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INTERIM REPORT ON PRACTICES AND CHALLENGES IN RELATION TO ONLINE
DISTANCE EDUCATION AND RESEARCH ACTIVITIES

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Interim Report on practices and challenges in relation to online distance education and research activities

The purpose of this study is to understand how the existing copyright framework affects online distance education and research activities, either through exceptions and limitations (E&L) or through licensing/contractual schemes, covering both national and international activities, and taking into account territorial diversity and different legal traditions (common law / civil law) as well as the cross-border dimension of online teaching and research activities.

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Methodology

1. Desk research (literature).
2. Surveys and interviews with universities teachers and researchers of several countries, CMOs of literary works in different countries and regions of the world and other stakeholders.

Due to the limited time available to prepare for this report, contributions were not abundant. Nevertheless, they were sufficiently diverse and substantial to confirm the findings resulting from literature research. Unfortunately, very few responses were received from Africa, Asia and Latin American countries – despite specific institutions in these countries having been individually invited to participate.

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EXECUTIVE SUMMARY

Digital technology and the internet have significantly and rapidly expanded teaching and research opportunities. However, in terms of copyright law, flexibilities that exist for teaching and research activities in the analogue world do not seem to apply in the same manner in the digital world.

In fact, most copyright laws allow making copies and performances of works for teaching and research purposes in analogue and face-to-face scenarios. The same uses are not always possible in online and digital contexts. Several reasons may explain this result. Firstly, because most exceptions and limitations (E&L) were adopted before digital and online technologies developed and the right of making available online was not accordingly exempted. Secondly, because even when teaching and research E&L cover online uses, they tend to be more restrictive in scope and less flexible than E&L for analogue and face-to-face uses. In addition, online teaching and research must face the paradox that while exceptions and limitations in national laws are territorial in scope, activities conducted online might be cross border. A teaching use exempted under the national law of the country where the teaching institution is located may not be so exempted in other countries where students or academics reside.

Similarly, worldwide availability of licensing for teaching and research activities is far from uniform. Licensing practices vary across different countries, depending not only upon the specific copyright statutory choices, but also on the specific licensing “ecosystem” and, of course, on the cultural, economic and market conditions that exist in each country. In some countries, licensing for teaching and research uses is easily available (mostly, for publications) whilst, in other countries, collective licensing is hardly operational. Even where licensing is available for specific academic uses, it tends to be territorial in scope, thus failing to satisfy the needs of online academic activities that take place across borders.

Some countries are introducing changes in their national laws to accommodate E&L to online teaching and research, and to foster more efficient licensing models (i.e., through collective management societies) for uses that go beyond the exempted scope under E&L. Given this situation, a reflection could be made on how to reduce uncertainties as to the scope of exempted uses under national laws and overcome their territorial effects, in order to better respond to the needs of teaching and research activities conducted online and across borders and to foster their development.

A combination of E&L in copyright laws and licensing systems, mostly under collective management, adjusted to the specific cultural, economic and market circumstances of each country, could provide relevant solutions.

1. INTRODUCTION

This is a preliminary report regarding current practices and challenges that educational and research institutions face in relation to **teaching and research activities conducted online, with a special focus on cross-border elements** (e.g. students and researchers located in different countries, materials obtained from/published in other countries, etc).

The report aims at presenting how the existing copyright legal framework operates in this field, either through Exceptions and Limitations (E&L) granted in national copyright laws and/or contractual/licensing schemes available in different markets.

Information has been gathered through **questionnaires** distributed to academics and educational institutions, as well as CMOs and copyright owners from different countries or territories and legal traditions (common law/civil law).

Questions related to the use of **any copyrighted contents involved in teaching and research activities** – that is, different kind of works (literary, music, audiovisual, art, etc) and recordings (phonograms, videos) as well as software, databases, etc -, that take place **in restricted environments** (such as a virtual learning environment (VLE) only accessed by registered students) – either directed at obtaining an official degree or a certificate-, as well as activities that take place on publicly accessible websites, such as **Massive Open On line Courses (MOOCs) and Open Educational Resources (OER)**.

In order to present the findings, four main scenarios have been identified:

- a) Teaching programs at different levels (degrees, postgraduate, life-long learning certificates) offered by universities and high-education institutions **face-to-face and online**,
- b) Teaching offered by exclusively **online universities**.
- c) **Research activities** conducted online by research centers and universities.
- d) **OER and MOOCs** offered by teaching or research institutions (not by private businesses);

Several exceptions and limitations¹ existing in copyright laws may be relevant to provide exemptions for educational and research uses conducted online:

- o Quotations E&L;
- o Teaching and Research E&L;
- o Private use/copying E&L;
- o Fair use/dealing provisions (in Common law countries);

Despite they may directly or indirectly interact with educational purposes,² **E&L for libraries will not be considered** in this report since they are considered elsewhere.

In general terms, **E&L for teaching and research activities online** tend to be defined narrowly (in terms of acts of exploitation, works and beneficiaries) and often subject to more restrictive conditions than those set for analogue and face to face academic activities.

As for licensing systems, licensing for teaching and research activities online varies widely across different countries.

Collective licensing may be fully operational in one country for some type of works (e.g. publications) but hardly available for others (movies and phonograms). Furthermore, **different licensing models may co-exist** within the same legal framework; for example, a CMO could be licensing the same teaching acts of exploitation under different licenses and conditions: for public, non-profit institutions (e.g. statutory licensing under an E&L) and for-profit ones (voluntary licensing).³ Let's also bear in mind that, regardless of the national statutory E&L regime, collective licensing and CMOs are not yet operational everywhere.

None of these **licensing models** (individual licensing, collective licensing or non-voluntary licensing) may be seen as more successful or efficient than another to facilitate online academic activities: it depends on the legal and market circumstances in each country. Certainly, some

¹ For the sake of simplicity, the terms 'exception' and 'limitation' will be used in this report indistinctively to refer to statutory provisions which authorize specific exploitation acts (or uses), whether the authorized act/use is for free (free uses) or remunerated (statutory or compulsory licenses).

² Most teaching and research uses are made possible through materials that have been obtained by or through libraries.

³ The specific design of statutory E&L has a direct impact on the kind of licensing market and conditions existing in each country, and *vice versa*: not only because the scope of an E&L defines the acts of exploitation that will require a voluntary license – either by CMOs or Rights holders, but also because statutory E&L often require remuneration that is usually managed collectively (by CMOs).

countries are introducing changes in their legal framework⁴, to adapt E&L to online contexts and to foster a more efficient licensing for academic uses, but at the end, their success and efficiency very much depend upon the market and economic context of that country.

Despite all this, collective licensing is undoubtedly called to play **an important role in the development of online and cross-border education**, meeting the needs and demands of educational institutions for online teaching and research activities, while respecting the primary markets. Of course, this requires new and better statutory provisions, as well as a fluid dialogue between copyright owners and educational institutions that permits an approach of interests and a joint work to find solutions to improve the offer and availability of contents for universities, teachers, researchers and students for their online teaching and research activities.

Furthermore, online teaching and research activities happen in **ubiquitous markets**: students and researchers may be located in different countries (other than the country where the university is located) making it more difficult to assess the scope of exempted uses under different national E&L; materials used for teaching and research purposes may have been obtained from sources “located abroad,” further complicating the task of locating and contacting copyright owners and obtaining an authorization from them; academic uses may have been licensed for specific territories only, thus failing to provide a complete answer to cross-border online uses.

We will now examine both issues separately, E&L and Collective Licensing, despite knowing that they are inherently linked and that the development of online teaching and research activities depends on the combination of both, adjusted to the specific cultural, economic and market circumstances of each country.

