



Leveraging copyright in support of education

COMMUNIA policy paper on exceptions and limitations for education

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Copyright policy needs to empower—and not thwart—the activities of teaching and learning. Exceptions and limitations to copyright for education should support necessary access and re-use of copyrighted content of all types in a variety of education settings and across borders. In this context, exceptions and limitations should promote positive learning outcomes, and the rights of copyright owners should be balanced with the public interest. Copyright needs to be reshaped to be fit for modern education—which spans the lives of learners, and takes place in a variety of formal and informal settings, online as well as off.

The right to education is universal. It is ensured by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. In Europe, this fundamental right is recognised by the European Convention on Human Rights. In many member states, education is a recognised constitutional right.

Copyright laws shall not hamper the exercise of this right. The 1996 WIPO Copyright Treaty “recogniz[es] 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...”.

The best way to achieve the proper balance of interests at stake is through the adoption of an exception or limitation to copyright for educational purposes that meets the following requirements: it should be able to address local and cross-border education needs; it should be mandatory; it should be neutral with regard to media type, format, and technology; it should be flexible; and it should cover all necessary uses provided they are in accordance with fair practice.

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The exception or limitation should be able to address local and cross-border education needs

In the European Union, education is the responsibility of member states. As a general rule, most educational institutions strive to provide educational instruction that fits needs of learners in a given state, region, or city. In many cases, small groups of people run schools, associations, or informal educational projects that cater to specific needs of a given group—be it children with special needs, local communities with specific traditions, or a student groups with particular learning interests.

School systems and educational institutions have different goals and rely on different pedagogical approaches and curricula. Learners have different interests and preferred ways of learning. **Yet access and ability to use copyrighted works (literary works, music, works of art, etc.) as educational resources is a universal need**—no matter which language they are written in or which world view they represent.

Copyright law needs to look beyond the walls of the classroom and the school building. Education is understood today as a process that encompasses both formal and informal teaching, conducted by a multitude of institutions, and even learners themselves. At the same time, outdated copyright law often limits the scope of exceptions and limitations to schools and other formal educational institutions. Instead of crafting limitations and exceptions that permit the diverse uses of copyrighted content for any educational purpose, our laws primarily focus on the type of person, institution or group doing the teaching.

Furthermore, **for a long time education has taken place across borders** and between cultures with different teaching mechanisms, styles, and content. Since 1987, students in the European Union have benefited from mobility schemes, such as the Erasmus and Marie Skłodowska-Curie programs. The eTwinning program, started in 2005, currently involves over 230,000 educators and learners in over 5000 projects that collaborate with the use of ICT. A European commitment to free flows of information, people, and resources across the continent is clearly visible in the education sector.

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Online education is also not limited by national borders. Multiple formal and informal initiatives use the internet to provide innovative, high quality education to learners across Europe. From Wikipedia to Khan Academy to MOOCs (which have been the focus of so much European support in the educational sector), these projects supplement local education. The education sector constitutes an important part of a market that is meant to be a Digital Single Market across the European Union.

For this reason, the treatment of education as an exception or limitation to copyright cannot be dealt with by member states alone. Teresa Nobre from Creative Commons Portugal studied the extremely fragmented landscape of educational exceptions and limitations across Europe. Looking at the results, it is hard to see how these widely-differing rules are shaped to fit EU-wide educational uses of copyrighted works. Instead, it becomes clear that the influence of partisan interests has led to a fragmented, dysfunctional regulation of the use of copyrighted works for educational purposes in the European Union. To overcome this problem, a harmonized solution within the European Union needs to be developed and implemented.

The exception or limitation should be mandatory

The preamble of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“InfoSoc Directive”) says, “(t)his Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching”.

Such an objective, while commendable, cannot be reached with merely optional exceptions and limitations to copyright. As we see, domestic treatment of education within the European Union is far different than that encountered in the rest of Europe. Apart from quotations, which are treated similarly within the EU countries, exceptions and limitations dealing with uses of protected works for educational purposes are a patchwork of different solutions.

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This compromises cross-border uses of copyrighted works for educational purposes. For example, while in Bulgaria a teacher can assign to their students the task of translating an entire poem into another language, in Italy this is not possible. Therefore, a student in Italy wishing to participate in a distance-learning course provided by a Bulgarian educational institution could not complete the assignment without infringing Italian copyright law.

