

IN3-UOC Research Project

Copyright and Digital Distance Education (CDDE) :
The Use of Pre-Existing Works in Distance Education Through the Internet.

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**Copyright and Digital Distance Education:
The Use of Pre-Existing Works in Distance Education Through the Internet.**

Dra. Raquel Xalabarder

The following questionnaire is part of a research project on Copyright and Digital Distance Education, funded by the Universitat Oberta de Catalunya's IN3 (Internet Interdisciplinary Institute). The research project attempts to provide **a comparative law study on the use of copyrighted works for purposes of teaching and research, with special reference to digital distance education** (hereinafter DDE). We will refer to DDE as the kind of distance instruction, where students are physically separated from their instructors, that takes place through the Internet.

In order to provide for some common background for the study, a **Working Paper** is attached, providing information on the research project currently under way where the questionnaire and national responses will be inserted.

The goal of this questionnaire is to examine whether and to what extent any **exceptions¹** provided for teaching purposes or alike (i.e., fair use) may be applied also to on-line distance teaching. As explained in the Working Paper, we have selected four specific exceptions that may be of interest for our study, either because they are specifically oriented to cover teaching uses, or because they may come to support or supply for some of the acts done as part of the teaching. These four exceptions are: **a specific exception for teaching purposes**, the **quotation exception**, the general exception for **private use / private copying**, and any **exceptions in favor of libraries**, that may exist in domestic laws.

Within the context of this questionnaire, you are requested to provide information on these four exceptions as existing in your country (if so). Treatment of each exception may vary in each country; therefore, we expect that some exceptions may be treated more in depth than others within each national response. Please, feel free not to answer under a particular exception, when it does not purport any specific applicability as to teaching purposes and DDE (or when such an exception does not exist in your country). Also notice that most questions may require a dual level analysis : first, as it is provided for and/or applied in the "real" world (i.e., live-teaching); second, as it translates or applies (if so) into digital distance education.

For systems relying on a **fair use exception** to copyright, feel free to translate the questions proposed in any manner that may be suitable to the specificities of the fair use doctrine under that system. Similarly, if no exception exists to cover such uses, and works used for teaching purposes are duly licensed, please provide as much information as possible on the **licensing system** implemented in your country.

In addition, we have also added a fifth section on **the interaction between exceptions (and specially those considered in this questionnaire) and the protection of technological measures**.

It will be very helpful if you can provide practical information (**caselaw, contracts, doctrine**), which is usually difficult to obtain from abroad.

Also, in addition to existing legislation, please refer to any **pending legislation on the issue** (i.e., within the European countries, the implementation of the Directive on Copyright in the Information Society may have an effect on that field, especially as far as art.5(3)(a) and the three-step-test).

¹ We have chosen to use only the term "exceptions", to refer in general to any kind of limitation/exception provided for in the copyright law to exclude the authorization of the copyright owner. In this questionnaire, the term does not have any implication as to whether it is a free use (usually called exception) or a remunerated use (usually called limitation).

As explained in the Working Paper, and in order to set a common ground to study the exceptions as applied to DDE, we will divide a digital teaching activity in three basic acts :

1. *Upload*--a digital copy of the work is uploaded to the VU server (usually by the teacher), so that it can be accessed (usually, by students);
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 of the work, as received, made on the computer's hard disk, or floppy disk, or in print.

The questions listed under the following 5 sections attempt to examine whether and to what extent the specific exceptions (or the fair use doctrine --if applicable) cover such acts when done as part of a teaching activity conducted over the Internet.

When answering the questionnaire, you are kindly requested to follow the structure of the questions (0 through 5) set for each section; the specific sub-questions set under each of them are merely to serve as a guide for the contents under each question. Either English or French may be used to answer this questionnaire.

For any doubts or comments, please contact Raquel Xalabarder at rxalabarder@uoc.edu

I.- EXCEPTION FOR TEACHING PURPOSES.

0.- Identify any specific exception that allows for the use of copyrighted works for teaching purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

1.- Exclusive Rights covered by the exception.

- a) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered?
- b) Can a work be digitized for use as part of the instruction? Would digitization qualify as a reproduction or also as a transformation?
- c) How many copies can be made? Is it somehow limited, i.e., to the number of students in a class?
- d) Does it cover communication to the public? Does it cover the storage of the copyrighted work on the server, thus allowing asynchronous teaching?
- e) How does your system qualify a digital transmission/delivery of a work? Have the WCT or WPPT had any effect on this matter? Has the EU Directive, if applicable, had any effect on this matter?
- f) Does the exception cover subsequent reproductions made in the course of transmission (routing copies, caché copies, etc) and reception (RAM copies, screen displays and downloads) of these works by each student? *(Please note that this last issue is intertwined with the question of eligibility: who is allowed to make reproductions for teaching purposes—just professors, or also students?)*

2.- Eligibility under the exception.

- a) Eligibility as to institutions:
 - Which institutions may benefit from a copyright exception for teaching purposes? Educational institutions? Schools? Universities? etc. How are those terms defined? How do they apply to the Internet?
 - Is there any specific condition as to the nature (for-profit or not-for-profit, public or private) of the teaching activity or of the institution? How does this apply to digital distance education?
 - May libraries benefit from such an exception, and therefore provide copies (and also distribute? communicate to the public?) of works for teaching purposes? *(Please note that this last issue may have a connection with any exception provided for in favor of libraries. If libraries cannot benefit from a specific teaching exception, the scope of the “remaining” library exceptions becomes paramount to cover the use of works for teaching purposes.)*
- b) Eligibility as to individuals:
 - May only teachers benefit from the exception or also students (and guest-lecturers, etc)?
 - If students cannot benefit from that exception, may a general private use/private copying exception (or fair use) “fill that gap” (as it seems to be the case in the analog world)? *(Please note that this last issue may be considered under a separate section III dealing with the private use/ copying exception)*
- c) Some teaching-related exceptions refer to or imply physical concepts related to face-to-face teaching activities—concepts like classroom, school premises, etc. If so, does this specific language limit or curtail the applicability of the exception in the digital world?
- d) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

3.- Purposes. What is “teaching purposes”?

- a) What constitutes “teaching purposes”? *(Please, substitute by the specific language used in your national exception; for instance, the EU Directive art.5.3(a) what is “illustration for teaching”).* Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

- b) Does it cover use of a work for preparing the lesson? Does it cover use of a work in the course of the instruction? Does it cover the making and distribution of copies for teaching purposes? Does it cover communication to the public for teaching purposes? What is the scope of such uses covered under this exception?
- c) Does it cover the making of a teaching compilation or anthology? Would it cover the asynchronous posting of teaching material on the Internet? And if so, within which limits? Is there a specific exception (or licensing system) covering the making of teaching compilations? Would it apply to digital teaching compilations?
- d) Is the exception subject to any technological measures to ensure that only students will have access to the works used for teaching?

4.- Extent and Nature of Works.

- a) Which works (and to what extent) may be subject to the exception?
- b) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- c) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?
- d) May works be used for teaching purposes in whole or only fragments?
- e) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?
- f) How does the exception interact with the possible existence of a license which specifically prohibits any further uses (other than those licensed)?

5.- Remuneration.

- a) Is the teaching use free or subject to remuneration?
- b) If subject to remuneration, how is that established? Criteria used to set the fees.
- c) How is it collected? Which collecting society? How is it distributed among the copyright owners ?
- d) Does this system also apply to digital uses? How?

II.- QUOTATIONS

0.- Identify any exception that allows for the use of copyrighted works for purposes of quotation, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

1.- Exclusive Rights covered by the exception.

- a) Reproduction? Distribution? Communication to the public? Transformation?
- b) Does it cover quotations made in digital formats (i.e., digital copies) and over the Internet (i.e., digital transmissions)?

2.- Eligibility under the exception.

- a) Who may benefit from the quotation exception? Is there any language that may allow or prevent its application to quotations made as part of the teaching over the Internet?

3.- Purposes.

- a) What constitutes a quotation? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?
- b) Is there any reference to any specific purposes (i.e., teaching, research, etc) the quotation must be made for, in order to qualify under the exception?

4.- Extent and Nature of Works.

- a) Which works (and to what extent) may be subject to the exception? Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- b) Are all kind of works covered? Are any specific materials excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?
- c) May works be quoted in whole or only fragments?
- d) Does it make any difference how the work has been obtained?

5.- Remuneration.

- a) Are quotations free or subject to remuneration?
- b) If subject to remuneration, how is that established? Criteria used to set the fees.
- c) How is it collected? Which collecting society? How is it distributed among the copyright owners ?
- d) Does this system also apply to digital uses? How?

III.- PRIVATE USE / PRIVATE COPYING EXCEPTION.

The purpose of this section is to address the importance of the private use/ private copying exception as far as teaching uses. To what extent may such an exception allow students (and teachers) to use works for teaching purposes through the Internet? This exception is specially important to the extent that downloads made by students do not qualify under the teaching exception. Please note that this last issue may be considered under a separate section dealing with the private use/ copying exception.

0.- Identify any exception that allows for the use of copyrighted works for private purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

1.- Exclusive Rights covered by the exception.

- a) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered? How many copies can be made? Is it somehow restricted, i.e., to non-collective use?
- b) Does it cover any other rights: distribution, transmission, performance, transformation ? Do they extend to digital means of exploitation? (See also *infra*, the questions concerning definition of “private”).

2.- Eligibility.

- a) Who may benefit from the private use/copying exception? Is there any specific reference to for-profit or not-for-profit uses, public or private, non-collective uses?
- b) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

3.- Purposes. What is “private”?

- a) What is the definition of “private use/private copying” in your country? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?
- b) How does this exception translate on the Internet? Would students’ downloads of material transmitted for teaching purposes over the Internet qualify as private?

4.- Extent and Nature of Works.

- a) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- b) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?
- c) May works be used for private purposes in whole or only fragments?
- d) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?
- e) How does the exception interact with the possible existence of a license which specifically prohibits any further uses?

5.- Remuneration.

- a) Is this exception free or subject to remuneration?
- b) If subject to remuneration, how is that established? Criteria used to set the fees.
- c) How is it collected? Which collecting society? How is it distributed among the copyright owners ?
- d) Does this system also apply to digital uses? How?

IV.- LIBRARY EXCEPTIONS.

The main purpose of this section is to address the interaction between library privileges and teaching uses: to what extent may library exceptions assist teaching activities conducted through the Internet (either exempted or licensed teaching uses). Please feel free to provide any information concerning the general scope of such exceptions, even though not especially helpful as far as teaching purposes.

0.- Identify any exception that allows for the use of copyrighted works by libraries, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

1.- Exclusive rights covered by the exception.

- a) Reproduction? Distribution? Communication to the public? Transformation? Does it cover digital copies? Does it cover digital transmissions of works?
- b) Would it be permissible for a library to make digital copies of the works in its catalogue, and post them on its web page, or transmit them to their teachers and/or students (for teaching purposes), or even for inter-library loans?

2.- Eligibility

- a) Which libraries may benefit from the exception? Only public libraries? Non-for-profit libraries? What about on-line libraries?
- b) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect digital (on-line) libraries?

3.- Purposes.

- a) Conservation, lending, studying, research, teaching purposes, etc.?
- b) Could the library supply material to be used for teaching purposes?
- c) Since the library privilege granted under article 5.2.(c) Copyright Directive is not limited to any specific purposes, it leaves the door open for coverage of reproductions for teaching purposes, provided such reproductions are not for direct or indirect economic or commercial advantage. Has your national legislator implemented (or intends to implement) such an exception? If so, how?

4.- Extent and Nature of works.

- a) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- b) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?
- c) May works be used in whole or only fragments?
- d) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?
- e) How does the exception interact with the possible existence of a license which specifically prohibits any further use?

5.- Remuneration.

- a) Is this exception free or subject to remuneration?
- b) If subject to remuneration, how is that established? Criteria used to set the fees.
- c) How is it collected? Which collecting society? How is it distributed among the copyright owners ?
- d) Does this system also apply to digital uses? How?

V.- TECHNOLOGICAL MEASURES VS. EXCEPTIONS.

The purpose of this section is to evaluate the interaction between exceptions and technological measures i.e., how is copyright balanced against the public interest?

1. Are technological measures protected in your country? To what extent (access control, anti-copy, etc.)?
2. How do exceptions relate to technological measures? Has the legislator implemented any specific provision to ensure that exceptions will continue to apply despite the existence of any technological measures implemented by the copyright owners? How has art.6.4 EU Directive (if so) been implemented?
3. Is there any case law or trade use that balances the interaction of exceptions between technological measures? Is there any agreement (contracts, collective bargaining, etc.) that permits certain categories of users (e.g., libraries, teaching institutions, etc) to circumvent a technological measure in order to benefit from a use covered by an exception?

VI.- Please add any further comments and information you deem interesting for this project.

Copyright and Digital Distance Education:

The Australian Copyright Law Provisions Dealing with Educational,
Library and Related Exceptions to Copyright

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MELBOURNE

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A Exceptions for Teaching Purposes under Australian Copyright Law

Introduction

There is no general exemption from liability in the *Copyright Act 1968* (Cth) where copyright material is used for educational purposes. However, there are five categories of ‘exceptions’ that allow for use of copyrighted works for certain educational purposes without the copyright owner’s prior authorisation:

1. Insubstantial reproduction
2. Reproduction by educational institutions of works
3. Statutory licence scheme
4. Fair dealing for research or study
5. Special exceptions

The criteria of eligibility and ‘teaching purposes’ are considered under each category separately (where applicable).

Part (3) deals with the statutory licence scheme in Australia, which allows certain usage of copyrighted works in conjunction with the payment of a royalty.

1. Insubstantial Reproduction

It is a basic principle of copyright law in Australia that a person will not infringe copyright if they only copy an **insubstantial part of the work**. Section 14 of the *Copyright Act 1968* (Cth) provides that the reference to the doing of an act in relation to a work or other subject matter shall be read as including a reference to the doing of that act in relation to a ‘substantial part of the work or other subject matter’. Thus, the insubstantiality principle would apply not only to reproduction of a work but also performance, digitisation and communication online. What is substantial is a question of fact to be determined with regard to all the circumstances.¹

2. Reproduction of Works by Educational Institutions

2.1 Rights covered

The *Copyright Act* allows **multiple reproductions of insubstantial parts of hardcopy literary or dramatic work** on the premises of an educational institution, **for the purposes of a course of education** provided by that institution without any payment to, or prior authorisation from, the copyright owner (s 135ZG).

¹ For example, in *Hawkes & Son (London) Ltd v Paramount Film Service Ltd* [1934] Ch 593, it was held that copyright in the musical work “Colonel Bogey” was infringed by reproduction of a substantial part of it in a newsreel with the accompanying band music. The part recorded on the newsreel took about half a minute and comprised 28 or more bars. The Court of Appeal held that this was a substantial part of the musical work as it contained the distinctive, essential part of the tune which everyone who heard would recognise.