2. E&L FOR TEACHING AND RESEARCH

In this chapter, we will examine how educational (teaching and research) activities may be directly authorized under copyright laws.

Teaching, as used in this report, include any acts which are necessary to convey the instruction: the work is directly used as material assistance to the instruction, rather than as background

⁴ This is the case of Jamaica and the UK towards an Extended Collective Licensing ECL model. In some countries, a statutory E&L would only apply as long as there is no license available in the market for it; this “**overridden**” E&L mechanism is a very efficient manner to foster negotiations towards collective licensing, with CMOs approved by the government, and even to encourage the development of CMOs. This is the case for the UK, which is contained for educational purposes in s. 26 (6) CDPA, in Mauritius, soon in Kenya, and a similar mechanism also exists in Zimbabwe. This mechanism has also encouraged right holders in some countries to establish CMOs to grant licenses for educational uses, as in the case of Jamaica.

material (*i.e.*, readings for further study and research purposes) or for entertainment (*i.e.*, as part of a “school event”).

Research, as used in this report, includes any acts which are necessary to gather and discover information, as well as to study, analyze and understand a topic, in order to enhance knowledge, science and culture. Research is typically conducted at universities and research centers.

Teaching and research activities that take place online involve acts of reproduction, communication to the public, making available online and, in some countries, distribution. Sometimes, translations may also be involved. In addition, in online contexts, materials used as part of the instruction may be somehow stored or “compiled” (be it on a webpage, a common storage space, drive or cloud) for access.

The **scope of E&L** for educational purposes very much depends on the specific language used to describe the acts of exploitation exempted, the formats or means of exploitation (*i.e.*, reprography, analog, digital), the specific beneficiaries (*i.e.*, public institutions, non-for-profit universities, schools etc) and/or individuals (teachers, students, librarians) entitled to do the exempted acts of exploitation, what kind of works (any or specific works) and the extent of use allowed (how much, how many copies), the specific purposes allowed (teaching, examinations, study, etc) as well as any further conditions and requirements, including remuneration.

E&L may result in **licensing schemes** to remunerate or compensate for the statutory exempted uses. Statutory-supported licensing (*i.e.*, extended collective licensing) and non-voluntary licensing (*i.e.*, statutory or compulsory licensing) will be considered in this chapter. Voluntary licensing schemes, dealing with uses authorized beyond E&L, will be dealt with in the next chapter.

2.1 THE BERNE CONVENTION

Teaching and research purposes have been present in the Berne Convention since its adoption in 1886.⁵

Both the **Berne Act of 1886** and the **Brussels Act of 1948** referred to “**educational or scientific**” purposes. Although current Art.10(2) BC (as drafted at **Stockholm, 1976**) only refers to teaching,

⁵ 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, BC]. Similar E&L exist in the Rome Convention. for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961).

scientific research purposes may be served by two other exceptions also reformed in Stockholm: quotations (Art.10(1) BC) and the general exception to reproduction rights (Art.9.(2) BC).

a) Teaching purposes

According to Art.10(2) BC:

*“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.**”*

This is an **open, flexible and technology-neutral** exception, aimed at accommodating any acts of exploitation⁶ and new technology.⁷ Accordingly, digital means and online teaching (or any other means of distance learning) are clearly included under the exception.⁸ Its backbone is ‘**by way of illustration... for teaching.**’ This was never intended to restrict the scope of “*educational purposes*” envisioned in the original provision; rather, it responded to a concern about the amount of a work used and to make sure that reproductions used are indeed “illustrating” the teaching.⁹

Art.10(2) BC was meant “to include teaching at all levels”¹⁰ yet, there is some doctrinal debate as to whether it should only include “official” programs and degrees or also general teaching available to the general public.¹¹ A restrictive interpretation excluding adult education courses

⁶ Including the making available granted in Art.8 WCT.

⁷ 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 technology; 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.

⁸ See Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO Document SCCR/9/7 (2003), p.15. See also Ricketson/Ginsburg, *op.cit.supra*, §13.44 and §13.45. As stated in the Agreed Statement concerning Art.10 WCT, Member States may ‘appropriately extend into the digital environment limitations and exceptions in their national laws ... [and] devise new E&L that are appropriate in the digital networked environment.’

⁹ 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. A commentary to the teaching exception in Sec.7(i)(c) of the WIPO Tunis Model Law on Copyright of 1976 explains that “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.”

¹⁰ See Ricketson, *WIPO Study*, *op.cit.supra*, p.15: “in educational institutions and universities, municipal and State schools, and private schools”.

¹¹ See Ricketson/Ginsburg, *op.cit.supra*, §13.45.

and life-long learning may, to some extent, be compensated by the provisions of the Appendix to the Berne Convention which clearly include them.¹²

Art.10(2) BC applies to all kinds of works, both literary and artistic; rather than specific quantitative or qualitative restrictions, the exempted use is only limited on two grounds: “*the extent justified by the purpose*” and “[*compatibility*] with fair practice.” No remuneration is required but Member States are free to implement it; in fact, some compensation or remuneration may be necessary to comply with “*fair practice*.”¹³

And last, but not least, Art.10(2) BC is not a mandatory exception: within its boundaries, the exempted use of works for teaching purposes remains a matter for national law.

b) 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.”*

As Prof. Ricketson explains,¹⁴ quotations for “*scientific, critical, informative or educational purposes*” are clearly included within its scope.

Art.10(1) BC exempts any acts of exploitation: reproduction, distribution, communication to the public and making available, as well as translations.¹⁵

Art.10(1) BC applies to all kind of works (provided they have been “*lawfully made available to the public*”), without any specific limitation as to the amount that may be quoted. Of course, the term

¹² However, only a few countries have incorporated the Berne Appendix in their laws (allowing their nationals to request a license to reproduce and translate non-available works) and, even when so, very few have used them. See (2009) WIPO *Studies on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities*: Fometeu, J. (Africa) SCCR/19/5, p.42; Nabhan, V. (Arab Countries) SCCR/19/6, p.4; Seng, D. (Asia and Australia) SCCR/19/7, p.202; available at https://www.wipo.int/meetings/en/details.jsp?meeting_id=17462

¹³ 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’”.

¹⁴ See Ricketson, WIPO Study, *op.cit.supra*, p.13.

¹⁵ See WIPO (1976), *WIPO Reports op.cit.supra*, § 205. See Ricketson, WIPO Study, *op.cit.supra*, p.37-39: “the exclusion of translations from the exceptions provided in these Articles will lead to a manifestly absurd or unreasonable result”. Aligned with this conclusion, Sec.7 “Fair use” of the WIPO Tunis Model Law on Copyright of 1976 expressly allows (under all the listed exceptions) the use of works “either in the original language or in translation”.

'quotation' itself already suggests some restriction, but its length will be ultimately determined *in casu*, subject to the conditions of "*extent justified by the purpose*" and in a manner that is "*compatible with fair practice*."¹⁶

Similarly, since the quotation exception is neither restricted in terms of beneficiaries nor technology, it may exempt quotations for teaching and research purposes made by professors, students and researchers, as well as by any means of exploitation (i.e, digital formats and online contexts).

Again, despite remuneration not being required, nothing prevents Member States from subjecting exempted quotations to remuneration schemes –which, "should more readily justify the requirement of compatibility with fair practice than would a free use."¹⁷

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

Art.10(1) BC is mandatory and Member States must apply it in their national laws. As we will see, not all national laws do so – at least, not with the scope of exempted quotation uses mandated by Art.10(1) BC.

