at home left him no time to attend evening classes at the nearest university, twenty-five miles from home. When Mark heard about a Virtual University that helped overcome space and time barriers, he thought fortune had finally smiled upon him. There would be no need to attend never-ending evening classes and no need to commute, either. No more excuses. So he registered.

The VU campus recreates the facilities of a “live” campus: classrooms, a library, and administrative offices (all registrations, payments, etc., are made on-line). There is even a cafeteria, where Mark can have on-line chats with other coffee-drinking students--especially at midnight!

Once on the VU campus, Mark has access to the “classrooms” of his registered courses. All virtual classrooms share a similar structure:

- A list of participants, with access to the personal web-pages of each person, some with uploaded material and links to other web sites;*
- Several message-boards for asynchronous discussion: an e-mail board for discussion between the teacher and the students, and more general, collective boards open to all students in the class;*
- A syllabus written by the professor, with detailed information as to exercises, time to be devoted to each lesson, and other tips to follow throughout the semester;*
- A classroom “e-reserve” web site, where he can access all materials used as part of the instruction;*
- A storage disk-space shared by all students in the class; and*
- Access to the “virtual” library, including catalog search engines as well as databases available online (and password protected: either by means of site-licenses or individual licenses).*

This semester, Mark has registered three courses: a Copyright course, a French course and a course on XXth Century art. Mark receives the basic learning materials for each course at home, in printed form; the same material is available as pdf (portable document format) in the classroom “e-reserve” page. These “course materials” have been specially commissioned by the VU, following precise pedagogic guidelines intended to facilitate distance self-learning.

In addition to the course materials, the following materials are available on each classroom “e-reserve:

Copyright course (Prof. Everbold):

- *A selection of thirty judicial decisions on copyright to be analyzed and commented in class; Although students have access to this database through the Library, Prof. Everbold made the selection herself.*
- *Two scholarly articles that were scanned (published in printed form) which will be used analyzed and commented as part of a debate.*

French course (Prof. Lafeuille):

- *10 word files with the transcription of the lyrics of 10 different songs, with some words missing: along the course, as his study of French grammar advances, he will have to fill out the missing words while listening to the performed songs streamed (at the time and place of his choice).*
- *10 sound files: according to the scheduled dates, he has to listen to the recordings, each containing a dictate of several passages from Albert Camus *The stranger*. He must write down the words recited (streamed) and must submit his exercises to the Prof.Lafeuille.*

Art Course (Prof. Ticasso):

- *A selection of 56 images showing art works of XXth Century artists, that will be studied, analyzed and commented along the course. These same images are contained in the printed course materials, but the digital images posted here are larger and of a better quality to facilitate their study and analysis.*
- *A chapter of a book (forty pages out of 200 pages) published in 1957, which is out of print book. The reading is fundamental for the course and students must prepare and submit a commentary as the final exercise of the course. The VU library obtained a copy as an inter-library loan. Last semester, students requested (and obtained) photocopies (delivered by post) from the Library. In order to avoid a similar number of requests, the article was scanned and posted. VU requested authorization from the publisher, but received no answer.*

As the course goes on, Prof. Ticasso decides to open a debate on the work of Paul Klee, on occasion of a retrospective exhibition being organized in his town. He posts a message to the “debate board,” attaching:

- *An article, downloaded from a free-online newspaper; and*
- *A scanned copy of a scholarly article (4 pages) published in a journal he subscribes.*

After reading the materials posted and the opinions of his classmates, Mark is ready to make his own contribution to the debate. He writes a long message stating his view on the artist and decides to attach a very interesting art commentary he read in an on-line Art Journal he subscribes.

As the course is coming to an end, Mark asks the Prof. Everbold a question regarding one of the lessons. When answering, Prof. Everbold attaches a portable document format (“PDF”) version of an article published in a US law journal that she obtained from the Library 2 months ago. At that time, she read the article in connection with a comment she was writing on a judicial decision. She believes that this article will be helpful for Mark, so she sends it to Mark as an attachment. A few days later, two other students raise the same question. Prof. Everbold then decides to post a general message to the students explaining the issue and making the article available to all students in her class as an attachment.

The VU has intentionally foregone having a traditional library, since there are plenty of other excellent libraries in the area, and both VU students and professors may request inter-library loans. The VU Library has limited its catalog to those treatises, materials and reviews that are strictly necessary for the courses offered each semester or are needed for the specific research conducted by the VU faculty. The VU Library devotes most of its budget and efforts to the creation of a “virtual library,” consisting of electronic databases (of review articles, legal materials, etc.), e-books, and other digitized material. The virtual library better serves the students and offers them the same options they would have in a physical library. We will call this collection a “library e-reserve.” All material posted in the library e-reserve is available to all students enrolled at the Virtual University.

Now, we only need to imagine the same scenario but in a face-to-face environment, where the copying, delivering and showing of the works is done by means of photocopying, live performances (readings, dictates and music playing) and wall-projectors.

What is the role that copyright law should play in each scenario? Should they be treated differently? Should the same act be exempted by law when conducted as part of face-to-face teaching and, instead, left for the author to authorize or prohibit when conducted online? To what extent should teaching exceptions prevail regardless of the means used to convey the instruction? And when should they be set aside in favor of licensing? Or to put it simple, to what extent and under what conditions should authors and owners decide which works are used for teaching and who gets to use them?

In the following chapters, we will examine how educational activities such as the ones shown in the example, may be exempted (or not) under national copyright laws. In order to do so, we will distinguish three different kind of activities related to education:

- *The acts which are necessary to convey the instruction or teaching (including lectures, exercises, readings for debate, commentary or analysis, tests and examinations). What is fundamental is that the work used is directly related and of material assistance to the instruction, not as unrelated background material (i.e., supplementary readings for further study and research purposes) or for the mere entertainment of the students (i.e., as part of a*

“school event”).⁹ *These teaching activities may involve some or a few different acts of exploitation (depending on the environment): reproduction (analog or digital), performance, display, communication to the public, making available online; sometimes, translations may also be involved.*

- *The making of anthologies (compilations in any format, recordings etc.) for teaching and educational purposes that fall beyond the instruction itself (the contents of the anthology may be used in the course of the instruction, but it may also be used for other purposes, such as subsequent study or research). A few national laws formally allow the making of publications (as well as recordings, broadcasts) of educational character or nature or intended for teaching. In online contexts, the making of teaching anthologies is fundamental since even the materials used as part of the instruction are somehow “compiled” on a webpage or storage space; in other words, if the applicable national teaching exception does not cover online teaching uses, the teaching compilation exception might.*
- *School events and celebrations: Despite they may take place within an educational context and at the educational institution, school events and celebrations (usually implying a performance) go beyond the instruction itself. Some educational exceptions exempt these acts, either formally or implicitly (by referring to an audience consisting of pupils and parents and other staff of the educational institution).*

National laws choose to exempt all or some of these three kind of education-related acts (and sometimes only partially), either under one or several specific exceptions or limitations, either for free or under remuneration/compensation schemes. The result is a panoply of different solutions, in terms of exceptions as well as licensing systems, which is very difficult to summarize.

Several exceptions and limitations may be relevant for these educational purposes: specific exceptions provided for teaching and instructional purposes, exceptions (or legal licenses) for reprographic copying, exceptions for quotations and for private use/copying or fair use/dealing, to the extent that:

- *many teaching uses (either as part of the instruction or as included in compilations) consist of quotations of pre-existing works;*
- *students copies (done by students themselves or by someone on their behalf) to be used as part of the instruction might also be exempted under the private use/copying exception or limitation;*
- *either group of acts may be allowed as fair use/dealing in Common law countries*

The combination and importance of each of these exceptions may be different in each country. In addition, *library privileges* may also interact with educational purposes either directly (some library exempted uses are for educational purposes) or indirectly since most

⁹ Although the scope of each teaching exception will ultimately depend upon the terms of each national law and the interpretation conveyed by national courts, this is the meaning of *teaching purposes* that we will retain in this Study

works used for educational purposes are obtained through a library (be it a licensed or an exempted use).

The analysis of these exceptions and limitations in national laws will be structured around some cross-cutting issues:

- *which acts of exploitation (i.e., reproduction, performance, communication to the public, making available online, translation) and in what formats or means (i.e., reprography, analog, digital) are exempted or allowed;*
- *who may benefit from the exception or limitation: which educational establishments (public institutions, non-for-profit or for profit too, universities, schools, libraries, etc) and/or individuals (teachers, students, librarians) are entitled to carry do the exempted acts of exploitation;*
- *the nature of the works (all kind of works or only some specific works) and the extent of use allowed (how much, how many copies);¹⁰*
- *the specific purposes allowed: teaching, examinations, study, etc.*
- *any further conditions and requirements, including remuneration.*

These exceptions and limitations result in *several licensing schemes* in place for educational uses either to remunerate/compensate for the uses exempted by law or to license non-exempted educational uses: voluntary licenses (for non-exempted uses), “voluntary” licenses mandated or supported by the law (i.e., extended collective licensing), legal (non voluntary) licenses (i.e., compulsory collective licenses, levy systems based on equipment and/or operators).

Before we start examining the scope of national exceptions and limitations for educational purposes, we will take a quick look at the Berne Convention and other international instruments to see how they address educational activities.

¹⁰ This issue is intertwined with the question of who is allowed to make reproductions for teaching purposes (only instructors or also students) and with the scope of the national private copying/use exceptions sometimes specifically drafted to include instructional purposes.

PART II: LIMITATIONS AND EXCEPTIONS FOR EDUCATIONAL ACTIVITIES UNDER THE INTERNATIONAL TREATIES

It is not the goal of this Study to deal with the general aspects of the exceptions and limitations existing in the Berne Convention or other international instruments. For this purpose, we refer to the previous Studies commissioned by WIPO: *Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment* prepared in 2003 by Sam Ricketson, and *Exceptions and Limits to Copyright and Neighboring Rights* prepared in 1999 by Pierre Sirinelli.¹¹

However, in order to contextualize the subsequent analysis of the national exceptions and limitations for educational activities, we will briefly visit to the fundamental parameters set by the international instruments.

1. Art.10(2) Berne Convention: illustration for teaching

The teaching exception in the Berne Convention may be traced back to its very origins. Art.8 of the *Berne Act of 1886* reserved “*the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies*” to national legislation.

The *Brussels Act of 1948* modified the matter reserved to national law under Art.10(2) as “*the right to include excerpts from literary or artistic works in educational or scientific publications.*”

And at the *1976 Stockholm Revision*, the proposal of a minor amendment (which only affected the English text) to replace “*excerpts*” with “*borrowings*,”¹² opened an important debate¹³ that resulted in current *Art.10(2)*¹⁴:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the *utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.*

¹¹ Both Studies are available at <http://www.wipo.int/copyright/en/limitations/studies.html>

¹² It was thought to correspond better to the French text ‘*emprunts*.’ See WIPO (1971), *Preparatory Document s/1*, *Records of the Intellectual Property Conference of Stockholm, June 11- July 14 1967* [hereinafter, *Stockholm Records*], p.48.

¹³ See WIPO (1976), *Reports on the Work of the Five Main Committees of the Intellectual Property Conference of Stockholm 1967*, WIPO Publication 309(E), # 93-94.

¹⁴ The final text proposed by the Working Group (document S/185) to amend Art.10(2) read : ‘It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications [broadcasts or recordings] for teaching, provided such utilization is compatible with fair practice.’ See *Stockholm Records, op.cit.supra.*, Document S/185, p.708.

Since its introduction in 1886, it was always agreed that -as long as the teaching is part of an “official” program or degree-¹⁵ this exception comprises both elementary and university teaching, in both private or public institutions, as well as distance teaching¹⁶:

“The wish was expressed that it should be made clear in this Report that the word ‘teaching’ was to include teaching at all levels –in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded.”

There is no reason to conclude that digital means and online teaching (or any other means of distance learning, such as *pod-casting*) should be left out¹⁷. On the one hand, the word ‘utilization’ is neutral enough to cover not only reproduction in all formats but also communication to the public (and the making available to the public¹⁸). On the other, there is no doubt that digital uses may be included,¹⁹ albeit perhaps subject to different conditions depending on the technology used (since digital teaching uses may pose far greater risks for the author’s interest, than face-to-face teaching). And finally, because far from constituting an exhaustive list (that could leave online teaching out), the reference to ‘*by way of illustration in publications, broadcasts or sound or visual recordings for teaching*’ resulted from a specific wish to accommodate to new technology²⁰.

Furthermore, reference to *publications* (as well as the original reference to ‘chrestomathies’²¹) favors the acceptance of *teaching (educational) compilations*²² under the

¹⁵ It should be noted that this is a restrictive interpretation since it excludes the utilization of works in adult education courses (which might be very important in developing countries). However, to some extent, this might be covered by the provisions of the Appendix to the Berne Convention.

¹⁶ See Ricketson, WIPO Study, *op.cit.supra*, p.15. See also Ricketson, Sam (1987), *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, London, Kluwer, §9.25 and §9.27 n.3; See Ricketson, Sam and Ginsburg, Jane C. (2006), *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, Oxford, UK and New York, US, Oxford University Press, §13.45.

¹⁷ See Ricketson, WIPO Study, *op.cit.supra*, p.15. See also Ricketson/Ginsburg, *op.cit.supra*, §13.44 and §13.45.

¹⁸ See Art.8 WCT.

¹⁹ According to the Agreed Statement concerning Art.10 WCT, Member States may ‘appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. ... [and] devise new exceptions and limitations that are appropriate in the digital networked environment’.

²⁰ The reason behind all the subsequent BC revisions (‘publications destined for educational or scientific purposes’ -Berne Act-, ‘educational or scientific publications’ -Brussels Act-, ‘publications intended for teaching or having a scientific character or in chrestomathies’ -as proposed in the Stockholm Program-, and the current text approved at Stockholm which added ‘recordings and broadcasts’) show that such wording was to enable educators ‘to take full advantage of the new means of dissemination provided by modern technology... and there is no reason today to argue that it should not extend to digital fixations of works.’ See Ricketson/Ginsburg, *op.cit.supra* §13.45.

²¹ See Ricketson/Ginsburg, *op.cit.supra*, §13.39 n.84, explaining the meaning of ‘chrestomathies’ as “collection of choice passages ... In the present context, this might be rendered as ‘educational compilations’.”

²² See Ricketson, *op.cit.supra*, §9.27 n.7: “In many instances these [teaching compilations] will, by their very nature, fall within the scope of publications made for teaching purposes under article 10(2)”.

exception, ‘to the extent justified by the purpose’ and ‘provided such utilization is compatible with fair practice.’ As usual, this will only be determined *in casu*, digital means posing far greater risks for the legitimate interests of authors than other (non-digital) educational compilations.²³

Which leads us to the crucial feature of this exception (and, in fact, the one that has found its way into national laws) is ‘by way of illustration... for teaching.’ What does it mean? Is it different from (narrower than) the ‘educational purposes’ previously stated in Art.8 of the Berne Act and Art.10(2) of the Brussels Act? The answer is, no. The Stockholm Conference documents show that the introduction of the current wording responds exclusively to a concern about the amount of a work used (and the accuracy of the English version, that ignited the revision), rather than to any intent to modify or reduce the concept of ‘educational purposes’ itself. The new language ‘by way of illustration for teaching’ was never intended to further restrict the original scope of the ‘educational purposes’, it was only enacted to make sure that the reproductions used are indeed “illustrating” the teaching.²⁴

Nothing is said as to the specific acts of exploitation covered by the exception; accordingly, the term ‘utilization’ permits to include all the exploitation acts envisaged under the BC and, later, by the WCT: reproduction,²⁵ distribution, communication to the public and making available, as well as translation.²⁶ In short, what is meant by ‘utilization’ is a matter to be determined by national legislation.²⁷

²³ In their last work, Prof. Ricketson and Prof. Ginsburg show some reserve concerning digital teaching compilations:

[...] while it is always possible that some [compilations] may fall within the scope of Art.10(2), it is more likely that they will not. [...] it will be a distortion of language to describe an anthology of poetry (with the complete texts of the poems) or a “course pack” consisting of chapters taken from various books about the subject to be covered in the course, as being used “by way of illustration [...] for teaching”. Such usages are well-developed forms of exploitation in many countries subject to voluntary licensing arrangements or even compulsory licensing schemes that meet the requirements of art.9(2).

See Ricketson/Ginsburg, *op.cit.supra*, §13.45, p.794. Leaving aside the fact that the existence of well-developed licensing schemes in some countries is not enough to support (let alone, justify) an interpretation against the express wording of Art.10(2) -after all, domestic laws are not obliged to provide for such an exception-, it should be mentioned that the two specific examples chosen by the authors are not exemplificative nor exhaustive of all teaching anthologies possible. Furthermore, nothing prevents national legislators to allow the making of teaching compilations under this exception subject to a remunerated legal license to make sure that the use will be ‘compatible with fair practice’. See Ricketson/Ginsburg, *op.cit.supra*, §13.45, p.794.

²⁴ In that sense, the commentary to Sec.7(i)(c) of the WIPO Tunis Model Law on Copyright of 1976 (see *infra* chapter 6) –which provides for an exception for teaching purposes- explains that “the illustrations must actually illustrate the teaching, and they are permitted only to the extent justified by the purpose. In practice, this means that the publication... is itself made solely for teaching purposes.”

²⁵ The right of reproduction was not formally included within the BC until the Stockholm Revision of 1967. In addition, the reproduction for teaching purposes would fit under Art. 9(2) BC. In that sense, see Ricketson/Ginsburg, *op.cit.supra*, §13.36: “Copying for teaching purposes ... is already dealt with specifically in article 10(2), so it seems reasonable to assume that copying for this purpose would not fall within the scope of article 9(2). Copying of materials for use by students in the course of the instruction, however, might well be justified within article 9(2)...”

²⁶ According to the Main Committee I: “it was generally agreed that Articles... 10(1) and (2) ... virtually imply the possibility of using the work not only in the original form but also in

In terms of nature and amount of works covered, Art.10(2) BC is only limited on two grounds: “*the extent justified by the purpose*” and “[*compatibility*] with *fair practice*.” Therefore, instead of any specific quantitative (how much can be used²⁸ and how many copies²⁹) or qualitative (which kind of works) restrictions, Art.10(2) BC applies to all kinds of works, both literary and artistic, provided that they are used for illustration according to these conditions.

Ever since its introduction, this provision has referred to *publications, broadcasts and recordings* done for teaching purposes, but remains silent about what we now call instructional and teaching ‘uses’ (copies, displays, recitations, etc done as to convey the instruction), one may wonder whether these ‘uses’ are deemed exempted under Art.10(2) BC. Several reasons favor an affirmative answer.

[Footnote continued from previous page]

translation, subject to the same conditions...” See WIPO (1976), *Reports on the Work of the Five Main Committees of the Intellectual Property Conference of Stockholm 1967*, WIPO Publication 309(E), §205. The same problem and possible solutions are applicable with respect to the public communication right. However, the implied inclusion of translation rights within the existing BC exceptions remains an open issue. On this issue, see Ricketson, WIPO Study, *op.cit.supra*, p.37-39 concluding in favor of the existence of “implied exceptions with respect to translation rights” within the BC, and specifically in Art.10(2) BC; It may be argued that translation is a form of reproduction and therefore automatically covered by any exception to the reproduction right or, instead, it could be argued that being two distinct rights, “the implication of parallel exceptions in relation to the making of translations is imperative for the effective operation of the Convention. Not to do so would ... lead to an absurd result that cannot have been intended by the framers of the Convention and its revised Acts.” See also Ricketson, *op.cit.supra*, §9.64 n.2 and Ricketson/Ginsburg, *op.cit.supra*, §13.83. Of course, it would have been easier and advisable to make specific amendments to introduce ‘*either in its original or in a translated version*’ in both paragraphs of Art.10 BC; See Ricketson, *op.cit.supra*, §9.68 n.2 and Ricketson/Ginsburg, *op.cit.supra*, §13.87.

For similar reasons (to avoid absurd or unreasonable results), Sec.7 “Fair use” of the WIPO Tunis Model Law on Copyright of 1976 (*see infra* chapter 6) expressly allows (under all the listed exceptions) the use of works “*either in the original language or in translation*”.

²⁷ See Ricketson, WIPO Study, *op.cit.supra*, p.14.

²⁸ Of course, “The words “by way of illustration” impose some limitation, but would not exclude the use of the whole of a work in appropriate circumstances’ See Ricketson, WIPO Study, *op.cit.supra*, p.14. See also Ricketson, *op.cit.supra*, § 9.27 n.2 p.496 and Ricketson/Ginsburg, *op.cit.supra*, §13.45, p.791.

²⁹ See Ricketson, WIPO Study, *op.cit.supra*, p.15:

Just as no limitation is imposed in respect of the public which is reached by a broadcast intended for teaching purposes, so there can be no limitation on the number of copies that can be made for the same purpose. The only further qualification applied here is that the making of multiple copies must be compatible with “fair practice”. Obviously, if this competes with the author’s normal exploitation of his work and unreasonably prejudices his legitimate interests, article 10(2) should not apply.

See also Ricketson, *op.cit.supra*, § 9.27 n.8 and Ricketson/Ginsburg, *op.cit.supra*, §13.45, p.794-794.

CASE STUDY

Teaching and instructional uses under Art.10(2) BC.

Seen through the eyes of the XXIst Century, the language and scope of Art.10(2) BC may look incomplete because it does not refer to “mere” instructional and teaching uses which do not necessarily result in the making of a publication, broadcast or recording for teaching purposes. Yet, if we put this language in its historical context, we realize that pre-digital copyright laws (and the BC text is clearly so) did not bother to deal with *mere use* of works, as opposed to more visible *exploitation acts*. At that time, these teaching uses were deemed to be irrelevant to copyright (*de minimis non curat lex*).

Several interpretative techniques may guide us to integrate teaching uses under Art.10(2) BC. Furthermore, teaching uses may be exempted under other provisions in the BC. On the one hand, the *minor reservations* doctrine (*see infra*) embedded in the Berne Convention could exempt acts of public performance done for teaching purposes; likewise, according to the test of Art.9(2) BC, specific acts of reproduction done for teaching purposes might also be exempted by national laws. Last but not least, some teaching uses may easily be exempted as quotations under Art.10(1) BC;³⁰ It is by no coincidence that both exceptions form part of the same article 10: the second paragraph allowing for a larger scope of exempted uses (justified by the teaching purpose) than the first.

Teaching uses may be implicitly included within Art.10(2) BC by means of the doctrine of *maiori ad minus*. In addition, the teaching exception for related rights in Art.15(1)d of the Rome Convention of 1961 (*see infra*) refers in general to “*for the purposes of teaching*”; It makes no sense to interpret that only recordings and performances may be used for *teaching* purposes (i.e., instructional uses), but not the works performed and recorded in them.³¹

In short, it is an *open, flexible and technology-neutral* exception that leads us to consider the specificities (nature and amount of work, technology, purposes, institution) of

³⁰ In fact, as Prof. Ricketson explains “it was argued by the delegates at the 1885 Conference that the right to make quotations might be dealt with in national legislation as part of the general discretion accorded to Union members under article 8 of the Berne Act...” *See* Ricketson/Ginsburg, *op.cit.supra*, § 13.39. In similar terms, the commentary to the teaching exception in Sec.7(i)(c) of the WIPO Tunis Model Law on Copyright of 1976 (*see infra* chapter 6) explains that this exception “*in some respects... joins up with the previous exception ('quotation')*,” since they both allow the making of quotations and borrowings in another work –the difference being that in this case it must be a publication, broadcast or recording “*itself made solely for teaching purposes*”.

³¹ Likewise, one should conclude that the “teaching purposes” in Art.15(2)d RC also include the use of the performances and recordings in broadcasts and further recordings *by way of illustration for teaching* (*ex* Art.10(2) BC).

each scenario, in order to find *in casu* the right balance between the public interest (education) and that of the author.

Nothing is said in Art.10(2) BC as to remuneration. Member States are free to implement it either as a free exception or limitation, as a remunerated legal license or as a combination of both. In fact, a different treatment of different teaching uses may already be imposed by the requirement of compliance with “*fair practice*”³² and, ultimately, by the Three-Step-Test (*see infra*).

According to Art.10(3) BC, mention shall be made of the name of the author as it appears on the original, but also the source (from where the work has been obtained) must be mentioned.

Finally, we should bear in mind that Art.10(2) BC is not a mandatory exception and simply sets the outer limits within which an exception for teaching purposes may be carried out by national laws.³³ The exempted use of works for teaching purposes remains a matter for national law.

2. Art.10(1) Berne Convention: quotations

According to Art.10(1) BC:

“It shall be permissible to make quotations from a work which has already been lawfully available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”

This exception originated at the Rome Revision Conference in 1928 with the following language: “*analyses or short textual quotations of published literary works for the purposes of criticism, polemical discussion or teaching*”. The current language (as introduced at the Stockholm Conference) is not restricted to any specific uses. It was concluded that a list of specific purposes could never hope to be exhaustive, but –as Prof. Ricketson explains³⁴– quotations for “*scientific, critical, informatory or educational purposes*” are clearly included within the scope of Art.10(1) BC.

As to the specific rights covered by the exception, silence must be read in favor of including any acts of exploitation: reproduction, distribution, communication to the public and making available (after the WCT, for all works), as well as translations.³⁵

³² See Ricketson, WIPO Study, *op.cit.supra*, p.15: “Remuneration for [some] uses under a compulsory license may therefore make the use more ‘compatible with fair practice’”.

³³ See Ricketson, WIPO Study, *op.cit.supra*, p.14. See also Ricketson, *op.cit.supra*, §9.27 n.1 and Ricketson/Ginsburg, *op.cit.supra*, §13.45, p.791.

³⁴ See Ricketson, WIPO Study, *op.cit.supra*, p.13. See Ricketson, *op.cit.supra*, § 9.22 n.3 and Ricketson/Ginsburg, *op.cit.supra*, § 13.41 p.786

³⁵ See WIPO (1976), *WIPO Reports on the Work of the Five Main Committees of the Intellectual Property Conference of Stockholm 1967*, WIPO Publication 209(E), § 205. See Ricketson, WIPO Study, *op.cit.supra*, p.12: “There is nothing in the wording of Art.10(1) to indicate that this exception is only concerned with reproduction rights”.

The quotation exception applies to all kind of works (provided they have been “*lawfully made available to the public*”), without any limitation as to the amount that may be quoted. Of course, the term ‘quotation’ itself already suggests some restriction (“that the thing quoted is a part of a greater whole”³⁶) but it was preferred to leave the length of the quotation as a matter to be determined *in casu* subject to the conditions of “*extent justified by the purpose*” and “*compatible with fair practice*.”³⁷ Notice, also, that the quotation exception is neither restricted in terms of beneficiaries or of technology. Thus, it may exempt quotations for teaching purposes made by professors and students³⁸, as well as any means of exploitation (i.e, digital formats and online contexts), provided that they are done *to the extent justified by the purpose* and in a manner that is *compatible with fair practice*.

Nothing is said in Art.10(1) BC as to remuneration, but nothing prevents Member States from subjecting the quotation exception (or part of its exempted uses) under remuneration schemes (legal license) –which, “should more readily justify the requirement of compatibility with fair practice than would a free use.”³⁹

As happens with the teaching uses, according to Art.10(3) BC, mention shall be made of the name of the author as it appears on the original, but also the source (from where the work has been obtained) must be mentioned.

CASE STUDY

An obligation to exempt quotation

The compulsory (mandatory) nature of the quotation exception means that Member Countries cannot exclude it -at least, in relation to foreign works claiming protection under the Convention. The question is then how will the mandatory quotation exception in the BC interact with the quotation exceptions envisioned in domestic laws which, in many cases (as we will see) may be narrower in scope?

[Footnote continued from previous page]

In favor of including translation rights within the exceptions in Art.10 BC, *see* Ricketson, WIPO Study, *op.cit.supra*, p.37-39 explaining the existence of “implied exception with respect to translation rights” within the BC: “the exclusion of translations from the exceptions provided in these Articles will lead to a manifestly absurd or unreasonable result”. *See* also Ricketson, *op.cit.supra*, § 9.64-68 and Ricketson/Ginsburg, *op.cit.supra*, § 13.83-87. Aligned with this conclusion, Sec.7 “Fair use” of the WIPO Tunis Model Law on Copyright of 1976 (*see infra* chapter 6) expressly allows (under all the listed exceptions) the use of works “*either in the original language or in translation*”.

³⁶ *See* Ricketson, WIPO Study, *op.cit.supra*, p.12.

³⁷ *See* Ricketson, WIPO Study, *op.cit.supra*, p.12. *See* also Ricketson/Ginsburg, *op.cit.supra*, § 13.42 p.788.

³⁸ It applies to uses made by professors -as part of the instruction (either in public or private, profit or non-profit institutions)- but also by students -i.e., when asking a question to the professor or posting a contribution to the discussion, etc.

³⁹ *See* Ricketson, WIPO Study, *op.cit.supra*, p.13. *See* Ricketson/Ginsburg, *op.cit.supra*, § 13.41 p.786.

As Prof. Ricketson explains, the debate is largely theoretical: whether despite being an exception, it should be considered as a *minimum of protection* granted to the author (and therefore, Member States may restrict the quotation exception also for Union nationals and works protected under the BC) or instead, precisely because it is an imperative restriction to the authors' rights, Member States cannot reduce its extent in favor of Union authors and works (otherwise, there is no point in inserting restrictive provisions into the Convention if national laws were free to annul them by a contrary stipulation)⁴⁰. Ricketson prefers this later approach

“It will be contrary to the Convention for national legislation to provide protection in a case where this has been specifically prohibited. In the same way that there is a principle of minimum of protection that operates under article 19 in favor of Union authors, so (it can be argued) there is a corresponding principle of maximum protection to be implied in those few cases where the Convention limits or excludes protection”⁴¹

Instead, Ficsor explains that the compulsory nature of Art.10(1) BC is not an exception to the principle of minimum of protection granted under the BC but rather “it follows from a basic human freedom –the freedom of speech and criticism- that is justified and necessary to allow free quotations in appropriate cases.”⁴²

In either case, be it as an internal exception (subject to the principle of minimum of protection) or as an external obligation (*via* human rights protection), Berne Member States are obliged – when granting protection to foreign Union nationals and their works under the BC- to enforce the scope of the quotation exceptions as designed in Art.10(1) BC; any domestic quotation exceptions being only applicable to purely domestic scenarios of copyright protection –since Art.5(3) BC subjects the protection in the country of origin to exclusively national law.

Surprisingly, the EUCD failed to grant this exception a mandatory nature (as applicable among Berne Union Members). The good news is that the quotations exceptions in the EUCD and BC texts are very similar in scope (see comparative table in Annex);⁴³ the bad news is that, as we will see, the quotation exceptions in national laws are far more restrictive than the BC and EUCD ones (*see infra* Part III Chapter 2).

⁴⁰ This is the argument defended by Baum and Hoffmann since 1927; *see* Ricketson, *op.cit.supra*, § 12.12.

⁴¹ *See* Ricketson, *op.cit.supra*, §12.12. *See also* Ricketson, *op.cit.supra*, §§12.17-18 and Ricketson/Ginsburg, *op.cit.supra*, §§6.110-111.

This debate only affects three clear imperative restrictions under the present text: among them, the making of quotations under Art.10(1) BC.

⁴² *See* Ficsor, *op.cit.supra*, §5.12.

⁴³ So, in principle, there should be no major inconsistencies in their interpretation and application. In fact, the mandatory nature of the BC quotation exception will further justify to interpret the EU one under the light of the BC one; for instance, to confirm that teaching uses are also covered under the European quotation exception in art.5.3(d).

3. The ‘minor reservations’ doctrine.

In addition to the specific exceptions listed within the BC, two other provisions are fundamental to complete the whole picture of exempted uses under the BC. One of them is expressly enshrined in Art. 9(2) BC: the Three-Step-Test (which will be dealt with under the next Chapter); the other one is to be found only within the documents of the Brussels Conference: the ‘minor reservations’ doctrine. In addition, both provisions have something in common: they resulted from failed attempts to introduce a list of exempted uses to the newly introduced rights of reproduction (at Stockholm) and public performance (at Brussels), respectively.

The *minor reservations* doctrine consists of a formal declaration made in the final Report of the Brussels Conference in the sense that minor reservations (exceptions and limitations) to the right of public performance (communication to the public) existing in national laws are in conformity with the BC.⁴⁴ This doctrine is especially important for the present Study on two grounds:

First, because *teaching purposes* were expressly mentioned and considered as part of the ‘minor reservations’ allowed to stand in national laws:

“making an express mention of the possibility available to national legislation to make what are commonly called *minor reservations*.... The Delegates of ... have all mentioned these limited exemptions allowed for religious ceremonies, military bands and *the needs of child and adult education*”⁴⁵

Second, because this doctrine allows us to complete or reinforce the conclusion adopted above (*see supra* chapter 1) that despite Art.10(2) BC specifically refers to “publications, broadcast and recordings” it also allows for the exemption of other uses (public performance, recitation, communication to the public, making available, etc) done for teaching purposes but which do not involve any reproduction itself.

Subsequently, the Stockholm Conference Report endorsed that the ‘*minor reservations*’ doctrine (such as *for the requirements of education*) was still valid under the BC⁴⁶ and even with a general scope (i.e., applicable also to other exploitation rights in addition to public performance). Ever since, the ‘minor reservations’ doctrine has remained ever since rooted in the BC *acquis*.

⁴⁴ It was initially intended as a general provision inserted in the Convention to allow Member States to retain any limitations existing in their national laws, but it was finally rejected by fear that such a provision would ‘positively incite’ those States which had not such exceptions to incorporate them in their laws. *See* Ricketson, WIPO Study, *op.cit.supra*, p.34-37. *See also* Ricketson, *op.cit.supra*, §9.60.

⁴⁵ *See* WIPO (1951) *Documents for the Conference of Brussels 1948* p.100, *apud* Ricketson, WIPO Study, *op.cit.supra*, p.34. *See also* Ricketson, *op.cit.supra*, §9.61 and Ricketson/Ginsburg, *op.cit.supra*, §§13.80.

⁴⁶ *See* WIPO (1976), *WIPO Reports on the Work of the Five Main Committees of the Intellectual Property Conference of Stockholm 1967*, WIPO Publication 209(E), § 209-210. *See also* Ricketson, *op.cit.supra*, §9.62 and Ricketson/Ginsburg, *op.cit.supra*, §§13.81.

Of course this does not mean that national ‘*minor reservations*’ may be of any kind and scope. They must be “*of a restricted character*” (as mentioned in the Brussels Minutes)⁴⁷ and they must ultimately comply with the Three-Step-Test (*ex Art.9(2) BC and Art.10(1) WCT*). Both the *minor reservations doctrine* and the *restricted character* of the exceptions were agreed upon in the Brussels Conference (and later confirmed at Stockholm) and, therefore, according to Art.31(2) Vienna Convention on the Law of Treaties of 1969,⁴⁸ they form part of the context which must inform interpretation of the BC.

De minimis non curat lex

It is often affirmed that the principle *de minimis lex non curat* (the law is not concerned with trifles) should guide the interpretation of the exceptions and limitations in the BC.⁴⁹ Indeed, it should; but this principle should not be confused with either the rule of “restrictive interpretation” of the exceptions, or with the BC ‘minor reservations’ doctrine, nor with the Three-Step-Test itself.

The general legal principle of *de minimis lex non curat* is applicable not only to the regime of exceptions and limitations but also to the regime of exclusive rights. Applying it only to exceptions and limitations (as well as to the ‘minor reservations’ doctrine and the Three-Step-Test) may lead to inconsistent results, since it is obvious that most exceptions and limitations that clear the Three-Step-Test are not at all *de minimis*. On the contrary, if the uses were indeed *de minimis*, no exception or limitation would be needed (or justified) at all.

4. The Three-Step-Test: Art. 9(2) BC, Art.10 WCT and Art.13 TRIPs

The so called *Three-Step-Test* is found in several provisions in international instruments.

⁴⁷ “The Conference noted, nevertheless, that these limitations *should have a restricted character* and that, in particular, it did not suffice that the performance, representation or recitation was ‘without the aim of profit’ for it to escape the exclusive right of the author”. *See* WIPO (1951) *Documents for the Conference of Brussels 1948* p.100, *apud* Ricketson, WIPO Study, *op.cit.supra*, p.35. *See also* Ricketson, *op.cit.supra*, §9.61 and Ricketson/Ginsburg, *op.cit.supra*, §§13.80.

⁴⁸ Art.31 Vienna Convention of 1969: (1) *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.* (2) *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

⁴⁹ For instance, it is explained that the ‘restricted character’ of the ‘minor reservations’ is based on the *de minimis* rule, which should also guide the interpretation of these ‘minor reservations’ [*see* Ricketson, WIPO Study, *op.cit.supra*, p.36] and that “this means [the *de minimis* principle of interpretation] that exceptions to the rights granted in the relevant articles of the Convention must be concerned with uses of minimal, or no, significance to the author” [*see* Ricketson, *op.cit.supra*, §9.63(1) and Ricketson/Ginsburg *op.cit.supra*, §13.82].

– Art.9(2) BC

Art. 9(2) BC sets three standard criteria (so called the “Three-Step-Test”) to establish whether national exceptions to the *reproduction right* are in conformity with the Berne Convention:

“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

The rule of the Three-Step-Test was introduced at the Stockholm Conference on account of the newly recognized right of reproduction. As it happened in Brussels, it was feared that an exhaustive list of limitations to the reproduction right would be very long and always “inadequate, because it could never cover all the special cases existing in national legislation” and might “encourage the adoption of all the exceptions allowed and abolish the right or remuneration.”⁵⁰

Its goal was to set the conditions that national exceptions must comply with before they can be deemed in accordance to the BC. Accordingly, the test was designed as a restrictive tool to guide *legislators* in Member States, through a cumulative succession of steps to be considered when drafting the statutory exceptions and limitations.

Art.9(2) BC allows Member States to exempt the reproduction of protected works, as well as its translation.⁵¹

– Art.10 WCT

The 1996 *WIPO Copyright Treaty*⁵² extended the Three-Step-Test to the new rights granted: distribution and rental, communication to the public and making available. According to Art.10(1) WCT:

“Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this

⁵⁰ See Ricketson/Ginsburg, *op.cit.supra*, §13.07.

⁵¹ See Ricketson, WIPO Study, *op.cit.supra*, p.37-39 explaining the implied inclusion of translation rights in Art.9(2) BC (as well as in other exceptions to the right of reproduction).

⁵² “Art.10 (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.” *The Agreed Statement concerning Art.10 reads: “It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.” The same is provided for in the 1996 WIPO Performances and Phonograms Treaty.*

Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”

The Agreed Statement concerning Art.10 WCT makes clear that such limitations and exceptions may be extended and devised for digital uses and environments:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment

In addition, the WCT added yet another version of the Three-Step-Test which may posed more complex issues of interoperation of the test with the existing BC and national laws exceptions and limitations. According to *Art.10(2) WCT*:

“Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

As expressly acknowledged in the Agreed Statement concerning Art.10(2) WCT, “...Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.”⁵³ For purposes of this Study,⁵⁴ it is enough to bear in mind that, in principle⁵⁵ and despite the obscure language of this paragraph, WCT Member States are not required to modify their national limitations and exceptions that are consistent with the present BC text even if these would not pass the Three-Step-Test in Art.10(2) WCT; in other words, Art.10(2) WCT will not “trump” the existing limitations and exceptions in national laws (including their extension into the digital environment) that were found to be in conformity with the Berne Convention.

– *Art.13 TRIPs*

The direct precedent of Art.10(2) WCT is to be found in Art.13 TRIPs adopted in 1994. *Art.13 of the TRIPs Agreement*⁵⁶ reinforced the scope of the Three-Step-Test by incorporating

⁵³ However, it is apparent that the second paragraph of Art.10 WCT *adds something* to the Three-Step-Test originally enshrined in Art.9(2) BC and Art.10(1) WCT: at least, it is drafted as a mandatory binding norm (“shall confine”) –instead of a standard proviso to guide legislators in designing exceptions and limitations in conformity with the BC.

⁵⁴ For a detailed analysis of such a complex issue, *see* Ricketson, WIPO Study, *op.cit.supra*, p.56-63.

⁵⁵ As Prof. Sirinelli warns: “It is by no means certain that a non-expert will be able to understand this [Agreed statement on Art.10(2) WCT]. The ambiguities that remain must not give member States a margin of interpretation that would exacerbate the current disparities among laws.” *See* Sirinelli, WIPO Study, *op.cit.supra*, p.43.

⁵⁶ The WTO Agreements of 1994 (Uruguay Round of the GATT) included the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15th, 1994, available at <http://www.wto.org> [hereinafter TRIPs Agreement].

a slightly modified⁵⁷ version of Art.9(2) BC to all the exclusive rights listed in the BC and the TRIPs (that is, not restricted to reproduction). Art.13 TRIPs will apply to all WTO Member countries when implementing any exceptions:

“Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

Only time will tell what will be the effect of Art.13 TRIPs and Art.10(2) WCT be, and whether the original Three-Step-Test in Art.9(2) BC has been given a new meaning as a *binding interpretation rule* applicable not only in the *design and implementation* but also in the *application* of the exceptions and limitations, thus allowing a further restriction (in specific scenarios) of the boundaries defined in their statutory terms.⁵⁸

A recent example of this (perhaps non-intended) result may already be found in Art.5.5 EUCD which subjects the application (hence, interpretation) of all national exceptions and limitations to the rules of the Three-Step-Test:

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.”

– *Educational activities and the Three-Step-Test*

⁵⁷ Other noticeable differences when comparing Art.13 TRIPs with Art.9(2) BC are: reference to the “right holder” instead of the “author”; the mandatory character (“shall confine”) rather than a standard proviso; and ultimately, the fact that, unlike the BC, the TRIPs Agreement is “enforceable”. For a detailed analysis of the limitations and exceptions under the TRIPs Agreement, see Ricketson, WIPO Study, *op.cit.supra*, p.46-55.

⁵⁸ As Prof. Ricketson explains, “Originally a test of limited application under Berne, it has now been adopted as a general template for limitations and exceptions under the TRIPs Agreement, the WCT and WPPT. This has been more by accident than by design...” see Ricketson, WIPO Study, *op.cit.supra*, p.65.

The interpretation of the statutory exceptions when applied to ‘real’ cases is paramount to ensure a correct balance between the private and public interests involved in each case. Therefore, some scholars have proposed a flexible reading of the Three-Step-Test, when applied to interpret the statutory language of an exception –because it was found that the application of the original restrictive and cumulative reading when interpreting (rather than designing) new exceptions and limitations may lead to unfair results (even at the expense of forsaking the normative justification of the specific exception).

See *Declaration : A Balanced Interpretation of the Three-Step-Test in Copyright Law*:

http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm (accessed August 1st 2009). In fact, some domestic courts are already applying the three-step-test as a hermeneutic mechanism to “close” the copyright system and help compensate the lack of flexibility within it (perhaps more acute in *droit d’auteur* than in *copyright* systems), sometimes resulting in an “extensive” interpretation of the applicable exception. See, among others, C. Geiger, ‘From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step-Test’ (2007) *EIPR* 486, at 491 (fn.43).

A detailed analysis of the Three-Step-Test is beyond the scope of this Study,⁵⁹ so we will only point out some general issues that may guide its interpretation and application as far as educational purposes.

- (i) Art.9(2) BC has a special significance with respect of educational activities on two accounts. First, because the Stockholm Conference expressly accepted that the steps in Art.9.2 BC would allow the *reproduction by libraries* for preservation purposes -as already enshrined in most domestic copyright laws of the time. The BC never had a specific exception or limitation in favor of libraries;⁶⁰ yet, libraries play a fundamental role in terms of education: they supply the material used for teaching purposes. Current jurisprudence agrees that national exceptions and limitations in favor of libraries are fully compatible with the BC, not only when envisaged for preservation purposes (as accepted at Stockholm) but also for research and study purposes.⁶¹ In Part III of the present Study, we will briefly examine whether, and if so, to what extent, the national exceptions and limitations in favor of libraries may help educational activities.
- (ii) Second, because depending on the interpretation of Art.10(2) BC (*see supra*), Art.9(2) BC may allow Member States to exempt reproductions done for teaching and instructional uses which do not amount to a reproduction for purposes of illustration of teaching in publications and recordings.

As we mentioned, the goal of Art.9(2) BC was to set the standard for national exceptions to the reproduction right in accordance with the BC. Therefore, Art.9(2) BC does not affect the operation of other exceptions in the BC, such as Art.10(1) and (2) BC.⁶² In fact, these exceptions already incorporate the standard rules of what later became the Three-Step-Test:

“The references to being ‘*compatible with fair practice*’ may correspond to the second and third steps of the three-step test, while the limited scope of those provisions undoubtedly brings them within criteria contained in the first step.”⁶³

⁵⁹ For that matter, we refer to the WIPO Studies already done by Prof. Ricketson and Prof. Sirinelli, *op.cit.supra*. For more specific studies done on this issue, *see* M. Senftleben, *Copyright Limitations and the Three-Step-Test: An Analysis of the Three-Step-Test in International and EC Copyright Law*, Kluwer Law International, The Hague, 2004; *See also* Ricketson/Ginsburg, *op.cit.supra*, §§ 13.10-30. Although, it remains to be seen whether it will have any effect on the interpretation of the three-step-test provisions in the BC or the WCT, the *WTO Panel Decision of June 2000, on section 110(5) of the U.S. Copyright Act* may also provide some guidance to examine the Three-Step-Test; *See* The Report of the WTO Panel (WT/DS160/R) of June 15, 2000 (available at the WTO web page: <http://www.wto.org>).

⁶⁰ The fact that the oldest existing exception or limitation in a copyright statute failed to be included in the Berne Convention may be easily explained since –as we already pointed out- limitations and exceptions have not historically been a major concern for the Berne constituency.

⁶¹ *See* Ricketson, *op.cit.supra*, §9.11 and Ricketson/Ginsburg, *op.cit.supra*, §13.45. *See also* C. Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, WIPO (1978), §9.10

⁶² *See* Ricketson/Ginsburg, *op.cit.supra*, §13.10: “and that the uses allowed under them [Art.10] are therefore excluded from its scope [Art.9(2)]”.

⁶³ *See* Ricketson/Ginsburg, *op.cit.supra*, §13.110.

Nevertheless, the Three-Step-Test may ultimately affect –*ex Art.10 WCT and Art.13 TRIPs*⁶⁴ - not so much the design, but the implementation and interpretation of the national statutory exceptions provided for teaching purposes and quotations. Accordingly, we should briefly consider its main features.

A brief analysis of the Three Steps

The following considerations attempt to summarize the main features of the Three-Step-Test.

First Step: Certain Special Cases

The language “certain special cases” was interpreted by the *WTO Panel Report [op.cit.supra]* in detailed and restrictive terms:⁶⁵

- “certain”: “clearly defined,” “known and particularized, but not explicitly identified,” that which “guarantees a sufficient degree of legal certainty” [*id.* §6.108, at 33].
- “special”: “limited in its field of application or exceptional in its scope,” “narrow in quantitative as well as a qualitative sense” so that it does not exempt a large number of users;⁶⁶ [*id.* §6.109, at 33]
- “cases”: “could be described in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors”. [*id.* §6.110, at 33].

It is important to stress that a “special case” is not synonymous with the “special purpose” behind the exception [*id.* §6.111, at 33-34].⁶⁷

⁶⁴ Furthermore, the exceptions of Art.10(1) and (2) BC may come under the umbrella of Art.13 TRIPs; And, since the TRIPs obligations extend to the Berne *acquis* (i.e., any agreements made within the BC, at the time of adoption of the TRIPs) so would the ‘*minor reservations*’ doctrine.

⁶⁵ It is not hard to predict that some of the exceptions existing today in domestic laws would hardly meet the WTO’s definition of a “certain special case.” This may raise a real interpretation problem under the EUCD and the WCT which require the application of the three-step-test to all existing national exceptions [*ex Art.5.5 EUCD and Art.10(2) WCT*]. To solve this, one should assume that all statutory exceptions already comply with the first step (i.e., that they are “certain special cases”. As far as the specific exceptions expressly envisioned in the BC, some scholars expressly conclude that “there should be no conflict between the Berne Convention limitations and exceptions, on the one hand, and Article 10(2) WCT on the other. All the limitations and exceptions allowed under the Berne Convention should, if applied correctly and in the spirit of that Convention, pass the three-step-test and meet its conditions.” See J. Reinbothe, S. von Lewinski, *The WIPO Treaties 1996*, Butterworths, at 131 (2002).

⁶⁶ These considerations were also taken into account under the second step: if the exception only covers a small percentage of uses (or establishments, in that case) and only applies to some specific works, it will be deemed “not conflicting” with the normal exploitation of works; instead, if the exception covers a substantial number of uses (establishments) and applies to all works, it clearly conflicts with the normal exploitation of works.

⁶⁷ The EC argued that for an exception to be justifiable under Berne Convention art.9(2), it must serve a public policy purpose. The WTO Panel did not agree. The purpose behind the exception has nothing to do with the first step, although the specific public policy purpose may be useful in determining the scope and preciseness of the exception.

Second Step: Do Not Conflict With The Normal Exploitation Of The Work
What is “normal” exploitation?

According to the minutes of the Stockholm Conference in 1967:

“common sense would indicate that the expression *normal exploitation* of a work refers simply to the ways in which an author might reasonably be expected to exploit his work in the normal course of events. Accordingly, there will be certain kinds of use which do not form part of his normal mode of exploiting his work--that is, uses for which he would not ordinarily expect to receive a fee- even though they fall strictly within the scope of his reproduction right.”⁶⁸

This explanation may be helpful when dealing with an existing market (currently developed means of exploitation), but not when dealing with new markets and means of exploitation where there is no room for ordinary expectancy of a fee.

The WTO Panel had the chance to address this issue. According to the WTO Panel, “normal exploitation” includes both current and potential future uses of the work [*id.* §6.178, at 47]⁶⁹ and must be evaluated, not only with regard to the particular exclusive right affected by the exception, but with regard to each and every right granted by copyright [*id.* §6.183, at 48].⁷⁰

When will an exempted use “conflict” with the normal exploitation?

Once we have defined what the normal exploitation is, we cannot simply expect that every commercial use will “conflict” with a *normal exploitation* of the work. Only those uses that would deprive the owner of “significant” or “tangible” commercial profits may be deemed to “conflict” with the normal exploitation [*id.* §6.182 at 48].⁷¹ In short, “normal” exploitation should be something less than the full scope of the exclusive right [*id.* §§6.182-6.189, at 48-50].

Third Step: Do Not Unreasonably Prejudice The Author’s [Owner’s] Legitimate Interests

It is here when other external and normative considerations may come into play to help find the correct balance between public and private interests.