References to ‘copy’ in the Act were amended to refer to “reproduction” throughout s 135ZG by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) to extend the operation of these provisions to **reproductions made in electronic form**, that is: a *reproduction from the hardcopy work that creates an electronic copy*.

The Act also permits **copying of the whole or part of a printed published edition (being a work in which copyright does not subsist)** if the copy or each of the copies is made in the course of the making of a reproduction of the whole or part of the work **by, or on behalf of, a body administering an educational institution for the educational purposes** of that institution or another educational institution (s 135ZH).

2.2 Eligibility

Any person may make such a reproduction (teachers, students). However, the reproductions must take place **on the premises of (or by) an educational institution** for the purposes of a course of education provided by it (or for “**educational purposes**”: see below 2.3). This language compels some sort of physical presence by the copier on the institution’s premises.

The term ‘educational institution’ is defined in s 10 of the Act, which is reproduced below. It should be noted that the definition **includes pre-school, kindergarten, primary, secondary and tertiary education institutions**. It also includes institutions that **conduct courses by correspondence or on an external study basis**.

educational institution means:

- (aa) an institution at which education is provided at **pre-school or kindergarten** standard;
- (a) a school or similar institution at which full-time **primary** education or full-time **secondary** education is provided or both full-time primary education and full-time secondary education are provided;
- (b) **a university, a college of advanced education or a technical and further education institution**;
- (c) **an institution that conducts courses of primary, secondary or tertiary education by correspondence or on an external study basis**;
- (d) a **school of nursing** in relation to which a notice published under subsection 10A(4) is in force;
- (e) an undertaking within a hospital, being an undertaking:
 - (i) that conducts courses of study or training in the provision of medical services, or in the provision of services incidental to the provision of medical services; and
 - (ii) in relation to which a notice published under subsection 10A(4) is in force;
- (f) a **teacher education centre** in relation to which a notice published under subsection 10A(4) is in force;
- (g) an institution in relation to which there is in force a notice published under subsection 10A(4) that includes a declaration that the principal function of the institution is the provision of courses of study or training for one of the following purposes:
 - (i) general education;
 - (ii) the preparation of people for a particular occupation or profession;

- (iii) the continuing education of people engaged in a particular occupation or profession;
 - (iv) the teaching of English to people whose first language is not English;
 - (h) an undertaking within a body administering an educational institution of a kind referred to in a preceding paragraph of this definition in relation to which there is in force a notice published under subsection 10A(4) that includes a declaration that the principal function, or one of the principal functions, of the undertaking is the provision of teacher training to people engaged as instructors in educational institutions of a kind referred to in a preceding paragraph of this definition, or of 2 or more such kinds; or
 - (i) an institution, or an undertaking within a body administering an educational institution of a kind referred to in a preceding paragraph of this definition, in relation to which there is in force a notice published under subsection 10A(4) that includes a declaration that the principal function, or one of the principal functions, of the institution, or undertaking, is the providing of material to educational institutions of a kind referred to in a preceding paragraph of this definition, or to educational institutions of 2 or more such kinds, and that that activity is undertaken for the purpose of helping those institutions in their teaching purposes.
-

2.3 “Educational purposes”

The reproductions can only be made for the “educational purposes” of the institution or of another educational institution. Section 10(1A) provides a definition that is not intended to be exhaustive. These purposes include reproduction for use in a particular course of instruction and for addition to the library collection. (See extract below.)

There has been some uncertainty expressed as to what is covered by copying for educational purposes. Copying which is undertaken by students for their own research and study has been considered to fall within the fair dealing provisions of the *Copyright Act* (and is therefore not remunerable copying under the licence scheme). See also 4.4 for further discussion on this point.

In the case of *Copyright Agency Ltd v Victoria University of Technology* (1994) 29 IPR 263,² Gummow J of the Federal Court interpreted the legislation to require that the copying for the purposes of a course of education **requires more than a “primary or predominant purpose” of that nature**. His Honour inquired whether each copy was made for use in connection with a particular course of instruction provided by the respondent (as outlined in s 10(1A)). On the facts, the copies were made only or exclusively with the objective that they be used in connection with the particular courses of instruction, as suggested by the statements on the covers of the anthologies in which the extracts were contained.

² This was a test case concerning the applicability of Pt VB to the practice of universities and other tertiary institutions of making multiple copies of extracts from different literary works which related to a particular course for collection, sometimes in book form, and supply to students enrolled in that course. The collecting agency, CAL, took the view that the making and sale of anthologies was in breach of the licence agreement.

s 10 (1A) **Without limiting the meaning of the expression *educational purposes*** in this Act, a copy of the whole or a part of a work or other subject-matter shall be taken, for the purposes of the provision in which the expression appears, to have been made, used or retained, as the case may be, for the educational purposes of an educational institution if:

- (a) it is **made or retained for use, or is used, in connection with a particular course of instruction provided by the institution;** or
 - (b) it is **made or retained for inclusion, or is included, in the collection of a library of the institution.**
-

2.4 *Extent and nature of works*

This exception only applies to a **hardcopy literary or dramatic work**. A dramatic work includes a choreographic show or other “dumb show” and a scenario or script for a film (s 10); a literary work includes a table or compilation (s 10). The exception does not apply to musical or artistic works, or computer programs or compilations of computer programs (s 135ZE).

The exception is subject to certain quantitative requirements:

- The exception **does not apply to reproduction of the whole of the work** (s 135ZG(2))
- It **does not apply to reproduction of more than 2 pages** of a work in an edition of the work **unless** there are more than 200 pages in the edition and the total number of pages reproduced does not exceed 1% of the total (s 135ZG(3)).

It does not apply where a person has reproduced part of a work contained on a page/pages of an edition (which reproduction sub-section (1) applies to) and then, within 14 days of that reproduction, they reproduce any other part of that work (s 135ZG(4)).

2.5 *Remuneration*

No remuneration is paid to the copyright owner under the exceptions. The use is free.

3. **Statutory Licence Scheme**

The 2001 reforms to the statutory licences under Part VB of the *Copyright Act* established **two separate schemes** for educational copying of non-broadcast works. The first applies to **hardcopy** (analogue) copyrighted material; the second applies to copyrighted material in **electronic** (digital) form. They are dealt with separately below (3.1, 3.2).

Due to the length of the provisions containing the Statutory Licence Scheme, the relevant sections of the Act have been provided in full in *Appendix A*.

Note that Part VB does not exclude the possibility of voluntary agreements (s 135ZZF).

3.1 *Reproduction from hard copy works*

Under the statutory scheme in **Division 2** of Part VB of the *Copyright Act 1968* (Cth), reproductions can be made from the following **hardcopy material** by, or on behalf of, a body administering an educational institution, for educational purposes:

- The whole or part of an **article contained in a printed periodical** publication (s 135ZJ(1)).
- The whole or part of a **literary or dramatic work in a printed published anthology** of works and comprising not more than 15 pages in that anthology, whether or not the work has been separately published or is commercially available (s 135ZK).
- The whole or part of a **literary, dramatic, musical or artistic work** (other than an article contained in a periodical publication) that is in hardcopy form and has not been separately published (s 135ZL(1), (2)).

Illustrations accompanying articles or other works can be reproduced if their purpose is to “**explain or illustrate**” the article or other work (s 135ZM(1)). The statutory licence will include both the work and its accompanying illustrations and remuneration for the purpose of reproduction will be equally divided between the copyright owners of the illustration and the work (s 135ZM(2)).

3.1.1 Eligibility

These reproductions can only be made by, or on behalf of, the body administering an educational institution (see above, 2.2). The term “**body administering an institution**” is defined in s 10(3)(a) as the institution, where the institution is a body corporate or, in any other cases, the body or person (including the Crown) having ultimate responsibility for the administration of the institution.

3.1.2 “Educational purposes”

Reproductions can only be made under the statutory licence for the educational purposes of an educational institution or another educational institution (ss 135ZJ(1)(b), 135ZK(b), 135ZL(1)).

See also 2.3 for explanation of “educational purposes”.

3.1.3 Extent and nature of works

The licence under Division 2 applies to printed periodical articles, literary, dramatic musical or artistic works, literary or dramatic works contained in a printed published anthology, and other separately published works as well as accompanying illustrations.

Although multiple reproductions can be made under the Div 2 licence, there are quantitative limitations on the amounts that can be reproduced. Reproductions cannot be made of **two or more articles in the same publication** unless they relate to the same subject-matter (s 135ZJ(2)).

The provision *does* not apply in relation to reproductions of the whole, or of **more than a reasonable portion**, of a work that has been separately published *unless* the person who makes the reproductions is satisfied, after “reasonable investigation”, that reproductions (other than second-hand reproductions) of the work cannot be “obtained within a reasonable time at an ordinary commercial price” (s 135ZL(2)).

“*Reasonable portion*” is defined in s 10(2), (2A), (2B), (2C). Generally, in relation to hardcopy works where the edition in which they are published is more than 10 pages in length, a “reasonable portion” is not more than 10% the number of pages in the edition, or, if the work is divided into chapters and more than 10% of the whole work is required,

not more than the whole or part of the single chapter (s 10(2)). Note that **only one “reasonable portion” may be reproduced from the same work** (s 10(2C)).

Where a work is available in both hardcopy and electronic forms the amount reproduced is only required to be a “reasonable portion” as defined in relation to either the hardcopy or electronic form: there is no requirement that both tests be satisfied (s 10(2B)).

s 10 (2) Without limiting the meaning of the expression *reasonable portion* in this Act, where a literary, dramatic or musical work (other than a computer program) is contained in a published edition of that work, being an edition of not less than 10 pages, a copy of part of that work, as it appears in that edition, shall be taken to contain only a reasonable portion of that work if the pages that are copied in the edition:

- (a) do not exceed, in the aggregate, 10% of the number of pages in that edition; or
- (b) in a case where the work is divided into chapters exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of a single chapter of the work.

(2A) Without limiting the meaning of the expression *reasonable portion* in this Act, if a person makes a reproduction of a part of:

- (a) a published literary work (other than a computer program or an electronic compilation, such as a database); or
- (b) a published dramatic work;

being a work that is in electronic form, the reproduction is taken to contain only a reasonable portion of the work if:

- (c) the number of words copied does not exceed, in the aggregate, 10% of the number of words in the work; or
- (d) if the work is divided into chapters—the number of words copied exceeds, in the aggregate, 10% of the number of words in the work, but the reproduction contains only the whole or part of a single chapter of the work.

(2B) If a published literary or dramatic work is contained in a published edition of the work and is separately available in electronic form, a reproduction of a part of the work is taken to contain only a reasonable portion of the work if it is taken to do so either under subsection (2) or (2A), whether or not it does so under both of them.

(2C) If:

- (a) a person makes a reproduction of a part of a published literary or dramatic work; and
 - (b) the reproduction is taken to contain only a reasonable portion of the work under subsection (2) or (2A);
- subsection (2) or (2A) does not apply in relation to any subsequent reproduction made by the person of any other part of the same work.

The institution must also comply with certain marking and record keeping requirements (ss 135ZX(1), (3), 135ZXA) and the remuneration notice requirements under the scheme (see 3.1.4).

3.1.4 Remuneration

A key feature of the scheme is the **collective administration of fees** paid for making reproductions under the statutory licence. The mechanism used is in the form of a **remuneration notice, which the institution must give to the relevant collecting society before being exempt from infringement** (ss 135ZJ(1)(a), 135ZK(a), 135ZL(1)(a), 135ZU). In this notice, the institution undertakes to pay equitable remuneration to the society for licensed reproductions made in hardcopy form in accordance with either a **records system** (a “records notice”, see s 135ZV) **or a sampling system** (a “sampling notice”, see s 135ZW). Remuneration for *electronic reproductions* made under the licence must be made in accordance with an **electronic use system** (an “electronic use notice”) (s 135ZU(2A)).

Under a records notice, payment is made at a rate for each licensed reproduction whereas under a sampling notice, payment is made of an agreed annual amount. Under an electronic use notice, the amount of remuneration may be determined on an annual basis or otherwise. The rates under any of these types of notices are as determined by the agreement between the administering body of the institution and the collecting society (or by the Copyright Tribunal if agreement cannot be reached) (ss 135ZV(1), 135ZW(1), 135WA(1)).

The Australian **copyright collecting societies** are non-governmental organisations which administer the rights of copyright owners. The societies **negotiate licences** with users and receive payments that are passed on to members. There are a number of societies which administer different aspects of copyright: eg, Copyright Agency Limited (administers voluntary licences and the statutory licence which allows educational institutions to copy), Australasian Performing Right Association (administers public performance, broadcasting and cable diffusion rights in musical works), Phonographic and Performance Company of Australia Ltd (administers broadcast and public performance vested in sound recordings and music videos).

The licence fees are **generally paid annually as a fee for the volume of copying done**. The basis of the fee varies depending on the type of licence. The Attorney-General has also issued *Guidelines for Collecting Societies* which must be complied with.

In *Copyright Agency Ltd v University of Adelaide* (1999) 46 IPR 289, the Federal Court of Australia was asked by the Copyright Tribunal to determine questions of law concerning the equitable remuneration payable for reproduction of artistic works under s 135ZM. The Court made three key findings:

1. The Tribunal may not fix a separate or special rate of equitable remuneration for artistic works to which s 135ZM of the Act applies;
2. The Tribunal may not fix a separate or special rate of equitable remuneration for literary works that contain illustrations to which s 135ZM of the Act applies; and
3. The Tribunal may not fix a separate or special rate of equitable remuneration for a page containing an artistic work as referred to in sub-section 135ZM(2) of the Act.³

³*Copyright Agency Ltd v University of Adelaide* (1999) 46 IPR 289, [80].

3.2 *Reproduction or communication from electronic forms of works*

The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) expanded the licences in Parts VA and VB to apply to reproduction, copying and communication of copyright materials in *electronic formats*. **Division 2A** of Part VB of the *Copyright Act* provides a statutory licence for the **reproduction or communication** of works, articles or illustrations by educational institutions where the reproduction is made **from an electronic form of the work**.⁴

The following types of material may be reproduced or communicated under this licence without infringement of copyright:

- An insubstantial part of a published literary or dramatic work (s 135ZMB)
- The whole or part of an article contained in a periodical publication (s 135ZMC)
- The whole or part of a work — other than an article contained in a periodical publication (s 135ZMD)
- Illustrations accompanying articles or literary, dramatic or musical works (s 135ZME).

A further exception to infringement provided by the Division 2A, Pt VB licence applies to **illustrations in electronic form** that accompany an article or other literary, dramatic or musical work for the purpose of illustrating or explaining that work (s 135ZME(1)). Such an illustration may be reproduced or communicated together with the article or work without infringement of the copyright in the artistic work. Where only part of the article or other work is reproduced/communicated, the illustration must relate to that part (s 135ZME(1)(c)).