2.2 E&L IN NATIONAL LAWS

All national copyright laws provide for some E&L allowing teaching and research uses to a different extent. Specific exceptions for quotations and private uses may also be found in most statutes; while Common Law countries rely on fair use/fair dealing provisions that usually combine these later two. The scope and conditions of educational E&L vary, sometimes widely, among domestic laws; this is so even within "harmonized" markets such as the EU.¹⁸ The **lack of normative consensus** is far more acute when we consider digital formats and online teaching.

¹⁶ See Ricketson, WIPO Study, *op.cit.supra*, p.12.

¹⁷ See Ricketson, WIPO Study, *op.cit.supra*, p.13.

¹⁸ Little harmonization has been achieved within the EU countries as a result of the optional E&L set in Art.5.3(a) EUCD in favor of "illustration for teaching and research purposes". See Xalabarder, R. (2009) *WIPO Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel* SCCR/19/8; available at https://www.wipo.int/meetings/en/details.jsp?meeting_id=17462

In fact, as a general rule, E&L in national laws tend to be less generous than the ones envisioned for teaching, research and quotation purposes in the Berne Convention.

a) E&L for teaching purposes

E&L for teaching purposes in national copyright laws are far from homogeneous. Differences relate to the specific **purposes** exempted,¹⁹ the exempted **acts of exploitation**²⁰ (including translations or not),²¹ **beneficiary institutions**²² and **individual users**, and the **kind and of works** that may be used.²³

Another distinguishing factor is the requirement of **remuneration** (or compensation) for authors, publishers and producers. While most E&L for teaching and research purposes do not require any compensation (this is so in most African, Asian and Latin American countries), a few (especially in developed countries) require remuneration, and they do so by different means.²⁴ Of course, these legislative choices ultimately help define the scope of uses exempted under teaching E&L (free E&L tend to be narrower in scope than remunerated E&L) and shape the licensing system developed in each country.

In addition to specific E&L for teaching and research purposes, all national laws permit **quotations** and **private copying** and, in Common Law countries, **fair use/dealing**. Although

¹⁹ Some laws 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,” “school” and “classroom use”, and -more specifically- to “instruction,” “examination,” “lessons” and “lectures,” etc. These terms may be interpreted differently in each country.

²⁰ Most teaching E&L 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, reproduction, “live” performances, or are directly restricted to ‘face-to-face’ teaching. A few national laws refer to use, yet it is not clear whether they would cover digital and online teaching uses.

²¹ Very few E&L expressly allow translations for teaching purposes.

²² As a general rule, teaching uses are exempted at all educational levels; however, a few laws establish different E&L for schools and for universities, or restrict them to the context of public education and non-for-profit institutions (or ‘non-commercial purpose’) excluding private for-profit educational institutions.

²³ 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 exclude the use of textbooks or publications intended for educational use or set specific quantity restrictions (10%, 15 pages).

²⁴ Some E&L require compensation under a statutory license. Others (especially in Common-law regimes such as Canada and UK) foster voluntary licensing by establishing a statutory exception to apply where no voluntary licensing has been agreed. In Nordic countries, extended collective licensing applies to exempted uses and also to license beyond the statutory exceptions. In other countries (mostly, EU), compulsory collective licensing schemes apply to compensate for uses exempted under E&L. And in other countries (again, mostly EU), some teaching and research uses may be indirectly compensated through levy systems provided for private copying applicable on equipment (such as photocopiers, printers and scanners) and/or on operators (schools, colleges, universities, libraries, research institutions, etc).

they would not be enough *per se* to satisfy the needs of education and research, these exceptions may help complete the specific E&L for teaching and research purposes.

In general terms, **Common Law** provisions that exempt educational uses are far more detailed than **Civil law** ones; more detail does not always mean more exempted uses.

Yet, for purposes of this study, we intend to assess how national E&L respond to, and meet, the needs of digital and online teaching and research.

Contrary to the generosity and flexibility shown by Art.10(2) BC, national E&L for teaching purposes fail to properly envision digital and online education. Specific language used in national E&L (e.g. classrooms, performance, only photocopying) tends to restrict exempted teaching uses to face-to-face and “analogue” scenarios. Another issue that is poorly addressed by national laws and highly controversial is **digitization** of works to be used for teaching purposes. On the one hand, to the extent that scanning amounts to a reproduction, digitization might also be exempted as a reproduction. Yet, on the other, digital copies bring a higher risk of downstream infringing uses than analogue copies. This factor, together with the impact that digitization may have on the primary markets of the works are factors that deserve to be carefully considered in order to find more nuanced E&L solutions for online uses.

This is particularly the case of many countries in Asia, Africa, Latin America, Middle East and Eastern Europe: many national E&L laws remain rooted in face-to-face teaching scenarios and when E&L apply online it is subject to conditions different from those applicable to face to face teaching.²⁵ The scenario has not changed much in 10 years. Certainly, in some countries, recent amendments have designed specific E&L for digital and online teaching. Unfortunately, the result is often a restrictive and intricate compromise of interests that makes it difficult to enforce, and even more difficult to integrate with the rest of E&L.

Designing E&L for digital online teaching requires **a uniform treatment of several acts of exploitation** necessarily involved in any online teaching activity: at least, reproduction and making available (when uploading the contents on a website), transmission (which at the same time includes multiple transient copies) and subsequent copying (when content is downloaded by recipients). In order to fully exempt online teaching uses, all these acts of exploitation should be uniformly addressed by national teaching exceptions. Therefore, an E&L that only allows

²⁵ See (2009) WIPO *Studies on the Limitations and Exceptions to Copyright and Related Rights for the Purposes of Educational and Research Activities*: Monroy Rodríguez, J.C. (Latin America and the Caribbean) SCCR/19/4; Fometeu, J. (Africa) SCCR/19/5; Nabhan, V. (Arab Countries) SCCR/19/6; Seng, D. (Asia and Australia) SCCR/19/7; Xalabarder, R. (North America, Europe, Caucasus, Central Asia and Israel) SCCR/19/8. available at https://www.wipo.int/meetings/en/details.jsp?meeting_id=17462

reproduction (even when digital copies are allowed) of a work for teaching purposes may not be fit to exempt online uses. Similarly, an E&L that only allows performances (or communication to the public) but not reproductions may also fail to exempt online uses, and so on.

Another challenge that needs to be duly addressed by E&L for teaching and research, is its applicability to all kind of works (e.g., not only textual) and under flexible conditions (e.g., to allow uses “to the extent necessary” as under Art.10 BC). Sufficient coverage of works and protected subject matter, and some degree of flexibility, are critical for the development of teaching and research online.

The possibility to allow translations for teaching purposes is especially important in some countries (with minority languages) which are net importers of academic materials published elsewhere.

In general terms, E&L in national copyright laws do not meet the needs of online education.

b) E&L for research purposes

As a general rule, in most national copyright laws, research purposes tend to benefit from the same E&L envisioned for teaching purposes. In addition, uses exempted as quotations are fundamental for research purposes.

Research activities conducted online face the same obstacles and challenges analyzed under the teaching E&L: researchers and academics located in different countries who want to “exchange” copyrighted contents and are uncertain about the scope of exempted uses under applicable E&L; uncertainty as to the applicable law and the extent of E&L covering specific uses; contents obtained from licensed databases subject to territorial restrictions or to contractual conditions prevail over E&L; TPM-protected works that prevent specific uses or uses in foreign countries; and, of course, interpretation challenges of what qualifies as research. For all these reasons, open licensing and open access initiatives have been developing across academic communities.²⁶

Furthermore, beyond copyright, the use of raw data and information (often resulting from research projects, or originated within the Public Sector) that is not *per se* protected under copyright, is also a very valuable asset for research. Challenges here include uncertainties to distinguish between copyright protected works and data which is not protected by copyright.