Sharing of educational resources is also impaired due to differences between national copyright laws. For example, an educator in the Czech Republic is allowed to make teaching compilations of copyrighted works for use in class for free, but the same teacher in Austria is required to pay an equitable remuneration to the authors. If such a teacher decides to share such an educational resource with colleagues abroad, namely through online networks of teachers, he or she could be infringing copyright.

Finally, market players that wish to add value by developing novel technologies, services, and content also have a hard time trying to understand the differing national implementations of limitations and exceptions. For example, online uses of quotations for educational purposes are covered in all of the EU, except in Austria and Lithuania. In those two countries, one can write a quote of a literary work in a paper, but cannot use that same quotation in online contexts. Copyright laws in those two countries will therefore be an obstacle to the free movement of educational resources.

The only way to solve this balkanization of legal solutions within the European Union is through a mandatory exception or limitation to copyright for educational purposes at the EU level.

The exception or limitation should be neutral with regard to media type, format, and technology

A wide spectrum of media formats is potentially available to teachers: movies, multimedia and interactive materials, computer programs and mobile applications, and educational games. Content can also come from a variety of sources beyond the conventional field of education publishers. For example, scientific articles and

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datasets, cultural heritage collections, and artworks can be used as interesting and informative educational resources, given the proper context. There are choices between digital and analog, between media formats and content types, and choices that are made by individuals or education institutions.

The existence of such variety in learning and teaching styles, mechanisms, and materials means that it's impossible to clearly declare that one piece of content is “educational” while another piece of content is not. Nevertheless, a few member states discriminate the categories of works that can be covered by a certain exception or limitation for education. For instance, cinematographic works are not covered by the teaching compilation exception or limitation provided by copyright laws in Austria, Denmark, Finland, Greece, Hungary, Ireland, and Sweden.

Publishers argue that textbooks and other printed content should fall outside of the scope of exceptions and limitations. Yet they provide no argument to support their position. There is no evidence showing that, during the last decades of educational practice, sales of textbooks were harmed by the existence of copyright exceptions and limitations for education. Surely, if the purpose of use harms the educational publishing market, it should not be exempted or should at least be subject to a remuneration. That does not mean, however, that it should not be legal to use in education all categories of works (including textbooks and other works intended for educational use) provided that the purpose is noncommercial or does not otherwise harm the market.

All copyrighted work that is to be used for educational purposes—no matter the category, media type, format, or delivery mechanism—should therefore be within the scope for use under exceptions and limitations to copyright. In particular, we should guarantee that educators in the digital, networked environment receive the same degree of freedom that they have been granted by laws regarding access and re-use of analog content under a copyright exception or limitation.

Publishers believe that digital resources should be made available through closed, membership-only platforms—making the use regulated by technology, and making legal exceptions unnecessary. This is a model that breaks education in the digital age and destroys all the added-value provided to education by digital technologies and the

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web. The ability to access and use content under an exception or limitation to copyright for educational purposes should not be able to be restricted by technological barriers or contractual agreements.

It is no longer acceptable to have an exception or limitation to copyright for educational purposes limited to analog content and its uses—as is the case with the scope of such provisions in some member states. Copyright law should no longer avoid the issue of educational content being used and shared online.

We also need to acknowledge the fact that increasing numbers of educators and students—especially the most innovative, driven, and ambitious—are becoming creators of educational content themselves. We need to build digital environments and legal tools that support all educators as co-creators of content, not simply consumers of pre-packaged goods. “User generated content” should not be understood as simply movies of cats on YouTube and status updates on Facebook; it is also rich educational content created by educators themselves for use by their students and others.

The optional exception or limitation for educational purposes provided in the InfoSoc Directive was designed to cover all categories of copyrighted works, regardless of their format, and to be technologically neutral, exempting all acts of use necessary for both face-to-face teaching and online and digital education. Such legal provision is in accordance with the Three-Step-Test, and it is only a matter of political will to make it mandatory in all member states.

The exception or limitation should be flexible

The system of targeted, purpose-based exceptions defined in current national copyright laws does not offer legal certainty, is too rigid, and cannot be made future proof.