3.2.1 *“Communication”*

The **exclusive right of communication to the public** was introduced into the Copyright Act by the *Copyright Amendment (Digital Agenda) Act 2000*,⁵ which intended to bring the Act into conformity with the standards prescribed by the WIPO Copyright Treaty and the WIPO Phonograms and Performances Treaty.

The word “*communicate*” is defined as to “**make available online or electronically transmit** (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter” (s 10).

The Explanatory Memorandum to the Amendment Act states that the new communication right encompasses the making available of copyright material online so as to provide **protection to copyright material made available through on-demand, interactive transmissions**. An example given is the uploading of copyright material onto a server that is connected to the Internet.

Notably, the right only applies to those communications made **to the public**, this includes a public outside Australia (s 10). *Australasian Performing Right Association*

⁴ Division 2A was inserted by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth). The application is specifically limited to reproduction of works where the source document is in electronic form (s 135ZMA).

⁵ The amendments came into operation on 4 March 2001.

*Ltd v Telstra Corp Ltd*⁶ is the most important judgment in this respect. The case was brought by the parties to determine whether the provision of music heard by mobile phone users ‘on hold’ constituted an infringement by Telstra (a telecommunication carrier) of the copyright in the underlying works. In interpreting the concept ‘to the public’, the High Court of Australia endorsed the finding of the Full Federal Court that ‘a transmission to the public was intended to mean a transmission to the **copyright owner’s public**.’⁷ The question whether a work is performed in public or in domestic or quasi-domestic circumstances **depends upon the character of the audience**, and the effect of the performance on the value of the copyright.⁸ If the performance occurs as an adjunct to a commercial activity the performance is likely to be regarded as public.⁹ The question is whether the audience for the performance are persons who come together, not bound by a domestic or private tie but as an aspect of their public life.¹⁰ It is unlikely that the downloading of copyrighted matter for study or research by an external student would be seen as private rather than “public”. Such a student is likely to be considered as within the “copyright owner’s public”. Moreover, the “privacy” of the end user is not decisive.¹¹ A transmission received by a student in their private home would likely nevertheless be seen as “public”.

Importantly, the Amendment Act provided **exceptions to infringement for temporary reproductions made in the course of communication** in relation to works (s 43A) and for **temporary copies** of audio-visual items (s 111A). Section s 43A provides that copyright in a work, or in an adaptation of a work, is not infringed by making a **temporary reproduction** of the work or adaptation **as part of the technical process of making or receiving a communication**, *unless* the communication is itself an infringement of copyright. There is a similar provision in s 111A which applies to temporary copies of audio-visual items (sound recordings, films and broadcasts).

The Act also provides an **exception for service providers** who provide facilities for making or facilitating the making of a communication. They are not taken to have authorised any infringement merely because another person uses the facilities so provided to infringe copyright (s 39B).

⁶ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 146 ALR 649 (High Court of Australia); *Australasian Performing Right Association Ltd v Telstra Corporation Ltd* (1995) 131 ALR 141 (Federal Court of Australia) (collectively ‘*APRA v Telstra*’). Note that the case concerned the very similar pre-existing rights of broadcasting to the public and transmission by diffusion service.

⁷ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 146 ALR 649, 657 (Dawson and Gaudron JJ), 694 (Kirby J). *Australasian Performing Right Association Ltd v Telstra Corporation Ltd* (1995) 131 ALR 141, 160, 165, 166 (Sheppard J).

⁸ See also *Australasian Performing Right Association v Canterbury-Bankstown League Club Ltd* [1964–65] NSWLR 138.

⁹ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 146 ALR 649.

¹⁰ See also *Rank Film Production Ltd v Dodds (t/as Town and Country Motel)* [1983] 2 NSWLR 553.

¹¹ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 146 ALR 649, 658 (Dawson and Gaudron JJ). See also *ibid*.

3.2.2 Eligibility

Any person (teachers, students etc) may reproduce or communicate a work in accordance with the above statutory licence, *providing* the work is reproduced or communicate **on the premises of an educational institution for the purpose of a course of study** provided by the institution (s 135ZMB(1)).

See 2.2 for explanation of “educational institution”.

3.2.3 Educational purposes

See above 2.3.

3.2.4 Extent and nature of works

This exception applies to published literary or dramatic works, articles contained in a periodical publication, works other than an article contained in a periodical publication and illustrations accompanying articles or literary, dramatic or musical works.

The reproduction or communication made under this licence must not consist of more than a **“reasonable portion” of a literary or dramatic work, or more than 10% of a musical work** where either of these has been published separately, *unless* the body administering the educational institution is satisfied after reasonable investigation that the work is **not available in electronic form within a reasonable time at an ordinary commercial price** (s 135ZMD(2)). Note that the *Copyright Act* does not provide any guidance as to what constitutes a reasonable investigation, reasonable time or ordinary commercial price. However, a “reasonable portion” of an electronic work is determined in accordance with the number of words in the work and consists of not more than 10% of the total number of words or, if the work is divided into chapters and more than 10% of the total is required, not more than the whole or part of a single chapter (s 10(2A)). Only one “reasonable portion” may be reproduced from the same work (s 10(2C)).

For **“insubstantial” copying** under s 135ZMB, the part of the work reproduced or communicated **must not consist of more than 1% of the total number of words** in the work (s 135ZMB(2)). No other part of the work in question may be reproduced or communicated within 14 days of the previous reproduction or communication (s 135ZMB(3)) and an institution **must not communicate more than one insubstantial part of the same work online simultaneously** as parts communicated online must be removed before further parts of the same work can be made available online (s 135ZMB(24)).

Periodical articles in electronic form may be reproduced or communicated in **whole or part** by or on behalf of the body administering the educational institution provided the following requirements are complied with:

- (a) a remuneration notice given by or on behalf of the body administering the educational institution to the relevant collecting society must be in force (s 135ZMC(1)(c)).
- (b) the body administering the institution must comply with marking, record-keeping or notice requirements that apply to each reproduction or communication (s 135ZMC(1)(e)).

Other works in electronic form (other than a periodical article) may be reproduced or communicated in whole or part provided the following requirements are complied with

1. a remuneration notice given by or on behalf of the body administering the educational institution to the relevant collecting society must be in force (s 135ZMD(1)(c));
2. the reproduction or communication must be carried out solely for the educational purposes of the institution or of another educational institution (s 135ZMD(1)(d)); and
3. the body administering the institution must comply with the marking and record-keeping requirements in relation to records notices and sampling notices (for hardcopy reproductions) or the electronic use notice requirements in relation to electronic reproduction or communication (s 135ZMD(1)(e)).

Where part of a work is made available online under this licence, that part must be removed before a further part of the same work can be made available online (s 135ZMD(3)).

3.2.5 *Remuneration*

Again, **equitable remuneration is paid to a collecting society** under this licence in accordance with a remuneration notice given to the society by the administering body of the educational institution (ss 135 ZMC(1)(c) (articles), 135ZMD(1)(c) (works), 135ZME (illustrations)). See above 3.1.4.

An **electronic use notice must be given for licensed copies made in electronic form**, or for licensed communications. An *electronic use notice* is defined in s 135ZB as a remuneration notice specifying that the amount payable in respect of licensed copies in electronic form or licensed communications made by the administering body is to be assessed on the basis of an electronic use system. The remuneration scheme is set out in s 135ZWA. Note that if a work is reproduced and made available online and it remains available online for more than the prescribed period, the work will be taken to have been reproduced and communicated again for a further prescribed period (s 135ZWA(2A)). The “prescribed period” is a default of 12 months, or such other period as the parties may agree to, as provided in s 135ZWA(4).

3.3 *Reproduction of broadcasts*

Part VA of the *Copyright Act* introduced a compulsory licensing scheme which enables educational institutions to copy **broadcasts, sound recordings or films included in the broadcast** under certain conditions (s 135E). Such a copy can be used to teach students, it can be made available to students or can be retained in a library or elsewhere as a teaching resource.

There are two further provisions that must be read together with this statutory licence. Section 200(2A) permits an educational institution to make a **record of a sound broadcast** to be used only for the educational purposes of the institution without infringing copyright in the broadcast (s 200(2A)). **No payment is required** for such copying. In addition, if a sound broadcast is intended to be used for educational purposes, **a record can be made of the broadcast for use in the course of instruction** by a non-profit educational institution without infringing any copyright in a work or sound

recording included in the broadcast (s 200(2)). This copying is also free copying and is outside the statutory licence scheme.

3.3.1 *Eligibility*

The copy or communication of the copy must be made by or on behalf of an **administering body administering an educational institution** (s 135E(1)).

Staff may copy material either at home or at work. Students can copy television and radio programs on behalf of the institution provided the copy is made for the **educational purposes** (of the institution) and is **marked** appropriately. Note that such copying will usually fall under the fair dealing provisions though and not Part VA of the *Copyright Act* (see below, 4). The fair dealing provisions of the *Copyright Act* allow a student to make a fair use of an audio-visual work for the purpose of his or her own research or study.

3.3.2 *“Educational purposes”*

The licence applies to copies/communications made solely for the **educational purposes** of an educational institution (ss 135E(1)(b), 135F(7)(a)). See above 2.3 for discussion of “educational purposes”.

The copy, or communication of a copy, of a broadcast **must not be made, sold or supplied for a financial profit** (s 135E(2)(b)).

3.3.3 *Extent and nature of works*

The statutory licence permits the copying or communication of the **whole or part of a broadcast** (s 135B(b), (c)). In addition, further copies in the form of **sound recordings or cinematograph films** may be made of the initial copy of the broadcast (s 135B(a)).

The licence extends to the copying or communication of any work, sound recording or cinematograph film included in the broadcast (s 135E(1)).

A “**broadcast**” means a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (Cth). The term is broadly defined to include, among other things, cable transmissions but does not refer to services that provide only data or only text (eg teletext services) or services which make programs available “on-demand” on a point-to-point basis such as dial-up services (s 10(1)).

Note that it is possible under the licence for an institution to make or communicate a “**preview copy**” of a broadcast in order to *decide* whether or not to keep it for the educational purposes of the institution (s 135F). The copy must be made by, or on behalf of, a body administering an educational institution and **there must be a remuneration notice in force** (s 135F(2)). The Act specifies certain requirements and procedures which must be followed when a preview copy is made:

- (1) the preview copy **must be destroyed within 14 days** after being made unless a decision is made to keep the copy for educational purposes (s 135F(3), (4))
- (2) If the preview copy is kept, then the provisions of the Act apply as if the copy had originally been made solely for that purpose under the licence (s 135F(5)). This means that the marking and record-keeping requirements must be observed in relation to these copies (ss 135F(5), 135E(1)(d)).

- (3) If no decision is made within the 14 days and the copy is retained, the licence does not apply and the copy becomes an infringing copy from the time it was made (s 135F(6)).

Communication of preview copies is not an infringement of copyright in the broadcast or in the underlying works provided that it is made solely to enable the administering body to determine whether to keep the copy (for the authorised purposes) and the communication is made only to the extent necessary to enable the body to make that decision (within the 14 days) (s 135F(7)).

3.3.4 Remuneration

A key feature of Part VA is the **remuneration notice**. That is: a notice undertaking to pay equitable remuneration for the copies of broadcasts made or communicated while the notice is in force must be given in writing by the educational institution to the relevant collecting society (ss 135A (definition of remuneration notice), 135G(1)). Only when the notice is in force can the administering body make or communicate a copy of a broadcast without infringing.

The Act provides that the **educational institution must keep records** of the copying or that samples be taken (s 135E). The notice provides for the payment of equitable remuneration for the copies of broadcasts made by or on behalf of an institution in accordance with either a records system or a sampling system. Again, it is only where a remuneration notice is in force that an institution can make a copy of a broadcast or in the material included in it (s 135F(1)(a)).

The institution can pay equitable remuneration on the basis of a records system, sampling system or an agreed system (s 135G(2)). If the remuneration notice specifies that the amount is to be paid on the basis of a **records system**, the notice is referred to as a “records notice” (s 135A). Under this system, an amount is paid to the collecting society for each copy or communication; if an amount cannot be determined by voluntary agreement, the Copyright Tribunal will determine the amount upon application by either party (s 135H(1)). The Act also provides that different amounts may be determined for different classes of works, sound recordings or films included in broadcasts, for different institutions administered by the administering body or for different classes of students (s 135H(2)). Where a copy of a broadcast has been communicated by making it available online, equitable remuneration is determined according to a system of prescribed periods (the default is 12 months, s 135H(5)). Where a copy remains online for longer than the prescribed period, the broadcast is taken to have been copied and communicated again in the next prescribed period, incurring additional payment (s 135H(3)).

Under a **sampling system**, an annual amount is paid to the collecting society in respect of copies made under the licence (again, determined by agreement or the Copyright Tribunal). In determining the annual payment, the parties (or Tribunal) must have regard to the potential for additional payments if copies remain online for longer than the prescribed periods, the extent to which other copies of broadcasts are made and communicated in a particular period, and any other prescribed or relevant matters in the circumstances (s 135J(2), (3)).

Under an **agreed notice**, the parties must take account of the requirement for additional payments to be made where copies remain available online beyond the prescribed period

(s 135J(4), (5)). Other than this requirement, the other matters and processes of the agreement system are determined by the parties' (s 135JA(3)).

Marking requirements apply where a records notice is in force. Each analogue copy (or the container in which it is kept) must be marked in the specified manner (s 135K(1)(a), Copyright Regulations (Cth) reg 23B(1)). One of three systems can be used:

- (a) **Full particulars** (name of institution, a reference to Part VA of the Act; the date on which the broadcast that was copied commenced; where the copy was made on a different date, the date on which it was made) (reg 23B(1)(a));
- (b) **Identifying number** (a reference code allowing the collecting society to identify the institution and to locate the required copying record made for each copy) (reg 23B(1)(b), (2)); and
- (c) Any other particulars the parties may agree to (reg 23B(1)(c)).

The administering body is also required (in all situations) to give **notice** in accordance with the regulations in relation to each communication indicating that the communication is made under a statutory licence and that any work or other subject-matter contained in the communication may be subject to copyright protection (s 135K(A)(a)(i)). The administering body of the institution is also required to take all reasonable steps to ensure that all communications of broadcasts made while the remuneration notice is in force can only be received or accessed by persons entitled to receive or access them (eg teachers, students at the institution) (s 135KA(b)).

The collecting society **Screenrights administers the Part VA scheme** (ss 135P and 135ZZB). Money collected by Screenrights for copying under this statutory licence is distributed to relevant copyright owners who are the owners of copyright in works, sound recordings or films, but not broadcasters who own copyright in the broadcasts themselves (see s 135A). Screenrights collects payments for all copyright owners, whether or not they are members. Where an owner is not a member, the funds are held in trust pending identification and admission to membership (s 135P(3)).

