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Copyright exceptions for teaching purposes in Europe

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ABSTRACT

There is no "typical" digital distance education course. For copyright purposes, the activities of an on-line University always involve the *use of preexisting copyrighted works* or otherwise protected material (either through the tangible reproduction and distribution of materials, through web-posted materials, or through library-accessed databases).

When using a preexisting copyrighted (or otherwise protected) work, the educational institution or teacher has two options: either seek a license from the copyright owner or rely on the several existing exceptions/limitations to the copyright law. On the one hand, the problems an educational institution must face when obtaining licenses are diverse: difficulty in locating the copyright owner, inability to obtain a timely response, and unreasonable prices or other terms. On the other hand, not all the uses of copyrighted works that take place as part of DDE activities may be covered by copyright exceptions/limitations allowing the unauthorised (and usually, free) use of protected works (among others, exceptions for teaching purposes, quotations, private use, etc).

The **goal of this project** is to examine whether and to what extent these exceptions/limitations, clearly envisioned for the world as we know it today (what we call the "analog world"), could and should be applied also to the digital world. We examine whether and to what extent something that is allowed as part of an educational activity in the analog world should also be allowed when that same educational activity takes place in the digital world-that is, the Internet, as we know it today. Since the extent and conditions of these exceptions vary, sometimes widely, among different **domestic laws and international agreements**, we have consulted with several exprerts from around the world.

As a conclusion, we propose a statutory licensing scheme, as a remunerated copyright exception, to cover all teaching uses over the Internet.

KEYWORDS

Copyright, teaching uses, exceptions

SUMMARY

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Panel III: Access to distance education.

Copyright exceptions for teaching purposes in Europe

by Dra. Raquel Xalabarder[1]

There is no "typical" digital distance education course. In 1999, the U.S. Register of Copyrights issued a *Report on Copyright and Digital Distance Education*[2], which defined distance education as "*a form of education in which students are separated from their instructors. . . . [T]he term . . . appears to focus most clearly on the delivery of instruction with a teacher active in determining pace and content, as opposed to unstructured learning from resource materials.*" Digital distance education ("DDE") refers to the same activities conducted by means of digital technologies, that is, through computers connected on the Internet.

For copyright purposes, the activities of an on-line University (that we will call Virtual University) may be classified into two general groups:

1. Activities involving the *use of preexisting copyrighted works* or otherwise protected material (either through the tangible reproduction and distribution of materials, through web-posted materials, or through library-accessed databases);
2. Activities involving the *creation and subsequent exploitation* of works originated in connection with the instruction conducted through the on-line university "campus" (that is, authored by professors, students, and other personnel of the educational institution).

We will focus on the first group: the use of preexisting copyrighted works.

When using a preexisting copyrighted (or otherwise protected) work, the educational institution or teacher has two options: either seek a license from the copyright owner or rely on the several existing exceptions/limitations to the copyright law.[3]

According to the *USCO Report on DDE*, most **licensing for educational purposes** relates to materials in printed form (i.e., "course materials") or materials in digital form (i.e., "classroom e-reserve")[4]. Site-licenses, usually library based, are used for databases, journals, and software. They may also be used for

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[1] This paper has been prepared as a contribution to the Panel on "Access to distance education". It includes parts of the article "*Copyright and Digital Distance Education: The Use of Pre-existing Works in Distance Education Through the Internet*", 26 (2) Columbia Journal of Law and the Arts 101-178 (Spring 2003); and is based on the **research project on "Copyright and Digital Distance Education"** funded by the Universitat Oberta de Catalunya, during the academic year 2002-2003. Acknowledgement is due to the following participants to: Prof. Andrew Christie and Eloise Dias (Intellectual Property Research institute of Australia, The University of Melbourne, Australia), Prof. Alain Strowel and Charles-Henry Massa (Facultés Universitaires Saint-Louis, Brussels, Belgium), Prof. Valérie Benabou (Université de Versailles Saint-Quentin, France), Christophe Geiger (Max Planck Institute, Munich, Germany), Massimo Pavolini (Esq., Rome, Italy), Dr. Lucie Guibault and Annemarie Jansen (Institute for Information Law - IVIR, University of Amsterdam, The Netherlands), Prof. Anna Kingsbury (University of Waikato, New Zealand), Prof. Ramon Casas (Universitat de Barcelona, Spain), Jacques de Werra (Lenz & Staehelin, Zurich, Switzerland), Richard McCracken (The Open University, U.K.).

[2] U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (1999), *available at* http://lcweb.loc.gov/copyright/docs/de_rprt.pdf [hereinafter USCO REPORT ON DDE]. The *USCO Report on DDE* is a good source of information regarding current licensing practices in digital distance education, as well as the status of technologies relating to the delivery and protection of distance education materials. We will refer to it throughout this study.

[3] Of course, as an alternative, teachers could simply avoid the use of any pre-existing copyrighted works in digital distance education. We obviously refuse to accept that as an option.

[4] The majority of works licensed for digital educational use are textual materials. Pictorial and graphic works, audiovisual works, musical works and sound recordings and software are also used and licensed, though with less frequency (see USCO Report on DDE, at 36).

authorizing multiple uses of copyrighted works, for a set length of time, by a defined group of users, regardless of their physical location. In the case of an on-line university, this user group would be all students and professors who have access to the virtual "campus". Similarly, a CD-ROM supplier may license the University to place the material in a database so that it may then be accessed remotely by DDE students. The problems an educational institution must face when obtaining licenses are diverse: difficulty in locating the copyright owner, inability to obtain a timely response, and unreasonable prices or other terms. At stake, the possibility to use the material selected by the professor for the students to read.

Many of these uses that take place as part of digital DDE activities may well be covered by **copyright exceptions/limitations** allowing the unauthorized (and usually, free) use of protected works. Among others, the exceptions envisioned for teaching purposes, quotations, research and study purposes, and library copying, as well as the general private use and copying exceptions may be applicable to DDE uses. As admitted in the *USCO Report on DDE*, *"the least common form of licensing seems to be for digital uses of copyrighted works incorporated into the class itself, comparable to the uses an instructor might make of a work in the course of classroom instruction"* [5]. Are these lawful uses? Should they be covered by some kind of exception? Or subject to statutory licensing schemes?

Recent advances both in the technology used to protect works[6] as well as in the use of electronic copyright management information and on-line licensing (and delivery) systems will most likely facilitate the development of more effective digital licensing systems in the future.[7] Yet, just because licensing will be more easy in the digital world, this does not mean that exceptions/limitations to copyright should be overlooked. Regardless of how we refer to them (exceptions, exemptions or limitations), exceptions to rights granted under copyright law strike a balance between specific public interests and the authors' rights.[8] Exceptions/limitations to copyright should not be considered a tolerated departure from the monopoly of the author, but rather as a necessary part of the design of copyright policy.[9]

We intend to examine whether and to what extent something that is allowed as part of an educational activity in the analog world could and should also be allowed when that same educational activity takes place in the digital world—that is, the Internet, as we know it today. It is in that context that the comments and proposals gathered in this paper are made.

The extent and conditions of these exceptions vary, sometimes widely, among different **domestic laws and international agreements**. Thus, depending on the domestic law applied, the outcome may be completely different; under law "A," a license may be required for a particular teaching use, while under law "B," that use is covered by an exception. On the Internet, where territorial borders have no significance, these differences may either become a serious impediment for the development of DDE

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[5] See USCO Report on DDE, at 35.

[5] The most effective are secure container/proprietary viewer technologies that allow copyright owners to set rules for the use of their works, which are then attached to all digital copies and prevent anyone from making a use that is not in accordance with the rules. Another effective copyright-protective technology is the streaming format, which does not allow the making of copies (the work can only be seen or heard on-line). Among the developed technologies for embedding information in digital works to identify and track usage, digital watermarking is the most effective since it allows one to find unauthorised copies within the world wide web.

[7] As the USCO Report on DDE admits, though, it is difficult to predict the extent and the time for that improvement (see USCO Report on DDE, at 47).

[8] We should not be misled by appearances: just because it says "interest" it does not mean that the first is less important than the second. We should not forget that, sometimes, the public interest may constitute a right in itself.

[9] "[C]opyright limitations are but one alternative conceived by legislators and courts in defining the scope of copyright owners' exclusive rights"; "copyright limitations are mere (but essential) instruments, not exceptions to a rule." Lucie M.C.R. Guibault, Contracts and Copyright Exemptions, IMPRIMATUR, Institute for Information Law, Amsterdam, December 1997 # 4.2, avaliable at http://www.imprimatur.net/IMP_FTP/except.pdf

"L'economie actuelle de la propriété littéraire et artistique est un compromis visant à assurer un équilibre entre trois finalités sociales: une recompense accordée à l'auteur, la protection des investissements, la satisfaction des besoins des utilizateurs." Pierre Sirinelli, Exceptions et Limites aux Droits d'Auteur et Droits Voisins, OMPI, Geneva, 6-7 December 1999 (WCT-WPPT/IMP/1) at 42, avaliable at http://www.wipo.int/fre/meetings/1999/wtc_wppt/pdf/imp99_1.pdf

(aggravated by the territoriality of choice of law rules), or be simply ignored, with DDE functioning beyond compliance with any domestic copyright laws.

This paper examines the solutions adopted in Europe, both at a EU and domestic level, as well as under the Berne Convention; and contains some comparative references with non-European laws (namely, USA, New Zealand and Australia).

We have analyzed the existing copyright exceptions on the basis of the following **relevant acts** that take place as part of a regular teaching activity over the Internet:

1. **Upload**--a digital copy (reproduction) of the work is uploaded to the on-line university server (usually by the teacher), so that it can be accessed by students (making available to the public);
2. **Transmission**--a digital transmission, which consists of (a) multiple reproductions which occur while "in transit" and (b) reception of the work on the recipient's computer, which involves both screen display and/or performance (through the speakers), as well as RAM copying;
3. **Download**--a permanent copy (reproduction) of the work, as received, made on the computer's hard disk, or portable disk, or in print.

When examining a teaching-related exception/limitation, the following **legal issues** were considered:

- Which rights are covered by the exception?
- Which institutions and persons may benefit from the exception?
- Which uses are covered by the exception?
- Which works, and to what extent, can be used under the exception?
- Are such exempted uses subject to remuneration or free?

1.- Exceptions for teaching purposes.

1.a.- The **Berne Convention** provides for a specific exception to allow uses of copyrighted works for the purpose of teaching:

> *"**Art.10.2.-** 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**"*

The exception in article 10.2 may be traced back to the Berne Act of 1886 (article 8),[10] which remained essentially unchanged until the Brussels Revision of 1948[11], and the Stockholm Revision of 1967 (where it was modified it to its current language). Since its introduction in the Berne Convention, it was always agreed that teaching comprised elementary as well as advanced teaching, and also distance teaching[12]. Since the exception in article 10.2 BC refers to the "utilization" of the work, it may comprise not only the

[10] Art.8 of the Berne Act of 1886 stated: "As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies, the effect of the legislation of the countries of the Union, and of special arrangements existing or to be concluded between them, is not affected by the present Convention".

[11] Art.10(2) of the Brussels Text was: "The right to include excerpts from literary or artistic works in educational or scientific publications, or in chrestomathies, in so far as this inclusion is justified by its purpose, shall be a matter for legislation in the countries of the Union, and for special Arrangements existing or to be concluded between them."
See WIPO, Records of the Intellectual Property Conference of Stockholm, June 11- July 14 1967, Preparatory Document S/1 --Berne Convention for the Protection of Literary and Artistic Works: Proposals for Revising the Substantive Copyright Provisions (Articles 1 to 20), Document S/1 at 48 (1971).

[12] *See* Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (1987), §9. 25, at 494 and §9. 27, at 497-498.

reproduction right but also the right of communication to the public, thus easily encompassing digital distance teaching as well as broadcast distance teaching.

The key piece in this exception is "by way of illustration in publications, broadcasts or sound or visual recordings for teaching." The several versions of art.10(2) along the history of the Berne Convention (and the Stockholm Conference) show, on the one hand, that "by way of illustration . . . for teaching" responds to a concern about the amount of work used rather than to the teaching purpose itself[13] (in other words, "illustration for teaching" is not more restrictive than "teaching" or "educational purposes" as stated in article 8 of the Berne Act). On the other, the language "publications, broadcast or sound or visual recordings" does not constitute an exhaustive list, but rather aims to accommodate all technologies available: the language results from an evolution over time due to technology: from "publications destined for educational or scientific purposes" (as in article 8 of the Berne Act), to "educational or scientific publications" (as in the Brussels text), and to "publications intended for teaching or having a scientific character or having a scientific character or in chrestomathies" (as proposed in the Stockholm Program)[14], until the addition -in view of the emerging technologies at the time- of broadcasts and recordings (in Stockholm).

