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

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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 conducted by universities, 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 these activities.

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Methodology

1. Desk research (literature).
2. Surveys and interviews with universities teachers and researchers of several countries, CMOs in different countries and other stakeholders.
3. Three WIPO Regional Seminars on Libraries, Archives, Museums and Educational and Research Institutions in the field of Copyright, for the Asian, African and Latin American and Caribbean regions, conducted between April and July 2019. Meetings involved SCCR Members and stakeholders:

OMPI/DA/SDO/19 https://www.wipo.int/meetings/en/details.jsp?meeting_id=52668

WIPO/CR/NBO/19 https://www.wipo.int/meetings/en/details.jsp?meeting_id=52670

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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.

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 often take place in different countries (we refer to it as the “cross border” element). A teaching use exempted under the national law of the country where the teaching institution is located may not be so exempted under the national laws of other countries where students or academics reside.

Similarly, availability of licensing for teaching and research activities is far from uniform worldwide. 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) either via CMOs or directly from Copyright owners; whilst, in other countries, collective licensing is hardly operational and direct licenses are not yet available. In general terms, 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 licensing models (e.g., through collective management organizations) for uses that go beyond those exempted 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 E&L 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.

E&L and voluntary licensing are not mutually exclusive. A combination of E&L in national copyright laws - adjusted to the specific cultural, economic and market circumstances of each country - and licensing schemes - either under collective management or directly from right holders -, could provide relevant solutions to foster copyright uses in teaching and research activities online.

1. INTRODUCTION

This report gathers current practices and challenges that educational and research institutions face in relation to **teaching and research activities at university level 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 licensing schemes available, for specific copyrighted contents, in different markets.

Information has been gathered through **questionnaires** distributed to academics and educational institutions, as well as Collective Management Organizations (CMOs) and copyright owners from different countries or territories and legal traditions (common law/civil law). Debates and interviews with government officials and stakeholders at the three Regional Seminars organized by WIPO¹ have also provided relevant information for this report.

Copyrighted contents used in teaching and research activities at universities may be diverse: different kinds of works (literary, music, audiovisual, art, etc) and recordings (phonograms, videos) as well as software, databases, etc. Teaching and research activities may take place **in restricted environments** (such as a virtual learning environment (VLE) only accessed by registered students) and is often directed at obtaining an official degree or a certificate, or on publicly accessible websites, such as **Massive Open Online Courses (MOOCs) and Open Educational Resources (OER)**.

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

¹ Documents from these seminars are available at:
OMPI/DA/SDO/19 https://www.wipo.int/meetings/en/details.jsp?meeting_id=52668;
WIPO/CR/NBO/19 https://www.wipo.int/meetings/en/details.jsp?meeting_id=52670;
WIPO/REG/CR/SIN/19 https://www.wipo.int/meetings/en/details.jsp?meeting_id=51652 .

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

Several exceptions and limitations² existing in copyright laws may apply to educational and research uses conducted online:

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

Despite they may directly or indirectly interact with educational purposes,³ **E&L for libraries will not be considered** in this report since they are considered elsewhere. For the same reason, **private use/copying E&L** that benefit not only students, teachers and researchers, but individuals in general, will not be examined here, despite these E&L may have a direct impact on the scope of uses permitted by some national laws for purposes of teaching and research.⁴ **Quotations done for teaching and research purposes⁵** are generally permitted under Quotation E&L or Fair use/dealing provisions. Hence, the report will focus on E&L designed specifically for Teaching and Research purposes, as well as on Fair use/dealing provisions -where existing- that may exempt them.

Specific examples of teaching uses, at any educational level, that may be permitted by law include copying works or fragments of works for purposes of an exercise or an exam, dictating fragments of literary works to students as part of their training, playing a song (phonogram) for students to identify words in a foreign language, playing a musical composition, copying a work of art to use as an exercise, playing part of a movie (or part of a recorded TV program) to debate in class,

² 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).

³ Many teaching and research uses are made possible through materials that have been obtained by or through libraries.

⁴ See WIPO International Survey on Private Copying Law & Practice (2015) available at https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2016.pdf

⁵ Such as reciting a poem or showing an art work to be explained or commented in class.

scanning a few pages from a book to use as an exercise or exam or as part of the instruction, etc. These uses amount to something more than quotations and they will only be allowed to the extent that they are exempted by a specific E&L for teaching purposes or, failing that, that they have been authorized by right holders. The scenario gets more complicated when the same acts are conducted online, as part of distance education programs or of MOOCs and OER projects.

Furthermore, within the context of university education, the publishing sector (academic publications) is heavily impacted: whether copying (either in analogue or digital format) of fragments of treatises and textbooks to be used for reading and studying purposes is permitted under a specific E&L (and if so, to what extent and conditions) or, instead, it requires a license (and if available, under what conditions) remains a critical issue. **In no case, should infringing activity occurring in some countries, be confused with exempted uses under E&L for teaching and research purposes.**

In general terms, **E&L envisioned in national laws to allow the use of copyrighted content for Teaching and Research activities** tend to be defined narrowly in terms of acts of exploitation allowed, works and amount that can be used, and beneficiaries. Not all works, and not in the same manner, may be used for teaching and research purposes. Furthermore, most national E&L for Teaching and Research purposes fail to cover digital and online uses; when they do, they are often subject to more restrictive conditions than those set for analogue and face to face academic activities.

The use of copyrighted works for Teaching and Research may be permitted under E&L **for free or subject to remuneration**. Depending on the scope of permitted uses, remuneration may be necessary to comply with the **Three-step test requirements (e.g., Art.9(2) BC)**: namely, to avoid *conflicting with a normal exploitation of the work and causing unreasonable prejudice to the legitimate interests of the author*. Remuneration schemes for teaching and research uses permitted under E&L (either as statutory licensing or compulsory licensing) are usually **managed by CMOs** – we will refer to them, in general terms, as *non-voluntary licensing*.

E&L are meant to secure specific public interests, and they are only **justified to the extent they do so**. Teaching and research activities are one of these public interests that copyright laws must safeguard.⁶ And it is precisely the “public interest” that must help define the scope of teaching and research uses that are permitted under E&L: fundamental teaching and research needs must be authorized under E&L (subject to terms and conditions that satisfy the three-step-

⁶ As confirmed by the fact that the Berne Convention has always safeguarded teaching and research activities.

test). Further teaching and research uses must remain in the hands of right holders to authorize or prohibit.

The statutory design of E&L and licensing existing in each country are inherently linked: the scope of activities permitted under a statutory E&L will define the scope of acts of exploitation that require licensing and, *vice versa*, licensing availability in one country will shape the kind of E&L best suited for it.

Licensing availability and licensing formats for teaching and research activities varies widely across different countries. Collective licensing and CMOs are not yet operational everywhere, and not equally so for all kind of works. Collective licensing may be available in one country for some type of works (e.g. publications), but hardly available for others (e.g. movies and phonograms). Furthermore, **different licensing models may co-exist** within the same legal framework; for example, the same teaching uses may be licensed under different conditions (scope of permitted uses, pricing, etc.) or even licensing models (non-voluntary or voluntary licenses) depending on the academic institution's public or for-profit nature.⁷

None of these **licensing models** (collective licensing, voluntary licensing by right holders, or compulsory or statutory licensing often, deriving from an E&L) may be seen as better than another to facilitate online academic activities: their needs and success will depend on the legal, cultural and market circumstances existing in each country. Certainly, some countries are introducing changes in their legal framework⁸, 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, not only on its legal drafting, but upon the market and economic context of that country.⁹

Together with E&L, 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 the licensed works. 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

⁷ For instance, some E&L distinguish between public and for-profit academic institutions: non-voluntary licensing (uses permitted under E&L subject to remuneration) applies to the former, while the later remain a matter for strict voluntary licensing.

⁸ For instance, 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 mechanism fosters negotiations towards collective licensing, with CMOs approved by the government, and even encourages the development of CMOs. This is the case of the UK (educational purposes in s. 26 (6) CDPA), Mauritius, soon 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.