Before the decision of the High Court in *Phonographic Performance Co of Australia Ltd v Federation of Australian Commercial Television Stations*¹² in 1998, Screenrights did not make distributions of any of the remuneration collected by it to owners of copyright in sound recordings incorporated into the sound track of a film because it was believed that no separate right existed in such a recording. The High Court held that this was invalid and that although s 23(1) of the Act operated to deny any separate protection of the sound recording for the sounds embodied in a soundtrack which forms part of a cinematograph film, the provision did not operate to deny to the broadcasting of a film the character of a broadcast of the sound recording.

Following this decision, the Australian Record Industry Association (ARIA) demanded payment of the proportionate share of the distributable receipts of Screenrights attributable to the reproduction of sound recordings. Screenrights sought declarations from the NSW Supreme Court that in failing to pay equitable remuneration in relation to film soundtracks, it had not breached the trust upon which collected royalties were held

¹² (1998) 195 CLR 158.

(or alternative, it was not liable for such a breach). The Court held that Screenrights had breached that trust but that it was not personally liable because it had acted honestly.¹³

4. Fair Dealing for Research or Study

Under current law, the defence of fair dealing for what would otherwise be an infringing act in relation to a work, is permitted in four circumstances outlined in Division 3 of the *Copyright Act 1968*: research and study (s 40), criticism and review (s 41), reporting the news (s 42), and professional advice given by a legal practitioner or patent attorney (s 43(2)). Equivalent exceptions are provided for subject matter other than works such as audiovisual items or cinematograph films (see ss 103C, 103A, 103B). The first of these exceptions is the most important for the purposes of education.

s 40 Fair dealing for purpose of research or study

- (1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work.
- (1A) A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution.
- (1B) In subsection (1A) the expression *lecture notes* means any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research.
- (2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:
 - (a) the purpose and character of the dealing;
 - (b) the nature of the work or adaptation;
 - (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
 - (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
 - (e) in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.
- (3) Notwithstanding subsection (2), a dealing with a literary, dramatic or musical work, or with an adaptation of such a work, being a dealing by way of the reproducing, for the purposes of research or study:

¹³ *Audi-visual Copyright Society Ltd v Australian Record Industry Association Ltd* (1999) 46 IPR 29.

- (a) if the work or adaptation comprises an article in a periodical publication—of the whole or a part of that work or adaptation; or
 - (b) in any other case—of not more than a reasonable portion of the work or adaptation;
- shall be taken to be a fair dealing with that work or adaptation for the purpose of research or study.
- (4) Subsection (3) does not apply to a dealing by way of reproducing the whole or a part of an article in a periodical publication if another article in that publication, being an article dealing with a different subject matter, is also reproduced.
-

4.1 Eligibility

This defence is open to any person or entity.

Importantly, a **fair dealing with a literary work other than lecture notes** is not an infringement of copyright in the work if it is **for the purpose of, or associated with, an approved course of study or research by an enrolled external student** of an educational institution (s 40(1A)). The expression “lecture notes” means any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research (s 40(1B)). The definition of “educational institution” is discussed above.

This important provision was introduced to overcome the fact that external students were unable to copy in institutional libraries (under the fair dealing provisions). It has been an ongoing dispute between collecting society CAL and Australian universities whether multiple photocopying by the universities of copyrighted literary works for external students (in connection with courses being undertaken by them) constitutes copying under the statutory licence in Part VB *or* an exempt fair dealing: see below 4.4.

4.2 Purposes

The defence of fair dealing for research or study can only be relied upon where it is shown that the use is done for the specific purpose and the dealing, for that purpose, is fair. **“Research and study”** have been given their **ordinary dictionary meaning**.¹⁴ In *De Garis v Neville Jeffress Pidler Pty Ltd*,¹⁵ Beaumont J relied upon the Macquarie Dictionary definition of **research** as meaning “diligent and systematic enquiry or investigation into a subject into order to discover facts or principles” and **study**, defined as including (1) the application of the mind to the acquisition of knowledge, as by reading, investigation or reflection; (2) the cultivation of a particular branch of learning, science or art; ... (3) a particular course of effort to acquire knowledge ... (5) a thorough examination and analysis of a particular subject.

In that case, the provision of a media monitoring service for a fee was not “research” within the meaning of the Act. First, the defendant was engaged in a commercial information activity, not research activity. Second, the Court interpreted the purpose

¹⁴ See *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625.

¹⁵ *Ibid.*

required by the Act as the research or study of the *defendant* — rather than the consumer.¹⁶

4.3 *Nature and extent of works*

The defence applies generally to any dealings with the work: that is, any use of the work that is covered by the exclusive rights that are conferred on the copyright owner under the Act.

Where there is a dealing by way of reproduction, what is a “*fair*” **dealing** is not fixed by reference to the number of copies but is to be determined by reference to the facts of each case.¹⁷ Certain criteria are outlined in s 40(2) which provide some guidance in relation to what constitutes a dealing by way of reproduction of the whole or part of the work:

- the **purpose** and **character** of the use
- the **nature** of the copyrighted work
- the possibility of obtaining the work within a **reasonable time** and at an **ordinary commercial price**
- the **effect of the use** on the potential market or value of the work
- (where only part is reproduced) the **amount and substantiality** of the portion used in relation to the whole — both quantitatively and qualitatively.¹⁸

A *qualitative test* is also provided in respect of copying of articles in periodical publications and for other cases (s 40(3)). If the work comprises the former, the whole or part of that work (or adaptation) is taken to be a “fair dealing”. In any other case, the copying of no more than a “*reasonable portion*” of the work will be a “fair dealing”.

¹⁶ Ibid, 298.

¹⁷ *Haines v Copyright Agency Ltd* (1982) 42 ALR 549.

¹⁸ In the case of *Hubbard v Vosper* [1972] 2 QB 84, the defendant took large extracts, without prior authorisation, from the books of L Ron Hubbard in the process of criticising Hubbard’s cult of Scientology. The parts taken were seen to be so substantial that the defence of fair dealing could not be relied upon. In considering the meaning and scope of “fair dealing”, Lord Denning MR stated that: “It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. ... Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.” (At 94.) This passage is often cited in the Australian cases: see, eg, *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, at 372–5 (Conti J, Federal Court of Australia).

There is no simple definition of “reasonable portion”. Section 10(2) states that:

(2) Without limiting the meaning of the expression **reasonable portion** in this Act, where a literary, dramatic or musical work (other than a computer program) is contained in a published edition of that work, being an edition of not less than 10 pages, a copy of part of that work, as it appears in that edition, shall be taken to contain only a reasonable portion of that work if the pages that are copied in the edition:

- (a) do not exceed, in the aggregate, 10% of the number of pages in that edition; or
- (b) in a case where the work is divided into chapters exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of a single chapter of the work.

(2A) Without limiting the meaning of the expression **reasonable portion** in this Act, if a person makes a reproduction of a part of:

- (a) a published literary work (other than a computer program or an electronic compilation, such as a database); or
- (b) a published dramatic work;

being a work that is in electronic form, the reproduction is taken to contain only a reasonable portion of the work if:

- (c) the number of words copied does not exceed, in the aggregate, 10% of the number of words in the work; or
 - (d) if the work is divided into chapters—the number of words copied exceeds, in the aggregate, 10% of the number of words in the work, but the reproduction contains only the whole or part of a single chapter of the work.
-

4.4 *Overlap of s 40 and the statutory licence scheme*

Fair dealing for research or study does not allow for the same amount or type of copying as is permissible under the statutory licence for multiple copying by an educational institution (see below). In the Federal Court case of **Haines v Copyright Agency Ltd** (1982) 42 ALR 549, proceedings were brought against the New South Wales Government and the Director-General of Education in NSW by the collecting agency CAL, four publishing companies and three authors. McLelland J, at first instance, considered that the availability to educational institutions of the right to make copies under s 53B [the old licence provision] upon compliance with conditions designed to provide “equitable remuneration” to the owners of copyright must necessarily have an influence upon what amount and type of copying could properly be regarded as “fair dealing” under s 40. The Federal Court on appeal agreed with his Honour’s conclusions. The Court emphasised that what was a fair dealing with a work for the purpose of research or study must take into account the existence and effects of the statutory licence scheme.¹⁹

¹⁹ *Haines v Copyright Agency Ltd* (1982) 42 ALR 549, 556.

There is nothing to suggest that there can be no overlap between a fair dealing reproduction and copying which is also covered by a statutory licence.²⁰ There is nothing in the *Haines* judgment to suggest that a teacher could not make a copy for a student under s 40.

5. Special Exceptions

5.1 *Performance in the course of educational instruction*

The **performance of a literary, dramatic or musical work** in class, will not infringe copyright (ie, as a public performance) if the audience is limited to persons who are taking part in the instruction or are directly connected with the place where the instruction is given (s 28(1)). This statutory defence **applies also to sound recordings and cinematograph films**, which can be played or shown in class without infringing the right of the copyright owner to cause the recording or film to be heard or seen in public (s 28(4)).

The defence would seem to be **limited to the ‘live’ classroom situation** and would not cover an act such as the online transmission of a work for digital distance education students because the defence does not apply to acts of ‘communication to the public’ (ie making available online or electronic transmission as defined in s 10).

5.1.1 *Eligibility*

The performance must be **conducted by a teacher** in the course of giving educational instruction, which is **not given for profit, or by a student** in the course of receiving such instruction (s 28(1)(b)).

The performance is deemed not to be a performance in public if the audience is limited to persons taking part in the instruction or who are otherwise directly connected with the place where the instruction is given. However, a person is not “directly connected” with a place where instruction is given merely because they are a parent or guardian of a student (s 28(3)).

If a place of education is not conducted for profit, it is **immaterial that the teacher receives remuneration** for giving the instructions (s 28(2)).

s 28 Performance of works or other subject-matter in the course of educational instruction

(1) Where a literary, dramatic or musical work:

- (a) is performed in class, or otherwise in the presence of an audience; and
- (b) is so performed by a teacher in the course of giving educational instruction, not being instruction given for profit, or by a student in the course of receiving such instruction;

the performance shall, for the purposes of this Act, be deemed not to be a performance in public if the audience is limited to persons who are taking part in the instruction or are otherwise directly connected with the place where the instruction is given.

²⁰ See Butterworths, *Halsbury’s Laws of Australia*, Copyright and Designs, vol [40,075].

- (2) For the purposes of the last preceding subsection, educational instruction given by a teacher at a place of education that is not conducted for profit shall not be taken to be given for profit by reason only that the teacher receives remuneration for giving the instruction.
 - (3) For the purposes of subsection (1), a person shall not be taken to be directly connected with a place where instruction is given by reason only that he or she is a parent or guardian of a student who receives instruction at that place.
 - (4) The last three preceding subsections apply in relation to sound recordings and cinematograph films in like manner as they apply in relation to literary, dramatic and musical works but, in the application of those subsections in relation to such recordings or films, any reference to performance shall be read as a reference to the act of causing the sounds concerned to be heard or the visual images concerned to be seen.
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5.2 *Inclusion of copyright works in collections*

The copyright in a published literary, dramatic, musical or artistic work is not infringed by the inclusion of a **short extract** from the work (or from an adaptation of a literary, dramatic or musical), in a **collection of works contained in a book, sound recording or film intended for use by places of education** (s 44(1)). The collection must consist principally of matter in which copyright does not subsist.

What constitutes a “short extract” may be **difficult to discern**. It is likely a question of fact based upon the length and nature of the extract in relation to the work as a whole.

There is **no indication of the meaning of “collection”** in the Act either, but presumably it is directed at collections of course materials prepared for students, containing extracts of relevant articles, texts etc. However, it could not be said of many of such collections that they constitute *principally* material in which copyright does not subsist — the exemption is therefore a limited one.

There are **further conditions** that must also be observed:

- (a) the collection must be described in an appropriate place as being intended for use by places of education;
- (b) the work or adaptation must not have been published for the purpose of being used by places of education; and
- (c) a **sufficient acknowledgement** of the work or adaptation must be made.

There is also a **limit upon the number of extracts** from the works of the same author which may be included in such a collection by the same publisher over a 5 year period (there must not be two or more other extracts, in addition to the extract concerned, in which copyright subsists at the time: see s 44(2) below).

s 44 Inclusion of works in collections for use by places of education

- (1) The copyright in a published literary, dramatic, musical or artistic work is not infringed by the inclusion of a short extract from the work, or, in the case of a published literary, dramatic or musical work, from an adaptation of the work, in a collection of literary, dramatic, musical

or artistic works contained in a book, sound recording or cinematograph film and intended for use by places of education if:

- (a) the collection is described in an appropriate place in the book, on the label of each record embodying the recording or of its container, or in the film, as being intended for use by places of education;
 - (b) the work or adaptation was not published for the purpose of being used by places of education;
 - (c) the collection consists principally of matter in which copyright does not subsist; and
 - (d) a sufficient acknowledgement of the work or adaptation is made.
- (2) The last preceding subsection does not apply in relation to the copyright in a work if, in addition to the extract concerned, 2 or more other extracts from, or from adaptations of, works (being works in which copyright subsists at the time when the collection is published) by the author of the first-mentioned work are contained in that collection, or are contained in that collection taken together with every similar collection, if any, of works intended for use by places of education and published by the same publisher within the period of 5 years immediately preceding the publication of the first-mentioned collection.
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5.3 *Reading or recitation in public*

A person will not infringe copyright in a published literary or dramatic work by **reading or reciting in public an extract of reasonable length** from the work, or an adaptation of it, provided a sufficient acknowledgement is made (s 45). The work must be a published work and only an extract of “**reasonable length**” can be read/recited — not the whole of work. What is a ‘reasonable length’ will depend upon the circumstances of the case.

The reading or recitation may also be included in a **sound or television broadcast** under s 45 without infringing copyright in the work.

The work must be given “**sufficient acknowledgment**” which is defined in s 10(1) of the Act as an acknowledgment identifying the work by its title or other description, and also identifying the author, unless the work is anonymous or pseudonymous or the author has previously agreed or directed that an acknowledgment is not to be made.

The wording of the provision seems to limit it to face-to-face “reading or reciting” or inclusion in sound or television broadcast on a plain interpretation. Therefore, it is not clear that an **online transmission**, ie “communication to the public”, would be exempt under this exception.

s 45 Reading or recitation in public or for a broadcast

The reading or recitation in public, or the inclusion in a sound broadcast or television broadcast of a reading or recitation, of an extract of reasonable length from a published literary or dramatic work, or from an adaptation of such a work, does not constitute an infringement of the copyright in the work if a sufficient acknowledgement of the work is made.