A far more interesting issue is that all of these forms "by way of" imply some kind of fixation. Could it be that a simple "use as part of the instruction" was never envisioned in the teaching exception because those who drafted the BC never thought that such uses would conflict with the authors' interests (and therefore, no exception was necessary)?[15] In any case, this language seems to be more favorable to online teaching than to live teaching, for two reasons. First, the specific reference to "publications" leaves no doubt that the creation of compilations (anthologies) for teaching purposes is covered by the exception.[16] Second, the acceptance of "broadcasts" clearly implies the acceptance of distance education under the exception.[17]

In the USA, the 2002 TEACH Act[18] was adopted in order to exempt some basic acts necessary to conduct instruction over the Internet, basically transporting the instructional exceptions already existing under sec.110 (to cover both face-to-face teaching uses and distance-teaching uses by means of radio and/or TV broadcasting) into the digital context. Such an exception (non-remunerated) is "completed" with a

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[13] In the programme for the Stockholm Conference, the word 'borrowings' was proposed as an attempt to bring the English translation closer to the original French word 'emprunts,' but it received considerable criticism from the British delegate to Main Committee I. This was on the cases that it might be taken to mean not only that parts ('excerpts'), but the whole, of a work might be taken. To counter this possibility, the French delegate suggested that a more appropriate wording would be 'the lawful borrowing of extracts.' However, the Working Group proposed a different wording: 'the utilization, to the extent justified by the purpose, . . . by way of illustration . . . for teaching, provided that such utilization is compatible with fair practice.' These references to purpose and fair practice are similar to those in article 10(1), and make the provision more open-ended, implying no necessary quantitative limitations. The words 'by way of illustration' impose some limitation, but would not exclude the use of the whole of a work in appropriate circumstances. See Ricketson, *op cit. supra* , §9.27(2).

[14] Art.10(2) proposed at the Stockholm Conference was: "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, to the extent justified by the purpose, borrowings from literary or artistic works for use in publications intended for teaching or having a scientific character or in chrestomathies". See Stockholm Conference Records, *op.cit. supra*, Doc.S/1 at 48.

[15] Furthermore, teaching uses may still be covered under the quotation exception (also regarded for teaching purposes) under Berne Convention, art. 10(1).

[16] See Ricketson, *op.cit. supra*, §9.27 n.7, at 499: "[I]n many instances these will, by their very nature, fall within the scope of publications made for teaching purposes under article 10(2)."

[17] As Ricketson concludes: "there is no reason to exclude [correspondence courses where students receive no face-to-face instruction from a teacher] from the scope of "teaching" for the purposes of article 10(2)." *See* Ricketson, *op.cit. supra*, §9.27 n.3, at 498.

[18] The Technology, Education, and Copyright Harmonization Act, Public Law 107-273, passed on November 2nd 2002.

strong licensing system (remunerated) that allows the compilation of material for teaching purposes, also in digital format[19].

1.b.- So does the **Directive 2001/29/EC**[20] [hereinafter, Copyright Directive], which was adopted in order to harmonize the main legal issues concerning copyright that may affect the development of the Information Society in the EU countries. Among the several exceptions listed in that Directive, there is one specific exception devoted to teaching uses. Article 5.3(a) allows Member States to exempt any :

> *"use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved."*

- The teaching exception covers the **rights of reproduction**[21] **and communication to the public** (which includes the "making available to the public")[22], and is clearly intended to apply to **both face-to-face and distance education --also by digital means.**[23] Thus, the acts of uploading,

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[19] For instance, in the U.S.A., permission is requested from authors and publishers for the production of course packs and royalties are paid. The Copyright Clearance Center, one of 33 national Reproduction Rights Organizations (RRO) which provide a variety of photocopy authorization services throughout the world, offers a service to do so. (Copyright Clearance Center, *at* http://www.copyright.com (last visited March 31st, 2004). Authors and publishers may choose to register with a variety of CCC services. By registering with a specific CCC service (each covering different kind of uses), the CCC is pre-authorized to grant permissions and collect royalties. Among the CCC services, through the **"Academic Permission Service" (APS)**, Universities, professors and bookstores may obtain permissions to photocopy works within the CCC catalog for course packs and classroom handouts. "Academic Permission Service," at http://www.copyright.com/services/APSterms.asp (last visited March 31st, 2004). The CCC also grants permissions for electronic copying for teaching purposes, under the "**Electronic Course Content Service" (ECCS)**: permission for universities and educators to use copyrighted materials in distance learning, electronic reserves and electronic course packs. According to the terms of the license, the ECCS grants authorization to import requested material in electronic format, and to allow electronic access to this material to members of a designated college or university class, under the direction of an instructor designated by the college or university, access to the copyrighted material must be limited via password protection, or other control. "Electronic Course Content Service," at http://www.copyright.com/services/ECCSterms.asp (last visited March 31st, 2004).

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

[21] The following harmonized definition of the right of reproduction is provided in art.2 *[Id.* art.2]: "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part (of works and other subject matter)" is intended to include each and every one of the copies made as part of a digital transmission (over the Internet).

[22] As defined in art.3.1, the right of communication to the public takes place "by wire or wireless means, including the making available to the public … in such a way that members of the public may access them from a place and at a time individually chosen by them." The "making available to the public" is clearly intended to cover the exploitation of the work through digital networks. As explained in Recital 23, this language (derived directly from the WIPO Treaties) is to be understood "in a broad sense covering all communication to the public not present at the place where communication originates." The WIPO Treaties allowed for its implementation (at a national level) either under the distribution right (WCT art.6) or the communication to the public (WCT art.8); the EU legislator made a choice in favor of the latter (see art.3 Copyright Directive).

[23] Recital 42, Copyright Directive: "When applying the exception or limitation for non-commercial educational and scientific research purposes, *including distance learning*, the non-commercial nature of the activity in question should be determined by that activity as such. The organizational structure and the means of funding of the establishment concerned are not the decisive factors in this respect" [emphasis added by the author].
In addition, the Explanatory Memorandum accompanying the initial proposal of Directive of 10 Dec. 1997 (COM(97) 628 final) explained: "It does not only cover traditional forms of using protected material, such as through print or broadcasted media, but might also serve to exempt certain uses in the context of on-demand delivery of works and other protected matter. Member States will have to take due account of the significant economic impact such an exception may have when being applied to the new electronic environment. This implies that the scope of application

transmission[24] and reception[25] a work over the Internet will be covered by the teaching exception of art.5.3(a), provided the other conditions are fulfilled. It is far less clear whether downloads of the transmitted work made by recipients (i.e., students) will be covered by the teaching exception[26], or even under the private use exception of article 5.2(b)[27].

The meaning of "private use" itself becomes very sensitive in the digital world. Where are the boundaries of private use in the Internet? To my understanding, multiple downloading (by a group of students) of a transmitted work--even if it's only one copy each-- undeniably implies, at least "indirectly," some commercial effect. In face-to-face teaching, the private copying exception could never exempt the reproduction of a work in multiple copies to be distributed among students for classroom use. In fact, as we will see, some private copying exceptions expressly exclude copies intended for collective use.[28] Therefore, the same should be concluded in the digital world: the private use exception should not cover downloads made by students of the works transmitted for teaching purposes. Nevertheless, there is one serious drawback to not including reception (RAM copies) and downloading of transmitted works as private copies: while private copies are subject to fair compensation,[29] teaching uses are not necessarily so.[30] As we will see, this may be overcome solved by complying with the three-step-test.[31]

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may have to be even more limited than with respect to the "traditional environment" when it comes to certain uses of works and other subject matter."

[24] In addition to the coverage of any specific exception listed under art.5(3), any temporary reproductions that enable digital transmissions of works will be covered by the mandatory technical copies exception of article 5.1:

> "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
> (a) a transmission in a network between third parties by an intermediary, or
> (b) a lawful use
> of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2".

The same applies to any RAM copies that enable reception of the work on the computer screen. Recital 33 of the *Copyright Directive* makes clear that both caching (also proxy caching) and browsing are covered by the exception:
"To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information."
Yet, it may be difficult to distinguish when the sole purpose of the reproduction is to enable a transmission and when a lawful use. For instance, when the transmitted work is received (viewed and/or heard) in the recipient's computer, does this reproduction enable a transmission in the sense of art.5.1(a) or rather a lawful use under art.5.1(b)? According to Recital 33 "A use should be considered lawful where it is authorised by the rightholder or not restricted by law"; which leads to a vicious circle: in order to know if the reception is covered under the teaching exception in art.5.3(a) we need to know whether reception is part of the transmission.

[25] It is true that communication to the public occurs regardless of actual reception, but when that "simple act of reception" takes place, should be deemed part of the communication to the public. Notice that the definition of "making available to the public" of art.3.1 expressly refers to "access" of the work by the public: "in such a way that members of the public may access them from a place and at a time individually chosen by them." Rather, making a permanent copy of the work received is not part of the making available to the public.

[26] The broad language of article 5.3(a) could easily cover them. It makes sense to conclude that teaching exceptions should cover all reproductions which are necessary to carry on such teaching use, as long as it is for "teaching purposes." National legislators have the opportunity to state it clearly –as we will see, they haven't done so.

[27] Art.5.2(b) allows member states to introduce an exception "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly or indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned".

[28] Not only because the one who made the copies is not using them for private use, but rather because she is making a collective use of them. For instance, France art.L122-5(2) and Spain art.31 exclude copies made for "*collective use*" from the private copying exception. Also the UK sec.29.3.b exclude "*systematic single copying*" (all the members of a class requesting the same material at once) from the fair use exception for research and private study.

[29] *See* Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 21 May 1999, COM (1999) 250 final, O.J. C-180/1999,

- Unlike most domestic laws, the *Copyright Directive*'s teaching exception has **no limitations as to the extent and nature of the works**. It allows for the use of entire works or fragments, "only the part of the use which is justified by its non-commercial purpose may be exempted from the exclusive right."[32] Therefore, works primarily intended for education, either analog or digital, may fall under the scope of the *Copyright Directive*'s teaching exception provided, as usual, that they pass the three-step-test. Also, works created during the teaching activities (for instance, messages and attachments, both by professors and students) could be subject to the exception.

- **To determine eligibility**, the *Copyright Directive*'s teaching exception does not focus on the category (school, university, etc.) or nature of the educational establishment, but rather on the particular educational activity and, more specifically, its purpose. Instead of referring to non-profit educational establishments (as the TEACH Act does)[33] art.5.3(a) refers to **the "non-commercial purpose to be achieved"** and Recital 42 explains:

  > "When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the *non-commercial nature of the activity* in question should be determined by that activity as such. The *organisational structure* and the *means of funding* of the establishment concerned are not the decisive factors in this respect.[34] *(emphasis added)*

  What is a "non-commercial purpose"? What is the "non-commercial nature of the activity"? Almost all courses are offered in exchange for some payment. Is that enough to disqualify that use under the *Copyright Directive*'s teaching exception? I don't' think so. In my understanding, the teaching exception envisioned in the *Copyright Directive* does not only allow free uses, but rather it is broad enough to encompass any "non-commercial" teaching uses, subjecting them to different compensation regimes[35] depending, for instance, on the nature of the institution (i.e., free use for nonprofit institutions and compensated use for for-profit institutions). In that sense, member countries will have a lot of discretion.

  Nothing is said in article 5.3(a) as to who is allowed to perform the teaching use: only teachers or also students? The U.S. TEACH Act exception seems to cover student use.[36] The silence of art.5.3(a) seems to point to the same conclusion.

- **As to the purpose of the use** covered by the exception, article 5.3(a) refers to **"illustration for teaching or scientific research."** At a first glance, the term "illustration" seems to unnecessarily complicate the scope of the teaching exception. During the parliamentary proceedings, two

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Recital 26: "*it is of particular importance, in the case of digital private copying, that all rightholders receive fair compensation*.".

[30] *Compare* art. 5.2(b) *with* art. 5.3(a), Copyright Directive.

[31] The *Copyright Directive* contains no definition of what is "fair compensation" (there is only some guidance in Recital 35). Therefore, Member States are given a large degree of flexibility as to how to interpret the fair compensation condition, to the extent that they may decide that where the prejudice to the rightholder is minimal (or where he has been already been compensated), no obligation for payment (or further payment) arises. Also the exact form (and amount) of such compensation (i.e., levies on copy shops, sales of blank tapes and equipment, as exists in most Member States) is to be decided by each Member State, in accordance with their own legal traditions and practices.

[32] *See* the Explanatory Memorandum accompanying the Commission's initial Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 10 December 1997, COM (1997) 628 final, at 40.

[33] TEACH Act, S. 487, 107th Cong. § 110(2) (2002).

[34] Copyright Directive, Recital 42.

[35] Which is perfectly possible under the Copyright Directive, Recital 36.

[36] See TEACH Act, S. 487, 107th Cong. § 110(2)(A) (2002).

proposals to substitute this language were discussed: "education, learning and research,"[37] and "education, learning, research and for private purposes."[38] But the Parliament adopted neither one, and "illustration" was maintained in the enacted text. The most plausible explanation is that the term comes from the teaching exception contained in article 10.2 of the BC as shaped in the Stockholm Conference.[39] It is not unreasonable to assume that the EU legislator simply followed the BC language (and therefore, the same interpretation applies here).

The "trick" with the list of exceptions contained in the Copyright Directive is that it is an exhaustive list (no exceptions other than those listed by the Directive are allowed in EU member states) but non-compulsory: each member country will decide whether or not to adapt all (or some or none) of these exceptions into national law. Therefore, no real harmonization should be expected (it seems that exceptions turned out to be a far more sensitive issue than originally expected). Although the Copyright Directive was to be implemented by member states before December 2002, as of March 2004 not all of them have done so yet.

1.c.- At a **domestic level**, the legal context for teaching uses is a wild one.

Most European laws have some kind of exception specifically provided for teaching purposes (either pre-dating the Copyright Directive or introduced after its implementation): **Austria[40], Belgium[41], Germany[42], Greece[43], Luxembourg[44], Netherlands[45], Italy[46], Switzerland[47], UK[48] and Ireland[49], and some Nordic countries[50]**. No need to get excited, though: most of them fail to cover DDE.