The WTO Panel defined “*legitimate*” –as “[lawful] from a legal positivist perspective, but it also has the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of

⁶⁸ See Ricketson, *op.cit.supra*, §9.7 at 483.

⁶⁹ Each new means of exploitation must redefine the scope of what constitutes a “normal exploitation”; otherwise, any new means of exploitation of works would be directly excluded from the copyright monopoly granted to the author.

⁷⁰ A conflict with a normal exploitation of a work with regard to one right cannot be justified (compensated) by reference to another right that is not affected by the exception.

⁷¹ The Panel denied the EC’s contention that any use that might yield economic gain to the user is a normal exploitation of the work.

objectives that underlie the protection of exclusive rights” [*id.* §6.224 at 58],⁷² and “prejudice” as any damage, harm or injury [*id.* §6.229, at 59]. However, the key question is whether the prejudice is “unreasonable”.

The degree of prejudice that is unreasonable can only be decided *in casu*, taking into account not only the importance of the other interests at stake (i.e., normative reasons that justify the exception) but also the real prejudice (economic⁷³ or moral, etc) that such an exception may cause to the author. In many cases, the unreasonableness of the prejudice may be minimized (and rendered “reasonable”) by means of a fair compensation scheme in favor of the author -a possibility that has always been accepted under the BC,⁷⁴ provided of course, that the use doesn’t conflict with the normal exploitation of the work.⁷⁵

5. Related Rights: Art.15 Rome Convention and Art.16 WPPT

In general terms, both the Rome Convention and the WPPT intend to provide for the same kinds of limitations with regard to the protection of performers and phonogram producers as provided for in the Berne Convention and the WCT with respect of the copyright in literary and artistic works.⁷⁶

In that sense, *Art.15(2) Rome Convention* permits the application of the national limitations and exceptions envisaged for copyright (authors’ rights):

“Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connection with the protection of

⁷² This would allow some room for the introduction of new exceptions justified by public policy issues: in other words, a full (all-encompassing) monopoly of all uses of his work (including those uses which share a public interest) would not qualify as a “legitimate” interest.

⁷³ In its examination of section 110(5) of the U.S. Copyright Act, the Panel exclusively took into account the loss (both actual and potential) of income to right holders, in order to ascertain the unreasonableness of the exception. *See* WTO Panel Report, §§6.229, at 59 : “In our view, prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”

⁷⁴ *See* Ricketson, *op.cit.supra*, §9.8 at 484: “It also seems clear from the Report of Main Committee I that ‘unreasonable prejudice to the legitimate interests of the author’ may be avoided by the payment of remuneration under a compulsory license (although this would not, of course, ‘cure’ a use that conflicted with the normal exploitation of the work--by definition, the receipt of royalties under a compulsory license could not be regarded as a part of the normal exploitation of a work).”

⁷⁵ To put it (too) simple, the second and third steps are two grades of a same requirement (that the author is not the only one bearing the costs for such use): the later allowing a “fine tuning” of the former.

⁷⁶ In general, *see* Ricketson, WIPO Study, *op.cit.supra*, pp.44-45 and 64-65.

copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention.⁷⁷

Art.15(1) RC⁷⁸ allows Member States to introduce or maintain national exceptions and limitations for specific purposes, such as (a) private use, (b) the reporting of current events, (c) ephemeral fixation by broadcasting organizations, as well as (d) “*use solely for the purposes of teaching or scientific research.*”

At a first glance, this provision looks different from Art.10(2) BC: it is not limited to purposes of “illustration for teaching” but rather to the more general “purposes of teaching,” and does not refer to “publications, broadcasts and recordings”. In practice, these differences may not be significant:⁷⁹ on the one hand, because a generous reading of Art.10(2) BC in the sense that “illustration for teaching” equals “teaching” and “educational purposes” (*see supra*) renders it a merely linguistic difference; on the other, because it makes sense to assume that the conventional legislator meant the same scope to be exempted under both exceptions (and that the different language is only a result from the historical gap existing between the enactment of both provisions);⁸⁰ and finally, because most national laws tend to provide for the same exceptions for copyright and for related rights (*see infra*).⁸¹

Although no specific steps or conditions are set in the Rome Convention, it is generally accepted that the Three-Step-Test as in Art.9(2) BC must also apply to any restriction set to the reproduction right of performers and producers.⁸² Instead, the test did find its way into the WPPT. *Art.16 WPPT*⁸³ follows the same parameters as Art.10 WCT in order to extend the

⁷⁷ This means that compulsory licensing for broadcasting of performances (art.7(2)(2) RC), broadcasting of phonograms (art.12 RC), communication to the public of certain broadcasts (art.12(d) RC). However, nothing prevents that an exception (in the form of a compulsory license) that meets the conditions explicitly stated in the BC and the three-step-test may be applied to the rights of performers and phonograms producers under Art.16(1) WPPT. See Reinbothe/von Lewinski, *op.cit.supra*, p.396.

⁷⁸ Art.15(1) RC: Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

- (a) private use;
- (b) use of short excerpts in connection with the reporting of current events;
- (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
- (d) use solely for the purposes of teaching or scientific research.

⁷⁹ In fact, the most significant difference derives from Art.15(1)(d) RC including “scientific research,” while Art.10(2) BC only refers to ‘teaching’ purposes. This may difficult the examination of the correspondence of the conventional articles with exceptions and limitations in national laws. In that sense, it is suggested that ‘scientific research’ should be restrictively construed so as to avoid, for instance, the inclusion of “popular science broadcasts” within the exception. See Ricketson, WIPO Study, *op.cit.supra*, p.45. However, research purposes go beyond the scope of the present Study.

⁸⁰ It does not make sense to assume that recordings, performances and broadcasts may be used for teaching purposes (in general) but works embedded in them can only be used “for purposes of illustration of teaching in publications...”.

⁸¹ The fact that the Rome Convention is only open for accession to members of the Berne Convention (or of the Universal Copyright Convention) further simplifies the issue.

⁸² See Reinbothe/von Lewinski, *op.cit.supra*, p.387-388.

⁸³ Art.16 WPPT: (1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of

permitted exceptions and limitations to any new exploitation rights granted under the WPPT as well as to the digital environment;⁸⁴ even the agreed statement concerning Article 10 WCT is applicable *mutatis mutandis* to Article 16 WPPT.

6. Tunis Model Copyright Law of 1976

In 1976, the WIPO proposed the Tunis Model Law on Copyright for Developing Countries, which includes several exceptions and limitations that may be applied for educational purposes.

In particular, under sec.7 entitled “Fair use” the following uses of lawfully published works are allowed, “*either in the original language or in translation*”:

(i)(a): reproduction, translation, adaptation ... of a lawfully published work exclusively for the user’s own *personal and private use*

Commentary: as a rule, this concept is the reverse of collective use and presupposes that no profit-making purpose is pursued; a case in point is the student who copies a text, or causes it to be copied, in accomplishing his work of personal research or his studies.

(i)(b): the inclusion of *quotations* from a lawfully published work in another work, provided that such quotations are compatible with fair practice and their extent does not exceed that justified by the purpose

Commentary: A quotation consisting of the word-for-word reproduction of passages from a work, with a view to reviewing or criticizing the work or to using passages of it for purposes of illustration or explanation, can only cover extracts from works.

(i)(c): the utilization of a lawfully published work by way of illustration in publications, broadcasts or sound or visual recordings *for teaching*, to the extent justified by the purpose, or the communication for teaching purposes of the work broadcast for use in schools, education, universities and professional training, provided that such use is compatible with fair practice...

[Footnote continued from previous page]

phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

⁸⁴ And according to the *Agreed statement concerning Articles 7, 11 and 16*, the reproduction right (as set out in Articles 7 and 11) and the exceptions permitted there under (through Article 16), “fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”

Commentary: ...permits the use of a work for illustration in teaching by means of publications, broadcasts or sound or visual recordings. In some respects this exception ... joins up with the previous exception ('quotation'). But there is a further restriction on the exception for the purpose of illustration: the illustrations must actually illustrate the teaching, and they are permitted only to the extent justified by the purpose. In practice, this means that the publication... is itself made solely for teaching purposes. Also, as in the case of quotations, the illustration must be compatible with fair practice...

(v): the reproduction, by photographic or similar process, by *public libraries*, non-commercial documentation centers, scientific institutions *and educational establishments*, of literary, artistic or scientific works which have already been lawfully made available to the public, provided that such reproduction and the number of copies made are limited to the needs of their activities, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author;

Commentary: According to the commentaries included in the Model Law, the library exception is intended to develop on the language of Art.9(2) BC: steps 2 and 3 are literally repeated, while the first step is complied with by restricting its beneficiaries to "public libraries, ..." and to the "needs of their activities".

As we will see, some national laws have mirrored the Model Law provisions in their national laws. In addition, the commentaries included for each provision may be helpful when interpreting the scope of these national provisions and may also offer some interesting insights when interpreting the parallel exceptions in the Berne Convention (as we have seen above).

PART III: LIMITATIONS AND EXCEPTIONS FOR EDUCATIONAL ACTIVITIES IN NATIONAL LAWS (WORKS)

Of the 57 countries that form the scope of the present Study,⁸⁵ 53 reliable sources of copyright statutes were located and have been used.⁸⁶ In addition to these national sources, and because all 27 States which are current Members of the European Union⁸⁷ are included within the scope of this Study, we will also examine the corresponding exceptions listed in Art.5 Directive 2001/29/EC of the European Parliament and of the Council, of 22 May 2001, on the harmonization of certain aspects of copyright and related rights in the Information Society (O.J. L-167 of 22 June 2001) [hereinafter, EUCD].⁸⁸

The EUCD

Since 1991, the EU has been issuing Directives for the harmonization of specific areas in the laws of copyright and related rights of Member States aimed at preventing that major differences in the national copyright laws end up hindering the effective exploitation of copyright and related rights products within the Internal Market.⁸⁹ These

⁸⁵ Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, United States of America, Uzbekistan, Vatican City State.

⁸⁶ No current copyright statute could be located for Monaco, San Marino and Turkmenistan. Italian Copyright Law applies to the Vatican City State (by virtue of Law N.XII on Copyright of January 12th 1960). The States of Serbia and Montenegro currently share the same Copyright Law.

⁸⁷ At the time of the Study, the following States are members of the European Union: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom. In addition, Norway, Iceland and Liechtenstein are part of the European Economic Area (EEA) which allows them to participate in the EC Internal Market (all relevant EC legislation applies throughout the EEA, ensuring the homogeneity of the internal market). Current candidate countries to become future EU Members are Croatia, Macedonia and Turkey.

⁸⁸ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

⁸⁹ At the time of presenting this Study, the following Directives had been issued: Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property right; Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art; Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society; Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version of the Council Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights); Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to

Directives are not directly enforceable in Member countries and must be subsequently “implemented” by each Member State. Depending on the terms of the Directive’s provisions, the States have some latitude when implementing them (in fact, some provisions are optional for Member States); as a result, differences do exist (some times extreme) among EU national laws. It is not the goal of the present Study to examine whether the implementation laws of EU Member States are in compliance with the several EU Directives. However, because of the importance of these Directives in shaping the copyright laws of the EU Member States (as well as of some neighboring countries), we will indeed examine some of the exceptions and limitations allowed to be implemented by Member States, under Art.5 EUCD.

As we mentioned in the Introduction, different exceptions may have an impact on educational activities: exceptions for *teaching purposes*, *teaching compilations*, *quotations*, *private use/copying* and, of course, *fair use/dealing defenses*. In addition, the exceptions provided for in favor of *libraries* may –to some extent– cover some of educational activities (specially when they allow for the making of copies for study or private use and/or when they include educational establishments or –at least- their libraries among the list of beneficiaries).

All 53 statutes provide for some kind of exception for teaching or educational purposes, although with a varied scope. Specific exceptions for quotations and private uses may also be found in all statutes, although Common Law countries rely on fair use/fair dealing provisions that usually combine the later two.⁹⁰ All the statutes provide for some sort of exception in favor of libraries but, as we will see, not all of them exceptions are helpful in terms of educational activities.

Collective licensing systems available in each jurisdiction may also vary: in some countries voluntary collective licensing systems have developed to permit the authorization of protected works for educational purposes beyond the uses exempted by the statute; in other, the only licensing available for educational purposes is under the scope of the statutory exceptions.

1. General Survey

National teaching exceptions solutions (within the EU and beyond) are far from homogeneous. A few numbers and general comments will serve to introduce and sketch the most “relevant” issues and to show the complexity of the picture:

[Footnote continued from previous page]

satellite broadcasting and cable retransmission; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version of the Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property); Council Directive 91/250/EEC on the legal protection of computer programs.

All available at http://ec.europa.eu/internal_market/copyright/documents/documents_en.htm

⁹⁰ This is the case of Canada, Ireland, Israel, UK and USA.

Differences are already evident as to the specific *purposes* exempted. A few laws⁹¹ have chosen to incorporate the formula “*illustration for/of teaching*” envisioned in Art.10(2) BC and Art.5(3)(a) EUCD, but the majority of teaching exceptions still prefer other terminology such as “educational purposes” or “teaching purposes,” “educational activities” or “educational contexts,” “teaching,” “school” and “classroom use”, and -more specifically- to “instruction,” “examination,” “lessons” and “lectures,” etc. And, of course, each country may have a different interpretation of what is meant by its statutory terms.

CASE STUDY

Preparation, instruction and study

Depending on the specific acts of exploitation mentioned, the scope of exempted teaching uses may vary (see *infra*), but all these purposes have in common an attempt to cover the *acts that are necessary to convey the instruction or teaching* (including lectures, exercises, readings for debate, commentary or analysis, tests and examinations), as long as such use is substantial for the teaching or instruction (not as mere supplementary reading or entertainment). However, most laws remain silent as to the acts that precede and follow the instruction itself. That is, the acts of exploitation necessary to prepare for the instruction (i.e., copies, translations, adaptations, etc) usually carried on by the instructor as well as the copies done by the students (be it handwritten or by means of recording devices or digital equipment, and including downloads).

The preparatory acts are usually neglected in all laws (except in some Common law countries) and intrinsically connected with the exceptions envisioned for library purposes: since usually the work is obtained by means of a library service.

Students’ copies (and digital downloads) are either deemed exempted as part of the instructional use (some laws permit the making of as many copies as students participants in the lecture or class) or as acts allowed under the general private copying/use exceptions.

It should be expected that these three steps of any instructional use would be addressed in a comprehensive and coherent manner by national laws. But national laws fail to do so, specially when digital formats are considered.

The scope of *exempted uses* (acts of exploitation) is also varied. The majority of teaching exceptions cover both reproduction and/or performance and are basically designed to envision the kind of activities (and works) used in face-to-face teaching. Some only allow photocopying,⁹² reproduction,⁹³ “live” performances,⁹⁴ or are directly restricted to ‘face-to-face’ teaching.⁹⁵

⁹¹ The term *illustration* in connection with *teaching* purposes is used by 23 countries (in 27 exceptions: 19 teaching exceptions, 6 teaching compilations, 2 quotations): Andorra, Armenia, Belarus, Belgium, Cyprus, Estonia, France, Georgia, Germany, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Luxembourg, Macedonia (twice), Malta, Netherlands (twice), Romania, Russia, Spain (twice), Tajikistan, Ukraine (twice) and Uzbekistan.

⁹² See Andorra, Azerbaijan, Georgia, Moldova.

Online teaching and face-to-face teaching receive, thus, a different treatment in national laws. In part, this is due to legal technique problems (since online teaching involves different acts of exploitation not mentioned in the exception), but not all national legislators have been equally ready to face them. This “shyness” is at odds with the generosity shown by international (i.e., Art.10(2) BC) and supranational legislators (i.e., Art.5(3)(a) EUCD) when dealing with distance and online education.

Recent amendments in some national teaching exceptions allow digital reproduction and communication to the public (including the making available online), but usually these changes received strong opposition in national parliaments and the resulting text is a restrictive and intricate compromise of interests.⁹⁶

A few national laws refer to use,⁹⁷ yet it is not clear whether they would cover digital and online teaching uses.

CASE STUDY

Acts of exploitation involved in online teaching

Any digital teaching activity involves –in terms of copyright law- (at least) three different acts of exploitation:

1. *Upload* (a digital copy of the work is uploaded to the server so that it can be accessed by registered students) involves an act of *reproduction* (sometimes, more than one: i.e., digitization/scanning of a printed copy) and an act of *making available* to the public (or a communication to the public).

2. *Transmission* (digital transmission of the work consists of (a) multiple reproductions which occur while “in transit” from the server to the recipient, as well as (b) reception of the work by the registered student –including screen display and/or performance, as well as RAM copying that makes them possible); this involves both a myriad of (more or less) *temporary reproductions*,⁹⁸ as well as an act of *transmission*

[Footnote continued from previous page]

⁹³ See Belarus, Bulgaria, Lithuania, Montenegro, Serbia, Ukraine, Uzbekistan. See also Albania - which only covers the making of teaching anthologies and, therefore, only exempts reproduction.

⁹⁴ See Armenia, Bosnia & Herzegovina, Bulgaria, Croatia, Iceland, Israel, Macedonia, Turkey.

⁹⁵ See Andorra: ‘reprographic reproduction for face-to-face teaching’. Latvia, Spain: ‘in the classrooms’.

⁹⁶ For instance, the amendment of Sec.110(2) in the US as well as the introduction of Art.52a in Germany and Art.32.2 in Spain are the result of difficult negotiations and lobbying activity, with completely different outcomes: the US solution is very restrictive, the German exception is subject to the condition that no license is available for such uses (and was initially subject to an expiration date), and the Spanish provision ended up restricted to face-to-face teaching scenarios.

⁹⁷ See Cyprus, Czech Republic, Estonia, Kazakhstan, Kyrgyzstan, Liechtenstein, Latvia, Poland, Switzerland, Tajikistan, Russia.

⁹⁸ We will not address temporary copies done within the course of online instructional activities (including the copies necessary to transmit the work from one server to another and to allow display and temporary storage of the work and display in the user’s unit: we will assume that these acts are exempted as temporary copies (such as under Art.5.1 EUCD) in all national laws.

[Footnote continued on next page]

or *making available* or *communication to the public* (specific qualification depends on the specific national law).

3. Download (permanent storage of the work, as received, on the computer's hard disk, a floppy disk, in print or in any other format) involves an act of reproduction (in some jurisdictions, this would also entail an act of distribution).

In order to fully exempt online teaching uses, all these acts should be addressed (either under one or several provisions) by national teaching exceptions. Therefore, a teaching exception that only allows reproduction (even when digital copies are allowed) or performance of a work for teaching purposes will not be fit to exempt online uses –unless, of course, the specific national law has qualified the making available online under the performance right (which is rarely the case). The right of making available tends to be either granted as a separate independent right or included under the right of communication to the public.

Interestingly, only a few of teaching exceptions expressly allow *translations* for teaching purposes,⁹⁹ this comes as a surprise since translations of some works would appear to be fundamental for educational purposes, at least in minority language countries.

Another issue that is poorly solved by national laws is *digitization* of works to be used for teaching purposes. In principle, to the extent that scanning amounts to a reproduction, digitization could be exempted.¹⁰⁰ Yet, the issue is not pacific.

Another ground for other visible and structured differences among national teaching exceptions in this group concern the kind of *institutions that may benefit*. In general terms, laws are silent and teaching uses may be exempted at all educational levels: primary and secondary school, colleges and universities, either public or private-owned. However, a few laws choose to directly restrict the teaching exceptions to the context of public education and non-for-profit institutions;¹⁰¹ or simply require that the acts are not carried on for 'commercial purpose' (which may indirectly exclude many private for-profit educational institutions). In general terms, directly or indirectly, it is more difficult for private teaching institutions to benefit from the statutory teaching exceptions (especially when no remuneration is in place). Formal differences also exist in terms of individual users who may benefit from the teaching exception, but national teaching exceptions tend to be open and include teachers as well as pupils.

Exempted teaching uses usually cover *any works to the extent required* by the purpose. But a few national solutions prefer to regulate in detail the nature, extent, and quantity of works that may be used for teaching purposes. Some laws subject the teaching use to time-bound requirements (destruction of copies within a year, use of certain works only after 2 years from release, etc.), others exclude the use of textbooks or publications intended for

[Footnote continued from previous page]

See Hugenholtz, *Adapting ...* at 101-102: "*The act of screen display and related acts of temporary storage may not be restricted by copyright, in so far as these acts are necessary for private viewing, and do not qualify as communication to the public*".

⁹⁹ See Albania, Malta, Netherlands, Poland, Slovenia.

¹⁰⁰ Digitization is formally allowed in the US, Belgium, Germany and Netherlands.

¹⁰¹ Andorra, Belgium, Canada, Estonia, Germany, Portugal, Turkey and the US restrict the application of teaching exceptions to not-for-profit (public) educational institutions.

educational use from the scope of the teaching exceptions –although similar results might be reached indirectly by compliance with the three-step-test (since their exempted use would certainly conflict with the normal exploitation of these works and prejudice the legitimate interests of their authors and owners). Some laws, especially in Common law systems and Nordic countries also permit the recording of broadcasts and its subsequent use for teaching purposes.

The observance of moral rights (specially, the mention of the name of the author and source) is a common denominator (express or implicit) in all laws –and for this reason, we have simply omitted any further reference to it.

Another distinguishing factor is the requirement of *remuneration* or compensation in favor of authors and/or publishers or producers, and the specific system implemented to do so. The majority of teaching exceptions exclude any compensation. Only a few do –and by different means.¹⁰²

- Belgium, France, Germany, Netherlands and Switzerland require compensation for teaching uses under a *legal license*;
- Canada, UK and Ireland apply the exception for some teaching uses (not for others) provided that no voluntary license apply (under the applicable license, the exempted use will be remunerated);
- In the Nordic countries some exempted teaching uses are compensated by means of extended collective licensing (which also licenses teaching uses beyond the statutory exceptions);
- In addition to the legal license for illustration for teaching, France has a compulsory collective licensing scheme for reprography (which includes reprographic copying for educational uses);
- And in other countries, some teaching uses may be indirectly compensated through the levy systems provided for private copying applicable on equipment (such as photocopiers, printers and scanners)¹⁰³ and/or on the operator (schools, colleges, universities, libraries, research institutions, etc).¹⁰⁴

One wonders whether the restrictive scope of the teaching exceptions is a consequence of the non-remunerated format (free-use) of the teaching exceptions and whether more teaching uses (especially in digital contexts) could be statutorily exempted under remunerated schemes.

In addition to the specific teaching exceptions, two other exceptions are paramount to exempt teaching uses. All national laws permit *quotations* and *private copying*, or –in Common Law countries– *fair use/dealing*, in terms far more flexible than the teaching exceptions themselves. Of course, flexibility is counterbalanced with a narrower scope of exempted uses. Although they are not enough *per se* to satisfy the needs of education, these exceptions may cover some of the teaching uses that (both in face-to-face and digital environments) fail to be reflected under the specific teaching exceptions.

¹⁰² See Part V *infra*.

¹⁰³ For instance, Greece, Romania, Spain.

¹⁰⁴ For instance, Austria, Belgium, Czech Republic, Germany,

Beyond instruction, the *making of teaching compilations* is allowed in the majority of laws.¹⁰⁵ Solutions are also varied. Within the Common law countries, the UK, Ireland and Canada permit it with a very restrictive non-remunerated scope, while Israel and the US subject any use beyond a fair use, directly to voluntary licensing. Among Civil law countries, the making of teaching compilations is generally allowed; not all of them are fit to exempt digital copies and making available online, but some of them also permit the making of broadcasts and recordings for teaching purposes. Teaching compilations are almost equally exempted either under non-remunerated exceptions or remunerated schemes (under legal licensing or compulsory collective management).¹⁰⁶

Only 10 European countries fail to have a specific exception in that sense.¹⁰⁷ These laws will only allow the making of teaching compilations to the extent that they qualify as quotations¹⁰⁸ or as a fair use/dealing.¹⁰⁹

The making of these teaching compilations should not be confused with the *reprography* exceptions for educational uses which are in place in some jurisdictions – although, to some extent, reprographic regimes may ultimately allow for the making of these “compilations”. It is mostly with regards to digital compilations and online “reserves” that the teaching compilations exceptions regain a central role in the system of educational uses exempted. Whether the right solution is the “traditional” exempted use (i.e., Art.10(2) BC) or voluntary licensing remains to be seen (perhaps, as usual, the best solution is found in between).

The majority of national laws also permit the performance of works at *school events*, provided that performers receive no compensation and that no entrance fee is charged.

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¹⁰⁵ This is the case of Albania, Andorra, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Denmark, Finland, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Sweden, Switzerland, Tajikistan, Turkey, Ukraine, United Kingdom, Uzbekistan.

¹⁰⁶ Remuneration is required in Austria, Germany, Italy, Netherlands, Poland, Portugal, Slovenia, as well as in non-EU Bosnia and Herzegovina, Macedonia and Croatia; Nordic countries allow it subject to extended collective licensing. Instead, no remuneration is provided for in Greece, Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, Lithuania, Romania, and outside the EU in Andorra, Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Turkey, Ukraine, Uzbekistan.

¹⁰⁷ No exception for the making of teaching anthologies exists in France, Spain, Liechtenstein, Luxembourg, Malta, Slovakia and Switzerland, as well as in non-EU Moldova, Montenegro and Serbia.

¹⁰⁸ This is the case of Czech Republic, Estonia, France, Germany and Spain: the making of teaching anthologies would only be allowed to the extent that it qualifies as a quotation.

¹⁰⁹ This is the case of Israel and USA.

¹¹⁰ For a survey of EU Member States exceptions for teaching purposes, see Westcamp, *op.cit.supra*. See also Ernst, Silke and Haeusermann, Daniel M. (2006), ‘EUCD Teaching Exceptions in selected E.U. Member States – A Rough Overview’, of 8 June 2006, [www.fir.unisg.ch](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925950), ; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925950 [accessed 12 Oct.2009].

Any use that falls beyond the statutory exceptions or defenses needs to be licensed. *Voluntary licensing systems* have, thus, evolved (and are evolving) differently in each country –depending also on the scenario of exempted uses. Voluntary licenses for educational purposes may be granted on a collective or individual basis.

In short, the variety of teaching uses and scope exempted within the jurisdictions covered by this Study makes any attempt to sketch a synthetic summary extremely difficult.

For this reason, a combination of different criteria has been used to group the jurisdictions in this Study, depending on the issues examined: Common law/Civil law, EU countries/Non-EU countries, specific rights of exploitation exempted, remuneration systems for exempted uses (extended collective licensing, legal licensing, and equipment/operator levies). A first general distinction can be made among:

- *Common law countries* (Canada, Ireland, Israel,¹¹¹ UK and USA);
- The remaining countries (largely of *Civil Law tradition*); within this large group (of almost 50 countries) we will distinguish (when necessary) between EU and non-EU countries, Nordic countries, etc. in accordance to the features of the national exceptions envisioned for purposes of education.

In general terms, *Common Law* provisions that exempt educational uses are far more detailed than the *Civil law* ones; yet, as we will see, more detail does not always mean more exempted uses. Similarities and differences do neither start nor end here.

2. Common Law Countries

Within the scope of this Study, Common Law countries include Canada, Ireland, Israel, UK and US. These countries contain detailed provisions to exempt uses for educational purposes (A), in addition to the general fair use/fair dealing defenses (B) which remain fundamental for educational uses.¹¹² To a lesser (and far less uniform) extent, they also allow for the making of teaching anthologies (C) and the performance at school events (D).

A. TEACHING AND INSTRUCTION

(i) The United States of America

Sec.110 exempts both face to face and distance (including online) teaching uses.¹¹³

¹¹¹ Although Israel has a mixed system of common law and civil law traditions, the exceptions for educational purposes in Israeli Copyright Law follows the pattern of the UK and US Copyright Acts.

¹¹² As we will see, other non typically common law countries adopt the fair use/dealing defense; This is the case, for instance, of Israel and Switzerland. However, because the specific formulas adopted to exempt teaching uses are closer to the ones found in common law or civil law countries, they will be dealt with under each group.

¹¹³ In addition to the exempted uses under Sec.110, copies of broadcast nondramatic or musical works may be made for classroom use under Sec.112(b).

– *Scope and purposes*

Sec.110(1) exempts the *performance* and *display* of works “in the course of *face-to---face teaching activities ... in a classroom* or similar place devoted to *instruction...*” of nonprofit educational institutions. Notice that *reproduction* is not exempted under Sec.110(1) but it may be exempted as a fair use under Sec.107 (*see infra*).

Sec.110(2) does the same for distance education; initially limited to the forms of distance education that were known in 1976 when the US Copyright Act was enacted (namely, radio and TV transmissions received in classrooms), the 2001 TEACH Act modified Sec.110(2) to extend it to online digital uses.¹¹⁴ Sec.110(2) exempts the transmission of such performance and display. The TEACH Act added a new paragraph (f)(1) to Sec.112 (“ephemeral recordings”) to allow the storage of the material that will be performed or displayed on servers, at the request by students, thus allowing performances and displays to be made asynchronously on the Internet. In addition, it formally allows digitization of works used for teaching purposes.

In order to qualify under Sec.110(2), the performance or display of the work must be “an *integral part of a class session* offered as a regular part of the *systematic mediated instructional activities*” of the educational establishment, the work must be “*directly related and of material assistance* to the teaching content of the transmission.”¹¹⁵

The transmission of the teaching performance or display must be directed only to registered students, and “to the extent technologically feasible,” the reception of such transmission must be “*limited to ...students officially enrolled in the course* for which the transmission is made.” This requirement is not intended to impose network security obligations, but rather to require that the recipients should be identified (through access-control systems).

– *Beneficiaries*

Sec.110 makes no distinction between public or private institutions (private non-profit institutions may qualify) and does not require that the courses be for free or for non-commercial purposes. However, Sec.110(1) (face-to-face teaching) only benefits *nonprofit educational institutions*,¹¹⁶ while Sec.110(2) (distance teaching) is restricted to “*accredited nonprofit educational institutions ... providing elementary or secondary or post-secondary education*”.

In terms of individual users, Sec.110(1) expressly refers to both “instructors or pupils,” while Sec.110(2)(A) requires that the performance or display be made “by, at the direction of, or under the actual supervision of an instructor;” this means that the exempted performance

¹¹⁴ See Technology, Education and Copyright Harmonization Act of 2001 (“TEACH Act”), of November 2nd 2002, Public Law 107-273.

¹¹⁵ In other words, the portion performed or displayed should not be “for the mere entertainment of the students or as unrelated background material,” it must be part of a class, an instructional activity, rather than ancillary to it (i.e. supplemental reading material) [*see* Senate Report No. 107-31, at 11].

¹¹⁶ In other words, private-owned commercial (for-profit) education institutions must obtain a license for uses that other non-profit institutions can do without a license and for free.

or display may be done by the instructor but also by a student, under his direction or “actual supervision.”¹¹⁷

– *Extent and Nature of Works*

The exceptions in Sec.110 apply to all kind of works, albeit to a different extent.

Sec.110(1) (face-to-face teaching) allows the “performance of a nondramatic literary or musical work or display of [any] works,” while Sec.110(2) (distance teaching) is restricted to the performance of “non-dramatic literary or musical work or reasonable and limited portions of any other work”¹¹⁸ and the display “of a work in an amount comparable to that which is typically displayed in the course of a live classroom session.” This limitation is intended to prevent display of certain types of works (basically, literary works), that could substitute for traditional purchases of the work¹¹⁹, while at the same time being flexible enough to allow full display of certain works.¹²⁰

Furthermore, Sec.110(1) does not apply if “in the case of a motion picture or other audiovisual work” the performance or display is given by means of an unlawful copy and the person responsible for it knew or had reason to believe it was not lawfully made. The same holds true under subsection (2): the exception will not exempt “a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired... and the transmitting [institution] knew or had reason to believe was not lawfully made and acquired.”

CASE STUDY

Digitization of works

The US TEACH Act allows digitization of works used under the teaching exception. The concept of “lawfully made or acquired” allows for the possibility of making digital copies from non-digital works. Although the TEACH Act stated that it “does not authorize the conversion of print or other analog versions of works into digital formats,” the educational institution may make digital copies of analog works, but “only with respect to the amount of such works authorized to be performed or displayed under section 110(2),” in two cases: where no digital version is available to the institution, or where the available digital version is protected by technological measures *ex* Sec.112(f)(2). This measure should be praised to the extent that the fact that the work is

¹¹⁷ “Actual” does not mean constant, real-time supervision, or even pre-approval by the instructor, but simply supervision “in fact”, as opposed to “in name or theory only.” *See* Senate Report No. 107-31, at 9.

¹¹⁸ What constitutes a “reasonable and limited” portion should take into account both the nature of the market for that type of work and the pedagogical purposes of the performance. *See* Senate Report No. 107-31, at 7-8.

¹¹⁹ Notice that under the original Sec.110(2) exception (before the TEACH Act amendment), the transmission (i.e., broadcasting) of displays of works is limited (de facto) to works of visual art (very seldom will the display of a literary work be broadcast as part of the instruction). Instead, in a digital transmission, literary works may be perfectly “displayed” (i.e., a scanned copy of any printed literary work constitutes a display of that work that may be transmitted under the exception).

¹²⁰ Notice that the “limited portion” language is only used in conjunction with the performance and not with the display: for certain works, “display of the entire work could be appropriate and consistent with displays typically made in a live classroom setting (e.g., short poems or essays, or images of pictorial, graphic or sculptural works, etc.).” *See* Senate Report No.107-31, at 8.

not available in digital format will not be a *de facto* impediment for its use under the exception. Digitization (scanning) is only allowed for the portion of the work that will be used for teaching purposes under the exception, and only according to the limitations of section 110(2); that is, in an exempted transmission (i.e., not for building a repository of teaching materials).

Current licensing practices (i.e., as offered by the Copyright Clearance Center at <http://www.copyright.com>) tend to cover digitization as well as further uses not exempted under Sec.110(2) (*see infra*).

Subsection (2) does not apply to works that were “*produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks.*” In other words, only those materials whose primary market is the digital networked environment are excluded, while instructional materials developed and marketed for use in face-to-face teaching would clearly fall under Sec.110(2) as well as under subsection (1) (face-to-face teaching).

– *Further requirements*

Sec.110(2) (distance and on-line teaching uses) requires the transmitting institution to institute copyright protection policies, providing information regarding copyright to faculty, students and staff members, and giving notice to students that materials used in the course may be subject to copyright protection. In addition, in the case of digital transmissions, it must apply “*reasonably effective technological measures to prevent retention of the work in accessible form by recipients ...for longer than the class session, and unauthorized further dissemination of the work in an accessible form by such recipients to others.*”

This requirement may in practice become a *de facto* limitation on the kind of works covered by the exception: only those works that need not be *retained by students* and that may be “assimilated” in one only streaming session will be covered. Works that are substantial for teaching and that, therefore, should be retained by students to read, observe and study may not be covered by the exception. Once again, it is regrettable that by simply retaining the scope of the original Sec.110(2) exception, the TEACH Act missed an opportunity to address fully the specific needs of online education. Of course, these copies might be allowed to the extent they qualify as a fair use under Sec.107 (*see infra*).

– *Compensation*

No compensation applies to teaching uses exempted under Sec.110.

CASE STUDY:

From distance teaching to online teaching: sec.110(2) USCA

As enacted in 1976, Sec.110 USCA exempted both face-to-face teaching uses as well as distance-teaching uses by means of radio and TV broadcasting. The TEACH Act of 2 November 2002 which amended the Copyright Act of 1976 transported these instructional exceptions into the digital environment. It was the end of a long journey. In 1997, two bills were introduced proposing amendments to bring Sec.110(2) to cover digital distance education. The Digital Copyright Clarification and Technology Education Act of 1997, S. 1146, 105th Cong. § 204 (1997) and The Digital Era

Copyright Enhancement Act, H.R. 3048, 105th Cong. § 5 (1997) proposed the following language for Sec.110(2):

(2) Performance, display or distribution of a work, by or in the course of an analog or digital transmission, if-

(A) The performance, display or distribution is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution;

(B) The performance, display or distribution is directly related and of material assistance to the teaching content of the transmission; and

(C) The work is provided for reception by-

(i) Students officially enrolled in the course in connection with which it is provided; or

(ii) Officers or employees of governmental bodies as part of their official duties or employment,

In its Study mandated by the Senate, the Copyright Office recommended, instead, what was called a “minimalist approach” simply to update the language and the policy balance of sec.110(2), without broadening it: so that the same kind of distance education that was subject to the exception in sec.110(2) could also be conducted through digital means and asynchronously.

The two initial proposals were discarded and the TEACH Act was finally enacted in the exact “minimalist” terms proposed by the USCO. If there is one criticism to be made to the TEACH Act is its narrow scope, which may be somehow excused by its non-remunerated character, but which makes it insufficient to cover the full needs of on-line teaching. The general *fair use* defense of Sec.107 remains fundamental for educational uses. In addition, a widely spread system of voluntary remunerated licenses allow for the compilation of material for teaching purposes, also in digital format [*see infra*].

Many teaching uses not exempted under Sec.110 may still be permitted under the fair use defense in Sec.107, depending on the consideration of all the factors in each case (*see infra*).

(ii) Canada

Sec.29 contains several exceptions for teaching purposes.

– *Scope and purposes*

Under Sec.29(4), *reproduction, translation and public performance* of works and other subject matter is allowed for purposes of *instruction* (by means of manual copies made on boards, flip charts or similar surfaces, or by means of overhead projectors or similar devices) and for *examinations*, provided that these acts are done on the premises of the educational institution, that copies are not available in a medium appropriate for these purposes and that there is no intent to make a profit (other than recovering costs –overhead included).

Under Sec.29(5), live *performances* of works by students, performance of sound recordings (and works embodied in them) and of telecommunicated works are also allowed provided that they are done for *educational or training purposes*, on the premises and before an audience consisting primarily of instructors, students and persons related to the institution.

Under Sec.29(6) and (7), educators are also allowed to make a *recording of a telecommunicated work* (including news and news commentaries, but excluding documentaries) and perform it on the premises for educational or training purposes within a year of the recording, provided that the telecommunication was not received by unlawful means and subject to the payment of royalties to the right holders.

Reprographic copying (Sec.30.3) of works in printed form by means of photocopiers located on the premises of an educational institution or library is also exempted.¹²¹

Fair dealing provisions may also apply to exempt further educational and training uses (*see infra*).

– *Beneficiaries*

The Canadian exceptions for teaching purposes apply as long as the exempted acts are done without motive of gain (cost-recovery is not deemed “gain”). Non-profit¹²² institutions providing elementary, secondary and higher education as well as continuing, professional or vocational education may benefit from the teaching exceptions provided that they have been licensed or recognized by the Parliament. The exempted teaching use may be done by “an educational institution or a person acting under its authority.”

– *Extent and Nature of Works*

Sec.29(4) applies to works and other subject matter, provided that copies are not available in a medium appropriate for these purposes. Sec.29(5) applies only to sound recordings and works embodied in them,¹²³ as well as to telecommunicated works done for educational or training purposes.

Under Sec.29(6) and (7) telecommunicated news and news commentary programs (excluding documentaries) may be recorded and shown on the premises of the educational institution for educational or training purposes within a year of the recording; other broadcasted works may also be recorded, the educational institution having a 30 days period to decide whether or not to keep it for educational or training purposes. After these periods, recorded material must be either destroyed or paid for (*see infra*). None of these exceptions apply if the telecommunication was received by unlawful means.

– *Further requirements*

Reproduction, translation and public performance for purposes of *instruction* and examinations is only exempted provided that it is not for profit and as long as the work is not commercially available in a medium that is appropriate for the purpose.

The recording of broadcast works to be used for teaching purposes must be shown to students within the following year and then destroyed; educational institutions must keep records of this material and pay the corresponding fees.

¹²¹ Provided that the institution or library has entered into an agreement with an authorized CMO or if the Copyright Board has certified a tariff and/or agreed upon licensing terms.

¹²² It is required that any acts done under the teaching and library exceptions are carried out without “motive of gain”. However, cost-recovery is permitted, including overhead costs. According to Sec.29.3, “the educational institution or library... does not have a motive of gain where... recovers no more than the costs, including overhead costs, associated with doing that act”

¹²³ Notice that films and audiovisual recordings are left out of the exception.

– *Compensation*

Compensation for reproduction and public performance for educational purposes is only required under Sec.29.6 and .7 for the recording of broadcasts. The Educational Rights Collective of Canada (ERCC) is an umbrella organization of collective societies and professional associations which collect the royalties set by the Copyright Board.¹²⁴

Reprographic copying (Sec.30.3) is only exempted if the institution or library has entered into an agreement with an authorized CMO or if the Copyright Board has certified a tariff and/or agreed upon licensing terms.

CASE STUDY:

Online instruction in Canada

Although Sec.29(4) allows reproduction, translation and public performance for purposes of instruction and exams, these acts are only allowed within the physical premises of the educational institution. In order to extend this exception to online teaching, Canada recently examined (and dismissed) two Copyright Act reforms [*see www.parl.gc.ca/*]. Bill C-61 purported to introduce a provision permitting online teaching uses in terms very similar to the US *TEACH Act*. Previously, Bill C-60 proposed a two-layer system for on-line teaching uses: a broad non-remunerated exception for digital teaching uses, and a statutory extension of collective licenses for reprographic copies (subscribed by educational institutions) to cover digital copies. It was expected that this would stir up voluntary collective licensing and, at the same time, ‘ensure that the exercise of new digital rights for creators will not hamper access to works for educational or other socially important purposes.’

As the Act stands today, online teaching does not benefit from any specific statutory exception beyond what may qualify as a fair dealing either for purposes of research or private study (Sec.29.1) or criticism or review (Sec.29.2). In other words, digital uses for educational purposes, at large, must be licensed by right holders. *See Part V.*

(iii) United Kingdom and Ireland

In the UK and Ireland several exceptions for educational purposes exist with similar features.

– *Scope and Purposes*

Sec.32 UK and Sec.53 Ireland provide for several detailed provisions intended to cover different educational uses:

- (i) *Non-reprographic copying* may be made in the course of the instruction or of preparation for instruction;

¹²⁴ Usually, rates are set on the basis of an amount per minute of program recorded or of an amount per student.

- (ii) *Anything done for the purposes of examination* (by way of setting, communicating or answering the questions) is allowed.
- (iii) Educational establishments are allowed to do the following acts:
- (iv) *performance, playing or showing* of literary, dramatic or musical works for the purpose of instruction or in the course of the activities of the educational establishment; (Sec.34 UK and Sec.55 Ireland)
- (v) *recordings of broadcasts* and cable programs to be later used (played) for their own educational purposes (Sec.35 UK and Sec.56 Ireland); this exception only applies in the absence of a voluntary license granted by right holders.¹²⁵
- (vi) *reprographic copying* is permitted by (or on behalf of) educational establishments for the purpose of instruction (Sec.36 UK and Sec.57 Ireland); this exception only applies in the absence of a voluntary license granted by right holders.¹²⁶
- (vii) and the making of *teaching anthologies* intended for use at educational establishments –which, as we will see, is subject to so many restrictions that make it virtually useless (*see infra*) (Sec.33 UK and Sec.54 Ireland).

CASE STUDY

Reprographic copying

According to Sec.178, "reprographic copying" refers to copying by means of a process (a) for making facsimile copies, or (b) involving the use of an appliance for making multiple copies, and includes, in relation to a work held in electronic form, any copying by electronic means, but does not include the making of a film or sound recording. This means that a teacher may copy onto a blackboard a poem and students may copy it down, as long as both acts are done in the course of the instruction; but he could not photocopy (or make digital copies of) the same material for use by students -unless there is a license for that. It appears that digitization of a work in printed form would also be included as reprographic copying and, accordingly, a teacher cannot digitize a work to use it as part of the instruction, unless duly licensed. Instead, both reprographic copies and digitization is allowed if done for purposes of examination (unless it involved sheet music: candidates taking a musical test must buy or hire the sheet music).

– *Beneficiaries*

The British exceptions set for purposes of instruction (non-reprographic copying) and examinations (Sec.32 UK) are open in terms of beneficiaries and apply to any kind of institutions provided that the instruction is for a non-commercial purpose. The remaining exceptions for educational purposes (the making of educational anthologies (Sec.33), the performance, playing or showing a work in the course of activities (Sec.34), the recording of broadcast to be used for educational purposes (Sec.35), as well as reprographic copying (Sec.36) apply only to "educational establishments," which include any schools, universities, colleges and institutions providing higher education as well as institutions of further

¹²⁵ This is aimed at inducing the making of collective licensing agreements on reasonable terms (the Government must certify the licensing scheme).

¹²⁶ This is aimed at inducing "voluntary" collective licensing.

education¹²⁷ –provided that the use is for non-commercial purposes. A similar structure of exceptions is in place in Ireland.¹²⁸

In terms of individual users, both in the UK and Ireland, the *instructional copying* may be done “by or on behalf of the person giving or receiving the instruction;” the *performance* “by a teacher or a pupil in the course of the activities of the educational establishment” or “done at the establishment by any person for the purposes of instruction,” provided that these performances are before an audience consisting of students, instructors and persons directly connected with the educational establishment;¹²⁹ the *recording of a broadcast* and *reprographic copying* may be made “by or on behalf of an educational establishment.”¹³⁰ It is apparent that common law teaching exceptions tend to be very flexible and complete as to the individual users.

– *Extent and Nature of Works*

Neither country has any restrictions in terms of the amount and nature of works (and subject matter)¹³¹ can be used for purposes of instruction and examination and for use at educational establishments; this means that works intended for use in educational establishments are excluded from the making of educational anthologies (*see infra*), but may be used for instructional and examination purposes.

Reprographic copying is limited to “passages” from published works or to maximum percentages (i.e., 1% of the work in a quarter of a year, 5% of a work within a year); any further copying should be licensed (*see Part V*). These minimum amounts are “protected:” any licensing terms more restrictive will be of no effect.

– *Further requirements*

In both countries, *non-reprographic* copies made in the course of the instruction or of preparation for instruction must be a fair dealing with the work: copies cannot be subsequently sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public.¹³²

The *recording of broadcasts* and cable programs to be later used for their own educational purposes¹³³ will only be exempted failing a certified licensing scheme in force;

¹²⁷ See the Copyright (Educational Establishments) Order N.223/2005.

¹²⁸ Sec.53 (instruction and examination), Sec.54 (anthologies), Sec.55 (performance), Sec.56 (copies of broadcasts) and Sec.57 (reprography).

¹²⁹ Parents are not deemed “directly connected” with the establishment, which confirms that the exempted performances will be strictly for instruction purposes –not for school events or ceremonies (*see infra*).

¹³⁰ See Order SI 2005/222 (The Educational Recording Agency Limited Licensing Scheme): the License applicable in this context allows the making of a recording on three accounts: at the premises of the educational establishment by or under the direct supervision of a teacher or employee, at the residence of a teacher employee of the establishment, and at the premises of a third party commissioned by the establishment to make recordings or copies on its behalf under written contractual terms.

¹³¹ Literary, dramatic, musical or artistic works, sound recordings, films and broadcasts, etc. Sound-recordings, films and broadcasts may be played in educational establishments for instruction purposes.

¹³² Sec.32(5) UK, Sec.53(7) Ireland.

¹³³ Sec.35 UK (provided that it is for non-commercial purposes) and sec.56 Ireland.

Licenses (recording of broadcasts and cable transmissions for non-commercial educational purposes at an educational establishment) are operated by the Educational Recording Agency (ERA) –the BBC as well as other broadcasters and copyright holders are members of the certified scheme and receive the revenues distributed by the ERA.¹³⁴ The goal behind these exceptions is to induce voluntary collective licensing. The Secretary of State can extend a license or scheme to cover works which are similar and are unreasonably excluded (Sec.136-139) or decide that a license should be in place to exempt a category of works not currently covered (Sec.140); if the right holders do not provide for such a license within a year from the recommendation, a royalty free license will take effect.

Reprographic copying by educational establishments (Sec.36 UK and Sec.57 Ireland) is also exempted (with the quantitative restrictions set above) provided that no license is available to authorize it. Reprographic licenses are operated by the Copyright Licensing Agency.¹³⁵

All these exceptions tend to require sufficient acknowledgement –unless it proves impossible.

– *Compensation*

Compensation is only available when licensing schemes are in place. This is meant to foster the availability of licensing schemes for *recording of broadcasts* and *reprographic copying*.

CASE STUDY:

Online teaching uses in the UK and Ireland

Although nothing is said in UK and Irish laws as to the application of these exceptions to digital means and online teaching, their language is broad enough to include at least the making of copies for purposes of instruction and anything done for purposes of examinations. The same might be concluded as far as performances for purposes of instruction or by a teacher or pupil within the activities of the educational establishment: as long as reception is restricted to teachers and pupils it could be deemed exempted. The problem here is rather the specific reference to the right of public performance (Sec.19), since the online exploitation qualifies as an act of making available under the right of communication to the public (Sec.20).

The remaining exceptions will hardly benefit online teaching uses. Of course, recordings of broadcasts and cable programs (for later teaching use) may be made in digital supports but this exception is rather intended to exempt only its subsequent

¹³⁴ See Order SI 2007/266 (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited). See also Order SI 1993/2755 (amended by SI 1996/190) certifies a new licensing scheme for the recording by educational establishments of broadcasts of all Open University television programs.

¹³⁵ As we mentioned above, CLA licenses also authorize the scanning and making available online of works. Reprographic licensing schemes need not be approved by the Government.

“direct” performance or, at most, communicated to the public only to persons situated within the premises of the educational establishment.¹³⁶

Accordingly, it is by means of voluntary collective licensing that digital teaching uses (and digital teaching compilations) are being authorized in the United Kingdom. The Copyright Licensing Agency (CLA)¹³⁷ initially set for the licensing of reprographic copying (not exempted under sec.36) is currently authorizing digital uses of articles and extracts from books, journals, magazines and digital publications, including the scanning and making available online (posting and emailing). CLA licenses currently available for educational purposes include primary & secondary education (schools), further and higher education (colleges and universities) as well as language schools and adult education. We will examine these licenses in more detail in Part. V (*infra*).

(iv) Israel

Israeli Copyright Act deals with educational activities in Sec.29.

– *Scope and purposes*

Sec.29 only exempts the *public performance* “in the course of *educational activities* of educational institutions.”

Provided that “such performance is made by the employees of the educational institution, or by the students studying therein [and] in front of an audience limited to employees or students of the educational institution, the relatives of the students or other people directly connected with the activity of said institution, and to them alone;”

Furthermore, Sec.29 *in fine* adds: “However, the screening of a cinematographic work is permitted according to this section if done solely for purposes of teaching and examination by an educational institution.”