⁹ In addition, broader market questions, such as the degree of competition in education and research publishing markets and the significant concentration of research publications in some countries, may also have an impact.

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.

Last, but not least, 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 Licensing, despite knowing that they are inherently linked and that the development of online teaching and research activities depends on a balanced combination of both, adjusted to the specific cultural, economic and market circumstances of each country.

Licensing schemes resulting from E&L – usually managed by CMOs – to remunerate for the statutory exempted uses will be considered in the following chapter. Voluntary licensing, as well as statutory-supported licensing, will be dealt with in the third chapter.

2. E&L FOR TEACHING AND RESEARCH

Academic uses (*i.e.*, teaching and research purposes) of copyrighted works may be directly authorized by copyright laws, either for free or subject to remuneration.

For purposes of E&L, **teaching** may include different kind of activities: uses which are strictly necessary to convey the instruction (*i.e.*, the work is directly used as material assistance to the instruction); uses of works as reading material (*i.e.*, for study and research purposes) or for school-related entertainment purposes (*i.e.*, performing a theatrical play at 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. Academic research is typically conducted by universities and research centers.¹⁰

¹⁰ Sometimes in conjunction with external partners.

Teaching and research activities that take place **online** usually involve several exclusive rights: acts of reproduction, communication to the public, making available online and, in some countries, distribution. Sometimes, translations may also be involved. In addition, materials used in online teaching may have been digitized from analogue formats (i.e., a book or a journal) or recorded (i.e., from TV broadcasts), and they may be stored or “compiled” (i.e., on a common storage unit or cloud) for later access and studying purposes. Whether or not these acts are permitted by law or require a license from right holders depends on the scope of E&L in applicable national laws.

As we will see, the **scope of E&L** for educational purposes very much depends on the specific language used to describe:

- the acts of exploitation exempted (i.e., instructional uses, studying purposes, school-events),
- the formats or means of exploitation (i.e., reprography, analog, digital),
- the specific beneficiaries (i.e., public institutions, for-profit institutions, universities, schools) and/or individuals (i.e., teachers, students, librarians) entitled to do exempted uses,
- what kind of works (i.e., any or specific works) and the extent of use allowed (i.e., how much, how many copies),
- the specific purposes allowed (i.e., teaching, examinations, exercises, studying),
- as well as any further conditions and requirements, including remuneration.

2.1 THE BERNE CONVENTION

E&L for teaching and research purposes have been present in the Berne Convention since its adoption in 1886.¹¹

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, 1967**) only refers to teaching, 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:

¹¹ 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).

*“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 exploitation¹² and new technology.¹³ Accordingly, digital means and online teaching (or any other means of distance learning) are clearly included under the exception.¹⁴ 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.¹⁵

Art.10(2) BC was meant “to include teaching at all levels”¹⁶ 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.¹⁷ A restrictive interpretation excluding adult education courses and life-long learning may, to some extent, be compensated by the provisions of the Appendix to the Berne Convention which clearly include them.¹⁸

¹² Including the making available granted in Art.8 WCT.

¹³ 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.

¹⁴ 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.’

¹⁵ 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.”

¹⁶ See Ricketson, WIPO Study, *op.cit.supra*, p.15: “in educational institutions and universities, municipal and State schools, and private schools”.

¹⁷ See Ricketson/Ginsburg, *op.cit.supra*, §13.45.

¹⁸ 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

Art.10(2) BC applies to **all kinds of works**; 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*.”¹⁹

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,²⁰ quotations for “*scientific, critical, informatory 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.²¹

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 ‘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*.”²²

¹⁹ 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’”.

²⁰ See Ricketson, WIPO Study, *op.cit.supra*, p.13.

²¹ 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”.

²² See Ricketson, WIPO Study, *op.cit.supra*, p.12.

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 is not formally 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.”²³

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.

c) The Three-Step Test

As a general rule,²⁴ international instruments (such as the Berne Convention) delegate on national legislators the responsibility to identify and define the E&L needed in their copyright laws. The Three-Step test is the primary instrument to secure that national E&L will comply with international standards.

According to Art.9(2) Berne Convention, Member States are allowed to maintain and introduce exceptions and limitations to reproduction right in national laws, provided that three cumulative conditions are met:

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

This is commonly called the “Three-Step test.” Subsequently, Art.13 TRIPs and Art.10 WCT extended the application of the test (with slightly different language) to all exclusive rights of authors -beyond reproduction- and with a clear intent to also apply in the digital environment.

²³ See Ricketson, WIPO Study, *op.cit.supra*, p.13.

²⁴ Notable exceptions are Art.10(1) BC and the mandatory E&L in the Marrakesh Treaty.

National laws must comply with the cumulative test when adapting and introducing E&L to exclusive rights.

According to it, E&L for teaching and research purposes must be carefully defined to avoid exempting uses in a manner (and scope) that conflict with the normal exploitation of a work.²⁵ In addition, the requirement of remuneration may help clear the last step (“unreasonable prejudice to the legitimate interests of the author’s”) and help strike a “reasonable” balance between the public interest justifying the E&L (in our case, teaching and research purposes) and the prejudice caused to right holders.

2.2 E&L IN NATIONAL LAWS

In addition to the general exceptions for quotations and private copying that partially satisfy academic needs, all countries provide for **specific E&L for teaching and research** uses, Common Law countries tend to rely, instead, on fair use/fair dealing provisions to authorize these uses.

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.²⁶ The **lack of normative consensus** is far more acute when we consider digital formats and online teaching. As a general rule, E&L in national laws tend to be less generous than Art.10(1) and (2) Berne Convention.

²⁵ For instance, by excluding from the E&L works meant for the teaching market or by setting flexible but clear quantitative or qualitative restrictions so as to avoid depleting the normal exploitation of the work.

²⁶ 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

a) E&L for teaching purposes

National E&L for teaching purposes are far from homogeneous. Differences relate to the specific **purposes** exempted,²⁷ the exempted **acts of exploitation**²⁸ (including translations or not),²⁹ **beneficiary institutions**³⁰ **and/or individual users**,³¹ as well as the **kind and amount of works** that may be used.³²

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.³³

Of course, specific legislative choices ultimately help define the **scope of uses exempted** under teaching E&L and shape the licensing system developed in each country. As a rule of thumb, the following statements may be made: E&L allowing uses for free tend to be narrower in scope than remunerated ones; E&L requiring remuneration are more common in countries where CMOs are deployed to manage it while, at the same time, remunerated E&L are a powerful tool to foster the

²⁷ 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.

²⁸ 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.

²⁹ Very few E&L expressly allow translations for teaching purposes.

³⁰ 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.

³¹ Some E&L refer to teachers and/or students (or pupils) as beneficiaries.

³² Following Art.10(2) BC, 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).

³³ 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).

development of CMOs;³⁴ In general terms, **Common Law** provisions that exempt educational uses are far more detailed than **Civil law** ones – albeit more detail often does not mean a broader scope of exempted uses.

Beyond these general comments, let's now focus on **online teaching uses**.

Contrary to the flexibility shown by Art.10(2) BC, most national E&L for teaching purposes fail to properly envision digital and online uses. Specific language tends to **restrict exempted teaching uses to face-to-face and “analogue” scenarios** (e.g. classrooms, performance, photocopying). This is particularly the case in Asia, Africa, Latin America, Middle East and Eastern Europe. Most national E&L laws only benefit face-to-face teaching scenarios. This was the general finding of the comparative law Studies commissioned by WIPO in 2009;³⁵ the scenario has not changed much in 10 years.

Recent amendments in a few countries (most notably, in the EU,³⁶ USA, Canada, Australia, China, Japan, South Korea and Singapore) have introduced **specific E&L for digital and online teaching**. Often these E&L tend to combine a cluster of exempted free instructional online uses with further uses of specific works (i.e., publications for readings and compilations) subject to remuneration, managed by CMOs. Often, E&L contain restrictive terms (as to works and extent

³⁴ Non-voluntary licensing set by law (statutory or compulsory licensing) facilitates the establishment and work of CMOs by making it unnecessary for them to obtain mandates of rights from right holders: the CMO is legitimized by law to grant licenses and collect remuneration.