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[37] As proposed by the Committee on Economic and Monetary Affairs and Industrial Policy, see the Report of the EP Committee on Legal Affairs and Citizens' Rights' on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, of 28 Jan.1999, A4-0026/1999, at 43, Amendment 18 (to art.5.3).

[38] As proposed by the Committee on the Environment, Public Health and Consumer Protection, see the Report of the EP Committee on Legal Affairs and Citizens' Rights' on the proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, of 28 Jan.1999, A4-0026/1999, at 58, Amendment 24 (to art5.3.a).

[39] Berne Convention, art.10(2).

[40] **Austria:** Federal Law on Copyright in Works of Literature and Art and on Related Rights of 9 April 1936 (No. 111/1936), as last amended by Law of June 6th 2003, implementing Directive 2001/29/EC.

[41] **Belgium**: Law on Copyright and Neighboring Rights of 30 June 1994, as last amended by Law of 31 August 1998. (implementation bill pending).

[42] **Germany**: Law on Copyright and Neighboring Rights of 9 September 1965, as last amended by Law of September 10th 2003, implementing Directive 2001/29/EC.

[43] **Greece**: Law on Copyright, Related Rights and Cultural Matters of March 1993 (No. 2121/1993), as last amended by Law No. 3057/2002 implementing Directive 2001/29/EC.

[44] **Luxembourg:** Law on Copyright of 29 March 1972, as last amended on September 8th 1997. (implementation bill pending).

[45] **Netherlands**: Copyright Act of 23 September 1912, as amended by Law of 27 October 1972, and last amended by Law of 18 March 10 1993 (implementation bill pending).

[46] **Italy**: Law for the Protection of Copyright and Neighboring Rights No. 633 of 22 April 1941, as last amended by Decree No. 68/2003 implementing Directive 2001/29/EC.

[47] **Switzerland**: Federal Law on Copyright and Neighboring Rights of 9 October 1992, as amended by Law of 16 December 1994. Although not a EU member, Switzerland intends to follow EU legislation very closely, and may "impement" the Copyright Directive into national law.

[48] **United Kingdom**: Copyright, Designs and Patents Act of 1988 (Ch.48) of 15 November 1988; see also, The Copyright and Related Rights Regulations 2003 (No.2498/2003), implementing Directive 2001/29/EC.

[49] **Ireland**: Copyright Act of 2000; see also, The Copyright and Related Rights Regulations 2004 (No.16/2004), implementing Directive 2001/29/EC.

[50] **Denmark**: Consolidated Copyright Act of 2003 (No. 164 of March 12th 2003), after implementing Directive 2001/29/EC. **Finland**: Copyright Act Law No. 404 of 8 July 1961, as last amended by Law No. 365 of 25 April 1997 (implementation bill pending). **Sweden**: Act on Copyright in Literary and Artistic Works, Law No. 729 of 30 December 1960, as last amended by Law No. 1274 of 7 December 1995 (implementation bill pending). Although not part of the EU, we have also considered the copyright law of **Norway**: Act Relating to Copyright in Literary, Scientific and Artistic Works No. 2 of 12 May 12 1961, as last amended by Law No. 27 of 2 June 2 1995; see, also, Regulation

This is due not only to the fact that domestic teaching exceptions fail to expressly refer to distance education, let alone digital distance education; but rather to the specific language defining the scope of the teaching exceptions which is not fit to cover digital distance education. Let's examine this language.

- ***Reproduction vs. Public communication***

Some teaching exceptions exempt only the reproduction of works[51] (saying nothing about distribution[52]), and fail to include the right of "communication to the public", thus implicitly excluding digital distance education from its scope. This is the case of **Austria**[53], **Belgium**[54] and the **UK**[55]. Even when communication to the public is envisioned under an exception for teaching purposes, the specific language used clearly limits it to "physical" performances, plays or showings in front of a real audience (thus, not covering DDE) –this is the case of **Ireland**[56].

Concerning the Scope and Extent of the Provisional Act Relating to Photocopying, etc. of Protected Works for Use in Educational Activities (Royal Decree No. 297 of 15 February 1985) –since, as a EEA member, Norway must implement the Copyright Directive: implementation bill pending).

[51] For instance, **Austria** art.42(6), **Belgium** art.22(1)4°bis and 4°ter (the current implementation bill does not make any substantial change on the issue) and the **UK** sec.32.

[52] As an exception, see **Austrian** law: art.42(6) expressly exempts both the reproduction and distribution for teaching purposes. Which opens an interesting debate as to whether the students in a classroom do qualify as "public" in terms of distribution. Is this the reason why distribution is ommited in the other teaching exceptions?

[53] **Austria:** Art.42(6) "Schools and Universities shall be allowed to make and distribute copies of works for purposes of school use and/or teaching in the context of their academic activity, in the quantities required for a specific class or academic activity (reproduction for teaching purposes), on the supports provided for under paragraph 1 [paper and any similar supports] only for non-commercial ends. The authorization to reproduce works for use at school shall not apply to works which by their nature and designation, are intended for school use or teaching".

[54] **Belgium**: Article 22(1) : « Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (…)
4°bis.- la reproduction fragmentaire ou intégrale d'articles ou d'œuvres plastiques ou celle de courts fragments d'autres œuvres fixées sur un support graphique ou analogue lorsque cette reproduction est effectuée à des fins d'illustration de l'enseignement ou de recherche scientifique dans la mesure justifiée par le but non lucratif poursuivi et ne porte pas préjudice à l'exploitation normale de l'œuvre ;
4°ter.- la reproduction fragmentaire ou intégrale d'articles ou d'œuvres plastiques ou celle de courts fragments d'autres œuvres fixées sur un support autre qu'un support graphique ou analogue lorsque cette reproduction est effectuée à des fins d'illustration de l'enseignement ou de recherche scientifique dans la mesure justifiée par le but non lucratif poursuivi et ne porte pas préjudice à l'exploitation normale de l'œuvre; »
The current implementation bill (of *January 21st 2004)* does not make any substantial change on the issue :
Article 22(1) :« Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (…)
4°bis.- la reproduction fragmentaire ou intégrale d'articles ou d'œuvres plastiques ou celle de courts fragments d'autres œuvres, sur papier ou sur support analogue, au moyen d'une technique photographique ou d'une autre méthode produisant un résultat similaire, à l'exception de la partition, lorsque cette reproduction est effectuée à des fins d'illustration de l'enseignement ou de la recherche scientifique dans la mesure justifiée par le but non lucratif poursuivi et ne porte pas préjudice à l'exploitation normale de l'œuvre, pour autant que la source y compris le nom de l'auteur soit indiquée, à moins que cela ne s'avère impossible;
4°ter.- la reproduction fragmentaire ou intégrale d'articles ou d'œuvres plastiques ou celle de courts fragments d'autres œuvres sur quelque support que ce soit, lorsque cette reproduction est effectuée soit dans le cercle de famille et réservée à celui-ci, soit à des fins d'illustration de l'enseignement ou de recherche scientifique dans la mesure justifiée par le but non lucratif poursuivi, et ne porte pas préjudice à l'exploitation normale de l'œuvre, pour autant que la source y compris le nom de l'auteur soi indiquée, à moins que cela ne s'avère impossible;».

[55] **U.K.**: Sec.32 « (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, provided the copying (a) is done by a person giving or receiving the instruction, (b) is not by means of a reprographic process, and (c) is accompanied by sufficient acknowledgement., and provided that the instruction is for a non-commercial purpose »
The current text (as amended by the implementation Decree 2498/2003) is not very different from the previous one (only paragraph c) and the final one were added). Photocopying for teaching purposes is governed by sec.36; also the making of teaching anthologies is very precisely dealt with under sec.33.

[56] **Ireland:** The Irish Copyright Act of 2000 provides for an exception for purposes of instruction or examination which only covers the making of copies (sec.53), together with an exception to allow performing, playing or showing works in the course of activities of an educational establishment (sec.55) -which is clearly limited to "live" performances. On the other hand, the fair dealing provision of sec.50 for the purposes of research or private study is not enough to cover DDE, either: **Sec. 50.**—"(1) Fair dealing with a literary, dramatic, musical or artistic work, sound recording,

In **Switzerland**[57] and **Luxembourg**[58]**,** the teaching exceptions refer in general terms to "*use*", thus, following the language of art.10(2) of the Berne Convention. However, while Luxembourg's exception clearly covers digital distance education[59], the Swiss one does not (since the teaching use exception is envisioned only as a variety of private use, and its language seems to be limited to the context of "live" teaching)[60].

In **Italy**, art.70.1 (as amended by the implementation Decree[61]) clearly allows DDE: both the reproduction and communication to the public of fragments or parts of a work for educational purposes within the extent justified by that purpose and provided that it does not constitute competition with the exploitation of the work and that it has no commercial ends. Besides, art.15.2 reads: *"the performance or recitation of a work within the normal circle of ...a school, shall not be deemed a public performance provided that it has not been carried out with gainful intent".* The same happens in the **Netherlands**[62], where both the current Law

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film, broadcast, cable programme, or non-electronic original database, for the purposes of research or private study, shall not infringe any copyright in the work."

[57] **Switzerland:** Art. 19.1: "L'usage privé d'une œuvre divulguée est autorisé. Par usage privé, on entend : … (b) toute d'utilisation d'œuvres par un maître et ses élèves à des fins pédagogiques." Reproduction under this exception is subject to payment of an equitable remuneration to the author, which can only be asserted by the "approved collecting societies" (art.20.4). "*Read together, these provisions (of art.19) attempt to cope with advanced copying and recording technologies consistently with the intent behind article 22 in the 1922 Act which allowed for private copying. ...the true import of such exceptional provisions only allows them to be invoked where the user did not mean to reap a profit and, more broadly, where such uses would not have an adverse effect upon the copyright owner's market*" (see F. Dessemontet, "Switzerland" in International Copyright Law and Practice (P.E.Geller, ed.) Matthew Bender, 2000 at #8(2)(a)(i)).

[58] **Luxembourg**, Art. 13: "(1) The author's right in a literary or artistic work that has already been lawfully made available to the public shall not preclude the right to make quotations, in the original or in translation, to the extent justified by the purpose, provided that the quotations are compatible with fair practice, including quotations from newspaper articles and periodicals in the form of press reviews. (2) The same shall apply to the use of literary or artistic works, to the extent justified by the purpose, by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided that such use is compatible with fair practice. (3) Any such quotation or use shall be accompanied by a mention of the source and of the name of the author if it appears thereon."

[59] Notice that the current implementation bill modifies art.13 in order to accommodate it to that of art.5(3)a of the Copyright Directive, and thus, substitutes the term "use" by "reproduction and communication to the public"; See art.10: "Once the work, other than a database, has been lawfully made available to the public, the author cannot prohibit: …(2) the reproduction and communication to the public of works for illustration of teaching or for scientific research and to the extent justified by the non-commercial ends to achieve and provided that such use is according to good practices and that –unless it is impossible- the source included the author's name is duly indicated."

[60]

[61] **Italy**: Before the Decree No. 68/2003 implementing Directive 2001/29/EC, art.70(1) only covered reproduction for teaching purposes. The new text expresslsy extends the exception to communication to the public (which inlcudes digital networks) for teaching purposes provided the ends are non-commercial. Art.70(1): "The abridgement, quotation or reproduction of fragments or parts of a work and their communication to the public shall be free if they are made for the purpose of criticism or discussion, within the limits justified by such purposes and provided that they do not constitute competition with the economic exploitation of the work; if they are made for purposes of teaching or scientific research, the use must –in addition to the above- be made for illustration and non-commercial ends".

[62] **Netherlands**: Art.12: « The communication to the public of a literary, scientific or artistic work includes : … (5) A recitation, performance or presentation which is exclusively for the purposes of education provided on behalf of the public authorities or a non-profit making legal person, in so far as such a recitation, performance or presentation forms part of the school work plan or curriculum where applicable, or which exclusively serves a scientific purpose, shall not be deemed public. »

Art. 16 : «1.- The following shall not be deemed an infringement of copyright in a literary, scientifc or artistic works :
(a) the taking over of parts of works in publications or sound or visual recordings made for use as illustrations for teaching purposes, provided : 1º the work from which was taken over has been lawfully communicated to the public ; 2º the taking over is in conformity with that which may be reasonably accepted in accordance with social custom ; 3º the provisions of art.25 have been taken into account ; 4º the source is clearly indicated, together with the indication of the author if it appears in the source ; and 5º an equitable remuneration be paid to the author or his successors in title.

as well as the implementation bill in its current version, allow the reproduction and communication to the public of copyrighted works for teaching purposes. In **Germany**, coverage of DDE under the teaching exception has been made possible due to the Directive's implementation bill passed last year[63].

Greek law[64] provides for two separate exceptions covering the "reproduction" for teaching purposes and exams conducted in a school (art.21) and the "public performance and display of works" within the activities conducted (both by teachers and students) at a teaching institution (art.27). This one may be interpreted as covering DDE, yet, its application to DDE is not clear (it may well only cover theater and musical performances at school). The same "uncertainty", as to DDE being covered, is found in the laws of the **Nordic countries[65]**.