²⁶ See SPARC: <https://sparcopen.org/>

c) E&L for text and data mining

Machine reading technology and platforms, text-and-data mining (TDM), have become a fundamental opportunity for research (and teaching).

Text and data mining for research purposes is being successfully licensed in some countries (i.e., USA), while others seem to prefer solutions based on statutory E&L (i.e. UK) (see licensing section below).

In the UK, where the 2014 non-commercial statutory exception removed any requirement for a licensing scheme for TDM for research purposes, the Copyright Licensing Agency (CLA) is studying the possibility to discuss user requirements for a TDM license with researchers and their representatives in other fields. Some CMOs have pointed out that they will forward their efforts to other sectors beyond the academic field, such as the corporate market.

An EU-wide mandatory exception to allow text and data mining for research and teaching purposes is included in the proposal of the Directive on Copyright in the Digital Single Market, leaving it for member states to decide about the possibility of enacting E&L for TDM for any other purposes – given the possibilities that machine reading (TDM) may bring for the development of future goods and services.

2.3. EXPERIENCES AND VIEWS FROM ACADEMICS

One of the challenges for academics is to have a clear understanding (awareness) of the scope of permitted uses under E&L for teaching and research purposes. Instead, they tend to be aware of **uses generally permitted as quotations and private copying**. As a general rule, librarians are more knowledgeable on copyright matters, and academics often rely on them for that.

Misconceptions commonly spread in academic communities include the following: ²⁷ non-for-profit uses are always allowed under copyright (only commercial uses require a license), using 10% of a work is always allowed, teaching and research uses are allowed as long as authorship is attributed or as long as no commercial purposes are sought, anything available online may be used for teaching and research purposes, and any work licensed with a Creative Commons may be freely used (without paying much attention to the specific conditions of that license). Most

²⁷ Some scholars profess to be aware of copyright E&L and consider them clear and broad enough to cover teaching and research needs; yet, these same scholars express some common misunderstandings.

scholars also believe that the scope of teaching and research uses permitted under E&L (or even under licenses) is the same for face-to-face and online activities; for example, that a picture, a song or a fragment of a movie that may be shown or played as part of the instruction in a classroom may also be shown or posted online (VLE intranet) for the students to access it.

When necessary for teaching, academics **translate works** that are not available in their countries without considering whether translation is an act of exploitation exempted under national E&L or the need for a license; sometimes, a tangible copy of the work has been purchased in/from a foreign country. In countries with sufficient access to copyrighted material available for teaching and research in their own language, translations for teaching and research purposes are rarely needed.

Works and materials used for teaching and research are often **obtained either from open-access repositories (i.e., image databases, scholarly articles) and open-licensed sources or directly from libraries**. Open-access repositories and sources, as well as licensed databases may be from overseas sources. Copies obtained from libraries may be copies permitted for research purposes under library E&L or copies licensed by publishers (library licensed databases). Often, use of library-licensed materials is restricted to a specific territory and cannot be accessed by students residing in another territory (see chapter 5). In addition, materials used for online teaching may often be scanned (digitized) copies of tangible ones (books, DVD, posters) acquired by academics (as a personal purchase) or departments (as an institutional purchase) in or from foreign markets.

Teaching uses often link to **contents freely available online**, stored on Youtube or websites worldwide; in general terms, linking to online content does not qualify as an act of exploitation that requires exemption or authorization, but as a disadvantage, linked contents may be no longer available when necessary for teaching.

Academics refer to **unclear language and insufficient scope of E&L** for teaching and research purposes. For instance, the scope of exempted uses under the quotation exception make universities refrain from publishing thesis and dissertations online for fear that some of the images and works included in them may exceed the scope of use permitted under the quotation exemption. Legal uncertainty is aggravated when online teaching or research occurs across different countries and a use clearly exempted under one national law may not be so exempted under the law of other countries where students or academics reside (see chapter 5).

Also, without questioning the validity of DRM to exploit works and prevent infringement, **DRM** are often identified as an obstacle to the use of copyrighted content (mostly, audiovisual content) for

teaching purposes. Some academics explained that they must take screen-captures of video contents to show their students or that DRM restrictions have pushed them to use OER, instead.

Legal uncertainty about the scope of exempted uses under E&L leads to unnecessary licensing or even precautionary removal of contents, which has a negative impact on the quality of education provided. Furthermore, in some cases - depending on the source (e.g., materials obtained through a licensed database) - **licensing terms may prevent a teaching use that might be exempted under an E&L**. Even though, in theory, one may expect E&L and fair use to prevail over specific contractual terms and conditions²⁸, in practice, this is a controversial issue (much debated by case law and scholarly doctrine) and one that may require further guidance from the international and national legislators.²⁹

As a result, online teaching uses basically consist of clearly exempted uses and of database-licensed contents; transactions costs of clearing copyright for other uses and materials being too high to bear for most academics.

Not all teaching and research institutions have a unit which specializes in copyright law and often, institutions' legal offices fail to include copyright expertise. Most institutions have general warnings on copyright compliance and academic ethics (Codes of conduct), but they fail to offer **specific guides** for the use of copyrighted material for teaching and research uses (although, on this specific issue, a clear distinction may be drawn between academic institutions in developed and developing countries). Even where guidelines exist, academics do not seem to pay much attention to them, or are generally unaware of them.

Guidelines have often been prompted by copyright infringement claims or by notice and take down requests sent by copyright owners; these cases serve as a "wake up call" for the institution

²⁸ One may question the benefit of statutory E&L that may be subsequently displaced by contracts. On this issue, CC licenses expressly refrain from interfering with the scope of any applicable statutory E&L; however, not all national laws are clear enough on this matter and often licensing terms are meant to prevail over exempted uses under applicable E&L.

²⁹ As an example, the EU Copyright *acquis* offers diverging solutions. While E&L to Computer programs and Databases cannot be prevented by TPMs, Art.6.4(4) InfoSoc Directive expressly allows TPMs to prevail over E&L (despite a few of them are especially "protected" through courts). None of these Directives say nothing regarding contractual terms. Instead, the new proposed CDSM Directive formally states that any contractual provision contrary to the mandatory E&L in Art.3-9 (namely for TDM, Education and research, cultural heritage & out-of-commerce works) "shall be unenforceable," yet, it also refers to Art.6(4) InfoSoc Directive, thus opening the door for implementation of TPMs that may prevent the effective enforcement of these mandatory E&L. Last, but not least, the Marrakesh Directive addressed this issue in a more coherent manner (Art.3(4) and (5)) ensuring that the VIP exception cannot be overridden by contract or by TPMs (since Art.6(4)(4) InfoSoc Directive was not formally referred).

(to generate copyright guidelines) and for academics (to be more aware of the need of copyright compliance). Very few institutions offer copyright courses for their staff.

In Europe and developed countries, **risk-avoiding institutions** tend to advise their students and professors to seek permission from copyright holders to use works (i.e., images) in doctoral thesis and research papers that are intended to be published on an online open-repository; and this is so despite quite often these uses could be exempted as quotations or under the teaching and research E&L.

When academics identify that a specific use will not be allowed under copyright law, they prefer to find alternative contents (preferably, available in open-access repositories and/or licensed with a Creative Commons license), or to re-create the contents themselves. When neither option is feasible, they try to contact the author or copyright owner – challenges include identifying and locating him/her and obtaining a timely response (if any at all).

When all this fails, some academics choose to conduct the teaching or research use, anyhow. In general terms, contacting a CMO (if available) in their country is usually envisioned as the last possible option (although, in European and developed countries, CMOs are more easily contacted). Academics tend to have little information about CMOs existing in their countries.