³⁵ 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

³⁶ According to Directive 2019/790, of 17 April 2019, on Copyright and related rights in the Digital Single Market (Art.5), digital and online uses of works for teaching purposes will be permitted in the EU countries under a uniform mandatory E&L (Member States may choose the scope of exempted uses and the requirement of compensation); online cross-border teaching will be deemed to occur only in the country where the educational establishment is established (thus, subject to one national E&L). Member States may choose not to apply this mandatory E&L, either in general or as regards specific types of works, when “adequate licenses ... are easily available in the market.” The concern behind this option is to avoid negative economic effects in countries where digital teaching uses are already being licensed by voluntary agreements (i.e. Nordic countries, UK and Ireland); at the same time, countries should be vigilant that the interpretation of “adequate licenses” does not prevent the enforcement of the E&L.

uses permitted)³⁷ and eventually they include specific language that may render the E&L technologically obsolete.³⁸

Interestingly, a few African countries³⁹ have recently amended their laws to formally include “uses on computer networks ... provided that **access to the works is only available to enrolled pupils or students and their teachers,**” but this language is meant to refer to digital storage “on site” (such as university computer networks) rather than “online distance learning”.⁴⁰

Failing a specific E&L, online teaching uses may also be deemed permitted where national laws retain the flexible language of Art.10(2) BC (illustration for teaching in publications, broadcasts and recordings)⁴¹ or when E&L authorize “any use” or “anything done” for educational purposes.⁴² In both cases, these general provisions entail legal uncertainty that will ultimately deter the development of online teaching projects. In Common law countries, fair use/dealing provisions may be more prone to deem online teaching uses exempted;⁴³ despite also sharing some degree of legal uncertainty, fair use/dealing is constantly built up with new caselaw and guidelines adjusting to technological and market evolution.

For the rest, E&L for teaching purposes only cover face to face and analogue formats, and online educational activities fail to benefit from them.

Among the challenges that current E&L present for digital and online teaching, the need for a **uniform treatment of the several acts of exploitation** involved should be mentioned first. Online teaching uses involve acts of reproduction and making available (when uploading the contents on a website), communication to the public or transmission (which at the same time includes multiple transient copies) and subsequent copying (when content is downloaded by

³⁷ Within the Asian region, Singapore formally allows using an insubstantial part of a work (e.g. 5 pages or 5%) for online teaching uses (distance learning), for free; while China, Japan, South Korea and Singapore allow further copyright uses (e.g. a journal article or an out-of-commerce work) for online learning, subject to remuneration (non-voluntary licensing).

³⁸ Sometimes, E&L for online teaching are the result of an intricate compromise of interests which is difficult to enforce and even more difficult to integrate with the rest of E&L; see, for instance, Sec.110(2) USCA.

³⁹ Liberia, Mauritius, Seychelles.

⁴⁰ As confirmed by Country delegates at the Regional Meetings.

⁴¹ For instance, 43 countries in Africa, 27 in Latin America and 29 in Asia-Pacific; despite not all of them refer to the three means of exploitation.

⁴² For instance, Ghana and Nigeria; Cambodia, North Korea, Lebanon, Malaysia, Philippines and Thailand.

⁴³ For instance, in the Caribbean region and in a few African countries (Kenya, Liberia, Uganda, Zambia, Zimbabwe, Eswatini, Namibia, South Africa).

recipients).⁴⁴ In order to fully exempt online teaching uses, all these acts of exploitation should be uniformly addressed by the E&L.

Another issue that is poorly addressed by national laws – and highly controversial – is **digitization** of works to be used for teaching purposes. To the extent that scanning amounts to a reproduction, digitization might be exempted as a reproduction (where E&L exempts it). However, digital formats bring a higher risk of downstream infringing uses than analogue ones. 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 teaching uses.

Similarly, allowing **translations** for teaching purposes is especially important in some countries (with minority languages) which are net importers of academic materials published elsewhere. Following the Berne Convention Appendix (1971),⁴⁵ some developing countries envision the possibility to obtain (from a “competent authority”) authorization to translate and/or reproduce for purposes of instruction (not research) works which are not available in that country (under certain circumstances). Under the current Appendix, it is unlikely that online uses (which involve not only digital reproduction, but also making available and communication to the public rights) might also benefit from this possibility.

Another challenge that needs to be duly addressed by E&L for teaching and research, is the need for flexibility in terms of **kind of works** (e.g., not only textual) and amount of use (e.g., to allow uses “to the extent necessary” as under Art.10 BC). Sufficient coverage of any works and protected subject matter, and some degree of flexibility, are critical for the development of teaching and research online. Yet, this is not the reality under most national E&L, which tend to cover only the use of specific works (mostly, published works) and be restricted by number of pages or percentages.

In short, there is room for national copyright laws to further explore the scope of permitted uses under Art.10(2) BC and formally exempt online teaching uses under the guidance of the Three-Step test.

⁴⁴ An E&L that only allows 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.

⁴⁵ See Berne Convention, APPENDIX - SPECIAL PROVISIONS REGARDING DEVELOPING COUNTRIES:
https://www.wipo.int/treaties/en/text.jsp?file_id=283698

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 and private copying are fundamental for research purposes.

Research activities conducted online face the same obstacles and challenges analyzed under the teaching E&L: restrictive terms that only exempt face-to-face or analogue research activities and failure to cover all kind of works in a flexible manner. Once again, researchers and academics located in different countries who want to “exchange” copyrighted contents and make their research available to researchers globally (i.e., in VLEs), 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.⁴⁶

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 the difficulty to distinguish between copyright protected works and data which is not protected by copyright.⁴⁷

Machine reading (automated processing) of large volumes of text and data (i.e., scientific databases) become a fundamental tool for the advancement of research (and teaching). Yet, in principle, **Text and Data Mining (TDM)** of copyrighted content implies several acts of exploitation (namely, reproduction, transformation, communication to the public) that would require authorization by copyright owners. TDM is hardly exempted under current E&L for research purposes.

⁴⁶ See SPARC: <https://sparcopen.org/>

⁴⁷ Where Database *sui generis* rights exist (such as in EU countries), the distinction is less relevant, since the maker of a database may claim an exclusive right on its contents (be it works or data).

Text and data mining for research purposes is being successfully addressed in some countries under fair use doctrines (*i.e.*, USA)⁴⁸ or statutory E&L (*i.e.* UK).⁴⁹ An EU-wide mandatory exception to allow text and data mining for research and teaching purposes is included in the recently adopted Directive on Copyright and related rights in the Digital Single Market (Directive 2019/790 of 17 April 2019), offering also the possibility for Member States to enact E&L for TDM for other purposes, as long as not expressly reserved by right holders. Beyond TDM exempted by E&L and fair use, most publishers are already licensing TDM uses as part of their subscription database licenses (see Direct Licensing section below).

2.3. EXPERIENCES AND VIEWS FROM ACADEMICS

Academics⁵⁰ tend to be aware of **uses generally permitted as quotations and private copying**. Instead, **they fail to have a clear understanding** of the scope of permitted uses under E&L for teaching and research purposes. As a general rule, librarians are more knowledgeable on copyright matters, and academics often rely on them for that.

Academics refer to **unclear language and insufficient scope of E&L** for teaching and research purposes. For instance, universities refrain from publishing thesis and dissertations online out of fear that some of the images and works included in them may exceed the scope of use permitted under quotation and research E&L.⁵¹ **Legal uncertainty** is aggravated when an online activity occurs across different countries: 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).

⁴⁸ In the USA, courts have availed several instances of TDM as fair use. For instance, regarding copying and indexing done by search engines (see *Kelly v Arribasoft*, 336 F.3d 811 (9th Cir. 2003) and *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007)), as well as the massive scanning, storing and indexing in a searchable database of whole books in libraries as part of the Google Books project (see *AG v. Google*, SDNY 14 Nov. 2014, confirmed 804 F.3d 202 (2d Cir. 2015) and, as far as university libraries, allowing them to create a full-text searchable database of copyrighted works based on scanned copies obtained as part of the Google Books project (see *AG v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

⁴⁹ In the UK, the non-commercial TDM statutory exception introduced in 2014 removed any requirement for a licensing scheme for TDM.; the Copyright Licensing Agency (CLA) is studying the possibility to discuss user requirements for a TDM license with researchers and their representatives in other sectors. Some CMOs have pointed out that they will forward their efforts to other sectors beyond the academic field, such as the corporate market.