(b) communication to the public of parts of works by broadcasting a radio or television programme made to serve as an illustration for teaching purposes, provided : : 1º the work from which is taken over has been lawfully communicated to the public ; 2º the communication to the public is in conformity with that which may be reasonably accepted in accordance with social custom ; 3º the provisions of art.25 have been taken into account ; 4º the source is clearly indicated, together with the indication of the author if it apperas in the source ; and 5º an equitable remuneration be paid to the author or his successors in title. »

Under the implementation bill (version of March 2003) art.12(5) remains unchanged, and art.16 states : «1.- The reproduction or communication of a literary, scientifc or artistic work for the sole purpose of illustration for teaching shall not be deemed and infringement of copyright, to the extent justified by the intended, non-commercial purposes, provided : 1º the work from which was taken over has been lawfully made available; 2º the taking over is in conformity with that which may be reasonably accepted in accordance with social custom ; 3º the provisions of art.25 have been taken into account ; 4º insofar as is reasonably possible, the source including the author's name is clearly indicated; and 5º an equitable remuneration be paid to the author or his successor(s)."

63 **Germany**: Art. 52.a « (1) It is allowed to communicate to the public small parts of a work, short works or isolated articles of newspapers or periodicals, 1. for purposes of illustration for teaching in schools and universities only for the participants in a course ; or 2. only for a limited circle of persons for their scientific research; to the extent that the communication to the public is necessary for these purposes and is justified for non-commercial purposes. (2) The communication to the public of a work designed for teaching purposes can only be made with the autorisation of the author. The communication to the public of a filmwork can only be made with the autorisation of the author in the two years following the start of the exploitation of the film. (3) It is also allowed under paragraph 1, to make reproductions related to the communication to the public to the extent necessary for that purpose. (4) The communication to the public under paragraphs 1 and 2, as well as reproductions made in relation with it, grant a right to an equitable remuneration in favor of the author. These rights can only be managed by means of a collecting society."

64 **Greece**: Art.21: Reproduction for Teaching Purposes.- "It shall be permissible, without the consent of the author and without payment, to reproduce articles lawfully published in a newspaper or periodical, short extracts of a work or parts of a short work or a lawfully published work of fine art work exclusively for teaching or examination purposes at an educational establishment, in such measure as is compatible with the aforementioned purpose, provided that the reproduction is effected in accordance with fair practice and does not conflict with the normal exploitation. The reproduction must be accompanied by an indication of the source and of the names of the author and the publisher, provided that the said names appear on the source."

Art.27: Public Performance or Presentation on Special Occasions.- "The public performance or presentation of a work shall be permissible, without the consent of the author and without payment on the following occasions: (a) at official ceremonies, to the extent compatible with the nature of the ceremonies; (b) within the framework of staff and pupil or student activities at an educational establishment, provided that the audience is composed exclusively of the aforementioned persons, the parents of the pupils or students, persons responsible for the care of the pupils or students, or persons directly involved in the activities of the establishment.".

These exceptions were not altered the Copyright Directive implementation law 3057/2002.

65 Among them, only Denamrk has already implemented the Copyright Directive.

Denmark : Section 13. Reproduction Within Educational Activities- "(1) Photocopying, etc., for educational use may be made of published works and copies may be made by recording of works broadcast in radio and television provided the requirements regarding the extended collective agreement license contained in section50 of this Act have been met. The copies thus made may be used only in such educational activities which are covered by the agreement presumed in section 50. (2) The provision of subsection(1) concerning recording shall not apply to cinematographic works which are part of the general cinema repertoire of feature films except where only brief excerpts of the work are shown in the telecast. (3) Teachers and pupils may for educational purposes make recordings of their own performances of works. Such recordings may not be used for any other purposes."

Finland : Art. 14. Reproduction in educational activities- "Where an organization representing a large number of Finnish authors in a certain field has authorized the copying, by audio or video recording, on agreed terms, of a

- ***Digital copies? How many?***

Another obstacle is the extent to which **digital reproductions** are covered by the teaching exception? Some laws are not limited to any particular means of reproduction (i.e., Greece), thus allowing an interpretation in favor of digital copies to be made under the exception. Others expressly refer to "*paper and similar supports*" (i.e., Austria[66]) "*photocopying, or similar means of reproduction*" (i.e, Nordic countries[67]), or expressly exclude photocopying (i.e., UK[68]). In all these cases, domestic laws remain silent as to whether the copies made for teaching purposes may have been digitized from non-digital formats. Belgian law (as amended in 1998) is probably the only one so far that expressly allows the making of digital copies (also from non-digital formats) for teaching purposes[69] -although, as we saw, it is of little use since the exception only covers reproduction.

The next question is **how many (digital) copies** can be made? If the domestic exception expressly allows the making of as many copies as students per class[70], there is no reason to believe that it would not apply to a limited (i.e. password-accessed) virtual classroom. A more generic solution is to allow digital copying for teaching purposes provided that it does not prejudice the normal exploitation of the work[71]. Do digital

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disseminated work included in a radio or television broadcast for use in educational activities or in scientific research, the recipient of the authorization may on corresponding terms make copies of another work in the same field, included in a broadcast, by an author not represented by the organization. It is permitted, in connection with educational activities, to make copies by direct audio or video recording of a disseminated work performed by a teacher or a student for temporary use in those activities. A copy so made may not be used for any other purpose.
Parts of a disseminated literary work or, when the work is not extensive, the whole work may be incorporated in a test constituting part of the matriculation examination or in any other comparable test. A disseminated work of art may be reproduced in pictorial form for the same purpose."

Norway : Sec. 13. Making Copies for Use in Educational Activities- " Any person may for use in his own educational activities, by photocopying or similar means of reproduction, make copies of a published work, as well as make a fixation of a work that is included in a broadcast, if he fulfills the conditions for an extended collective license pursuant tosec.36, first paragraph. Works of pictorial art and photographic works may only be photocopied from a reproduction in a book, periodical, newspaper or similar printed publication. Nor does this provision confer a right to make a fixation of a cinematographic work which must be perceived as also intended for uses other than presentation via television unless only minor parts of the work are used in the broadcast. Fixation centers which are approved by the Ministry may, for use in educational activities, make fixations as specified in the first paragraph, if the center fulfills the conditions for an extended collective license pursuant to sec.36, first paragraph. Copies made pursuant to the first and second paragraphs may only be used in educational activities covered by the agreement under section 36. The King shall issue regulations concerning the storage and use of fixations. The King may decide that schools and other educational institutions may make fixations for time-deferred use free of charge. Teachers and pupils may make fixations of their own performances of works for educational use. Such fixations shall not be used for other purposes."

Sweeden : Art. 13. Reproduction Within Educational Activities- "For educational purposes, copies of published works may be prepared by means of reprographic reproduction and recordings made of works broadcast by sound radio or television if an extended collective agreement license applies under art.26i. The copies and recordings thus made may be used only in those educational activities which are covered by the agreement forming the basis for the extended collective agreement license. The first paragraph does not apply if the author has filed a prohibition against such reproduction with any of the contracting parties."

[66] **Austria**, art.42(6).

[67] The **Nordic countries** (Denmark art.13.1, Norway art.13, Sweden art.13).

[68] The **UKCA** (sec.32.1) : "provided the copying ... (b) is not by means of a reprographic process".

[69] **Belgian** law provides for twin teaching exceptions to the reproduction right: one for works on a graphic or analogue medium (art.22(1)4bis) and another one for works on "*a medium other than graphic or analogue*", i.e., digital copies (art.22(1)4ter: "*la reproduction fragmentaire ou intégrale d'articles ou d'oeuvres plastiques ou celle de courts fragments d'autres oeuvres fixées sur un support autre qu'un support graphique ou analogue lorsque cette reproduction est effectuée à des fins d'illustration de l'enseignement ou de recherche scientifique dans la mesure justifiée par le but non lucratif poursuivi et ne porte pas préjudice à l'exploitation normale de l'oeuvre*."). The implementation bill (in tis current version) will change the language but not the substantial meaning of these exceptions.

[70] **Austria**, art.42(6).

[71] **Belgium**, art.22(1)4ter.

copies made for teaching purposes prejudice the normal exploitation of the work? Are they more prejudicial than reprographic copies made for the same purposes? The Copyright Directive acknowledges the different treatment exceptions should be given when applied to traditional media and digital media[72].

- ***Which works? To what extent?***

Some domestic laws do set limitations as to **extent and nature of the works** covered by the teaching exception.[73] Some laws expressly exclude educational works[74].

- ***Who is eligible to benefit from the exception?***

As to **eligibility**, domestic teaching exceptions tend to be very specific (far more than the Directive). On the one hand, the language usually refers to **schools, universities or educational establishments**, and is related to face-to-face teaching activities: educational premises, classroom, etc[75]. This language poses a double problem: on the one hand, to ascertain the porosity of these terms, at least for purposes of the teaching exception; and on the other, whether digital premises, digital schools, digital establishments and digital classrooms (that do not exist in the physical world) may still be included? The issues may be solved differently in different countries; and since the exception in the Directive does not forbid it, Member States may chose to maintain their particular restrictive language when implementing it.

On the other hand, since the exceptions in art.5.3 (as well as in art.5.2) set out the minimum conditions for their application, the "non-commercial purpose" of the teaching activity is a minimum condition: Member States cannot obliterate it in favor of commercial teaching activities. If not mentioned in the domestic teaching exceptions pre-dating the Copyright Directive, Member States will have to introduce such a requirement[76].

Despite that, art.5.3(o) allows Member States to maintain existing exceptions beyond those listed there, but only for the "analogue world". Thus, although a wider copyright exception for teaching purposes could survive to exempt teaching activities in the physical classroom, the same may not be true when the same teaching activity is done by means of a DDE network.

- ***For what purposes?***

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[72] The public interest behind the teaching exceptions is the same in the analog and digital world, therefore, the exceptions should equally apply in both media. Yet, since the potential prejudice is quite different in both worlds, they should be treated differently, and be subject to different requirements.

[73] **Germany**, art.52.a(1) only covers the making of "*copies of small parts of a printed work or of individual contributions published in newspapers or periodicals*". In **Greece**, the only works that may be reproduced for teaching purposes are articles published in reviews or periodicals, short parts of works and works of art previously disclosed (art.21); instead, all works may be communicated to the public and displayed as part of teaching activities (art.27). In **Belgium** (art.22(1)4ter): "*reproduction fragmentaire ou intégrale d'articles ou d'oeuvres plastiques ou celle de courts fragments d'autres oeuvres"*

[74] **Germany**, art.52.a(2): "*The communication to the public of a work designed for teaching purposes can only be made with the autorisation of the author*"; **Austria**, art.42(6): "works which by their nature and designation, are intended for shool use or teaching" are excluded from the teaching exception. This makes sense within the context of the Austrian exception for teaching purposes which allows the reproduction and distribution of as many copies as required for a certain class or lecture: if teaching materials were covered by the exception, schools could purchase one copy of a textbook and make copies for all their students. Where the teaching exception is not so broad, the need for the exclusion of works destined for instruction is not so urgent.

[75] The teaching exception in **Italian** law (art.15) refers to "*the normal circle of ... a school ... provided that it has not been carried out with gainful intent*". The **Austrian** teaching exception (sec.42.6) refers broadly to "*schools and universities*". *See* also **Greece** arts.21 and 27.

[76] See, **Germany** art.52.a(1). Still, some implementation bills use other language (i.e., Belgium, art.22(1) "*but non lucratif*") which may lead to intepretation different than the Directive's "*non-commercial purposes*" or "*but non commercial*".

Domestic teaching exceptions tend to use similar language[77] to that of the Directive, and don't give much guidance as to how to interpret "teaching", "illustration for teaching", etc. –thus, sharing similar interpretation problems.

- ***Subject to remuneration?***

As we saw above, the Copyright Directive leaves ample room for members to decide on the remuneration of teaching uses, always within the limits set by the three-step-test. Germany and the Netherlands require compensation; Italy, Luxembourg, and Belgium do not.

As pointed above, some domestic laws provide for no teaching exception. **France**[78] and **Spain**[79] include teaching purposes solely under the quotation exception[80]. **Portugal**[81] has neither an exception for teaching purposes, nor a quotation exception (in fact, quotations are explicitly prohibited without the author's consent, art.79). None of them has implemented the Copyright Directive, but the chances of a teaching exception being introduced are very narrow[82].