First, a mandatory exception or limitation for educational purposes needs to be simply designed, since is aimed at teachers, students and other education actors. The potential beneficiaries should not be required to look into complex legal provisions in

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order to figure out which one applies to their intended use. Instead, all the uses (including without limitation reproduction, distribution and communication to the public) should be covered in a single exception or limitation. The language should be user friendly: clear, and easy to understand. Surely, legal provisions need to rely on general concepts, and will be subject to ongoing judicial interpretation. However, EU lawmakers should strive to craft the language with as much clarity as possible.

Second, a mandatory exception or limitation for educational purposes needs to be flexible. Copyright law needs to adapt to rapid technological change, which naturally affects education. A legal provision that limits the uses covered will not be able to cover new uses even if they are similar to past ones. An “open norm” will increase flexibility of the copyright law.

Such a norm would provide for exceptions or limitations that work in a technologically neutral manner. Currently, at a local level, digital and online education does not always benefit from the same exceptions and limitations as traditional forms of teaching conducted in the classroom. This is due to the fact that several national legal provisions specify the acts of use covered by the exception or limitation, not including in those exhaustive lists all the rights necessary for digital and online uses (e.g. reproduction, communication to the public, making available to the public).

As an example, until recently Polish copyright law allowed educators to make only analog duplicates of copyrighted content, but not digital copies. A teacher could therefore play in a classroom a VHS recording of a movie, but could not show a movie streaming from an online service. And the most popular medium—the DVD—fell into a copyright grey zone. An open norm, if introduced, would make it clear that if a teacher can play a VHS tape in class, she can just as well use a DVD, a file, or an online stream.

The Three-Step Test does not preclude exceptions or limitations that are open ended. This has been clearly expressed in the “Civil Society statement on Exceptions and Limitations for Education”, submitted to WIPO in 2012. In fact, the optional exception or limitation for educational purposes provided in the InfoSoc Directive is already written in a neutral language (“use”), exempting all acts of use, not just specific

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ones. Such a policy option needs to be reflected in the national laws of member states.

The exception or limitation should cover all necessary uses provided they are in accordance with fair practice

It is commonly understood that the lack of remuneration for a use under an exception or limitation to copyright does not mean that such exception or limitation does not meet the three-step test. There are currently several education exceptions and limitations to copyright in the European Union that exclude any compensation to the rightsholder.¹ Some of those national law provisions only cover uses that do not have commercial purposes or that are not directed towards an economic advantage. Others cover the educational use as long as it is in accordance with fair practice. Our understanding is that users who wish to leverage content under an educational exception or limitation to copyright and do so in accordance with fair practice should generally be able to do so free of cost.

Currently, the InfoSoc Directive exempts uses of copyrighted works for education provided that there is no commercial purpose involved. When dealing with the issue at a local level, though, some member states have decided not to rely on the commercial/noncommercial distinction, instead exempting the use as long as it is in accordance with fair practice (e.g. Cyprus²). Such terminology is not unfamiliar to the EU lawmakers, who also use it when exempting the act of quotation.

Results from the study of How the Online Population Understands “Noncommercial Use” - commissioned by Creative Commons - show that there is more uncertainty than clarity around whether specific uses of online content are commercial or noncommercial. Specially if the uses generate some amount of money for the user (e.g. through a micro-payment service), or if there is an advertisement involved. As MEP

¹ Xalabarder, Raquel. *Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel*, p. 91. WIPO. November, 2009.

http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=130393

² See article 7(1)(e) of the Copyright and Related Rights Law No. 59/1976, of December 3, 1976 (as last amended by 181(I)/2007, of December 31, 2007). The (not updated) English version of the law is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126086

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Julia Reda puts it, “(i)f there is a consensus on this matter, it’s that the realm of commercial usage is entered long before a person makes a profit”.

On the other hand, it should also be noted that there is evidence showing that the EU education sector relies on exceptions and limitations to copyright to produce new materials, estimating that, in 2007, the added value generated by the existence of such rules equaled nearly 350 million euros, which is equivalent to 60% of the total public expenditure on education.