Fair use is a fundamental piece for teaching and research uses in some Common Law countries. US academics realize that fair use is a flexible tool to foster teaching and research, but they are also aware of its challenges and the uncertainty it generates, being ultimately a matter to be decided *in casu* by case law. In the USA, institutions and libraries generally provide extensive fair use guidelines but fair use determination is ultimately up to academics.

Sometimes, challenges result from having **several E&L that are applicable to teaching and research scenarios**. For instance, in the USA and Canada, there is some uncertainty as to how fair use and fair dealing may apply to online teaching activities that are also subjected to a specific E&L. Canada, for instance, has a specific regime combining voluntary blanket licenses (i.e., Access Copyright), usually priced on a per student/per year basis- with individual transactional licenses, that are only available to institutions which are already subscribing to the blanket license. Thus, institutions who are not part of this blanket license, end up caught in a loop when individual publishers refer them to Access Copyright which cannot license them.

In **Nordic countries**, teaching uses are subjected to collective licensing under Extended Collective Licensing (ECL). Teaching ECL tend to cover copying, scanning, and online uses (through secured VLE), but they tend to include restrictions as to the number of pages that can

be used and are restricted to uses done “on campus.”³⁰ On the other hand, ECLs yield to other specific licensing agreements. As more and more database licenses are being entered by libraries with copyright owners (offering better conditions than under the ECL),³¹ and more and more content is published in open-access repositories, the scope and importance of ECL is diminishing. In these countries, some academics and librarians have expressed their concerns that teaching and research uses would be better served with a combination of voluntary licensing agreements (database access or open-source repositories) and free statutory exempted uses (such as under fair use), rather than under remunerated ECL. They also complain that the “ECL culture is much too strong” and negotiations started between universities and textbook publishers tend to fail. Apparently, in order to overcome this, some institutions have started licensing directly from foreign publishers.

Regardless of any statutory E&L, in many countries, **the conditions do not exist to comply with copyright law** (i.e., CMOs are not operational in all countries,³² foreign rightholders are difficult to reach, etc). Of course, this does not make it less of an infringement when teaching and research uses that have not been exempted by law take place without a license from the rightsholder or CMO. However, it does show the conundrum faced by teaching and research communities in many countries where compliance of copyright law is impossible in the specific circumstances existing in their countries. As one academic from a developing country put it: “We cannot care about copyright, we care about teaching”. This statement may well summarize the frustration when the necessary institutions to enforce copyright do not exist. This may also explain why most of the teaching and research institutions from developing countries invited to participate in this study fail to submit any response to it. Complying with E&L for teaching and research purposes in copyright laws may be a luxury only affordable in some countries.

In summary, the current scenario of E&L for online teaching and research is far from optimal: it generates legal uncertainty, deterring the development and weakening the quality of teaching and

³⁰ In some Nordic countries, researchers have been sued for using copyrighted images at conferences outside campus.

³¹ For instance, database licenses do not establish restrictions on the number of pages that can be copied for teaching and research uses.

³² See (2009) Monroy Rodríguez *WIPO Study*, op.cit.supra., p.232: “users may find it difficult to obtain express prior authorization since, in the region, rightholders have not implemented a collective management systems for rights...” Regarding a similar situation in African countries, see T. Koskinen-Olsson (2014) *WIPO Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector*, http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_inf_2.pdf : “The scarcity of strong and representative associations or guilds of creative collaborators and financing partners does not support collective negotiation of rights in [these countries].”

research activity online, and often deprives authors and right holders from obtaining remuneration for the use of their works.

3. LICENSING TEACHING AND RESEARCH ACTIVITIES

In this chapter, we refer to licensing through collective management organizations (CMO), which represent rights-holders (usually through voluntary mandates)³³.

Availability of licensing for teaching and research activities is not uniform. Licensing practices vary across different countries, depending not only on the specific copyright statutory choices (e.g., scope of E&L for these activities, statutory licensing and/or Extended Collective Licensing), but also on the specific licensing “ecosystem” and, of course, on the cultural, economic and market conditions existing in each country. In some countries, there are no CMOs available to license teaching and research activities (or not for all different kind of works). Language and cultural inputs are also fundamental to explain specific practices in different countries.

Information obtained refers mostly to CMOs for text and images (i.e., written works, in books, texts, journals and images), which are usually known as Reproduction Rights Organizations (RROs). Several CMOs for music and audiovisual contents were also consulted for this report. They expressed they are not managing any licenses at this time in the field of education, except in a few rare cases. In Australia, for instance, musical content is licensed for educational uses directly by the CMOs representing music composers, publishers and phonographic producers.³⁴ In the UK, CLA (the UK’s RRO) also offers a music license on behalf of music publishers alongside its other licenses.

Licensing available for audiovisual works (from audiovisual distributors) are generally seen as too expensive for academic institutions; and some of them (namely Netflix and Amazon) refuse to license their productions for use in teaching and research purposes. In some instances, institutions turn to streaming services (such as CANOPY) or to video licenses available (in some countries) from public institutions (National Film Archives and National Broadcasting

³³ **Licenses** for educational purposes may be granted on a **collective or individual** basis. We refer to **individual licensing**, when the copyright owner authorizes the use of the work under the conditions and remuneration agreed upon. Instead, **collective licensing** is granted by collective management organizations (CMOs) that have been entrusted by rights owners with exercising their rights on their behalf. Thus, in **voluntary** model of collective licensing, a CMO can only license rights that have been voluntarily entrusted to it by its members, through mandates. In addition, CMOs negotiate Bilateral Agreements with other CMO around the world so as to license their repertoires (in their respective territories), on the basis of reciprocal representation.

³⁴ This is the case of Australia <http://apraamcos.com.au/music-customers/licence-types/music-in-education/>

Corporations). More often, universities simply prefer to license audiovisual works on an individual basis – to avoid collective licensing prices they find excessive.

a) Collective licensing for teaching and research purposes

In order to assess licensing availability for digital uses required by universities to carry on online education and research activities, we conducted interviews to different CMOs located in various countries. The following paragraphs summarize the information collected.

- **Off-line teaching and research activities are normally licensed by CMOs**, under a wide variety of licensing and situations, in different countries. We will not focus in this scenario but rather on the licensing meant to cover online distance education and research activities – either done by universities who also conduct “face -to-face” teaching and research or by fully online universities.
- In most cases, licenses granted by RROs cover uses required for **face-to-face as well as online** teaching and research.
- The type of license granted is in most of cases **an annual blanket/repertoire non-exclusive license** to use the entire CMO repertoire in the respective territory, as well as the repertoire of other CMOs with a reciprocal representation agreement or Bilateral Agreement. Most of CMOs have only one type of license for digital uses for educational and research purposes in academic institutions. Less frequently, CMOs offer independent licenses for academic research.
- In some cases, license is **granted upon request**, and within the CMO’s mandate, to institutions who have negotiated a blanket license, for specific uses: e.g., to use a second extract of the same work, or an additional percentage above that granted in the blanket license.
- For digital uses, in addition to blanket licenses, most CMOs also offer **transactional licenses**, which would be weaved on a case-by-case basis to cover specific uses that are not contemplated in the repertoire license.
- In a few countries, CMOs³⁵ are in a position to offer **pay- per- use licenses**. They may be acquired on line by schools and departments, as well as by teachers and even by students. These licenses include the possibility of preparing course packs and classroom handouts, reuse and share information in library reserves, interlibrary loan and document delivery services, post and share content electronically in e-reserves, distribute content via e-mail or post it to intranet, Internet and extranet sites, republish an article, book

³⁵ <http://www.copyright.com/academia/pay-per-use/>

excerpt or other content in the user's own books, journals, newsletters and other materials, whether print or digital.