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[77] For instance, "the purpose of shool use and/or teaching" (**Austria** art.42.6), "illustration for teaching" (**Germany** art.52.a, "à titre d'illustration de l'enseignement" (**Luxembourg** art.13.2) and "à des fins d'illustration de l'enseignement" (**Belgium** art.22.1.4bis and 4ter)
As far as the **Nordic countries** (Denmark art.13.1, Norway art.13, Sweden art.13), they allow the reproduction of published works "*for educational use*" or "*educational activities*" or "*educational purposes*", subject to (remunerated) collective licensing, which would seem to allow for a wider coverage of all teaching uses, also of digital distance teaching ones. Finland allows, subject to collective licensing, the "*making … of copies by audio or video recording of a disseminated work included in a radio or television broadcast, for use in educational activities or in scientific research*" (art.14); however, notice that it only applies to audio and video reproductions of broadcast works.
Some laws provide for a similar exception to the reproduction right for exams. And where no such exception exists, it could be easily argued that the exception for teaching or educational purposes should also cover exams uses.
[78] **France**: Law on the Intellectual Property Code of 1 July 1992 (No. 92–597), as last amended by Laws Nos. 94–361 of 10 May 1994, 95–4 of 3 January 1995, and 97-283 of 27 March 1997 (implementation bill pending).
[79] **Spain**: Consolidated Text of the Law on Intellectual Property approved by Royal Legislative Decree 1/1996 of 12 April 12 1996, as last amended by Law 5/1998 of 6 March 1998 (implementation bill pending).
[80] While no general exception allowing the unauthorized use of preexisting works for teaching purposes exists under **Spanish law**, there is one regarding databases: Art.34.2(b): "*where the use is made for the purposes of illustration in teaching or scientific research, provided that it is made to the extent justified by the non-commercial purpose pursued, and that in all cases the source is mentioned*". And the same exception (with exact language) is provided for the *sui generis* right granted to the maker of the database against unfair extraction of its content (see art.135). This means that, under Spanish law, a professor is allowed to make the compilation of 30 judicial decisions from a database and post it in the classroom e-reserve website without any license, just mentioning the source of the extraction; instead, she cannot do so when the extraction is of 5 (or 1) article from a Westlaw-like database because there is no teaching exception for works in general, other than databases. Rather than taking the opportunity of implementing the Database Directive, to design a whole teaching exception (in harmony with the BC, and avoiding a special treatment for databases), the Spanish legislator instead opted for the minimum required (implementing the teaching exception only for databases).
[81] **Portugal:** Code of Copyright and Related Rights, Law No. 45/85 of 17 September 1985, as last amended by Law No. 114/91 of 3 September 1991 (implementation bill pending). Current Portuguese law only provides for an exception concerning reproduction of lectures given by professors (art.79), in addition to the general private use exception (art.81). However, the current version of the implementation bill introduces an exception to reproduction for teaching purposes, which will be clearly inssuficient to cover DDE: *"Art.75(2): The following uses of the work are allowed, without the consent of the author: …(f) a partial reproduction in teaching institutions, provided that such reproduction and the corresponding copies are destined exclusively for the teaching purposes in the institutions and are not for profit."*. It is worth mentioning that paragraph (g) of the same article introduces a quotation exception.
[82] **French** law has always been reluctant to admit exceptions: no teaching exception exists in the current law, nor does the last version of May 22nd 2003 of the implementation bill provide for any. In **Spain**, the last government presented a draft of the implementation bill on November 2002, which introduced a teaching exception with the exact text of art.5(3)(a) Copyright Directive. The opposition rose by both collecting societies and authors (either misinformed or for political reasons) brought the project to a stall. The new government will most likely drop the

In short, only a few domestic teaching exceptions (Italy, Germany, Luxembourg, and the Netherlands) may cover –to some extent- digital distance education; Most of them (Austria, Belgium, Switzerland, Ireland and the U.K., let alone, Spain, France and Portugal) do not cover DDE, or are uncertain (the rest).

2- Other exceptions: Quotations, the making of teaching compilations and private use.

Nevertheless, a teaching exception is not only one that may have an impact on DDE. Other exceptions may also be applied on that field: quotations, the making of teaching compilations, library exceptions, and even the private use/copying exceptions. Let's also see them all, briefly.

The quotation exception usually covers the reproduction or use of a work--usually, only a portion--for criticism and scientific research. For our study, the quotation exception is especially important in those countries where no specific exception is provided for teaching purposes (France and Spain), or where the existing teaching exception is not applicable to the digital world (see supra).

2.a.- Quotations

The **Berne Convention** provides for an **imperative quotation exception;** in fact, this is the only imperative exception in the whole Berne Convention, thus proving its fundamental status:

> *"**Art.10(1).-** 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."*

The quotation exception is neither restricted to any specific uses,[83] nor to any specific purposes, nor to the reproduction right or any particular means of exploitation. Therefore, it should also cover quotations made within a digital context and networked environment. The quotation exception applies to all kind of works, provided they have been "*lawfully made available to the public*," without any limitation as to the amount that may be quoted (only the "*extent* [of quotation] *justified by the purpose*" will be allowed in each case). Therefore, we must conclude that the BC quotation exception of art.10(1) applies to digital distance education.

Also the ***EU Copyright Directive*** provides for a specific quotation exception. According to **art.5.3(d)**, member states may provide for exceptions or limitations to the rights of reproduction and communication to the public, in the case of:

> *"quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns our to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.*"

Since it covers both rights, it is perfectly applicable to quotations made over the Internet. Since, there is no limitation as to who may benefit from this exception, it must be concluded that everybody, both teachers and students, are allowed to use somebody else's work for purposes of criticism or review, provided it is

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whole bill and make a *de minimis* implementation of the Directive (maintaining the current *status quo*, and wiping off any chance for a teaching exception).

[83] The exception originated in the Rome Revision Conference in 1928 with the following language: "analyses or short textual quotations of published literary works for the purposes of criticism, polemical discussion or teaching." The present wording was introduced at the Stockholm Conference. No list of purposes was ever adopted (because such list could not hope to be exhaustive), but it is clear that quotations for "scientific, critical, informatory or educational purposes" are within the scope of article 10(1) of the BC. *See* Ricketson, *op.cit. supra*, §9.22 n.3, at 492-493.

done within the limits set in the exception. Apart from the requirement that the quoted work must have "been lawfully made available to the public," nothing else is said in as to the extent and nature of the works covered by the exception. Silence implies that any work could be quoted in its entirety, provided it is done "in accordance with fair practice, and to the extent required by the specific purpose." However, the very concept of "quotation" already implies at least some limitation as to the extent of the work that may be used without authorization. Quotations are exempted for the purposes of criticism or review. However, since the wording "such as" implies that the list of examples in art.5.3(d) is non-exhaustive, quotations may also be made for teaching purposes, either in the course of the instruction or in a teaching anthology.

At a **domestic level in Europe**, with the exception of Portugal, quotations are allowed in all countries. However, the scope of the quotation exception may be very different depending on the domestic law. Although some countries have opted for a broad quotation exception that is not limited to any specific purposes[84], most of them refer to specific purposes –among them, teaching or education[85]. In principle, the quotation exception is well suited to allow some of the unauthorized uses of works that are made as part of the instruction, especially where the use is made for purposes of review or analysis, etc. This would be especially true if quotations were allowed for all "uses" (regardless of whether it involves reproduction, communication to the public or transformation[86]), in all media (analogue and digital), and for all kind of works. Yet, this is not always the case. Unlike the Directive, the quotation exception in domestic laws tends to be limited as to the extent, usually in connection with the nature of the quoted work[87].

Excursus on the interaction of the three levels of quotation exceptions.-
It is important to notice the compulsory nature of this exception: Member Countries must adopt it, at least in relation to foreign works claiming protection under the BC. Then, how does the quotation exception interact with the other exceptions in the BC (namely, the teaching exception in article 10.2), as well as with the quotation exceptions envisioned in domestic laws and in the EU *Copyright Directive*? It could be argued that, since the BC already provides for a specific

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[84] For instance, **Luxembourg** art.13.1, and **Italy** art.70.1. Also in the **Nordic countries,** the quotation exception is not limited to any specific purposes: Denmark art.22: "*A person may quote from a worl which has been made public, in accordance with proper usage and to the extent required for the purpose."* Also, in similar terms, Finland art.22.

[85] For instance, **France** Article L122-5: "Once a work has been disclosed, the author may not prohibit: … 3°. on condition that the name of the author and the source are clearly stated: a) analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated"; **Belgium** Art.21: "*short quotations ... for the purpose of ... teaching or in scientific -scholarly- works*"; **Spain**: Art. 32: "Quotations and Summaries.- It shall be lawful to include in one's own work fragments of the works of others, whether of written, sound or audiovisual character, and also to include isolated works of three-dimensional, photographic, figurative or comparable art character, provided that the works concerned have already been disclosed and that they are included by way of quotation or for analysis, comment or critical assessment. Such use may only be made for teaching or research purposes and to the extent justified by the purpose of the inclusion, and the source and the name of the author of the work shall be stated."

[86] In fact, some national quotation exceptions require or imply (like the Directive does) that the quoted work must be somehow commented, analyzed or criticized in another work: it must be used as a basis for a subsequent "work". For instance, **Spain** art.32, **France** art.L122-5, **Greece** art.19. One may assume that this requirement has been loosely applied to teaching activities in a live class, or at least, it has never seemed to be an impediment to coverage under the exception for non-written quotations that take place during instruction in a live class. This particular condition of the quotation exception was recently addressed by the French *Cour de cassation* in the controversial "Microfor" case: based on the "informative character" of the works quoted, the court allowed the incorporation into a database of materials drawn from newspapers "*without a commentary or the personal development of its author, by bringing together and classifying brief quotations taken from preexisting works*". Would the same stand when the works quoted do not share such an "informative character"? (*See* André Lucas and Robert Plaisant, "France," International Copyright Law and Practice (Paul Edward Geller & Melville B. Nimmer, eds.) §8(2)(a)(ii) at FRA-123).

[87] This limitation has been subject to an endless debate by the jurisprudence of some countries (for France, see André Lucas, Traité de la Propriété Littéraire & Artistique 311 (1994); for Spain, see Carmen Pérez de Ontiveros Baquero, Comentarios a la Ley de Propriedad Intelectual, (coord. Bercovitz), Tecnos, Madrid, 2d ed., at 610-611 (1997).

teaching exception in article 10(2), it is not proper to extend the scope of the quotation exception to also cover teaching uses.[88]

A similar question arises concerning the quotation exceptions envisioned in domestic laws which are generally more restrictive than the one in article 10(1) BC. Are they contrary to the BC? As Ricketson explains, the debate is largely theoretical: whether, despite being an exception, art.10(1) should also be considered as a minimum of protection to the author (and therefore, Member States may restrict the quotation exception also for Union nationals and works protected under the BC) or instead, precisely because it is an imperative restriction to the authors' rights, Member States cannot reduce its extent in favor of Union authors and works (otherwise, there is no point in inserting restrictive provisions into the Convention if national laws were free to annul them by a contrary stipulation) [89]. Ricketson prefers this latter approach:

> *It will be contrary to the Convention for national legislation to provide protection in a case where this has been specifically prohibited. In the same way that there is a principle of minimum of protection that operates under article 19 in favor of Union authors, so (it can be argued) there is a corresponding principle of maximum protection to be implied in those few cases where the Convention limits or excludes protection.*[90]

Therefore, the quotation exception that Member States should apply to protect foreign Berne Union nationals and works is that of article 10(1) BC; any domestic quotation exceptions (usually more restrictive)[91] being only applicable to purely domestic scenarios of copyright protection.

How does this work with the EU *Copyright Directive*? Given that the BC quotation exception is a mandatory exception (among Berne Union Members), the EU should never provide for a quotation exception that is narrower than the BC one. The good news is that the EU *Copyright Directive* quotation exception of art. 5.3(d) and the BC one are very similar in scope, so there should be no major inconsistencies in their interpretation and application. The bad news, that the EU quotation exception is not compulsory for Member States, which are free to keep or introduce in their laws a narrower quotation exception.

To summarize, despite being fundamental for bringing most unauthorized uses of copyrighted works for teaching purposes under the legal umbrella, quotation exceptions prove to be insufficient *per se* to cover the whole uses of DDE.

2.b.- Teaching compilations.

Most uses of copyrighted works made as part of distance learning conducted over the Internet, results in the making of a "teaching compilation". In the traditional sense, we all know what a teaching compilation (anthology) looks like—a list of preexisting materials selected and arranged in order to be used as part of the instruction. In the analog world, it is easier to distinguish between materials used in the course of instruction (used during the class)[92] and a compilation of materials for teaching purposes that the student gets before or during "class". In DDE, both barriers easily break down: all uses that are part of the

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[88] Instead, the opposite could hold true: since quotations are already covered by the broad -and mandatory- exception in Berne Convention art. 10(1), the teaching exception in art.10(2) becomes more relevant concerning teaching uses (and teaching compilations) that do not fit under the quotation exception.

[89] This debate only affects three clear imperative restrictions under the present text. Among them, the making of quotations under Berne Convention art. 10(1).

[90] *See* Ricketson, *op.cit. supra*, §12.17-18, at 681.

[91] *See, e.g.,* **France** art.L122-5(3)(a).

[92] For instance, the professor writes it on the blackboard, reads the poem to the students or shows the graphic work to them, or even distributes a literary text with some words missing to be filled out by students.

teaching necessarily entail a reproduction on a web page[93], and all these reproductions made for teaching purposes end up conforming a teaching compilation that students may access during the course.[94]

As we pointed above, and without relinquishing a strict interpretation of copyright exceptions, the language "*publications, broadcasts or sound or visual recordings*" of **art.10(2) Berne Convention** seems to be more favorable to online teaching than to live teaching, for two reasons. First, the specific reference to "publications" leaves no doubt that the creation of compilations (anthologies) for teaching purposes is covered by the exception.[95] Second, the acceptance of "broadcasts" clearly implies the acceptance of distance education under the exception.[96]

Yet, does art.10(2) BC cover DDE and more specifically, web-based digital compilations intended for teaching? Once again, the legislative history of this article may provide some help. The intent behind the introduction of recordings and broadcasts at the Stockholm Revision (initially, only publications were envisioned in the exception) was to enable educators "to take full advantage of the new means of dissemination provided by modern technology."[97] Furthermore, the Stockholm Conference expressly accepted that educational broadcasts would be covered by the exception even if received by a much larger section of the general population than the public for which the instruction was intended.[98] Both issues (the legislator's intent that educators could take advantage of new means of dissemination, on the one hand, and the express acceptance that educational activities may be received by a public other than intended, on the other) clearly favor the conclusion that, in principle, DDE (and digital teaching compilations) should also be covered under the exception, provided of course that these uses are made "by way of illustration for teaching" and that "such utilization is compatible with fair practice."