In short, Sec.29 not only exempts the performances of works conducted specifically for “purposes of teaching and examination” but also other performances (of other works) that may take place “in the course of *educational activities* of educational institutions” (not specifically for teaching and examination purposes).¹³⁸

¹³⁶ This is confirmed by the scope licensed by Order 2005/222 (The Educational Recording Agency Limited Licensing Scheme): when recordings are stored in digital format and posted on a webpage the educational establishment must operate passwords and other DRM or technological protection systems to ensure that such communication cannot be received by persons situated outside the premises of the licensed establishment.

¹³⁷ CLA (<http://www.cla.co.uk>) was set up in 1983 by the Authors' Licensing and Collecting Society Ltd. (ALCS) (<http://www.alcs.co.uk/>) and the Publishers' Licensing Society Ltd. (PLS) (www.pls.org.uk) to perform collective licensing on their behalf. The Design and Artists Copyright Society Ltd.(DACS) (www.dacs.org.uk) has a similar license in place for artistic works. However, the images embedded in journals, books and other publications are covered under the CLA license on behalf of DACS (under the CLA-DACS agreement).

¹³⁸ We will revisit Sec.29 to exempt performances in “school events” (*see infra*).

Sec.29 may apply to distance education because it does not require that the performance is done “at” the educational institution and, according to the definition in Sec.13, the public performance of a work means the oral playing or staging of it publicly, either directly or through use of a device. However, digital (online) education uses will hardly be exempted since they will always involve an act of reproduction (as defined in Sec.12) which is not exempted under Sec.29. The fair use clause (Sec.19) might still apply to exempt some digital online teaching uses.

Any other acts of exploitation (i.e., reproduction, translation, performance, etc) done for purposes of teaching and examination –other than the screening of a movie– may be exempted under the *fair use* provision in *Sec.19*: fair use of a work is permitted for purposes such as “instruction and examination by an educational institution” (*see infra*).

– *Beneficiaries*

Sec.29 refers in general to “educational institutions, of the type prescribed by the Minister.” In principle, this wide reference is open to include private and public, profit and not-profit institutions and acts, but one must wait until the Ministry has determined which educational institutions will benefit from it.¹³⁹

As to the individual users, performers may include both instructors (and employees of the institution) as well as students.

– *Extent and Nature of works*

Any works (including cinematographic works) may be performed under Sec.29 for purposes of teaching and examination.

– *Further requirements. Compensation*

Neither further requirements nor compensation is established for these instructional performances done in the course of educational activities of educational institutions.

B. FAIR USE/DEALING

In addition, to the specific teaching exceptions provided for in these countries, the fair use doctrine remains critical for education uses, either face-to-face or online. The fair use/dealing clauses apply in addition to these specific exceptions to exempt further teaching uses.

(i) The United States of America

The fair use provision in sec.107 continues to be critical for education uses. Fair use is a doctrine based upon the analysis of all factors and circumstances of the individual case, including the purpose and character of the use, the nature of the copyrighted work, the amount

¹³⁹ The IIPA recommended that when defining which public institutions are eligible for the exception, the Minister should confine it to “public institutions that are official schools only and not to general educational-related establishments as a whole.” *See the International Intellectual Property Alliance (IIPA), 2009 Special 301 Report on Copyright Protection and Enforcement*, available at <http://www.iipa.com/rbc/2009/2009SPEC301ISRAEL.pdf> However, considering the narrow scope of the uses exempted under Sec.29, it appears to be an unnecessary worry.

and substantiality of the portion used, and the effect of the use upon the potential market or value of the work. Therefore, it is a flexible and technology-neutral solution that may exempt educational uses in addition to Sec.110. The factors listed in sec.107 are:

– *Purpose and Character of the Use*

“*Teaching* (including multiple copies for classroom use)” is expressly mentioned in sec.107 as an example of fair use purposes. In considering whether the use is a teaching use, we may end up revisiting issues of whether the use is “an integral part of a class,” whether it is “directly related and of material assistance to the teaching,” and whether the use is made or directed by an instructor, or rather originates from a student for purposes unrelated to a specific teaching activity.

The profit or non-profit character of the use is also important. Thus, a non-profit educational use is more likely to be fair than an educational use that earns a profit.¹⁴⁰ Yet, distinguishing between profit and non-profit educational uses is not always an easy task.

Downloads made by students might be accepted under the fair use doctrine (Sec.110(2) does not allow them).¹⁴¹ Sec.107 expressly mentions “multiple copies for classroom use” and *a priori* nothing prevents its application to digital copies received and retained for classroom use by students (as long as used for private studying and non-commercial purposes). As we will see, however, the remaining factors (especially the fourth factor) may not always weigh in favor of considering students’ downloads to be “fair use.”

– *The Nature of the Copyrighted Work*

As to the nature of the copyrighted work, courts generally look at whether the work is creative or factual¹⁴², whether it has been published or not, and whether the work is commercially available or it is out of print. If the use is based on a lawfully obtained copy, this factor would weigh in favor of a fair use defense.

– *The Amount and Substantiality of the Use*

As a general rule, the smaller the portion used, the more likely to be fair; however, the importance of this factor will depend upon the type of work and the subject of the course, as well as on the purpose and character of the use (first factor). The third factor is addressed to ensure that only what is necessary to satisfy the specific purpose is taken.

– *The Effect of the Use upon the Potential Market of the Work*

The effect of the use upon the potential market or value of the original work becomes the crucial factor of any fair use analysis. It depends upon the opportunities for sale or license of the work itself and derivative works, the availability of licenses for that use, the number of

¹⁴⁰ Which shows the connection existing between this factor and the fourth one (effect of the use on the potential market of the copyrighted work).

¹⁴¹ Senate Report, *op.cit.supra*, at 15: “student downloading of course materials will continue to be subject to the fair use doctrine”.

¹⁴² For instance, a scientific work will be more easily subject to fair uses than a movie or a musical work. However, notice that the fourth factor (effect of the use upon the potential market) would once again prevent the finding of a fair use when school books, exercises, tests, etc are being copied for purposes of teaching and/or studying purposes [see H.R. Rep No. 94-1476, 94th Cong., 2d Sess. 69, 71 (1976)].

recipients of the presumed fair use copy, the character of the institution using the work,¹⁴³ and whether the use usurps the intended audience of the work, that is, whether it substitutes for the purchase of a copy (which in the case of downloads made by students may strongly weigh against fair use). In short, it aims at protecting the commercial market of the work.

– *The Fair Use Guidelines*

Coetaneous with the enactment of the Copyright Act, the *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*,¹⁴⁴ was adopted to provide some guidance as to the application of fair use in education and teaching activities. Nevertheless, although the Guidelines were written in reference to classrooms in the physical world, they may become an influential standard to help determine what constitutes fair use in the digital world as well.¹⁴⁵

According to the *Guidelines*, a teacher may make a single copy (of a chapter from a book, an article from a periodical or newspaper, a short story, an essay or poem, or a chart, graph, diagram, drawing, cartoon or picture) for use in teaching or preparation to teach a class.¹⁴⁶ Multiple copies (not more than one copy per pupil) may also be made for classroom use or discussion, provided that the tests of brevity,¹⁴⁷ spontaneity¹⁴⁸ and cumulative effect¹⁴⁹ are met and that each copy includes a notice of copyright.¹⁵⁰

According to these standards, a repeated use (each semester) of a whole chapter of a treatise as compulsory reading (which would –in the long run- diminish the number of copies of the treatise sold to students) could hardly be considered a fair use. By contrast, the use of a paragraph of a journal article to initiate a debate, as part of the instruction, should be deemed

¹⁴³ To the extent that the use is originated by a “nonprofit educational institution,” it is more likely to be fair (although this does not exclude the possibility that for-profit educational institutions may also benefit from the fair use for teaching uses).

¹⁴⁴ Agreement on GUIDELINES FOR CLASSROOM COPYING in Not-For-Profit Educational Institutions with Respect to Books and Periodicals [hereinafter the Guidelines], contained in H.R. Rep. No. 94-1476, at 68 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681. In order to provide some predictability, several guidelines have been agreed upon over time to convey the minimum standards of fair use under section 107. Among them, the *Guidelines* were agreed upon by the representatives of the educational institutions and the authors to provide further certainty as to what is considered a minimum fair educational use. The *Guidelines* only state the minimum and not the maximum standards of educational fair use; uses that do not fall within the *Guidelines* may nonetheless be permitted under the criteria of fair use. See also *Circular 21: Reproduction of Copyrighted Works by Educators and Librarians*, United States Copyright Office, available at <http://www.copyright.gov>

¹⁴⁵ The *Guidelines* have very limited application (if any) to online teaching: because they only cover photocopying (and implicitly, distribution) and they only apply to books and periodicals (they are not intended to apply to musical works, which have their own set of guidelines, nor to audiovisual works).

¹⁴⁶ See *Guidelines*, *op.cit.supra*, at 68.

¹⁴⁷ Brevity means up to 250 words for a poem, or 1000 words or 10% of the work (whichever is less) for an article or essay. *Ibid.*

¹⁴⁸ Spontaneity means at the instance and inspiration of the individual teacher within such a short time that it would be unreasonable to expect a timely reply to a request of permission. *Ibid.* at 69.

¹⁴⁹ The cumulative effect means that the material is only for one course, that it consists of not more than one work from the same author and not more than three works from the same periodical or collective work, and that there are not more than nine instances of multiple copying for one course during one class term. *Ibid.*

¹⁵⁰ *Ibid.* at 68.

fair, no matter where the work is posted or how often it is used for the debate. Between these two poles, there are myriad possible combinations.

In the online world, however, the ultimate challenge is to decide the effect of the use upon the potential market of the work.

CASE STUDY

FAIR USE AND DIGITAL DISTANCE LEARNING

In connection with the *National Information Infrastructure* initiative, for over a period of three years (from 1994 thru 1997) the *Conference on Fair Use (CONFU)* negotiated several sets of guidelines for the fair use of electronic materials in a variety of nonprofit educational contexts: “Educational Fair Use Guidelines for Distance Learning” (Appendix I), “Educational Fair Use Guidelines for Digital Images” (Appendix H) and the “Fair use Guidelines for Educational Multimedia” (Appendix J). None of these Guidelines were adopted. See Final Report and Guidelines (in Appendix) at <http://www.uspto.gov/web/offices/dcom/olia/confu/report.htm>

Distance Learning raised concerns about making and distributing copies, but also about the "public performance." Sec.110 authorized educational performances and displays of entire works (like poems, plays, musical works and movies), but it significantly distinguishes between what can be performed in the classroom (Sec.110.1) and what can be transmitted -as distance education (Sec.110.2). This results in a legal "gap" to perform certain works for distance learners. Fair use applies to fill this gap, and the *Educational Fair Use Guidelines for Distance Learning* intended to help. These guidelines applied to the performance of lawfully acquired copyrighted works not included under section 110(2) (such as a dramatic work or an audiovisual work) as well as to uses not covered under Section 110(2), that is: live interactive distance learning classes (i.e., a teacher in a live class with all or some of the students at remote locations) and delayed transmission of faculty instruction (i.e., faculty instruction recorded without students present for later transmission); but it failed to address asynchronous online distance learning (it was felt that although fair use does apply in some aspects of such instruction, the area was “so unsettled” and the uses “so new” that no guidelines should be attempted). These guidelines were completely overcome by the TEACH Act and Sec.110(2), which introduced most of the its agreements.

The *Fair Use Guidelines For Educational Multimedia* were endorsed to provide guidance on the application of fair use principles in the development of multimedia projects using portions of copyrighted works under fair use. Under these guidelines, students' and/or educators' original material (such as course notes or commentaries) may be used together with other copyrighted text material, music, graphics, illustrations, photographs, films and digital software combined into an integrated presentation or other “multimedia project”, provided that they have been lawfully acquired (by the institution or individual). They only apply when such use is done as part of a systematic learning activity (either in face-to-face instruction or distance learning, including online) of non-profit educational institutions, limited to educators and students enrolled in the class (and when done online, provided there are technological limitations on access to the network and educational multimedia project –such as a passwords– and

provided further that the technology prevents the making of copies of copyrighted material). Similar to what is done under the *CONFU Guidelines for classroom copying*, limitations apply as to time (a work may be used for a period of up to two years after the first instructional use within a class),¹⁵¹ amount of use (10% or 3 minutes, whichever is less, of audiovisual works; 10% or 1000 words, whichever is less, of text works;¹⁵² 10%, but always less than 30 seconds, of a musical work; no more than 5 images by an artist or photographer; not more than 10% or 15 images, whichever is less, photographs and illustrations from a published collective work; 10% or 2500 fields or cell entries, whichever is less, from a copyrighted database or data table) as well as scope of acts permitted (reproduction and distribution –including online– of a limited number or copies).

Digitization was address by the *Educational Fair Use Guidelines for Digital Images*. These guidelines allow digitization of lawfully acquired analog images and its subsequent use for educational purposes, provided that they are not available in usable digital form for purchase or license at a fair price. Educators may compile and display digital images for educational purposes (including face-to-face teaching and secure digital networks to students enrolled in a course) and scholarly activities (i.e., peer conferences, lectures and presentations), as well as for students assignments (papers, exercises, thesis, etc), at non-profit educational institutions. Educational institutions may create thumbnail images of lawfully acquired images for inclusion in a visual catalog for use at the institution. The use of digitized images is permitted for one academic term; permission is required after this “initial use,” unless –of course– the use complies with the four-factor fair use analysis.

Other issues were discussed at the CONFU but failed to reach any agreement on a proposal of Guidelines. They were: “Interlibrary Loan and Document Delivery”, “Use of Computer Software in Libraries” and “Electronic Reserve Systems.” The *Fair Use Guidelines for Electronic Reserve Systems* described general limitations on the scope of materials that should be included (single articles or chapters, or small parts of a work, copies of materials that a faculty member or the library possesses legally), citation and notice requirements and access, use, storage and reuse of reserve materials (i.e., that access must be limited to students enrolled in the class and terminated at the end of the class term). These guidelines did not receive enough support and failed to be proposed: it was determined by the parties involved that it was premature to draft guidelines addressing digital transmission of digital documents in the context of interlibrary loan and document delivery activities.

Of course, no Guidelines will need to apply if the work is in the public domain or copyright is owned by either the instructor or the institution, or if the work is already subject to a license (in which case, the terms of that permission apply).

¹⁵¹ Use beyond that time period, even for educational purposes, requires permission for each copyrighted portion incorporated in the production.

¹⁵² An entire poem of less than 250 words may be used, but no more than three poems by one poet, or five poems by different poets from any anthology may be used. For poems of greater length, 250 words may be used but no more than three excerpts by a poet, or five excerpts by different poets from a single anthology may be used.

(ii) Canada

Fair dealing with a work for the purpose of *research or private study*, as well as for the purpose of *criticism or review* (sec.29.1), is not an infringement of copyright. Research and private study do not require acknowledgement of the author and source (purposes of criticism and review do) and from this it is inferred, that research and private study purposes only involve reproduction, but not further communication to the public.

The factors that will help decide whether the use is fair dealing are not stated in the Act but have been mostly drawn by case law: the amount taken and its proportion with the resulting work, whether or not the work was published, whether the resulting work or use competes with the work, etc. No discrimination is done in terms of private or public educational establishments, and it will be the commercial character of the specific use (not the user) that may have an influence on its qualifying or not as fair dealing.

(iii) The UK and Ireland

Fair dealing for the purpose of *research or private study* (Sec.29.1 UK and Sec.50.1 Ireland), as well as for the purpose of *criticism or review* (Sec.30.1 UK and Sec.51.1 Ireland), is not an infringement of copyright. Both exceptions apply in general to any literary, dramatic, musical or artistic work (as well as to recordings, performances and broadcasts) without any requirements as to the amount that can be used. Sufficient acknowledgement is always required in the UK—unless it proves impossible for practical reasons; while Ireland only requires it for purposes of criticism or review.

No *a priori* discrimination is done in terms of private or public educational establishments or in terms of profit or non-profit purposes (i.e., both commercial and non commercial purposes may be deemed fair –depending on the other relevant factors of each case).¹⁵³

The copying must be done by either the researcher or student; it can also be done by the librarian (or someone on his behalf) in the terms allowed by the specific library exceptions (allowing the copying upon request of articles and of parts of published works) or by anybody else, provided that the person doing the copying knows or has reason to believe that it will result in copies of the same material being provided to more than one person at the same time and for the same purpose. In other words, systematic single copying is formally excluded from fair dealing, both in the UK and Ireland.

No guidance as to what will be deemed fair can be found in the Acts. Sec.50.4 Ireland explains that fair dealing means “the making use of a work... for a purpose and to an extent which will not unreasonably prejudice the interests of the owner of the copyright”. In the UK, fair dealing is usually explained as a “reasonable use” and the factors examined to ascertain it include: the amount of work used, the economic effect for the copyright owner and whether or not the work was published, etc No requirement of compensation applies.

¹⁵³ The only exception being Sec.29.1 UK, which restricts research to non-commercial purposes.

Although the fair dealing provisions sometimes expressly refer to copying, other acts of exploitation (such as performance and communication to the public) may also be deemed fair.

(iv) Israel

Sec.19 draws clear inspiration from Sec.107 USCA. It applies to all kind of works¹⁵⁴ and exploitation acts, for purposes such as “private study, research, criticism, review, ... quotation, or *instruction and examination by an educational institution.*”¹⁵⁵

In determining whether a use is fair, the factors to be considered shall include, *inter alia*, all of the following:

- (1) The purpose and character of the use;
- (2) The character of the work used;
- (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;
- (4) The impact of the use on the value of the work and its potential market.

The Minister may issue regulations prescribing conditions under which a use shall be deemed a fair use –although so far, no regulation has been issued on this topic.¹⁵⁶

Sec.19 replaces the fair dealing provision existing in the 1911 Copyright Act Sec.2(1)(i) which simply referred to closed list of 5 purposes: “private study, research, criticism, review, or newspaper summary.” Although these purposes had been somehow liberally interpreted by case law, teaching uses (even strictly instructional and for examination) could hardly benefit from the fair dealing provision.¹⁵⁷

C. TEACHING ANTHOLOGIES

¹⁵⁴ According to Sec.4, reference to *works* includes original literary, artistic, dramatic and musical works as well as sound recordings.

¹⁵⁵ Sec.4 of the Performers' and Broadcasters' Rights Act of 1984 exempts fair use, “for purposes of private study or nonprofit instruction, or for research, criticism, review or journalistic summary.”

¹⁵⁶ In addition, the IIPA expressed its concern that by means of these regulations “potentially opens the door for even broader exceptions to be introduced in Israel” (*ibid*). In response, the Israeli Government stated that “to the extent that regulations can be promulgated under the new section 19 with regard to specifying fair uses, such regulations are always subordinate to the primary legislation and can not contradict it.” See *2009 Submission of the Government of Israel to the US Trade Representative with respect to the 2009 “Special 301 Review,”* available at <http://www.justice.gov.il/NR/rdonlyres/BD753811-E87A-4AB2-8ADD-DC9423DFC794/13684/2009special301submission.pdf>

¹⁵⁷ In 1998, a court decided that the use of an article to be analyzed and commented as part of a matriculation exam was not a fair use. See *Bergman v. The State of Israel* C.C. (Mag.Ha.) 12595/98; *apud* T. Greenman “Israel” in *Copyright Throughout the World* (S. von Lewinski ed.), Thomson/Reuters, §20:22 at 20-65 (2008).

The making of teaching anthologies may be exempted in Common Law countries either under a specific exception or as a fair use/dealing.

Canada, UK and Ireland provide for a *specific exception* for the making of teaching anthologies. However, as we will see, these exceptions are so restrictive that they become useless in practice.

Canada (Sec.30) allows publication of short passages from published literary works in a collection mainly composed of non-copyright matter intended and advertised for use in educational institutions.

The UK (Sec.33) allows the inclusion of a short passage from a published literary or dramatic work in a collection which is intended (and advertised) for use in educational establishments and consists mainly of material in which no copyright subsists.

Ireland (Sec.54) allows the inclusion of a short passage from a literary, dramatic or musical work, or an original database lawfully made available to the public in a collection that is intended and advertised for use in educational establishments.

Regardless of the differences as to the kind of works covered,¹⁵⁸ all of them share some common features:

- (i) no more than two passages/excerpts from works by the same author can be published in collections by the same publisher within five years;
- (ii) works which are intended for use in educational establishments are excluded from the making of educational anthologies;
- (iii) no compensation is required; and
- (iv) acknowledgement of the author and source is always required –unless impossible.

It is apparent that these provisions are directed to the making of “printed” compilations; yet, their neutral language might also allow the making of digital teaching compilations as well as their subsequent use for teaching purposes online.¹⁵⁹ Of course, the risks posed to the interests of copyright owners by digital teaching compilations (and specially if exploited online) are higher than when done by paper and printed means of exploitation.

The restrictive language of these exceptions makes them of minimal use in practice (in any format whatsoever). As a consequence, the making of teaching compilations needs to be allowed –if so– as fair dealing (*see supra*) or, failing that, it needs to be licensed (*see Part V*).

CASE STUDY:

¹⁵⁸ Sec.30 Canada refers to literary works, Sec.33(1) UK to literary and dramatic works, and Sec.54(1) Ireland to literary, dramatic and musical works.

¹⁵⁹ Since the compilation may be done not only of literary works (as in Canada), but also of dramatic (UK) and dramatic and musical works (Ireland), the technical means to build such compilation must be necessarily diverse: printing, recordings, digital supports, etc. In principle, excerpts of these recordings could be included in an anthology for educational purposes (at least, in the UK and Ireland).

Teaching compilations as fair dealing?

A couple of examples may illustrate the difficulties. In Canada, a course-pack prepared by a university professor for use by his students could neither be exempted under sec.30, as a teaching anthology, nor as deemed a fair dealing because according to the court it did not qualify as “private study.”¹⁶⁰ In the UK, the reproduction of a work in “study notes” sold to students was not deemed fair dealing because it did not qualify as “research or private study.”¹⁶¹

In fact, this is already the choice directly made by *Israel*¹⁶² and the *U.S.*: instead of a specific exception, the making of teaching anthologies is only allowed to the extent that it constitutes a *fair use* (Sec.19 Israel, Sec.107 US) or has been licensed.

CASE STUDY:

Licensed “Course-packs” and “Study-packs”

The making of teaching anthologies in the *US* may be exempted by law, to the extent that the borrowing qualifies as a fair use. The *Guidelines* (see *supra*) permit –to some extent– the compilation of portions of copyrighted works made by university professors for use in teaching activities, provided that the copying does not substitute or replace for the purchase of anthologies, compilations or collective works,¹⁶³ and case law has confirmed this position.¹⁶⁴ Accordingly, *voluntary licensing* for the compilation of teaching materials (i.e., *coursepacks*) is widespread in the US.

For the production of course packs, permission is requested from authors and publishers and royalties are paid. The *Copyright Clearance Center*, a national Reproduction Rights Organization (RRO) which provides a variety of photocopy

¹⁶⁰ See *Boudreau v. Lin* (1997) 75 C.P.R.(3d) 1 (Ont.)

¹⁶¹ See *Sillitoe v. McGraw Hill* (1983) F.S.R. 545.

¹⁶² Instead, Sec.2(1)(iv) of the 1911 Copyright Act (now repealed) permitted the making of teaching compilations in terms similar to the UK provision: “The publication in a collection, mainly composed of non-copyright matter, *bona fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists; Provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged.”

¹⁶³ See *Guidelines for classroom copying, op.cit.supra*, at 68.

¹⁶⁴ This is true especially after the *Kinko’s* decision. In *Basic Books Inc. v. Kinko’s Graphics Corp.*, 758 F.Supp.1522 (U.S. Dist. S.D.N.Y., 1991), the court examined the *Guidelines*, and decided that because of *Kinko’s* profit making intent (*Kinko’s* was a for-profit corporation) and because the copying was not spontaneous (copying coincided with the start of each semester), the copying of excerpts from books without the publishers’ permission constituted an infringement of the publishers’ copyright. After this decision, “copy shops that produce class packets for college and university courses obtain permission all the time as a matter of self preservation.” John Wm. Maddox, *Copyright Violation and Personal Liability in Education: A Current Look at “Fair Use,”* 1995 *BYU Educ. & L.J.* 97, 104 (Spring 1995).

authorization services throughout the world, offers a service to do so. (Copyright Clearance Center, at <http://www.copyright.com> (last visited Oct. 12, 2009). Authors and publishers may choose to register with a variety of CCC services. By registering with a specific CCC service (each covering different kind of uses), the CCC is pre-authorized to grant permissions and collect royalties. Among the CCC services, the “Academic Licensing & Permission Services” (ALPS) allows Universities, professors and bookstores to obtain permissions to photocopy, scan, distribute and post works online within the CCC catalog for course packs and classroom handouts, both in analog and digital formats. “Academic Licensing and Permission Services,” at <http://www.copyright.com/cc/viewPage.do?pageCode=ac1-n> (last visited Oct. 12, 2009).

Similarly, in the *UK* the Copyright Licensing Agency (CLA) enters into blanket licenses with educational establishments (including universities) for the making of teaching compilations (*study-packs*) See: http://www.cla.co.uk/applynow_education.php (last visited Oct. 12, 2009).

We will examine these licenses under Part V.

D. SCHOOL EVENTS

The U.S.A and Israel expressly exempt some performances at school events.

Sec.110(4)¹⁶⁵ *US* exempts live performances of non-dramatic or musical works provided that it is not done without purposes of direct or indirect commercial advantage, that no payment or compensation is made to performers, promoters or organizers, that there is no direct or indirect admission charge, and that the proceedings (after deducting the reasonable production costs) are used exclusively for educational, religious or charitable purposes and not for private financial gain; nevertheless, the exempted performance is subject to the copyright owner’s will, since he may oppose it by serving a notice of objection.

As we mentioned, *Israel* (Sec.29) allows the public performance of any work (excluding the screening of cinematographic works)¹⁶⁶ “in the course of the educational activity of educational institutions” provided that “such performance is made by the employees of the educational institution, or by the students studying therein, provided that said public performance is made in front of an audience limited to employees or students of

¹⁶⁵ See USA Sec.110(4): “Performance of a non-dramatic literary or musical work ... without any purpose of direct or indirect commercial advantage and without payment of any fee... to its performers, promoters or organizers if there is no direct or indirect admission charge or the proceeds (after deducting reasonable costs) are used exclusively for educational ... purposes and not for private financial gain.” This exception does not apply if the copyright owner has objected to the performance (according to a specific notification procedure).

¹⁶⁶ The IIPA already complained in its 2009 Report that this exception “is still overly broad with respect to sound recordings” and recommended to restrict them for teaching or examination purposes only (“as was done with respect to motion pictures”). See the International Intellectual Property Alliance (IIPA), *2009 Special 301 Report on Copyright Protection and Enforcement*, available at <http://www.iipa.com/rbc/2009/2009SPEC301ISRAEL.pdf>

the educational institution, the relatives of the students or other people directly connected with the activity of said institution, and to them alone.” Notice that its scope is larger than its U.S.A counterpart: no restriction in terms of works (except for cinematographic works) or in terms of non-commercial aim or admission charges, no limitation to live-performances and it cannot be opposed by the author. No remuneration applies either.

Instead, *Canada* (Sec.29.5), *Ireland* (Sec.55.1a) and the *U.K.* (Sec.34.1a) only exempt public performances done at the premises of an educational institution, for not for profit educational or training purposes and provided that the performance is done by students and/or instructors¹⁶⁷ before an audience consisting of students, instructors and persons directly connected with the educational establishment; parents are not deemed “directly connected” with the establishment, which confirms that the exempted performances will be strictly for instruction purposes –not for school events or ceremonies.

As always, fair use/dealing provisions might exempt some uses of works in school events and ceremonies beyond the specific exceptions in the U.S.A and Ireland, as well as in Canada, the UK and Ireland.

3. Civil Law Countries

Although they may all be deemed part of the Civil Law “family,” the countries examined in this chapter come from different legal, cultural and economic traditions. Their exceptions and limitations for educational purposes are largely influenced both by the Berne Convention and, more recently, by Art.5 EUCD (within the EU and beyond).¹⁶⁸ This will permit us to examine them, in general, under two large groups: EU and non-EU countries; although, as we will see, similarities and differences in terms of educational exceptions cut across them.

Current Member States of the European Union (excluding Ireland and the United Kingdom –examined above) are *Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden*.¹⁶⁹ Despite not in the EU, the members of the European Economic Area (*Norway, Iceland and Liechtenstein*) and *Switzerland* remain close to the EUCD solutions.

¹⁶⁷ The UK and Ireland exempt both performances done by a teacher or pupil in the course of the activities of the establishment, as well as performances done at the establishment by any person for the purposes of instruction.

¹⁶⁸ For this reason, despite not all countries in this chapter are EU Member States and despite the UK and Ireland (both EU members), were examined in the previous chapter, we will examine the exceptions in Art.5 EUCD dealing with education in this chapter.

¹⁶⁹ For an extensive study on the implementation of the EUCD in each Member State, including detailed examination of the exceptions listed in art.5 EUCD, see G. Westcamp, *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society: Part II - Implementation of Directive 2001/29/EC in the Member States*, Brussels: European Commission 2007: http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf

Non-EU countries include *Albania, Andorra, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Croatia, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Montenegro, Russia, Serbia, Tajikistan, Turkey, Ukraine and Uzbekistan.*

Educational purposes in these countries may be covered by one or more provisions, under a quite regular structure: the specific (and varied) exceptions provided for teaching purposes in EU countries:

- (A) and in non-EU countries,
- (B) the making of teaching anthologies,
- (C) other exceptions such as quotations and private use/copying which also have an influence on educational purposes,
- (D) and the school events, and
- (E) as we will see, the national solutions in this group are varied and far from homogeneous.

A. TEACHING AND INSTRUCTION (WITHIN THE EU)

Teaching purposes are dealt with under a variety of solutions by means of either one or several teaching exceptions; solutions range from exempting any “use,” in general, to a fragmented exemption of only some specific exploitation acts (usually, reproduction and communication to the public); from exempting the use of all works to only specific works; from benefiting all educational institutions to only public non-profit institutions; from non-remunerated to legal (non-voluntary) licensed schemes. Within this large and diverse group, a subgroup may be easily identified and distinguished from the rest: the Nordic countries (Finland, Denmark, Iceland, Norway and Sweden), which are characterized by the availability of ‘extended collective licenses’ for some educational purposes.

It is impossible to go into a detailed examination of all these laws, we will examine them under several groups sharing common features and will only take a closer look to some national provisions with specific or substantial differences.

Before, we will examine the teaching exception provided for in Art.5(3)(a) EUCD, which has influenced national laws within and beyond the EU.

(i) Art.5(3)(a) EUCD

Among the list of non-mandatory exceptions under Art.5 EUCD, Art.5(3)(a) 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 the non-commercial purpose to be achieved.

Closely following Art.10(2) BC, the teaching exception in Art.5(3)(a) EUCD is technologically neutral and clearly intended to cover both face-to-face as well as distance education, including by digital means. Recital 42 EUCD expressly includes ‘distance learning’ under the teaching exception and the Explanatory Memorandum accompanying the

initial proposal of Directive further confirms its application to ‘the new electronic environment.’¹⁷⁰

CASE STUDY

Reproduction, making available online and digitization

Art.5(3)(a) EUCD allows Member States to exempt any acts of reproduction and communication to the public that are necessary to carry on *teaching uses online*: upload, transmission and reception; in addition to any technical copies (temporary reproductions, including RAM copies) necessary being exempted under the temporary copies exception of Art.5(1) EUCD. The act of *uploading* the work on a server, in order to make it available to the public (students) entails both a reproduction and a making available to the public (or communication to the public) –also when access is restricted to registered students.

However, Art.5(3)(a) EUCD is silent about whether *digitization* is allowed or not. To the extent that digitization (scanning) amounts to a reproduction and since the exception is technologically neutral (not limited to specific means of exploitation), domestic laws and national courts are free to decide whether the making of a digital copy of a work that is not available in such format is allowed for teaching purposes or not. As we will see, they remain silent too; only Belgium, Germany and the Netherlands expressly permit digitization (notice that all three laws require remuneration).

– *Scope and purposes*

Art.5(3) EUCD expressly refers to both rights of *reproduction and communication to the public* (including the right of *making available online*) and domestic laws may extend it to *distribution* (according to Art.5(4) EUCD). However, nothing is said about the right of *transformation* (i.e., translations), which is not harmonized by the EUCD.

– *Beneficiaries*

The *EUCD* does not focus on the category (school, university, etc.) or nature (public or private, for-profit or non-profit, etc) of the educational establishment, but on the ‘non-commercial’ purpose of the specific educational activity. Determining eligibility on the basis of the nature of the institution would have been easier, but it might result in unfair scenarios. The EU legislator felt that education, *no adjectives added* (be it private or public, for-profit or

¹⁷⁰ See Explanatory Memorandum accompanying the Commission’s proposal for a Directive of 10 December 1997 (COM(97)628 final), O.J. C-108/6 (07.04.1998):

It does not only cover traditional forms of using protected material, such as through print or broadcasted media, but might also serve to exempt certain uses in the context of on-demand delivery of works and other protected matter. Member States will have to take due account of the significant economic impact such an exception may have when being applied to the new electronic environment. This implies that the scope of application may have to be even more limited than with respect to the “traditional environment” when it comes to certain uses of works and other subject matter.

non-profit) is the fundamental right that justifies the exception in Art.5(3)(a) EUCD; therefore, it is only reasonable that no distinction was done on that account.

Recital 42 EUCD offers some guidance as to what may be deemed a ‘non-commercial purpose’:

The *non-commercial nature of the activity* in question should be determined by that activity as such. The *organisational structure* and the *means of funding* of the establishment concerned are not the decisive factors in this respect.¹⁷¹

In other words, instruction may be offered in exchange for some payment (as it usually happens), but this alone should not be enough to disqualify it under the exception. In theory, private teaching institutions as well as public ones may benefit from the exception. However, the *non-commercial nature of the activity* will not be always easy to assess.

In that sense, member countries have a lot of discretion.

Nothing is said in Art.5(3)(a) EUCD as to who is allowed to do the teaching acts: only teachers and instructors (any teacher or instructor?) or also students? The answer to this question will decide the degree in which other exceptions will be needed to exempt some teaching acts (i.e., private copies, quotations). Silence may be interpreted broadly, at least, as broad as the national legislator chooses to do.

– *Nature and Extent of Works*

Art.5.3(a) EUCD (like Art.10(2) BC) used open-ended clauses to exempt all kind of works, be it in full or in part,¹⁷² ‘to the extent justified by the non-commercial purpose to be achieved.’

It is precisely this flexibility (as to the extent and amount of use) that may allow the making of teaching anthologies under Art.5(3)(a) EUCD. In its 1997 Explanatory Memorandum of the Proposed Directive, the Commission expressly mentioned the ‘compilation of an anthology’¹⁷³ as an example of teaching uses under Art.5(3)(a) EUCD. The neutral EU solution is aligned with Art.10(2) BC. However, allowing teaching anthologies to be covered by this exception does not mean that all teaching anthologies *per se* will be exempted, only those –and to the extent– that are used for teaching purposes and comply with the non-commercial requirement, as well as with the three-step-test, will qualify.

CASE STUDY

Exempted compilations under Art.5(3)(a) EUCD

¹⁷¹ See Recital 42 EUCD.

¹⁷² See EUCD Commission’s Proposal, *op.cit.supra*, COM(97)628 final: ‘only the part of the use which is justified by its non-commercial purpose may be exempted from the exclusive right’

¹⁷³ See EUCD Commission’s Proposal, *op.cit.supra*, (COM(97) 628 final) p.40.

A compilation of materials in a physical format (a CD or DVD), which is sold or simply delivered to students as part of the material for the course, would neither satisfy the “non-commercial purpose” required by Art.5(3)(a),¹⁷⁴ nor the Three-Step-Test: since it would conflict with the normal exploitation of the work and unreasonably prejudice the author’s legitimate interests.

Instead, posting materials online for teaching purposes, available to only registered students and subject to compensation for the authors, could clear the Three-Step-Test¹⁷⁵ and be allowed under the teaching exception.

However, national solutions tend to be more specific and restricted to instructional uses (especially within the EU Member States): not all of them exempt the making of teaching anthologies or recordings.

– *Further requirements and compensation*

Art.5(3)(a) EUCD requires that the source and the author’s name are indicated, unless it turns out to be impossible.

Fair compensation is not specifically required under Art.5(3)(a). However, national legislators are free to apply it to any exceptions they deem fit.¹⁷⁶ In fact, fair compensation may ultimately be required through the Three-Step-Test.

Indeed, the EUCD did not miss the opportunity to include the Three-Step-Test proviso into EU law. However, being an exhaustive list,¹⁷⁷ Art.5(5) EUCD omitted the first step (‘certain special cases’) and turned the Three-Step into a Two-Step-Test. It may be discussed whether it is a mandate for governments to guide implementation of the exceptions, or rather a mandate for courts and parties (people) to guarantee a restrictive interpretation¹⁷⁸, as a final restriction acting directly on the enforcement (rather than on the adoption) of the listed exceptions.¹⁷⁹ It may be both: being a non-mandatory list of exceptions (safe Art.5(1)

¹⁷⁴ The answer to what is non-commercial remains open: is it commercial only when “sold” to students and “non-commercial” only when distributed “for free” among students registered in the course? But then, what if the registration includes a fee for the compilations and teaching material?

¹⁷⁵ It is expected that most teaching compilations will require remuneration to the authors in order to clear the Three-Step-Test. This is why many teaching compilations exceptions are subject to remuneration.

¹⁷⁶ Recital 36 EUCD: ‘The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation’. The EU Parliament proposed to subject Art.5(3)(a) to fair compensation; see European Parliament Opinion (1st Reading) of 10 February 1999, A4/1999/26, O.J. C-150/171 (28.05.1999).

¹⁷⁷ The list of exceptions in Art.5 EUCD form an exhaustive list; no other exceptions will be allowed in Member States national law, except as allowed under art.5(3)(o) EUCD.

¹⁷⁸ See Cohen Jehoram, Herman (2005), ‘Restrictions on Copyright and their Abuse’, *European Intellectual Property Review* 2005 (10) 359-364, p.364.

¹⁷⁹ One may wonder whether as a two-step-test, Art.5(5) EUCD will function as some sort of *fair use defense* (like sec.107 U.S. Copyright Act) that will end up distinguishing the exempted use

EUCD) and Member States not being obliged to use the exact EUCD wording, the Three-Step-Test will most likely act as a guide not only for the interpretation but also for the implementation of these exceptions into national law. It remains to be seen whether or not its terms and its traditional reading is fit to do both tasks.

The rules of the Three-Step-Test must apply to the interpretation and application of all exceptions provided for in EU national laws.¹⁸⁰

In short, Art.5(3)(a) EUCD sets the general outline for Member States to implement specific solutions for exempting teaching uses, adapted to the national context and needs. Within this flexible frame, the transposition of this exception in EU Member States has resulted in a variety of solutions depending on the specific combination of exempted acts, scope, purposes and requirements. The solutions outside the EU are not completely different.

(ii) Purposes: Teaching, Education, Illustration for Teaching, etc.

Diverse terminology is used in the national laws to indicate which the exempted educational purposes are.

Some laws have chosen the exact language of Art.5(3)(a) EUCD (as well as Art.10(2) BC, *see supra*): ‘*illustration ...for teaching*’ is used in *Belgium, Cyprus, Estonia, Germany, Italy, Luxembourg, Malta, Netherlands, Romania*. Instead, *France, Spain* and the *Czech Republic* use slightly modified versions (respectively): “*for purposes of illustration within an educational context*,” “*for purposes of ...educational activities in the classrooms*” and “*while teaching for illustration purposes*.”

Others simply prefer more general language such as “*teaching purposes*” (*Poland, Slovakia* and *Switzerland*), “*teaching uses*” (*Italy*, Art.70.1bis), “*for teaching in class*” (*Liechtenstein*), “*for purposes of teaching and education*” (*Portugal*) or simply to “*educational purposes*” (*Latvia* Art.19.1). Also the *Nordic countries* tend to refer to “*educational activities*,” “*educational contexts*,” and “*educational purposes*,” as well as to “*public examinations*.”

Similar terms are used by these exceptions linked to specific acts of exploitation. For instance, *Austria* exempts the making and distribution of copies for purposes of “*teaching and training*”, the display “*in an educational lecture*” and the public performance “*for the purpose of teaching and lectures*”; *Belgium* exempts “*free performance during a public examination*” (Art.22.1.7); *Bulgaria* permits reproduction for “*educational purposes*” and *Germany* allows the making (or causing to be made)

[Footnote continued from previous page]

(covered by a correct ‘2ST sanctioned’ reading of a statutory exception) from an infringement (resulting from a wrong ‘non 2ST sanctioned’ interpretation).

¹⁸⁰ 17 EU Members have expressly implemented the Three-Step-Test into their national laws: *Bulgaria* (Art.23), *Czech Republic* (Art.29.1), *Estonia* (Sec.17), *France* (Art.L122-5(9)4), *Greece* (Art.28C), *Hungary* (Art.33.2), *Italy* (Art.71*nonies*), *Latvia* (Sec.18.2), *Lithuania* (Art.19), *Luxembourg* (Art.10 *in fine*), *Malta* (Art.9.3), *Poland* (Art.35), *Portugal* (Art.75.4), *Romania* (Art.33.1), *Slovakia* (Art.38), *Slovenia* (Art.46), *Spain* (Art.40bis). The Three-Step-Test has not been formally implemented in *Austria, Belgium, Cyprus, Denmark, Finland, Germany, Iceland, Liechtenstein, Netherlands, Norway, Sweden* and *Switzerland*. Albeit this does not mean that it is not being applied by case law.

single copies “for the illustration of teaching (instruction)” and for “examinations”. Also in Greece copies can be done “for teaching and examination purposes,” while public performances are allowed “within the framework of staff and pupil or student activities;” in Hungary, copies are permitted “for educational purposes and for purposes of exams” and performances “for purposes of school education;” Romania allows reproduction “for teaching purposes;” Slovenia permits reproduction “for internal use in educational establishments” and performance “in the form of direct teaching.” In addition to the general “use” exemptions (see supra), Estonia allows both reproduction “for the purpose of teaching” and public performance “in a direct teaching process,” while Latvia permits the performance “in a face to face teaching process.”

How can these different purposes affect the exempted scope? Except when reference is made to exams only, all of these terms are basically addressed to allow any acts that are necessary to convey the instruction. *Teaching, instruction, and education*, should be read broadly as to include use of works as *part of the instruction*: be it a lecture (explanations by the instructor) or an exercise, a test or examination, but also as a reading (proposed by the teacher) to write a paper, participate in a debate or for the student to study. The same should be concluded as far as *illustration for teaching*.

CASE STUDY

Illustration for teaching

At a first glance, the word *illustration* seems to unnecessarily complicate the scope of the teaching exception. We all know what is *teaching*, but ‘*illustration for teaching*’ is not self-evident. One may argue that ‘*illustration for teaching*’ should be narrowly interpreted, so as to exempt only those uses that ornament or exemplify the teaching. But this would leave out precisely the teaching uses that are *substantial* –not merely illustrative– for the teaching and, in consequence, would devoid the teaching exception of any meaning. We already concluded against a narrow interpretation of this kind under Art.10(2) BC by proving that ‘*illustration for teaching*’ was not intended to limit or reduce the ‘*educational*’ purpose itself, but rather to help clarify the amount of work that could be used for teaching purposes.

The same holds true as far as the EUCD wording in Art.5(3)(a). During its parliamentary proceedings, alternative language was discussed: ‘education, learning and research’ and ‘education, learning, research and for private purposes;’¹⁸¹ but they were all discarded in favor of the more familiar Art.10(2) BC wording. Besides, the EUCD also mentions ‘*for the purpose of education and teaching*’ (Recital 14), ‘*educational ... purposes*’ (Recital 34) or ‘*education, learning and research*’ (as considered by the Parliament¹⁸²); nothing indicates that ‘*illustration for teaching*’ is intended to have a narrower scope than any of the terms examined by the Parliament or the ones finally included in the Recitals. Evidence of such equivalence may be found in

¹⁸¹ See Report of the EP Committee on Legal Affairs and Citizens’ Rights on the proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society, of 28 Jan.1999, A4-0026/1999, pp.43 and 58 (Amendments 18 and 24, to Art.5(3) EUCD).

¹⁸² See *id.*

the slightly modified wording of the French teaching exception (Art.122-5(3)e): “for purpose of illustration *within an educational... context.*”

Once we conclude that “*illustration for teaching*” equals “*education*” and “*teaching*” and that it merely involves a reminder about the amount of work that can be used, the reference to *illustration* does not alter the nature of the teaching or educational purposes. In fact, as we will see, all the different provisions in national laws are deemed in consistence with Art.5(3)(a) EUCD.

Instead, the exceptions envisioned for *direct teaching* or *face-to-face teaching* will hardly apply to distance and online education.

Of course, depending on the specific combination of the purposes with the exempted acts (*see below*), the exempted scope may be different under each law. Art.5(3)(a) EUCD has resulted in a variety of solutions in terms of exempted acts.

(iii) Scope: Exempted acts of exploitation

(a) Scope: Any use

Seven countries choose the general reference to *use* for exempting teaching and educational uses: Cyprus (Art.7.1r), the *Czech Republic* (Art.31.1c), *Estonia* (Sec.19.2), *Latvia* (Art.19(1)2), *Liechtenstein* (Art.22.1b), *Poland* (Art.27) and *Switzerland* (Art.19.1b).

The exempted purposes tend to be identified in general terms: “for the purpose of illustration for teaching” (*Cyprus* Art.7.1r and *Estonia* Sec.19.2), “for educational purposes” (*Latvia* Sec.19(1)1 and *Switzerland* Art. 19.1), “for teaching purposes” (*Poland*: Art.27), “for teaching in class” (*Liechtenstein* Art.22.1), and “while teaching (in a lecture) for illustration purposes” (the *Czech Republic* Art.31.1c).

In *Switzerland* and *Liechtenstein*, the exception for teaching purposes is a variety of private use; while in the *Czech Republic* this exception is listed as a “Quotation”. Regardless of its title and placement, “use” may be read to exempt any kind of exploitation acts (reproduction –including, perhaps, digitization–, distribution, performance and communication to the public, as well as making available online). If so,¹⁸³ these exceptions will be easily applicable to digital and online teaching –provided, of course, that the other requirements are met.

Poland expressly allows translations (“*use...in original or in translation*”), but the term “*use*” in the other national provisions may deem translations done for teaching purposes exempted too.

¹⁸³ This may not be true in all countries. For instance, in *Switzerland*, the German official version of Art.19.1b reads “for teaching in class” (instead of “for teaching purposes”) which may be interpreted as restricted to face-to-face instruction only.

CASE STUDY

Overlapping teaching exceptions

This general (EUCD-imported) exception for teaching purposes may be complemented with other exceptions mostly envisioned for face-to-face teaching scenarios –none of them being subject to remuneration.

Cyprus (Art.7.1j) permits any use of a work (in any language) done in the public interest by educational establishments, provided that no revenue is derived and that no fee is charged for the communication to the public, if any, of the work thus used.

The *Czech Republic* permits educational establishments (“schools, school related and educational establishments”) to *use school works* (works created by students as part of their school assignments) “for teaching purposes or to meet their own internal needs”

(Art.35.3), as well as the use of a work during *school performances* performed exclusively by the pupils, students or teachers of the educational establishment” (Art.35.2); provided that neither use is done for any direct or indirect economic or commercial purposes.

Estonia allows *reprographic reproduction* of disclosed works “for the purpose of teaching” in educational institutions whose activities are not carried out for commercial purposes (Sec.19.3) and public performance of works¹⁸⁴ “in a direct teaching process” in educational institutions by the teaching staff and students (Art.22). Reprography exempted under Sec.19.3 is subject to compensation of authors and publishers, under a legal license subject to compulsory collective management (Sec.27-1).

Latvia provides for two other non remunerated exceptions for teaching purposes: Sec.19(1)7 permits the use of a musical work “in teaching institutions as part of a face-to-face teaching process,” and Sec.26.2 allows performances in educational institutions in a face-to-face teaching process with the participation of teachers and learners...”.

Although these issues are treated in more detail under the corresponding subchapters, it is worth pointing out some of the differences already existing within this group:

They are all open in terms of beneficiaries: any *educational institution* may benefit and remain silent in terms of individual uses, except for *Switzerland* (“by a teacher and his pupils”) and *Liechtenstein* (“by a teacher for teaching in class”). Both *Liechtenstein* and *Switzerland* allow that copies be done by a third person on behalf of the teacher, such as by a library (*Liechtenstein*) or “by libraries, public institutions and copy shops” (*Switzerland*).¹⁸⁵

¹⁸⁴ According to the definitions in Sec.13, public performance, making available on line and communication to the public are three different rights.

¹⁸⁵ These copies (made by third parties on behalf of the user) are subject to remuneration (Art.20.2). However, libraries are not allowed to make these copies available online (only teachers and students can do so for teaching purposes).

No specific restrictions apply as to the *nature and extent of the works* covered by the exceptions. All of them permit the use of any “disclosed works” to the extent required by the purpose. *Cyprus*, the *Czech Republic* and *Estonia* further require that the use is not done for economic or commercial purposes.

Only *Lichtenstein* and *Switzerland* require *compensation*, under a legal license subject to compulsory collective management. In the remaining countries, the exempted teaching uses are permitted for free.

CASE STUDY

Teaching compilations

In addition to the general exception for teaching purposes, *Cyprus* (Art.7.1e), the *Czech Republic* (Art.31.1b), *Latvia* (Art.21), and *Poland* (Art.29.2) provide for another specific exception for the making of *teaching anthologies*. Therefore, it makes sense to assume that in these countries, the making of these anthologies will not be exempted under the general teaching purposes exceptions (although their general terms might permit them) but under the specific ones.

Instead, *Estonia*, *Lichtenstein* and *Switzerland* do not. In these countries, the making of teaching compilations may only be allowed under the general teaching exceptions (or to the extent that the use qualifies as a quotation). However, in *Estonia* the exception provided for reprography for the purpose of teaching in educational institutions whose activities are not carried out for commercial purposes (Sec.19.3) may permit the making of such anthologies (at least, in reprographic form); this exception is subject to compensation of authors and publishers, under a legal (statutory) license subject to compulsory collective management (Sec.27-1).

(b) Scope: Reproduction, distribution and communication to the public (making available online)

The acts of *reproduction (in any format), distribution and communication to the public (including the making available online)* for teaching purposes are exempted in *Belgium* (Art.22.1), *France* (Art.122-5(3)e), *Germany* (Art.53.3 and Art.52a), *Italy* (Art.70.1), *Luxembourg* (Art.10.2), *Malta* (Art.9.1h), *Netherlands* (Art.16), *Portugal* (Art.75.2f), *Romania* (Art.33), and *Slovakia* (Sec.28.1). This is done either under one or several exceptions.