⁵⁰ This section conveys information expressed by academic respondents to our surveys.

⁵¹ Ultimately frustrating governmental and institutional open access policies and failing to comply with specific funding grants' requirements.

Legal uncertainty about the scope of exempted uses leads to unnecessary licensing or even precautionary removal of contents, which has a negative impact on the quality of education or research provided.⁵² **Risk-avoiding institutions** tend to advise their students and professors to seek permission from copyright holders to use any works (i.e., images) in doctoral thesis and research papers that are intended to be published on an online open-repository; despite, quite often, these uses could be exempted as quotations or under the teaching and research E&L.

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 conditions⁵³, 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.⁵⁴

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.

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

⁵² Legal uncertainty and excessively restrictive E&L will likely reduce online teaching uses to database-licensed or open-access content; copyright clearance costs to use other materials being too high for most academics and institutions.

⁵³ 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.

⁵⁴ 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 anything regarding contractual terms. Instead, the recent 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;" however, 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).

developing countries). Even where guidelines exist,⁵⁵ academics are generally unaware of them.⁵⁶

Additionally, university policies and academic obligations may sometimes conflict. For example, an institution may favor open access publishing (which will subsequently facilitate reuse for teaching and research purposes) but, at the same time, academics are expected to publish in the most prestigious (non-open access) journals in order to obtain professional accreditation and career promotions.

Misconceptions commonly spread in academic communities include the following:⁵⁷ 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 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.

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

⁵⁵ 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 (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.

⁵⁶ Another important issue, which exceeds the scope of this Report, is the eventual liability of universities and educational institutions for copyright infringements committed by their staff and professors.

⁵⁷ 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 of these common misunderstandings.

research purposes under library E&L or copies licensed by publishers (e.g. 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 lawfully available online 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.

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 to obtain authorization. Challenges include identifying and locating him/her and obtaining a timely response (if any at all).

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. When all this fails, some academics choose to conduct the teaching or research use, anyhow.

Fair use is a fundamental piece for teaching and research uses in some Common Law countries (notably, the USA). 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 courts (case law). In the USA, institutions and libraries generally provide extensive fair use guidelines but the application of these guidelines (and fair use assessments) remains in the hands of academics (only when controversies arise, fair use determination may be a matter for courts) .

Sometimes, challenges result from having **different E&L that are applicable to a specific teaching or research scenario**. 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 specific E&L. Canada, for instance, has a specific regime combining voluntary blanket licenses (i.e., like those offered by 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.”⁵⁸ On the other hand, ECL 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 collective licenses),⁵⁹ and more and more content is published in open-access repositories, the scope and importance of collective licensing (and 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 collective licensing.⁶⁰ 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 statutory E&L, in many countries, **the existing conditions are not conducive to enforce copyright law** (i.e., CMOs are not operational in all countries,⁶¹ foreign right holders are difficult to reach, etc). Of course, these conditions do not make unauthorized uses less infringing but they do show the conundrum faced by teaching and research communities where compliance of copyright law is hard, if not 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 of academics when copyright laws fail to properly address the academic reality.

⁵⁸ As explained by academic respondents to this Study, in some Nordic countries, researchers have been sued for using copyrighted images at conferences outside campus.

⁵⁹ For instance, database licenses do not establish restrictions on the number of pages that can be copied for teaching and research uses.

⁶⁰ Similar views have been expressed in Australia; see Australian Law Reform Commission (2014) *Copyright and the Digital Economy*, available at <https://www.alrc.gov.au/publication/copyright-and-the-digital-economy-alrc-report-122/>

⁶¹ 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, right holders 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].”

In summary, the current scenario of E&L for online teaching and research is far from optimal: it generates legal uncertainty, deterring the development of online projects and weakening the quality of teaching and research online, while – at the same time – depriving authors and right holders from obtaining remuneration for the use of their works.

3. LICENSING TEACHING AND RESEARCH ACTIVITIES

Beyond the specific uses authorized by national E&L (be it for free or subject to remuneration), further teaching and research uses may be authorized either collectively, by CMOs, or directly, by copyright owners. We refer to **direct 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.

Traditionally, the licensing of **primary markets** has been reserved by copyright owners; while licenses for secondary uses of published works were managed -on their behalf- by CMOs, offering the advantages of a wider territorial deployment and reciprocal representation of repertoires. This picture is changing as the internet, telecommunication technologies and digital means of exploitation facilitate direct licensing also for secondary uses (such as teaching and research purposes, including Text and Data Mining).⁶²

In this section we will focus on what is available in the market to meet the demand of universities for their online distance education and research activities, both via collective licensing, through CMOs, and via direct licensing, by right holders themselves. Given the purpose and scope of this report we will only refer to the main practices of universities and the main challenges they face.

3.1. COLLECTIVE (CMO) LICENSING

Collective licensing is a system precisely designed to meet the needs of users for accessing contents, ensuring copyrights protection and guaranteeing a remuneration to right holders. However, it has been observed that **availability of collective licensing** for teaching and research activities is not uniformly developed. Licensing practices vary across different countries,

⁶² Let us remember that collective management only applies to cases in which the owner cannot, does not have the capacity or is not interested in negotiating its rights directly with users.

depending not only on the specific copyright statutory choices done by legislators (e.g., scope of E&L for teaching and research, either for free or remunerated under statutory or compulsory licensing), but also on the specific 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).

Despite collective licenses do not formally refer to them, at least, three licensing models offered by CMOs may be identified: ⁶³

- **Voluntary** collective licensing is the most extended one.⁶⁴ 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. In some countries there are some stipulations in the copyright legislation that encourages right holders to establish a CMO⁶⁵
- **Voluntary Licensing with legislative backup** may adopt several forms. In some countries, a statutory E&L would only apply failing a license available for it; this is a very efficient manner to foster negotiations towards collective licensing, with CMOs approved by the government. In other countries,⁶⁶ Extended Collective License (ECL) makes collective management more efficient for users: once a license has been agreed with a CMO that is representative on the sector, it will “extend” to cover members as well as non-

⁶³ Notice that a different licensing system may apply to the same activities in the market, depending on the specific licensee and licensed subject-matter. For instance, public teaching institutions may benefit from an E&L subject to remuneration and, thus, obtain a legal license from the CMO, while businesses and private institutions will obtain a voluntary license from the same CMO; And a public university may obtain a legal license from a CMO to remunerate for teaching uses exempted under an E&L and a voluntary license (from the same CMO) to authorize further teaching uses, beyond those exempted by the statutory E&L.

⁶⁴ This is the licensing system operating in many countries around the world, i.e. USA, UK, Kenya, Colombia, Argentina, Chile, Mexico.

⁶⁵ This is the case for the UK, which is contained for educational purposes in s. 36 (6) CDPA, Jamaica, soon in Kenya, and a similar mechanism also exists in Zimbabwe.

⁶⁶ It is native to the Nordic countries; today, the ECL model has also been adopted in other countries such as Malawi, the Russian Federation and will be implemented in the UK and Jamaica soon. Also the EU has recently implemented an ECL model in its Directive 2019/790 on Copyright in the Digital Single Market.

members of the CMO.⁶⁷ The ECL provides an integral solution for users without any risk of infringement claims from right holders not represented by the CMO.