5.4 *Reproduction and adaptation in the course of instruction and for exams*

The Act also allows a work to be reproduced or adapted for the purposes of education without infringing copyright in two cases:

- (a) where the copying is made by a teacher or student **in the course of educational instruction otherwise than by using a multiple copying machine** or a machine capable of producing copies by a process of reprographic reproduction (s 200(1)(a)).
- (b) Where the reproduction is made as **part of the questions to be answered in an exam, or in an answer** to such a question (s 200(1)(b)).

The exclusion of use of a photocopy machine in the former situation severely limits the utility of this defence to the student or teacher. It also seems to be directed to tangible copying and reproduction rather than digital dissemination online.

This exception applies to literary, dramatic, musical or artistic works and sound broadcasts.

s 200 Use of works and broadcasts for educational purposes

- (1) The copyright in a literary, dramatic, musical or artistic work is not infringed by reason only that the work is reproduced or, in the case of a literary, dramatic or musical work, an adaptation of the work is made or reproduced:
 - (a) in the course of educational instruction, where the work is reproduced or the adaptation is made or reproduced by a teacher or student otherwise than by the use of an appliance adapted for the production of multiple copies or an appliance capable of producing a copy or copies by a process of reprographic reproduction; or
 - (b) as part of the questions to be answered in an examination, or in an answer to such a question.
 - (2) The making of a record of a sound broadcast, being a broadcast that was intended to be used for educational purposes, does not constitute an infringement of copyright in a work or sound recording included in the broadcast if:
 - (a) the record is made by, or on behalf of, the person or authority in charge of a place of education that is not conducted for profit; and
 - (b) the record is not used except in the course of instruction at that place.
 - (2A) The making of a record of a sound broadcast is not an infringement of copyright in the broadcast if the record is made by, or on behalf of, the body administering an educational institution and is not used except for the educational purposes of that institution or another educational institution.
 - (3) For the purposes of sections 38 and 103, in determining whether the making of an article constituted an infringement of copyright, subsections (1), (2) and (2A) shall be disregarded.
 - (4) For the purposes of any provision of this Act relating to imported articles, in determining whether the making of an article made outside Australia would, if the article had been made in Australia by the importer of the article, have constituted an infringement of copyright, subsections (1), (2) and (2A) shall be disregarded.
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B Exceptions for Quotations

Some of the exceptions dealt with above allow for the use of copyrighted works for purposes of quotation without previous authorisation by the copyright owner.

1. Insubstantial reproductions

See above A, 1.

2. Multiple reproductions of insubstantial parts of hardcopy works

See above A, 2.1.

3. Fair dealing

See above A, 4.

A quotation from a work is likely to meet the criteria outlined in s 40(2), especially in relation to the amount and substantiality of the quote in relation to the work as a whole and the effect of the use on the potential market or the work's value. The purpose and character of the use must be for research or study.

The case of *Hubbard v Vosper* [1972] 2 QB 84, is often cited in this area. In that case, the defendant took large extracts, without prior authorisation, from the books of L Ron Hubbard in the process of criticising Hubbard's cult of Scientology. The parts taken were seen to be so substantial that the defence of fair dealing could not be relied upon. In considering the meaning and scope of "fair dealing", Lord Denning MR stated that:

"It must be **question of degree**. You must consider first the **number and extent of the quotations** and extracts. Are they altogether too many and too long to be fair? Then you must consider the **use made of them**. ... Next, you must consider the **proportions**. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression."²¹

²¹ *Hubbard v Vosper* [1972] 2 QB 84, 94. This passage is quoted in the Australian cases: see, eg, *TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2001) 50 IPR 335, at 372–5 (Conti J, Federal Court of Australia).

C Exceptions for Private Use

There is **no exception** in the Australian *Copyright Act* that allows for private use without infringement of the copyright owner's rights. The fair dealing exceptions to copyright infringement, for example, do not provide a general exception for private copying because the dealing must be for one of the specified purposes.

Section 111 (reproduced below) provides that there will be no infringement in the **making of a film of a broadcast (or a copy of that film) for private and domestic use** by the maker. The copyright in a sound broadcast or television broadcast (in so far as it consists of sounds) is also not infringed by the making of a sound recording of the broadcast (or copy of such a sound recording) if it's for **private and domestic use by the maker**.

s 111 Filming or recording broadcasts for private and domestic use

- (1) The copyright in a television broadcast in so far as it consists of visual images is not infringed by the making of a cinematograph film of the broadcast, or a copy of such a film, for the private and domestic use of the person by whom it is made.
- (2) The copyright in a sound broadcast, or in a television broadcast in so far as it consists of sounds, is not infringed by the making of a sound recording of the broadcast, or a copy of such a sound recording, for the private and domestic use of the person by whom it is made.
- (3) For the purposes of this section, a cinematograph film or a copy of such a film, or a sound recording or a copy of such a sound recording, shall be deemed to be made otherwise than for the private and domestic use of the person by whom it is made if it is made for the purpose of:
 - (a) selling a copy of the film or sound recording, letting it for hire, or by way of trade offering or exposing it for sale or hire;
 - (b) distributing a copy of the film or sound recording, whether for the purpose of trade or otherwise;
 - (c) by way of trade exhibiting a copy of the film or sound recording in public;
 - (d) broadcasting the film or recording; or
 - (e) causing the film or recording to be seen or heard in public.

1. Proposed blank tape royalty schemes

A **blank tape royalty scheme** was introduced by s 16 of the *Copyright Amendment Act 1989*. The royalty was to be applied to blank audio tapes at the point when they are first sold in Australia and it was to be paid by vendors to a collecting society. Consumers would have the right to make copies at home, for private and domestic use, of any published sound recording (and the works included on it) on blank tapes subject to the royalty.

However, the provisions of the scheme were **declared unconstitutional by the High Court** of Australia in *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia*.²² The High Court found, *inter alia*, that the legislation constituted a law with respect to taxation and rejected the argument that the levy imposed was a royalty or something analogous to a royalty.

Following the High Court's decision, the Government **proposed a new scheme** referred to as the **Blank Audio Media Recording Level (BARML)**. Under that proposal, a levy to compensate copyright owners would have been collected as a tax. However, the proposal was not pursued (apparently because the issue was eclipsed by other copyright reform issues).²³

Recently, **collecting societies** including Screenrights and the Australian Mechanical Copyright Owners Society (AMCOS) have proposed a new scheme to introduce a private copying levy. Under these proposals, the **purchaser would pay the royalty** to the seller who would then transfer the royalty to the distributor (who would pass the money on to the collecting society). The retailer would be compensated for the cost of compliance. The purchaser would be able to reproduce works for private purposes without infringing copyright. Private use would mean reproduction or copying by a person for that person's own private and non-commercial use or use within that person's domestic circle.

²² (1993) 176 CLR 480.

²³ See Australian Copyright Council, *Remuneration for Private Copying in Australia: Discussion Paper* (2001).

D Library Exceptions

Division 5 of Part III of the *Copyright Act* provides for exceptions to copyright for libraries and archives. Due to its length, a full extract is provided in *Appendix B*.

1. Reproduction and communication of works by libraries

Amendments made by the *Digital Agenda Act* allow libraries and archives to supply electronic as well as hardcopy reproductions of works or parts of works in response to user requests for the **purposes of research or study**, subject to certain conditions.

Under s 49(1), a person may furnish a **request** in writing to the office in charge of the library or a declaration to be supplied with a **reproduction of an article or a part of an article contained in a periodical publication or of the whole of a published work** (other than a periodical article) **being a periodical publication or a published work held in the library's collection** and they must also submit a **signed declaration** stating that the reproduction is required for the purpose of research or study and will not be used for any other purpose and that they have **not previously been supplied** with a reproduction of the work by an authorised officer of the library or archives. The officer may supply the reproduction to the person who made the request, unless the declaration contains a statement which to their knowledge is untrue (s 49(2)).

There are two (further) conditions in relation to the making of **electronic copies**. First, where a library or archives makes an electronic reproduction in response to a user request to communicate the reproduction under s 49(2) or s 49(2C), there is no exception from copyright infringement unless the requesting user is **notified**, in accordance with the regulations: that the reproduction is made under s 49; that the article or work might be subject to copyright protection under the Act; and about such other matters (if any) as are prescribed (s 49(7A)). The notice may be given before or when the reproduction is communicated to the user. The second requirement is that the **reproduction is destroyed as soon as practicable after it is communicated** to the user (s 49(7A)(d)) (so that libraries do not build up electronic collections of articles or works as a result of communicating them to users).

Section 49(5A) is also important because it provides that if a library obtains copyright works in digital form the permission of the copyright owner is not necessary for the library to exercise the new right of communication to the public to make the material available online to users **within the premises of the library**. However, the communication must be made in such a way that the user cannot electronically reproduce or communicate the work (although a fair dealing would be allowed).

Long-distance users are catered for in s 49(2A). If, by reason of the remoteness of a person's location, they cannot furnish the authorised officer with a written request or declaration, it *need not be made in writing* (s 49(2A), (2B)). The same request and declaration requirements apply as above but the declaration must also state that by reason of the remoteness of the person's location, they cannot conveniently furnish their request in writing soon enough to enable the reproduction to be supplied to the person before the time by which they require it (s 49(2A)(b)(iii)).

1.1 Rights covered by the exception

The “**supply**” of a reproduction in response to a user’s request includes a **supply by way of communication** (s 49(9)) (as well as the usual hardcopy supply). Thus, the reproduction can be made available online or electronically transmitted in accordance with the s 10 definition of “communicate”.

1.2 Eligibility

In ss 49(9) and 50(9), “library” is said to **not include a library that is conducted for profit, direct or indirect**, of the individuals. A library shall not be taken to be established or conducted for profit by reason only that the library is owned by a person carrying on business for profit (s 18). No further definition is given in the Act.

The officer in charge of the library, or a person authorised by that officer to act on his or her behalf, may make the reproduction or cause the reproduction to be made. An “**authorised officer**”, in relation to a library or archives, is defined in s 10 to mean the officer in charge of that library or archives or a person authorised by that officer to act on his or her behalf.

1.3 Purposes

The user’s request must be for the purpose of “**research or study**”. This is likely to be interpreted in the same manner as the fair dealing provisions: see above A, 4.

1.4 Nature and extent of works

The licence applies to an **article or a part of an article contained in a periodical publication or of the whole of a published work** (other than a periodical article) **being a periodical publication or a published work held in the library’s collection**.

In relation to published works, a “**reasonable portion**” of the work may be reproduced. A reproduction is taken to contain only a “reasonable portion” if what is reproduced is not more than 10% of the number of pages in a published edition of a hardcopy literary, dramatic or musical work (other than a computer program) of not less than 10 pages *or*, if more than 10% of a work divided into chapters is reproduced, if the reproduction contains only the whole or part of a single chapter (s 49(5)). Where a published literary work (other than a computer program) or dramatic work is in *electronic form* the test is expressed in terms of words. A reproduction in which the number of words does not exceed 10% of the total number of words in the work *or*, if the total exceeds 10% of the whole, where the reproduction is confined to a whole or part of a single chapter will be a “reasonable portion” (s 10(2A)). Reproductions of works available in both analogue and digital form need only satisfy the ‘reasonable portion’ requirements of one format. Note that only one reasonable portion may be reproduced from the same work (s 10(2C)).

The whole or an amount exceeding a “reasonable portion” of a published work (other than an article referred to above) can only be reproduced if the work forms part of the library collection *and*, before the reproduction is made the authorising officer has, after reasonable investigation, made a declaration stating that he or she is satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price (s 49(5)).

2. Reproduction and communication for *other* libraries

The Copyright Act allows libraries and archives to supply electronic reproductions of works or parts of works in response to requests from other libraries or archives subject to certain conditions.

Again, the supply of a reproduction includes a supply by way of communication (s 50(10)). Thus, the reproduction can be made available online or electronically transmitted.

2.1 *Eligibility*

The officer in charge of a library not conducted for profit, direct or indirect, or a person authorised by that officer to act on his or her behalf may make the reproduction and supply it to the officer in charge of the library or archives who made the request for the reproduction (s 50(1), (2), (9)). The reproduction is then deemed to have been made on behalf of an authorised officer of the requesting library or archives for the purpose for which it was requested (s 50(3)(a)). In addition, no action for infringement of copyright can be brought against the supplying library, or against any officer or employee of that library, for making or supplying the reproduction (s 50(3)(b)).

2.2 *Purposes*

The request must be made for the purpose of supplying the reproductions for one of three purposes specified in the Act. For our purposes, these are:

- (a) for **inclusion in the collections of the requesting library** (s 50(1)(a)); or
- (b) for the **purpose of supplying a reproduction to a person who has made a request from the requesting library** under s 49 of the Act (s 50(1)(b)).

2.3 *Nature and extent of works*

The following material can be reproduced under this exception:

- (a) An article or part of an **article contained in a periodical publication** held in the collection of the library network (s 50(1));
- (b) The whole or part of a **published work** (other than an article contained in a periodical publication) held in the collection of the library (s 50(1));
- (c) A **published edition of a work** where the reproduction of the work is not an infringement of copyright because of the operation of s 50 (s 112(a)(ii), (b)(ii));
- (d) Any artistic works ("**illustrations**"), which accompany the article or work for the purpose of "*explaining or illustrating*" it (s 53).

The whole or parts of two or more articles from the same periodical can only be reproduced if they related to the same subject matter (s 50(8)). **Where the article or part thereof is reproduced from a work held in electronic form**, the authorised article **must not be able to be obtained on its own in electronic form within a reasonable time at an ordinary commercial price** (s 50(7B)(e)(iv)). This "commercial availability" test does not apply in respect of articles reproduced from a hardcopy work (s 50(7A)(a)).

Where a reproduction is made from s 50 from a hardcopy work (other than an article contained in a periodical publication) which consists of **more than a "reasonable portion"** of the work, the exception to copyright infringement is not available unless a

copy could not be obtained within a **reasonable time** at an **ordinary commercial price** (s 50(7A)(e)). The authorised officer of the library is required to provide declarations to this effect. However, no guidance is given as to what a “reasonable investigation”, “reasonable time” or “ordinary commercial price” entails.

3. **Electronic reproduction and communication of unpublished works**

Amendments were made to s 51A of the Copyright Act to enable libraries and archives to digitise copyright material in their collections and to exercise the communication right in that material for preservation and other purposes. The word “reproduction” includes conversions of a work into and from digital form and the exception is intended to include exercise of the communication right. Section s 51A(2) permits libraries and archives to digitise copyright works held in the collection of the library or archives “**for administrative purposes**”. The reproduction can also be communicated by making it available online within the premises of the library or archives under s 51A(3).

Section 51A(2A) enables libraries (and archives) to **make available online what is referred to as a “preservation reproduction” of an original artistic work**, to be accessed through a computer in the premises of the library or archives. The **terminal must be a “dumb” terminal** that cannot be used for making copies (electronic or hard copy) or to communicate the reproduction. A “preservation reproduction” is defined in s 51A(6) as a reproduction of an artistic work made under s 51A(1) for the purpose of preserving the work against loss or deterioration. The “preservation reproduction” can only be made available in this way if the work has been lost or has deteriorated, since the preservation reproduction of the work was made, or the work has become so unstable that it cannot be displayed without risk of significant deterioration.