Reproduction, translation, distribution and communication to the public (including the making available online *ex Art.2.1*) are exempted in *Malta* (Art.9.1h) “*for the sole purpose of illustration for teaching;*” no restriction applies as to educational establishments, individuals, nature and extent of works, other than “to the extent justified by the non-commercial purpose to be achieved. This exceptions is not subject to remuneration.

In addition, specific acts of reproduction may be done by educational establishments, provided they are not for direct or indirect economic or commercial advantage (Art.9.1d).

So does *Slovakia* (Sec.28.1): *reproduction, distribution (except for sale) and communication to the public*, including the making available online (*ex* Sec.5(11) and (14)) for teaching purposes *in school*; this reference is aimed at identifying the beneficiaries of the exception rather than at restricting its scope to physical facilities. This exception permits the use of short parts of disclosed works, provided that the use does not exceed the extent justified by the purpose and that the copy is not for direct or indirect economic advantage. Within these margins, the teaching uses are allowed for free. Translations cannot be deemed exempted, since it is granted as an independent economic right (*ex* Sec.18.2d) and not expressly exempted under Sec.28.1.

In addition, two other exceptions are provided in relation with education: Sec.28.2 allows the making and distribution of *reprographic* copies in paper or similar medium of “a short part of a disclosed work, a disclosed short work or a disclosed work of visual art”, also for teaching purposes and without any compensation to authors;¹⁸⁶ And Sec.30 permits the non-remunerated public performance of a work “within the course of free-of-charge fulfillment of duties falling under the subject matter of the activity of a school,” as well as “in admission-free school performances” (*see infra*).

France, Luxembourg and the *Netherlands* exempt *reproduction* and *communication to the public* –which also include the making available online. Nothing is said about *distribution* but its inclusion may be deemed implicit under the other exempted rights.¹⁸⁷

In *France*, Art.L122-5(3)e)¹⁸⁸ exempts the reproduction (including distribution) and performance (including any form of communication to the public and the making available online –*ex* Art.L122-2) of parts of disclosed works (works primarily intended for educational use, sheet music and digital editions of literary works are excluded) for purposes of illustration “*in the course of teaching*”, provided that such use does not lead to a commercial exploitation, that the public is “*composed mostly of pupils, students, teachers.*” The teaching uses exempted are subject to a negotiated compensation in favor of authors; this compensation is without prejudice of the compensation (under compulsory collective management) established for the legal assignment of the right of reprographic exploitation granted under Art.L122-10.

The *Netherlands* (Art.16) exempts reproduction, distribution, translation (*ex* Art.16.4) and communication to the public of parts of disclosed works (as well as entire short works and works of art or photographs) for use as illustrations for teaching purposes, to the extent

¹⁸⁶ The general reprography exception in Sec.24.2 Slovakia does not require remuneration either.

¹⁸⁷ Distribution is included under the right of reproduction in France (Art.122-3) and under the right of communication to the public in the Netherlands (Art.12) and, accordingly, it may be also deemed exempted. Instead, reproduction and distribution are granted as independent exclusive rights in Luxembourg (under Art.3.1 and Art.3.5 respectively); excluding distribution from Art.10.2 would be inconsistent with the possibility afforded by Art.5.4 EUCD and lead to a completely irrational result: the copies made under the exception could not be distributed to the students. As an alternative, one may always understand that the delivering of the copies to the students does not amount to an act of distribution “to the public”.

¹⁸⁸ The introduction of this teaching exception in France (operated by a 2009 Amendment) is quite important, since teaching purposes were only regarded under the quotation exception, as “*analyses and short quotations justified by the ...pedagogic ...nature of the work in which they are included.* (Art.L122-5(3)a)

justified by the non-commercial purpose and in accordance with what might be reasonably accepted under the rules of social custom. This exception is subject to fair compensation of authors and right holders, under a compulsory license (fees are negotiated between the Publishers' Association and educational institutions). In addition, Art.12.5 permits the *recitation, performance or presentation* for purposes of *education* in public institutions and non-profit private institutions, as part of the school work plan or curriculum.

Luxembourg (Art.10.2) permits reproduction and communication to the public of short fragments of works, for purposes of illustration of teaching in accordance with fair practice and to the extent justified by the non-commercial ends to be achieved. No remuneration applies. Nothing is said about distribution and translations. Reproduction and distribution are granted as independent exclusive rights (under Art.3.1 and Art.3.5 respectively). However, excluding distribution from Art.10.2 would be inconsistent with the possibility afforded by Art.5(4) EUCD and lead to a completely irrational result: the copies made under the exception could not be distributed to the students. As an alternative, one may always understand that the delivering of the copies to the students does not amount to an act of distribution "to the public". Translations may be more easily included under the exempted right of reproduction (*ex* Art.3.2). Deeming both translations and distribution included under the scope of Art.10.2 is consistent with the scope of the exception for teaching purposes provided before the EUCD implementation which exempted *any use*. Too bad the Luxembourgian legislator preferred to adjust to the only two acts of exploitation listed in Art.5(3)(a) EUCD, instead of keeping the preexisting (and EUCD complying) formula. In short, an eloquent result from the fragmented EU approach combined with a cut-and-paste implementation into national laws (*see infra*).

Portugal (Art.75.2f) allows reproduction, distribution and making available to the public of parts of published works for purposes of teaching and education, provided that they are exclusively used for educational purposes in the educational establishments and that they do not intend to obtain a direct or indirect economic or commercial advantage. The omission of any reference to the right of communication to the public casts some doubts as to whether performances and displays of works for purposes of teaching and education (as well as other means of communication to the public) are exempted or not.¹⁸⁹ If necessary, face-to-face performances or displays of works for teaching purposes might be exempted as a quotation under Art.75.2g (*see infra*), but it would be preferable that the teaching exception could cover all the different types of activities conducted for these purposes. Nothing is said about translations, which means that they are not exempted. This exception is not subject to remuneration.

Germany allows teaching uses under several provisions:¹⁹⁰

- (i) Art.53.3 exempts the *making of single copies* (in analog formats) for (a) the illustration of teaching in a quantity required for the *participants in the instruction* as well as for (b) *examinations*; notice that the distribution of the copies among students (participating in the instruction) is implicitly exempted, but these copies should be neither distributed (beyond them) nor made available to the public.

¹⁸⁹ In Portugal, performance and display of works are defined under Art.68.2b and 2c, while the making available online is granted under Art.68.2j.

¹⁹⁰ In addition, Art.52.1 permits performances at school events, subject to remuneration (*see infra*).

- This exception only benefits “schools and other non-commercial educational establishments,” universities being excluded; no compensation applies.
- (ii) In addition, Art.53.2(iii) exempts *reprographic* copying in analog formats for “own individual uses” such as instruction, subject to remuneration.
 - (iii) A recently introduced Art.52a permits *reproduction* (in any format) *and making available* to the public *for purposes of illustration for teaching*, either by post and fax or by electronic means; digital delivery (making available) of these copies is subject to two conditions: that it is done to the extent justified by the non-commercial purpose and exclusively for use within the group of participants (students).¹⁹¹ This exception is open to all “schools, universities and other non-commercial institutions of further education and professional training;” fair compensation applies under a legal license (subject to compulsory collective management).

Specific restrictions apply in terms of nature and extent of works¹⁹² (*see infra*) and of beneficiary institutions¹⁹³ (*see infra*).

Belgium gathers all permitted teaching uses in several provisions under Art.22.1:

- (i) *Free and private communication* of lawfully published books is permitted “as part of school activities” (paragraph 3);¹⁹⁴
- (ii) For purposes of illustration for teaching, *reproduction* in part or in whole of articles or works of fine art or of short fragments of other works is allowed both on paper or similar support (paragraph *4bis*) and on any other medium, i.e., digital copies (paragraph *4ter*), while paragraph *4quater* exempts the *communication to the public* of works (including through digital networks); Authors and publishers are entitled to remuneration for reprography in paragraph *4bis*¹⁹⁵ (compulsory collective management), as well as for the exceptions in paragraphs *4ter* and *4quater*¹⁹⁶ (legal license).
- (iii) *Free performance* of a work during a public examination is allowed only where the purpose of the performance is the assessment of the performer/s with a view to awarding them a certificate, a diploma or other title, and it is done within the framework of an approved type of teaching (paragraph 7).

¹⁹¹ This exception was very difficult to pass (it brought a strong opposition) as a trade-off its application was initially limited until Dec.31, 2006, but it was reinstated in the “second basket” amendments of the Copyright Law in Oct.2007.

¹⁹² Art.52a and Art.53.3 exempt the use of “small parts of published works, short works or isolated contributions to newspapers or periodicals.” Works intended for instructional use at schools are excluded from Art.52a; and so are audiovisual works for 2 years upon release.

¹⁹³ While Art.52a benefits schools, universities and other non-commercial educational establishments and is subject to fair compensation (under compulsory collective management), Art.53.3 leaves universities out and is not compensated (in other words, reproduction for instruction at universities must be licensed).

¹⁹⁴ “School activities” in paragraph 3 is understood as the acts of communication to the public that occur during a teaching session in a classroom, but it may also apply to school events beyond the teaching activity itself (*see infra*). The communication to the public under paragraph *4quater* is done by technical means to a distant (not face-to-face) audience.

¹⁹⁵ *See Belgium* (Art.59).

¹⁹⁶ *See Belgium* (Art.61bis(a) and Art.61quater).

While these exceptions are open to any educational establishments, the communication to the public (including the making available) is restricted to “establishments officially recognized by the government.”

Also in *Italy*, several exceptions are applicable to exempt teaching uses:

- (i) *photocopying* of works available in school libraries is permitted for the services of these institutions, if made without either direct or indirect economic or commercial advantage and subject to compensation (Art.68);
- (ii) the quotation exception which expressly mentions “for non-commercial purposes of illustration of teaching” (Art.71sexies);
- (iii) a recently introduced exception that allows *reproduction and communication to the public* (including by means of digital networks) “for purposes of teaching or scientific research” when such use is not for lucrative purposes (Art.70.1).¹⁹⁷

In *Romania*, a double layer of teaching exceptions permit

- (i) *reproduction* (analog and digital) for *teaching purposes* within the framework of *public education* (Art.33.1c);
- (ii) *specific acts of reproduction* may be made by educational establishments which are not for direct or indirect economic or commercial advantage (Art.33.1e);
- (iii) as well as *reproduction, distribution, broadcasting and communication to the public for the sole purpose of illustration for teaching* (Art.33.2d) with neither direct nor indirect commercial or economic advantage.

No compensation or remuneration is required under any of these exceptions. They may apply to digital formats and online education, although only “isolated articles or brief excerpts from works” may be used –to the extent justified by the intended purpose and “provided that such uses conform to proper practice, do not conflict with the normal exploitation of the work and are not prejudicial to the author or the owners of the exploitation rights.”

Translations are expressly exempted in *Malta* and the *Netherlands*, and perhaps also in *Belgium* and *Luxembourg*.¹⁹⁸ But it cannot be deemed exempted in the other countries where translation is granted as an independent economic right.

Although these issues are treated in more detail under the corresponding subchapters, it is worth pointing out some of the differences already existing within this group:

They are all open in terms of beneficiaries: any *educational institution* may benefit and remain silent in terms of individual uses; as the only exception, *Belgium* restricts the

¹⁹⁷ Art.70.1 requires that the teaching uses are done “for non-commercial ends” and that they do not compete with the “economic exploitation” of the works; No remuneration applies. Instead, the making of teaching anthologies (Art.70.2) is subject to compensation (legal license) –see *infra*.

¹⁹⁸ An implicit exemption of translations might exist in Belgium and Luxembourg, where the translation right is comprised within the exempted right of reproduction (*ex* Art.1.1 and Art.3.2, respectively). Instead, translation is granted as a separate exclusive right in France (Art.L122-4), Germany (Art.23), Italy (Arts.4 and 18), Portugal (Art.68.2g) and Slovakia (Sec.18.2d) and, therefore, it may not be deemed included in the exceptions for teaching purposes.

communication to the public (including the making available) to “establishments officially recognized by the government.”

No specific restrictions apply as to the *nature and extent of the works* covered by the exceptions: all of them permit (albeit with different wording) the use of any “disclosed works” to the extent required by the purpose and provided that the use is not done for economic or commercial purposes; *Netherlands* refers to “the rules of social custom” and *Romania* to “proper practice.”

Belgium, France, Germany and *Netherlands* require *compensation*, under a legal license subject to compulsory collective management (this compensation will be without prejudice of any compensation applicable for reprographic copying). In the rest, the exempted teaching uses are permitted for free.

CASE STUDY

Teaching compilations

In addition to the general exception for teaching purposes, *Belgium* (Art.21.2), *Germany* (Art.46), *Italy* (Art.70.2), *Netherlands* (Art.16.3), *Portugal* (Art.75.2h), *Romania* (Art.33.1b). Therefore, it makes sense to assume that in these countries, the making of these anthologies will not be exempted under the general teaching purposes exceptions (although their general terms might permit them) but under the specific ones. Except for *Romania*, they are all subject to remuneration.

Instead, no exception for the making of teaching compilations exists in *France, Luxembourg, Malta, Slovakia*. In these countries, the making of teaching compilations may only be allowed under the general teaching exceptions (or to the extent that the use qualifies as a quotation). Furthermore, in *Slovakia* the exception provided for reprography for teaching purposes (Sec.28.2) may permit the making of such anthologies (at least, in reprographic form) without any compensation to right holders.

(c) Scope: Face-to-face teaching

Austria, Bulgaria, Greece, Hungary, Lithuania, Slovenia and *Spain* exempt teaching uses by means of a combination of several exceptions mainly envisioned for face-to-face teaching; their application to digital and online education is less than evident.

Austria provides for three different exceptions for the benefit of schools and universities:

- (i) *making and distribution of copies* of works of literature for purposes of teaching and training (Art.42.6) in the quantities required for a specific class or lecture;
- (ii) *display* of works of art in an educational lecture (Art.54.1-4); and
- (iii) *communication to the public* of cinematographic works (including feature films) and associated music for the purpose of teaching and lectures (Art.56c).

The first and third exceptions are subject to remuneration.¹⁹⁹

Exempted uses are only allowed to the extent justified by the purpose, but notice that all three restrictions are limited as to which works may be used: literary works, works of art and films, respectively. In addition, works which by their nature and designation are intended for use in schools, teaching or training are excluded under all three exceptions.

CASE STUDY

Teaching uses in Austria

The combination of works and specific rights exempted results in a curious scenario: copies of a poem could be made and circulated among students in a class for commentary and study, but the same poem could not be recited by the instructor since the public performance of works is not exempted. And vice-versa, an original or a copy of a work of art or a picture could be displayed by the instructor, but not reproduced in single copies (neither paper, nor digital) for students.

Digital copies can be made under Art.42.6 for non-commercial ends. However, since Art.42.6 only exempts reproduction and distribution, this exception will only apply to face-to-face environments or to distance education done by “analogic” means (i.e. by delivering tangible copies by post).

For the same reasons, the language used in the remaining exceptions (concerning works of art and cinematographic works) make them also hardly applicable (and insufficient) to exempt digital and online uses of all kind of works.

Bulgaria permits the *public presentation or performance* of published works in educational establishments (Art.24.8),²⁰⁰ as well as the *reproduction* of published works for *educational purposes* by educational establishments, provided that it is not done for profit (Art.24.9). Neither use is subject to compensation.

In *Greece*, educational establishments are entitled to conduct:

- (i) *reproductions* of disclosed works²⁰¹ “for *teaching or examination purposes*,” in accordance with fair practice and provided that it does not conflict with the normal exploitation of the works (Art.21);

¹⁹⁹ Compensation for the reproductions exempted under Art.42 is done by means of a levy system on equipment and operators (i.e., educational establishments).

²⁰⁰ Under Art.24.8, the public presentation and performance is permitted provided that there are no pecuniary revenues and the participants do not receive compensation. This exception is mostly envisioned for school events and celebrations but it may as well apply to exempt performances and display (presentations) done by the instructor in the course of teaching.

²⁰¹ Reproduction for teaching and examination purposes exempted under Art.21 is limited to articles lawfully published in a newspaper or periodical, short extracts of a work or parts of a short work or a lawfully published work of fine art... in such a measure that is compatible with the purpose.

- (ii) as well as *public performances and display*²⁰² of any works “*within the framework of staff and pupil or student activities*”²⁰³ (Art.27). Neither one is subject to compensation of authors.

Once again, although no restriction applies as to reproduction formats (both analog and digital copies might be exempted, and even digitization –to the extent that it qualifies as a reproduction), failure to mention the making available (or at least, communication to the public) may lead to restrictive interpretations limited to face-to-face teaching and physical premises of the educational institution –reinforced by the references to ‘at the educational establishment’ or ‘public performance and display’ (which implies a live audience).

In *Hungary*, schools and universities are entitled to:

- (i) *reproduce* works²⁰⁴ “for educational purposes and for purposes of exams” in a number corresponding to the number of pupils in a class or in a number necessary for the purposes of exams (Art.35.5) and
- (ii) to *perform* “for purposes of *school education or at celebrations held at school*” (Art.38.1b). None of these exceptions is remunerated, and since the making available (or communication to the public)²⁰⁵ is not mentioned, they will hardly benefit online teaching.

In addition, educational institutions are allowed to make copies “for internal purposes” (Art.35.4), as long as it is not done for commercial purposes or for direct or indirect commercial advantage, subject to compensation (under a levy system based on equipment and operators).

Slovenia permits:

- (i) *reproduction* on any medium of no more than 3 copies of works from their own copies “for *internal use in educational establishments*,” provided that it is not done for direct or indirect economic advantage (Art.50.3); and
- (ii) *public performance* “in the form of *direct teaching*” (Art.49.1).²⁰⁶

²⁰² The right of making available on line is defined as part of the communication to the public under Art.3(1)h; while the public performance is defined in Art.3(1)f. Being two different rights, Art.27 will hardly include the making available.

²⁰³ Since the public performance permitted by Art.27 would not only cover performances done as part of the teaching and instruction, but also as part of school events or “student activities,” it is required that the audience is composed exclusively of staff and pupils or students, their parents, persons responsible for their care or persons directly involved in the activities of the establishment.

²⁰⁴ Reproduction may be in any means and formats (analog or digital). The exempted reproduction is limited to “specific parts of a work published as a book, as well as newspaper and periodical articles.” The reproduction of work of fine art, an illustration or a photograph that is published “in” or “as part of” a book may be deemed exempted –but these works can only be displayed for purposes of instruction to the extent that the use qualifies as a quotation (Art.34.1).

²⁰⁵ The making available is envisioned within the right communication to the public under Art.26.8.

²⁰⁶ In addition to “direct teaching,” the exemption of public performance for purposes of teaching of Art.49 extends to “school events with free admission” provided that performers receive no payment (*see infra*) as well as to “rebroadcast of a radio or tv school broadcast.”

Transformation (translation) is allowed “if dictated by the purpose of the permitted use” (Art.53.3). No compensation applies under either exception. Unfortunately, both the definition of public performance (Art.26) and the reference to “direct teaching” restricts this exception to face-to-face environments.²⁰⁷ Unless to the extent of uses permitted under Art.47 for the “reproduction and communication to the public” of works “in readings and textbooks intended for teaching” (*see infra*).

The only exception for teaching purposes in *Lithuania* allows *reproduction* of short published works or short extracts of published works, for teaching purposes, *by way of illustration, in writings, sound or audiovisual recordings, provided that the reproduction is related to study programs and does not exceed the extent justified by the purpose*. No compensation is required. The wording of this exception is a combination of both Art.10(2) BC (*see supra*) and Art.5(3)(a) EUCD, since it refers to writings and recordings. Depending on how it is interpreted, it may not only exempt the making of teaching anthologies but also the “less relevant” uses done as part of the instruction.²⁰⁸ Still, assuming that a flexible and generous reading of this exception is done, and assuming that digital copies are exempted, online uses will hardly be so –because only the reproduction right is included. This is ultimately a question of interpretation by national courts and we have had no access to any information on that issue.

The case of *Spain* is specially interesting since it shows how despite using the original ingredients of Art.5(3)(a) EUCD, the result will most likely fail to cover on-line teaching. Reprographic reproduction done by educational establishments (i.e., for teaching purposes) and libraries is not exempted by law but subject to licensing (usually under collective management).²⁰⁹

CASE STUDY

Teaching uses in Spain

Since 1987, the Spanish Intellectual Property Law (LPI) only exempted teaching uses within the quotation exception under Art.32.1: ‘use by way of quotation or for analysis, comment or critical assessment ...made for teaching or research purposes and to the extent justified by the purpose of the use.’

As interpreted by courts, this exception covers two different kinds of uses: quotations (*stricto sensu*) and uses for analysis, comment or critical assessment, provided that they are done for teaching or research purposes. Over time, courts have done a flexible and generous interpretation of what is meant by “teaching or research purposes” under this article, so as not to deem infringing all kind of quotations done for

²⁰⁷ The right of making available online (Art.32.a) and the right of public performance (Art.26) are listed as independent sub-rights under the right of communication to the public (Art.22.2). The right of public performance is restricted to recitations of a literary work and performances of musical and dramatic works in front of an audience.

²⁰⁸ In that sense, the coma behind “by way of illustration” might help distinguish between “reproductions done “by way of illustration” and reproductions done “in writings ... and recordings”.

²⁰⁹ According to RD 1434/1992 (Art.10) educational institutions and libraries require a license for reprographic copies (which are not deemed exempted as private copying).

other purposes such as information, literary and art production, etc. Art.32.1 combined both exceptions in Art.10(1) and (2) BC –quotations and teaching purposes– failing to fully satisfy either one.

In 2006, the implementation of the EUCD brought a new Art.32.2 which exempts reproduction, distribution and communication to the public of works²¹⁰ for purposes of ‘illustration of the teaching activities’ by ‘teachers of official education’, ‘in the classroom.’ This new exception will add up to the two teaching exceptions that already existed for teaching purposes –which remain untouched: the quotation exception

(Art.32.1) and a specific exception for teaching purposes that only applies to databases.²¹¹

However, in the aftermath, the new exception for teaching purposes is more restrictive than the quotation exception! First, because it only applies to “*regulated education*” (i.e., programs leading to “official” degrees that have been sanctioned by the government). Second because it only permits the use of “*small fragments of works or of isolated works of art or photography*” –while Art.32.1 permitted the use of “*fragments of works... to the extent justified by the purpose.*” And third, because despite all three rights of reproduction, distribution and communication to the public (which includes the making available online) are exempted and students in an online course might qualify as a “classroom”, the legislative history suggests that Art.32.2 is intended to apply only to face-to-face classrooms and teaching environments.²¹²

Furthermore, this non-remunerated exception (for “illustration of teaching”) may unsettle the collective licensing for multiple copying for classroom use (managed by CEDRO): it remains to be seen how the new exempted scope may affect the existing licensing practices (probably, not too much).

For all these reasons, the introduction of this new and restrictive exception for teaching purposes is difficult to explain, in view of the several other options available: to make no amendment and leave Art.32.1 as the only exception for teaching purposes and for quotations, in compliance with both Art.5(3)(a) and Art.5(3)(d) EUCD; to simply expand (to all works) the exception for teaching purposes provided already for databases teaching exception (Art.34.2b) and thus, release the quotation exception from the unnecessary restriction of “for purposes of teaching and research”; or to introduce a

²¹⁰ Text books and university treatises are expressly excluded.

²¹¹ See Spain (Art.34.2b): ‘use for purposes of illustration for teaching or scientific research, as long as it is used to the extent justified by the non-commercial purpose to be achieved and the source is always indicated’. This exception was introduced by Law 5/1998 of 6 March 1998, implementing Directive 96/9/EC of 11 March 1996, on the legal protection of databases [O.J. L-77/1996, 27.03.1996].

²¹² During the parliamentary debate, alternative wording was proposed by all political groups (except for the Socialist Party in the Government –which introduced the bill), to use language closer to Art.5(3)(a) EUCD and, specifically, to delete both references highlighted above. All 8 amendments proposed aimed at ensuring that the new exception would cover all types of education and also on-line teaching, as well as all sort of uses in the course of instruction (also uses done by students, not only teachers). None of them succeeded. See Amendments in the Senate, BOCG, Senado, Serie II, n.53 of 21 April 2006, pp.21-58; and Amendments in the House of Representatives, BOCG, Congreso, Serie A, n.44-10 of 30 November 2005, pp.29-96.

new exception for teaching purposes which enlarged the scope of uses already exempted by law.²¹³

Ironically, under the current three-layered regime of teaching exceptions (none of which, by the way, establishes fair compensation), the old open-ended quotation exception remains fundamental to exempt uses in both face-to-face and on-line teaching.²¹⁴

Although these issues are treated in more detail under the corresponding subchapters, it is worth pointing out some of the differences already existing within this group:

All these exceptions are open in terms of beneficiaries: any *educational institution* may benefit and remain silent in terms of individual uses. In general terms, all of them permit (albeit with different wording) the use of “disclosed works” to the extent required by the purpose and provided that the use is not done for economic or commercial purposes. Only *Austria* requires *compensation* for the exempted teaching uses. In the rest, the exempted teaching uses are permitted for free.

CASE STUDY

Online teaching compilations

Austria (Art.45, 51, 54), *Bulgaria* (Art.24.3), *Greece* (Art.20.1), *Hungary* (Art.34.2-3), *Lithuania* (Art.22.1), *Slovenia* (Art.47) permit the making of teaching compilations. Only *Austria* and *Slovenia* require compensation.

Some of these exceptions allow not only the reproduction but also the “communication to the public” (*Slovenia*), “dissemination” (*Hungary*) or “use” (*Bulgaria*) of these teaching anthologies. Therefore, to some extent, these exceptions may afford some “exempted scope” for teaching uses online in these countries. Instead, *Greece* (only in print), *Austria* (reproduce and distribute) and *Lithuania* (reproduce) will hardly apply to exempt online teaching compilations.

²¹³ In November 2002, an EUCD implementation bill drafted by the previous Government proposed to delete “teaching and research purposes” from Art.32.1 (so as to leave the exception open to any purposes) and to add a new exception for teaching and research purposes in the following terms:

“Art.32.2. No authorization from the author will be necessary when the use of protected works is done solely for the illustration for purposes of teaching or scientific research, to the extent justified by the non-commercial goals, provided that the works have been lawfully disclosed and, unless it is impossible, the name of the author and source are mentioned. The specific conditions for the application of this limitation will be regulated by the Government.”

However, in addition to implementing the EUCD provisions, the bill contained other major reforms of the Act (such as the regime of collecting societies) and, after strong opposition from collecting societies, was finally dropped by the Government.

²¹⁴ It imposes no limitation as to public or private institutions or as to classrooms, covers any use (therefore, reproduction, distribution, communication to the public, as well as translation), and allows for the use of any kind of works (also text books and university treatises) ‘to the extent justified by the purpose of the use’ (therefore, in full or in part).

No exception exists in *Spain*, where the making of any teaching uses and/or teaching compilations may only be allowed to the extent that the use qualifies as a quotation or is licensed. Licenses (on a voluntary opt-in basis) for online and digital teaching uses are starting to develop in Spain by CEDRO (*see infra* Part V).

(d) Scope: Nordic countries

Finland, Denmark, Iceland, Norway, Sweden also present a fragmented approach to permit teaching uses under, at least, two different provisions: one allowing the making of copies for educational purposes (subject to compensation) and another exempting educational public performances. But the characteristic of these countries is the availability of *extended collective licenses*²¹⁵ that may cover educational uses beyond those exempted by the statute.

– *Copying (and more) for education and extended collective licensing*

Nordic countries allow the *making of copies* for the purpose of educational activities (Sec.13 Denmark), for use in public examinations and educational activities (Sec.13 Norway) and for educational purposes (Art.42c Sweden), subject to extended collective licensing.

Copies made for educational/teaching purposes subject to extended collective licensing cover all kind of published works,²¹⁶ as well as radio and TV broadcasts.

Traditionally, these statutory provisions and the corresponding extended collective licenses²¹⁷ only covered reproduction, failing to include communication to the public. This is all about to change: extended collective licenses for educational institutions are expected to cover digital uses and online delivery, soon. For instance, in *Denmark* an extended collective license managed by COPY-DAN for training colleges²¹⁸ already covers scanning, printing, storage, e-mail transmission, upload in a password protected intranet and students' downloading, in exchange of a fixed amount per student, per year. Still, it only allows copying to a maximum of 20% or 30 pages of a work, whichever is less. *Finland* (Sec.14) already permits not only the making of copies but also communication to the public for educational purposes through means other than radio or TV broadcast –unless the author has explicitly prohibited such use. Similarly, in *Sweden*, the extended collective license applicable to allow the reproduction of published works for educational purposes will not apply if the author has filed a prohibition against such reproduction with any of the contracting parties (sec.42c).

²¹⁵ Extended collective licensing is not considered to be an exception or limitation to the exclusive authors' rights, but rather a specific method of management of these rights. These licenses are agreed upon between the user (or an organization of users) and a collective management organization which represents a substantial number of authors and right holders; this agreement will also apply to authors and right holders who are not members of the CMO.

²¹⁶ However, in Denmark, works of art are subject to a different regime; under Sec.23, works of art may be used in critical or scientific presentations in accordance with proper usage and to the extent required by the purpose.

²¹⁷ In practice, these teaching exceptions adopt here the form of a remunerated statutory (or compulsory) license.

²¹⁸ A similar license is being negotiated for universities but, so far, with no success.

It may be seen as a shy attempt to foster online teaching uses, since its effectiveness will ultimately depend on the authors' will.

– *Performances*

On the other, published literary and musical works²¹⁹ may be *performed in public*²²⁰ on occasion of educational activities and for educational purposes (and only within the premises of the establishment), provided that the performance is not done for commercial purposes. This exemption is neither subject to remuneration in favor of right holders nor to extended collective licensing. For this reason, these statutory exceptions are usually aimed at exempting only *live* public performances that take place within the premises of the educational establishment, be it as part of the teaching itself or as part of a school event, as long as they are not for commercial purposes.

In addition, teachers and pupils may record their own performances provided that they are only used for educational purposes.

It is not clear whether these performances could be transmitted (synchronously or non-synchronously) beyond the premises of the educational establishment. *Norway* expressly states that transmission (either by wire or wireless) is not covered within education for commercial purposes, which seems to imply *a contrario* that as long as the performance is not for commercial purposes it can be transmitted also on-line. If this is so, only public performances done for commercial purposes and their communication beyond the premises of the educational institution will need to be licensed.

CASE STUDY:

The EUCD 'fragmented' approach to exceptions and limitations

So far we have seen several different ways of implementing the scope of the uses exempted under Art.5(3)(a) EUCD: through a general all encompassing provision (referring to *use*) and by means of specific references to the acts of exploitation (reproduction, distribution and communication to the public or making available), under one or several exceptions. And we have seen the disparate results of these later solutions in terms of translations, distribution, performances and display, communication to the public, etc.

In terms of EU law, since the exclusive right of transformation (derivative works) has not been harmonized (and is not affected by the EUCD) Member States are free to include translations and/or any other transformation of works within their national teaching exceptions (an option which becomes especially important for minority language countries). However, as we have seen, only a few laws would allow translations to be made for teaching purposes: the countries that permit *any use* for teaching purposes (Cyprus, Czechia, Estonia, Latvia, Liechtenstein, Poland and Switzerland), as well as others which have chosen to expressly mention it (Malta, Netherlands, Slovenia) or implicitly allow it (Luxembourg and Belgium).

²¹⁹ Dramatic and audiovisual works are excluded from the exceptions.

²²⁰ Public performances are permitted in the course of educational activities (Sec.21 Denmark, Sec.21.2 Sweden), in educational contexts (Sec.21 Norway) and for educational purposes (Finland Sec.21); Iceland only permits public performances for educational purposes (Sec.21).

We have also seen how in some jurisdictions, performances and displays or other communication to the public done for teaching purposes fail to be exempted (i.e., Portugal Germany, Luxembourg). This is a fine example of how a poor national implementation of the EUCD *fragmented* structure (where only some exploitation rights are harmonized and the corresponding exceptions only refer to the harmonized rights) may jeopardize the effectiveness of the exempted teaching uses. National legislators should have been alert and, when implementing the EUCD provisions, introduce any amendments necessary to maintain the balance –and consistency– within their copyright laws. It is regrettable that national laws preferred to simply ‘replicate’ the fragmented EUCD structure instead of finding complete and coherent solutions to exempt acts for teaching purposes.

Furthermore, the combination of this fragmented approach with further restrictions as to the kind of institutions that may benefit from the exception and the nature (and extent) of works that can be used, results in an intricate mosaic of exempted teaching uses that will be insufficient and will *de facto* require licensing –especially, for online teaching uses.

(iv) Beneficiaries

Two criteria are commonly used to establish who may benefit from a specific teaching exception: establishments and individuals.

(a) Establishments

The EUCD left it to Member States to decide which establishments may benefit from the exception and only sanctioned that the *non-commercial nature of the activity* should be determined by that activity as such, and that the *organisational structure* and the *means of funding* of the establishment concerned should not be decisive factors. Member States have chosen different solutions.

– *Educational establishments, schools and universities*

The majority of laws in this group remain silent as to which institutions may benefit from the teaching exception. A few make a general reference to educational establishments²²¹ or to schools²²² and universities.²²³

Both the silence and these general references may be read as to include elementary schools, secondary or higher education, as well as university education –although we should always bear in mind that the same terms may be interpreted differently by national courts.

²²¹ See Greece, Poland and Slovenia (Art.50.3). Nordic countries refer to “educational contexts” or “activities”.

²²² Although Slovakia (Sec.28) only refers to “schools,” this is broadly defined in Sec.5(12) as “the basic school, secondary school, college or the interest-based education facility.”

²²³ See Hungary and Austria. Czech Republic (Art.35.3 –use of school work for teaching purposes) refers to “a school, a school-related or educational establishment;” Instead, the general exception for teaching purposes under Art.31.1c is open ended.

Hungary has one of the most detailed provisions (Art.33.4): “the use shall be taken to serve the purposes of illustration of teaching if it is implemented in accordance with the requirements of education and with the curriculum used in kindergarten, primary and secondary school, industrial school, vocational school education, primary education of arts, as well as in higher education falling within the scope of the act on higher education.”

Far more troublesome is whether what is called “adult education” or “further education” is also covered. Statutes tend to be very opaque on this issue.

– *Non-commercial purposes*

A few laws require (as a condition for the exception to apply) that the use is not done for commercial or lucrative purposes.

Estonia (Sec.19.2)²²⁴ and *Cyprus* require that the *use is not done for commercial purposes*; so do *France, Luxembourg, Malta* and *Spain* with respect to the specific acts exempted under each law. The *Czech Republic* (Art.35.3 and Art.31.1c), *Portugal, Romania* (Sec.33.2d), *Slovakia* and *Slovenia* require that *no direct or indirect economic or commercial advantage* is intended. *Belgium* requires that the teaching uses exempted under Art.22.1–*4bis, 4ter* and *4quater* (reproduction in any format and communication to the public including online) are *not done for profit*. And *Bulgaria* requires that the *reproduction for educational purposes* is not done for profit (Art.24.9) and that no collection of revenues is involved in the exempted *public presentation or performance* (Art.24.8).²²⁵

Nordic countries require that the *performance* of works as part of educational activities is not done for commercial purposes.²²⁶ Instead, the exception for *reproduction* for educational purposes –which is remunerated and subject to extended collective licensing– is open to any educational institution (private or public, non-profit or for profit).

Instead of any specific reference to non-commercial or non-profit purposes, the *Netherlands* refers to “what might be reasonably accepted under the rules of social custom.”

It is certainly easier to assess the “commercial” or “for-profit” nature when the activity is a school performance (i.e., it is not *commercial* when no admission fee is charged and performers –usually students and instructors– receive no remuneration); instead, it is far more

²²⁴ Estonia has different non-commercial requirements under each teaching exception: Sec.19.2 allows the *use* (to the extent justified by the purpose) of lawfully published works for the purpose of illustration for teaching “on the condition that such use is not carried out for commercial purposes;” while Sec.19.3 allows *reproduction* (to the extent justified by the purpose) of disclosed works for the purpose of teaching “in educational institutions whose activities are not carried out for commercial purposes.”

Sec.22 makes no reference to non-commercial and permits *public performance* of works in the direct teaching process *in educational institutions* by the teaching staff and students with the sole condition “that the audience consists of the teaching staff and students or other persons (parents, guardians, caregivers, etc) who are directly connected with the educational institution where the work is performed in public.”

²²⁵ In addition, it is required that the participants (in the preparation of or in the performance) do not receive compensation.

²²⁶ See Sec.21 Denmark, Finland, Norway, Sweden. Instead, in Iceland the author is entitled to remuneration if admission is charged specifically for the performance conducted for educational purposes (Sec.21). In other words, performances done for commercial purposes must be licensed (and, most likely, remunerated).

difficult to decide when instruction is deemed commercial or for-profit: does it depend on the registration fees charged to students? Or should we look into the net benefits of the each institution?). To some extent, the non-commercial/not-for-profit requirement will indirectly cast some educational institutions out of the coverage of the exception, but this will only be decided *in casu* by the courts of each jurisdiction.

– *Non-commercial institutions*

This difficulty is probably why, in spite of the EUCD approach,²²⁷ some statutes directly require that the educational establishment itself have no direct or indirect commercial (or profit making) purposes.

In *Germany*, Art.52a (reproduction and making available) applies to “schools and universities (higher education institutions)” as well as “other non-commercial institutions of further education and of professional training”. Notice that the first group of institutions (schools and universities) may be for-profit or non-profit, while the second group (professional training and continuing/further education) is limited to non-for-profit institutions. Instead, Art.53.3 (making of single copies for instruction and examinations) is only set in favor of “schools and other non-commercial educational establishments” thus excluding universities from its coverage.²²⁸

Also in *Portugal* (Art.75.2f) the non-commercial purpose requirement is linked to the nature of the institution instead of to the activity itself: only the “institutions which are not aimed at obtaining a direct or indirect economic or commercial advantage” may benefit from the exception, thus resulting in a narrower scope than the EUCD allowed for.

In *Estonia*, the exception for reproduction (Sec.19.3) only benefits educational institutions “whose activities are *not carried out for commercial purposes.*”

These solutions are not always easy to apply and may be perceived as unfair and discriminating towards private-owned educational establishments.

– *Other requirements: “officially recognized,” “official education”*

In *Belgium*, while all the exceptions for teaching purposes in Art.22.1–3 to 7 are open to any institutions, *communication to the public* (including the making available online) is restricted to establishments ‘officially recognized or organized for this purpose by the public authorities’ (Art.22.1-4*quater*). Public schools and universities will be clear beneficiaries, but the meaning of “officially recognized” remains to be seen; it could be read as an establishment that grants official degrees (so that the exception could also benefit recognized private teaching institutions) or differently (so as to exclude any private institutions).

Spain, on the other hand, purports that only “professors of official education” benefit from the teaching exception in Art.32.2; rather than to professors, this language is aimed at restricting the teaching exception to the context of programs leading to an official (government approved) degree, offered by either public or private establishments and at primary, secondary or university level; adult and continuing education is clearly excluded.

²²⁷ In clear disregard of Recital 42 EUCD.

²²⁸ Universities must then rely on the private use exception in Art.53.2 which allows the making of single copies in any support for ‘own individual uses’ such as ‘instruction’: universities would act as the third party doing the copy on behalf of the student.

The quotation exception in Art.32.1 (which expressly covers teaching purposes) and has no restriction whatsoever in terms of beneficiaries –thus, open to any kind of educational institution and programs– remains paramount to exempt teaching uses in Spain (*see infra*).

In *Italy*, teaching uses are to be regulated by a government decree which may impose some restrictions in that respect.

(b) Individual users

Who is entitled to conduct the teaching use: only teachers or also students? Contrary to what Common law countries do, the majority of Continental Europe laws remain silent on this issue. In fact, so was the EUCD. Silence favors a wider variety of users (instructors, students, guests lecturers, etc.), provided that the use is done for teaching purposes. A few exceptions: *Switzerland* refers to “*by a teacher and his pupils*,” which may leave sufficient margin for a wide number of possible beneficiaries. Instead, *Liechtenstein* refers to “*by a teacher for teaching in class*” which may cast some doubt as to whether uses done by the students for purposes of instruction would also be exempted or not. Both Liechtenstein and Switzerland allow that copies be done by a third person on behalf of the teacher, such as by a library (Liechtenstein) or “by libraries, public institutions and copy shops” (Switzerland).²²⁹

(v) Nature and extent of works

Differences are also apparent as to which kind of works are covered by the national teaching exceptions and which are not, as well as to the amount of work that can be used (depending on the nature of the work).

As a departing point, it makes sense to assume that the extent of use exempted under a teaching exception should go beyond what is already exempted as a quotation (i.e., Art.10(1) BC and Art.5(3)(d) EUCD); otherwise, there would be no need for a separate exception specifically for teaching purposes.

Art.5(3)(a) EUCD and Art.10(2) BC used open-ended clauses to exempt all kind of works, be it in full or in part, ‘*to the extent justified by the non-commercial purpose to be achieved.*’ However, national solutions tend to be more specific.

– *Lawfully disclosed works, to the extent required by the purpose*

Most laws expressly require that the work used for teaching purposes has been *lawfully disclosed*; however, even when the law is silent about it, such a requirement may implicitly result from the moral right of divulgation –at least, in the countries where it is granted.

Likewise, some laws expressly limit the exempted use *to the extent required by the purpose*;²³⁰ but even when silent, this restriction will implicitly result from the purpose to be achieved which will ultimately define the extent of the exempted use: no more, no less. Notice that this defines both the amount of work that can be copied or used *and the number of*

²²⁹ These copies (made by third parties on behalf of the user) are subject to remuneration (Art.20.2).

However, libraries are not allowed to make these copies available online (only teachers and students can do so for teaching purposes).

²³⁰ *See*, i.e., Czech Republic (Art.31.1c), Estonia, Cyprus, Austria, Slovakia, Belgium, Greece, Spain,.

copies that can be made. In fact, a few laws expressly state that the exempted copies should be limited to the “quantities” required for the class or lecture (Austria, Hungary Art.35.5 and Germany).²³¹

CASE STUDY

Student downloads

Whether or not permanent downloads made by recipients (students), in any format: print-outs or digital storage, of the work transmitted as part of the instruction should be deemed exempted also under the teaching exception is not pacific.

Downloads might be exempted under the private use/copying exception (*see infra*) but they might also be deemed part of the teaching exception (after all, these copies are made as part of the instruction). One of the ‘advantages’ of including them under the teaching exception is that where remuneration schemes apply for it, permanent downloads or streaming formats could be taken into account to set different applicable fees. As a ‘draw-back,’ students’ downloads may end up –in some countries– subject to a double compensation regime: under the teaching license (voluntary or not) and as private copying (compensated by means of “blind” levy systems).

Similarly, when the *public performance* is exempted, most laws expressly require that the audience consists only of the teachers and students of the institution.²³²

– *Specific restrictions as to works and extent*

Although the majority of laws exempt the teaching use of *works* or of *literary and artistic works*, some laws shape the scope of the teaching use according to the works used. Let’s see them.

In some jurisdictions, the use (reproduction, distribution, communication to the public) of whole works is restricted to either *isolated articles or brief excerpts* (Romania Art.33.1) or *small/short works* (Germany Art.52a²³³ and Netherlands Art.16). A few laws restrict the exempted uses to only *parts or fragments of works* (France, Luxembourg, Portugal, Romania, Spain, Slovakia). *Works of visual art* are expressly included under the teaching exceptions in Slovakia, Germany, Netherlands,²³⁴ and Spain.²³⁵ As a curiosity, Italy requires that when

²³¹ In Germany, both exceptions are limited to the quantities required for use “within the group or participants in the instruction” (Art.52a and Art.53).

²³² See Estonia (Art.22), Greece (Art.27), Latvia (Art.26.2), Czech Republic (Art.35.2), Romania (Art.22.1g) and Slovakia (Art.30). See also Nordic countries.

²³³ See Germany (Art.52a) ‘small parts of a published work, short works or isolated contributions to newspapers or periodicals.’ German case law refers to 10% as a small part of a work which is exempted. However, higher fractions and more flexible rules are favored by legal scholarship.

²³⁴ Netherlands: in the case of short works and works of art, photographs and designs, the entire work may be used.

²³⁵ Despite exempting the use of isolated works of art or of photographic nature, Spain (Art.32.2) does not allow the making of compilations or collections of fragments of works or of isolated works of art, or of photographic or figurative nature.

“images and music” are made available on line for teaching uses (for non-lucrative purposes) it is done “in low resolution and for free” (Art.70.1bis)

When the exception only covers *reproduction*, the kind of works exempted tend to be narrower. For instance, *Austria* Art.42.6 only refers to *works of literature*; *Hungary* refers to “specific parts of a work published as a *book*, as well as *newspaper and periodical articles*” and *Greece* exempts the reproduction of “articles lawfully published in a newspaper or periodical, short extracts of a work or parts of a short work or a lawfully published work of fine art.” Instead, *Slovenia* (Art.50.3) permits the *reproduction* on any medium for the *internal use* in educational establishments of “*works from their own copies*” (no more than 3 copies, provided that this is *not done for direct or indirect economic advantage*).

Belgium is perhaps the best example of a different treatment under each exempted use: *articles* and *works of fine art* may be reproduced “in part or in whole,” but only “short fragments” of *other works* may be reproduced (Art.22.1–*4bis* and *4ter*); instead, no quantitative or qualitative restriction is imposed for the communication to the public (including making available online) which is open to all *works* (*4quater*). It remains to be seen whether the restrictions set for reproduction will ultimately extend over the making available online since, after all, it will also involve a reproduction.²³⁶

Restrictions to the nature of works that may be used for teaching purposes may also come indirectly as a result from the definition of the exempted rights. For instance, in *Slovenia*, the teaching exception in Art.49 permits the *public performance* of “a disclosed work;” However, as defined in Art.26, the right of public performance is restricted to recitations of a literary work and performances of musical and dramatic works in front of an audience. This means that, in practice, no works of art, photographs, audiovisual or sound recordings may be displayed or played for teaching purposes²³⁷ –they may be reproduced (under Art.50.3), but not displayed or shown or made available on line.

Nordic countries allow the reproduction of published works²³⁸ and of radio and TV broadcasts, as well as the *live* non-commercial performance of published literary or musical works (dramatic and audiovisual works being excluded). Nothing is said as to the amount of the work that can be copied, which will be implicitly measured according to *the extent required by the purpose* or expressly regulated by the applicable extended collective license which usually set a maximum of 20% or a number of pages (i.e., 10 or 30), whichever is less.

²³⁶ This is another example of how the fragmented approach of Art.5 EUCD may distort the effectiveness of the exceptions: any exception envisioned for communication to the public (and making available) should also include any reproductions necessary for the making available.

²³⁷ The right of public presentation (not included in the teaching exception of Art.49) is defined in Art.29 as “the exclusive right to communicate to the public, by technical means, an audiovisual work, a photographic work, a work of fine art, a work of architecture, urban planning, applied art, industrial design, and cartography, or a presentations of scientific or technical nature.”

²³⁸ Denmark also exempts the use of works of art in critical or scientific presentations.

CASE STUDY:

Fragments, short fragments, percentages

How short is a ‘short fragment’? How large is an ‘excerpt’? Are percentages enough? Is 5% short or 10% or 20%? These are some of the questions that arise when the exception refers to specific amounts of exempted use. Is 10 pages of a work enough to achieve the teaching purpose? What if the article or the chapter that the students have to comment on has 12 pages? In principle, any use above the permitted maximum (even one page) would fall outside of the exempted (or collective licensed) scope and would require authorization from the author for the whole use? Does this make any sense?

In addition to quantitative restrictions, qualitative exclusions are also difficult to justify. Why should the reading of a poem as part of a poetry lesson or the showing of a painting in an art lesson be allowed, but not the showing of a fragment of a film (or even the whole film!) to generate a debate on audiovisual narrative at the university? It is difficult to see the justification for this line-drawing (other than, perhaps, the ability of certain lobbies in securing their interests).

Quantitative and qualitative restrictions are not only difficult to manage (by the educational establishment) and enforce (by the right holders and CMOs), but they may end up compromising the quality of education –since teachers and professors will have a smaller pool of material to work with.

Instead, open and flexible solutions, in favor of using *all kind of works ...to the extent justified by the purpose,*” may be easier to apply and more in accordance with the ultimate goal of the teaching exception. Other flexible considerations include whether the portion used “substitutes for the work” or whether it “conflicts with the normal exploitation” (under the Three-Step-Test criteria). And, in order to comply with the Three-Step-Test, the use may be subject to different pricing and time conditions.

– *Works excluded*

Austria, France, Germany and *Spain* exclude *works intended for educational use* (textbooks, treatises, etc). In addition, *France* excludes *sheet music and digital editions of literary works*, while in *Germany* (Art.52a) *audiovisual works* can only be used (reproduced and made available online) for teaching purposes after 2 years upon release.

This kind of restrictions derive from the EUCD requirements and, ultimately, from the three-step-test.

(vi) Further conditions and requirements

Fair practice and the Three-Step-Test

Some laws expressly add other requirements to justify the exempted use. For instance, *Luxembourg, Greece* (Art.21) and *Romania* require that the use is in accordance “*with fair practice;*” *Belgium* and *Greece* (Art.21) require that it does *not prejudice the normal*

exploitation of the work; and *Portugal* (Art.76.2) refers to “provided that it does *not create confusion* with the work used, and does *not prejudice the interests* on these works.” Also the *Netherlands* requires that the use is “*in conformity with what may be reasonably accepted in accordance with social custom*” (Art.16.1). Depending how we read these requirements, they may be already implicit in the Three–Step–Test or they may add additional requirements.

– *Limited recipients*

We already mentioned that some laws expressly state that the exempted copies should be limited to the “quantities” required for the class or lecture (Austria, Hungary Art.35.5, Germany).²³⁹ The “extent justified by the purpose” will lead to the same conclusion also when the teaching exception is silent.

Yet, as more and more teaching exceptions apply to online teaching, specific language has been introduced to further reinforce the same idea: that the teaching use must be limited to registered participants in the course or class.

French law requires that “the public to whom the communication or reproduction is directed is composed mostly of pupils, students, teachers ... directly related to it” (Art.L122-5(3)e), and since this exemption applies to online uses for teaching purposes, it implies a requirement to enable passwords or other technological features to restrict online access to registered students only.