- **Non-voluntary licensing** includes statutory and compulsory licensing. Under statutory **(legal) licenses**,⁶⁸ no consent from right holders is required because the license is granted by law usually subject to the payment of a remuneration (often set by law, too). Under compulsory licensing, right holders are obliged by law to grant a license but they may negotiate its conditions (including pricing). Non-voluntary licenses often are linked to E&L that require remuneration schemes. The most visible example of non-voluntary licensing is **the private copying remuneration**, which is managed by CMOs and collected through a levy system applicable on equipment and devices (such as photocopiers, printers and scanners) or directly from operators (such as schools, colleges, universities, libraries, research institutions, etc.), or a combination of both.⁶⁹

a) Collective licensing for teaching and research purposes

Collective licensing for educational purposes is mostly offered by **CMOs for text and images** (i.e., written works, in books, texts, journals, printed music and images), usually known as Reproduction Rights Organizations (RROs). Off-line, analogue, teaching and research activities have been traditionally licensed by RROs; over the past decades digital and online uses have been added, after securing from right holders the corresponding mandates of digital rights and means of exploitation. RROs offer blanket licenses, on a non-exclusive basis, that cover all their repertoire (on a reciprocal representation basis). Allowed uses include: 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, accessible just for authorized persons, such as students, researchers, teachers, staff. Quantitative restrictions apply (e.g., between 10% and 20% of a work, or a chapter, article, single story, poem,

⁶⁷ Licensing negotiations take place on a voluntary basis and the CMO must be representative within the sector. All right holders (members and non-members) have a right to receive remuneration (from the ECL) and, often, they can opt-out of it.

⁶⁸ In the field of education, this applies in Australia. Netherlands and Switzerland cover other sectors.

⁶⁹ Belgium, Spain, and many other countries, most of them European.

essay). In some countries, RROs also offer pay-per-use licenses (to prepare course-packs and compilations, classroom handouts).

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- licenses are well known.⁷⁰, covering TDM of subscribed content (included in a previous license) and for TDM of previously un-subscribed content⁷¹. These licenses have been boosted with the inclusion of “text and data-mining” clauses in model agreements, allowing use of licensed content for TDM, for internal non-commercial research purposes. Licensees who are interested in using these materials for TDM projects that are commercial in nature or for other external activities or purposes, have to negotiate a separate license agreement.⁷² Maybe this is why collective licensing of TDM, by a CMO is rather rare. Yet, a few CMOs (such as the Finnish RRO, Kopiosto) do include TDM activities in their blanket licenses for universities and research centers.⁷³ Another example is the Copyright Clearance Center -CCC-⁷⁴ license in the 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.

⁷⁰ <https://www.stm-assoc.org/copyright-legal-affairs/licensing/text-and-data-mining-stm-statement-sample-licence/>

⁷¹ [and https://www.stm-assoc.org/2013_04_17_Readable_Summary_Sample_licence_for_Text_and_Data_Mining_of_subscribed_copyright.pdf](https://www.stm-assoc.org/2013_04_17_Readable_Summary_Sample_licence_for_Text_and_Data_Mining_of_subscribed_copyright.pdf)

⁷² Science Online Journals Institutional License Agreement <https://www.sciencemag.org/subscribe/institutional-license-agreement>

⁷³ See: https://www.kopioisto.fi/app/uploads/2018/11/11095521/Brochure-The-Kopioisto-copying-licence-Universities_19.pdf

⁷⁴ For instance, see <http://www.copyright.com/business/xmlformining-2/>

Collective licensing of music and audiovisual contents for teaching and research purposes is far less widespread. Only a few CMOs for music and audiovisual are at this time managing licenses in the field of education. In Australia and Norway, for instance, musical content is licensed for educational uses directly by the CMOs representing music composers, publishers and phonographic producers.⁷⁵ In the UK, CLA (the UK's RRO) also offers a music license on behalf of music publishers alongside its other licenses.

b) 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 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 - in most cases- to the needs and demands of teaching and research institutions. Different factors have contributed to it: a solid legal framework that encourages digital collective licensing⁷⁶ (for instance, extended collective license system, voluntary licensing supported by statutes, or non-voluntary legal licenses), a constructive and transparent dialogue between CMOs and university representatives,⁷⁷ the willingness of publishers and authors to be flexible and realistic about digital licensing, the willingness of CMO stakeholders to invest in technology to improve and offer

⁷⁵ See Australia <http://apraamcos.com.au/music-customers/licence-types/music-in-education/>; See Norway <https://www.tono.no/en/> and <https://norwaco.no/en>

⁷⁶ 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, where a similar compulsory license allows online transmission of copyright content by universities.

⁷⁷ Universities UK and GuildHE established a copyright working group, now called the Copyright Negotiating and Advisory Committee (CNAC), responsible for all copyright matters that have implications for the higher education sector. It is responsible for negotiating copyright licenses on behalf of the sector if they are considered to be in the best interests of the sector. This includes monitoring their implementation, and raising issues with licensing bodies about any new products or services that they may wish to initiate that are related to copyright and likely to affect the sector. See <https://www.universitiesuk.ac.uk/policy-and-analysis/Pages/copyright-working-group.aspx>

new services ⁷⁸ and last, but not least, the bilateral agreements between CMOs to jointly license as a consortium (e.g. countries of a same speaking language) in order to offer a more solid repertoire.

In some developing countries, collective licensing of educational uses is certainly successful. But this is a rather exceptional situation. Jamaica is a good example. The RRO Jamcopy operates on a voluntary licensing system basis. Today all universities (and colleges) have a blanket education license which includes digital uses and covers distance education. Jamcopy is also working in a project, the CARROSA license, aiming to offer a solution for cross border matters (see more about CARROSA in chapter 5), and is searching for new licensing solutions (Extended Collective Licensing is expected to be implemented soon).

Instead, in most 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. In some countries of Africa and LATAM⁷⁹, they still rely on using physical materials. In the case of online distance learning, materials are often sourced elsewhere and only accessed by learners enrolled in their countries; local universities which offer distance learning materials, pay for licenses to use the content from a foreign institution.

c) 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 incurring in an infringement. Overcoming this first struggle has taken years for some CMOs.

⁷⁸ Copibec -the RRO for Quebec- offers the possibility to have online access to over 30 000 books, picture books, illustrations, song lyrics, sheet music collections, magazines and visual artworks. This service -SAMUEL- allows to download selected excerpts and to share them in class or on the secure network of the institution <https://www.copibec.ca/en/samuel>. Or in the UK, where CLA offered new services such as the 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. <https://www.cla.co.uk/digital-content-store>.

⁷⁹ In LATAM, six countries have established an RRO, three of them offer digital licenses. In Africa, there are 15 established RROs and four of them offer digital licenses (<https://www.ifrro.org/rro>).

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 present gray areas where it is unclear whether a license is required or not. Legal uncertainty weakens their claim and chances to sell licenses for teaching and research activities. Instead, when E&L are clear and academic institutions offer guidance and awareness programs to their staff (professors, researchers and students), all parties win: academics and institutions perform their activity at ease, students have access to copyrighted contents as needed, and right holders are properly remunerated.

Negotiating the scope of the license seems to be the most confusing one for academic institutions. First, because in exchange for payment, they expect to be able to copy the entire work; and second, because licenses (and their pricing) often fail to make a clear distinction between uses that are already exempted by an applicable E&L for "teaching" or "educational" purposes, and further uses which are being authorized by it.

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 right holders 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 licensing. Some RROs pointed out that closing negotiations with educational institutions, in particular, cost too much time and resources even once they have acknowledged the need to obtain a license with the RRO.

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 is called to play **an important role in the development of online education**: allowing legitimate access to works by users, assuring right holders an efficient management of their rights (and widespread dissemination of their works facilitated by digital technologies) and 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 to new territories and markets, 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.

Copyright laws may do a lot to foster the development of collective management licensing to meet the needs of online distance education and research. Examples include the “E&L failing licenses” solution implemented in the UK, Ireland and Jamaica – and that will soon be also implemented in Kenya: a statutory, non-remunerated E&L will apply for teaching purposes if no voluntary agreement is reached among parties. Other possibilities include the Extended Collective Licensing (ECL) - established in the Nordic countries, as well as in Malawi and soon in Jamaica- which enlarges the scope of a voluntary license agreed with a CMO, beyond its repertoire and associates to all works and authors of the same category, as well as compulsory (non-voluntary) licenses (*i.e.*, E&L subject to remuneration), as enacted in Japan for digital educational uses.