Moreover, competing knowledge intensive economies, such as China, South Korea, Singapore, Taiwan and the United States have “fair use” style clauses in their copyright laws. Those flexible legal provisions are designed to allow the use of copyrighted works so long as the use is deemed “fair”. Evidence shows that in the U.S. the fair use industry represented, in 2011, one sixth of the total U.S. GDP. The education sector is identified as one of the core fair use industries, since its activities depend in large measure of the fair use freedoms.

A single mandatory exception or limitation to copyright for education within the European Union should, therefore, exempt all uses of copyrighted works that are in accordance with fair practice. Uses for noncommercial purposes and uses that, despite being for a commercial purpose, do not harm the market for the works should be considered to be in accordance with fair practice.

The exception or limitation is crucial because licensing will never be a wholly adequate solution to provide access to copyrighted works for educational purposes

Teaching and learning about all types of subject matters (arts, philosophy, music, etc.) cannot be possible without the use of copyrighted artworks, literary works, musical works, etc. For as long as literary and artistic works are protected by copyright, there will always be an obligation and duty of teachers towards society to use copyrighted works. At the same time, educators deserve the freedom to use whatever copyrighted

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works they require in order to create the best educational environment for their students.

Unfortunately, there is no perfect marketplace to supply the resources necessary to support the diversity of teaching and learning needs and styles. Licensing, (including collective licensing and open licensing), is not—and will never be—a comprehensive solution for access and re-use of educational materials.

Publishers argue that education exceptions to copyright were a solution in times of scarcity—and that licenses should be used in times of abundant content and information. This argument makes no sense. Finding rights owners and negotiating licenses incurs high transaction costs. Similarly, it’s difficult to create a license that will fit all types of content and all types of uses. But more importantly, **educational institutions cannot adequately support teaching and learning activities if they are fully dependent on the will of a particular licensor, who may revoke access or increase costs as they see fit.**

In fact, as pointed out on the European Commission’s Green Paper on Copyright in the Knowledge Economy, in the few European countries where collective licensing schemes in the field of education are in place, the solution has not proven to be effective: collecting management organizations sometimes offer restrictive agreements, and in the worst-case scenario no agreement will be reached. It’s a no-win situation: the educational content is not delivered to learners, and the creators do not get paid.

And **even though open licensing has become a popular way to permit access and re-use of educational materials, the entirety of educational content will never be openly licensed.** This has been addressed by Creative Commons, in its statement on copyright reform:

“It has been suggested that the very success of CC licenses means that copyright reform is unnecessary — that the licenses solve any problems for users that might otherwise exist. This is certainly not the case. CC licenses are a patch, not a fix, for the problems of the copyright system. They apply only to works whose creators make a conscious decision to affirmatively license the

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right for the public to exercise exclusive rights that the law automatically grants to them.”

Open licensing for educational resources, as proposed by the OER movement, plays an important role in securing the availability of educational resources. In particular, publicly funded resources should be made broadly available in the global digital commons under open licenses. In this way, the public will be granted access and re-use rights to the educational materials that they pay for. Where public entities have the ability to couple grant funding with open licensing requirements, they should do so.

While there are increasing numbers of policies that support public access to publicly funded educational content, there will always be a large corpus of works that will be developed outside of this scheme but which should be available to use by teachers and students. This is where the harmonised exception or limitation to copyright for educational purposes is crucial. Access to all these types of copyrighted works can only be ensured by law, and not through licensing schemes.

Conclusion

Access to education is a universal human right, and our international agreements stress the need for balance between the rights of authors and the public interest, especially within the context of education. The existing limitations and exceptions across the EU pose considerable barriers to 21st century teaching and learning, including cross-border online education.

Considering that licensing will never be a wholly adequate solution to provide access to copyrighted works for educational purposes, the EU should work toward developing an exception or limitation to copyright for educational purposes that meets the following requirements: it should be able to address local and cross-border education needs; it should be mandatory; it should be neutral with regard to media type, format, and technology; it should be flexible; and it should cover all necessary uses provided they are in accordance with fair practice.

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About Communia

The COMMUNIA International Association on the public domain is a network of activists, researchers and practitioners from universities, NGOs and SME established in 10 Member States.

COMMUNIA advocates for policies that expand the public domain and increase access to and reuse of culture and knowledge. We seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

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