In *Belgium communication to the public* (including the making available online) (Art.22.1-4*quater*) is only exempted to the extent that “*it takes place within the context of the normal activities of the establishment*” and that it is conducted “*solely by means of closed transmission networks of the establishment*”. This wording may complicate the effectiveness of this exception; in principle, it does not require that the network be only accessible within the premises of the educational establishment,²⁴⁰ but any different interpretation might severely restrict its application to on-line teaching.

– *Source and name of the author*

Most laws expressly require that the source and name of the author be indicated. But even when the law is silent, both requirements directly spring from the moral right of attribution (at least, as far as the name of the author) –where applicable–, and should therefore be enforced also for any uses covered under the teaching exception. For space considerations, we have omitted any reference to the indication of source/name.

²³⁹ In Germany, both exceptions are limited to the quantities and use “within the group or participants in the instruction” (Art.52a and Art.53).

²⁴⁰ Compare with the language used in Art.5(3)(n) EUCD “*communication or making available ... by dedicated terminals on the premises of establishments*”, which has been transposed by Art.22(1)(9) as “*by means of dedicated terminals accessible within the premises of these establishments*” (“au moyen de terminaux spéciaux accessibles dans les locaux de ces établissements”).

(vi) Compensation

The requirement of compensation is another important ground for dissimilarities.

Within the EU Member States, compensation (remuneration) for the exempted teaching use is only required in 5 countries: *Belgium, France*,²⁴¹ *Germany* (Art.52a –reproduction and making available), *Switzerland* and the *Netherlands*.²⁴²

Luxembourg,²⁴³ *Portugal* and *Italy*²⁴⁴ remain silent.

The majority of laws in the EU expressly exclude any kind of remuneration or compensation to authors or right holders. One may only wonder whether the absence of any fair compensation will clear the three–step–test, but such an exam could only be done *in casu*, taking into account the scope of uses (and exploitation acts) exempted and the nature and extent of the works subject to the exception.

B. TEACHING AND INSTRUCTION (OUTSIDE THE EU)

Outside the EU, teaching uses in these 19 countries are exempted under a combination of three exceptions: for reproduction (mostly, reprography), for public performance and for the making of teaching anthologies –which becomes fundamental (especially to exempt –if possible– online teaching uses).

Countries examined in this group are *Albania, Andorra, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Croatia, Georgia, Kazakhstan, Kyrgyzstan, Macedonia, Moldova, Montenegro, Russia, Serbia, Tajikistan, Turkey, Ukraine* and *Uzbekistan*.

(i) Performance

Only five countries exempt public performances (plays, recitals or shows in front of an audience) done for *educational purposes*: *Bosnia & Herzegovina, Croatia, Macedonia, Turkey* and *Armenia*.

²⁴¹ In France (Art.L122-5(3)e) the remuneration “will be negotiated on a forfait basis”.

²⁴² The fees are negotiated between the Publishers’ Association and the educational institutions, and then collected by Stichting PRO (which redistributes the monies collected). These tariffs are usually established on a per-page basis (different fees apply to analog or digital formats, Dutch or foreign publications, commercial and non-commercial institutions, etc) which is multiplied by the number of “readers” (this is called the “Reader Agreement”).

²⁴³ According to the explanatory memorandum accompanying the EUCD implementation bill (No.5128 of 14 May 2003), Luxembourg refused to establish a system of levies on recording supports and equipment, and acknowledged that *fair compensation* –as required by the EUCD– does not necessarily amount to *remuneration* and that ‘alternative more balanced means of compensation should be explored’. Perhaps educational institutions and collecting societies (or copyright owners) may agree on some compensation regime for works used for teaching purposes.

²⁴⁴ Italy only requires compensation for teaching anthologies (Art.70.2).

(a) *Exempted acts and purposes*

Bosnia & Herzegovina, Croatia, Macedonia, Turkey exempt the public performance for the purposes of “face-to-face education and instruction” (*Turkey*)²⁴⁵ and of “direct teaching” (*Bosnia & Herzegovina, Croatia and Macedonia*).

Because of the partial approach (to the extent that reproduction and/or transmission of the performance are not exempted), these exceptions are unfit to cover online teaching uses beyond the facilities of the educational establishment. In addition, as we will see (*infra*), most of them expressly allow performances in school events and celebrations.²⁴⁶

This is precisely what *Armenia* refers to when exempting the performance of lawfully published *musical works*, “in the course of *educational activities* with the participation of teachers and students” (Sec.22.2-g).

(b) *Beneficiaries. Nature and Extent of works. Compensation.*

No distinction is done in terms of beneficiaries: all educational establishments qualify to benefit from these exceptions. They refer, in general, to works, literary or artistic works, or disclosed works (except for *Armenia*, limited to musical works).

None of them require remuneration.

CASE STUDY

Non-exempted acts (performance and display) in face-to-face teaching

Within a group of 19 countries, is it not surprising that only 5 of them expressly exempt performances? Is it surprising that none of the 19 refer to display of works for teaching purposes? Does it mean that the recitation of a poem, dictation of a literary passage, display of an art work or photograph... must be licensed by the author?

Although forgotten, performances and displays of works done in the course of teaching may still be allowed without the need of a license.²⁴⁷ The BC is a good example: Art.10(2) BC only refers to teaching acts which involve reproduction, distribution and communication to the public. And we concluded (*see supra*) that performances and displays of works (which do not ‘transcend’ the time and space of a physical classroom) may be exempted either under a *maiori ad minor* reading of Art.10(2) BC or as quotations under Art.10(1) BC. The same interpretative approach may apply in these countries where the specific teaching exceptions are restricted to

²⁴⁵ In addition, *Turkey* (Art.35.4) permits -as a quotation- to show published works of fine arts in scientific conferences or courses by means of projection or similar means in order to describe the subject; Once again, it is *de facto* limited to face-to-face environments.

²⁴⁶ See *Bosnia & Herzegovina, Croatia, Macedonia*.

²⁴⁷ A *de minimis* reasoning might also explain the silence: the acts of display, performance that take place within the walls of a classroom and do not involve any reproduction or transmission beyond it, are “too small” for the law to bother.

some acts of exploitation (i.e., reproduction, performance at school events, etc) but forsake the ‘more basic’ instructional acts.

(ii) Reproduction

Almost all the countries in this group provide for at least one exception to allow the making of copies (usually, reprographic) for teaching purposes.

(a) *Exempted acts and purposes*

In addition to exempting performances, *Croatia* (Art.84) and *Macedonia* (Art.34-a) allow non-profit educational institutions to *reproduce* in any media works from their own copies, in not more than one copy (Croatia) or three-copies (Macedonia) and without any compensation.²⁴⁸ *Armenia* (Art.24) allows educational institutions to do reprographic reproductions (digital formats excluded) of fragments of or short lawfully published works (except computer programs) in one or more copies “*for classroom studies*,” provided that it is not done for profit making.

Instead, no specific reproduction exception for teaching purposes is in place in *Bosnia & Herzegovina* and in *Turkey*; in these countries, reproductions for teaching purposes would only be exempted to the extent that they qualify as a private copy: as a reproduction of published works is allowed “for purposes of improving one’s personal knowledge”, provided that such reproduction is neither intended for collective use nor for profit-making use (*Bosnia & Herzegovina*, Art.51.1d) or duplication (and adaptation) of works “for personal usage” without collective or profit-making purposes (*Turkey*, Art.38). Neither one is subject to compensation.

Andorra, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Montenegro, Russia, Serbia, Tajikistan, Ukraine and *Uzbekistan* only exempt reproductions – some of them, only reprography. None of them require compensation to authors.

Andorra (Art.9.1b), *Azerbaijan* (Art.18.1c), *Georgia* (Art.22c), *Kazakhstan* (Art.19.2), *Kyrgyzstan* (Art.19.2), *Moldova* (Art.21.1), *Tajikistan* (Art.20.2), *Uzbekistan* (Art.28.2) exempt the making of *reprographic copies* (neither analog nor digital copies are allowed) in “*face to face teaching*” (*Andorra*), “*for classroom use*” (*Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan* and *Uzbekistan*), “*for teaching*” (*Georgia*), and “*for classroom lessons*” (*Ukraine* Art.23.2).

Instead, *Belarus* (Art.20.3),²⁴⁹ *Ukraine* (Art.23.1),²⁵⁰ *Serbia* (Art.43) and *Montenegro* (Art.43)²⁵¹ may cover *analog and digital copies*: copies done by educational institutions “for

²⁴⁸ In addition, reprography for private use is compensated in Macedonia by means of equipment levies (Art.21f).

²⁴⁹ The former Act of 1996 only exempted reprographic copies; the current reference to “reproduction” seems to include both analog and digital copying for educational lessons.

educational lessons,” provided that they are not subject to commercialization (*Belarus*); copies made by educational institutions “as *illustrations for training*” to the extent required by the purpose (*Ukraine*); copies made for non-commercial purposes “in the field of *education* [and] *examination*” (*Serbia, Montenegro*).

In *Russia* (Art.20), educational establishments may reproduce works in a single copy “to be used in class,” provided that it is done without gainful intent. No discrimination operates in terms of educational establishments but only one single copy can be done.

Since they all fail to exempt *communication to the public* (or *making available*) these exceptions remain applicable only within face-to-face teaching. However, it should be noted that these narrowly defined teaching exceptions tend to be “compensated” with broad quotation exceptions (sometimes expressly regarded for teaching purposes),²⁵² as well as with exceptions permitting the making of teaching compilations.²⁵³ For instance, the generous exceptions in Bosnia & Herzegovina and Turkey for the making of teaching compilations may exempt reproductions for instructional use. *See infra*.

(b) Beneficiaries. Further requirements.

In terms of beneficiaries, all these exceptions refer to educational institutions at large, but require as a condition that the reproduction is not done for commercial purposes or gainful intent.²⁵⁴ Only *Andorra* (Art.9.1b), *Croatia* (Art.84), *Macedonia* (Art.34-a) and *Turkey* require that the educational institution itself has no profit making goal.

(c) Nature and extent of works.

Some of these exceptions are very specific as to the nature and extent of works that may be reproduced.

[Footnote continued from previous page]

²⁵⁰ Since Art.23 distinguishes between section (1) “reproduce ... as illustrations for training” and section (2) “reprographically reproduce ... for classroom lessons ...by educational institutions”, the first section may be easily read as to include analog and digital copies. In addition, libraries are allowed to make one single photocopy upon individuals’ requests for the purpose of education, training or private research, provided that this is not a regular event and there is no restrictions by CMO concerning the terms and conditions for the reproduction.

²⁵¹ In addition, *Montenegro* (Art.53) and *Serbia* (Art.53) grant educational institutions and public libraries a remunerated statutory license to reproduce works by means of photocopying or similar for educational purposes.

²⁵² All of them have quotation exceptions; and *Belarus, Croatia* and *Moldova* quotation exceptions specifically mention teaching purposes.

²⁵³ Except for *Moldova*, all of them allow the making of teaching compilations, albeit with different scopes (for instance, *Montenegro* and *Serbia* only allow reprographic teaching compilations).

²⁵⁴ *Belarus* (Art.20.3), *Serbia* (Art.43), *Montenegro* (Art.43), *Azerbaijan* (Art.18.1c), *Georgia* (Art.22-c), *Kazakhstan* (Art.20), *Kyrgyzstan* (Art.20.3), *Moldova* (Art.21.1), *Macedonia* (Art.33 and Art.34-1), *Russia* (Art.20), *Uzbekistan* (Art.29).

Andorra (Art.9.1b) exempts the *reprographic reproduction* of “a published article or other short work or short extract of a writing, with or without illustrations.”²⁵⁵ *Armenia* (Art.24), *Azerbaijan* (Art.18.1c), *Georgia* (Art.22.c and b) *Kazakhstan*, (Art.20), *Kyrgyzstan* (Art.20), *Moldova* (Art.21.1) *Tajikistan* (Art.20.7), *Russia* (Art.20), *Uzbekistan* (Art.29) do the same with respect of “isolated articles... short extracts from lawfully published written works ...short works in periodical publications,” all of them excluding computer programs. And *Ukraine* (Art.23.2) exempts reprographic reproduction of “published articles and other small works and excerpts from written works with or without illustrations.”

Beyond reprography, *Belarus* (Art.20.3) exempts reproduction of “isolated articles or succinct works lawfully published in collections, newspapers or other periodical publications, of short extracts from lawfully published written works;” *Serbia* (Art.43) and *Montenegro* (Art.43) exempt the reproduction of “short excerpts from disclosed works;” and *Ukraine* (Art.23.1) allows reproduction of “excerpts from published written works or audiovisual works.”

Andorra (Art.9.1b), *Moldova* (Art.21.1) and *Ukraine* (Art.23.1) formally require that the reproduction adjusts to the extent justified by the purpose. *Ukraine* (Art.23.2) and *Andorra* (Art.9.1b) require that the reproduction is a single (not regular) event.

(d) Compensation.

Except for the reprographic copying by educational institutions in *Serbia* and *Montenegro* (which is subject to a statutory license), none of the visited exceptions require compensation. However, *Moldova* (Art.21.1) and *Ukraine* (Art.23.2) exempt reprographic reproduction on condition that no license is offered by a collecting society (once again, an attempt to induce voluntary collective licensing).

(iii) Educational anthologies, recordings and broadcasts

The making of teaching compilations and recordings will be specifically dealt with under a general subchapter below. But, as we mentioned, the vast majority of laws in this group provide for such an exception (only *Moldova*, *Montenegro* and *Serbia* fail to do so).²⁵⁶ This is the only teaching exception provided for in *Albania* (Art.27.2).

For the moment, we will only examine how these exceptions may apply to allow “strict” teaching and instructional uses.

²⁵⁵ In addition, *Andorra* requires that ‘the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions’.

²⁵⁶ *Montenegro* (Art.53) and *Serbia* (Art.53) grant educational institutions and public libraries a statutory license (remunerated) to reproduce works by means of photocopying or similar for educational purposes, which may to a certain extent allow the making of photocopied “teaching compilations.” The same may apply under the teaching exception in *Moldova* (Art.21.1) which allows teaching establishments to make reprographic copies for use in classroom; this exception is non-remunerated but it only applies failing a license offered by a collecting society.

(a) Scope and purposes

Armenia (Art.22.2b), *Azerbaijan* (Art.19.2), *Belarus* (Art.19.2), *Georgia* (Art.23.b), *Kazakhstan* (Art.19.2), *Kyrgyzstan* (Art.19.2), *Russia* (Art.19.2), *Tajikistan* (Art.20.2), *Ukraine* (Art.21.2) and *Uzbekistan* (Art.28.2), exempt *any use* of lawfully disclosed works and extracts thereof, for the purpose of illustration in publications, radio and TV broadcasts, and audio and video recordings of educational character.

Bosnia and Herzegovina (Art.50.1a) and *Macedonia* (Art.29) allow *reproduction and communication to the public* of works in compilations of readings and textbooks intended for education and teaching. In similar terms, *Croatia* (Art.85) only permits *reproduction (on paper or similar) and distribution*.

Andorra (Art.9.1a) only permits *reproduction* of short parts of published works by way of illustration in writings or sound or visual recordings for teaching.

Albania (Art.27.2) allows both *reproduction and translation* of a work or part of it, in “anthologies for educational purposes.”

In *Turkey* (Art.34), selections and collections of disclosed works may be made for training and education, by way of borrowing to the extent justified by the purpose, provided that no harm is done to the interests of right holders and it does not conflict with the normal exploitation of the work. This exception also permits the making and communication to the public of school radio broadcasts prepared by schools and approved by the Government.

(b) Beneficiaries. Nature and extent of works. Further requirements

In all of them, the reproduction or use is only permitted to the extent justified by the purpose. In addition, *Albania* requires that the use does not prejudice the rights of the owners, *Andorra*, that the reproduction is compatible with fair practice, and *Armenia* restricts its application in the case of databases to non-commercial purposes.

Croatia (Art.85) allows it on condition that the author has not expressly prohibited such use and that it is not prejudicial to his honor or reputation.

(c) Compensation

Remuneration is only required in *Bosnia and Herzegovina* (Art.50.1a), *Macedonia* (Art.29) and *Croatia* (Art.85).

(d) Are instructional uses exempted?

All these exceptions draw clear inspiration from Art.10(2) BC and the Tunis Model Law; accordingly, they pose similar questions as we examined earlier. Among them, whether strictly *instructional* uses (such as reading a poem in a lecture, dictating a fragment of a work, showing a work of art to examined, etc) are exempted or not.

As we already concluded under Art.10(2) BC, nothing justifies keeping instructional uses out of their coverage (*maiori ad minus*). And since they draw inspiration from these international instruments, the same conclusion may apply in these countries, for similar reasons as examined under Art.10(1) BC (*see supra*): the specific reference to publications, recordings and broadcasts was not aimed at restricting its scope but, on the contrary, at explaining that all means of exploitation are covered under it.

A substantial reasoning in favor of a broad and flexible interpretation of these provisions is the fact that the scope of uses exempted for related rights (performers and producers) in these countries is wider (*see infra* Part IV); unless we want that a teaching use exempted as far as related rights is not so far as authors' rights, these exceptions must be read under the same light as Art.10(2) BC.

Furthermore, what may be hiding behind these provisions (like Art.10(2) BC does –*see supra*) is the *de minimis* doctrine: “small” uses (such as performances as part of the instruction that takes place within the walls of a classroom) were never contemplated by the law and, hence, need not be formally exempted by it. Of course, digital instructional uses (be it online or not) may not always *de minimis* (i.e., they may easily interfere with the normal exploitation of a work), and therefore, not so often deemed exempted.

Nevertheless, as always, the scope of each teaching exception will be interpreted by national courts within each country –and we have not had access to this specific information. Failing either interpretation (*maiori ad minus* or *de minimis*), the exemption of instructional uses will need to be addressed under the quotation and private use/copying exceptions (*see infra*).

CASE STUDY

A non restrictive reading

These exceptions for the making of teaching anthologies may substantially enlarge the scope of exempted uses for teaching, especially in these countries where the other teaching exceptions are very narrow in scope (i.e., they only exclude some reproductions or performances). Let's see some examples.

Macedonia (Art.29) allows reproduction and communication to the public of already disclosed works for purposes of illustration of teaching in school books, reading-books and similar publications, without commercial goals. This goes substantially beyond the restrictive scope (3 copies only) of the reproduction exception in favor of non-profit educational institutions (Art.34-a).

In *Turkey*, Art.34 allows educational institutions to create selected and collected works from their states understandably aimed at training and education, to the extent justified by the purpose and in order to describe the contents of the selected and collected works. This exception will compensate for the lack of any exception for reproduction (only public performances in face-to-face instruction and education were exempted in Turkey, Art.33).

In *Russia*, where only copies made to be used in class are exempted (Art.20), a broad interpretation of Art.19.2 (and the generic reference to *use*) may help exempt performances done as part of the instruction.

This exception is paramount in *Albania* (Art.27.2) since it contains all teaching uses exempted in that country: *reproduction* and *translation* of a work or part of it, in “anthologies for educational purposes.”

Furthermore, when the teaching compilation exception permits *any use* (i.e., Russia) or, at least, *reproduction and communication to the public* (Macedonia, Bosnia & Herzegovina) it might easily apply to digital online uses: i.e., online uses might be deemed exempted in Russia, but not in Croatia (where only reproduction and distribution is exempted).

C. TEACHING ANTHOLOGIES

The vast majority of laws within the 48 jurisdictions in this group regulate the making of anthologies or compilations of materials to be used for educational purposes.

The possibility that national laws exempt the making of teaching anthologies is allowed under Art.5(3)(a) EUCD: in its 1997 Explanatory Memorandum of the Proposed Directive, the Commission expressly mentioned the ‘compilation of an anthology’²⁵⁷ as an example of teaching uses under Art.5(3)(a) EUCD. The neutral EU solution is aligned with Art.10(2) BC.

And as we already concluded under Art.10(2) BC, the fact that teaching anthologies may be exempted does not mean that all teaching anthologies *per se* will be allowed: only those –and to the extent– that are used for teaching purposes and comply with the non-commercial requirement, as well as with the three-step-test, will qualify.

CASE STUDY

Exempted compilations under Art.5(3)(a) EUCD

A compilation of materials in a physical format (a CD or DVD), which is sold to students, would neither satisfy the “non-commercial purpose” required by Art.5(3)(a),²⁵⁸ nor the Three-Step-Test: since it would conflict with the normal exploitation of the work and unreasonably prejudice the author’s legitimate interests.

Instead, under a remunerated scheme, the posting materials online for teaching purposes which are available only to only registered students or sending a CD to registered students only, could clear the Three-Step-Test²⁵⁹ and, thus, be allowed under the teaching exception.

The scope and conditions of the exceptions that allow for the making of teaching compilations exceptions differ from one jurisdiction to another; similarities and differences cross-cutting within EU and non-EU countries. The most evident is between remunerated

²⁵⁷ See EUCD Commission’s Proposal, *op.cit.supra*, (COM(97) 628 final) p.40.

²⁵⁸ The answer to what is non-commercial remains open: is it commercial only when “sold” to students and “non-commercial” only when distributed “for free” among students registered in the course? But then, what if the registration includes a fee for the compilations and teaching material?

²⁵⁹ It is expected that most digital teaching compilations will require remuneration to the authors in order to clear the Three-Step-Test.

(i) and non-remunerated (ii) exceptions, and the few countries which do not provide for such an exception (iii).

(i) Non remunerated exception

The making of teaching exceptions *for free* is allowed in both EU and non-EU Member States.

As we will see, these exceptions permit the making of publications and, in many cases, of recordings and broadcasts for teaching purposes.

All of them restrict the exempted use “to the extent required by the purpose” and provided that it is “compatible with fair practice”. Some provisions even expressly refer to the Three-Step-Test requirements: that the exempted use does not conflict with the normal exploitation of the work (Turkey) and that it does not prejudice the legitimate interests of the owner (Albania).

The exceptions in this group do not require remuneration, and, in fact, all of them expressly deny it –within the scope of the exception. To the extent that these exceptions are not remunerated, the scope of uses exempted should be *a priori* narrower than under remunerated schemes –specially in EU countries where all exceptions must comply with the Three-Step-Test criteria.

– *Within the EU:*

Bulgaria, Czechia, Cyprus, Hungary, Latvia, Lithuania and Romania permit the non-remunerated inclusion of works (usually fragments or small works) in a compilation for teaching purposes, to the extent required by the purpose, and provided that it is compatible with fair practice.

In some cases, the language used refers to “in a volume” (*Bulgaria*) or “reproduction and dissemination” (*Hungary*), which might restrict the scope of the exception to literary works and anthologies in print format. In others, the exempted scope covers not only *publications* but also *broadcasts and recordings* (*Cyprus, Latvia, Lithuania and Romania*) made for teaching purposes.

CASE STUDY

The scope of non-remunerated teaching anthologies

Bulgaria (Art.24.3) permits the *use* of parts of published works or of a moderate number of small works *in a volume that is required for purposes of preparing an analysis, commentary or other scientific research...if it is done for educational purposes.*

The Czech Republic (Art.31.1b) permits the inclusion of excerpts from a work or entire small works into *a work designated for teaching purposes, for the clarification of its contents*, to the extent complying with fair practice and required by the specific purpose.

Cyprus (Art.7.1e) permits the inclusion of a work in a broadcast, communication to the public, sound recording, cinematographic film or collection of works *by way of illustration for teaching purposes*, provided that it is compatible with fair practice.

Hungary (Art.34.2-3) permits the borrowing (beyond the scope of quotation), *reproduction and dissemination* of part of a disclosed work or a work of minor size for purposes of education in school and universities, provided that it is not used on a commercial scale.

Latvia (Art.21) allows the *use* of disclosed or published works (or of fragments of them) in *textbooks* which are in conformity with educational standards, *in radio and TV broadcasts, in audio-visual works, visual aids and alike...* specially created and used in face-to-face teaching process in educational institutions, for non-commercial purposes and to the extent justified by the purpose.

Lithuania (Sec.22.1) allows *reproduction* of short published works or short extracts of published works, for teaching purposes, *by way of illustration, in writings, sound or audiovisual recordings*, provided that the reproduction is related to study programs and does not exceed the extent justified by the purpose [this is the only exception provided for teaching purposes in Lithuania].

Romania (Art.33.1c) permits the *use* of isolated articles or brief excerpts of works in *publications, TV or radio broadcasts or sound or audiovisual recordings* exclusively intended for teaching purposes, to the extent justified by the intended purpose.

In *Greece* (Art.20.1), literary works and works of fine art may be reproduced in educational *textbooks* approved for use in primary and secondary education by the Ministry (university textbooks are excluded), according to the official syllabus; this is only permitted *in printed format* and only benefits *primary and secondary education* (not universities). In addition (Art.20.2), after the death of the author, a small part of his work production may be reproduced in a lawfully published anthology of literary works of more than one writer, without the consent of the right holders and without remuneration to them, provided that it does not conflict with the normal exploitation of the works from which the texts are taken.

– *Outside the EU:*

The making of teaching compilations is permitted, without any compensation for authors and publishers, in Albania, Andorra, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Turkey, Ukraine and Uzbekistan.

Albania (Art.27.2) allows the *reproduction and translation* of works or parts of it in *anthologies* for educational purposes, provided that the use does not prejudice the rights of the owners.

Andorra (Art.9.1a) permits *reproduction* of short parts of published works by way of illustration *in writings or sound or visual recordings* for teaching, to the extent justified by the purpose and provided that such reproduction is compatible with fair practice.

Armenia (Art.22.2b),²⁶⁰ *Azerbaijan* (Art.19.2), *Belarus* (Art.19.2), *Georgia* (Art.23.b), *Kazakhstan* (Art.19.2), *Kyrgyzstan* (Art.19.2), *Russia* (Art.19.2), *Tajikistan* (Art.20.2), *Ukraine* (Art.21.2) and *Uzbekistan* (Art.28.2), exempt *any use* of lawfully disclosed works

²⁶⁰ Armenia restricts its application in the case of databases to non-commercial purposes.

and extracts thereof, for the purpose of illustration in *publications, radio and TV broadcasts, and audio and video recordings* of educational character, to the extent justified by the purpose.

In *Turkey* (Art.34), *selections and collections* of disclosed works may be made for training and education, by way of borrowing to the extent justified by the purpose, provided that no harm is done to the interests of right holders and it does not conflict with the normal exploitation of the work. This exception also permits the making and communication to the public of school *radio broadcasts* prepared by schools and approved by the Government.

(ii) Remunerated

Other countries (within and outside the EU) permit the making of teaching anthologies subject to remunerated schemes.

– *Within the EU:*

Austria, Germany, Italy, Netherlands, Poland, Portugal and *Slovenia* allow the making of teaching compilations subject to remuneration –thus, functioning as a legal (statutory) license subject to *collective management*.

Austria, Germany and *Italy* only exempt *reproduction and distribution*; *Slovenia* exempts *reproduction, communication to the public and translations*; *Netherlands, Poland* and *Portugal* use the general term “*include*” which is neutral enough to permit reproduction, distribution, translation and communication to the public in any means, provided that the other conditions are fulfilled.

The nature and extent of works that may be used in the making of such compilations is different in all these countries, but –either formally or implicitly stated–, such a use will only be permitted to the extent that is justified by the teaching or instructional purposes and provided that it complies with the three–step–test. The remuneration scheme may indeed grant some flexibility to the scope of the permitted use, but it will never permit uses that go beyond what is necessary for the teaching purpose and conflict with the normal exploitation of the work used prejudicing the author’ and right holder’s legitimate interests. The amount of work that can be used and the specific compensation to be paid will depend on the circumstances of each case (and country, of course).

Austrian law excludes from the exempted instructional compilations the use of works intended for teaching or training. The same result may be reached in *Netherlands* and *Portugal* where the exempted use must be “in accordance with what might be reasonably accepted under the rules of social custom” and it should “not prejudice the interests on these works”.

Some of these exceptions specifically mention textbooks, while most of them refer in general to anthologies and collections. None of them refers to recordings and broadcasts but these may, in some cases, qualify as an anthology or collection done for teaching purposes.

CASE STUDY

Teaching compilations under a legal license

In *Austria*, works of all kind may be *reproduced and distributed* in a collection containing the works of several authors and intended for use in schools or for educational purposes... for the purpose of elucidating the content, to the extent justified by the non-commercial purpose.

Germany (Art.46.1) allows the *reproduction and distribution* of reasonable parts of works of any kind, of entire short literary or musical works, and of individual works of art or photography, incorporated in a collection (consisting of works of several authors) intended for school or instructional use.

Italy (Art.70.2) allows *reproduction* (in paper) in anthologies for school use, according to the terms specified in Regulations. The legal license (managed by SIAE and AIDRO) is limited to reproducing 15% of the work; licensing beyond 15% requires voluntary licensing.

In the *Netherlands* (Art.16.3), the “*taking over* in a compilation (including translations)... for use as illustration for teaching purposes” is permitted as far as “short works or short passages of works done by one author” and “a small number of works of art, photographs or designs only if they are reproduced in such a way that they differ considerably in size or manufacture from the original work,” and provided that it is in accordance with what might be reasonably accepted under the rules of social custom.

Poland (Art.29.2) permits the *inclusion* of disclosed short works or fragments of larger works “in textbooks and readings books (collections)” as well as “in anthologies for didactic purposes.”

Portugal (Art.75.2h) allows the *inclusion* of short works or of fragments of works of others in one’s own work intended for education, provided that it does not create confusion with the work used, and does not prejudice the interests on these works.

In *Slovenia* (Art.47) it is permitted to *reproduce (including translation) and communicate to the public* parts of disclosed works and single works of photography or fine arts of several authors, in readings and textbooks intended for teaching.

Belgium (Art.21) permits the making of teaching compilation only after the author’s death. The compilation of an anthology intended for teaching is subject to the consent of the authors while alive; after once they have died, their works may be included in teaching compilations subject to equitable remuneration as agreed between the parties or, failing that, as determined by the court in accordance with fair practice.

As a variant to the legal license regime, *Nordic countries*²⁶¹ allow the reproduction of short passages or minor portions of literary works as well as short works and musical works

²⁶¹ See Denmark, Finland, Norway, and Sweden (Sec.18) and Iceland (Sec.17).

(provided that five years have elapsed from their publication), in educational compilations for non-commercial purposes, by means of “extended collective licenses”. The exceptions do not apply to works intended for use in education. So far, these exceptions (and the applicable extended collective licenses) only cover the reproduction in printed form (Norway and Finland exclude digital formats), but as we already mentioned this license is being negotiated to include the making available online.

– *Outside the EU:*

Bosnia and Herzegovina (Art.50.1a) and *Macedonia* (Art.29) allow *reproduction and communication to the public* of works in *compilations of readings and textbooks* intended for education and teaching, subject to remuneration. For similar purposes and under similar terms, *Croatia* (Art.85) only permits *reproduction (on paper or similar) and distribution*.

(iii) No exception for the making of teaching anthologies

No specific exception for the making of teaching compilations exists in *France, Spain,*²⁶² *Liechtenstein, Luxembourg, Malta, Slovakia* and *Switzerland*, as well as in *Moldova, Montenegro* and *Serbia*.

In these countries, teaching compilations will only be exempted to the extent that they qualify under either the general teaching purposes or quotation exceptions,²⁶³ and as we saw, they are not always flexible enough (specially in terms of nature and extent of works used) as to meet the kind of uses that a teaching compilation usually entails.

In addition, exceptions and limitations set for *reprographic copying* must also be taken into account, especially when granted for educational contexts,²⁶⁴ since they may to a certain extent cover the making of *tangible* compilations intended for teaching purposes. Yet, these schemes (exceptions or legal licenses) would hardly cover online uses.

As a result, teaching compilations –and specially, online digital compilations– will require in these countries a license from a CMO or copyright owner. Unfortunately, the

²⁶² Spain (Art.32.2) expressly prohibits the making and exploitation of teaching compilations or collections of fragments of works or of isolated works of art or photography, without the authors’ consent –unless, of course, to the extent that they may qualify as a quotation (envisioned for teaching purposes, *see supra*).

²⁶³ For instance, the compilation for teaching purposes might be exempted under Art.22.1b in Liechtenstein or Art.18.1b in Switzerland which permits “any use” of a work by a teacher for teaching purposes, and are both subject to remuneration.

²⁶⁴ In France (Art.L122-10), reprography is subject to remunerated *compulsory* collective licensing. In Spain, reprographic copying done by educational establishments requires a license from authors/owners (RD 1434/1992, Art.10: which excludes copies done at copy shops, libraries, educational institutions, etc. from the scope of the private copying exception in Art.31.2); No compulsory licensing or exception for reprography exists in Spain but in practice reprographic licensing is usually done by means of collective licensing (operated by CMOs). Montenegro (Art.53) and Serbia (Art.53) grant educational institutions and public libraries a statutory license (remunerated) to reproduce works by means of photocopying or similar for educational purposes. The teaching exception in Moldova (Art.21.1) allows teaching establishments to make reprographic copies for use in classroom; this exception is non-remunerated but it only applies failing a license offered by a collecting society.

licensing system for the making of teaching compilations is not as evolved in the EU as in the USA (*see supra*).

CASE STUDY

The making of digital online anthologies: trapped between exceptions and licenses?

In the traditional sense, we all know what a teaching compilation (anthology) looks like –a list of preexisting materials selected and arranged in order to be used as part of the instruction. In the analog world, it is easier to distinguish between materials used in the course of instruction (during a lecture)²⁶⁵ and a compilation of materials for teaching purposes that the student gets before or without attending the lesson itself.

Instead, in a digital teaching context it is very difficult to distinguish between material that is “used in the course of the instruction” and a “teaching anthology”; this is why the all-encompassing EU solution makes sense. However, solutions existing in domestic laws will not always cover online (web-based) teaching anthologies. For instance, the making of online teaching anthologies might be permitted under exceptions that are not restricted to any specific rights or means of exploitation and subject to remuneration, such as in Netherlands, Poland, Portugal, Slovenia. Instead, they will not be permitted in Austria, Germany, Italy or the Nordic countries (at least, until the extended collective licenses include both digital reproduction and the making available) or before the authors’ death, in Belgium. Online teaching compilations will never be exempted in Greece, where only printed formats are exempted. Similarly, outside the EU, Bosnia & Herzegovina and Macedonia –which permit reproduction and communication to the public (under remunerated schemes)– might more easily allow online digital teaching anthologies than Croatia –which only permits reproduction and distribution of teaching anthologies on paper or similar.

When the exception is non-remunerated, its application to online digital uses may be more difficult since it may conflict with the normal exploitation of the work; especially in EU member States where the Three-Step-Test criteria must regulate the application of the statutory exceptions.

Besides, most of these laws say nothing as to whether the teaching compilation may consist of digitized material (previously published in non-digital format).

In short, the making of teaching compilations becomes fundamental in a digital context, but its exemption is not assured in all jurisdictions (either under remunerated or for-free schemes). Online and digital teaching compilations remain *de facto* subject to voluntary licensing –because even when the statute might exempt them, educational institutions are reluctant to incur in any risks. The problem arises in jurisdictions where voluntary licensing for teaching uses is not mature, and educational establishments end up ‘trapped’ between an insufficient system of statutory exceptions for teaching

²⁶⁵ For instance, the professor writes it on the blackboard, reads the poem to the students or shows the graphic work to them, or also when he distributes a literary text with some words missing to be filled out by students.

purposes and an insufficiently developed system of voluntary licensing (*see infra* Part V).

D. QUOTATION AND PRIVATE USE/COPYING

In addition to the specific teaching exceptions examined, the exceptions provided in general for purposes of quotations and private use/copying may also exempt some of the acts that take place in an educational context.

In this chapter we will examine the national solutions in both EU and non-EU countries, but specific reference will also be made to the solutions provided for in the EUCD.

(i) Quotations

All the national laws in the Civil Law group exempt quotations.

The quotation exception remains fundamental for a variety of teaching uses: reproducing or reciting parts of a literary work or an entire poem to be commented or analyzed as part of the instruction; displaying a work of art or showing a photograph on a projector to be studied, commented and criticized, etc.

In fact, it would make sense to assume that the teaching exception will only come into play when the teaching use is more than a quotation.²⁶⁶ However, once a teaching exception is in place, quotations done for teaching purposes tend to be exempted under it. Hence, as far as educational purposes, the importance of quotation exceptions is higher in those jurisdictions with restrictive and narrow teaching exceptions.

CASE STUDY:

Why is the quotation exception important for education?

Several reasons explain why regardless of any specific exceptions for teaching purposes, the quotation exception remains fundamental in education.

Pre-existing works are quoted, to a greater or lesser extent, in the course of instruction, either as part of the lecture, or as part of exercises and activities. Teaching and learning cannot take place without quoting, commenting on, analyzing, or criticizing preexisting works. A token of the importance of quotations for teaching and educational purposes may be found in 1928, when the introduction of Art.10(1) BC in the Rome Revision Conference expressly included teaching among its purposes (*see supra*).

²⁶⁶ As we saw, this may well be the reason why quotations and teaching uses are embedded in the same Art.10 BC, one after the other (and why Art.10(2) BC only formally refers to acts of exploitation that go beyond quotations).

Quotation exceptions tend to be flexible and open (as to technological means, purposes and beneficiaries), while at the same time being self-contained within the circumstances (as to nature, extent, purpose) of each case. They can easily adapt to all scenarios and circumstances.

Through the combination of quotation and teaching exceptions, different teaching uses may be subject to different rules; for instance, quotations done as part of the instruction (lectures, exercises, etc) may be allowed for free, but other teaching uses might be subject to equitable remuneration. Of course, the quotation exception becomes paramount in systems lacking a teaching exception or with very restrictive or rigid teaching exceptions (i.e., Spain, as well as Russia and most other non-EU countries).

(a) Purposes

Art.5(3)(d) EUCD is drafted in terms similar to *Art.10(1) BC*, when allowing Member States to exempt:

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

The wording “such as” means that “criticism or review” are listed as mere examples; quotations may also be made for teaching purposes (or any other purposes), either in the course of the instruction or beyond (i.e., in a teaching anthology).

At a domestic level, two different approaches to quotations may be identified: a broad quotation exception that is not limited to any specific purposes,²⁶⁷ and quotations which refer to specific purposes -among them, teaching or education is usually present.²⁶⁸ However, as a general rule, the quotation exception is well suited to allow the unauthorized reproduction, display or performance of a work as part of instruction –even when no teaching purposes are expressly mentioned.

²⁶⁷ See Austria (Art.46), Czech Republic (Art.31.1a), Cyprus (Art.7.1f), Germany (Art.51), Liechtenstein (Art.27), Switzerland (Art.25) and the Nordic countries: Denmark, Norway, Sweden and Finland (Sec.22) and Iceland (Sec.14.). Also outside the EU, Andorra (Art.8), Bosnia and Herzegovina (Art.51.1g) and Turkey (Art.35) do not specifically refer to any purposes.

²⁶⁸ See Belgium (Art.21), France art.L122-5(3)(a) -where, until recently, the quotation exception was the only specific provision dealing with education; Italy (Art.70.1: for non-commercial purposes of illustration of teaching...), Luxembourg (Art. 10.1), Poland (Art.29.1), Portugal (Art.75.2g), Slovakia (Sec.25), Spain (Art.32.1), as well as non-EU Belarus (Art.19.1) and Moldova (Art.22.1a).

CASE STUDY

Quotations for instructional uses

Despite teaching purposes are not expressly mentioned, they may be deemed included within the purposes envisioned as quotations in Bulgaria (Art.24.2: for critical appraisals or reviews), Malta (Art.9.1k: such as criticism or review), Netherlands (Art.15a: in an announcement, criticism or scientific treatise or publication with a similar purpose), Romania (Art.33.1b: for the purpose of an analysis, commentary or criticism, or for illustration), Slovenia (Art.51: for the purpose of illustration, argumentation or referral), Iceland (Sec.14: in the context of a critical or scientific public discussion, or other recognized purpose). The same applies to Macedonia (Art.35: for the purpose of clarification, illustration, debate or reference), Montenegro (Art.48) and Serbia (Art.48: for the sake of illustration, confirmation or reference).

Quotations ‘for scientific, research, polemic, critical and informational purposes’ are exempted in Albania (Art.27.1), Armenia (Art.22.2a), Azerbaijan (Art.19.1), Croatia (Art.90), Georgia (Art.23.a), Kazakhstan (Art.19.1), Kyrgyzstan (Art.19.1), Russia (Art.19.1), Tajikistan (Art.20.1), Ukraine (Art.21.1) and Uzbekistan (Art.28.1) –which may easily exempt instructional uses; as we saw, these exceptions are fundamental to exempt teaching uses in these jurisdictions because the other teaching exceptions only apply to reproductions and to the making of teaching anthologies.

The language of some quotation exceptions require (or, at least, imply) that the quoted work is somehow used or incorporated in a subsequent “work.”²⁶⁹ Should this be read as a requirement to disqualify “mere” quotations which do not result in a new work? Of course, the answer may be different according to national case law. However, *a priori*, it seems that the public interest enshrined in this exception would be severely damaged if it is read so as to restrict its application to the cases where a new work is created. Such a reading would mean that “mere” quotations which do not result in a subsequent new work would not be exempted, whereas quotations for the making of new works would be so. Needless to say that such an interpretation would be utterly inconsistent with a *maiori ad minus* interpretative rationale. The truth is that this requirement has been loosely applied to teaching activities in face-to-face environments (at least, it has never seemed to be an impediment to deem quotations that take place during face-to-face instruction exempted by law). It only seems logical that the same non-restrictive reading should apply to allow quotations in digital formats, regardless of whether they are a “mere” use or part of a new work.

²⁶⁹ For instance, Czech Republic (Art.31.1a), Germany (Art.51), Liechtenstein (Art.27: if the quotation serves as an explanation, a reference or an illustration), Lithuania (Art.21), Luxembourg (Art. 10.1), Netherlands (Art.15a), Poland (Art.29.1), Slovakia (Sec.25: use in the form of quotation in another work), Spain (Art.32.1: to include in one’s work), Switzerland (Art.25); Outside the EU, *see* Andorra (Art.8), Montenegro (Art.48), Serbia (Art.48) Turkey (Art.35.1 and .2) and Ukraine (Art.21.1).

(b) Scope exempted

Being embodied in Art.5(3) EUCD, the quotation exception covers both the rights of reproduction and communication to the public (including the making available to the public) and –if the State so chooses– also the right of distribution. Therefore, it allows quotations made in face-to-face teaching as well as online over the Internet.

Interestingly, most national quotation exceptions avoid any reference to a particular category of rights and simply refer to “use”²⁷⁰ or “quote.”²⁷¹ These general terms may be read as permitting any acts of exploitation (reproduction, distribution, communication to the public).

Only a few laws refer to specific exploitation acts: *Germany* (Art.51: reproduction, distribution and communication to the public), *Italy* (Art.70.1: abridgement, quotation, reproduction and communication to the public), *Malta* (Art.9.1k: reproduction, distribution, communication to the public and translation) and *Lithuania* (Art.21: reproduce in original or in translation). Outside the EU, *Andorra* (Art.8: reproduction in the form of quotation), *Montenegro* (Art.48) and *Serbia* (Art.48: reproduce and communicate to the public).

The same considerations may be done with regards to *translations*: Member States may choose to allow translations of the quoted parts. Translations are expressly exempted in *Cyprus* (Art.7.1f), *Luxembourg* (Art. 10.1), *Netherlands* (Art.15a), *Slovenia* (Art.51), *Malta* (Art.9.1k) and *Lithuania* (Art.21); as well as in *Albania* (Art.27.1), *Armenia* (Art.22.2a), *Azerbaijan* (Art.19.1), *Georgia* (Art.23.a), *Kazakhstan* (Art.19.1), *Kyrgyzstan* (Art.19.1), *Moldova* (Art.22.1a), *Russia* (Art.19.1), *Tajikistan* (Art.20.1) and *Uzbekistan* (Art.28.1). And, of course, the general references to “use” and “quote” may well be interpreted (by national courts) so as to include translations of the quoted parts or works.²⁷²

(c) Beneficiaries

Quotation exceptions tend to be open as to who may benefit from them. Accordingly, teachers and students may use somebody else’s work for purposes of quotation, provided it is done within the limits set in the specific exception.

²⁷⁰ See Czech Republic (Art.31.1), Slovakia (Sec.25), Bulgaria (Art.24.2), Romania (Art.33.1b) and Ukraine (Art.21.1: use quotations).

²⁷¹ See Cyprus (Art.7.1f), Estonia (Sec.19.1), Liechtenstein (Art.27), Poland (Art.29.1), Switzerland (Art.25), France art.L122-5(3)(a) Luxembourg (Art. 10.1), Netherlands (Art.15a), Portugal (Art.75.2g), Austria (Art.46), Hungary (Art.34.1), Greece (Art.19), Slovenia (Art.51), Belgium (Art.21), Nordic countries: Denmark, Finland, Norway, Sweden (Sec.22) and Iceland (Sec.14). See also Albania (Art.27.1), Armenia (Art.22.2a), Azerbaijan (Art.19.1), Belarus (Art.19.1), Bosnia and Herzegovina (Art.51.1g), Croatia (Art.90), Georgia (Art.23.a), Kazakhstan (Art.19.1), Kyrgyzstan (Art.19.1), Macedonia (Art.35), Moldova (Art.22.1a), Russia (Art.19.1), Tajikistan (Art.20.1) and Uzbekistan (Art.28.1).

²⁷² Notice that these national exceptions are broader than the EUCD quotation exception (limited to reproduction, communication to the public and, perhaps, distribution). Of course, since the transformation right was not harmonized by the EUCD, these provisions cannot be deemed in non-compliance with it; but it must be taken into account as another unwanted result from the “fragmented” EUCD harmonization attempt (*see supra*).

(d) Nature and extent of works

Apart from the requirement that the quoted work must have “been lawfully made available to the public,” Art.5(3)(d) EUCD makes no restriction as to the extent and nature of the works covered. Any work may be quoted in its entirety, provided it is done “in accordance with fair practice, and to the extent required by the specific purpose.” In addition, the very concept of “quotation” already implies some limitation as to the extent of the work that may be used without authorization.

Most domestic laws use the same flexible formula and allow quotations of any kind of works, to the extent required by the purpose. However, a few quotation exceptions prefer tailored formulas (with extent limitations depending on the nature of the work or even excluding some kind of works).²⁷³ This is the case in *France* and *Luxembourg* (Art.L122(5)3a and Art.10.1: short quotations),²⁷⁴ *Germany* (Art.51: individual published works, passages from a work), *Greece* (Art.19: short extracts of lawfully published works), *Romania* (Art.33.1b: use of brief quotations) and *Spain* (Art.32.1: fragments of written, sound or audiovisual character and isolated works of three-dimensional, photographic or art character).

(e) Further requirements. Compensation

Both Art.5(3)(d) EUCD and the majority of national laws require that the name of the author and the source of the quoted work be mentioned, whenever possible, and that the use is compatible with fair practice.²⁷⁵

No further requirements or compensation are set for the making of quotations permitted by law. As we already concluded under Art.10(1) BC, there would be no impediment to subject the exempted quotation uses (or at least, some of them) to remuneration schemes (legal licenses) –specially, in view of complying with the Three–Step–Test. Of course, such an option would require a meticulous assessment of the scenarios and eventual effects, so as to avoid stiffening subsequent creativity or damaging the general rights of information and access to culture served by the quotation exception.

²⁷³ As curiosities, see the detailed provisions in Moldova (Art.22.1a) and Turkey (Art.35). See *Annex*.

²⁷⁴ French case law has developed a very narrow interpretation of what is a short quotation (*courte citation*) excluding any use of an entire work and hence, *de facto*, prohibiting the quotation of works of art and photographs altogether. The same applies in Luxembourg: the quotation of an entire article or work (no matter how short) is deemed infringing.

²⁷⁵ See Andorra (Art.8), Cyprus (Art.7.1f), Croatia (Art.90), Malta (Art.9.1k), Netherlands (Art.15a), Slovakia (Sec.25), Bulgaria (Art.24.2: “quotations shall be made in the customary manner”), Bosnia and Herzegovina (Art.51.1g: “in compliance with customary usage”), Lithuania (Art.21), Greece (Art.19), Romania (Art.33.1b), Belgium (Art.21), Nordic countries: Denmark, Finland, Norway, Sweden (Sec.22) and Iceland (Sec.14). See also Italy (Art.70.1: expressly refers to “provided that it does not conflict with the exploitation of the work”).

CASE STUDY

The compulsory nature of quotations in BC Member States

Because of its compulsory nature, Member States are obliged to allow any uses exempted as quotations under Art.10(1) BC when protecting foreign Berne Union authors and works (*see supra*). As a corollary, any national quotation exception that is more restrictive than Art.10(1) BC, would only be applicable to purely domestic scenarios of copyright protection; while any domestic quotation exception broader in scope than what is exempted under Art.10(1) BC, should still apply to foreign works and authors, as a result from the BC principle of national treatment (Art.5(1) BC).

The EUCD missed the opportunity to make the quotation exception mandatory for EU members which –beyond the EU principles– remain bound by the BC obligations towards each other. Art.20 BC allows Berne countries to ‘*enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.*’ However, the purpose of this provision is to act as a barrier to any lowering of protection between member states,²⁷⁶ that is, to enforce the principle of minimum protection of Art.19 BC. Therefore, if –as we concluded earlier– the BC sets a *maximum protection* and the quotation exception is part of that ceiling, art.20 BC should not be read against it.

On the other hand, it is true that EU Member States must eliminate any conventional obligations among them that are incompatible with the EU ones, but this is not a question of incompatibility (after all, the EUCD is not obliging member states to disregard the quotation exception –thus conflicting with Art.10(1) BC) but rather of overlap: the EUCD *allows* member states to provide for a quotation exception, while the BC *obliges* member states to provide for it, at least as far as non–national authors/works. In short, the BC obligation to exempt quotations remains effective among EU States; the EUCD failure does not derogate the mandatory nature of the quotation exception within the Berne Union members, it simply makes things unnecessarily complicated.

(ii) Private use/copying

Private use and copying exceptions may also exempt some of the uses done within an instructional scenario. Copies made to be delivered to students to be used as part of the instruction (lecture or exercise) might be exempted as private copies in some jurisdictions, complementing the scope of exempted teaching uses under the exceptions examined above.

Also *reprographic copying* which is permitted by law in many countries (usually under a remunerated scheme)²⁷⁷ would cover most of the copying done for teaching and instruction

²⁷⁶ See Ricketson/Ginsburg, *op.cit.supra*, §6.130.

²⁷⁷ Reprographic copies are usually compensated by means of levy systems applied to equipment (such as photocopiers, scanners, etc) as well as depending on the operator of these equipments. A combination of equipment and operator levies for private copying applies in Austria, Belgium, Czech Republic, Germany, Hungary, Poland and Portugal. In Spain, a combined system of

[Footnote continued on next page]

purposes in face-to-face educational scenarios. We will not examine these exceptions (and licensing systems) here because they are not specifically related to education –albeit they may, to some extent, cover some of the copying done for teaching purposes.²⁷⁸

Instead, we will examine the main features of the general private copying exceptions to see whether (and to what extent) they may exempt some of teaching uses beyond those already permitted under the specific teaching exceptions and quotations.