- Licenses mostly cover **textual and image works**. All types of published works expressed in writing, as books, journals, magazines, newspapers, and images embedded in publications, as illustrations, photographs and other visual content. There is a great variety among the works covered by licenses granted by RROs. Some RROs also include sheet music in their licensing.
- RROs' licensing cover secondary uses of **published works**. Acts of reproduction and making available to the public are allowed through scanning from paper, make copies from digital to digital, digital to print, store copies on a local storage device or media, or repositories and databases of the institution, share copies with students and staff, post or upload content to digital copy, and making them available through to a secure network, e-mailing between authorized persons: itself, students, teachers, staff and researchers.
- Licensed content is generally required to be held on the university **secure network**, not hosted on the open internet. Where applicable, independent licenses for academic research activities also include reproduction and making available content via secure network, and access to digital journal articles in publisher databases, through IP authentication.
- Not all blanket licenses allow the making of **course packs**. To do so, it is necessary to negotiate a transactional license or obtain authorization directly from the right holders.
- Extension allowed by the digital uses license differs from country to country. The range varies between 10% and 20% of a work. Some clarify that 10% or a chapter, whichever is greater. In some cases, single stories, plays, poems, essays, or articles of a published works containing other published works are also allowed. Others establish that if the user institution wants to reproduce the work beyond the limits set out in the license, the institution must seek permission from the rightsholders.
- Negotiating the scope of the license seems to be the most confusing one for users. First, because in exchange for payment, they expect to be able to copy the entire work; and second, because they consider that these percentages included in the license are already exempted by the E&L on "teaching" or "educational", without carefully considering what is the scope exempted under the national copyright law.
- Authorized persons typically include staff, students, researchers and teachers. Some expressly include library staff. For research licenses, in addition to those indicated above, researchers and staff who evaluate the quality of research in higher education institutions, are also included.

- In some countries,³⁶ different licenses are envisioned for **non-profit and for-profit institutions**: a statutory license covering the personnel of public universities and public research organizations (that develop scientific research) as well as the teaching staff of regulated (formal) education; while private institutions must negotiate a voluntary license. Often, it is difficult to distinguish among profit and non-profit institutions.

b) Text and data mining licensing

Another area of licensing that is fundamental for teaching and research activities is **Text and Data Mining**. Most academic publishers offer their own TDM licenses, individually or in consortia agreement with other publishers. The Scientific Technical and Medical -STM- licenses³⁷ are well known. Maybe this is why collective licensing of TDM, by a CMO is rare. Yet, a few CMOs do include TDM activities under their blanket licenses for universities and research centers.³⁸

Another example is the CCC³⁹ license in USA, which is globally available. This license, which was initially designed as a corporate license, tries to address some of the problems expressed by the community of researchers when “machine reading” (mining) texts. This license allows access to the full text of scholarly articles, through a highly sophisticated and specialized search service, published in journals to which they are subscribed as well as those that are not. Searches can be done not only by references such as author name, work title, subject matter, or ISSN, but also by the content of the article itself. It offers a large content repository to conduct searches and obtain collections of articles that respond to the search criteria that can be downloaded in a uniform XML format, onto the user’s server so as to mine these texts. There is, of course, a series of conditions and restrictions for the use of these downloaded collections to ensure that text mining projects comply with copyright, minimizing infringement risks; security measures control uses in accordance with authorized terms.

³⁶ For instance, Spanish law provides for an E&L subject to remuneration (under statutory licensing which is managed exclusively by CEDRO – Spanish IFRRO) for publications used by public universities for teaching and research purposes; for-profit universities must obtain a voluntary license (either from CMOs or copyright owners).

³⁷ <https://www.stm-assoc.org/copyright-legal-affairs/licensing/text-and-data-mining-stm-statement-sample-licence/>

³⁸ Kopioisto, (Finish RRO) is an example; see: https://www.kopioisto.fi/app/uploads/2018/11/11095521/Brochure-The-Kopioisto-copying-licence-Universities_19.pdf

³⁹ For instance, see <http://www.copyright.com/business/xmlformining-2/>

c) Availability of licensing

Availability of licenses varies greatly from one country to another due to several reasons, including: social, economic, cultural factors, sensitivity to the subject of copyright, legal framework, the existence or not of organized right holders associations, the existence of a CMO able to offer licenses for education and research purposes, mandates covering digital rights necessary to license the online activities, and the lack of users' knowledge about the role that CMOs play. In addition, changes in digital technology are evolving rapidly and significantly in new teaching and learning practices, while legal frameworks react slowly to respond to these changes. Most of CMOs respond slowly to new requirements and demands for uses in online education. In summary, availability of licensing does not have a uniform response.

In developed countries, licensing for online learning and research uses responds to the needs and demands of teaching and research institutions. First of all, because RROs and institutions have a constructive dialogue and work together to accommodate licenses to the specific needs and demands of educational institutions. Secondly, because new licenses are developed regularly that permit better and easy access for teachers and students to copyrighted content. For example, in Canada where a combined license and content is offered;⁴⁰ in Japan where new legislation implemented compulsory license for universities digital uses of copyright content, including online sharing and storage of content for all type of works (text, image, audiovisual, music); in South Korea,⁴¹ where a similar compulsory license allows online transmission of copyright content by universities; or in the UK, where CLA offered new services such as the Digital Content Store.⁴² In other countries, the law encourages collective licensing of digital and online uses, and investment in technology improves the offer and availability of licenses for universities, teachers, researchers and students.

In some developing countries, voluntary licensing is certainly successful (with 100 % of its universities licensed). But this is a rather exceptional situation.

⁴⁰ <https://www.copibec.ca/en/Samuel>

⁴¹ <https://www.korra.kr/jsp/eng/EngCtrl.jsp?L=3&M=2&S=1#no-back-button>

⁴² <https://www.cla.co.uk/digital-content-store>. With 110 Higher Education Institutions signed up, over 241,827 items of content, over 229,884 active links, and UK students download 5 million copyright-compliant documents.

In most of the developing countries, the situation is quite the opposite. Presence and operation of CMOs is still very low, which means they cannot provide a solution that meets the needs of users in relation to distance education and research purposes.

d) Licensing challenges

In addition to the high level of uncertainty and lack of understanding of the need for a license for teaching and research uses, other reasons add extra hurdles to the process of negotiating a license. A common misunderstanding is that all academic activity is covered by E&L for educational or teaching purposes, and/or by the scope of licensing of databases subscribed to. Accordingly, the first pitfall is to understand the need and the benefits of a license in terms of being able to use a large repertoire of works from different parts of the world, from a large number of authors, with the certainty of not been incurring in an unauthorized use. Overcoming this first struggle has taken years for some CMOs.

Copyright owners and CMOs also identify the **lack of clarity regarding the scope and application of exceptions and limitations**, as a main hurdle. Most teaching E&L have gray areas where it is unclear whether a license is required. By not having clarity on the subject of the exceptions and limitations that would apply to each case, they cannot have the certainty of when to require a license for their teaching and research activities. In some cases, there is less uncertainty, given that there is an awareness program with the institutions and their staff, professors, researchers, even students about the advantages of the license, and in general, a dissemination of the principles of copyright.

Another challenge, as identified by CMOs relates to the **compatibility** between collective licensing (sometimes, non-voluntary) and the scope of licenses for databases and sources of teaching and research material granted by copyright owners. Academics understand, sometimes wrongly, that their teaching and research needs are covered with the databases they (rather, their libraries) have subscribed to, as well as with the materials produced by the University's staff itself. Beyond the specific terms of database licensing, this comment identifies a more general challenge regarding the compatibility of several licenses and rightsholders that operate within a same "licensing market".