Furthermore, **s 110B(2A) and (2B)** allow libraries and archives to exercise the communication right (ie make available online) in relation to sound recordings and films held in their collections for purposes of preservation and replacement.

4. **Infringing copies made on machines installed in libraries and archives**

Under ss 39A and 104B, libraries and archives are deemed **not liable for authorising** the making of infringing copies of, or part of, a work (s 39A) or audio-visual item or published edition of a work (s 104B) by users using machines (including computers) installed in libraries or archives by reason only that the copies were made on those machines.

There must be affixed to, or in close proximity to, the machine, in a place readily visible to persons using the machine, a **warning notice** of the prescribed dimensions and in accordance with the prescribed form.

Appendix A

Part VA—Copying and communication of broadcasts by educational and other institutions

Division 1—Preliminary

135A Interpretation

In this Part:

administering body means a body administering an institution.

agreed notice means a remuneration notice specifying that the amount of equitable remuneration payable to the collecting society by the administering body giving the notice is to be assessed on the basis of an agreed system.

collecting society means the body that is, for the time being, declared to be the collecting society under section 135P.

institution means:

- (a) an educational institution; or
- (b) an institution assisting persons with an intellectual disability.

notice holder means the person who is, for the time being, appointed to be the notice holder under section 135T.

preview copy means a copy of a broadcast referred to in section 135F.

records notice means a remuneration notice specifying that the amount of equitable remuneration payable to the collecting society by the administering body giving the notice is to be assessed on the basis of a records system.

relevant copyright owner means the owner of the copyright in a work, a sound recording or a cinematograph film.

remuneration notice means a notice referred to in subsection 135G(1).

rules, in relation to the collecting society, means the provisions of the memorandum and articles of association of the society.

sampling notice means a remuneration notice specifying that the amount of equitable remuneration payable to the collecting society by the administering body giving the notice is to be assessed on the basis of a sampling system.

135B Copies and communications of broadcasts

In this Part:

- (a) a reference to a copy of a broadcast is a reference to a record embodying a sound recording of the broadcast or a copy of a cinematograph film of the broadcast; and

- (b) a reference to the making of a copy of a broadcast is a reference to the making of a copy of the whole or a part of the broadcast; and
- (c) a reference to the communication of a copy of a broadcast is a reference to the communication of a copy of the whole or a part of the broadcast.

135D Operation of collecting society rules

This Part applies to the collecting society despite anything in the rules of the society but nothing in this Part affects those rules so far as they can operate together with this Part.

Division 2—Copying and communication of broadcasts

135E Copying and communication of broadcasts by educational institutions etc.

- (1) The copyright in a broadcast, or in any work, sound recording or cinematograph film included in a broadcast, is not infringed by the making or communication, by or on behalf of an administering body, of a copy of the broadcast if:
 - (a) a remuneration notice, given by or on behalf of the administering body to the collecting society, is in force;
 - (b) where the copy or communication is made by, or on behalf of, a body administering an educational institution—the copy or communication is made solely for the educational purposes of the institution or of another educational institution;
 - (c) where the copy or communication is made by, or on behalf of, a body administering an institution assisting persons with an intellectual disability—the copy or communication is made solely for the purposes of use in the provision of assistance to persons with an intellectual disability by the institution or by another similar institution; and
 - (d) the administering body complies with subsection 135K(1) or (3), or section 135KA, as the case requires, in relation to the copy or communication.
- (2) Where a copy, or communication of a copy, of a broadcast referred to in subsection (1):
 - (a) is used for a purpose other than a purpose referred to in paragraph (1)(b) or (c);
 - (b) is made, sold or otherwise supplied for a financial profit; or
 - (c) is given to an administering body when there is not in force a remuneration notice given by that body to the collecting society;
 with the consent of the administering body by whom, or on whose behalf, it is made, subsection (1) does not apply, and shall be taken never to have applied, to the making of the copy or communication.

135F Making and communication of preview copies

- (1) The copyright in a broadcast, or in any work, sound recording or cinematograph film included in a broadcast, is not infringed by the making of a preview copy of the broadcast.
- (2) A copy of a broadcast is a preview copy if:

- (a) the copy is made by, or on behalf of, an administering body;
 - (b) a remuneration notice, given by, or on behalf of, the administering body to the collecting society, is in force; and
 - (c) the copy is made and used solely for the purpose of enabling that body to decide whether or not the copy should be retained for the educational purposes of the institution administered by it, or for use in the provision of assistance to persons with an intellectual disability by the institution administered by it, as the case may be.
- (3) Subject to this section, a preview copy shall be destroyed within 14 days after the day on which it was made (in this section called *the preview period*).
- (4) A preview copy may be retained after the end of the preview period if:
 - (a) where the relevant institution is an educational institution—the copy is retained solely for the educational purposes of the institution; or
 - (b) where the relevant institution is an institution assisting persons with an intellectual disability—the copy is retained solely for the purpose of use in the provision of assistance to such persons by the institution.
- (5) Where a preview copy is retained under subsection (4), subsection 135E(1) applies in relation to the copy after the end of the preview period as if the copy had been made solely for a purpose referred to in paragraph 135E(1)(b) or (c).
- (6) Where a preview copy is neither destroyed within the preview period nor retained under subsection (4), subsection (1) does not apply, and shall be taken never to have applied, to the making of the copy.
- (7) The copyright in a broadcast, or in any work, sound recording or cinematograph film included in a broadcast, is not infringed by the communication of a preview copy of the broadcast if:
 - (a) the communication is made solely to enable an administering body to decide whether or not that copy should be retained:
 - (i) for the educational purposes of the institution administered by it; or
 - (ii) for use in the provision of assistance to persons with an intellectual disability by the institution administered by it; and
 - (b) the communication is made only to the extent necessary for the purpose mentioned in paragraph (a); and
 - (c) the communication is made within the preview period.

135G Remuneration notices

- (1) An administering body may, by notice in writing given to the collecting society by it, or on its behalf, undertake to pay equitable remuneration to the society for:
 - (a) copies of broadcasts made by it, or on its behalf, while the notice is in force; and
 - (b) communications of such copies made by it, or on its behalf, while the notice is in force.

- (2) A remuneration notice shall specify whether the amount of equitable remuneration is to be assessed on the basis of a records system, a sampling system or an agreed system.
- (3) A remuneration notice comes into force on the day on which it is given to the collecting society, or on such later day as is specified in the notice, and remains in force until it is revoked.

135H Records notices

- (1) If a records notice is given by, or on behalf of, an administering body, the amount of equitable remuneration payable to the collecting society by the administering body for:
 - (a) each copy of a broadcast made by, or on behalf of, the administering body while the notice is in force; and
 - (b) each communication of such a copy of a broadcast made by or on behalf of the administering body while the notice is in force;
 is such amount as is determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.
- (1A) If a determination has been made by the Tribunal under subsection (1), either the administering body or the collecting society may, at any time after 12 months from the day on which the determination was made, apply to the Tribunal under that subsection for a new determination of the amount of equitable remuneration payable to the collecting society by the administering body for the making, by or on behalf of that body, of a copy of a broadcast and for the communication by, or on behalf of that body, of a copy of the broadcast.
- (2) For the purposes of subsection (1), different amounts may be determined (whether by agreement or by the Copyright Tribunal) in relation to:
 - (a) different classes of works, sound recordings or cinematograph films included in broadcasts;
 - (b) different institutions administered by the administering body; or
 - (c) different classes of students of an institution administered by the administering body.
- (3) If:
 - (a) a broadcast is copied by, or on behalf of, an administering body, or is taken under this subsection to have been so copied; and
 - (b) the copy is communicated by, or on behalf of, the body by being made available online, or is taken under this subsection to have been so communicated; and
 - (c) the copy remains so available online for longer than the prescribed period;
 then, when that period ends:
 - (d) the broadcast is taken to have been copied again by, or on behalf of, the body; and

- (e) the copy mentioned in paragraph (a) is taken to have been communicated again by, or on behalf of, the body by making it available online for a further prescribed period.
- (4) For the purposes of subsection (1), an amount of equitable remuneration must be determined (whether by agreement or by the Copyright Tribunal) having regard to:
 - (a) copies and communications to which paragraphs (3)(d) and (e) apply; and
 - (b) such matters (if any) as are prescribed; and
 - (c) such other matters (if any) as are relevant in the circumstances.
- (5) In this section:

prescribed period means the period of 12 months, or if another period is agreed between the relevant administering body and collecting society for the purposes of subsection (3), that other period.

135J Sampling notices

- (1) If a sampling notice is given by, or on behalf of, an administering body, the amount of equitable remuneration payable to the collecting society by the administering body for:
 - (a) copies of broadcasts made by, or on behalf of, the administering body while the notice is in force; and
 - (b) communications of such copies made by, or on behalf of, the administering body while the notice is in force;is such annual amount as is determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.
- (1A) If a determination has been made by the Tribunal under subsection (1), either the administering body or the collecting society may, at any time after 12 months from the day on which the determination was made, apply to the Tribunal under that subsection for a new determination of the amount of equitable remuneration payable to the collecting society by the administering body for copies of broadcasts made by, or on behalf of, that body and for communications by, or on behalf of, that body of such copies.
- (1B) If:
 - (a) a broadcast is copied by, or on behalf of, an administering body, or is taken under this subsection to have been so copied; and
 - (b) the copy is communicated by, or on behalf of, the body by being made available online, or is taken under this subsection to have been so communicated; and
 - (c) the copy remains so available online for longer than the prescribed period;then, when that period ends:
 - (d) the broadcast is taken to have been copied again by, or on behalf of, the body; and

- (e) the copy mentioned in paragraph (a) is taken to have been communicated again by, or on behalf of, the body by making it available online for a further prescribed period.
- (2) The annual amount referred to in subsection (1) must be determined (whether by agreement or by the Copyright Tribunal) having regard to:
 - (a) copies and communications to which paragraphs (1B)(d) and (e) apply; and
 - (b) the extent to which other copies of broadcasts are made and communicated by, or on behalf of, the administering body in a particular period; and
 - (c) such matters (if any) as are prescribed; and
 - (d) such other matters (if any) as are relevant in the circumstances.
- (3) The extent of copying of broadcasts and the communication of those copies, and any other matters that are necessary or convenient to be assessed by use of a sampling system, shall be assessed by use of a sampling system determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.
- (4) For the purposes of subsection (1), different annual amounts may be determined (whether by agreement or by the Copyright Tribunal) in relation to different institutions administered by the administering body.
- (5) Where:
 - (a) a sampling notice is given by, or on behalf of, an administering body to the collecting society; and
 - (b) during any period, the administering body does not comply with one or more of the requirements of the sampling system determined under this section in relation to the notice;
 subsections 135E(1) and 135F(1) do not apply to any copy of a broadcast, or communication of a copy of a broadcast, made by, or on behalf of, the administering body during that period.
- (6) In this section:

prescribed period means the period of 12 months, or if another period is agreed between the relevant administering body and collecting society for the purposes of subsection (1B), that other period.

135JA Agreed notice

- (1) If an agreed notice is given by, or on behalf of an administering body, the amount of equitable remuneration payable to the collecting society by the administering body for:
 - (a) copies of broadcasts made by, or on behalf of, the administering body while the notice is in force; and
 - (b) communications of such copies made by, or on behalf of, the administering body while the notice is in force;

is an amount (whether an annual amount or otherwise) determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

- (2) If a determination has been made by the Tribunal under subsection (1), either the administering body or the collecting society may, at any time after 12 months from the day on which the determination was made, apply to the Tribunal under that subsection for a new determination of the amount of equitable remuneration payable to the collecting society by the administering body for copies of broadcasts made and communicated by, or on behalf of, that body.
- (3) Subject to subsection (5), the matters and processes constituting an agreed system, and any matters that are necessary or convenient to be assessed or taken into account for the purposes of the system, must be determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.
- (4) If:
 - (a) a broadcast is copied by, or on behalf of, an administering body, or is taken under this subsection to have been so copied; and
 - (b) the copy is communicated by, or on behalf of, the body by being made available online, or is taken under this subsection to have been so communicated; and
 - (c) the copy remains so available online for longer than the prescribed period;then, when that period ends:
 - (d) the broadcast is taken to have been copied again by, or on behalf of, the body; and
 - (e) the copy mentioned in paragraph (a) is taken to have been communicated again by, or on behalf of, the body by making it available online for a further prescribed period.
- (5) An agreed system (whether determined by agreement or by the Copyright Tribunal) must require the assessment of an amount of equitable remuneration by a method or process that takes account of copies and communications to which paragraphs (4)(d) and (e) apply.
- (6) For the purposes of subsection (1), different amounts may be determined (whether by agreement or by the Copyright Tribunal) in relation to different institutions administered by the administering body.
- (7) If:
 - (a) an agreed notice is given by, or on behalf of, an administering body to the collecting society; and
 - (b) during any period, the administering body does not comply with one or more of the requirements of the agreed system determined under this section in relation to the notice;subsections 135E(1) and 135F(1) do not apply to any copy of a broadcast, or communication of a copy of a broadcast, made by, or on behalf of, the administering body during that period.

(8) In this section:

prescribed period means the period of 12 months or, if another period is agreed between the relevant administering body and collecting society for the purposes of subsection (4), that other period.

135K Marking and record keeping requirements

- (1) Where a records notice is given by, or on behalf of, an administering body, the body shall:
 - (a) mark, or cause to be marked, in accordance with the regulations, each copy in analog form of a broadcast made by it, or on its behalf, while the notice is in force, or any container in which such a copy is kept;
 - (b) make, or cause to be made, a record of each copying of a broadcast, and each communication of such a copy, carried out by it, or on its behalf, while the notice is in force, being a record containing such particulars as are prescribed;
 - (c) retain that record for the prescribed retention period after the making of the copy or communication to which it relates; and
 - (d) send copies of all such records to the collecting society in accordance with the regulations.
- (2) A record of the kind referred to in paragraph (1)(b):
 - (a) may be kept in writing or in any other manner prescribed in the regulations; and
 - (b) if it is kept in writing, shall be in accordance with the prescribed form.
- (3) Where a sampling notice is given by, or on behalf of, an administering body, the body shall mark, or cause to be marked, in accordance with the regulations, each copy in analog form of a broadcast made by it, or on its behalf, while the notice is in force, or any container in which such a copy is kept.