(a) *Scope and purposes*

According to Art.5(2)(b) EUCD, Member States may exempt: reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.

Only the *reproduction* right is exempted, but digital reproductions (as well as – of course– analogue ones) are included.²⁷⁹ The same should be expected to hold true in national laws: digital private copying is permitted (either expressly or implicitly) and –to the extent that it does not entail an act of transformation- scanning (digitization) is also permitted.²⁸⁰

However, what is peculiar in national laws is not so much that they all exempt *reproductions*, but that a few of them allow *any use*.²⁸¹ Furthermore, in addition to reproduction, *Estonia* (Sec.18) and *Slovenia* (Art.50.2) permit translations.

[Footnote continued from previous page]

equipment levies to compensate for private copying (including reprography) and voluntary licenses (instead of operator levies) for what is called “public” copying (i.e., equipment placed in copy shops, libraries, educational institutions, etc.). Reprography is subject to compulsory collective management in France. Outside the EU Member States, levy systems are not so common, reprography and private uses being exempted for free in many countries. In general, see IFRRO, *Copyright Levies and Reprography* (2008), available at: <http://www.ifrro.org/upload/documents/Ifrrro-Levy%20Publication-9.pdf>

²⁷⁸ Reprography provisions for educational and teaching purposes have been examined under the chapters devoted to teaching and instruction (see *supra*). In addition, other general reprography provisions (beyond educational purposes) are found in Austria (Art.42.1), Belgium (Art.22.1(4)), Czech Republic (Art.30a), Cyprus (Art.7.1p), France (Art.L122-10), Latvia (Art.35), Lithuania (Art.23), Malta (Art.9.1b), Netherlands (Art.16.h-m), Poland (Art.20), Portugal (Art.75.2a), Slovakia (Art.24.2 –non remunerated).

²⁷⁹ See Nordic countries [Denmark (Sec.12), Sweden (Sec.12), Finland (Sec.12), Norway (Sec.12), Iceland (Art.11)], Czech Republic (Art.30), Austria (Art.42.2-4), Germany (Art.53), Netherlands (Art.16b), Estonia (Sec.18), Latvia (Sec.34.1), France (Art.L122-5(2)), Luxembourg (Art.10.4), Malta (Art.9.1c), Netherlands (Art.16b.1), Portugal (Art.81.2), Slovakia (Sec.24.1), Bulgaria (Art.25.2), Lithuania (Art.20.1), Hungary (Art.35.1), Greece (Art.18.1), Romania (Art.34), Italy (Art.71sexies), Slovenia (Art.50.2), Spain (Art.31.2), Belgium (Art.22.1(5)), Croatia (Art.82).

²⁸⁰ For instance, Belgium (Art.22.1(5)) expressly allows scanning.

²⁸¹ See Czech Republic (Art.30), Cyprus (Art.7.1a), Liechtenstein (Art.22.1a), Poland (Art.23) and Switzerland (Art.19.1): “*Published works may be used for private purposes.*”

Purposes are not uniform in national laws: some laws refer, in general, to *private or personal* purposes or needs,²⁸² while other laws only exempt copies made for *specific purposes*, such as research, private study or practice or even instruction.²⁸³

In principle, the term *use* means that not only reproduction is allowed but also translation or even a distribution or communication of these copies to the extent that do not qualify as “public”. However, other conditions and requirements (including the interpretation of *private* and *personal* uses) will ultimately reduce the scope of the exempted *use* (and exploitation acts). We will revisit all these issues at the end.

(b) *Beneficiaries*

The language “*by a natural person*” in art.5(2)(b) EUCD remains crucial to define the scope of this exception. This was one of the topics of conflict between the Commission and the Parliament.²⁸⁴

²⁸² See Nordic countries [Denmark (Sec.12), Sweden (Sec.12), Finland (Sec.12), Norway (Sec.12), Iceland (Art.11)], Czech Republic (Art.30), Estonia (Sec.18), Latvia (Sec.34.1), Liechtenstein (Art.22.1a), Poland (Art.23), Switzerland (Art.19.1), France (Art.L122-5(2)), Luxembourg (Art.10.4), Malta (Art.9.1c), Slovakia (Sec.24.1), Bulgaria (Art.25.2), Lithuania (Art.20.1: individual use), Germany (Art.53.1-2), Hungary (Art.35.1), Greece (Art.18.1: “the term *private* use shall not include use by an enterprise, a service or an organization”), Romania (Art.34), Italy (Art.71sexies), Slovenia (Art.50.2), Spain (Art.31.2), Austria (Art.42.4).

Outside the EU, Albania (Art.26.d), Armenia (Art.23), Croatia (Art.82) and Macedonia (Art.30-a) exempt reproduction for *private* non-commercial purposes. Instead, in Azerbaijan (Art.17), Belarus (Art.18), Georgia (Art.21), Kazakhstan (Art.18), Kyrgyzstan (Art.18), Moldova (Art.20), Montenegro (Art.45: for personal non-commercial purposes), Russia (Art.18), Serbia (Art.45: for personal non-commercial purposes), Tajikistan (Art.19), Turkey (Art.38: without intent of profit), Ukraine (Art.25.1) and Uzbekistan (Art.27) reproduction is exempted for exclusively *personal* purposes; Montenegro, Serbia and Turkey require non-commercial purposes. Andorra (Art.7) requires both: exclusively for one’s own private and personal use, and provided that three-step-test is complied with.

²⁸³ Cyprus (Art.7.1a: “fair dealing for purposes of research, private use, criticism or review”), Netherlands (Art.16b.1: “intended exclusively for personal practice, study or own use”), Portugal (Art.81.2: “private practice, study or personal use”), Germany (Art.53.1-2: “for own individual uses... for instruction”). Non-EU Bosnia and Herzegovina (Art.51.1d) refers to “for purposes of improving one’s personal knowledge”.

²⁸⁴ The text proposed by the Council (in its Common Position) read: “in respect of reproductions on any medium made *for the private use of a natural person* and for non-commercial ends, on condition that the rightholders receive fair compensation ...” This was intended to exempt the making of copies “*on behalf of*” a natural person, for his private and non-commercial use. In its 2nd Reading, the Parliament amended it to “*by a natural person for private use*,” which reduces the scope of the exception to the natural person making the copies himself for his private and non-commercial use. The Council’s intention was clearly forsaken. However, the Commission prefers to explain that either language means the same: “As with the previous formulation in the text of the Common Position, the Commission is of the view that the word ‘*by*’ would also allow a copy to be *made for and on behalf of* a natural person for private use. This would include providing the means, technical or otherwise, for the making of such copies.” But this explanation seems to be more purposeful (so as not to further delay the adoption of the Directive) than really substantive: we all know what ‘*by*’ means, otherwise, the Council would not have changed it. Besides, there is no Recital explaining it. It is easy to foresee that this will become an issue of debate both at a community and national level, specially in those countries where the issue has already been raised at a domestic level and interpretative case law has been settled.

CASE STUDY

“By a natural person for private use” or “for the private use of a natural person”?

The text proposed by the Council (in its Common Position) read: “in respect of reproductions on any medium made *for the private use of a natural person* and for non-commercial ends, on condition that the rightholders receive fair compensation ...” This was intended to exempt the making of copies “*on behalf of*” a natural person, for his private and non-commercial use. In its 2nd Reading, the Parliament amended it to “*by a natural person for private use,*” which reduces the scope of the exception to the natural person making the copies himself for his private and non-commercial use. The Council’s intention was clearly forsaken. However, the Commission prefers to explain that either language means the same: “As with the previous formulation in the text of the Common Position, the Commission is of the view that the word ‘*by*’ would also allow a copy to be *made for and on behalf of* a natural person for private use. This would include providing the means, technical or otherwise, for the making of such copies.” But this explanation seems to be more purposeful (so as not to further delay the adoption of the Directive) than really substantive: we all know what ‘*by*’ means, otherwise, the Council would not have changed it. Besides, there is no Recital explaining it. It is easy to foresee that this will become an issue of debate both at a community and national level, especially in those countries where the issue has already been raised at a domestic level and interpretative case law has been settled.

The same dilemma may be perceived in national laws: depending on the country, copies may be done by the copier (natural person) only,²⁸⁵ or also by someone else on his behalf.²⁸⁶ Within the first group, a teacher cannot make and distribute copies among his students to be used as part of the instruction (albeit it is likely that each student would be entitled to make his own copy in any format). Instead, among the later group, in Switzerland and Germany libraries and public institutions may be entitled to make copies on behalf of students for their private use (in Germany, private copies may be done for instruction use and, thus, delivered to each student participating in the instruction).

(c) Nature and extent of works

Art.5(2)(b) EUCD sets no limitation as to the nature and extent of the works that may be copied. Similarly, most domestic laws are open to any works (with some exceptions, such as computer programs, databases, works of architecture, etc), albeit a few differences may be found in some laws (*see* Annex).

²⁸⁵ *See* Iceland (Art.11), Sweden (Sec.12), Czech Republic (Art.30), Estonia (Sec.18), Malta (Art.9.1c), Slovakia (Sec.24.1), Bulgaria (Art.25.2), Lithuania (Art.20.1), Hungary (Art.35.1), Greece (Art.18.1), Luxembourg (Art.10.4), France (Art.L122-5(2)), Italy (Art.71sexies), Slovenia (Art.50.2), Spain (Art.31.2), Austria (Art.42.4). Outside the EU, *see* Andorra (Art.7), Azerbaijan (Art.17), Belarus (Art.18), Croatia (Art.82), Georgia (Art.21), Macedonia (Art.30-a), Moldova (Art.20), Montenegro (Art.45) and Serbia (Art.45).

²⁸⁶ *See* Denmark (Sec.12), Norway (Sec.12), Finland (Sec.12), Liechtenstein (Art.22.1a), Switzerland (Art.19.1: such as libraries and public institutions, etc), Netherlands (Art.16b.1), Germany (Art.53.1-2: legal entities may benefit).

(d) Further conditions and requirements

To further reduce the scope of the exempted use, Art.5(2)(b) EUCD requires that the copy is done for “*ends that are neither directly or indirectly commercial*”. Until the ECJ produces a harmonized interpretation, the meaning of what is “*directly or indirectly commercial*” may prove to be another problematic issue –especially since domestic laws have used alternative and not-so-similar terms such as “*collective use*”²⁸⁷ and/or “*commercial use*”²⁸⁸ the meaning of these terms may not be uniform in all national laws.

In addition, *Germany* (Art.53.1–2) and *Spain* (Art.31.2) require that the copies are not made from an *obviously unlawful copy*.

In *Italy*, Art.70sexies(3) declares that the private copying exception will not apply to works made available on the basis of a license. In fact, this is the same solution envisioned under Art.6(4)(4) EUCD: exceptions will not be enforced as to works made available to the public on agreed contractual terms.²⁸⁹

(e) Compensation

Art.5(2)(b) EUCD is subject to *fair compensation* of the right holders –which is deemed particularly important for digital private copying.²⁹⁰ However, the Directive contains no definition of what is “fair compensation” (there is only some guidance in Recital 35). Member States have, so far,²⁹¹ some flexibility to set the regime of fair compensation: they may decide that where the prejudice to the right holder is minimal (or where he has been already been compensated), no obligation for payment (or further payment) arises; they are free to decide the exact form and amount of such compensation (i.e., levies on copy shops, sales of blank tapes and equipment, as exists in most Member States), in accordance with their own legal traditions and practices, and taking into account the existence of DRMs and TPMs.

²⁸⁷ France (art.L122-5(2)), Netherlands (Art.16b.1: copies cannot be delivered to third parties), Portugal (Art.81.2), Germany (Art.53.1-2: copies should be neither distributed nor made available to the public), Slovenia (Art.50.2), Spain (Art.31.2), Austria (Art.42.4: copies should not be used for making available to the public). Non-EU Bosnia and Herzegovina (Art.51.1d) and Croatia (Art.82) require that the private copy is not made accessible to the public.

²⁸⁸ Commercial or profit-making purposes are expressly excluded in Denmark, Norway and Iceland; Czech Republic (Art.30), Estonia (Sec.18), Latvia (Sec.34.1), Luxembourg (Art.10.4), Malta (Art.9.1c), Netherlands (Art.16b.1), Slovakia (Sec.24.1), Bulgaria (Art.25.2), Lithuania (Art.20.1), Germany (Art.53.1-2), Hungary (Art.35.1), Italy (Art.71sexies), Slovenia (Art.50.2), Spain (Art.31.2), Austria (Art.42.4), Portugal (Art.81.2: subject to the three-step-test).

Outside the EU, Bosnia and Herzegovina (Art.51.1d), Croatia (Art.82), Montenegro (Art.45), Serbia (Art.45) and Turkey (Art.38) require that the private/personal copy is not done for commercial or profit making purposes; In Andorra (Art.7), Albania (Art.26.d) and Armenia (Art.23), private copies done for non-commercial use are permitted on condition that no prejudice is caused to legitimate interests of authors and/or to the commercial exploitation of the work.

²⁸⁹ In any case, notice that private copying is not listed in Art.6(4) EUCD as one of the exceptions “protected” against DRMs.

²⁹⁰ See Recital 26 of the Commission Amended Proposal: “it is of particular importance, in the case of digital private copying, that all right holders receive fair compensation”.

²⁹¹ At the time of writing this Study, a preliminary ruling from the ECJ has been sought by the Audiencia Provincial de Barcelona (Spain) on 31 October 2008 (Case C-467/08), *SGAE v. Padawan*, as to whether the meaning of ‘fair compensation’ in Article 5(2)(b) EUCD entails harmonization.

Most EU national laws require compensation, although the specificities of such compensation systems are diverse.²⁹² Private copying is usually compensated by means of levies applicable on the equipment (photocopiers, scanners, faxes, etc) and/or on the operator (institutions which do a lot of copying, i.e., schools, libraries, government, etc.).

Outside the EU, compensation for private copying/use is only required in *Moldova* (Art.20), *Montenegro* (Art.45) and *Serbia* (Art.45). No compensation applies in *Albania* (Art.26.d), *Armenia* (Art.23), *Bosnia and Herzegovina* (Art.51.1d), *Croatia* (Art.82) and *Turkey* (Art.38). Instead, *Andorra* (Art.7), *Azerbaijan* (Art.17), *Belarus* (Art.18), *Georgia* (Art.21), *Kazakhstan* (Art.18), *Kyrgyzstan* (Art.18), *Macedonia* (Art.30-a), *Russia* (Art.18), *Tajikistan* (Art.19), *Ukraine* (Art.25.1) and *Uzbekistan* (Art.27) only require it compensation for copies of phonograms and audiovisual recordings.

(f) Private use/copying in education

In face-to-face teaching, the private use/copying exception could easily exempt any copying done by students as a result from the instruction (i.e., notes taken from the professor's lecture, a dictate of a passage, an exercise, etc).²⁹³ Instead, the reproduction of a work in multiple copies to be distributed among students for classroom use might be more difficult to exempt (unless by means of reprography). Granted, it is commonly accepted that *private* uses go a little further than *personal* uses, and that an instructional use might qualify as private in some countries. However, such copying is done not by each student but by somebody else (a teacher, a librarian, an institution) on behalf of the student, and –as we saw– this possibility is not accepted in all jurisdictions.²⁹⁴ Furthermore, it may be deemed a “collective use” (in countries where it is excluded),²⁹⁵ and it may be considered a distribution if students are deemed “public” or, at least, are not deemed included within the “private” or “family circle” usually exempted. Finally, the fact that some domestic teaching exceptions expressly refer to “as many copies as students” proves that these students' copies do not qualify as a private use but rather as a teaching use.

Similar conclusions may be reached in *digital and online teaching contexts*: the making of students' copies may not only be deemed a “collective use” (or even a “commercial use”), but delivery to students would entail an act of making available online (rather than a distribution) to the public.

²⁹² Exception made of Liechtenstein (Art.22.1a: compensation only applies to copies done by other persons *ex* Art.23.2) and for Estonia (Sec.18), Poland (Art.20), Lithuania (Art.20.1) which only require compensation for private copying of audiovisual works and sound recordings. While Hungary (Art.35.1) directly exclude audiovisual and sound recordings from the non-remunerated private copying exception.

²⁹³ Specific references in the Netherlands (Art.16b.1) and Portugal (Art.81.2) to “practice” and “study,” and in Germany (Art.53.1-2) to “instruction,” are directed towards this conclusion (and beyond).

²⁹⁴ For instance, in Germany (Art.53.1-2) and Switzerland (Art.19.1a) private copies for purposes of instruction can be made by the library.

²⁹⁵ In fact, we reached a similar result under the Common Law countries; For instance, Sec.29.3b UKCA excludes “systematic single copying” (i.e., all the members of a class requesting the same material at once) from the scope of the fair use exception for private study.

Private use/copying exceptions might be of help in some countries to exempt students' downloads or copies done as part of the instruction. However, these exceptions are rather blunt and unsuited to find accurate solutions to all the interests involved. It is our understanding that the teaching exceptions should be "complete" and address all the different acts involved in an instructional use: from its delivery to its reception and use by students, regardless of the means used for that delivery. Otherwise, if a license is necessary for some of the acts in the chain of delivering the instruction, the effectiveness of a teaching exception becomes useless. Of course, the problem posed here is rather the potential damage of infringing downstream uses deriving from the instructional downloads; this should be correctly addressed (by means of DRMs and TPMs measures, education about IP protection and a compensation in favor of authors and right holders), but it should not be enough to simply disqualify them as exempted uses.

E. SCHOOL EVENTS

Beyond the teaching (instructional) activities themselves, a few statutes expressly allow performances of literary and musical works at school events and celebrations, provided that no admission fee is charged for the performance (or, that it is not designed for direct or indirect economic or commercial gain) and that performers are not remunerated.

This is the case of *Armenia* (Art.22.2g: only of musical works), *Bosnia and Herzegovina* (Art.51.1a *in fine*), *Belgium* (Art.22.3),²⁹⁶ *Bulgaria* (Art.24.8), *Croatia* (Art.88), the *Czech Republic* (Art.35.2), *Estonia* (Sec.22), *Germany* (Art.52.1), *Greece* (Art.27), *Hungary* (Art.38.1b), *Latvia* (Sec.26.2), *Macedonia* (Art.33), *Poland* (Art.31), *Romania* (Art.22.1g), *Slovakia* (Art.30), *Slovenia* (Art.49.2). Some of them require that both the performers and the audience consist mainly of students and instructors or staff of the educational establishment (*Armenia, Czech Republic, Estonia, Latvia, Greece, Slovakia*). Instead, *Estonia* and *Greece* allow relatives among the audience. They all envision for face-to-face performances and none requires remuneration (as long as done for non-commercial purposes).²⁹⁷

In *Nordic countries*, the general teaching exceptions that allow public performances of works (dramatic and audiovisual works are excluded)²⁹⁸ for educational purposes and activities²⁹⁹ would also cover performances at school events and celebrations to the extent that they are free of charge and not for commercial purposes. *Iceland* expressly states that when an admission fee is charged for the performance, authors will be entitled to remuneration.³⁰⁰

The rest of national statutes remain silent and school events will not always be exempted under the scope of these national teaching exceptions (*see supra*). For instance, *France* expressly excludes any "entertainment activity" from the exception for teaching purposes in Art.L122-5(3)e. In countries where collecting management societies are in

²⁹⁶ Art.22.3 Belgium permits "free and private performance within the family circle or within school activities."

²⁹⁷ In Germany, remuneration is required when the performance (directly permitted by law) entails some commercial profit by a third party.

²⁹⁸ Only Iceland allows public performances of any 'published works'.

²⁹⁹ See Denmark (Sec.21) Iceland (Sec.21.1), Finland (Sec.21), Norway (Sec.21), Sweden (Sec.21.2).

³⁰⁰ See Iceland (Sec.21.1).

place³⁰¹, a license from the corresponding collective society would be required for such performances (even when not done for commercial or profit-making purposes) –the authors, thus, being remunerated.

F. LIBRARY USES

We do not intend to convey here a full examination of the exceptions and limitations set in favor of libraries by national laws. For that purpose, we refer to the previous and recent Study prepared by Kenneth Crews: *WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives* (2008).³⁰²

In this chapter, we will only briefly refer to some crucial aspects of intersection between exceptions provided for educational purposes and exceptions for library uses, using the aforementioned Study as the basis.

(i) Discrimination of digital libraries and uses

It is generally accepted that the exempted acts of *reproduction* done by libraries may be in any format (analog or digital), but digital libraries tend to be discriminated on several other grounds:

Library exceptions tend to *cover only the act of “reproduction”* (sometimes, analog or digital), but nothing is said as to communication to the public or distribution. Art.5(2)(c) EUCD is a good example. It permits member States to exempt “*specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;*”³⁰³

The exception is not subject to fair compensation, although Member States may require it when implementing it; in fact, fair compensation may be a powerful tool to permit a larger scope of the exempted acts. The exception contains no restrictions as to nature and extent of works or as to specific purposes of the use (be it preservation, research or private study or teaching), provided that it is not done for direct or indirect economic or commercial

³⁰¹ No information could be gathered but it is foreseeable that in countries lacking a CMO structure, these kind of performances (despite not being exempted under the teaching exception) take place without any licensing or remuneration in favor of authors.

³⁰² Study available at <http://www.wipo.int/copyright/en/limitations/studies.html>

³⁰³ The initial Commission Proposal only referred to “*establishments accessible to the public*”. The Parliament (in its 1st reading) introduced both the condition that it be “*for archiving or conservation purposes*” and the wording “*such as libraries and archives and other teaching, educational or cultural establishments*”. The Council modified both issues: dropping the “*archiving and conservation purposes*” in favor of a more *flexible formulation* (that would allow any acts of reproduction -also in digital means-, as long as without economic or commercial advantage), and setting -instead- an *exhaustive list of establishments* benefiting from the exception (instead of all establishments accessible to the public, in general).

advantage,³⁰⁴ the national legislator is free to adjust this exception to the social and cultural circumstances of its jurisdiction. However, it only exempts reproduction (and distribution, if so chosen by the Member State).

CASE STUDY

The delivery of copies done by library services

In other words, a library could do a copy on behalf of a researcher, but could not deliver it to him. In the analog world, this ‘technical’ gap may be easily overcome by simply inferring that delivering a copy to the researcher is not an act of *distribution* to the *public*. However, things are far more sensitive in digital copyright.

Since library exceptions only exempt the act of reproduction but not the transmission of the copy done, the digital copy made upon request by a researcher or student can only be delivered to him by means of a printed copy or a USB or any other tangible digital device, but it can not be transmitted to him by e-mail. One might argue that regardless of the express language of the exception, libraries are allowed to ‘deliver’ the copy in any format to the individual who has requested since this is not act of *public* exploitation. However, this seems to be precisely what Recital 40 EUCD is preventing: “such an exception or limitation should not cover uses made in the context of *on-line delivery* of protected works or other subject-matter”. And according to Art.5.4 EUCD, domestic laws may extend the exception to the right of distribution, but nothing is said as to communication to the public. This means that in practice electronic libraries are being discriminated (as compared to physical libraries) since they cannot offer their users/students the same services that the physical library does; not because a payment is required for library uses in digital means, but because these digital uses may be restricted –and even prohibited!– by means of a license (and DRMs).

Also in Common law countries, the coverage of *fair use* in digital and online formats is very restrictive: US libraries are allowed to digitize works in their collections, but they cannot post them online unless a license has been obtained; in Canada, libraries are entitled to do anything on behalf of any person that he may do personally under Sec.20 (i.e, reproduction for instruction purposes), but this is restricted to analog formats; scanning and posting works for teaching purposes on an e-reserve (access limited to registered students) would not be allowed under the teaching and library exceptions.

The same ‘discrimination’ against digital libraries may be found in *art.5.3(n) EUCD* when providing for an exception to the right of communication to the public (or making available) “*for the purpose of research or private study*”, which only applies to “*by dedicated terminals on the premises of establishments referred to in paragraph 2(c)*” Perhaps in the future a reading of Art.5(2)(c) EUCD as restricted to physical premises only will be seen as an anachronism (and “virtual” library premises –i.e., a closed network restricted to registered

³⁰⁴ It may be applicable here, by analogy, the criteria set by Recital 42 EUCD, in the sense that “*the organizational structure and the means of funding of the establishment concerned are not the decisive factors*” to ascertain the “non-commercial” purpose of the ... reproduction.

library users– will also benefit from this exception). For the moment, it is not what the EU legislator intended.

Provisions like these are an example of how digital libraries (and educational institutions) are discriminated, compared to their physical counterparts. In addition, licensing and DRMs restrictions have also a direct impact on digital uses.

CASE STUDY

The interaction of exceptions and licenses (and DRMs).

Regardless of the scope of exempted teaching and library uses, the restrictions for online uses often result directly from licensing conditions and DRMs.

Libraries subscribe and pay for a variety of databases and access to works in digital formats, the licensing terms on these databases subscriptions do not always permit the use of these works for teaching purposes or to place them online (even for access of registered students only). The restriction of library and teaching uses by means of licensing conditions and technological means has been so far condoned by laws; either in general (i.e., art 6(4)(4) EUCD relinquishes the enforcement of the statutory exceptions in the case of works made available online) or by specifically restricting the application of a statutory exception on condition that no license is available for that use (i.e., the exception provided in Art.53a of German law applies as long as the work is not available on the basis of a license).

Licensing and DRMs may pose a wide range of barriers to library services and to teaching uses which may ultimately upset the public interest that these exceptions purport to protect. As more and more works are made available in digital formats, and as long as laws permit the implementation of DRMs and licensing terms which rule out the benefit of any statutory exceptions, the range of uses exempted for teaching and educational purposes will be decreasing.

(ii) Loopholes among exempted uses

Solutions adopted in domestic laws diverge, but one premise holds true: teaching purposes are rarely regarded in library copying exceptions. Domestic library exceptions usually refer to specific purposes such as preservation, research and private study, but they tend to forget about teaching purposes.

Yet, the interaction between library exceptions and teaching exceptions is fundamental to avoid forfeiting either one. All works to be used for teaching purposes, either under a teaching exception or under license, must be obtained from somewhere and libraries are usually the source to provide the works to be used for teaching purposes.

A strict application of these library exceptions would not allow a library to make copies for teachers and professors, copies that could be lawfully used for teaching purposes.

CASE STUDY

The gap between library and teaching exceptions

According to the WIPO Study on Library Exceptions and Limitations (*op.cit.supra*), only 14 countries (within the larger scope of that Study) permit library copying without detailing the purpose; these statutes give relatively broad rights for the library to make copies with no obligation to confirm the user's need for the material; Yet, they are limited to reproduction only.

Most library exceptions permit the making of copies for purposes of replacement and preservation, as well as for research and study purposes and onsite consultation -but teaching uses are obliterated. A few even require some proof of that purpose. Let's see some examples.

In the UK and Ireland, libraries are entitled to make copies upon request for research and private study only and librarians may rely on a signed declaration by the person requesting it that the copy is requested for these purposes and that the copy will not be used "for any other purposes". As a result, a professor cannot require a copy of a work he intends to use for teaching purposes. He cannot direct students to obtain the copy from the library themselves because copies of a work cannot be supplied by a library to more than three persons with a similar request at the same time and place and for substantially the same purpose. Which means that, a copy of the work to be used for teaching purposes (under the applicable exceptions) can only be obtained from the library by stating (in fact, signing) that it will be used for research or private study or by means of a license from the right holder (which would frustrate the goal of the teaching exception).

Ironically, Art.5(2)(c) EUCD refers to "*educational establishments*" The parliamentary works of this exception focused on the issue of eligibility³⁰⁵ precisely to avoid a possible gap between library exceptions and the subsequent teaching use. Yet, most EU domestic laws tend to keep teaching purposes and library privileges separated. Only a few national laws clear the gap between library and teaching uses. For instance, Art.53a German Copyright Act (public libraries are allowed to make and deliver by any means –analog, fax and digital– copies upon request by professors and researchers for teaching purposes and research, in exchange of an equitable compensation subject to collective management and provided that the work is not available under a license on reasonable terms), the Nordic countries (through extended collective licensing), and Cyprus (allowing libraries to do any use which is in the public interest).

³⁰⁵ The initial Commission Proposal only referred to "*establishments accessible to the public*". The Parliament (in its 1st reading) introduced both the condition that it be "*for archiving or conservation purposes*" and the wording "*such as libraries and archives and other teaching, educational or cultural establishments*". The Council modified both issues: dropping the "*archiving and conservation purposes*" in favor of a more *flexible formulation* (that would allow any acts of reproduction -also in digital means-, as long as without economic or commercial advantage), and setting -instead- an *exhaustive list of establishments* benefiting from the exception (instead of all establishments accessible to the public, in general).

Outside the EU, some library exceptions specifically addressing teaching and instructional purposes may also benefit educational institutions (usually, non-commercial ones). Still, they tend to be restricted to analog formats (i.e., Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, Uzbekistan) or only cover reproduction –hence, not allowing the posting of the digital copies online– (i.e, Belarus, Bulgaria, Croatia, Estonia, Macedonia, Slovenia).

A last ground for discrepancies –as far as exempted uses– lies in the for–profit or non–profit character of the library or teaching institution. As we have seen, most teaching (and library) exceptions are applicable only to non-for-profit libraries and uses.

As we can see, this discrepancy is especially important for digital libraries because –as we mentioned– they are the ones to provide the copies used for teaching purposes. By failing to cover one step of the process, the whole system of teaching and library exceptions becomes useless: a work that may be reproduced for teaching purposes without authorization (exempted by law) will still need a license (hence, a chance to be denied) to be obtained from the library. Why should a professor be allowed to obtain an exempted reproduction from the Library for research purposes (or for private use), but not for teaching purposes?

The *full integration of library and teaching exceptions*, especially as far as on–line teaching, is paramount.

CASE STUDY

The burden is on the librarian. The choice on the right holder

As things stand now, the *burden is on the librarian* (or the library) to check the purpose intended by the teacher or researcher, whether the specific use (and scope) is exempted or not by law, and whether a license exists to allow it (or not), and decide whether the copy can be made and delivered or not and in what format (digital or paper) and, ultimately, *the decision* as to what digital uses for teaching and educational purposes are allowed (and which are not) *is ultimately in the hands of the right holders*.

National laws fail to fully address the needs of digital libraries; needs which ultimately serve fundamental public interests, such as education.

PART IV: LIMITATIONS AND EXCEPTIONS FOR EDUCATIONAL ACTIVITIES IN NATIONAL LAWS (RELATED RIGHTS)

Limitations and exceptions for educational activities regarding related rights (performances, recordings and broadcasts) are addressed by national laws in three different ways, as sanctioned by Art.15 Rome Convention (*see supra*):

- By formally including related subject matter under the same teaching exceptions envisioned for works (i.e., Common law countries);³⁰⁶
- By applying *mutatis mutandis* to related rights the same exceptions and limitations envisioned for works (i.e., Armenia, Austria, Bulgaria, Croatia, Czechia, Cyprus, Germany, Greece, Hungary, Italy, Liechtenstein, Macedonia, Malta, Montenegro, Netherlands, Nordic countries, Poland, Portugal, Romania, Serbia, Slovenia, Slovakia, Spain, Switzerland and Ukraine); and
- By means of specific exceptions: Albania (Art.63), Andorra (Art.32), Azerbaijan (Art.36), Belarus (Art.36), Belgium (Art.46), Bosnia & Herzegovina (Art.97), Estonia (Sec.75), France (Art.L211-3), Georgia (Art.51), Luxembourg (Art.46), Kazakhstan (Art.41), Kyrgyzstan (Art.42), Latvia (Sec.54), Lithuania (Art.58), Moldova (Art.30), Russia (Art.42), Tajikistan (Art.41), Turkey (Art.80), Uzbekistan (Art.60).

As to the first and second groups, we refer to the previous chapters (under Part III). We will now briefly examine the provisions of the last group, pointing out at some eventual problems that may result from comparing them with the ones adopted for works in the corresponding jurisdictions.

Despite being formally under a separate provision, the exceptions in *Belgium* (Art.46), *Estonia* (Sec.75),³⁰⁷ *France* (Art.L211-3)³⁰⁸ and *Luxembourg* (Art.46)³⁰⁹ repeat *verbatim* the exceptions provided for authors' rights, with parallel scope and interpretation; thus, leaving no margin for eventual problems of interpretation.

³⁰⁶ Sec.189 UK reproduces for performance and broadcasting rights the exact same educational exceptions provided for works and recordings. In *Israel*, although sound and audiovisual recordings are subject to the general copyright exceptions (hence Sec.29-30), performers' and broadcasters exclusive rights are subject instead to the general fair use clause (Sec.19) (*see supra*). Of course, it is difficult to imagine that a performer might successfully oppose (arguing that it is not a fair use) the unauthorized performance of his sound or audiovisual recording for teaching purposes, exempted under Sec.29.

³⁰⁷ Sec.75.1(2) repeats the exception for illustration for teaching of Sec.19.2 (no other teaching exception applies to related rights).

³⁰⁸ Art.L211-3(3)d provides for the teaching exception (*ex* Art.L122-5(3)e), Art.L211-3(3)a refers to quotations (*ex* Art.L122-5(3)a), Art.L211-5(2) is private copying (*ex* Art.L122-5(2)).

³⁰⁹ The equivalent teaching exception (*ex* Art.10.2) for related rights is found in Art.46.9. In addition to the exceptions listed specifically for related rights, Art.46 further affirms that the same limitations set to the authors' rights will also apply *mutatis mutandis* to related rights.

Latvia (Sec.54.2) exempts, without remuneration, any use “(3) *for educational purposes, taking into consideration the provisions of Sec.21* [teaching compilations], as well as (4) *for other purposes specified in Sec.19, 22-27 and 33 of this Law* [which include teaching purposes and quotations],” thus also closing any eventual interpretation gap between both sets of exceptions.

Lithuania (Art.58.7) also uses the language of Art.10(2) BC (as it was done, for authors’ rights in Art.22.1-1) to exempt “*any use for the sole purpose of illustration for teaching,... to the extent justified by the non-commercial purpose to be achieved.*”

Turkey (Art.80) exempts, without remuneration, the “*not-for-profit use for purposes of education, teaching, ...;*” the scope of the teaching uses exempted here (for related rights) is, thus, broader than under the exception in Art.33 –which is restricted to performances for purposes of face-to-face education and instruction at non-for-profit establishments. In addition, the exceptions provided in Art.34 (teaching compilations) and Art.35 (quotations) will apply *mutatis mutandis* to related rights.

More original language is found in *Moldova* (Art.30) which exempts, without remuneration, “*any use ... in teaching as an illustration in the form of short extracts,*” and in *Georgia* (Art.51) which exempts, without remuneration, “*the normal use... at teaching in the form of excerpts and illustrations –only to the extent justified by the set purpose.*”

Andorra (Art.32.1c) exempts any use “*for the purpose of face-to-face teaching;*” In addition, the remaining exceptions envisioned for authors’ rights (teaching compilations, quotations, private copying and library uses) will apply *mutatis mutandis* (Art.32.1d).

Albania (Art.63), *Azerbaijan* (Art.36), *Belarus* (Art.36), *Bosnia and Herzegovina* (Art.97), *Kazakhstan* (Art.41), *Kyrgyzstan* (Art.42), *Russia* (Art.42), *Tajikistan* (Art.41), *Uzbekistan* (Art.60) simply exempt, without remuneration, any “*use exclusively for educational purposes (teaching, instruction).*” These provisions simply copied the language of the teaching exception in Art.15(1)d RC (*see supra*); likewise, most of them also incorporated the text of the teaching exception in Art.10(2) BC. The remaining exceptions (quotations and private use) parallel those provided for authors’ rights.

CASE STUDY

Wider exceptions for related rights than for authors’ rights?

These teaching exceptions provided for related rights are broader in scope than the teaching exceptions provided for authors’ rights in Moldova, Georgia, Andorra and the other non-EU countries which only exempt reproduction for teaching uses (in Andorra, only ‘for face to face teaching’). Accordingly, while a recording may be played for teaching purposes without the performer’s and the producer’s consent, the author’s consent would still be needed.

This is another reason in favor of a broad interpretation of the exceptions provided for authors’ rights in these countries (namely, the exception for teaching compilations – and if necessary, the quotation exception) in the sense that instructional uses are covered by them (*see supra*).

PART V: LICENSING PRACTICES FOR EDUCATIONAL ACTIVITIES

Licensing for educational purposes must be analyzed from two different grounds: the current licensing scenarios in place (statutory licensing, extended collective licensing and voluntary licensing) and the normative considerations involved –specially dealing with the interaction between licensing terms and DRMs, on the one hand, and the statutory exceptions and limitations, on the other.

1. Licensing of teaching uses

Teaching uses may be cleared by means of legal licenses, extended and compulsory collective licenses, and voluntary licenses (either collective or individually granted).

A. LEGAL LICENSES

Legal licenses are directly granted by law (usually in relation to some exempted use). They tend to be subject to remuneration (fair compensation) and to compulsory collective management. A distinction is made between a “statutory license” (where the royalty fee is set by the Statute) and a “compulsory license” (where the fee may be negotiated among owners and users). These legal licenses are usually compensated by means of *levies* (i.e., equipment and operator levies to compensate for private copying) or *fees* (either set by the government or the statute, or negotiated between CMOs and users).

Under a legal license scheme, the CMO is obliged to offer licenses for educational uses, under negotiated or statutorily set fees. Legal licenses for teaching purposes compensated with levies are in place in Belgium (Art.22.1–4bis, 4ter and 4quater), Germany (Art.53: reprographic copying), Spain (Art.31.2: private copying); while fees apply in Switzerland (Art.19.1a), Italy (Art.70.2: for teaching anthologies)³¹⁰ and Germany (Art.52a). Negotiated fees apply in France (Art.L122-5e) and Netherlands (Art.12).

B. EXTENDED COLLECTIVE LICENSING AND COMPULSORY COLLECTIVE MANAGEMENT

In some instances (usually also related to exempted uses), voluntary licensing is supported (backed-up) by the law.

This is the case of *extended collective licensing*: the voluntary license is freely negotiated between a CMO (that is representative in its field) and users in certain sectors, once it is concluded it is extended (by law) to cover the works of right holders that are not members of or have not mandated the CMO. These authors can opt out of the agreement (and in some cases, they may prohibit the use of their works). This type of licensing is used in the Nordic countries.

³¹⁰ Legal license (managed by SIAE and AIDRO) is limited to 15% of the work; licensing beyond 15% requires voluntary licensing.

Another instance of legal “back-up” to collective licensing is *compulsory collective management*: right holders are obliged by law (i.e., by means of a statutory presumption of license) to authorize these rights and only CMOs are entitled to manage them. Reprographic reproduction rights are usually subject to compulsory collective management (i.e., France Art.L122-10).

C. VOLUNTARY LICENSING

The uneven and insufficient legal national scenarios lead libraries and educational establishments to applying for licenses for most of their teaching uses (especially, in digital formats and online).

Voluntary licensing may be done on an individual basis (by the author or copyright owner) or collectively through a Collective Management Society (CMO) or other licensing organization.

(i) Voluntary collective licensing

In voluntary collective licensing, the CMO licenses the reproduction (or applicable rights) of protected works on behalf of their copyright owners, on the basis of a previous mandate from them. It is by means of the bilateral agreements (based on reciprocity) that national CMOs have with national CMOs of other countries that they can license an international repertoire.

Usually voluntary licenses contain an ‘indemnity clause’ to indemnify the licensed user (i.e., the educational institution) for “reasonable and proper legal costs, expenses and damages” caused if the licensee is sued for infringement of works which are not in the CMO’s catalogue.

Voluntary licensing is necessary for any uses which are not permitted by law under a statutory exception or limitation. However, we saw that some exceptions are only effective as long as no voluntary license is available;³¹¹ that is, exceptions as a means to incentive collective licensing. The terms and prices of the voluntary license are usually negotiated and agreed between the CMO and major representatives of the users.

In the *UK*, CLA licenses for educational institutions permit the making and distribution of photocopies of works (of original owned by the Licensee) among registered students and employees of the educational institution, as well as the scanning and making available of copies to students who have access to the secure network (only accessible to identified and authenticated students). Digital copies cannot be stored on a server with the intention of creating an electronic library or similar resource, but they may be stored on a server for the duration on the class, lesson or course of study and shall be deleted at the end of the academic year in which the digital copy was made. Students may “open, view and print out a single

³¹¹. This is the case of the *UK* and *Ireland*, where some of the exceptions envisioned in favor of education are to be replaced by a license, when in place.

paper copy” but they cannot make further digital copies. Digital copies cannot be placed on the publicly accessible internet or linked to or from external websites. Specific restrictions apply as to amount of copying/scanning allowed per year (course): 5% of a published edition or a complete chapter of a book, a whole article, a short story or poem less than ten pages long, or the entire report of a single judicial proceeding (case). No systematic copying is allowed of the same work. The license does not extend beyond the UK (to copies made outside the UK) but distance students may receive the copies.

In *Canada*, COPIBEC license for universities permits copying (photocopies and digital) in CD-Roms, computers and servers (but the copies must be deleted once the course has not been taught for 36 consecutive months). Users are authorized to copy 25 pages or 10% of a work (whichever is less) for a single course, or an entire article or an entire chapter of a book which is less than 20% of such book. Exercise books or manuals are expressly excluded.

In the *US*, CCC license for academic institutions authorizes photocopying and distribution of works among students, scanning, storage, transmission (by email or post) to students and making available on line through an e-reserve system, printing, as well as paper or digital course packs (provided that appropriate access controls such as passwords are in place). Some specific uses are pre-authorized by the copyright owner –and in these cases, the licensee will obtain immediate permission from CCC for such use; but for the other uses it is the owner who establishes the royalty fee (which may vary widely from one work/author to another).

In *Spain*, voluntary licensing for online teaching uses is currently being developed by CEDRO. This license permits scanning, copying from material in electronic format, and making it available online through a secure network accessed by registered students only (with passwords or other authentication means), under a repertoire (blanket) license; the institution must report the usage of works. Rightholders opt into the licensing scheme (not all repertoire of CEDRO is yet covered under this license). But in many cases the license is not enough to cover its needs: for instance, when the work is not managed by CEDRO or its author has not mandated CEDRO the management of digital rights, when the use exceeds the specific amounts allowed under the license (i.e., 10% of a work). If the work is not in its catalogue, the CMO may help the user contact the owner or even request permission on behalf of the user/licensee. In these cases, any answer is possible as to fees and conditions imposed for the license, or more often than desired, a denial of license...

(ii) Voluntary individual licensing

The difficulties in *clearing rights* for teaching uses³¹² derive mostly from the legal uncertainty (lack of clarity) as to which teaching uses are exempted by law and which are not –this is specially acute when the teaching activity involves the making of digital copies (including digitization) and making them available online to registered students. Legal

³¹² For a study on this topic, see the Harvard University Berkman Center (2006), ‘The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital Age’, cyber.law.harvard.edu/media/files/copyrightandeducation.html, accessed 13 November 2006; See also Crews, Kenneth D. and Ramos, Jacque (2004), ‘Comparative Analysis of International Copyright: Law Applicable to University Scholarship’, www.surf.nl/copyright, accessed 13 November 2006.

uncertainty benefits nobody: it brings extra-cautious educational institutions to seek sometimes unnecessary and usually costly and time-consuming licenses and empowers copyright owners to unreasonably deny³¹³ authorization for on-line uses (or simply to set unreasonable prices and conditions), thus limiting the freedom and quality of education.

Additional difficulties exist in locating the owner and obtaining timely responses. It is not unusual to find discrepancies (between authors and publisher or producers) as to who is entitled to license these acts.³¹⁴ Sometimes, the decision as to who owns the copyright in digital and online means of exploitation of a published work (whether the publisher or the author) will depend on difficult processes of right clearance that may have different results depending on the applicable national law. For instance, questions such as who owns the copyright in a commissioned work, who owns new means of exploitation that were not known at the time of entering the assignment contract, etc. In addition, the problem of orphan and out-of-print works further complicates the process of locating the owner.

Librarians from different countries coincide: “The clearance of rights requires a significant commitment of resources by the institution in terms of staff time and coordination ... this lengthy, complicated process” (Canada); “the process of finding, contacting and negotiating with the rights holders is prohibitively time-consuming for most cases and as often does not result in a positive outcome” (US).

Collecting societies cannot always help because they have not been granted the specific mandate to manage the rights necessary to clear teaching uses (i.e., digital reproduction and making available online). This is also true with regards to the societies that manage reprographic rights. In many countries, in addition to the management of any compulsory or legal licenses and compensations imposed by law, they have traditionally obtained from authors and publishers a mandate to manage reproduction rights, but not further communication to the public or making available online. They may help educational institutions in identifying and locating the authors and/or owners, but even when localized, it is the authors or owners the ones who can grant (or deny) the license and establish the conditions (and price) they deem fit.

Failure to secure the permission (denial of license, unacceptable terms and conditions, or non-located owners) to use a work for teaching purposes, means that the instructor will have to rethink the contents of the course and lesson plans. Librarians have experienced how sad it is to tell faculty that they cannot use some material because of copyright law. “Restrictions on online course packs and e-reserves are limiting the ability of education institutions to provide online learning of the same quality as in-person teaching.”

CASE STUDY

Self-archiving and Open (Public) licensing

Prompted by similar concerns, public licenses (such as Creative Commons) of academic works have been gaining acceptance (specially in educational

³¹³ Let's not forget that the exclusivity grants the power to authorize and to prohibit.

³¹⁴ According to one librarian, “rightsholders that are not major organizations (like large publishers) are quite reasonable and even generous.”

environments)³¹⁵ as an alternative means to ensure the development of e-learning and access to culture, and somehow counterbalance what is considered a “too restrictive” copyright regime, by allowing authors to “give back to society” what the law is granting them in exclusive. Public (open) licensing is proving to be a flexible solution to promote e-learning and, in general, restore the public interest in the use of copyrighted works, but it will only take us so far.

The perverse effects that open/public licensing might have for some authors and works will only be seen on the long run –as the combination of licensing terms (sometimes not fully compatible) and the amount of adapted/transformed works builds up, and along with it the chances for infringement (perhaps innocent –but still infringing use). In addition, it is also difficult to predict what will be the result of promoting the “commons” by means of private legal instruments (licenses) based on exclusive rights (copyright).³¹⁶

In short, open licensing is not the solution to enhance the “public domain”. By only focusing on open licensing practices we may end up in a more complex “licensed” world, with copyright laws that remain as ‘unbalanced’ (if so) as before. It is only within the copyright laws that the balance can be restored –by means of strengthening the statutory exceptions and limitations.

2. Some normative considerations: licensing, DRMs and limitations

Another important aspect is the effect of *DRMs*³¹⁷ and *licensing terms* on the scope of exempted teaching uses, specially the restrictions that DRMs may impose on the kind and extent of works that can be used for teaching purposes. Although most laws remain silent on the issue, there is a tendency to let licensing and DRM mechanisms prevail upon the enforcement of the exceptions, as a clear attempt to give the market of digital online delivery of works time to develop and mature.

Exceptions, in general, have been loosing ground in favor of *licensing schemes* (often, non-negotiated) and *DRMs enforcement*. A good example may be found within the EU: both the exceptions for library uses and for illustration for teaching are included in art.6(4) EUCD among the list of exceptions where, in the absence of voluntary measures taken by right holders, Member States are obliged to take appropriate measures to ensure that right holders make available the means of benefiting from that exception or limitation, as long as the beneficiary has legal access to the protected work or subject-matter concerned. Yet,

³¹⁵ In the words of a librarian who participated in this Study: “it does not make sense to think of research institutes and universities just as consumers of copyrighted material.”

³¹⁶ Some voices have arisen pointing out that CC’s legal strategy (based on property and licensing) will not only fail to create an alternative to copyright but may also lead to some unintended consequences (contrary to the project’s worthy pursuit of promoting the free use of creative works). See Elkin-Koren, N. (2005). “What contracts cannot do: The Limits of Private Ordering in Facilitating a Creative Commons”, 74 *Fordham Law Review* 375.

³¹⁷ For a complete study on DRMs and exceptions, we refer to the previous Study prepared by WIPO: [Study on Automated Rights Management Systems and Copyright Limitations and Exceptions](http://www.wipo.int/copyright/en/limitations/studies.html), prepared in 2006 by Nic Garnett: available at <http://www.wipo.int/copyright/en/limitations/studies.html>

Art.6(4)(1) EUCD remains to be proven effective, because lacking any definition of which are the ‘*means of benefiting from that exception,*’ domestic laws tend to simply rely on courts and arbitration, which may turn out to be too slow and costly a mechanism to effectively enforce them.³¹⁸

Furthermore, according to Art.6(4)(4) EUCD, this provision will not apply to works or other subject-matter contracted on-line (by means of ‘*interactive on-demand services*’). These works will remain subject to any agreed (or unilaterally imposed) contractual terms and DRMs set by the copyright owner, also when used for purposes of teaching and library uses. As more and more works become available in digital formats and are contracted on-line, the scope of any statutory teaching exceptions may be strongly reduced in practice –to the extent that they may be *de facto* be effective only in off-line environments. Such a restriction on the scope of works available for teaching purposes may be in detriment of two other fundamental rights: education and culture.

Closely related to the technological issue, should contracts should be allowed to override exceptions and limitations statutorily granted. Some steps were initially taken precisely to prevent that some copyright exceptions be overridden by contract³¹⁹.

However, the recent trend is quite the opposite: *exceptions to copyright are default rules* that can be overridden (waived or limited) by contract. We have seen some examples among the current exceptions in national laws. For instance, in Canada (Sec.29.4(3)), the exceptions for instruction and examination purposes do not apply when the work is commercially available in a medium that is appropriate for the purpose. In Sweden, the extended collective license for reproduction of published works for educational purposes will not apply if the author has filed a prohibition against such reproduction with any of the contracting parties (Sec.42c). In similar terms, in Finland the author is entitled to prohibit the communication to the public of his work for educational purposes (Sec.14).

Instead, the statement (as made in Luxembourg and Belgium) that exceptions are mandatory is certainly a gesture in their favor, but even then, contracts and TPMs may end up prevailing.

In short, the question of whether contracts should be allowed “to override an underlying copyright balance”³²⁰ remains unanswered and will be decided *in casu* (on the basis of each exception) mainly at a domestic level.³²¹ Perhaps not all exceptions deserve the same

³¹⁸ Not all libraries and educational establishments have the economic means to sue copyright owners to obtain the appropriate measures to lawfully benefit from an exception.