Finally, we should not forget that unlike the compulsory quotations exception of art.10(1) BC, article 10(2) BC only sets the limits within which such regulation may be carried out;[99] under the BC, the use of works

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[93] The "place" where the compilation of materials is posted should not be relevant to qualify under an exception: whether it is in the "classroom e-reserve" (a compilation of material necessary for the teaching, discussions and exercises throughout the course, as well as reading material) or in the "Library e-reserve" (provided that it is material for a particular course and not the library general catalog in digital format) or in any storage disk space shared by the participants in the course. What is relevant is that the material is used for teaching and that it is only available to students registered for that course

[94] It could be argued that a teaching anthology must be compiled as such from the very beginning. By definition, a compilation (an anthology) requires a previous selection (and to some extent, some "arrangement") of the material it comprises; in other words, the comilation must be a "work" in itself (resulting from a selection or some other creative input). Accordingly, the material compiled (by students) in a storage disk or a collective message board would hardly qualify as a teaching compilation (unless we are willing to accept that the selection and arrangement is done as a collective or joint work).

[95] See Ricketson, *op.cit. supra*, §9.27 n.7, at 499: "[I]n many instances these will, by their very nature, fall within the scope of publications made for teaching purposes under article 10(2)."

[96] As Ricketson concludes: "there is no reason to exclude [correspondence courses where students receive no face-to-face instruction from a teacher] from the scope of "teaching" for the purposes of article 10(2)." *See* Ricketson, *op.cit. supra*, §9.27 n.3, at 498.

[97] *See* Ricketson, *op.cit. supra*, §9.27 n.5, at 498: "In this regard, it should be noted that sound and visual recordings includes tapes and videograms, as well as phonograph records and cinematographic films". What about digital records (CDs, DVDs... etc.)? In principle, there seems to be no reason not to include them as "sound and visual recordings".

[98] *See* Ricketson, *op.cit. supra*, at 498-499: "...a particular problem arises with respect to broadcasting, that does not occur in the case of publications and recordings. It is easier to control the destination of the latter so as to ensure that they are used on ly for teaching purposes. An educational broadcast, however, may be made to a far wider section of the public than those for whom the instruction is intended. This possibility concerned the French delegation at the Stockholm Conference who sought therefore to limit the scope of the exception to educational broadcasts carried out in teaching establishments or in schools. By a vote of 19 to 8 (with 6 abstentions), Main Committee I decided against the imposition of any restrictions on broadcasting. Accordingly, the inclusion of works in a broadcast for schools and other educational institutions will be permitted by art.10.2, even where the broadcast is receivable by a much larger section of the general population. Furthermore, the exception does not only apply to the making of the broadcast itself, but to the public performance of that broadcast, for example, in the school room or lecture theatre."

[99] *See* Ricketson, *op.cit. supra*, §9.27 n.1, at 496.

for teaching purposes still remains a matter for national legislation. Therefore, even if we agree that web-based teaching compilations are also included under article 10(2), countries are free to enact (or extend) a teaching exception for digital distance education, always within the limits of the three-step-test. In addition, EU countries will now be constrained by the teaching exception provided for in the *Copyright Directive*.

None of the exceptions provided for in art.5(2) and (3) of the ***Copyright Directive*** expressly envisioned such uses. Nevertheless, it can be argued that the reason why the EU *Copyright Directive* contains no teaching compilations exception is because they are already covered under the teaching exception in article 5.3(a). In fact, in 1997, the Commission expressly mentioned the "compilation of an anthology" as an example of teaching uses that may fall under art.5.3(a).[100] Unfortunately, no other specific reference to teaching anthologies can be found in subsequent legislative history of this exception--either to exclude or confirm it--but nothing in the language of the *Copyright Directive*'s teaching exception seems to deny such a possibility.

Since in a DDE context it is very difficult to distinguish between material that is "used in the course of the instruction" and a "teaching anthology", the all-encompassing solution of art.5.3(a) makes sense. Provided the use is for teaching purposes, it may be exempted, no matter whether the material has been used separately (i.e., it is attached to a message sent or posted by the professor) or it is presented in an anthology-like format available to students during the course (i.e., in a website accessible to registered students).

However, this does not mean that all teaching compilations are covered by the teaching exception: only those that are used for teaching purposes and that comply with the requirements of the teaching exception (among them, the non-commercial purpose [101]), as well as the three-step-test (art.5.5 Copyright Directive). Therefore, posting selected materials for teaching purposes, available on-line to limited users and with copy restrictions (so as to avoid subsequent copies by recipients), and provided remuneration is paid to their authors, could perfectly be allowed under the Directive's teaching exception.

The inclusion of teaching compilations under the Directive's teaching exception sharply contrasts with the solutions existing in **domestic laws**.

Droit d'auteur systems tend to be rather vague about the compilation of pre-existing works for teaching purposes. Some remain silent (i.e. France and Spain). Some expressly subject such use to the author's consent, while alive[102]. And the rest contain some kind of provision (either an exception or a compulsory license) allowing the unauthorized (not necessarily free) reproduction of preexisting works in anthologies or compilations intended to be used for teaching purposes[103]. The extent and conditions of such unauthorized use may vary; and what is more important, its application to cover digital web-based

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[100] *See* the Explanatory Memorandum accompanying the Commission's initial Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 10 December 1997, COM (1997) 628 final, at 40.

[101] The requirement of non-commercial purpose may have different outcomes depending on the format of the teaching use, or specially on the effect of the teaching use (considering the conditions of access and use of the material, etc.)

[102] For instance, in **Belgium**, art.21.3 allows such use in educational anthologies after the death of the author provided that moral rights are respected and an equitable remuneration is paid.

[103]For instance, **Greece** (art.20: a previously published work, constituting a small part of an author's total creation, may be reproduced in educational books used for teaching in primary and secondary schools; after his death, it may be freely reproduced in an anthology along with other texts of other authors without his heirs' consent and no royalties are due) and **Italy** (art.70.2: the reproduction of works in anthologies for educational use cannot exceed the extent specified by Regulations). As a general rule, the reproduction in teaching anthologies is subject to remuneration of the author.

teaching anthologies remains unclear (even after implementing the Directive): despite the technology-neutral language[104], most of them only envision the reproduction (and distribution) right.[105]

Instead, *copyright* laws set detailed conditions and limitations to the amount and extent of reproduction of preexisting works in teaching compilations[106], fostering -in excess of that copying- the administration of compulsory licenses to cover the compilation of teaching anthologies[107]. As a variant to the compulsory license regime, Nordic countries[108] allow the reproduction of "*short passages*" or "*minor portions*" of preexisting works in compilations to be used in classroom instruction (provided that five years have elapsed from publication), by means of "extended collective licenses"[109].

Once again, since the EU exception allows for a wider scope than any of the domestic ones, Member States are free to keep, modify or enact teaching anthologies exceptions, accepting the language (and full scope) of the Directive teaching exception, or a narrower one. However, when a EU member implements the teaching exception of art.5.3(a) as it is (using the same language), its scope should necessarily be that of the Directive (thus, including teaching compilations).

2.c.- Library privileges.

The **EU Copyright Directive** also provides for a specific exception regarding library uses[110]. We will briefly examine it in order to see its possible effect on teaching purposes.

> ***Art.5.2(c)*** *"in respect of specific acts of* ***reproduction made by publicly accessible libraries****, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;"*[111]

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[104] In general, the language "*composite work*", "*compilation work*", "*collection intended for use in educational establishments*" or even "*anthologies for scholastic use*" (**Italy** art.70.2), would easily allow its extension to web-anthologies of teaching materials.

[105] For instance, **Greece** (art.20: reproduction) and **Italy** (art.70.2: reproduction).

[106] For instance, the **UKCA** exception which allows the inclusion of short passages of literary and dramatic works in collections for use in educational establishments, is subject to so many restrictions that seems to be of little utility –for our purposes- (sec.33): in addition to the difficulty of determining what is a "*short extract*", the work from which it is taken must itself not be intended for use in an educational establishment, no more than two excerpts from copyright works by the same author may be published in collections by the same publisher over any period of five years, and such collections must consist mainly of material in which no copyright subsists.

[107] In the absence of a license authorizing such use, educational establishments may copy -for purposes of instruction- one per cent of a literary, dramatic or musical work per quarter of the year. According to sec.36: "*Reprographic copies of passages from published literary, dramatic or musical works may, ...be made by or on behalf of an educational establishment for the purposes of instruction*" … provided that "*not more than one per cent of any work may be copied … in any period (of three months)*" and that no licenses authorizing such copying were available. A similar exception is provided "*for the educational purposes of the establishment*" regarding the "*recording of a broadcast or cable programming*". According to an Order n.1068 of 26/06/1989, universities are considered "*educational establishments*" under all these sections (32, 33 and 36) of the Copyright Act.

[108] **Denmark** art.18.1, **Sweden** art.18, **Finland** art.18, **Iceland** art.17.

[109] When a collective organization representing a "*substantial portion*" of national authors within a particular field enters into an agreement on photocopying with a user (here, an educational institution), that agreement is deemed to cover all works within the same field, regardless of whether their authors are members of the collective organization or not. As a result, the proceeds of the licenses do not go directly to the authors or copyright owners but rather are used to fund several domestic social programs. *See* Jane C. Ginsburg, *Reproduction of Protected Works for University Research or Teaching*, 39 Journal of the Copyright Society of the USA 181 (Spring 1992), at 194.

[110] Some domestic laws (especially in *copyright* systems) contain very detailed provisions regarding the reproduction and further use of works by libraries, archives and museums. But the examination of these provisions goes beyond the scope of this paper.

[111] The initial Commission Proposal only referred to "*establishments accessible to the public*". The Parliament (in its 1st reading) introduced both the condition that it be "*for archiving or conservation purposes*" and the wording "*such as libraries and archives and other teaching, educational or cultural establishments*". The Council modified both issues: dropping the "*archiving and conservation purposes*" in favor of a more **flexible formulation** (that would allow any

The exception contains no limitations as to nature and extent of works, or as to specific purposes of the use. The only conditions being those of eligibility and categorization. The interpretation of "***publicly accessible***" in order to decide eligibility under the exception may be difficult. Is it equivalent to public libraries or to non-profit libraries? How publicly accessible is an on-line library?[112] What about educational establishments: how are they defined?

Notice also that this exception is **only to the reproduction right**. On the one hand, since nothing in the exception restricts it to analogue reproductions made by these establishments, it must be concluded that **digital copies** can lawfully be made under the exception, provided that no economic gain is pursued[113]. On the other, it does not cover communication to the public. Recital 40 clearly states that "*such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter*"[114]. Therefore, although "virtual" libraries may be covered by the exception to make digital copies, they cannot post them or maybe even transmit them to their students or users[115].

This exception is **not subject to fair compensation**, although Member States may require it when implementing it (and let's not forget that the three-step-test must at all times be complied with).

The many different issues that the application of this exception to DDE may raise are beyond the scope of this article[116]. What is important (and usually forgotten) for our study is the interaction between library exceptions and teaching exceptions, as far as DDE is concerned. To what extent library copying exceptions help/assist the teaching activities conducted through the Internet (especially under teaching exceptions, but also under licenses)? All works to be used for teaching purposes (either under a teaching exception or under license) must be obtained from somewhere, and libraries are usually the ones to provide the works to be used for teaching purposes. Although solutions adopted under domestic laws diverge, one premise holds true: teaching purposes are never regarded in library copying exceptions[117]. In our opinion, teaching uses should be included under the library exception. Otherwise, a work that may be reproduced for teaching purposes without any authorization, would still need of a license to be obtained from the library[118]. Besides, why should a professor be allowed to obtain an exempted reproduction from

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acts of reproduction -also in digital means-, as long as without economic or commercial advantage), and setting -instead- an **exhaustive list of establishments** benefiting from the exception (instead of all establishments accessible to the public, in general).

[112] Of course, one could argue that accessibility does not only imply a physical access but also a virtual one? In that case, when is a virtual library publicly accessible: when no password is required? When no membership fee is paid?

[113] Although it is not clear whether the requirement that it not be "*for direct or indirect economic or commercial advantage*" applies to the institution or to the act of reproduction itself.

[114] It remains to be seen how is "*on-line delivery*" defined: does it also include the sending of a work by attached mail or only through uploading and downloading it from a server?

[115] Digital copies (made under the exception, without the owner's consent) can only be safely used within the library "premises". This means that, *de facto*, electronic libraries (without any physical facilities) are being discriminated (as compared to physical libraries) since they cannot offer their users/students the same services that the physical library does(at least, not without a license). The same "discrimination" against virtual libraries may be found in art.5.3(n) when providing for an exception to the right of communication to the public (or making available) "*for the purpose of research or private study*", which only applies to "*by dedicated terminals on the premises of establishments referred to in paragraph 2(c)*". Once again, we'll have to wait for an interpretation: as to whether the establishments in art.5.2(c) are only those with physical premises or while art.5.2(c) covers both physical and virtual libraries, art.5.3(n) only covers the former.

[116] I.e., whether users can get digital copies covered by library exceptions, whether digital copies may be made for preservation purposes and to e-reserve collections to improve the services they render, whether digital copies may be provided through interlibrary loan, etc. On this subject, see Laura Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115 (2000).

[117] As a general rule, it could be affirmed that all domestic laws exempt reproductions of copyrighted works by libraries, for purposes of replacement and preservation but also for loans to other libraries and for research purposes; teaching purposes are usually discriminated.