In some cases, individual authors and publishers are concerned about the **impact that the collective license may have on their primary markets**; because of the security systems used by universities and the risk of downstream uses as a substitute to primary markets, they choose not to grant digital rights for RRO licences.

From the users' perspective, major obstacles identified by academics **when trying to obtain a license from copyright owners, CMOs or Copyright Agencies are**: identifying and locating the author or copyright owner (especially when dealing with out of commerce work or the publisher or producer is no longer in business), obtaining timely responses and excessive pricing (pricing based on "per student" rather than "per access" make prices too expensive). The fact that small publishers may not be part of major clearance centers (or CMOs) further complicates clearance of rights (they need to be contacted on an individual basis and often fail to respond).

In summary, collective licensing could certainly play an important role in the development of online education. Real and effective availability of licenses that meet the needs and demands of educational institutions for online teaching and research activities, would make collective licensing a relevant solution to allow legitimate access to works by users and, at the same time, to assure right holders an efficient management of their rights, whilst guaranteeing protection of their contents in a widespread dissemination facilitated by digital technologies and also assuring they receive a fair share of the value obtained from the use of their works.

Yet, collective management will likely face challenges, such as regularly developing new licenses which respond to the emerging needs of online education (respecting primary markets of copyrighted works); extending licenses availability, beyond textual and image works traditionally licensed, to cover other works used in digital teaching such as musical works, audiovisual works, video and audio recordings, interactive games, etc.; fostering awareness that allow users to know the existence, benefits and advantages of collective licensing, as well as the possibility of accessing a world-wide repertoire of copyright protected works without risk of infringement; additionally, making right holders aware of the value and importance of collective management of their works, in order to improve availability of licenses for online education; and lastly, working to broaden the presence and operation of collective management in different regions of the world.

4. OER AND MOOCS: A SPECIAL SCENARIO

Open Educational Resources⁴³ and MOOCs⁴⁴ are being widely developed by universities as well as teaching and research institutions, and offered online, to a global audience, usually for free.⁴⁵ OER and MOOCs are not aimed at granting any university degree or academic credits; at most, students may be granted a certificate for participation in or completion of MOOC courses.

For copyright purposes, OER and MOOCs present a completely different scenario from teaching and research activities examined above.

Firstly, because OER and MOOCs are heavily based on materials which **are ex novo created by academics** (teachers, professors and researchers) and, as a general rule, they retain ownership (copyright and IP rights) over them. Despite the use of third-party copyrighted material in OER and MOOCs is far less significant than in regular teaching and research activities, copyright compliance is an important issue and a real cause for liability concerns, given the massive public exposure of these actions. Platforms supporting the development of OER and MOOCs offer **guidelines** for academics (authors),⁴⁶ and identify a unit (or someone) to help them with copyright clearance process;⁴⁷ yet, the ultimate decision lies with academics.

Secondly, because OER and MOOCs **can be hardly exempted by teaching and research E&L** available in copyright laws. Several reasons may account for this:

- OER and MOOCs are offered to a wide and general public (rather than to specific “students” and within “classrooms”) and, even when materials are only offered to pre-registered students within “closed fire-walled networks,” they will hardly qualify as the kind

⁴³ The Open Educational Resources (OER) movement aims at providing high-quality digitized educational materials, tools, and implementation resources offered freely and openly for anyone with access to the Internet (see <http://www.hewlett.org/oer>) The Open Education Consortium assembles more than 200 universities worldwide promoting universal access to knowledge on a nonprofit basis <https://www.oecconsortium.org/>

⁴⁴ MOOCs figures are impressive (see <https://www.class-central.com/report/mooc-stats-2018/>): in 2018, 2500 new courses, 20 million new learners signed up for at least one MOOC.

⁴⁵ Private platforms (businesses) have also started offering MOOCs, usually in exchange of a fee or other indirect payment. MOOCs top providers are Coursera, edX , XuetangX (Chinese), Udacity, FutureLearn or Miriadax (Spanish).

⁴⁶ The MIT's “Code of Best Practices in Fair Use for OpenCourseWare” provides a good example. OpenCourseWare was launched by the Michigan Institute of Technology (MIT) back in 2002, as an initiative to adapt the MIT course materials and publish them as OCW for use by MIT educators. It soon turned out that independent learners, widely distributed around the globe, quickly became OCW's principal audience. <https://ocw.mit.edu/index.htm>

⁴⁷ The copyright clearance process (verifying ownership of rights, obtaining authorizations, assessing conditions, fair use and E&L exemptions) imposes an important burden on the Institution developing OER or MOOCs initiatives.

of teaching activities (regulated, primary, secondary, university) that are regularly exempted under national E&L. Even in countries where teaching uses are subject to statutory licensing, this does not extend to OER and MOOCs.⁴⁸

- Because of the ubiquitous nature of online exploitation and differences in national laws: a specific use that may be exempted as fair use in one country may not be so in another. At most, the use of copyrighted material as part of an OER or MOOC may benefit from general E&L, such as **quotations** (e.g. Art.10.2 Berne Convention) or from general **fair use defenses** (e.g. sec.107 USCA). Yet, these exempted uses are not always easy to define (not even under one law). Third, because beyond clearly exempted uses, OER and MOOCs guidelines advise academics to use **public domain and open-licensed contents**, and avoid -as far as possible- using any contents that requires “traditional” licensing or licensing that requires payment.
- OER and MOOCs scenarios welcome the use of **public domain works** and of contents **previously licensed with an open license** (especially when it allows transformation) because in these cases, neither an E&L nor another license will be necessary. However, **other challenges** arise, such as identifying when a work has entered the public domain (i.e., term of protection is not always based on the death of the author or may be subject to different terms)⁴⁹ or assessing the authenticity and legitimacy of an open license (i.e., it would not be uncommon that a work is subject to an open-license without its owner’s consent thus, unfolding a cascade of *bona fide* infringements by subsequent users who rely on the licensing terms).
- Sometimes, OER and MOOCs link to contents stored in open repositories, with the subsequent risks if that contents “disappears” at any time during the development of the course (a risk that they cannot bear).

Thirdly, if the above are not possible, **authorization must be secured on a world-wide basis and without time-restrictions**⁵⁰ – otherwise, contents licensed for the OER or MOOC will not be consistent with the open-license conditions imposed on the OER / MOOC. Academics and

⁴⁸ This is the case of Australia.

⁴⁹ For instance, under US law, works published in the USA before 1924 are in the public domain – but this may not be so according to other national terms of protection.

⁵⁰ Since OER material will be used worldwide (under a CC license) and subject to multiple national copyright laws, academics are advised to only use material that has been licensed on a world-wide basis without time or territorial restrictions.

copyright owners have a very different experience when talking about licensing for OER and MOOCs.

- For academics, “the process of securing permissions or licenses from copyright owners is rarely an easy, inexpensive, certain, or straightforward enterprise.”⁵¹ As we have seen above, academics often refer to difficulties to identify or locate the owner, obtain timely responses, excessive pricing and too restrictive conditions as the main hurdles to obtain copyright licenses.
- Not all CMOs and right holders are in a position to grant world-wide licenses without time restriction. Only a few CMOs that have world-wide mandates can do so. In fact, some of them have explored licensing opportunities for MOOCs, concluding that blanket-type licensing is not the right solution for MOOC platforms, because almost all content is either original or licensed from non-traditional providers under CC licenses. Instead, where necessary, transactional permissions for MOOCs and OER platforms are granted -on a petition basis- by copyright owners (e.g., the Publishers Association).