3.2. DIRECT LICENSING

Rather than through a CMO, right holders (publishers, in most of the cases) may negotiate licenses directly with individual institutions or via consortia of universities and research institutions, “consortia licenses”.⁸⁰ Right holders may choose to license directly to users due to a

⁸⁰ About 90% of larger publishers actively marketed to consortia, and about half of all publishers According to the last two ALPSP Scholarly Journals Publishing Practice reports (Cox & Cox, 2008; Inger & Gardner, 2013). In: STM Report 2018 “An overview of scientific and scholarly publishing”. In Ghana, for example, the Consortium of Academic and Research Libraries (CARLIGH) with more than thirty (30) tertiary educational institutions as members, subscribe to

concern about the impact of the use permitted under the CMO license on their primary markets, (for example, concerns about the security settings of the systems used by the university) and the risk of leaked content being used as a substitute in either primary markets or for RRO licenses that they participate in other countries. On the other hand, in order to avoid negotiating licenses' terms and conditions with a large number of publishers, libraries and universities have also grouped into consortia⁸¹, which represent hundreds or thousands of libraries in different countries and regions of the world.⁸²

Academic content being licensed online is constantly increasing. It is a vast offer. Not only because of the diversity of digital resources that exist today in the market for academic licenses and their new developments, but also because of the different business models generated, different ways of using content, the number of actors involved in this market, or the various market niches.

Today, we are not only talking about the production and licensing of digital resources for online distance learning and research, which is already a complex world, but also about new developments that go beyond the sole licensing of contents, to cover a great range of services and solutions for academic institutions, that includes design of courses, support and content, offered from the large publishers own platforms⁸³.

In this study, we will focus on aspects that are closely related to the availability and the way in which users of digital content, i.e: universities and research institutions, effectively access to content, through licenses that negotiate directly with rights-holders, consortia of owners, or through distributors and content aggregators, all of whom sell and license content (which in turn have been previously negotiated with the corresponding owners).

online materials (covering different subject area) directly from the right holders or database service providers, without the involvement of CopyGhana (RRO of Ghana).

⁸¹ Consortia centralize services, including content acquisition and negotiation with rights holders, mainly publishers. The vast majority (61-97% depending on the publisher) of publisher-library contracts, is done through consortia. In: STM Report 2018

⁸² The numbers of consortia have been growing strongly: the Ringgold Consortia Directory Online lists over 500 consortia in 126 countries, representing over 32,000 individual institutions; of these, about 350 are responsible for licensing content. The International Coalition of Library Consortia has about 200 members. The size and nature of consortia vary considerably, from national consortia to small regional ones, and include academic, medical, public, school and government libraries. In STM Report 2018, p. 20.

⁸³ For example Pearson <https://www.pearson.com/uk/educators/higher-education-educators/products-and-services/course-development.html>, Wiley Education Services <https://edservices.wiley.com/why-partner/services-and-solutions/> Mc Graw-Hill <https://www.mheducation.co.uk/>

As far as the **publishing industry** is concerned, products normally used for online education and research purposes are e-journals⁸⁴, e-books, and databases. In the field of publications, journals are the largest market.⁸⁵ According to PRC Open Access Licensing Study: currently, all Scientific Technical and Medical (STM) journals are available online as well as the vast majority of journals in the field of arts, humanities and social sciences (AHSS).⁸⁶

The vast majority of e-journals are sold as bundles of titles, either directly to libraries, universities or through consortia (this last one being the most widely used model).⁸⁷ In recent past years, publishers have increased the offer of content different to journals in order to include it as “bundles” in their sales, particularly ebooks (entire or chapters),⁸⁸ especially monographs, anthologies, reference works, which were the first to migrate to the digital environment or “born digital”. **Fragmented ebooks** allow users to edit their own books, which is ideal for the teaching and academic field.⁸⁹ Or the sale of **individual articles**,⁹⁰ and also article and article bundle rental, or offering the **same book in several downloadable formats**: PDF, chapters, modules, etc. Students are allowed to read educational content in open, while sales are made through print on demand (POD) or digital format.⁹¹

⁸⁴ There were about 33,100 active scholarly peer-reviewed English-language journals in 2018, collectively publishing some 3 million articles a year. CrossRef database includes over 97 million DOIs, of which 73 million refer to journal articles from a total of almost 60,000 journals. the Web of Science ‘Core Collection’ included about 70 million article records as of June 2018, out of a total of 150 million items across all WoS databases. Journals which published only original research articles comprise about 95% of journals. In: STM Report 2018, p.25.

⁸⁵ OC&C Strategy Consultants have estimated global spending on academic and scientific content by academic libraries alone at just over €7 billion. Academic libraries have traditionally been the primary source of journal revenues, estimated at 68-75% of the total. In: STM Report 2018.

⁸⁶ In 2008, the ALPSP released an international survey reporting on scholarly publishing practice (Cox & Cox 2008 via the STM Report) finding that 96% of STM and 87% of Arts, Humanities and Social Sciences (AHSS) journals were already accessible electronically or ‘born digital’. In: PRC Open Access Licensing Study by Carlo Scollo Lavizzari and René Voljoen, 2015, p 9.

⁸⁷ Sales of individual journal subscriptions fell in favor of bundles, while electronic publishing was arising. Cox & Cox (2008) found that nearly all (95%) of large and most (75%) of medium publishers offered bundles of content, and 40% of small publishers. In: STM Report, 2018.

⁸⁸ Historically there has been a big difference between the market figures of books and journals. However, according to experts, electronic books can gradually become more important both for libraries and for end users.

⁸⁹ Publishers such as McGraw Hill Education, HarperCollins, Ingram, Penguin-Random House, publish through SliceBooks Store, and also offer their users and readers the service of editing their own ebooks from fragments of the digital books offered in the store. In: *Evolución de los nuevos modelos de negocio en la era digital*. Study by DosDoce and CEDRO, 2016. http://www.dosdoce.com/evolucion_nuevos_modelos_negocio_en_la_era_digital_v2.pdf

⁹⁰ Already in 2012, it amounted to be 83% (Inger & Gardner, 2013). In: STM Report 2018.

⁹¹ DosDoce and CEDRO Study, 2016

The following subchapters a), b) and c) will focus on the **publishing sector**.

a) Direct licensing of educational and research activities

Right holders (in most of the cases publishers, acting as copyright owner or as licensor) offer and license their own products directly to institutions thus avoiding the need for a CMO to manage their rights on their behalf. To some extent, academic licensing for digital and online uses (mostly, via databases) has become a “primary market.”⁹² An example of this are the course and content development products offered by Wiley and Sons, Elsevier, Springer, Taylor and Francis, Pearson—from their own platforms, just to mention the largest and best-known publishers in the academic market. And of course, also the largest Universities⁹³ sell their copyrighted contents - journals and books- through their own platforms.

Small publishers also join together in order to strengthen their catalog and services in this market, or to sell directly from their platforms to users, taking advantage of their niche market, (with the difficulties that this entails due to the lack of visibility in the academic market) as well as through aggregators and distributors platforms, which is one of the most widespread ways of content distribution. In recent years, a considerable number of digital start-ups that focus on educational content have emerged in both, developed and in developing countries. There are many examples, but we highlight Snapplify,⁹⁴ as one of the main digital aggregators of the African continent. It distributes the electronic books of more than 250 publishers and integrates them into its virtual education platform. In 2014, Snapplify presented the SnappBox, a device that allows students to access electronic content through an intranet, instead of online.