[118] In the analog world, the transition between both uses (library / teaching) is smoother, but in the digital world the issue becomes very sensitive. As it is now, strict application of the copyright laws would not allow a library to make copies that will be lawfully used ultimately for teaching purposes.

the Library for research purposes (or for private use), but not for teaching purposes? **Library privileges and teaching exceptions should fill up any gaps between them**[119]. Art.5.2(c) –even though only covering reproduction- seems to go in that direction when referring to "educational establishments".

The good news is that the library privilege granted under article 5.2.(c) is not limited to any specific purposes, thus leaving the door open for coverage of reproductions made for teaching purposes (provided such reproductions are not for direct or indirect economic or commercial advantage). The bad news is that national implementation laws are not doing so, thus leaving the issue to be solved by courts, when interpreting this article (and the correspondent domestic provisions).

3.- Private use/copying exceptions and fair dealing provisions.-

These exceptions allow the reproduction or use of a work for private purposes. For our study, this exception is especially important to help "complete" the exempted/licensed teaching use: where the teaching exception/license fails to cover the reproduction (download) made by students in the course of the instruction. Two key issues are important concerning this exception:

- where to set the boundaries of private use/copying on the Internet[120],
- what is the impact of technological measures on that exception[121].

The **Berne Convention** does not include any exception concerning the use of works for private purposes; although there is general agreement that the private copying exception is compatible with the BC.[122] In addition, a general provision under **art.9.2** allows member States to introduce new exceptions to the reproduction right, according to the so-called "three-step-test":

> *"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"*

Under **art.5.2** of the ***EU Copyright Directive***, Member States may provide for exceptions or limitations to the reproduction right :

> *"(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive*

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[119] Maybe the answer is not to be found within the scope of the library exception, but rather within that of the teaching exception (or license), which should include all acts of reproduction necessary to make the exempted/authorized use possible: not only those made by teachers (and students) but also by the library in order to enable him to do the teaching.

[120] The private use/copying exceptions share the fundamental problem of copyright: that of deciding what is subject to the monopoly of the author and what is not. What is "*private use*"? Is it larger than "*personal use*"? Where are the boundaries of the "*collective use*"? What is a "*profit-making use"*? For instance, is it a private copy that a member of the Napster community is doing when downloading a song from another member? And notice that I am only referring to the reproduction made by the end-user, not to the reproduction -and communication to the public made by that member who has the song available for other members.

[121] The problem posed here is rather the potential damage of infringing downstream uses deriving from the private copy (and the "perfect" quality of downstream copies). In my opinion, digital private use/copying should not be completely outcast because of the potential damage to the authors' interests. And vice-versa, the survival of the private use exception in the digital world should not be subject to the existence anti-copying mechanisms to prevent (as far as possible) infringing reproductions and subsequent exploitation of works. In any case, the study of the nature and extent of the private use/copying within the Internet deserves to be studied in more detail than possible in this paper.

[122] See Sam Ricketson, *op. cit. supra*, §9.11, at 485-486. C. Masouyé, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), OMPI, §9.10 at 56 (1978).

fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;"

At a domestic level, the specific conditions and the scope of such a fundamental exception may vary widely among countries. Private copying / use exceptions may be distinguished on 2 grounds:

- "use" *vs.* "reproduction" (or "making copies").
- "private use / purposes" *vs.* specific purposes (such as research and/or private study).

The combination of these 2 factors results in quite a colorful spectrum: some exceptions allow any uses for private purposes; others only exempt reproductions for "*private*" purposes or "*personal uses"*, sometimes limited with references to "*collective use*" and/or "*profit-making use*"[123]; while a few only exempt copies made for specific purposes, such as research and private study[124]. As a general rule, private copying is subject to equitable remuneration of the author, by means of levies (applied on equipment and tangible supports) operated by collecting societies.

Thus, while most of them[125] might allow the download of transmitted works made by students for purposes of studying, they would unlikely cover copies made (and sent) by students to other students as part of the instruction… (for instance, when a student scans an article from the "NY Times on-line" and sends it to all students in the classroom as part of a debate). Such a use could never qualify as a private use, neither as research or study… It is clearly a teaching use that should either qualify under a teaching exception or as a quotation, to be exempted.

This is one more reason to justify that, in order to maintain the private use/copying exception within its rational limits, teaching exceptions should cover teaching uses (as a whole), made by all participants in the instruction (not only professors). National legislators have the opportunity to do so when implementing the EU teaching exception; however, they do not seem to be taking it.

4.- The three-step-test.-

The origins of the so-called three-step-test must be found in art.9.2 of the Berne Convention, which allows Member States to introduce new exceptions to the reproduction right:

"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."

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123 **France** (art.L122-5): (2) "*copies or reproductions reserved strictly for the private use of the copier and not intended for collective use*"; making multiple copies raises the presumption that these are intended for use by a group, if not the public at large: such use would fall outside the exception. **Spain** (art.31): reproduction "*for the private use of the copier… provided that the copy is not put to either collective or profit-making use*"

124 **UKCA** sec.29.1: "Fair dealing with a literary, dramatic, musical or artistic work for the purposes of research or private study does not infringe any copyright in the work". An exception subject to the purposes of research and/or study poses two basic problems: the difficulty of defining what is research and study, and the difficulty of proving (and controlling) that the copy is to be (and will only be) used for that purpose. One of the pillars of law making is not to enact what cannot be enforced; subjecting a copyright exception to the specific (and non-objective) intent of the user is not only unenforceable but impossible to prove.

125 As an exception, sec.29.3.b **UKCA** makes clear that "systematic single copying" (for instance, all the members of a class requesting the same material at once) is not within the fair use exception for research and private study. In other words, the fair use exception (for research and private study) not only takes into account the purpose of making the copy, but also the number of times that same work is being copied at the same time (over which period of time?) and place (where are the borders of the community set?).

Although this provision only refers to the reproduction right, the 1994 TRIPs Agreement, [126] and the 1996 WCT[127] extended application of the three-step-test to all exclusive rights and to any new exceptions that Member States may implement in the future. Also the **EU *Copyright Directive*** expressly enshrines the three-step-test in its **art.5.5:**

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

How does the three-step-test apply to a teaching exception to cover DDE?[128]

As to the first requirement "certain special cases", "use of a work for teaching purposes" affords a sufficient degree of "certainty."[129] However, we need to keep the scope of the exception within restricted limits, so that it may be deemed a "special case." [130] Our best bet would be to allow wide, but well-defined, teaching purposes and eligibility criteria, along with strong measures to ensure that works will not be used beyond the teaching purposes.

- All uses of protected material should be allowed, as long as they are "necessary" for the instruction; this would include **works of any kind**, whether **fragments or whole** works, used by the professor as part of the instruction, as part of activities to be done in class, or as reading material for debates, comments, etc. By contrast, the exception would not include the use of works as supplementary readings or study materials, not even when recommended by the professor. **Works intended primarily for teaching purposes should not be covered by the exception** (regardless of their intended primary market), because their use for teaching purposes

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[126] See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (1994). Art.13 TRIPs: "*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder*." As a result of this, countries that are members of both the Berne Convention and the WTO (TRIPs Agreement) must apply the three-step-test when implementing any exceptions allowed under the Berne Convention (not just the reproduction right).

[127] WCT Art.10(1): "Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." World Intellectual Property Organization Copyright Treaty, adopted December 20, 1996.
The Agreed Statement concerning Art.10 reads: "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."
The same is provided for in the World Intellectual Property Organization Performances and Phonograms Treaty, adopted December 20, 1996.

[128] Although, it remains to be seen whether it will have any effect on the interpretation of the three-step-test in the BC or the WCT, let alone the *EU Copyright Directive*, **the WTO Panel Decision of June 2000, on section 110(5) of the U.S. Copyright Act** may provide some guidance to examine this provision. *See* The Report of the WTO Panel (WT/DS160/R) of June 15, 2000 (available at the WTO web page: http://www.wto.org/).

[129] As interpreted by the WTO Panel: **"certain"** means "clearly defined," "known and particularized, but not explicitly identified," that which "guarantees a sufficient degree of legal certainty" (§6.108).

[130] As interpreted by the WTO Panel: **"special"** means "limited in its field of application or exceptional in its scope," "narrow in quantitative as well as a qualitative sense," so that it does not exempt a large number of users (§6.109); and **"cases"** "could be described in terms of beneficiaries of the exceptions, equipment used, types of works or by other factors" (§6.110). The WTO Panel also stated that a "special case" is not synonymous with the "special purpose" behind the exception (§6.111). The EC argued that for an exception to be justifiable under Berne Convention art.9(2), it must serve a public policy purpose. The WTO Panel did not agree. The purpose behind the exception has nothing to do with the first step, although the specific public policy purpose may be useful in determining the scope and preciseness of the exception.

would clearly conflict with the normal exploitation of the work (failing the second step of the test).[131]

- The exception would only cover the **rights of reproduction and communication to the public**. Thus, when applied to a digital networked environment, teaching uses should be limited to those necessary to post, transmit and download the work used for teaching purposes.
- The use of works should be **limited to students officially enrolled in the course** (by means of passwords, firewalls, encryption, etc.), and technical measures should be implemented to ensure that the work is not re-used beyond the exempted teaching use. This point will be further considered in connection with the second step of the test.
- A distinction should be made between "teaching purposes" and any other kind of "cultural activities," especially on the Internet, where any webpage may be deemed to "teach" something to its visitor. It seems reasonable, however, to cover **teaching at all levels**, including elementary, secondary and graduate education, provided the teaching activities are part of an official-degree program.
- There would be no need to limit the exception to cover only nonprofit **educational institutions**, after all, the public interest that is being protected is the same regardless of the nonprofit or for-profit nature of the institution. However, this may be taken into account to establish the price the institution must pay for each teaching use.

The second and third steps --which require that the use do not conflict with the normal exploitation of the work[132], **and that the use do not unreasonably prejudice the author's legitimate interests**[133]**--** could be met by establishing two requirements:

- The educational institution must implement **technological measures** to ensure the work will not be re-used (infringed) beyond the teaching use. For instance, student use should not be restricted to a specific number of times or a short period, but open for accessing and viewing for the whole duration of the course; downloads in digital format should be limited to one per student per course; downloaded copies could be neither further reproduced nor altered by their recipients.
- The educational institution must pay an **equitable remuneration** to the copyright owner, thus turning the exception into a compulsory license. This remuneration should not only take into

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[131] Of course, one may also argue whether a doctrinal article published in a Law Journal is not "primarily intended for teaching purposes."

[132] According to the WTO Panel, "normal exploitation" includes actual and potential uses of the work (§6.178: each new means of exploitation must redefine the scope of what constitutes a "normal exploitation", otherwise, any new means of exploitation of works would be directly excluded from the copyright monopoly granted to the author) and must be evaluated, not only with regard to the particular exclusive right affected by the exception, but with regard to each and every right granted by copyright (§6.183: a conflict with a normal exploitation of a work with regard to one right cannot be justified (compensated) by reference to another right that is not affected by the exception).
Not every commercial use "conflicts" with a normal exploitation of the work, only those uses that would deprive the owner of "significant" or "tangible" commercial profits. The WTO Panel denied the EC's contention that any use that might yield economic gain to the user is a normal exploitation of the work But what is "normal" exploitation? The WTO Panel took into account the economic importance of the exploitation (i.e., whether authors or owners would be deprived of significant economic gains) and the relevance of current licensing practices, and agreed that "normal" exploitation should be something less than the full scope of the exclusive right (§§6.182-6.189).

[133] "Prejudice" means any damage, harm or injury, but the key question is whether the prejudice is "unreasonable": what is reasonable or unreasonable will be better decided *in casu*, taking into account not only the importance of the other interests at stake (the interests that justify the exception) but also the real economic (or other) prejudice that such an exception causes to the author. *See* Ricketson, *op.cit.supra,* §9.8 at 484: "It also seems clear from the Report of Main Committee I that 'unreasonable prejudice to the legitimate interests of the author' may be avoided by the payment of remuneration under a compulsory license (although this would not, of course, 'cure' a use that conflicted with the normal exploitation of the work--by definition, the receipt of royalties under a compulsory license could not be regarded as a part of the normal exploitation of a work)." In short, the third step means that the restriction should not prevent the author from participating in the economic (and moral) benefits flowing from use of the work. To put it (too) simply, it could be said that the second and third steps are two grades of a same requirement (that the author is not the only one bearing the costs for such use): the later allowing a "fine tuning" of the former.

account the kind of use (reading, transforming, etc), the number of uses (once per semester, once a year), the number of students that will receive the work, etc., but also the nonprofit or for-profit nature of the educational institution. The remuneration fee should be set and administered by collecting societies; educational institutions would declare the material used for teaching purposes and should be charged accordingly.

It is true that digital distance education may be a new, growing and potentially lucrative market. It is also true that extending the current teaching exceptions so as to cover digital distance education, will likely result in the loss of an important economic market for licensing works for use in digital distance education. In addition, since digital technology increases the risk of unauthorized downstream uses of works, it could have a significant impact on the market for sales of tangible copies of these works, harming both their primary and secondary markets. But these risks do not mean that educational exceptions should be completely ruled out in the digital world; rather, they simply mean that educational exceptions must be applied here with extreme caution, minimizing the potential damage to the author's interests. We would all agree that reproducing a work, as part of some course of study, and posting it so that it may be accessed by students registered in that course, does not involve the same risk as posting it on a library e-reserve, which is open to all university members (and maybe to the general public). The carefully designed boundaries of what constitutes a "certain special case" help to minimize the risk of damage to authors' interests, and should provide a solid foundation upon which to build the remaining conditions of the teaching exception.