³¹⁹ See the Directive 91/250/EEC on computer programs (Art.5) and the Directive 96/9/EC on databases (Art.6). Also, Art.23bis of the Belgian Copyright Act of 1994 (last amended in 2005) states the imperative nature of some exceptions [Art.21, 22, 22bis and 23 (1) and (3)] –thus, teaching exceptions are of a mandatory nature.

³²⁰ See Paul Goldstein, ‘Summary of Discussion’, *The Future of Copyright in a Digital Environment* (P. Bernt Hugenholtz, ed.), Information Law Series -4, Kluwer (1996), pp. 241-248, at 246.

³²¹ See Lucie M.C.R. Guibault, ‘Contracts and Copyright Exemptions’, *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* (P. Bernt Hugenholtz ed.), Information Law Series -8, Kluwer (2000), pp. 125-163

treatment.³²² Perhaps public interest must prevail in some instances but not in others. But education appears to be grounded on a strong public interest.

In his 1999 WIPO Study on Exceptions and Limitations, Prof. Sirinelli stated:

“It is unacceptable that the “public domain” should be determined by individuals and not by the law. For the time being, this problem is totally theoretical because, in practice, this hypothesis has little chance of being put into effect.... This question may arise in twenty years time, but not before”. Ten years have already passed since this conclusion and we already start to see how excessive DRMs and licensing practices may become a threat for the survival of exempted teaching uses. Should we wait another ten years?

The different treatment of digital and analog uses under the law (and applicable exceptions) is, indeed, a meditated choice made by legislators in order to allow for the expansion of the new market of digital delivery of works. But legislators should closely monitor the development of this new market (i.e., including, availability of works, licensing conditions and DRMs implementation) and be vigilant that the exceptions remain effective against the implementation of DRMs and contractual terms. As one librarian stated, we need to make sure that a profit opportunity for a few does not cause a bad for too many.

³²² A similar conundrum is posed by the re-use of *lawful copies*. For instance, Let's assume that the copy has been obtained from another Library through an interlibrary loan. Can this copy be later “re-used” under a teaching exception? Could a fair use (or a lawfully exempted) copy be subject to other fair (or statutorily exempted) uses? Why a library should be obliged to invest time and money in doing a second scanning of a printed work already previously requested for research or teaching purposes? Can licensing terms and DRMs prohibit this? The US Copyright Office, in its *DMCA Report*, considered a somewhat similar issue of interaction between fair use and the first sale doctrine and concluded that while the first sale doctrine does not apply to fair use copies, these copies could indeed be further distributed under fair use. *See* USCO DMCA REPORT at 157.

PART VI: FINAL CONSIDERATIONS REGARDING ONLINE TEACHING

In this part, we will analyze some alternative ways of addressing the identified copyright problems in the field of educational uses with particular emphasis on distance education and the unsolved issue of applicable law.

1. Applicable law to online teaching uses

In addition to the not always friendly environment in terms of exempted teaching uses under national laws, online education must still face another problem: that of applicable law.

Let's go back to the introductory scenario and assume the Virtual University headquarters are located in Spain, that teaching is done both in Spanish and English, and that students located all over the world earn "official" Spanish degrees (sanctioned by the Spanish Government). Which copyright law should be taken into account when deciding what can and cannot be done without a license? And, when seeking a license, what should be the territory licensed (and the copyright owners to be addressed)?

According to article 5(2) of the BC, "the extent of protection . . . shall be governed exclusively by the laws of the country where protection is claimed." When applied in a networked environment, this choice of law rule (and the territoriality principle of copyright law) may lead to the application of several copyright laws. Art.5(2) BC has been usually read as independent from *lex fori*: the applicable law will not necessarily be the law of the country whose courts are being seized to claim protection, but rather the law of the country "for which" protection is claimed.

On the Internet, the country "for which" protection is claimed may lead to a myriad of applicable national laws. In our scenario, every country of reception –where the work is accessed and downloaded by students–³²³ may have its law applied to govern the teaching acts done online.

According to this, the university will need to assess whether its acts of exploitation qualify to benefit from teaching exceptions in all these countries³²⁴ and whether the specific use is exempted under all these national laws; and the answers (having seen the differences in national laws) may not always coincide. For instance, posting (reproduction and making available) a work may qualify under the teaching exception in Switzerland and Luxembourg (where students may be also allowed to download the work) but not in Spain; or the work may be considered "an integral part of a class session . . . directly related and of material assistance to the teaching" (exempted under Sec.110(2) USA) but it should be licensed in the UK. If licensed, the territorial scope of the license may not cover all the countries where students reside CCC and CLA licenses for online uses tend to cover only their respective territories –or, at most, both countries under reciprocity but not beyond. An effective

³²³ I.e., each and every country of residence and beyond, since students may also access the course while on holidays in a foreign country, or working abroad, etc.

³²⁴ As we saw, a "for-profit" educational institution may benefit from the teaching exception in the Netherlands, but not in Germany (since it is not for profit) or in Belgium (since it has not been accredited).

licensing system for online teaching uses would require a complete system of reciprocity agreements between CMOs and licensing societies and educational institutions which is –for the time being– unavailable.

Therefore, in order to comply with all these applicable laws, the VU must either go through an incumbent process of copyright clearance under each of these national laws or deny access to the students residing in the countries for which the material has not been cleared? As an alternative, students residing in countries for which the teaching material has not been cleared should not be allowed to register –albeit there is no certainty that the information given upon registration is true (faked countries of residence are not unusual online).

The application of the laws of the countries of reception would make it extremely difficult to know, in advance, which uses are permissible under an exception (and the conditions of such a permissible use) and which should be licensed. In fact, no matter how carefully the copyright has been cleared, there would likely be an infringement of copyright somewhere in the world, where the material is received.

As an alternative, the choice of law rule in Art.5(2) BC may be interpreted so as to lead to the law of one single country (i.e., the country of upload -where the initiating act took place). This would certainly facilitate copyright clearance and afford some more certainty to the educational institution, but problems would be of a different kind. Within a world-wide (non-harmonized) context, the application of one single law to decide the whole reception in several countries may easily lead to the creation of “copyright havens” for educational institutions (those countries with a generous copyright exception for teaching purposes): if the use of the work is lawful under the law of that country, it will not be an infringement anywhere else in the world! Another possible criterion to “anchor” copyright clearance to one only applicable law would be to use the “degree-granting-country” as the point of attachment. This could avoid (or at least, minimize) the creation of online educational havens, on the one hand, while maintaining the benefits of one single applicable law, on the other.³²⁵ But it is not problem-free either cause it means that online educational establishments will be “unfairly” competing within the same territories (one institution may benefit from a larger scope of statutorily exempted uses, while another is restricted by licensing terms).

Of course, none of these solutions is completely satisfactory and, to be on the safe side, online educational institutions end up facing the uncertainty of a myriad of possible applicable domestic laws and the “mission impossible” to seek worldwide licenses (or exemptions) for all materials to be used for teaching. It is not unrealistic to foresee that in the long run, online education may end up operating outside of the copyright law: not only because users will not know which law and licenses to abide by, but also because countries and CMOs will be helpless to enforce their copyright laws.

³²⁵ An educational institution offering Spanish law degrees should be subject to Spanish copyright law, regardless of where its headquarters or students are located, etc. Spanish copyright law should then decide whether, to what extent and under which conditions the use of pre-existing works for teaching purposes will be allowed without authorization and/or without compensation to the authors, or whether a license is needed (and for which scope).

2. A legal (non-voluntary) license for online teaching?

Having seen the diverse, fragmented and incomplete scope of exempted teaching uses under national laws, the difficulties and inefficiency of voluntary licensing systems (collective or individual) and the inadequate provision of the legitimate public interests of education through voluntary licensing arrangements, a *statutory (non-voluntary) licensing system* subject to remuneration and compulsory collective management, appears to be the most plausible solution to balance the legitimate interests of authors and owners with the public interest of education.³²⁶ Such a provision would be especially useful for online teaching. The advantages of a remunerated compulsory licensing scheme for online teaching (and for teaching, at large) are obvious:

- It would ensure that all works (also those accessed by means of electronic databases) can be used for educational purposes, subject to fair terms and conditions; instead of letting teaching uses be decided by authors and owners (who are free to prohibit them directly or indirectly, by means of unfair terms and prices).
- It would simplify the licensing process, in the benefit of all parties involved: libraries and educational establishments, on one side, as well as collective societies and authors, on the other.
- And, in general, it would ensure that more authors and copyright owners will be compensated for the teaching uses of their works, and that more works can be used for teaching purposes.

Under such a legal license, lawfully disclosed works –of any kind– could be used for teaching (instructional) purposes in any means and formats, including the reproduction and making available on–line, so that they can be accessed and downloaded by registered students, under the following conditions:

- works primarily intended for teaching are excluded (so that their normal exploitation is not affected);
- works accessed by means of an electronic database will remain subject to its own terms and conditions, as long as teaching uses are allowed;
- the work is used only to the extent necessary for the teaching purpose;
- reasonable efforts (including DRMs) are undertaken to restrict access to registered students³²⁷ and to prevent misuse or, at least, minimize downstream infringement;
- authors are duly credited (including the source),
- and receive fair compensation –which will take into account the nature of the teaching use (not all teaching uses should be compensated and compensated equally), the nature of the educational establishment and/or

³²⁶ Prof. Ricketson concluded: “The provision of statutory licenses may be one of the means of ensuring that there is no unreasonable prejudice to the legitimate interests of authors, while ensuring that an appropriate balance is struck between the rights of authors and those seeking educational objectives.” See Ricketson, WIPO Study on Limitations and Exceptions, *op.cit.supra*, at 76.

³²⁷ Passwords and other access control measures are critical to ensure that solely the students officially enrolled in the course will have access to the works.

- program, and the means used to deliver the work (downloading or only streaming).
- All educational establishments (be it public or private-owned, for-profit or non-profit) should benefit from the exception (provided the remaining conditions are met), albeit they may be subject to different compensation regimes and conditions.

PART VII: CONCLUDING REMARKS

Both the BC and the EUCD provide for flexible and technology neutral exceptions for teaching purposes, which may exempt any use done as part of the instruction, as well as teaching anthologies, in any formats (analog or digital), thus clearly intended to cover face-to-face, distance and on-line teaching. However, most national legislators fail to fully take advantage of such opportunity. Exceptions and limitations for teaching purposes in national laws tend to be restricted in terms of acts of exploitation (i.e., reproduction and/or performance or display, but not making available), works and amounts (percentages, pages, etc) that can be used, and in some cases for-profit institutions are left out. Complex provisions that are not always fit to cover digital means and online teaching, and in some cases fall short of satisfying the full needs of face-to-face education. Licensing (voluntary licensing) becomes, thus, necessary to clear, at least, some teaching uses.

Several powerful reasons justify the BC and EUCD open and flexible approach in favor of all forms of education (be it face-to-face, distance or on-line teaching), to the extent required by the purpose and, as necessary, subject to remuneration in favor of authors and rights holders.

On the one hand, the *public interest* that justifies copyright exceptions for teaching purposes is the same regardless of the means used to conduct that teaching. The distinction between face-to-face and on-line teaching will soon be obsolete, digital formats being far too common (and valuable) so as to treat them differently.³²⁸ On the other, education is severely constrained in a world where copyright owners have a right to unilaterally set the conditions (price and terms) for their works to be used for teaching purposes and even *refuse permission* for a work to be used for teaching. Lacking any counterbalance (i.e., an exception or limitation), *authors are ultimately granted the power to control what is taught:*

‘There is also a serious concern about academic freedom and the control that content providers can exert by whether and to what extent they allow their content to be used in distance education courses. The power to refuse to license or to offer terms that an educational institution cannot afford or cannot accept is the power to control what is taught in courses.’³²⁹

One may argue that no exceptions would be necessary if solid *voluntary licensing systems* were available, and that efforts should be devoted to building these systems instead of the ‘old-fashioned’ legal technique of exceptions. It is true that licensing systems are steadily developing and that technology may eventually allow the granting of individual licenses for every specific use of a work. However, these arguments miss a fundamental step: that exclusive rights granted to authors are not unlimited and that education and culture deserve to act as a limitation to these exclusive rights, also in digital contexts. Copyright must be

³²⁸ The potential damage of digital reproduction for the authors’ legitimate interests justifies special conditions and limitations for digital libraries and teaching purposes, but the *public interest* that justifies educational copyright exceptions is the same regardless of the means used to conduct that teaching.

³²⁹ See Gasaway, Laura (2001), ‘Impasse: Distance Learning and Copyright’, 62 *Ohio State Law Journal*, 783, p.815.

enforced also in digital contexts, provided that it is not done at the expense of education and culture.

Technology and licensing³³⁰ alone (no matter how perfect and evolved) are not likely to find the right balance between public and private interests at stake. Public policy concerns are a fundamental part of copyright law and they can only be correctly addressed by within the law. The needs of education and access to culture must be guaranteed within our copyright laws as a question of strict *public policy*. It is not the “right” of an instructor to use protected works, but his obligation and duty towards society; and the copyright laws should provide for this. Strong mandatory remunerated exceptions for educational purposes (under legal license schemes) will only benefit the advance of creativity and benefit the Authors. This is the option enshrined in Art.10(2) BC (as well as in Art.5(3)(a) EUCD) which has been adopted already by some European legislators. But some is not enough –not in an online market.

Education deserves more effective exceptions than those existing today in national laws and this can only be attempted at a supranational level. Education is a cornerstone for the progress of society and the development of economic markets. The Internet affords a unique opportunity for education, and the *fragmentation, disparity and insufficiency of national law solutions* may ultimately become an impediment for the developing of online teaching. A statutory license (remunerated) subject to compulsory collective management would overcome the difficulties and shortcomings of voluntary licensing, while ensuring both the interests of authors and owners (fairly compensated) as well as of society, setting the ground for online teaching to lawfully and fully develop.

International instruments have traditionally proceeded on the assumption that countries will take due care of the public interest within their copyright laws. But in the digital networked–world national solutions are no longer effective: borders blur, especially among communities sharing a same language, and domestic laws discrepancies and licensing complexities may end up stalling the development of on-line education. International instruments, such as the Berne Convention, are in a privileged position to envision some solution.

[Appendix follows]

³³⁰ “Bilateral contract will be ubiquitous in cyberspace, but it is unlikely to displace completely state-backed property rights for two reasons. First ... the “safety net” of a property right may still be necessary to protect adequately investment by creators of digital content. Second, certain limits on the rights of intellectual property owners are best seen as immutable, i.e. outside the ability of contracting parties to waive or vary.” See Robert Merges, ‘The end of friction? Property Rights and Contract in the “Newtonian” World of On-line Commerce,’ 12 *Berkeley Technology Law Journal* 115, at 136 (1997)

APPENDIX

The information contained in the following charts has been gathered from the official web pages of the national governments as well as from:

WIPO's Collection of Laws for Electronic Access:
<http://www.wipo.int/clea/en>

UNESCO's Collection of National Copyright Laws:
http://portal.unesco.org/culture/en/ev.php-URL_ID=14076&URL_DO=DO_TOPIC&URL_SECTION=201.html

LIST OF COUNTRIES

CANADA

Copyright and Related Rights (Neighboring Rights), The Copyright Act, R.S.C. 1985, Chapter C-42 – current to 22 June 2009: <http://laws.justice.gc.ca/PDF/Statute/C/C-42.pdf>
An Act to amend the Copyright Act, S.C. 1997, c. 24 (Assented to 25 April 1997)
Exception for Educational Institutions, Libraries, Archives and Museums Regulations (P.C. 1999-1351) 28 July 1999. Copyright Rules, P.C. 1997-1422 1 October, 1997 SOR/97-457

UNITED STATES OF AMERICA

United States Code, Title 17 (USC) - Copyrights, Chapters 1-13 - as amended through Oct.16 2008 available at: <http://www.copyright.gov/title17/circ92.pdf>

ALBANIA

Law No. 9380 of May 28, 2005 - The Copyright and Other Rights Related to It

ANDORRA

Law on Authors' Rights of 10 June 1999

ARMENIA

Law on Copyright and Related Rights of June 15, 2006.

AUSTRIA

Federal Law BGBl No. 111 of 1936 on Copyright in Works of Literature and Art and on Neighboring Rights (Copyright Law), as amended by BGBl 1949/206, 1953/106, 1963/175, 1972/492, 1980/321, 1982/295, 1988/601, 1989/612, 1993/93, 1996/151 and by 1998/25. Last Amendments of 2000/110, 2003/32 and 2006/129 (German) *Translation by Author*

AZERBAIJAN

Law on Copyright and Related Rights, as entered into force on October 8, 1996

BELARUS

Law of the Republic of Belarus on Copyright and Related Rights. Law No. 370-XIII of May 16, 1996 -as last amended and consolidated by Law No. 396-Z of 14 July, 2008 available at:

<http://law.by/work/EnglPortal.nsf/6e1a652fbefce34ac2256d910056d559/7e18184c14ae0e6bc2256dec0042400c?OpenDocument>

BELGIUM

Law on Copyright and Neighboring Rights (of June 30, 1994, as amended by the Law of April 3, 1995 and last amended by Laws of 22 May 2005 and of 4 Dec. 2006) (French)
Translation by Author

BOSNIA AND HERZEGOVINA

Law on Copyright and Related Rights in Bosnia and Herzegovina, as adopted on 21 March 2002

BULGARIA

Law on Copyright and Neighboring Rights, No.56/1993. An unofficial consolidated text as of 2008 (English) available at: <http://solicitorbulgaria.com/index.php/bulgarian-copyright-and-neighbouring-rights-act>

CROATIA

Copyright and Related Rights Act (O.G. 167/2003)

CYPRUS

The Copyright and Neighboring Rights Law No. 59/1976, of December 3, 1976, as amended by Laws No. 18(I)/1993, 54(I)/1999, 12(I)/2001, 128(I)/2002, and 128(I)/2004.)

CZECH REPUBLIC

Act No. 121/2000 Coll., of 7 April 2000, on Copyright and Rights Related to Copyright (the Copyright Act), as amended by Act No. 81/2005 Coll., Act No. 61/2006 Coll. and Act No. 216/2006 Coll.

DENMARK

Consolidated Act on Copyright No. 763 of June 30, 2006

ESTONIA

Copyright Act adopted on 11 November 1992 [consolidated text of 2000] as last amended by Act. 31 May 2006

FINLAND

Copyright Act (Law No. 404 of July 8, 1961), as last Amended by Law No. 821/2005 of October 14
Copyright Decree, Decree No. 574/1995 issued on April 21, 1995, as last Amended by Decree No.1036/2005

FRANCE

Law on the Intellectual Property Code (Legislative Part) No. 92-597 of July 1, 1992 (as last amended by Law n°2009-669 of 12 June 2009 available at:
<http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414&dateTexte=20090902> (French) *Translation by Author*
Official translation (updated 2003) available at:
<http://195.83.177.9/code/liste.phtml?lang=uk&c=36>

GEORGIA

Law on Copyright and Neighboring Rights of 22 June 1999, as last amended on 5th Dec. 2000

GERMANY

Law on Copyright and Neighboring Rights (Copyright Law) of September 9, 1965, consolidated as of 16 July 1998. Last amended by Laws of 10 Sept. 2003 and of 26 October 2007 available at: <http://transpatent.com/gesetze/urhg.html> (German)
Translation by Author

GREECE

Law No. 2121/1993, Copyright, Related Rights and Cultural Matters, as last amended by Law No. 3207 of 2003 – and by Law No.2524/2007

HUNGARY

Copyright Act No. LXXVI of 1999 (Consolidated by Act No. XLVIII of 2001 on Designs and Act No. LXXVII of 2001). Last amended by 2003. évi CII. törvény [hatályos 2004. május 1. napjától]; 2003. évi CXXV. törvény; and 2004. évi LXIX. törvény [hatályos 2004. július 10. napjától] available at <http://www.hpo.hu/jogforras/9976.html> (Hungarian)
Translation by Author
Decree No. 9/1969 Implementing Act No. III of 1969 on Copyright (as last amended by Decree No. 24/1994.

ICELAND

Copyright Act (No. 73 of May 29, 1972 [consolidated as of June 2006])

IRELAND

Copyright and Related Rights Act, 2000 (No. 28 of 2000)
S.I. No. 16 of 2004 European Communities (Copyright and Related Rights) Regulations 2004

ISRAEL

Copyright Act of 19 Nov. 2007

ITALY

Law No. 633 of April 22, 1941. Protection of Copyright and Rights Related to its Exercise
(as last amended by Legislative Decree S861 of 21 Dec. 2007 (Italian) *Translation by Author*)

KAZAKHSTAN

Law on Copyright and Neighboring Rights, as entered into force on June 10, 1996 (WIPO)

KYRGYZSTAN

Intellectual Property (Civil), Code (Part 2), 05/01/1997
Law on Copyright and Neighboring Rights, of December 16, 1997, as last amended in 2001.

LATVIA

Copyright Law (of April 6, 2000), as amended on 6 March 2003 and 22 April 2004

LIECHTENSTEIN

Law on Copyright and Neighboring Rights (Copyright Law) (of 19 May 1999) -amended by
Law of January 1, 2000

LITHUANIA

Law on Copyrights and Related Rights No. VIII-1185 of May 18, 1999, as amended by Law
No. VIII-1886 of July 20, 2000 and by Law No. IX-1355 of 5 March 2003.

LUXEMBOURG

Law of 18 April 2001 on Copyright, Neighboring Rights and Databases, as amended by Law
of 18 April 2004. (French) *Translation by Author*

MACEDONIA

Law on Copyright and Related Rights of September 12, 1996 -as amended up to 2005
(unofficial consolidated text)
Official consolidated text as of 1998: <http://www.mlrc.org.mk/law/1023.htm>

MALTA

Copyright Act of April 25, 2000 (Act No. XIII of 2000) (as amended by Acts VI of 2001, IX of 2003 and IX of 2009:

http://docs.justice.gov.mt/lom/legislation/english/leg/vol_13/chapt415.pdf

MOLDOVA

Law on Copyright and Neighboring Rights No. 293-XIII of November 23, 1994 (as last amended by Law No. 1268-XV, of 25 July 2002)

MONACO

Not found

MONTENEGRO

Law on Copyright and Related Rights, as entered into force on 1 September 2005.

Montenegro is assumed to have succeeded to the copyright obligations of Serbia and Montenegro.

NETHERLANDS

The Copyright Act, 1912 (as last amended by the Law of October 27, 1972) –amended up to 2006 (unofficial translation and consolidated text available at:

http://www.ivir.nl/legislation/nl/copyrightact1912_unofficial.pdf

NORWAY

Act N.2 of 12 May 1961, relating to copyright in literary, scientific and artistic works; with subsequent amendments, latest of 17 June 2005.

Regulation Concerning the Scope and Extent of the Provisional Act Relating to Photocopying, etc. of Protected Works for Use in Educational Activities (Laid down by Royal Decree No. 297 of February 15, 1985, in pursuance of Provisional Act No. 40 of 8 June 1979)

POLAND

Act of 4 February 1994 on Copyright and Neighboring Rights –as last amended in 2004

PORTUGAL

Code of Copyright and Related Rights (No. 45/85 of September 17, 1985, as last amended by Law No. 50/2004 of August 14th (Portuguese) *Translation by Author*

ROMANIA

Law No. 8 of 14 March 1996 on Copyright and Neighboring Rights -consolidated text of 2006

RUSSIAN FEDERATION

Law of the Russian Federation No. 5351-1 of July 9, 1993 on Copyright and Neighboring Rights (with the Additions and Amendments of July 19, 1995, July 20, 2004)

SAN MARINO

Law on Authors' and Performers Rights No.8 of 25 January 1991 –as amended by Law n.63 of 1997 and Law n.48 of 1998

SERBIA

Law on Copyright and Related Rights, as entered into force on 1 September 2005. Serbia is assumed to have succeeded to the copyright obligations of Serbia and Montenegro.

SLOVAKIA

Copyright Act No. 618/2003 of 4th December 2003 on Copyright and Rights Related to Copyright

SLOVENIA

Copyright and Related Rights Act of 30 March 1995 as last amended on 15 December 2006

SPAIN

Consolidated Text of the Law on Intellectual Property, regularizing, clarifying and harmonizing the applicable statutory provisions [Approved by Royal Legislative Decree 1/1996 of April 12, 1996, and amended by Law 5/1998 of March 6, 1998, incorporating Directive 96/9/EC on the Legal Protection of Databases; by Act 10/2007 of June 22, on Reading, Books and Libraries; and by Act 3/2008 of December 23, implementing Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art]

Translation by Author

SWEDEN

Act on Copyright in Literary and Artistic works (No. 729, of December, 30, 1960, as amended up to July 1st, 2005)

Copyright Regulation No 1212 of November 25, 1993, amended by Regulation No 194 of April 14, 1994

SWITZERLAND

Federal Law on Copyright and Neighboring Rights (Federal Copyright Law) of 9 October 1992, as last amended by the Law of 5 October 2007 (French) *Translation by Author*

TAJKISTAN

Law on Copyright and Related Rights, adopted on 13 November 1998 (Law No. 726) and subsequently amended on 1 August 2003 (Law No. 27).

TURKEY

Law No. 5846 of 5 December 1951, on Intellectual and Artistic Works, as last amended by Law No. 4110 of 7 June 1995 and Law No. 4630 of 21 February 2001

TURKMENISTAN

The Copyright Law (as part of Turkmenistan's Civil Code) was enacted in 1993 and last amended in 1999, in force since 2000. –not located

UKRAINE

Law on Copyright and Related Rights, Adopted on 23 December 1993, amended on 28 February 1995, 16 July 1999, 11 July 2001, 22 May 2003 and 20 November 2003

UNITED KINGDOM

Copyright, Designs and Patents Act 1988 (C. 48) – as amended by The Copyright and Related Rights Regulations of 27 September 2003, No. 2498

UZBEKISTAN

Law on Copyright and Related Rights (No. 272-I) of 30 August 1996

VATICAN (HOLY SEE)

Law N. XII on Copyright of January 12, 1960 *Translation by Author*

[Annex follows]

ANNEX

Charts of consulted national law provisions:

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	TEACHING PURPOSES TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	Berne Convention Art.10(2)	Berne Convention Art.10(1)	Berne Convention Art.9(2) Three-step-test
Rights	utilization	make quotations	BC: reproduction Art.10 WCT / Art.16 WPPT : rights granted (digital means included)
Purposes	by way of illustration in publications, broadcasts or sound or visual recordings for teaching (→ Teaching Anthologies)	No specific purposes (→ education purposes)	in certain special cases
Beneficiary			
Works	literary or artistic works	a work which has already been lawfully available to the public	Works Other subject matter
Other conditions	to the extent justified by the purpose compatible with fair practice	justified by the purpose compatible with fair practice	do(es) not conflict with a normal exploitation of the work/ performance/recording do(es) not unreasonably prejudice the legitimate interests of the author /owner

Fair comp.	Not required but allowed	Not required but allowed	Not required but allowed
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	TEACHING PURPOSES TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	Art.5.3(a) EUCD	Art.5.3(d) EUCD	Art.5.2(b) EUCD
Rights	Reproduction → (Distribution) Communication to the public Recital 42: including distance learning	Reproduction → (Distribution) Communication to the public	Reproduction on any medium
Purposes	Use for the sole purpose of illustration for teaching or scientific research	such as criticism or review → teaching purposes ?	for private use
Beneficiary			made by a natural person
Works	Works and other subject matter	a work or other subject matter which has already been lawfully made available to the public	Works and other subject matter
Other conditions	justified by the non commercial purpose to be achieved Recital 42: the non-commercial nature of the activity in question should be determined by that activity as such. The organizational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.	required by the specific purpose in accordance with fair practice	and for ends that are neither directly or indirectly commercial

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Fair comp.	Not required but possible (Recital 36)	Not required but possible (Recital 36)	Yes. - Fair compensation must take account of the application or non application of technological measures
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS PRIVATE COPY / USE	LIBRARY USES
	CANADA (sec.29.4-9)	CANADA (sec.30)	CANADA (sec.29)	CANADA (sec.30.2)
Rights	(sec.29.4) Reproduction, translation, public performance (sec.29.5) Performance in public (sec.29.6-9) Make a copy (of a telecommunicated work) and perform it in public (sec.30.3) Reprographic copying	publication in a collection, mainly composed of non-copyright matter	Fair dealing	(1) to do anything on behalf of any person that the person may do personally under section 29 or 29.1 (2) reprographic reproduction upon request (3) reprographic reproduction
Purposes	(sec.29.4.1) for Instruction (a) to make a manual reproduction of a work onto a dry-erase board, flip chart or other similar surface intended for displaying handwritten material (b) to make a copy of a work to be used to project an image of that copy using an overhead projector or similar device for the purposes of education or training on the premises of an educational institution. (sec.29.4.2) for Examinations, etc (a) reproduce, translate or perform in public on the premises of the educational Institution (b) communicate by telecommunication to the public situated on the premises of the educational institution a work or other subject-matter as required for a test or examination. (sec.29.5) for educational or training purposes and not for profit (Sec.29.6-7) for educational or training purposes	Intended for the use of educational institutions, and so described in the title and in any advertisements issued by the publisher,	(sec.29) for the purpose of research or private study (sec.29.1) for the purpose of criticism or review	(1) for the purpose of research or private study, and for the purpose of criticism or review (2) to use the copy for research or private study (3) photocopies installed on the premises of educational institutions, libraries, archives or museums, for use by students , instructors or staff at the educational institution or by persons using the library, archive or museum
	an educational institution or a person acting under its authority (sec. 30.4) libraries of educational institutions included			a library, archive or museum or a person acting under its authority
Works	(sec.29.4) Works or other subject matter (sec.29.5) live performances by students, performance of sound recordings or works embodied in sound recordings, performance of telecommunicated works (sec.29.6) of a broadcasted news program ... excluding documentaries (sec.29.7) of a broadcasted work or other subject-matter	of short passages from published literary works Excluded: works published for the use of educational institutions		(2) of a scholarly, scientific or technical periodical; or other newspaper or periodical published more than one year before. Excluded: works of fiction, poetry, dramatic or musical works (3) of works in printed form

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Other conditions	<p>Sec.29.4 (1b) and (2) do not apply if the work or other subject-matter is commercially available in a medium that is appropriate for the purpose</p> <p>Sec.29.5 applies provided that: performances are done on the premises; before an audience consisting primarily of students, instructors or any person who is directly responsible for setting a curriculum for the educational institution (sec.29.4 and 5) Without motive of gain (sec.29.3: excluded recovery of no more than the costs and overhead costs) (sec.29.6-7): performance within one year after the making of the copy, before an audience consisting primarily of students, on its premises, copies must be destroyed (sec.29.6-7) copies of telecommunications may be kept for 30 days and then –if not used for teaching- must be destroyed. (sec.29.5-7) Excluded: telecommunication received by unlawful means</p>	<p>Provided that ... not more than two passages from works by the same author are published by the same publisher within five years;</p>		<p>A single copy</p> <p>Without motive of gain (sec.29.3: excluded recovery of no more than the costs and overhead costs)</p> <p>(3) if a license from a collecting society</p>
	<p>(sec.29.4 and 5) : NO (sec.29.6-7): Yes</p>	No	No	<p>No Yes (reprographic copying).</p>

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	ALBANIA	ALBANIA (art.27.2)	ALBANIA (art.27.1)	ALBANIA (art.26.d)
Rights		Reproduction (ex art.27.3: translation included: in case of translation, the name of the translator must be mentioned)	Briefing, citation or reproduction (ex art.27.3: translation included: in case of translation, the name of the translator must be mentioned)	Reproduction
Purposes		In anthologies for educational purposes	For purposes of critical studies, or for discussions or theoretical purposes,	For private use
Beneficiary				
Works		Of the work or parts of it	Of excerpts or parts of a work	Of the entire work or parts of works
Other conditions		Must not exceed the extend defined by the legal provisions and regulations in force On the condition that (the use) does not prejudice the rights holders rights on the work	Within the extent of these aims On the condition that these acts do not prejudice the commercial exploitation of the work On the condition that (the use) does not prejudice the rights holders rights on the work	On the condition that it does not prejudice the commercial exploitation of the work On the condition that (the use) does not prejudice the rights holders rights on the work

Fair comp.		Without any remuneration	Without any remuneration	Without any remuneration
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	ANDORRA (art.9.1b, 10.a)	ANDORRA (art.9.1a)	ANDORRA (art.8)	ANDORRA (art.7)
Rights	(9.1b) Reprographic reproduction (10.a) Make a single copy of the work by reprographic reproduction	(1a) Reproduction	Reproduction	Reproduction in a single copy
Purposes	(9.1b) for face-to-face teaching (10.a) At the request of a physical person for purposes of study, scholarship or private research	(1a) By way of illustration, in writings or sound or visual recordings for teaching	...In the form of quotation, in another work	exclusively for his own private and personal use
Beneficiary	(9.1b) in educational institutions whose activities do not serve direct or indirect commercial gain (10.a) Any library or archive whose activities do not serve direct or indirect gain			made by a physical person Including such use within the normal circle of his family and its social acquaintances
Works	(9.1b) Of a published article or other short work or short extract of a writing, with or without illustrations	(1a) Of a short part of a published work	Of a short part of a published work	Of a published work Excluded: buildings, sheet music, entire books or a substantial part, computer programs, electronic database
Other conditions	(9.1b) To the extent justified by the purpose, provided that the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions (10.a) That the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions	(1a) That such reproduction is compatible with fair practice and its extent does not exceed the extent justified by the purpose	That such a reproduction is compatible with fair practice and its extent does not exceed the extent justified by the purpose	That reproduction does not conflict with a normal exploitation ... or unreasonably prejudice the legitimate interests
Fair comp.				Only for phonograms and audiovisual works

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	ARMENIA (art.24.3b, art.22.2g)	ARMENIA (art.22.2b)	ARMENIA (art.22.2a)	ARMENIA (art.23)
Rights	(24.3b) Reprographic reproduction in one or more copies (storage in electronic format not included) (22.2g) Public performance	The use	Quotation, in original language or in translation	Reproduction
Purposes	(24.3b) For study and research purposes (upon request by a natural person) As well as by educational institutions for the classroom studies (22.2g) In the course of educational activities with the participation of teachers and students	By illustration in the publications of educational nature, programs of broadcasting organizations, audio and video recordings	For scientific, research, polemic, critical and informational purposes	Exclusively for private, non-commercial use
	(24.3b) Libraries and archives, educational and cultural institutions (22.2g) At educational institutions			
Works	(24.3b) independent articles, succinct works lawfully published in collections... periodical publications, and short extracts of lawfully published written works - except computer programs (22.2g) Of a musical work lawfully made public	Of works of literature and art lawfully made public and extracts thereof	Of an extract of a work lawfully made public	Of a work lawfully made public (except architectural works, electronic databases, computer programs, sheet music, whole books)
Other conditions	(24.3b) Without profit making (22.2g) If the audience is composed of teachers and students, as well as persons directly connected with educational institution (parents, guardians, trustees, tutors)	To the extent justified by the purpose of illustration of education And in the case of databases, for the illustration of education and to the extent justifying the non-commercial purpose	To the extent justified by the purpose of the quotation	That the use ...does not prejudice the legitimate interests of the author
Fair comp.	Without remuneration	Without remuneration	Without remuneration	Without remuneration

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	AUSTRIA (art.42.6) (art.54.1-4) (art.56c)	AUSTRIA (arts. 45, 51, 54)	AUSTRIA (arts. 46)	AUSTRIA (art.42, art.42a)
Rights	(42.6) Make and distribute copies (reprography) (54.1-4) Present in public (display?) (56c) Publicly perform	Reproduce and distribute Use in broadcasts designated as school broadcasts	quotations	(1) Reprography (2,4) Reproduction (including digital copies)
Purposes	(42.6) For purposes of teaching and training (54.1-4) In a predominantly scientific or educational lecture (56c) For the purpose of teaching and lectures	in a collection containing the works of several authors and intended for use in schools or for educational purposes ... only for the purpose of elucidating the content		(1) For own purposes (personal, internal uses) (2) For own research purposes (4) For private use (personal and domestic use: family and close friends)
Benef.	Schools and higher educational establishments (universities)			(1,2) Anyone (legal and natural persons) (4) Any natural person (legal entities excluded)
Works	(42.6) works of literature (54.1-4) works of art (56c) cinematographic works (including feature films) and associated music To the extent justified thereby Excluded: works which, by their nature and designation, are intended for use in schools, teaching or training	individual works of language, individual musical works, individual works of art, Excluded: works which, by their nature and designation, are intended for teaching or training	of individual passages of literary or musical works	(4) single copies Of a work
Other conditions	(42.3) In the quantities required for a specific class or lecture (reproduction by schools for own use) (42.6) Neither for direct nor indirect commercial purposes	To the extent justified by the non-commercial purpose	to an extent justified by the purpose of quoting.	(42.6) Neither for direct nor indirect commercial purposes Copies made for personal use may not be used for the purpose of making the work available to the public

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Fair comp.	(42.6) Yes (56c) Subject to equitable remuneration - compulsory collective management	Yes - compulsory collective management		Yes: reprography, and private copying in audio and visual supports (levies)
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	AZERBAIJAN (art.18.1b, 1c)	AZERBAIJAN (art.19.2)	AZERBAIJAN (art.19.1)	AZERBAIJAN (art.17)
Rights	(1b, 1c) Reprographic reproduction	Use	Quotation, in the original language or translation	Reproduction
Purposes	(1b) At the request of natural persons who will make use of the copies for study or research purposes (1c) Intended for classroom use	In publications, radio or television broadcasts or sound or audiovisual recordings of educational character	For scientific, research, polemic, critical or informational purposes	For exclusively personal purposes
	(1b) By a library or archive (1c) By an educational establishment			By a physical person
Works	(1b) Of isolated articles or succinct works in periodical publications, or short extracts from lawfully published written works (excepting computer programs) (1c) Isolated articles or succinct works in periodical publications, or short extracts from lawfully published written works (excepting computer programs)	Of extracts of lawfully disclosed works	Of extracts from lawfully disclosed works	Of a lawfully disclosed work Excluded: architectural works, databases, computer programs, whole books, music sheets, original works of art
Other conditions	(1b, 1c) Without gainful intent	To the extent justified by the purpose	To the extent justified by the purpose of the quotation	
Fair comp.	(1b, 1c) Without payment of remuneration	Without remuneration	Without remuneration	Without payment of remuneration –except for audiovisual works and phonograms, subject to collective management
	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE

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	BELARUS (art.20.2 and .3)	BELARUS (art.19.2)	BELARUS (art.19.1)	BELARUS (art.18)
Rights	Reproduction (Act of 1996 only covered "reprographic reproduction")	Use	Quotation	Reproduce
Purposes	(2) to meet the requirements of natural persons who will use the copies obtained for study or research purposes (3) For educational uses (lessons, classroom use)	For the purpose of illustration in publications, radio or television broadcasts or sound or video recordings of an educational nature	For scientific or research purposes, for teaching, polemic, critical or informational purposes	Exclusively personal purposes
	(2) by a library or archive (3) by an educational institution			A natural person
Works	(2) Of isolated articles or succinct works lawfully published in collections, newspapers or other periodical publications, or of short extracts from lawfully published written works (3) A single copy: Of isolated articles or succinct works lawfully published in collections, newspapers or other periodical publications, Of short extracts from lawfully published written works	Extracts from lawfully published works	Extracts from lawfully published works	A single copy ... Of a lawfully published work Excluded: works of architecture, databases, computer programs, musical scores and entire books.
Other	Without gainful intent (for non commercial purposes)	To the extent justified by the intended purpose	To the extent justified by the intended purpose	
Fair comp.	Without payment of remuneration	Without payment of remuneration	Without payment of remuneration	Without payment of remuneration Exception: Authors, performers and producers of phonograms and audiovisual recordings are remunerated

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	BELGIUM (art.22.1)	BELGIUM (art.21.2)	BELGIUM (art.21)	BELGIUM (art.22.1)
Rights	(3) Free and private communication (4bis) Reproduction on paper or similar support (4ter) Reproduction in any medium other than paper or similar support (4quater) Communication (including online) (7) Free performance during a public examination	The compilation of an anthology	Quotations	(3) Free and private communication (4) Reproduction on paper or similar support (reprography) (5) Reproduction in any medium other than paper or similar support (digital included, scanning ok)
Purposes	(3) ...as part of school activities (4bis, 4ter, 4quater) For purposes of illustration for teaching or scientific research (7) where the purpose of the performance is ... the assessment of the performer/s with a view to awarding them a certificate, a diploma or other title	intended for teaching	For the purposes of criticism, polemic or teaching or in scientific works	(3) Within the family circle or as part of school activities (4) For a strictly private purpose (5) Within the family circle and restricted to it
Beneficiary	(4quater) : by establishments officially recognized or organized for this purpose by the government, provided that such communication... is done within the normal activities of the establishment, ... only by means of closed transmission networks of the establishment (7) within the framework of an approved type of teaching	After the death of the author the consent of his successor in title shall not be required on condition that :		
Works*	(3) Of lawfully published works (4bis) (4ter) in part or in whole of articles or works of fine art or reproduction of short fragments of other works (4quater) of works (7) of a work		Taken from a lawfully published work	(3) Of lawfully published works (4) In part or in whole of articles or works of fine art, and short fragments of other works (except music scores) (5) Of lawfully published works
Other conditions	Once a work has been lawfully published (4bis, 4ter, 4quater) To the extent justified by the non-profit goal (4bis, 4ter, 4quater) Provided that it does not prejudice the normal exploitation of the work	- The choice of the extract, its presentation and its place respect the moral rights of the author	- In accordance with the fair practice of the profession - And to the extent justified by the purpose	(4) Provided that it does not prejudice the normal exploitation of the work
Fair comp.	(4bis) Authors and publishers, as set for reprography under Art.22.1(4) (Art.59) (4ter, 4quater) Authors and publishers (Art.61bis(a) and Art.61quarter)	And that an equitable remuneration be paid as agreed between the parties or, failing that, determined by the court in accordance with fair practice.		under art.22.1(4,5) Authors and publishers are entitled to remuneration (Art.59)

*Under Art.22bis, similar exceptions for "strictly private purposes" (as in art.22.1(4)) and for "purposes of illustration for teaching and scientific research" (as in arts.22.1(4bis, 4ter, 4quater) apply to databases.

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	BOSNIA and HERZEGOVINA (art.51.1a)	BOSNIA and HERZEGOVINA (art.50.1a)	BOSNIA and HERZEGOVINA (art.51.1g)	BOSNIA and HERZEGOVINA (art.51.1d)
Rights	Public presentation and performance	Reproduction And public communication (in appropriate manner)	Faithful quotations	Reproduction
Purposes	For the purposes of direct teaching or in the form thereof, As well as secondary broadcasting of school shows by means of radio-diffusion	In reader's books and textbooks to the purpose of educational and scientific work	Of excerpts (citations)	For purposes of improving one's personal knowledge,
Works	Of a literary or artistic work	Of individual pieces of literary, scientific or artistic works or such works of smaller extent As well as individual works in the field of photography, fine arts, architecture, applied arts, industrial design and cartography if it is the matter of already published works of a larger group of authors;	From a lawfully disclosed work	Of works already published,
Other conditions	ALSO EXEMPTED (Art.51.1a in fine): public presentation and performance of published works provided that such performance involves no entrance fee or other form of payment or is given on the occasion of school celebrations where attendance is free of charge;		In the measure justified by the purpose to be achieved Provided that it is in compliance with customary usage	Provided that such reproduction is neither intended for nor accessible to the public and does not indirectly serve to another person for gaining or increasing profit
Fair comp.	Without the payment of remuneration	Subject to remuneration of the author		Without the payment of remuneration

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	BULGARIA (art.24.9)	BULGARIA (art.24.3)	BULGARIA (art.24.2)	BULGARIA (art.25.2)
Rights	Reproduction	Use	Use of quotations	Reproduction
Purposes	For educational purposes or to ensure preservation	In a volume that is required for purposes of preparing an analysis, commentary or other scientific research Only if it is done for scientific or educational purposes	For critical appraisals or reviews	For their personal use
	Publicly accessible libraries, research and educational establishments, museums, archives			By natural persons
Works	Of already published works	Of parts of published works or of a moderate number of small works	From works already made available to the public	Of works
Other conditions	Provided that the action is not undertaken for profit ALSO EXEMPTED (art.24.8): the public presentation or performance of published works in educational establishments provided that it does not involve the collection of revenues and the participants (in the preparation and performance) do not receive compensation		Quotations shall be made in the customary manner and to the extent justified by the purpose	Reproduction not done for commercial purposes Excluded: software and architectural designs
Fair comp.	Without compensation	Without compensation	Without compensation	(art.26) With payment of compensation (equipment levies)

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	CROATIA (art.84, 88)	CROATIA (art.85)	CROATIA (art.90)	CROATIA (art.82)
Rights	(art.84) may reproduce in any media (art.88) to publicly perform or to present it at stage	Reproduce on paper or any similar medium And distribute	to make quotations	reproduce a work in any medium,
Purposes	(art.88) in the form of direct teaching or at school events, to the extent justified by the educational purpose thereof to be achieved by such communication,	In the form of a collection which contains contributions of several authors, and which is, by its contents, and systematization, exclusively intended for teaching or scientific research	for purposes of scientific research, teaching, criticism, polemics, revision, review	for private use, which has no direct or indirect commercial purpose, or for other personal use in the form of photocopying
Beneficiary	(art.84) Public archives, public libraries, educational and scientific institutions, preschool educational institutions and social (charitable) institutions pursuing non-commercial purposes			A natural person
Works	(art.84) A work from their own copy (art.88) A work	- particular portions of lawfully disclosed works, - or integral short works from the domain of science, literature and music, - as well as disclosed individual works of visual arts, architecture, applied arts and industrial design, photographic or cartographic works, and presentations of scientific or technical nature	of excerpts from a work, which has already been lawfully made available to the public	Excluded: the whole book (unless the copies of such book have been sold out for at least two years), sheet music, electronic databases, cartographic works, building of architectural structures, unless otherwise provided by ... a contract.
Other conditions	(art.84) in not more than one copy (art.88) where the tickets are free of charge, where the performers receive no payment for their performance, and where the works are not used for direct or indirect economic or commercial benefit by the educational institution, the organizers or third persons.	unless the author expressly prohibits it unless the disclosure of particular part would be prejudicial for the honor or reputation of the author.	to the extent justified by the purpose to be achieved and in accordance with fair practice	This copy is not intended for or accessible to the public

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Fair comp.	Without payment of remuneration (art.80)	Authors are entitled to an appropriate remuneration	Without payment of remuneration (art.80)	Without payment of remuneration (art.80)
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	CYPRUS (art.7.1j, 1r)	CYPRUS (art.7.1e)	CYPRUS (Art.7.1f and 1g)	CYPRUS (art.7.1a, 1o, 1p)
Rights	(j) any use (r) any use (art.7.2): includes in any of the languages in general use in the Republic	(e) the inclusion of a work in a broadcast, communication to the public, sound recording, cinematograph film or collection of works,	(f) quotation (g) reading to the public (art.7.2): includes in any of the languages in general use in the Republic	(a) Doing any exploitation act (reproduction in any form, distribution, communication to the public, translation, adaptation, other arrangements) (o) reproduction (p) reprographic copying
Purposes	(j) where such use is in the public interest, (r) for the purpose of illustration for teaching or scientific research	(e) if such inclusion is made by way of illustration for teaching purposes		(a) by way of fair dealing for purposes of research, private use, criticism or review,... (o) for private use
Beneficiary	(j) by such public libraries, non-commercial documentation centers, museums, educational establishments, and scientific institutions as may be prescribed			
Works	(j) made of a work (r) of works		(f) of passages from published works ... including extracts from newspaper articles and magazines in the form of press summaries (g) extracts of lawfully published literary works	
Other conditions	(j) Provided that no revenue is derived there from and no fee is charged for the communication, if any, to the public of the work thus used; (r) To the extent justified by the non-commercial purpose to be achieved	(e) Compatible with fair practice	compatible with fair practice and their extent does not exceed that justified by the purpose	(o) for ends that are neither directly or indirectly commercial

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Fair comp.	No	No	No	Only reprography (art.7.1p)
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	CZECH REPUBLIC (art.33.1c, art.35.3)	CZECH REPUBLIC (art.31.1b)	CZECH REPUBLIC (art.31.1a)	CZECH REPUBLIC (art.30)
Rights	(31.1c) Use (35.3) Use	(b) Includes	(a) Use	Use
Purposes	(31.1c) while teaching, for illustration purposes; (35.3) For teaching purposes or to meet their own internal needs	(b) into his independent scientific, critical or technical work, or into a work designated for teaching purposes, for the clarification of its content,		For personal needs
	(c) Anybody who (35.3) A school, a school-related or educational establishment	(b) Anybody who	(a) Anybody who	By a natural person
Works	(31.1c) a work (35.3) A work created by a pupil or student as part of his school or educational assignments (school work)	(b) excerpts from a work or small works in their entirety,	(a) Excerpts from works of other authors which were made public	Of a work
Other conditions	(31.1c) without seeking to achieve direct or indirect economic or commercial advantage and without exceeding the extent adequate to the given purpose; (35.3) Provided that this is not done for the purpose of any direct or indirect economic or commercial advantage ALSO EXEMPTED (art.35.2): Use a work during school performances performed exclusively by the pupils, students or teachers of the school or of the school-related or educational establishment, provided that this is not done for the purpose of any direct or indirect economic or commercial advantage. (art.35.2)	(b) to the extent complying with fair practices and required by the specific purpose;	(a) To a justified extent	Without seeking to achieve direct or indirect economic benefit
	No remuneration	No remuneration	No remuneration	Subject to remuneration

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	DENMARK (s.13) (s.21) (s.23)	DENMARK (sec.18)	DENMARK (sec.22)	DENMARK (sec.12)
Rights	(sec.13) copies may be made (sec.21): performed in public (sec.23) use	used in composite works (compiling contributions by a large number of authors)	quote	make (or have made) copies Excluded: engage another person to make copies of musical, audiovisual works, etc...)
Purposes	(sec.13): for the purpose of educational activities (sec.21): in the case of educational activities (sec.23) in critical or scientific presentations	for use in educational activities,		for private purposes
			A person	Anyone (natural person)
Works	(sec.13): of published works and of radio and tv broadcasts (only brief excerpts of feature films; computer programs excluded) (s.21): a published work (dramatic and audiovisual works excluded) (s.23) works of art	Minor portions of literary and musical works or short works of these categories ... In connection with the text also works of art and works of a descriptive nature	From a work which has been made public	single copies of Works which have been made public
Other conditions	(s.21): not for commercial purposes (sec.23) In accordance with proper usage and to the extent required by the purpose ALSO EXEMPTED (sec.13.4) Teachers and students may as part of educational activities make recordings of their own performances of works if this is not done for commercial purposes (may not be used for any other purposes)	provided that five years have elapsed since publication It does not apply to works prepared for use in educational activities or if the use is for commercial purposes.	in accordance with proper usage to the extent required for the purpose	if this is not done for commercial purposes. Such copies must not be used for any other purposes
	(s.13) Subject to extended collective licensing (Sec.50-52) (s.21) No.	The author is entitled to remuneration (set by agreement – or by Copyright Tribunal).		