Although most of the digital resources are offered as a “paid” model (accessible through purchase, subscription, rental, lending, pay-per-view or similar licensing model), academic institutions also use **Open Access** contents in their online distance education and research activities. OA is presented as a supplementary model, to commercial licensing solutions; teachers and researchers may use contents available in OA formats for their educational and research uses, in addition to contents commercially licensed to their institutions. However, the impact of OA is

⁹² A 2013 Association of Learned & Professional Society Publishers -ALPSP- report suggests that the market had reached near saturation in terms of online availability, with the large majority of publishers having over 90% of their content available online. In: STM Report 2018 “An overview of scientific and scholarly publishing”, p. 28

⁹³ Cambridge.org/es/academic/subjects/arts-theatre-culture/titles/?options[]=Textbooks:
<https://global.oup.com/academic/product/productivity-and-the-bonus-culture-9780198836117?lang=en&cc=es>:
<https://yalebooks.yale.edu/>

⁹⁴ See <https://www.snapplify.com/>

fundamental on specific projects and contexts, such as OER and MOOCs, that will be examined in chapter 4 of this report.

Open Access repositories tend to authorize academic uses (educational and research activities), for free. The most commonly used licenses in Open Access are the *Creative Commons* licenses which always allow use, reuse and distribution for any non-commercial purposes - for free, forever and worldwide – as long as the name of the author and source are mentioned. Some CC licenses go beyond this “nuclear” scope of permitted uses and also authorize commercial uses; A few require subsequent works to be subject to the same CC license (the “copyleft” requirement). There are other licenses used in OA platforms, such as those launched by STM publishers, (as complementary to the CC licenses), as well as “taylor-made” licenses, or a combination of all of the above.

Depending on the specific terms and conditions of his assignment of rights to the publisher,⁹⁵ if an author takes the option to publish in Open Access, he may do so himself or through the publisher (i.e., by granting the publisher an exclusive license to publish his work under a *Creative Commons* license).

In fact, the same content or digital resource could be licensed by its right-holders through open access licenses and also by “commercial” licenses, for example, by offering e-books through an Open Access license and printed books under a commercial license, or some specialized contents through OA license and others through commercial licensee.

b) Licensing terms

Of course, each publisher has its own license model, as well as several organizations, including publishing organizations, libraries and consortia have developed model (standard) licenses, which simplify transactions and generally represent the “best practice” after negotiation between interested parties. We highlight the database subscription license model recommended by the consortia to its members for being the most widely used in different countries and regions of the world.⁹⁶

⁹⁵ In general terms, authors transfer their rights to the publisher -but usually maintaining some of their rights- or grant an exclusive license to the publisher (this last option offers great security regarding the specific rights and uses included).

⁹⁶ <https://support.ringgold.com/cdo-useful-info/>). Licenses included academic libraries, academic consortia, corporate library, public library, ebooks and 30/60-day free trials. <http://www.licensingmodels.org>

The following are some of the clauses that could generate some conflict with the users' access to licensed content, which is our focus in this study:

- A **non-exclusive and non-transferable** license that is granted, throughout the world, to give authorized users access to the licensed materials via a Secure Network. There are also cases of licenses that cover just selected countries. This could be a restriction to access for learners enrolled in an e-learning course, but located abroad.
- **Authorized users:** refers to current members of the faculty and other staff of the Licensee (whether on a permanent, temporary, contract or visiting basis) and individuals who are currently studying at the institution, who are permitted to access via Secure Network. Today, what is preferred is unlimited concurrence licenses, although this may affect the rate.
- **Licensed Materials** usually described in annexes, may be agreed by the parties from time to time. Including auxiliary or supplementary materials, including podcasts, datasets, blogs, images, music, games, tests and questionnaires. The publisher often reserves the right to remove some titles from the licensed catalog, which may cause problems for the institution when trying to access a teaching material that is no longer available under the license.
- **Rights and uses allowed include:** Acts of reproduction, making available and distribution are included and uses detailed as follows:
 - to load and access on the Secure Network, reading/viewing in streaming contents, single printed or electronic copies of single articles at the request of any authorized user,
 - display, download or print for internal use or for training, search, view, retrieve and display print a copy or download and save individual articles for personal use,
 - use individual parts of the Licensed Materials within Learning Objects for the Licensee's teaching, learning or training purposes,
 - use Text Mining technologies to derive information from the Licensed Materials,
 - distribute a copy of individual articles in print or electronic form to other Authorized Users or to other individual scholars collaborating with Authorized Users but only for the purposes of research and private study,
 - download a copy of individual articles and share the same with Authorized Users or other individual scholars collaborating in a specific research project with such Authorized Users provided that it is held and accessibly within a closed network that is not accessible to any person not directly involved in such collaboration and provided that it is deleted from such network immediately upon completion of the collaboration.

The license also includes the possibility of assembling print course packs and electronic reserve collections of fragments of the licensed content and using it in Virtual Learning Environment (VLE) in the course of instruction, but not for commercial use (each item must mention the source, title and author of the extract, title and author of the work, and publisher).⁹⁷ It is a sensitive issue for rights holders and not all of them agree to allow collections of fragments of their works.

This wide range of rights and uses included, certainly allows the development of online distance education activities, in VLE, face to face, and all forms of e-learning and researching (including TDM). Users are also allowed to access online content through any device, including of course mobile devices, (as tablets and smartphones). Important point, given that in some developing countries, student access is mostly through smartphones.

The uses and rights included in license agreements are some of the issues that hold the most lack of understanding in the negotiations and therefore the misinterpretations of what is allowed and what is not. Consortia or even right holders themselves have teams dedicated to training about this. Institutions also have to train educators and students about the uses allowed and not allowed, bearing in mind that any copyright infringement would terminate the agreement of license. Also related to this point, licenses embedded in machine readable formats – as CC and software licenses – might be a solution. Machine readable embedded licenses offer the advantage of clarity and brevity.⁹⁸

Most of commercial licenses include DRMs to guarantee compliance of terms and conditions established for allowed uses, authorized persons, territories from where access is permitted. An Open Access license generally does not allow the distribution of content with DRM, as it restricts some uses and this would be contrary to what it intends. DRMs may restrict uses of licensed materials by learners and teachers which are permitted under applicable E&L.

⁹⁷ Make difference between course packs, as a collection or compilation of printed materials (e.g. book chapters, journal articles) for use by students in a class (face to face), and electronic reserve, electronic copies of materials (e.g. book chapters, journal articles) made and stored on the Secure Network by the Licensee for use by students in connection with specific courses of instruction offered by the Licensee to its students.

⁹⁸ Example of a *Creative Commons Attribution License (CC BY) machine readable embedded license*: This article is available under the terms of the [Creative Commons Attribution License \(CC BY\)](#). You may copy and distribute the article, create extracts, abstracts and new works from the article, alter and revise the article, text or data mine the article and otherwise reuse the article commercially (including reuse and/or resale of the article) without permission from Elsevier. You must give appropriate credit to the original work, together with a link to the formal publication through the relevant DOI and a link to the Creative Commons user license above. You must indicate if any changes are made but not in any way that suggests the licensor endorses you or your use of the work.

c) Licensing challenges

In terms of availability of quality content by rights holders, it seems that we can affirm that the level is high and even tends to the saturation of the market, but we cannot say the same about access for users. **Most of the reasons are related to the high cost of journals subscriptions, the high prices charged for individual articles and the reduction of the budgets of the institutions.** For these reasons, behind others, the “bundle” model of content is being reassessed by some academic libraries and universities that prefer to have less volume, paying more for individual content surely, but ensuring quality and effective use. It is observed an urgency to privilege content based on its effective use and its relevance, over amounts of collections that may end up not being used due to their lack of value.

One key issue at the moment is to prioritize the selection of content. The business of buying large amounts of academic content (bundles) that still leads the market⁹⁹, has been questioned in past years. Prior to investing large budgets in the purchase of content bundles, the idea of prioritizing quality returning to title by title, is being considered. These large purchases that involve large budgets, particularly in developing countries, do not have their balance in the effective use of such materials, especially with e-learning. This seems to be a pattern in various developing countries¹⁰⁰.

Conditions for the use of available digital resources must be clear and transparent to the user from the beginning, for example, if the license establishes a time limit for the contents to be accessible, or if some contents may be removed from it, the user must be expressly warned (and with enough time to find alternative resources). Otherwise access to resources, and academic activities, are put at risk.¹⁰¹

Language is also a fundamental element to explain why specific licensing practices and availability of licenses vary from one country to another.