Some argue that, to the extent that technology may allow the author to control all uses made on the Internet, an all encompassing copyright (strengthened by technological measures and contracts) should govern the exploitation of works in networked environments and copyright exceptions should be ruled out in cyberspace. I do not agree. Copyright is there not only to protect the authors' rights but also to ensure (within the established limits) the public interest in accessing and using these works. Acts permitted under a copyright exception should not be subject to a license in a digital world, just because technology makes it possible. [134]

5.- The always troubling issue of applicable law

Now that we have examined the existing domestic and international solutions that apply to DDE, we should make a brief reference to the reason why these differences become a real problem for DDE: applicable law.

According to **article 5(2) of the BC**, "the extent of protection . . . shall be governed exclusively by the laws of the country where protection is claimed." When applied in a networked environment, this choice of law rule may result in the application of as many domestic laws as countries of download (of receipt). [135]

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[134] Within a broader scope, I agree with Prof. Merges conclusion that "(b)ilateral contract will be ubiquitous in cyberspace, but it is unlikely to displace completely state-backed property rights for two reasons. First ... the "safety net" of a property right may still be necessary to protect adequately investment by creators of digital content. Second, certain limits on the rights of intellectual property owners are best seen as immutable, i.e. outside the ability of contracting parties to waive or wary." See Robert Merges, *The end of friction? Property Rights and Contract in the "Newtonian" World of On-line Commerce*, 12 Berkeley Technology Law Journal 115, at 136 (1997).

[135] We may define these laws by the countries of residence of students enrolled in the course. Although this may not always be accurate, because students may also access the course while on holidays in a foreign country, or working abroad, etc.

A University[136] will need to apply different standards for each and every one of **the countries of reception.** The specific use may be covered by an exception in some countries, but not in others. Does this mean that an on-line university should obtain licenses to use some specific articles for selected countries, or that students residing in Spain and France should be denied access to the full articles posted in the classroom e-reserve? If so, would these students pay the same fees as students who get the whole course? Should students residing in countries for which the teaching material has not been cleared, not be allowed to register? On the other hand, it is difficult to make sure that the information given upon registration is true--faking a residence in another country is not impossible. Furthermore, application of the law of the country of reception would make it extremely difficult to know, in advance, which uses are permissible under an exception (and the conditions of such a permissible use) and which should be licensed. In fact, no matter how carefully the on-line university cleared all rights for the material used for its teaching activities, there would likely be an infringement of copyright somewhere in the world, where the material is received.

Under a different (but not impossible) construction of the choice of law rule in article 5(2) of the BC, the applicable law may be that of **the country of upload and/or storage (on a server)**, from which the communication to the public is initiated. If article 5.2 of the BC is construed as pointing to the law of the country of upload, where the initiating act took place, we face other problems. In Spain and France, the U.S. on-line university would be able to offer cheaper and better courses than those offered by Spanish or French education institutions, which, lacking a teaching exception, must not only pay for all material used for teaching purposes, but have a more limited selection of material: only licensed works. As a result, different universities would be "unfairly" competing in each country under different laws. Besides, the fewer connections of the course with the country of the institution—the country whose law is being applied--the fewer arguments there are in favor of applying only that law to govern the use of copyrighted works in connection with a course offered around the world (especially if most of the students enrolled have no connection with that country). Furthermore, within a world-wide (non-harmonized) context, the application of that single law may easily result in the creation of "copyright havens" for educational institutions (those countries with a generous copyright exception for teaching purposes), so that if the use of the work is not an infringement under the law of that country, it will not be an infringement anywhere else in the world!

Neither solution is completely satisfactory. Under the law of the country of upload, we are facing the danger of DDE copyright havens. Under the law of the country of reception, the on-line university faces either the uncertainty of a myriad of possible applicable domestic laws, or alternatively a "mission impossible" to seek worldwide licenses for all materials to be used for teaching. Both problems would have disastrous results: either on-line teaching institutions would end up working as copyright outlaws[137], or they would not work at all.

Copyright choice of law rules envisioned for a territorial world cannot govern on the digital world. The issue of applicable law to the protection of copyright on the Internet must be treated and answered at a general level, that is, not only for digital distance education. One possible criterion for determining the law

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[136] We will assume that the University qualifies to benefit from a teaching exception in all countries; but this may not always be the case: for instance, a "for-profit" educational institution that is covered by a European teaching exception (the *Copyright Directive* establishes no elegibility requirements and Member States may choose to do the same, making no distinction between profit or not for profit institutions) may not be "accredited" under the U.S. Copyright Act of 1976, and will not be able to benefit from section110(2). In fact, it remains to be seen whether foreign educational institutions will ever be "accredited" for these purposes.

[137] DDE may end up operating, at an international level, outside of copyright, not only because users will not know which law to abide by, but also because countries will be helpless to enforce their laws. For instance, it does not come as a surprise that ("due to the developing nature of this service"), CCC's Electronic Course Content Service (ECCS) is only available to users in the United States. Instead, for photocopying, if there is no RRO (Reproduction Rights Organization) in the country in which copying is being done, or if the existing RRO does not provide the type of authorization required and CCC does, copying from titles found in CCC's title database can be reported to CCC. *See,* ECCS license, *supra*.

applicable to the use of copyrighted works for teaching purposes in digital distance education[138] is a point of attachment that could avoid (or at least, minimize) the creation of DDE-havens, on the one hand, while maintaining the benefits of one single applicable law, on the other. That possible choice of law rule may be a based on a "degree-granting" point of attachment. Regardless of where the headquarters of the educational institution are located (or from where its website is operated), an institution that offers official degrees sanctioned by one particular country should comply with the copyright law of that country[139]. An educational institution offering Spanish law degrees should be subject to Spanish copyright law, regardless of where its headquarters or students are located, etc.

By **anchoring the applicable law to the "degree-granting" country**, the impact of DDE copyright havens is diminished. As a general rule, one might assume that official degrees granted by such countries would not be highly regarded, and therefore, would not be in great demand. One should assume that the public at large prefers to obtain a law degree from the U.S. or a European country, rather than from, to use a tax-haven analogy, Barbados or the Caiman Islands. That applicable law will decide whether, to what extent, and under which conditions the use of pre-existing works for teaching purposes will be allowed (without authorization and/or without compensation to the authors). The degree-granting point of attachment would perfectly apply to all kinds of educational institutions (public and private, profit or nonprofit), and to all official courses offered by them.

When the educational institution offers both official degrees and non-official degree courses, the law applicable to the former should also govern the later. In addition, when the institution offers no official degree courses, and it is therefore more difficult (or impossible) to relate the course to one particular country, the "degree-granting" point of attachment will be useless. We should then turn, as a default point of attachment, to the law of the country where the educational institution has its headquarters[140], provided that this law complies with the BC minimum of protection (i.e., where the country is a Member of the BC or of the WCT or of the TRIPs Agreement).

6.- Conclusions.-

We have seen that, in the "analog" world, teaching uses are exempted from the copyright monopoly of the author. It's either because such use may be deemed fair, or because it is covered under a general quotation exception or under a more specific teaching exception (specially crafted for face-to-face teaching). One may say that the reason why teaching uses in the analogue world find their way out of the copyright monopoly is because, as a general rule, they may be easily "located" (they take place within the classroom) and do not have a major economic significance. In other words, teaching uses neither conflict with the normal exploitation of the work nor unreasonably prejudice the author's legitimate interests.

The digital world breaks both rules. But this does not mean that these exceptions should not survive into the digital world. It only means that they must be accommodated to the specific circumstances and dangers of that world. How can this be done?

As long as a teaching use qualifies under the scope of a quotation exception or a fair use exception, there will be no need for a teaching exception. However, we saw above that most quotations are limited as to the amount and nature of works used, or they are limited to specific purposes, which may, or may not, include teaching, and usually require the creation of a new work that incorporates the quoted one. These limitations strongly reduce the application of the quotation exception to cover both live and digital teaching uses. Any teaching use that exceeds a quotation or a fair use, must be either covered by a specific teaching exception or duly licensed.

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[138] And why not for distance education in general?

[139] The application of one law of origin makes sense when the course is part of an official degree/program, aimed at receiving an official degree granted by that country.

[140] Which seems preferable to the law of the country of upload (of the materials), which may often be utterly accidental.

Teaching uses must also be acknowledged in the digital world for two reasons. First, education at all levels is a public interest that deserves protection, regardless of the medium through which it is conducted. As Internet resources are invading schools and universities, the separation between face-to-face teaching and digital distance teaching is losing its significance. "The concept of distance education may become obsolete, as distance and classroom education merge"[141]. The rationale (protected public interest) that justifies copyright exceptions for teaching purposes (i.e., access to culture and promotion of knowledge) is the same regardless of the means used to conduct that teaching. At most, the conditions that regulate such uses may vary according to the context in which the teaching takes place. Besides, digital uses for education purposes will be far too common (and valuable) so as to subject them to the will of the author.

The second reason why teaching uses must be acknowledged on the Internet, is that the need to obtain previous authorization significantly constrains the quality of teaching; teachers and professors cannot decide which material to use in their classes, rather they can only choose among material that has been licensed at a reasonable price. Is thus the "progress of arts and science" being served? Copyright owners, authors and publishers alike, should not have a right to decide whether (and how) their lawfully published works will be used for teaching purposes[142]. However, this does not mean all teaching uses should be free (non-remunerated): the public interest may be perfectly served by means of a compulsory license regime that allows unauthorized, but compensated, use of pre-existing works for teaching purposes.

DDE has special needs, different from face-to-face education, and even different from non-digital distance education. Unlike face-to-face teaching, where lessons (the words of the professor) exist only within a specific time and place[143], lessons in the on-line university (as well as any works used within these lessons) remain recorded and may be re-used over and over again. Teaching in the on-line university is mostly conducted asynchronously and works used in the course of the instruction, for teaching purposes, end up forming a "teaching compilation". To a certain degree, DDE cannot function without creating teaching compilations.

On the other hand, the danger posed by digital technologies should clearly discourage a flat exception that allowed free use of works for teaching purposes, since that would prejudice the authors' interests, thus clearly failing the three-step-test. The public interest of the teaching use is the same in the analog and the digital world, but the risks involved for the interests of the author are not.

In order to both satisfy the needs of DDE and preserve the authors' legitimate interests, a compulsory license regime,[144] should allow teaching uses by digital means, provided that they are only transmitted to officially registered students, that reasonable efforts are undertaken to prevent abuse and downstream copying (not retention) of these works, and that authors (and publishers) are duly compensated.

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[141] *See* USCO REPORT ON DDE, *supra*, at 10.

[142] *See* Laura Gasaway, *Impasse: Distance Learning and Copyright*, 62 Ohio State Law Journal 783, 815 (2001). "There is also a serious concern about academic freedom and the control that content providers can exert by whether and to what extent they allow their content to be used in distance education courses. The power to refuse to license or to offer terms that an educational institution cannot afford or cannot accept is the power to control what is taught in courses. If students cannot have access to the work, the ideas embodied in the works are withheld. A copyright holder can forestall any criticism of its works by offering unreasonable terms, which raises First Amendment concerns as well as academic-freedom issues for faculty. "

[143] They may only be kept in the professor's notes or in the students' notes, each a derivative work of the professor's class, or by some tape recorder turned on during the lesson.

[144] A license established by statute that permits particular uses of works upon compliance with prescribed procedures. Thus, it would be similar to the CCC´s *ECCS* licensing system with two major differences: coverage would be compulsory (not voluntary) or even automatic (all published works would be included in the catalog, so that it can be used for teaching purposes) and fees would not be set by the author but by the collecting society (and approved by the respective government Agency). The result either under a remunerated exception or a compulsory license would be the same.

The EU *Copyright Directive* allows for such a result in art.5.3(a)[145], but EU national legislators are not taking this opportunity when implementing the Directive. By contrast, the United States' TEACH Act falls behind: its reduced scope (covering only free uses) fails to offer a comprehensive treatment of DDE uses and needs. Of course, in the U.S., the gaps may be covered *in casu* by the fair use doctrine of section 107 USCA and, although so far there is no case law on the issue, the result may be the same as that achieved under the *Copyright Directive*.

DDE must face two major obstacles: on the one hand, the copyright exceptions provided for educational and teaching purposes in domestic laws are ill-suited to cover teaching uses conducted through the Internet; on the other, the differences among domestic laws, combined with the territoriality of existing copyright choice of law and enforcement rules (designed for a physical world) threaten to become a de facto impediment for the development of DDE within a lawful copyright framework. The adoption of a compulsory material provision at an international level (namely, the Berne Convention, the WCT or the TRIPs), to lay out the basis and boundaries of uses of copyrighted works for teaching purposes, could diminish the inconsistencies resulting from the current choice of law rule in article 5.2 of the BC.

At a domestic level, it is now a good time both in Europe (where countries are implementing the *Copyright Directive* at a national level) and in the United States of America (where the TEACH Act will begin to be applied) to work in that direction. Any agreement, no matter how small, on fundamental issues would be a big step, a beginning.

[145] First, art. 5.3(a) does not require fair compensation, but the three-step-test does. Second, although art. 5.3(a) refers to the commercial nature of the activity (rather than of the institution), this proposal is perfectly possible under the EU Copyright Directive, Recital 36: Member Countries may choose to establish a table of compensation for teaching uses that ranges from a free use to a maximum of scaled compensations and ultimately excludes (from the exception) uses in commercial teaching activities.