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	ESTONIA (s.19.2-3) (s.22)	ESTONIA	ESTONIA (s.19.1)	ESTONIA (s.18, sec.20)
Rights	(s.19.2) Use (s.19.3) reproduction (s.22) public performance	(see s.19.3)	Making summaries and quotations	Reproduced and translated
Purposes	(s.19.2) For the purpose of illustration for teaching and scientific research (s.19.3) for the purpose of teaching or scientific research (s.22) of works			for purposes of personal use
Beneficiary	(s.19.3) in educational and research institutions whose activities are not carried out for commercial purposes (s.22) in the direct teaching process in educational institutions by the teaching staff and students			by a natural person (sec.20) Public archives, museums or libraries can make a copy for a natural person for the purposes in sec.18
Works	(s.19.2) Of a lawfully published work, or parts thereof ... (s.19.3) of a lawfully published work		From a work which has been lawfully made available to the public	A lawfully published work Excluded: works of architecture, art, electronic databases, computer programs, music scores (sec.20) of a work included in its collection
Other conditions	(s.19.2) to the extent justified by the purpose and on the condition that such use is not carried out for commercial purposes (s.19.3) to the extent justified by the purpose (s.22) on the condition that the audience consists of the teaching staff and students or other persons (parents, guardians, caregivers, etc.) who are directly connected with the educational institution where the work is performed in public		Provided that its extent does not exceed that justified by the purpose And the idea of the work as a whole which is being summarised or quoted is conveyed correctly	Provided that it is not carried out for commercial purposes

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Fair comp.	(s.19.2, s.23) Without payment of remuneration (s.19.3) Yes -legal license, under compulsory collective management (s.27-1)			Without payment of remuneration Except for audiovisual works and sound recordings (sec.26)
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	FINLAND (sec.14) (sec.21)	FINLAND (sec.18)	FINLAND (sec.22)	FINLAND (sec.12)
Rights	(s.14) copies made and communication to the public through other means than... radio or television broadcasting (unless the author has explicitly prohibited such use) (s.21): public performance	Reproduced in a printed compilation	may be quoted	make copies or engage an someone to make them – except musical, audiovisual works...
Purposes	(s.14) to be used for education or scientific research (s.21): for educational purposes	Intended for use in educational activities,		for private use
				Any person
Works	(s.14) : of published works (s.21) : a published literary or musical work (dramatic and audiovisual works excluded)	Minor parts of a work or a whole work (if not too extensive) Provided that five years have elapsed from the publication of these works	a disseminated work to the extent required for the purpose	single copies of a disseminated work (computer programs and works of architecture excluded)
Other conditions	(s.14) Published works performed by teachers or pupils may be recorded... to be used within education. Such copies may not be used for other purposes (s.14) Parts of a broadcasted literary work or, when the work is not extensive, the whole work may be incorporated in a test ... (s.21): provided that the performance is not for commercial purposes	It does not apply to works created for use in education (classroom instruction)	in accordance with proper usage (sec.25): Disseminated works of art may be reproduced...(1) in a critical or scientific presentation;	Such copies must not be used for any other purposes
Fair comp.	(s.21) No (s.14) Subject to an extended collective license	The author is entitled to remuneration (compulsory licensing)		

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	FRANCE (art.122-5(3)e)	FRANCE	FRANCE art. L122-5(3)(a)	FRANCE art. L122-5(2)
Rights	Reproduction or communication (performance) to the public		Analysis and short quotations	copies or reproductions (art.L122-10) reprography
Purposes	For purposes of illustration within an educational or research context		Justified by the critical, polemic, educational, scientific or informatory purpose of the work in which they are incorporated	Strictly for the private use of the copier
Beneficiary	Provided that the public to whom the communication or reproduction is directed is composed mostly by pupils, students, teachers or researchers directly related to it			A natural person (by caselaw)
Works	Of parts of works, except for works intended for educational use, sheet music and digital editions of literary works, Once the work has been disclosed		Of disclosed works	Of disclosed works
Other conditions	Provided that the communication or reproduction does not lead to a commercial exploitation Without prejudice to the licensing of the reproduction right by reprographic means Excluding any entertainment activity			Not intended for collective use
Fair comp.	Compensated by means of a negotiated remuneration (ad hoc commission)			Yes (art.L331-1)

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	GEORGIA (art.22.b and .c)	GEORGIA (art.23.b)	GEORGIA (art.23.a)	GEORGIA (art.21)
Rights	(b, c) reprographic reproduction	To use	To quote ... in original or translation	reproduce
Purposes	(b) for educational, scientific or personal purposes (c) for teaching purposes	In the form of illustrations of printed matter, radio and TV programs, phono and video recordings of educational character	For scientific, research, polemic, critical and information purposes	only for personal purposes
Beneficiary	(b) by libraries and archives at the request of natural persons (c) by the educational institutions			by natural persons
Works	(b) in a single copy (b, c) of the lawfully published works and other small volume works, or small excerpts from written works (with the exception of computer programs),	Excerpts from lawfully published works	From lawfully published works	a lawfully published work
Other conditions	(b, c) without direct or indirect gaining of profit	To the extent justified by the purpose to be achieved	To the extent justified by the purpose of the quotation	Excluded: architectural works, databases, computer programs, whole books, sheet music and works of fine art,
Fair comp.	No	No.	No.	Only for authors and owners of audiovisual recordings and phonograms

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	GERMANY (art.52a) (art.53.3)	GERMANY (Art.46)	GERMANY (ART.51)	GERMANY (art.53.1-2)
Rights	(52a) reproduce and make available to the public (53) to make (or cause to be made) single copies (53a) (1) Reproduce and transmit (by post or fax); (2) Transmit in electronic form ... as a graphic file	Reproduce / distribute	reproduction, distribution and communication to the public	(1) to make single copies (in any support) (2) make or cause to be made ...single copies
Purposes	(52a) by post and fax -upon request by electronic form -for purposes of illustration for teaching and for purposes of scientific research, only to the extent justified by the non-commercial purpose and exclusively for use within the group of participants (students or researchers) (53.3) (a) for the illustration of teaching (instruction) ... in a quantity required for the participants in the instruction; (b) for examinations ... to the extent required by the purpose (53a) (1) for purposes allowed under art.53 (private use, own individual uses, illustration of teaching and examinations); (2) For the illustration of the teaching	Incorporated in a collection... intended for school or instructional use	For purposes of quotation	(1) for private use (2) for own individual uses: (i) scientific use, (ii) archives (internal collections), (iii) instruction (iv) other own uses
Beneficiary	(52a) upon request ... by public libraries in schools, universities, and other non-commercial institutions of further-training and professional training (53.3) in schools and other non-commercial educational establishments (universities are excluded) (53a) public libraries			(1) by a natural person (or by a third party on his behalf –provided that it is not for commercial gain “free of charge” and only in analog supports) (2) not limited to natural persons (legal entities may benefit)
Works	(52a) small parts of published works, other short works, or individual contributions to newspapers or periodicals Works intended for instructional use at schools excluded; audiovisual works only after 2 years upon release. (53.3) of small parts of a work, of short works or of single contributions appeared in newspapers ...publicly accessible - Works intended for instructional use at schools excluded. (53a) To the extent justified by the non-commercial purpose Excluded: works made available on the basis of a license.	Parts of works, individual works of fine art or photographs	Of a published work: (1) individual works included in an independent scientific work to explain its contents; (2) passages from a work in an independent literary work; (3) passages from a published musical work in an independent musical work.	(1) of a work (2) (a) of small parts of published works or individual contributions published in newspapers or periodicals, (b) a work out of print for at least two years; provided that the copy is either only in analog formats or not for commercial gains
Other	(art.53.6) copies should be neither distributed nor made available to the public ALSO EXEMPTED (art.52.1) performances at school events –subject to remuneration.		to the extent justified by the purpose	Provided that copies (1) are not made from an obviously unlawful copy and are (6) neither distributed nor made available to the public

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	(52a, 53a) subject to fair compensation, under compulsory collective management (53.3) No	Yes	No	Yes (art.54)
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	GREECE (art.21, art.27)	GREECE (art.20.1)	GREECE (art.19)	GREECE (art.18.1)
Rights	(art.21): reproduce (art 27): public performance or presentation	reproduction (only in print)	quotation	Make a reproduction
Purposes	(art.21): exclusively for teaching or examination purposes (art.27): within the framework of staff and pupil or student activities	in educational textbooks approved for use in primary and secondary education by the Ministry of National Education and Religions or another competent ministry, according to the official detailed syllabus,	by an author for the purpose of providing support for a case advanced by the person making the quotation or a critique of the position of the author	For his own private use
	(art.21): at an educational establishment (art.27): at an educational establishment			A person (a natural person)
Works	(art. 21): articles lawfully published in a newspaper or periodical, short extracts of a work or parts of a short work or a lawfully published work of fine art ... in such measure as is compatible with the purpose (art.27): of a work	of published literary works of one or more writers and small parts of works of fine art provided that such reproduction only amounts to a short part of the whole production of each author and that they are relevant to the content of the textbook	of short extracts of a lawfully published work	Of a lawfully published work
Other conditions	(art.21): provided that the reproduction is effected in accordance with fair practice and does not conflict with the normal exploitation. (art.27): provided that the audience is composed exclusively of the aforementioned persons, the parents of the pupils or students, persons responsible for the care of the pupils or students, or persons directly involved in the activities of the establishment	that such use does not conflict with the normal exploitation of these works.	provided that the quotation is compatible with fair practice and that it does not exceed that justified by the purpose.	Provided that it does not conflict with normal exploitation or prejudice the author's legitimate interests The term 'private use' shall not include use by an enterprise, a service or an organization.
	No	No	No	Yes –for specific reproduction devices

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	HUNGARY (art.35.4 and .5, art.38.1b)	HUNGARY (art.34.2-3)	HUNGARY (art.34.1)	HUNGARY (art.35.1)
Rights	(35.4 and 5) reproduce (38.1b) perform	(2) may be borrowed (beyond the scope of quotation), (3) the borrowing in (2) includes reproduction and dissemination	Quote	Reproduce (in any means)
Purposes	(35.4) For internal purposes (35.5) for educational purposes or for purposes of exams (perform) for purposes of school education or at celebrations held at school	(2) for purposes of education in school and universities and scientific research		for private purposes (wider than personal sphere)
Beneficiary	(35.4) in a public library, archive, museum or educational institution (35.5) in public and higher education (schools and universities)			By natural persons
Works	(reproduce) Specific parts of a work published as a book, as well as newspaper and periodical articles (reproduce) in a number corresponding to the number of pupils in a class ... in a number necessary for the said purpose	(2) Part of a disclosed literary or musical work or a work of minor size	disclosed works	a single copy of a work Excluded: architectural works, engineering structures, software, databases, fixation (recording) of public performances of a work.
Other conditions	(35.4) For non-commercial purposes - not for direct or indirect economic advantage (perform) provided that the performance is not designed for direct or indirect economic gain and performers are not remunerated	(2) Provided it is not used on a commercial scale	true to the original its scope justified by the nature and purpose of the borrowing	not for direct or indirect economic advantage
	No remuneration (35.4) Subject to compensation (equipment and operator levies)	No remuneration	No remuneration	No remuneration.

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	ICELAND (sec.21)	ICELAND (sec.17)	ICELAND (sec.14)	ICELAND (art.11)
Rights	public performance	reproduced	quote	Reproductions
Purposes	for educational purposes	in composite works (consisting of a compilation of works from many authors) for use in classroom instruction or educational broadcasting	In the context of a critical or scientific public discussion, or other recognized purpose	Exclusively for private use
Beneficiary				Individuals
Works	a published work	Minor portions of literary and musical works or short works of these categories; Pictures or drawings of works of art; Provided that five years have elapsed from publication	Any published literary work, including dramatic works, cinematographic works and musical works,	Of published works
Other conditions		Provided that no commercial purpose is involved Excluded: works created for use in classroom instruction	provided that the quotation is correct and of reasonable length	Provided that it is not done for commercial purposes

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Fair comp.	No. The author is entitled to remuneration only if an admission is charged for the performance	Yes	No	Yes
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	IRELAND (sec.53, sec.55.4, sec.57)	IRELAND (sec.54)	IRELAND (sec.51.1)	IRELAND (sec.50.1)
Rights	(s.53.1-4) Copied (not by reprography) (s.53.5) anything done... (s.55) showing and performances (s.56) recording of broadcasts (s.57) Reprographic copies	Inclusion	Fair dealing	Fair dealing
Purposes	(copied) in the course of instruction or of preparation for instruction (anything done) for the purposes of an examination (performance) before an audience limited to persons who are teachers and pupils at an educational establishment or other persons directly connected with the activities of that establishment— (reprography) for the educational purposes of the establishment	in a collection that— (a) is intended for use (i) in educational establishments	for the purposes of criticism or review	For the purposes of research or private study
Beneficiary	(copied) by (or on behalf of) the person giving or receiving the instruction (anything done) by way of setting the questions, communicating the questions to the candidates or answering the questions (performance) (1a) by a teacher or pupil in the course of the activities of the establishment or (1b) by any person for the purposes of instruction at the establishment (reprography) by or on behalf of an educational establishment			
Works	literary, dramatic, musical or artistic work, sound recording, film, broadcast or cable programme or an original database (reprography) of passages from lawfully available literary, dramatic or musical works ... or original databases	of a short passage from a literary, dramatic or musical work, original database...lawfully made available to the public Excluded: works intended for use in such establishments	with a work	A literary, dramatic, musical or artistic work, sound recording, film, broadcast, cable program, non-electronic original database.
Other conditions	copies made according to these exceptions cannot be subsequently ... sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public (reprography) 5% of a work within a year – not applicable if work available under licensing			Systematic single copying excluded

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	Yes –licensing schemes	NO	NO	NO (unless it causes an unreasonable prejudice).
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	ISRAEL (sec.29, sec.30.b)	ISRAEL	ISRAEL	ISRAEL (sec.19)
Rights	(29) A public performance (30.b) Copying See also sec.19	See sec.19	See sec.19	Fair use
Purposes	(29) In the course of the educational activity of educational institutions,... where such performance is made by the employees of the educational institution, or by the students studying therein, (30.b) Upon request by a person who, if he made the copy himself, would be permitted by law to do so.			
Beneficiary	(29) Educational institutions ... of the type prescribed by the Minister (30.b) Of a library or archive ... prescribed by the Minister (libraries of educational institutions included)			For purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.
Works	(29) of a work The screening of a cinematographic work is permitted ... if done solely for purposes of teaching and examination by an educational institution. (30.b) Of a work in the permanent collection			of a work
Other conditions	Provided that performance is made in front of an audience limited to employees or students of the educational institution, the relatives of the students or other people directly connected with the activity of said institution, and to them alone. Sec.31: The Minister may prescribe different conditions for the applicability of sec.29-30 with respect to particular types of educational institutions, libraries and archives, taking into consideration the character of their respective activities.			Factors to be considered inter alia: purpose and character of the use; character of the work used; scope of the use in relation to the work as a whole; impact of the use on the value of the work and its potential market.
	No. Unless prescribed by the Minister			No

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	ITALY (art.68, art.70.1bis)	ITALY (art.70.2)	ITALY (art.70.1)	ITALY (art.71 sexies)
Rights	(68.2) Photocopying (70.1bis). publication by means of Internet See also art.70.1	reproduction	abridgement, quotation or reproduction and communication to the public	(68.1): reprography (70 sexies) reproduction on any carrier
Purposes	(68.2) For the services of the said institutions (70.1bis) for teaching or research uses (70.1bis) only when such use is not for lucrative purposes	In anthologies for school use	for the purpose of criticism or discussion for non-commercial purposes of illustration of teaching or research	(68.1) for the personal use of the reader (70sexies) with the sole purpose of personal use
Beneficiary	(68.2) Of works available in publicly accessible libraries or in school libraries, in public museums or in public archives			(70 sexies) by natural person (not by a third party)
Works	(68.2) Of works available in publicly accessible libraries or in school libraries, in public museums or in public archives (70.1bis) of images and music in low resolution, for free,		fragments or parts of a work	(68.1) Of single works or of portions of works (70 sexies) of phonograms and videograms
Other conditions	(68.2) If made without either direct or indirect economic or commercial advantage (70.1bis) Teaching and research uses will be regulated by a Government Decree.	shall not exceed the extent specified in the Regulations (n.633 de 22 Abril 1941)	within the limits justified for such purposes provided that it does not conflict with the exploitation of the work	(70 sexies) provided that no gainful intent, nor direct or indirect commercial purposes (70 sexies-3): not applicable to works made available on the basis of a license
	(68.2) Yes (70.1bis) No	Yes	No	Yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	KAZAKHSTAN (art.20)	KAZAKHSTAN (art.19.2)	KAZAKHSTAN (art.19.1)	KAZAKHSTAN (art.18)
Rights	make a reprographic reproduction	the use	the quotation in the original language or in translation,	Reproduction
Purposes	(2) to meet the request of natural persons who will use the copies obtained for study or research purposes; (3) the copy obtained is intended for classroom use.	for the purpose of illustration in publications, radio or television broadcasts or sound or visual recordings of educational character,	for scientific or for research, polemic, criticism or informational purposes	for exclusively personal purposes
Beneficiary	(2) if the reproduction is done by a library or archive (3) if the reproduction is carried out by an educational establishment			
Works	of isolated articles or succinct works lawfully published in collections, newspapers or other periodical publications, or of short extracts from lawfully published written works (with or without illustrations)	of lawfully disclosed works and extracts from such works	of extracts from lawfully disclosed works	a lawfully disclosed work Excluded: works of architecture, databases, computer programs, whole books and musical scores.
Other conditions	in one copy without gainful intent	to the extent justified by the intended purpose;	to the extent justified by the intended purpose	in one single copy
Fair comp.	NO	No	No	NO –only for private copies of audiovisual works and sound recordings (art.26)

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	KYRGYZSTAN (art.20)	KYRGYZSTAN (art.19.2)	KYRGYZSTAN (art.19.1)	KYRGYZSTAN (art.18)
Rights	make a reprographic reproduction	the use	the quotation in the original and in translation,	Reproduction
Purposes	(2) for educational and research purposes; (3) to be used in classes	for the purpose of illustration in publications, radio or television broadcasts or sound or visual recordings of educational character,	for scientific, research, polemic, criticism and informational purposes	for exclusively personal purposes
Beneficiary	(2) by libraries and archives as requested by individuals (3) by educational institutions			
Works	of isolated articles or succinct works lawfully published in collections, newspapers or other periodical publications, and of short extracts from lawfully published written works (with or without illustrations)	of lawfully disclosed works and excerpts from such works	from lawfully disclosed works	a lawfully disclosed work Excluded: works of architecture, databases, computer programs, books (in full) and musical scores.
Other	in a single copy without gainful intent	to the extent justified by the intended purpose	to the extent justified by the intended purpose	

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Fair comp.	NO	No	No	NO –only for private copies of audiovisual works and sound recordings (art.26)
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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	LATVIA (sec.19.1, sec.26.2)	LATVIA (sec.21)	LATVIA (sec.19.1)	LATVIA (sec.34.1)
Rights	s.19.1(2) and)(7): use s.26.2: perform	Use		Reproduction (not reprographic) (art.35) reprography
Purposes	(use) (2) for educational and research purposes (7) as well as (a musical work) in teaching institutions as part of a face-to-face teaching process	in textbooks (which are in conformity with educational standards), in radio and tv broadcasts, in audio-visual works, in visual aids and the like, ... which are specially created and used in the face-to-face teaching and research process		for personal use without direct or indirect commercial purposes
Beneficiary	(perform) in educational institutions in a face-to-face teaching process with the participation of teachers and learners, if the audience comprises only the teachers and learners, and persons directly associated with the educational program.	in educational and research institutions		
Works	(use) A work (perform) a musical work	disclosed or published works or fragments of them Excluded: computer programs		Of one copy of works, which are included in lawfully acquired films or phonograms, as well as visual works Excluded: computer programs, databases
Other		for non-commercial purposes to the extent justified by the purpose of their activity.		
Fair comp.	No	No	No	Yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	LITHUANIA	LITHUANIA (art.22.1(1))	LITHUANIA (art.21)	LITHUANIA (art.20.1)
Rights	See art.22.1(1)	Reproduction	reproduce ... both in the original and translated language	Reproduce (art.23.1) : reprography
Purposes		for teaching and scientific research purposes ... by way of illustration, in writings, sound or visual recordings,	in the form of a quotation in another work	for individual use
Beneficiary				by a natural person
Works		of short published works or a short extract of a published work	a relatively short passage of a published work or a work made available to the public,	a single copy of a disclosed work Excluded: works of architecture, computer programs, databases
Other conditions		provided that this is related to study programs and does not exceed the extent justified by the purpose	Provided that is compatible with fair practice and to the extent justified by the purpose	not for direct or indirect economic advantage, where the reproduction is a single action
Fair comp.		No	No	Yes : Reprography Yes: Private copies, only of audiovisual and musical works

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	LIECHTENSTEIN (art.22.1b)	LIECHTENSTEIN	LIECHTENSTEIN (art.27)	LIECHTENSTEIN (art.22.1a)
Rights	used		Quoted	used
Purposes	For private purposes : (b) any use of a work by a teacher for teaching in class		if the quotation serves as an explanation, a reference or illustration	for private purposes: (a) any use of a work in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends;
Beneficiary	By a teacher (or have the copies made by other persons)			(or have the copies made by other persons)
Works	Published works		Published works	Published works
Other cond.			the extent of the quotation is justified for such purpose	
Fair comp.	Yes (art.23.2) – legal license, under compulsory collective management		no	No (art.23.1) – except for copies made by other persons (art.23.2)

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	LUXEMBOURG (art.10.2)	LUXEMBOURG	LUXEMBOURG (art.10.1)	LUXEMBOURG (art.10.4)
Rights	Reproduction and communication to the public		Short quotations in original or translation	Reproduction in any support
Purposes	Only for purposes of illustration of teaching or of scientific research		Justified by the critical, polemic, pedagogical, scientific or informatory nature of the work where they are incorporated	By a natural person, for his own private use and for non (direct or indirect) commercial ends
Beneficiary			To the extent justified by the purpose	
Works	Short fragments of works			
Other conditions	In accordance with fair practice To the extent justified by the non-commercial ends to be achieved		In accordance with fair practice, Provided that no commercial intent and do not prejudice normal exploitation of the work	
Fair comp.	No		No	Yes
	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE

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	MACEDONIA (art.33, 34-a)	MACEDONIA (art.29)	MACEDONIA (art.35)	MACEDONIA (art.30-a)
Rights	(33) public performance (34-a) reproduction	Reproduction and communication to the public	Quote	Reproduce
Purposes	(33) for direct teaching illustration (33) and for non-commercial school performances (34-a) for private use	exclusively for teaching illustration purposes... in school books, reading-books and other alike publications,	For the purpose of clarification, illustration, debate or reference,	For private use
Beneficiary	(34-a) by non- profitable institutions (archives, libraries, film-archives, museums, other cultural, educational, scientific and similar institutions)			By an individual
Works	Already disclosed works	Already disclosed works partially or entirely when dealing with short copyright works and works in domain of photography, fine and applied art, architecture, design and cartography,	Already disclosed works	Already disclosed works
Other conditions	(33) for non-commercial purposes (33) insofar the participants in these performances do not receive any remuneration. ALSO EXEMPTED (art.33.2n) The reproduction and public presentation of radio and TV broadcasted copyright works for teaching illustration and non-commercial purposes shall be free. (34-1) in at most three copies; provided that the reproductions are made from their own copy; without commercial purposes;	without commercial goals	To the extent adequate to the purpose and the aim of the use	In at most three copies For purposes which are not directly or indirectly commercial
Fair comp.	(33) No	Yes (legal license)	No (free use)	Yes (legal license) but only for audio and sound recordings and photocopies (reprography). Art.21-f)

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	MALTA (art.9.1d and 1h)		MALTA (art.9.1k)	MALTA (art.9.1c)
Rights	(1d) Specific acts of reproduction (1h) reproduction, translation, distribution or communication to the public		reproduction, translation, distribution, communication to the public of quotations	Reproduction on any medium (art.9.1b) Reprography
Purposes	(1h) for the sole purpose of illustration for teaching or scientific research		for purposes such as criticism or review	for private use
Beneficiary	(1d) By publicly accessible libraries, educational establishments, museums or archives			by a natural person
Works	(1h) of a work		Works (or other subject matter) lawfully made available	
Other conditions	(1d) Which are not for direct or indirect economic or commercial advantage (1h) only to the extent justified by the non-commercial purpose to be achieved		in accordance with fair practice and to the extent required by the specific purposes	And for ends that are neither directly or indirectly commercial
Fair comp.	No		No	Yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	MOLDOVA (art.21.1)		MOLDOVA (art.22.1a)	MOLDOVA (art.20)
Rights	Reprographic reproduction		Quotation In the original language or in translation	reproduction
Purposes	(1b) if such reproduction, in one copy, is made by a library or archive services to meet the needs of natural persons who use the copy so obtained for the purpose of study or research or for their own personal use; (1c) if such reproduction is made by a teaching establishment and the copy so obtained is intended for use in the classroom		in articles or studies, press reviews or radio and television programs of a critical, polemic, teaching, scientific or informational nature,	For his own exclusive personal use
Beneficiary				By a natural person
Works	of isolated articles and other succinct works or of short extracts of written works (save for computer programs) that have been lawfully published		of extracts from lawfully published works;	Of a lawfully published work
Other conditions	In one copy Without gainful intent To the extent justified by the aim pursued On condition that no license is offered by a collective society		the length of quotations may not exceed: for an isolated extract (prose): 400 words (if one isolated extract), (if more) 300 words for each extract, ...	
Fair comp.	No		No	Yes.

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	MONACO	MONACO	MONACO	MONACO
Rights				
Purposes				
Beneficiary				
Works				
Other conditions				
Fair comp.				

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	NETHERLANDS (art.16)	NETHERLANDS (art.16.3)	NETHERLANDS (art.15a)	NETHERLANDS (art.16b.1)
Rights	reproduction or communication to the public (includes: digital copies and making available) (art.16.4) translations also covered	Taking over in a compilation (art.16.4) translations allowed	Quotations (art.15a.3) translations also covered	Reproduction (art.16h-m) Reprography
Purposes	for use as illustration for teaching purposes	for use as illustration for teaching purposes	In an announcement, criticism or scientific treatise or publication with a similar purpose	intended exclusively for personal practice, study or own use
Beneficiary				by the natural person who makes the reproduction without any direct or indirect commercial motivation or has ordered the reproduction to be made, exclusively for his own benefit.
Works	parts of a lawfully published literary, scientific or artistic work in the case of short works and works of art, photographs, designs: the entire work may be used	Only short works or short passages of works by the same author may be taken over in the case of works of art, photographs, designs: only a small number of those works may be used and only if they are reproduced in such a way that they differ considerably in size or manufacture from the original work	From a lawfully published literary, scientific or artistic work the number and length of the quoted passages justified by the purpose to be achieved	a literary, scientific or artistic work (different requirements apply depending on the kind of work)
Other conditions	Provided that it is in accordance with what might be reasonably accepted under the rules of social custom	Provided that it is in accordance with what might be reasonably accepted under the rules of social custom	Provided that it is in accordance with what might be reasonably accepted under the rules of social custom	if it is restricted to a few copies The copies cannot be delivered to third parties
Fair comp.	Yes	Yes	No	Yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	NORWAY (sec.13a, 13b, sec.16, sec.21)	NORWAY (sec.18, sec.23)	NORWAY (sec.22)	NORWAY (sec.12)
Rights	(13a/b): Make copies 16) Make copies and make these copies available to the public (21): public performance (within education for commercial purposes, wire or wireless transmission to the public is not covered)	reproduced (digital formats excluded)	quote	make copies (or engage someone to make them –except musical, audiovisual works...)
Purposes	(13a): for use in public examinations (13b) for use in own educational activities (16) For conservation and safety purposes and other special purposes (21): in educational contexts	in a collective work intended for use in... education (consisting of works by a large number of authors)		for private use
	(16) Archives, libraries, museums, and educational and research institutions			
Works	(sec.13a/b): of published works Fixations of broadcasts can be made on the same conditions (except for cinematographic works) (16) works in their collections (sec.21) : a published literary or musical work (excluded dramatic and audiovisual works)	Minor portions of literary and musical works or short works of this kind... In connection with the text works of art and photographic works may also be reproduced (see also sec.23) Provided that five years have elapsed since publication	a work which has been disclosed to the extent required to achieve the desired purpose	single copies Of Works which have been disclosed
Other conditions	(sec.13b): subject to extended collective license (sec.21): provided that the performance is not for commercial purposes ALSO EXEMPTED (sec.13) : Teachers and pupils may make recordings of their own performances of works for educational use (not to be used for other purposes).	It does not apply to works created for use in education (classroom instruction)	in accordance with proper usage	Provided it is not done for commercial purposes. Such copies may not be used for other purposes
Fair comp.	(13a) Yes –remuneration (13b): Yes –extended collective license (16): Yes –extended collective license	Yes.	No	Yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	POLAND (art.27)	POLAND (art.29.2)	POLAND (art.29.1)	POLAND (art.23)
Rights	to use ... in original and in translation and to make copies	To include	To quote ... in works constituting an independent whole	to use (use of single copies of the work by a group of persons staying in a personal interrelation with each other, including in particular blood relation, kinship or a social relationship) (art.20) : Reprography
Purposes	for teaching purposes or in order to conduct their own research	For teaching and research purposes ... in textbooks and readings books (selection of readings?) in anthologies for didactic and research purposes.	within the scope justified by explanation, critical analysis, teaching or the rights governing a given kind of creative activity	for purposes of private use
Benef.	Research and educational institutions			
Works	(use) published works (make copies) of fragments of published works	disseminated short works or fragments of larger works	fragments of disseminated works or short works in full	a work that has already been disclosed
Other conditions	ALSO EXEMPTED (art. 31): Perform published literary and musical works in public free of charge (except for profit- making purposes) associated with the practice of ... ceremonies organized at schools.		within the scope justified	Free of charge
Fair comp.	No	Yes	No	Only for phonograms and audiovisual works (art. 20)
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	PORTUGAL (art.75.2e and 2f)	PORTUGAL (art.75.2h)	PORTUGAL (art.75.2g)	PORTUGAL (art.81.2)
Rights	(2e) Reproduction (2f) reproduction, distribution and making available to the public	Inclusion	Quotations or abridgments	Reproduction art.75.2a: reprography
Purposes	(2e) limited to the specific needs of the institution (2f) for purposes of teaching and education	in one's own work intended for education	To support one's own doctrines or for purposes of criticism, discussion or teaching	for the sole purpose of private practice, study or personal use
Beneficiary	(2e) By a public library, archive, museum, non-commercial documentation center or a scientific or research institution (2f) provided that they are exclusively used for the educational purposes in the establishments			
Works	(2e) In whole or in part of published works (2f) of parts of a published work	of short works or of fragments of works of others	works of others, of any kind and nature,	A limited number of copies Of a literary, scientific or artistic work
Other conditions	(2e) Provided that copies are not intended for public use and do not intend to obtain a direct or indirect economic or commercial advantage (2f) do not intend to obtain an direct or indirect economic or commercial advantage (art.76.2): provided that it does not create confusion with the work used, and does not prejudice the interests on these works	(art.76.2): provided that it does not create confusion with the work used, and does not prejudice the interests on these works	To the extent justified by the purpose to be achieved (art.76.2): provided that it does not create confusion with the work used, and does not prejudice the interests on these works	provided that it is not contrary to the normal exploitation of the work and does not cause an unjustified prejudice to the legitimate interests of the author, and the copy is not used for communication to the public or profit-making use.
Fair comp.	(2e) Yes: authors and publishers (for analogic copies) (2f) No	yes	No	Yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	ROMANIA (art.33.1c, 1e, 2d)	ROMANIA (art.33.1c)	ROMANIA (art.33.1b)	ROMANIA (art.34)
Rights	(1c) the reproduction (1e) specific acts of reproduction (2d) reproduction, distribution, broadcasting or communication to the public,	the use	the use of brief quotations	reproduction
Purposes	(1c) for teaching purposes, within the framework of public education or social welfare institutions, (2d) for the sole purpose of illustration for teaching or scientific research	in publications, television or radio broadcasts or sound or audiovisual recordings exclusively intended for teaching purposes	for the purpose of an analysis, commentary or criticism, or for illustration	for personal use or for use by a normal family circle,
Benef.	(1e) made by publicly accessible libraries, educational establishments or museums, or by archives,			
Works	Of isolated articles or brief excerpts from works to the extent justified by the intended purpose	Of isolated articles or brief excerpts from works	a work already disclosed to the public	provided that the work has already been disclosed to the public
Other conditions	(1e, 2d) not for direct or indirect economic or commercial advantage; provided that such uses conform to proper practice, ALSO EXEMPTED (Art.22.1g) the representation and execution of a work as part of the activities of educational establishments, exclusively for specific purposes and provided that both the representation or execution and the public's access are free of charge;	to the extent justified by the intended purpose provided that such uses conform to proper practice,	to the extent justified by use thereof provided that such uses conform to proper practice,	
	No	No	No	Yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	RUSSIA (art.20)	RUSSIA (art.19.2)	RUSSIA (art.19.1)	RUSSIA (art.18)
Rights	reproduced	the use	the quotation in the original or in translation,	Reproduction
Purposes	(2) for educational and research purposes; (3) to be used in classes	for the purpose of illustration in publications, radio or television broadcasts or sound or visual recordings of educational character,	for scientific, research, polemic, criticism and informational purposes	exclusively for personal needs
Beneficiary	(2) by libraries and archives as requested by individuals (3) by educational establishments			
Works	of individual articles and short works lawfully published in collections, newspapers or other periodical publications, and short extracts from lawfully published written works (with or without illustrations)	of lawfully published works and excerpts from such works	from lawfully published works	a lawfully published work Excluded: works of architecture, databases, computer programs, books (in full) and musical scores.
Other cond.	in a single copy without gainful intent	to the extent justified by the intended purpose	to the extent justified by the intended purpose	
Fair comp.	NO	No	No	NO –only for private copies of audiovisual works and sound recordings (art.26)

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	SAN MARINO	SAN MARINO	SAN MARINO	SAN MARINO
Rights				
Purposes				
Beneficiary				
Works				
Other conditions				
Fair comp.				

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	SERBIA & MONTENEGRO (art.43)	SERBIA & MONTENEGRO (art.53)	SERBIA & MONTENEGRO (art.48)	SERBIA & MONTENEGRO (art.45)
Rights	reproduced	Reprography (reproduce by means of photocopying or similar)	Reproduce and communicated to the public	Reproduce
Purposes	for non-commercial purposes in the field of education, examination or scientific research	For educational or scientific research purposes	The mentioned parts are integrated into another work without alterations, For the sake of illustration, confirmation or reference,	For personal non-commercial purposes
Beneficiary		educational institutions and public libraries		Any natural person
Works	Short excerpts from the disclosed works	Works Excluded: sheet music	A disclosed work	A disclosed work
Other cond.			with a clear indication that a quotation is involved;	
Fair comp.	No	Yes (legal license)	No	Yes (art.38)

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	SLOVAKIA (s.28)	SLOVAKIA	SLOVAKIA (s.25)	SLOVAKIA (s.24.1)
Rights	(1) make a copy, distribute (except for sale) and communicate to the public (2) reprographic copying and distribute (except for sale)	See s.28.2	Use in the form of quotation in another work	Make a copy (s.24.2 : reprography)
Purposes	For teaching purposes		for purposes of review or criticism or for teaching purposes, scientific research or artistic purposes	For private use
	in school			a natural person
Works	(1) of a short part of a disclosed work provided that such use is not exceeding the extent justified by teaching purposes (2) of a short part of a disclosed work, a disclosed short work or a disclosed work of visual art		a short part of a disclosed work	of a disclosed work
Other conditions	Provided that... the copy is not for direct or indirect economic advantage Art.30: public performance of a work in admission-free school performances (carried on exclusively by pupils, students or teachers) ... public performance of a school work in the course of charge-free school activities (fulfillment of duties)		use in accordance with fair practice its extent may not exceed that which is justified by the purpose	For end that is neither directly or indirectly commercial .
Fair comp.	No		No	Yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	SLOVENIA (art.49-50.3)	SLOVENIA (art.47)	SLOVENIA (art.51)	SLOVENIA (art.50.2)
Rights	(art.50.3) Reproduce on any medium (art.49) Publicly perform Art.53.3. transformation is allowed if... dictated by the purpose of the permitted use;	Reproduce and communicate to the public Art.53.3. transformation is allowed if... dictated by the purpose of the permitted use;	Make quotations Art.53.3. transformation is allowed if... dictated by the purpose of the permitted use;	Reproduce in any medium Art.53.3. transformation is allowed if... dictated by the purpose of the permitted use;
Purposes	(reproduce) for internal use (perform) For the purpose of teaching: (1) in the form of direct teaching; (2) at school events with free admission (if performers receive no payment), to rebroadcast a radio or television school broadcast; (3) rebroadcast a radio or tv school broadcast.	in readings and textbooks intended for teaching,	for the purpose of illustration, argumentation or referral	For private use
	(reproduce) in educational or scientific establishments			a natural person
Works	(reproduce) No more than 3 copies ... of works from their own copies (whole books excluded) (perform) a disclosed work	parts of works, as well as single works of photography, fine arts,	of a disclosed work and of single disclosed photographs, works of fine arts, architecture, applied art, industrial design and cartography	of a disclosed work Excluded: whole books, graphic editions of musical works, electronic databases and computer programs, buildings, unless otherwise provided by contract
Other cond.	(reproduce) provided that this is not done for direct or indirect economic advantage.	provided that these are already disclosed works of a number of authors;	To the extent that is necessary	not done for direct or indirect economic advantage copies cannot be made available to the public No more than 3 copies
Fair comp.	no	Yes (legal license)	no	yes

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	SPAIN (art.32.2)	SPAIN	SPAIN (art.32.1)	SPAIN (art.31.2)
Rights	reproduction, distribution and communication to the public	See art.32.2	to include in one's own work	reproduce, in any support
Purposes	only for purposes of illustration of their educational activities in the classrooms		by way of quotation or for analysis, comment or critical assessment ... only for teaching or research purposes	for his private use
Benef.	Professors of official education (programs leading to official degrees)			by a physical person
Works	of small fragments of works or of isolated works of art, or of photographic or figurative nature, excluding textbooks and university treatises Prohibited: the making of compilations or collections of fragments of works or of isolated works of art, or of photographic or figurative nature		fragments of the works of others (of written, sound or audiovisual character) and isolated works of three-dimensional, photographic, figurative or comparable art character	works previously disclosed Excluded: digital databases and computer programs
Other cond.	to the extent justified by the non-commercial purpose and provided that the works have been previously disclosed		provided that the works concerned have already been disclosed and to the extent justified by the purpose of the inclusion,	On the basis of works which have been lawfully accessed provided that the copy is not used for either collective or gainful purposes
Fair comp.	No		No	Yes
	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE

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	SWEDEN (sec.21.2, sec.42c)	SWEDEN (sec.18)	SWEDEN (sec.22)	SWEDEN (sec.12)
Rights	(42c): copies (21.2): public performance	Reproduce ... in a composite work consisting of works by a comparative large number of authors	Quote	Make
Purposes	(42c) for educational purposes (21.2): in the course of educational activities	for use in educational activities,		for private purposes (for own use, family and friends)
Benef.	(42c) Educational activities covered by the extended collective licensing	Anyone	Anyone	Anybody
Works	(42c) of works which have been made public (21.2) : a published literary or musical work (excluded dramatic and audiovisual works)	Minor portions of literary and musical works or short works of these, Works of fine art (in connection with the text) Provided that five years have elapsed since their publication	From works which have been made available to the public	of Works which have been made public one or a few copies
Other conditions	(42c) : where an extended collective license applies The provision ... does not apply if the author has filed a prohibition against the reproduction with any of the contracting parties. (21.2): provided that the performance is not for commercial purposes Art.14: Teachers and pupils may for educational purposes make recordings of their own performances of works. Such recordings may not be used for other purposes	It does not apply to works created for use in education (classroom instruction)	In accordance with proper usage and to the extent necessary for the purpose	Such copies must not be used for any other purposes
	(42c: Yes –extended collective license (21.2: No)	Yes (remuneration)	no	No

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	SWITZERLAND (art.19.1b)	SWITZERLAND	SWITZERLAND (art.25)	SWITZERLAND (art.19.1a)
Rights	Any use		Quotations	Any use
Purposes	As a private use ...for teaching purposes		To the extent they serve as a comment, reference or explanation	As a private use ...for personal ends or within a circle of people closely related, such as parents or friends
Beneficiary	By a teacher and his pupils (or by another person on his behalf : such as libraries, public institutions ...)			The authorized person (or by another person on his behalf : such as libraries, public institutions ...)
Works	Of disclosed works		Of disclosed works To the extent justified by its purpose	Of disclosed works
Other cond.				
Fair comp.	Yes –legal license, subject to compulsory collective management (art.20.2)		No	No (art.20.1). Only applicable to recording supports

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	TURKEY (art.33)	TURKEY (art.34)	TURKEY (art.35)	TURKEY (art.38)
Rights	Performance / presentation	Create selected and collected works	1. Including some sentences and paragraphs of a publicized work in an independent work of science and literature; 3. Including published works of art and other published works in a work of science to the extent justified by its purpose and for the purpose of describing its contents;	Duplicate
Purposes	for the purposes of face-to-face education and instruction	understandably aimed at training and education	4. Showing published works of fine arts in scientific conferences or courses by means of projection or similar means in order to describe the subject.	For personal use
Benef.	in all educational and instructional institutions	from their states		
Works	of a published work	from published works of music, science and literature and works of fine art	from a work	
Other conditions	with no intention of profit either directly or indirectly	To the extent justified for the purpose. Only in order to describe the contents of the selected and collected works. The provisions of the first paragraph also apply for the broadcasts (school-radio) exclusively prepared for the schools and approved by the Ministry of National Education		Without profit intent
Fair comp.	No	No. Compilations made for purposes other than education and instruction requires the author's permission.	No	No.

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	TAJIKISTAN (art.20.7)	TAJIKISTAN (art.20.2)	TAJIKISTAN (art.20.1)	TAJIKISTAN (art.19)
Rights	reprographic reproduction	use	quotation, in the original language or in translation,	reproduction
Purposes	(b) if the reproduction is the work of a library or archive service and it is done to meet the requirements of natural persons who will make use of the copies so obtained for study or research purposes; (c) the copy obtained is intended for classroom use.	for the purpose of illustration in publications, radio or television broadcasts or sound or visual recordings of educational character,	for scientific or for research, polemic, critical or informational purposes	for exclusively personal purposes
Beneficiary	(b) if the copy is made by a library or archive at the request of natural persons (c) if the copy is made by an educational establishment			
Works	of isolated articles or succinct works lawfully published in collections, newspapers or other periodical publications, or of short extracts from lawfully published written works (with or without illustrations)	of lawfully published works and of extracts from such works	of extracts from lawfully published works	of a lawfully published work Excluded: works of architecture, databases, computer programs, books (in their entirety) and musical scores.
Other cond.	in one copy without gainful intent	and to the extent justified by the intended purpose	to the extent justified by the intended purpose,	
Fair comp.	No	No	No	No. Remuneration only applies to copies made for exclusively personal purposes, of audiovisual works and sound recordings (art.39)

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	TURKMENISTAN	TURKMENISTAN	TURKMENISTAN	TURKMENISTAN
Rights				
Purposes				
Beneficiary				
Works				
Other conditions				
Fair comp.				

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	UKRAINE (art.23)	UKRAINE (art.21.2)	UKRAINE (art.21.1)	UKRAINE (art.25.1)
Rights	to reproduce to reprographic reproductions	to use	to use quotations (brief excerpts)	to reproduce works previously lawfully made available Excluded: works of architecture, computer software, sheet music and original works of fine art
Purposes	as illustrations for training for classroom lessons	as illustrations in publications, broadcasts, sound recordings or video recordings of an educational nature	if this is required by the critical, polemic, scientific or informational nature of the work incorporating the quotations	exclusively for personal purposes or for members of a family
Benef.	(2) by educational institutions			
Works	(1) excerpts from published written works or audiovisual works (2) published articles and other small works and excerpts from written works, with or without illustrations,	literary works and works of art	from published works from performances and works incorporated in a phonogram (videogram) or a broadcast program	
Other conditions	provided that the extent of the reproduction is consistent with said purpose; (2) Also provided that: reproduction of the work is a single, not a regular, event; and that there are no restrictions by collective management organizations concerning the terms and conditions for the reproduction.	to the extent justified by the intended purpose	to the extent justified by the intended purpose	
Fair comp.	No	No	No	Only for reprographic reproduction of books and copies or phonograms and videograms

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	UZBEKISTAN (art.29)	UZBEKISTAN (art.28.2)	UZBEKISTAN (art.28.1)	UZBEKISTAN (art.27)
Rights	reprographic reproduction	Reproduction, recording by technical means and broadcasting	Reproduction and dissemination in the form of quotations (in the original language or in translation)	Use / reproduction
Purposes	(b) if the reproduction is the work of a library or archive service and it is intended to meet the demands of natural persons who will use the copies obtained for purposes of study or research purposes; (c) the copy obtained is intended for classroom use.	By way of illustration in publications, radio or television broadcasts or sound or visual recordings of educational character,	for purposes of research, criticism or information	for personal reasons
Beneficiary	(b) if the copy is made by a library or archive at the request of natural persons (c) if the copy is done by an educational establishment			
Works	of single articles or succinct works lawfully published in collections, newspapers or other periodical publications, or of short extracts from lawfully published written works (with or without illustrations)	of lawfully disclosed works	of lawfully disclosed works	of a lawfully published work Excluded: works of architecture, databases, computer programs, books (in their entirety) and musical scores.
Other	without gainful intent	to the extent justified by the aim pursued	to the extent justified by the purpose of the quotation,	
Fair comp.	No	No	No	Only of sound and visual recordings
	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	UNITED KINGDOM (sec.32, sec.34, sec.36)	UNITED KINGDOM (sec.33)	UNITED KINGDOM (sec.30.1)	UNITED KINGDOM (sec.29.1)

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Rights	(sec.32.1-2) Copied... (sec.32.3) Anything done... (sec.34) Performance (sec.35) Recording (sec.36) Reprographic copying	Inclusion (in anthologies for educational use)	Fair dealing	Fair dealing
Purposes	(copied) in the course of instruction or of preparation for instruction (anything done) for the purposes of an examination (performance) before an audience consisting of teachers and pupils at an educational establishment or other persons directly connected with the activities of the establishment (parents not included)— (reprography) for purposes of instruction	... in a collection which (a) is intended for use in educational establishments and (b) consists mainly of material in which no copyright subsists, Excluded: works intended for use in such establishments	for the purposes of criticism or review	For the purposes of research (for a non-commercial purpose) or private study
Beneficiary	(copied) by the person giving or receiving the instruction (anything done) by way of setting the questions, communicating the questions to the candidates or answering the questions (performance) (1a) by a teacher or pupil in the course of the activities of the establishment or (1b) at the establishment by any person for the purposes of instruction (reprography) by or on behalf of an educational establishments (schools and universities)			By the researcher or student By a librarian (or someone on his behalf)
	literary, dramatic, musical or artistic work, sound recording, film, broadcast (reprography) of passages from published works	of a short passage from a published literary or dramatic work	with a work	A literary, dramatic, musical or artistic work
Other conditions	(copied) provided that the copying is fair dealing with the work and is not done by means of a reprographic process copies cannot be subsequently ... sold, rented or lent, or offered or exposed for sale, rental or loan, or otherwise made available to the public (reprography) Not more than one per cent ... unless a license authorizes the copying. Provided that the instruction is for a non-commercial purpose (sec.35: educational establishments may make for non-commercial purposes recordings of broadcasts and communicate it within the premises of the establishment)	No more than two excerpts from works by the same author in collections published by the same publisher over a period of five years.		Systematic single copying excluded
	No	No	No	No

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	TEACHING PURPOSES	TEACH, COMP.	QUOTATIONS PRIVATE COPY / USE
	USA Sec.110(2) - TEACH Act		USA Sec.107 - Fair use
Rights	<p>“performance ...or display ...by or in the course of a transmission”</p> <p>sec.112(f)(1): storage to enable such transmission;</p> <p>sec.112(f)(2): digitization to enable such transmission when no digital version is available;</p>		<p>fair use</p> <p>including ...reproduction in copies ...or by any other means</p>
Purposes	<p>2 cumulative purposes: the performance or display must be “an integral part of a class session offered as a regular part of the systematic mediated instructional activities”</p> <p>“directly related and of material assistance to the teaching content of the transmission”</p>		such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research
Beneficiary	<p>3 cumulative requirements: transmission made by “an accredited nonprofit educational institution ...providing elementary or secondary or post-secondary education ”,</p> <p>“solely for, and, to the extent technologically feasible, the reception of such transmission is limited to ... students officially enrolled in the course for which the transmission is made...”</p> <p>of a performance or display “made by, at the direction of, or under the actual supervision of an instructor”</p>		
Works	<p>Any works, except: “a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks” “a performance or display that is given by means of a copy that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired”</p>		a copyrighted work

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Other conditions	<p>“performance of a nondramatic literary or musical work or reasonable and limited portions of any other work”</p> <p>“display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session”</p> <p>The transmitting institution must: institute “policies regarding copyright...to faculty, students and staff...and promote compliance with...copyright”;</p> <p>in the case of digital transmissions, it must apply “reasonably effective technological measures to prevent (I) retention of the work in accessible form by recipients ...for longer than the class session, and (II) unauthorized further dissemination of the work in an accessible form by such recipients to others”</p>		<p>In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-</p> <p>(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;</p> <p>(2) the nature of the copyrighted work;</p> <p>(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and</p> <p>(4) the effect of the use upon the potential market for or value of the copyrighted work.</p> <p>The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.</p>
	No		No

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	TEACHING PURPOSES	TEACHING COMPILATIONS	QUOTATIONS	PRIVATE COPY / USE
	VATICAN	VATICAN	VATICAN	VATICAN
Rights	See ITALY	See ITALY	See ITALY	See ITALY
Purposes				
Beneficiary				
Works				
Other conditions				
Fair comp.				

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