⁹⁹ A 2012 survey conducted by the Association of Research Libraries reported that more than 90% of libraries bought “content packages” from major publishers. (Strieb and Blixrud, 2013). In: STM Report 2018 “An overview of scientific and scholarly publishing”, p 19

¹⁰⁰ <https://www.semana.com/educacion/articulo/bases-de-datos-universitarias-presupuesto-para-investigacion-en-colombia/524572>

¹⁰¹ De la distribución de libros electrónicos y los nuevos escenarios de compra y uso a nivel institucional. Pau Torres y Edgar Forero, Hipertexto Study, 2019.

Nowadays, the user, finds numerous digital resources available in the market, thus, it faces a fragmented panorama in terms of tools to manage and license types of each provider (which usually have particular scope and limitations in legal terms). For example, some digital resources allow unlimited access of users to a title, while other resources have a user license that restricts access to a single user per title and a part of the community of these users can be excluded¹⁰².

Even though most licenses cover all territories, copyright principles allow right holders to grant online use licenses of materials in specific territories or around the world. Accordingly, right holders or licensors can block the use in a territory not authorized by the license (geoblocking), as a result of which, students physically located in that territory would be out of access to the content, even if they are enrolled in the e-learning course.

In some cases, there are misunderstandings about the rights available to users. That is why uses and rights allowed by the license, are issues extremely important to be defined so clearly since the initial assignment or license agreement between author and publisher, to further be sure about acts users really can do or not with licensed materials.

Not all publishers in the world and in different countries are able to offer their content from their own platforms, as do the large STM publishers in the world, therefore, there is a great part of this content that is left out of the direct licensing market. It is very difficult for a small publisher to reach these international markets. In some cases, large national budgets are usually aimed at acquiring large databases and not national repositories. **Academic institutions also intend to access multiple and varied types of content, not only those offered by large publishers.**

d) Other content available

In addition to published contents, **licenses for music and audiovisual** contents are increasingly available in the e-learning market. An example of this, is the MediaPlus¹⁰³ portal, a service delivered to the UK HE and FE community in association with Jisc, with more than 100,000 videos, images and sound recordings. Users can purchase these contents directly from the platform.

¹⁰² Hipertexto Study, 2019.

¹⁰³.See <https://search.alexanderstreet.com/mpls>

Another example is the Umbrella License of MPLC,¹⁰⁴ that gives legal access to public exhibition of audiovisual content from more than 900 right holders (or more, it depends on the territory). It is granted for each territory, in this way the specificities and conditions for each territory are detailed in accordance with the national copyright legislation of each country.¹⁰⁵ It is offered for different types of business and activities. Licensees may use all the repertoire without having to report uses. Institutions pay an annual fee, depending of the number of final users accessing the repertoire included in the license. The MPLC license is available in different countries and regions of the world. It is generally seen as too expensive for academic institutions.

Instead, other audiovisual operators (namely Netflix and Amazon) refuse to license their productions for use in teaching and research purposes. In some instances, academic 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 Corporations). More often, universities simply prefer to license audiovisual works on an individual basis – to avoid collective licensing prices they find excessive.

Licensing markets for audiovisual and music digital resources for online education activities are still incipient. As far as collective licensing, where the CMOs of the audiovisual and music sectors, do not yet consider the online educational activity, as a market to cover. Similarly, direct licensing of this type of content specifically for academic markets, such as the MediaPlus and MPLC examples, is beginning to be developed.

4. OER AND MOOCS: A SPECIAL SCENARIO

Open Educational Resources¹⁰⁶ and MOOCs¹⁰⁷ are being widely developed by universities as well as teaching and research institutions, and offered online, to a global audience, usually for

¹⁰⁴ See <https://www.mplc.org/> which is available in different countries.

¹⁰⁵ For instance, the Umbrella License for Schools in Ireland that includes this advertisement related to a specific limitation in their Copyright Act: ...some educational screenings are exempt. This exemption is narrowly defined and applies only for educational use where the content is shown in the classroom, as part of the curriculum course or study programme. All other school showings require a separate licence.

¹⁰⁶ 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/>

¹⁰⁷ 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.

free.¹⁰⁸ 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),¹⁰⁹ and identify a unit (or someone) to help them with copyright clearance process.¹¹⁰

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 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.¹¹¹
- 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**

¹⁰⁸ 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).

¹⁰⁹ 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>

¹¹⁰ 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.

¹¹¹ This is the case of Australia.

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)¹¹² 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 risk of “disappearing” 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**¹¹³ – otherwise, contents licensed for the OER or MOOC will not be consistent with the open-license conditions imposed on the OER / MOOC. Academics and 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.”¹¹⁴ 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.

¹¹² 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.

¹¹³ 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.

¹¹⁴ See OCW Best Practices, p. 1.

- 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*)**.¹¹⁵

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 process¹¹⁶ forcing academics to either obtain unnecessary licensing or to use alternative contents so as to avoid any liability for copyright 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**.

¹¹⁵ 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/>

¹¹⁶ 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.

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. 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. As pointed by academic respondents, in some Nordic countries, researchers have been sued for using copyrighted images (exempted under ECL) at conferences outside campus or in other countries. This may likely hold 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.

In order to avoid that strict compliance with multiple national copyright laws deters the development of online education, academic institutions and CMOs have been exploring several contractual solutions.

Academic institutions tend to *de facto* rely on E&L in one national law – the **law of the country where the institution is located** – regardless of where their students and researchers are located and hoping that similar results might be achieved under other national copyright laws. 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.

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.¹¹⁷

In fact, this “law of origin” approach has been formally adopted by the EU *acquis* in several instances; most notably, it is the solution adopted in Art.5 of the recently adopted Directive 2019/790/EU on Copyright and related rights in the Digital Single Market: online cross-border teaching uses (exempted under a mandatory E&L in all EU countries) will be deemed to occur only in the country where the educational institution is established.¹¹⁸ Thus, by means of a statutory “legal fiction,” online teaching and research activities will be formally subjected to only one national law.

The same “territorial” discrepancy may be 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 commissioned to grant territorial licenses).

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.

¹¹⁷ 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.

¹¹⁸ 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.”

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 campuses¹¹⁹. 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.¹²⁰ 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.

Direct licenses from right holders may easily overcome the cross-border elements, by identifying the territorial scope of the licensed rights and contents.

6. CONCLUSIONS

This report shows that teaching and research in the digital environments is a complex issue and that one-size fits all solutions are 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. There is room for E&L in national copyright laws to further explore the scope of permitted uses under Art.10(2) BC and formally exempt online education uses under the guidance of the Three-Step test. National E&L are the best tools to secure the public interest behind

¹¹⁹ 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.

¹²⁰ 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/>

teaching and research purposes, according to the specific circumstances and needs of each country.

Collective licensing is not uniformly available in all countries, and for all kind of works. Publishers and Producers are increasingly making their contents available for teaching and research purposes under licensing schemes. However, this content mostly comes from developed countries and major stakeholders, while content from other sources (small publishers and producers, local universities, minority languages, etc) remains more difficult to access undermining their possibilities of being used in e-learning markets.

It appears that a sensible way forward, to address the needs and foster the development of university teaching and research activities online, may be a combination of clearly defined but flexible E&L authorizing a core of academic uses (either for free or remunerated, according to the specific cultural, economic and market circumstances of each country), together with functional licensing systems that authorize further teaching and research uses according to the conditions agreed by the parties.

Abbreviations

AHSS	Arts, Humanities and Social Sciences
BC	Berne Convention
CC	Creative Commons Licenses
CMO	Collective Management Organization
DRM	Digital Rights Management
E&L	Exceptions and Limitations
ECL	Extended Collective License
MOOCs	Massive Open Online Courses
MPAA	Motion Picture Association of America
MPLC	Motion Picture Umbrella Solution
OA	Open Access
OER	Open Educational Resources
RRO	Reproduction Rights Organization
STM	Scientific, Technical and Medical
TDM	Text and Data Mining
TPM	Technical Protection Measures
VLE	Virtual Learning Environment

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