135KA Notice requirements in respect of communications

If a remuneration notice is given by, or on behalf of, an administering body to a collecting society in respect of communication of copies of broadcasts made by, or on behalf of, the body while the remuneration notice is in force, the body must, except in such circumstances (if any) as are prescribed:

- (a) give a notice, in accordance with the regulations, in relation to each such communication made by it, or on its behalf, while the remuneration notice is in force, containing:
 - (i) statements to the effect that the communication has been made under this Part and that any work or other subject-matter contained in the communication might be subject to copyright protection under this Act; and
 - (ii) such other information or particulars (if any) as are prescribed; and
- (b) in the case of each such communication made by it, or on its behalf, while the remuneration notice is in force—take all reasonable steps to ensure that the communication can only be received or accessed by persons entitled to receive

or access it (for example, teachers or persons receiving educational instruction or other assistance provided by the relevant institution); and

- (c) comply with such other requirements (if any) as are prescribed in relation to each such communication made by it, or on its behalf, while the remuneration notice is in force.

135L Inspection of records etc.

- (1) Where a remuneration notice is or has been in force, the collecting society may, in writing, notify the administering body which gave the notice that the society wishes, on a day specified in the notice, being an ordinary working day of the institution specified in the notice not earlier than 7 days after the day on which the notice is given, to do such of the following things as are specified in the notice:
 - (a) assess the amount of copying of broadcasts and communication of such copies carried out at the premises of the institution;
 - (b) inspect all the relevant records held at those premises that relate to the making and communication of copies of broadcasts in reliance on section 135E;
 - (c) inspect such other records held at those premises as are relevant to the assessment of the amount of equitable remuneration payable by the administering body to the society.
- (2) Where the collecting society gives a notice, a person authorised in writing by the society may, during the ordinary working hours of the relevant institution on the day specified in the notice (but not before 10 a.m. or after 3 p.m.), carry out the assessment, or inspect the records, to which the notice relates and, for that purpose, may enter the premises of the institution.
- (3) An administering body shall take all reasonable precautions, and exercise reasonable diligence, to ensure that a person referred to in subsection (2) who attends at the premises of an institution administered by the body for the purpose of exercising the powers conferred by that subsection is provided with all reasonable and necessary facilities and assistance for the effective exercise of those powers.
- (4) An administering body that contravenes subsection (3) is guilty of an offence punishable, on conviction, by a fine not exceeding \$500.

135M Revocation of remuneration notice

A remuneration notice may be revoked at any time by the relevant administering body by notice in writing given to the collecting society, and the revocation takes effect at the end of 3 months after the date of the notice or on such later day as is specified in the notice.

135N Request for payment of equitable remuneration

- (1) Subject to this section, where a remuneration notice is or has been in force, the collecting society may, by notice in writing given to the administering body which gave the notice, request the body to pay to the society, within a reasonable time after the date of the notice, the amount of equitable remuneration specified in the notice, being an amount payable under section 135H, 135J or 135JA, as the case may be, for

copies of broadcasts and communications of such copies made by, or on behalf of, the body while the remuneration notice is or was in force.

- (3) If an amount specified in a request under subsection (1) is not paid in accordance with the request, it may be recovered from the relevant administering body by the collecting society in the Federal Court of Australia or any other court of competent jurisdiction as a debt due to the society.
- (4) Jurisdiction is conferred on the Federal Court of Australia with respect to actions under subsection (3).

Division 3—The collecting society

135P The collecting society

- (1) Subject to this section, the Attorney-General may, by notice in the *Gazette*, declare a body named in the notice to be the collecting society.
- (2) The Attorney-General shall not name more than one body in a declaration and shall not make a declaration while an earlier declaration is in force.
- (3) The Attorney-General shall not declare a body to be the collecting society unless:
 - (a) it is a company limited by guarantee and incorporated under a law in force in a State or Territory relating to companies;
 - (b) all relevant copyright owners, or their agents, are entitled to become its members;
 - (c) its rules prohibit the payment of dividends to its members; and
 - (d) its rules contain such other provisions as are prescribed, being provisions necessary to ensure that the interests of the collecting society's members who are relevant copyright owners or their agents are protected adequately, including, in particular, provisions about:
 - (i) the collection of amounts of equitable remuneration payable by administering bodies under section 135H, 135J or 135JA;
 - (ii) the payment of the administrative costs of the society out of amounts collected by it;
 - (iii) the distribution of amounts collected by it;
 - (iv) the holding on trust by the society of amounts for relevant copyright owners who are not its members; and
 - (v) access to records of the society by its members.

135Q Revocation of declaration

The Attorney-General may, by notice in the *Gazette*, revoke the declaration of a body as the collecting society if satisfied that the body:

- (a) is not functioning adequately as the collecting society;
- (b) is not acting in accordance with its rules or in the best interests of those of its members who are relevant copyright owners or their agents;
- (c) has altered its rules so that they no longer comply with paragraphs 135P(3)(c) and (d); or

- (d) has refused or failed, without reasonable excuse, to comply with section 135R or 135S.

135R Annual report and accounts

- (1) The collecting society shall, as soon as practicable after the end of each financial year, prepare a report of its operations during that financial year and send a copy of the report to the Attorney-General.
- (2) The Attorney-General shall cause a copy of the report sent to the Attorney-General under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after the receipt of the report by the Attorney-General.
- (3) The society shall keep accounting records correctly recording and explaining the transactions of the society (including any transactions as trustee) and the financial position of the society.
- (4) The accounting records shall be kept in such a manner as will enable true and fair accounts of the society to be prepared from time to time and those accounts to be conveniently and properly audited.
- (5) The society shall, as soon as practicable after the end of each financial year, cause its accounts to be audited by an auditor who is not a member of the society, and shall send to the Attorney-General a copy of its accounts as so audited.
- (6) The society shall give its members reasonable access to copies of all reports and audited accounts prepared under this section.
- (7) This section does not affect any obligations of the society relating to the preparation and lodging of annual returns or accounts under the law under which it is incorporated.

135S Amendment of rules

The collecting society shall, within 21 days after it alters its rules, send a copy of the rules as so altered to the Attorney-General, together with a statement setting out the effect of the alteration and the reasons why it was made.

Division 4—Interim copying

135T Appointment of notice holder

The Attorney-General may, by notice in the *Gazette*, appoint a person to be the notice holder for the purposes of this Division.

135U Copying before declaration of collecting society

- (1) The copyright in a broadcast, or in any work, sound recording or cinematograph film included in a broadcast, is not infringed by the making, by or on behalf of an administering body, of a copy of the broadcast if:
 - (a) at the time the copy is made, the first collecting society has not been declared;

- (b) a notice given by the administering body to the notice holder under subsection 135W(1) is in force;
 - (c) where the copy is made by, or on behalf of, a body administering an educational institution—the copy is made solely for the educational purposes of the institution or of another educational institution;
 - (d) where the copy is made by, or on behalf of a body administering an institution assisting persons with an intellectual disability—the copy is made solely for the purposes of use in the provision of assistance to persons with an intellectual disability by the institution or by another similar institution; and
 - (e) the administering body complies with paragraphs 135K(1)(a), (b) and (c) or subsection 135K(3), in so far as those provisions apply.
- (2) Where a copy of a broadcast referred to in subsection (1):
- (a) is used for a purpose other than a purpose referred to in paragraph (1)(c) or (d);
 - (b) is made, sold or otherwise supplied for a financial profit; or
 - (c) is given to an administering body when there is not in force a notice given by that body to the notice holder under subsection 135W(1);
- with the consent of the administering body by whom, or on whose behalf, it is made, subsection (1) does not apply, and shall be taken never to have applied, to the making of the copy.

135V Preview copies

Section 135F applies to the making of preview copies of broadcasts before the first collecting society is declared as if:

- (a) the reference in paragraph 135F(2)(b) to a remuneration notice given by an administering body to the collecting society were a reference to a notice under subsection 135W(1) given by the administering body to the notice holder; and
- (b) the references in subsection 135F(5) to subsection 135E(1), and paragraphs 135E(1)(b) and (c), were references to subsection 135U(1), and paragraphs 135U(1)(c) and (d), respectively.

135W Notices by administering bodies

- (1) An administering body may at any time before the declaration of the first collecting society, by notice in writing given to the notice holder, undertake to pay equitable remuneration to the collecting society, when it is declared, for copies of broadcasts made by, or on behalf of, the administering body while the notice is in force.
- (2) A notice shall specify whether the amount of equitable remuneration is to be assessed on the basis of a records system or a sampling system.
- (3) A notice comes into force on the day on which it is given to the notice holder, or on such later day as is specified in the notice, and remains in force until it is revoked.
- (4) A notice may be revoked at any time by the relevant administering body by notice in writing given to the notice holder, and the revocation takes effect on the date of the notice of revocation or on such later date as is specified in it.

135X Marking and record keeping requirements

- (1) Where an administering body gives a notice under subsection 135W(1) that specifies that the amount of equitable remuneration is to be assessed on the basis of a records system, paragraphs 135K(1)(a), (b) and (d) and subsection 135K(2) apply as if:
 - (a) the reference to the collecting society were a reference to the notice holder; and
 - (b) references to a records notice were references to the notice under subsection 135W(1).
- (2) Where an administering body gives a notice under subsection 135W(1) that specifies that the amount of equitable remuneration is to be assessed on the basis of a sampling system, subsection 135K(3) applies as if:
 - (a) the reference to the collecting society were a reference to the notice holder; and
 - (b) references to a sampling notice were references to the notice under subsection 135W(1).

135Y Effect of declaration of collecting society

- (1) Where the first collecting society is declared, a notice given by an administering body to the notice holder under subsection 135W(1) and in force immediately before that declaration shall, on and after that declaration, be taken, for the purposes of this Part, to be a records notice or a sampling notice, as the case may be, given by that body to the collecting society, being a records notice or sampling notice that came into force on the day on which the notice came into force.
- (2) Where a notice is to be taken under this section to be a records notice, the relevant administering body shall cause copies of all records made under paragraph 135K(1)(b) on or after the day on which the notice is taken to have come into force to be sent to the collecting society within 21 days after the declaration of the collecting society.

Division 5—Miscellaneous

135Z Relevant copyright owner may authorise copying etc.

Nothing in this Part affects the right of the owner of the copyright in a broadcast, or in a work, sound recording or cinematograph film included in a broadcast, to grant a licence authorising an administering body to make, or cause to be made, a copy of the broadcast, sound recording or film, or a reproduction of the work and to communicate, or cause to be communicated, that copy or reproduction, without infringing that copyright.

135ZA Copyright not to vest in copier

Despite any other provision of this Act, the making or communication of a copy of a broadcast by, or on behalf of, an administering body that is not an infringement of copyright under this Part, does not vest copyright in any work or other subject-matter in any person.

Part VB—Reproducing and communicating works etc. by educational and other institutions

Division 1—Preliminary

135ZB Interpretation

In this Part:

administering body means a body administering an institution.

collecting society means a body that is, for the time being, declared to be a collecting society under section 135ZZB.

electronic use notice means a remuneration notice specifying that the amount of remuneration payable in respect of licensed copies in electronic form, or licensed communications, made by, or on behalf of, the administering body giving the notice is to be assessed on the basis of an electronic use system.

eligible item has the meaning given by section 135ZC.

institution means:

- (a) an educational institution;
- (b) an institution assisting persons with a print disability; or
- (c) an institution assisting persons with an intellectual disability.

licensed communication means a communication made by, or on behalf of, a body administering an institution in reliance on section 135ZMC, 135ZMD, 135ZP or 135ZS.

licensed copy means:

(a) a reproduction of the whole or a part of the work, being a reproduction that is made by, or on behalf of, a body administering an educational institution in reliance on section 135ZJ, 135ZK, 135ZL, 135ZMC or 135ZMD;

(b) a record embodying a sound recording of the whole or a part of a literary or dramatic work, or a Braille version, a large-print version, a photographic version or an electronic version of the whole or a part of such a work, being a record or version made by, or on behalf of, a body administering an institution assisting persons with a print disability in reliance on section 135ZP; or

(c) a copy of the whole or a part of an eligible item, being a copy made by, or on behalf of, a body administering an institution assisting persons with an intellectual disability in reliance on section 135ZS.

records notice means a remuneration notice specifying that the amount of equitable remuneration payable in respect of licensed copies made in hardcopy form or analog form by, or on behalf of, the administering body giving the notice is to be assessed on the basis of a records system.

relevant collecting society, in relation to a remuneration notice, means the collecting society for the owners of the copyright in works, or other subject-matter, of the same kind as that to which the remuneration notice relates.

relevant copyright owner means the owner of the copyright in a work or an eligible item other than a work.

remuneration notice means a notice referred to in subsection 135ZU(1).

rules, in relation to a collecting society, means the provisions of the memorandum and articles of association of the society.

sampling notice means a remuneration notice specifying that the amount of equitable remuneration payable in respect of licensed copies made in hardcopy form or analog form by, or on behalf of, the administering body giving the notice is to be assessed on the basis of a sampling system.

135ZC Eligible items and photographic versions

In this Part:

- (a) a reference to an eligible item is a reference to:
 - (i) a published literary, dramatic, musical or artistic work;
 - (ii) a published sound recording or cinematograph film; or
 - (iii) a work referred to in subparagraph (i) that is included in a sound broadcast;
- (b) a reference to a copy of an eligible item, being a literary, dramatic or musical work, is a reference to any of the following:
 - (i) a reproduction of the work in a material form;
 - (ii) an adaptation of the work;
 - (iii) a reproduction in a material form of an adaptation of the work;
- (c) a reference to a copy of an eligible item, being an artistic work, is a reference to a reproduction in a material form of the work;
- (d) a reference to a copy of an eligible item, being a sound recording or a cinematograph film, is a reference to a copy of the sound recording or cinematograph film; and
- (e) a reference to a photographic version of a work or a part of a work is a reference to a copy of the work or part of the work produced as a film-strip, or series of separate transparencies, designed to meet the needs of persons with a print disability.

135ZE Part does not apply to computer programs

Nothing in this Part applies in relation to a literary work, being a computer program or a compilation of computer programs.

135ZF Operation of collecting society rules

This Part applies to a collecting society despite anything in the rules of the society but nothing in this Part affects those rules so far as they can operate together with this Part.

135ZFA Licensed communications

For the purposes of this Part, a reference to a licensed communication of a work, or part of a work, or other subject-matter includes a reference to a licensed communication of a licensed copy of the work or other subject-matter.

Division 2—Reproduction by educational institutions of works that are in hardcopy form

135ZGA Application of Division

(1) This Division applies in relation to the reproduction of a work (including an article contained in a periodical publication), or part of a work, and to the copying of a published edition of a work, or part of such an edition, only if the reproduction or copy is made from a document that is in hardcopy form.

(2) For the purposes of this Division:

(a) a reference to a reproduction of a work (including an article contained in a periodical publication), or a part of a work, is to be read as a reference to a reproduction of that work or part made from a document that is in hardcopy form; and

(b) a reference to a facsimile copy of a printed published edition of a work, or part of such an edition, is to be read as a reference to a facsimile copy of that edition or part made from a document that is in hardcopy form.