And lastly, in order to make them as widely available as possible to public-access and allow subsequent re-use (including transformation, translation), OER materials are **subject to open-licenses (e.g. *Creative Commons*)**.⁵²

On the one hand, the requirement of CC licensing helps overcome the territoriality of copyright laws: applying on a worldwide basis and without any time-restrictions and enlarging the amount of source materials that may be reused as OER without restrictions. On the other, CC licensing adds extra-pressure to the copyright clearance process⁵³ forcing academics to either obtain unnecessary licensing or to use alternative contents so as to avoid any liability for copyright infringement.

⁵¹ See OCW Best Practices, p. 1.

⁵² Transformation is always allowed (Non-Derivative clauses are not considered OER); commercial purposes may or may not be permitted. See OER Commons: <https://www.oercommons.org/>

⁵³ Before publishing an OER or MOOCs, intellectual property in the materials is duly cleared by the institution – yet, practices differ widely. Some institutions exert heavy revision and clearance processes before publishing OER materials, while others simply rely on their academic staff to follow guidelines and assign to them (at least, on paper) any liability for infringement.

Open-licensing, instead, allows overcoming both obstacles through contractual terms and has, thus, become a fundamental tool for the development of OER and MOOCs online and worldwide and across borders. However, open-licensing remains a contractual solution – a private-ordering solution, with the challenges it entails: diverging judicial interpretation of contractual terms and enforcement challenges.

5. SPECIFIC TERRITORIALITY CHALLENGES FOR ONLINE ACTIVITIES

A common challenge for E&L and licensing of online academic activities results from the **territoriality of copyright laws**.

In online teaching scenarios, students are often located in a country (or countries) other than the country where the educational institution is based. A student subscribed in a University located in a certain country, may have access to course content via the intranet of the University, regardless of the country in which it is located. Furthermore, a teacher or a researcher may access the content for their research or teaching activity in the place where they are located.

In fact, educational institutions **may not be in a position to exercise any control regarding the territorial scope of their activities**; even when intending to restrict the scope of their activity to one or a few specific territories, students and researchers may be (temporarily or permanently) residing in countries other than those identified as country of residence.

In such scenarios, multiple national copyright laws should be consulted and enforced. Institutions (and, to some extent, academics) are aware that multiple territorial laws apply and should be considered when assessing whether a specific teaching or research use that takes place online may be exempted under statutory E&L. However, it is hardly feasible to consider all these laws. Instead, one law is taken into account: the **law of the country where the institution is located**, regardless of any other countries where the teaching and research activity may be ultimately received, and hoping that similar results might be achieved under other national copyright laws.

This position is especially visible in OER and MOOCs scenarios. These platforms are very aware that their materials will need to be complying with **multiple national copyright laws**; yet, there is general consensus among academics and OER platforms that only one law will be taken into account: the country where the OER is being produced/created. And this is so, regardless of any

copyright laws of the countries where the material originates or of the countries where the OER will be available.⁵⁴

The territorial scope of statutory E&L may result in **eventual liability issues** when specific uses exempted at origin have effects beyond the territory of that country. In some Nordic countries, researchers have been sued for using copyrighted images (exempted under ECL) at conferences outside campus or in other countries.

This holds true not only for “brick and mortar” institutions (offering face-to-face teaching and online teaching), but also for those institutions that only offer online teaching. This discrepancy is also identified in terms of licensing. There is often a gap between the territorial scope of licenses obtained for teaching and research purposes (often formally restricted to one country) and the territorial scope of teaching activities conducted online, across multiple territories (where students are located). This is especially so when licensing is obtained from CMOs (which are basically prepared to grant territorial licenses).

Traditionally, CMOs licensing has been territorial. To overcome it, CMOs are adopting several solutions. Most collective licenses already foresee the possibility that students, professors and researchers of the licensed University may access the contents and material protected **through the intranet** of the University, regardless of the place where they are located.

Through Bilateral Agreements with other CMOs, CMOs may offer licenses of **a solid repertoire, as a consortium** (e.g. countries of a same speaking language). A good example of this, is the project from Jamaica CMO, together with the 4 other RROs in the Caribbean, formed a regional body, CARROSA, to conduct negotiations with The University of the West Indies (The UWI), the largest higher-education provider in the English-speaking Caribbean. The UWI is a regionally based university with three landed campuses in three Caribbean Countries –an Open Campus operating in 17 Caribbean Countries; and offshore locations in South Africa, China and New York. The CARROSA license will attach to each student irrespective of physical location and provides the rights to make copies/reproduction, in any material form whatever, including a digital copy.

Some collective education and research licenses permit the making available of digital copies to Authorized Persons outside the national territory, including students studying at overseas

⁵⁴ For instance, an OER produced in the USA would only take into account US Copyright law (and the fair use doctrine) to identify if a French material may be freely used as part of an OER course material; however, the academic is advised to also consider if the use would also be exempted under other national copyright laws' E&L of quotations, incidental use, teaching and research, etc.

campuses⁵⁵. The solution followed by Australian universities, is to include the number of students and teachers at “branch campuses” in the calculations for the main campus license fee.⁵⁶ Another solution is for the branch campus to be separately licensed directly by the RRO in the country of the branch campus. This is the case for many foreign universities operating in Singapore.

International Federation of Reproduction Rights Organisations -IFRRO- considers that territoriality remains an important principle of copyright and must be respected. But, at the same time, they contractually accept that once a student or teacher is given access to works, this authorization applies also across borders. To manage this situation, IFRRO- as a community of RROs, agreed as a practical solution that students/teachers/researchers who have been granted access to the educational institutions internal network, such as students who have paid the tuition fees and have been admitted to a course and provided access to the internal network, shall be able to legally access all works made available under a RRO license or remuneration rights system no matter where they live and study.

In summary, strict compliance with multiple national copyright laws would *de facto* halt the development of online education. This is why, in practice, institutions and CMOs tend to apply only one national law: that of their country of establishment, regardless of where their students and researchers are located.

This basically implies an acceptance that the acts of exploitation of works (through reproduction, making available, communication to the public) used for teaching and research purposes are deemed to take place in the country where the institution is located. In fact, this approach has been formally adopted by the EU *acquis* in several instances; most notably, it is the solution adopted in Art.4 of the proposed Directive on Copyright in the Digital Single Market, which establishes a mandatory E&L to oblige Member States to allow digital and online teaching uses of works across the EU and provides that online cross-border teaching will be deemed to occur only in the country where the educational establishment is established.⁵⁷ Thus, by means of a statutory “legal fiction,” online teaching and research activities will be formally subjected to only one national law.

⁵⁵ This is the case of the UK since 2014 CLA -UK RRO- has operated a pilot licensing scheme for universities wishing to make digital copies available to students studying for a UK degree at overseas campuses. The Overseas Campus Based Students pilot was developed at the request of the Copyright Negotiation and Advisory Committee (CNAC) representing UK higher education institutions.

⁵⁶ This approach is the solution preferred by Australian universities that offer the same course at a number of foreign campuses. for example, RMIT. <https://www.rmit.edu.au/>

⁵⁷ Member States may choose whether to require compensation or not, and whether to set aside this mandatory E&L when “adequate licenses ... are easily available in the market.”

6. CONCLUSIONS

From this preliminary analysis, this report shows that the issue of teaching and research in the digital environments is a complex issue and that any one-size fits all solution is unlikely to bring optimal results to this very important sector.

In most countries, current E&L do not adequately address the needs of online teaching and research. Similarly, collective licensing is not uniformly available in all countries, to remunerate for uses exempted under E&L (when so exempted and subject to compensation) or to grant licenses for uses beyond the scope exempted under E&L.

Finally, it appears that a sensible way forward, to address the needs and foster the development of teaching and research activities online, may be a combination of efficient and flexible E&L together with functional licensing systems (mostly under collective management) that are adjusted to the specific cultural, economic and market circumstances of each country.

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