135ZG Multiple reproduction of insubstantial parts of works that are in hardcopy form

(1) Subject to this section, copyright in a literary or dramatic work is not infringed by the making of one or more reproductions of a page or pages of the work in an edition of the work if the reproduction is carried out on the premises of an educational institution for the purposes of a course of education provided by it.

(2) Subsection (1) does not apply to the making of a reproduction of the whole of a work.

(3) Subsection (1) does not apply to the making of a reproduction of more than 2 of the pages of a work in an edition of the work unless:

(a) there are more than 200 pages in the edition; and

(b) the total number of pages so reproduced does not exceed 1% of the total number of pages in the edition.

(4) Where:

(a) a person makes, or causes to be made, a reproduction of a part of a work contained on a page or pages in an edition; and

(b) subsection (1) applies to the making of that reproduction;

that subsection does not apply to the making, by or on behalf of that person, of a reproduction of any other part of that work within 14 days after the day on which the previous reproduction was made.

(5) In this section, a reference to an edition of a work includes a reference to an edition of works that include that work.

135ZH Copying of printed published editions by educational institutions

The copyright in a printed published edition of a work (being a work in which copyright does not subsist) is not infringed by the making of one or more facsimile copies of the whole or a part of the edition, if the copy, or each of the copies, is made in the course of the making of a reproduction of the whole or a part of the work by, or on

behalf of, a body administering an educational institution for the educational purposes of that institution or of another educational institution.

135ZJ Multiple reproduction of printed periodical articles by educational institutions

(1) Subject to this section, the copyright in an article contained in a printed periodical publication is not infringed by the making of one or more reproductions of the whole or a part of that article by, or on behalf of, a body administering an educational institution if:

(a) a remuneration notice, given by or on behalf of the body to the relevant collecting society, is in force;

(b) the reproduction is carried out solely for the educational purposes of the institution or of another educational institution; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction.

(2) This section does not apply in relation to reproductions of, or of parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject-matter.

135ZK Multiple reproduction of works published in printed anthologies

The copyright in a literary or dramatic work, being a work contained in a printed published anthology of works and comprising not more than 15 pages in that anthology, is not infringed by the making of one or more reproductions of the whole or part of the work by, or on behalf of, a body administering an educational institution if:

(a) a remuneration notice given by, or on behalf of, the body to the relevant collecting society is in force; and

(b) the reproduction is carried out solely for the educational purposes of the institution or of another educational institution; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction.

135ZL Multiple reproduction of works that are in hardcopy form by educational institutions

(1) Subject to this section, the copyright in a literary, dramatic, musical or artistic work (other than an article contained in a periodical publication) is not infringed by the making of one or more reproductions of the whole or a part of the work by, or on behalf of, a body administering an educational institution if:

(a) a remuneration notice, given by or on behalf of the body to the relevant collecting society, is in force;

(b) the reproduction is carried out solely for the educational purposes of the institution or of another educational institution; and

(c) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction.

(2) This section does not apply in relation to reproductions of the whole, or of more than a reasonable portion, of a work that has been separately published unless the person who makes the reproductions, or causes the reproductions to be made, for, or on

behalf of, the body is satisfied, after reasonable investigation, that reproductions (other than second-hand reproductions) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

135ZM Application of Division to certain illustrations that are in hardcopy form

(1) Where an article or other literary, dramatic or musical work is accompanied by an artistic work or artistic works provided for the purpose of explaining or illustrating the article or other work, the preceding sections of this Division apply as if:

(a) where any of those sections provides that the copyright in the article or other work is not infringed—the reference to that copyright included a reference to any copyright in that artistic work or those artistic works;

(b) a reference to a reproduction of an article or other work included a reference to a reproduction of the article or other work together with a reproduction of that artistic work or those artistic works;

(c) a reference to a reproduction of a part of an article or other work included a reference to a reproduction of that part of the article or other work together with a reproduction of the artistic work or artistic works provided for the purpose of explaining or illustrating that part;

(d) a reference to a reproduction of a page of a literary or dramatic work in an edition of the work included a reference to a reproduction of a page in such an edition that contained that work and an artistic work or artistic works provided for the purpose of explaining or illustrating that part of that work; and

(e) a reference to a reproduction of pages of a literary or dramatic work in an edition of the work included a reference to a reproduction of pages in such an edition that contained a part of that work and an artistic work or artistic works provided for the purpose of explaining or illustrating that part of that work.

(2) If:

(a) any remuneration is paid under this Part in respect of a page of a document that is:

(i) a reproduction of the whole or a part of an article (other than a part that is an artistic work) contained in a periodical publication; or

(ii) a reproduction of the whole or a part of a literary or dramatic work contained in a published anthology of works; or

(iii) a reproduction of the whole or a part of a literary, dramatic or musical work other than an article contained in a periodical publication; and

(b) the making of the page is not an infringement of the copyright in the article or work because of section 135ZJ, 135ZK or 135ZL; and

(c) the page includes an artistic work or artistic works provided for the purpose of explaining or illustrating the article or work;

the following paragraphs apply:

(d) one-half of the remuneration paid in respect of the making of the page is to be paid to the owner, or divided equally among the owners, of the copyright in the literary, dramatic or musical work or works which, or a part of which, appear on the page; and

(e) one-half of that remuneration is to be paid to the owner, or divided equally among the owners, of the copyright in the artistic work or artistic works which, or a part of which, appear on the page.

Division 2A—Reproduction and communication of works that are in electronic form

135ZMA Application of Division

(1) This Division applies in relation to the reproduction of a work (including articles contained in periodical publications) or part of a work, only if the reproduction is made from an electronic form of the work.

(2) For the purposes of this Division, a reference to a reproduction of a work (including an article contained in a periodical publication), or a part of a work, is to be read as a reference to a reproduction made from an electronic form of the work or part.

135ZMB Multiple reproduction and communication of insubstantial parts of works that are in electronic form

(1) Subject to this section, copyright in a published literary or dramatic work is not infringed by:

- (a) the making of one or more reproductions of a part of the work; or
- (b) communicating a part of the work;

if the reproduction or communication is carried out on the premises of an educational institution for the purposes of a course of study provided by it.

(2) Subsection (1) does not apply to the reproduction or communication of more than 1% of the total number of words in the work.

(3) If:

(a) a person makes, or causes to be made, a reproduction of a part of a work or communicates a part of a work; and

(b) subsection (1) applies to the making of the reproduction or to the communication;

that subsection does not apply to the making by, or on behalf of, that person of a reproduction or to the communication by that person, of any other part of that work within 14 days after the day on which the previous reproduction or the first communication of the work was made.

(4) If:

(a) a person communicates a part of a work by making the part available online; and

(b) subsection (1) applies to the communication;

that subsection does not apply to the making available online by that person of any other part of that work while the part previously made available online continues to be so available.

135ZMC Multiple reproduction and communication of periodical articles that are in electronic form by education institutions

(1) Subject to this section, the copyright in an article contained in a periodical publication is not infringed by:

(a) the making of one or more reproductions of the whole or a part of the article; or

(b) the communication of the whole or a part of the article;
by, or on behalf of, a body administering an educational institution if:

(c) a remuneration notice given by, or on behalf of, the body to the relevant collecting society is in force; and

(d) the reproduction or communication is carried out solely for the educational purposes of the institution or of another educational institution; and

(e) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction or communication.

(2) This section does not apply in relation to the reproduction or communication of, or of parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject-matter.

135ZMD Multiple reproduction and communication of works that are in electronic form by educational institutions

(1) Subject to this section, the copyright in a literary, dramatic, musical or artistic work (other than an article contained in a periodical publication) is not infringed by:

(a) the making of one or more reproductions of the whole or a part of the work; or

(b) the communication of the whole or a part of the work;
by, or on behalf of, a body administering an educational institution if:

(c) a remuneration notice given by, or on behalf of, the body to the relevant collecting society is in force; and

(d) the reproduction or communication is carried out solely for the educational purposes of the institution or of another educational institution; and

(e) the body complies with subsection 135ZX(1) or (3) or section 135ZXA, as the case requires, in relation to each reproduction or communication.

(2) This section does not apply in relation to the reproduction or communication of:

(a) the whole, or of more than a reasonable portion of, a literary or dramatic work; or

(b) the whole, or of more than 10% of, a musical work;
that has been separately published unless the person who makes the reproduction or communication, or causes it to be made, for, or on behalf of, the body is satisfied, after reasonable investigation, that the work is not available in electronic form within a reasonable time at an ordinary commercial price.

(3) If:

(a) a person communicates a part of a work by or on behalf of a body administering an educational institution, by making the part available online; and

(b) subsection (1) applies to the communication;
that subsection does not apply to the making available online by, or on behalf of, that body of any other part of that work while the part previously made available online continues to be so available.

135ZME Application of Division to certain illustrations in electronic form

(1) If an article or other literary, dramatic or musical work that is in electronic form is accompanied by an artistic work or artistic works in electronic form provided for the purpose of explaining or illustrating the article or other work, the preceding sections of this Division apply as if:

(a) where any of those sections provides that the copyright in the article or other work is not infringed—the reference to that copyright included a reference to any copyright in the artistic work or artistic works; and

(b) a reference to a reproduction or communication of an article or other work included a reference to a reproduction or communication of the article or other work together with a reproduction or communication of the artistic work or artistic works; and

(c) a reference to a reproduction or communication of a part of an article or other work included a reference to a reproduction or communication of that part of the article or other work together with a reproduction or communication of the artistic work or artistic works provided for the purpose of explaining or illustrating that part.

(2) If:

(a) remuneration is paid under this Part in respect of:

(i) the reproduction or communication of the whole or part of an article (other than a part that is an artistic work) contained in a periodical publication; or

(ii) the reproduction or communication of the whole or part of a literary, dramatic or musical work, other than an article contained in a periodical publication; and

(b) the reproduction or communication is not an infringement of the copyright in the article or work because of section 135ZMC or 135ZMD; and

(c) the reproduction that is made or communicated includes an artistic work or artistic works provided for the purpose of explaining or illustrating the article or work; the amount of the remuneration must be divided among the owner or owners of the copyright in the artistic work or artistic works and the owner or owners of the copyright in the article or other literary, dramatic or musical work or works.

(3) The division of an amount of remuneration under subsection (2) is to be carried out as agreed between the relevant copyright owners or, failing such agreement, as determined by the Copyright Tribunal on application made by any of them.

...

Division 5—Equitable remuneration

135ZU Remuneration notices

(1) An administering body may, by notice in writing given to the relevant collecting society, undertake to pay equitable remuneration to the society for licensed copies and licensed communications made by it, or on its behalf, being copies and communications made while the notice is in force.

(2) A remuneration notice shall specify whether the amount of equitable remuneration is to be assessed on the basis of a records system, a sampling system or an electronic use system.

(2A) An administering body may give either a records notice or a sampling notice in respect of licensed copies made in hardcopy form or analog form, but may only give an electronic use notice in respect of licensed copies made in electronic form, or in respect of licensed communications.

(3) A remuneration notice comes into force on the day on which it is given to the collecting society, or on such later day as is specified in the notice, and remains in force until it is revoked.

135ZV Records notices

(1) Where a records notice is given by, or on behalf of, an administering body, the amount of equitable remuneration payable to the relevant collecting society by the administering body for each licensed copy made by it, or on its behalf, while the notice is in force is such amount as is determined by agreement between the administering body and that collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

(1A) If a determination has been made by the Tribunal under subsection (1), either the administering body or the collecting society may, at any time after 12 months from the day on which the determination was made, apply to the Tribunal under that subsection for a new determination of the amount of equitable remuneration payable to the collecting society by the administering body for each licensed copy made by or on behalf of that body.

(2) For the purposes of subsection (1), different amounts may be determined (whether by agreement or by the Copyright Tribunal) in relation to different institutions administered by the administering body and different classes of students of an institution administered by it.

135ZW Sampling notices

(1) Where a sampling notice is given by, or on behalf of, an administering body, the amount of equitable remuneration payable to the relevant collecting society by the administering body for licensed copies made by it, or on its behalf, while the notice is in force is such annual amount as is determined by agreement between the administering

body and that collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

(1A) If a determination has been made by the Tribunal under subsection (1), either the administering body or the collecting society may, at any time after 12 months from the day on which the determination was made, apply to the Tribunal under that subsection for a new determination of the amount of equitable remuneration payable to the collecting society by the administering body for licensed copies made by or on behalf of that body.

(2) The annual amount referred to in subsection (1) shall be determined (whether by agreement or by the Copyright Tribunal) having regard to the number of licensed copies made by, or on behalf of, the administering body in a particular period and to such other matters (if any) as are relevant in the circumstances.

(3) The number of copies referred to in subsection (2), and any other matters that are necessary or convenient to be assessed by use of a sampling system, shall be assessed by use of a sampling system determined by agreement between the administering body and the relevant collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

(4) For the purposes of subsection (1), different annual amounts may be determined (whether by agreement or by the Copyright Tribunal) in relation to different institutions administered by the administering body.

(5) Where:

(a) a sampling notice is given by, or on behalf of, an administering body to a collecting society; and

(b) during any period, the administering body does not comply with one or more of the requirements of the sampling system determined under this section in relation to that notice;

sections 135ZJ, 135ZK, 135ZL, 135ZMC, 135ZMD, 135ZP and 135ZS do not apply to any reproduction or copy of a work or other subject-matter made during that period by, or on behalf of, the administering body, being a reproduction or copy to which the sampling notice applies.

135ZWA Electronic use notices

(1) If an electronic use notice is given by, or on behalf of, an administering body, the amount of equitable remuneration payable to the relevant collecting society by the administering body for licensed copies and licensed communications made by it, or on its behalf, while the notice is in force is an amount (whether an amount per year or otherwise) determined by agreement between the administering body and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

(2) The matters and processes constituting an electronic use system, and any matters that are necessary or convenient to be assessed or taken into account for the purposes of the system, must be determined by agreement between the administering body and the relevant collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

(2A) If:

(a) a work is reproduced by, or on behalf of, an administering body, or is taken under this subsection to have been so reproduced; and

(b) the reproduction is communicated by, or on behalf of, the body by being made available online, or is taken under this subsection to have been so communicated; and

(c) the reproduction remains so available online for longer than the prescribed period;

then, when that period ends:

(d) the work is taken to have been reproduced again by, or on behalf of, the body; and

(e) the reproduction mentioned in paragraph (a) is taken to have been communicated again by, or on behalf of, the body by making it available online for a further prescribed period.

(2B) An electronic use system (whether determined by agreement or by the Copyright Tribunal) must require the assessment of an amount of equitable remuneration by a method or process that takes account of reproductions and communications to which paragraphs (2A)(d) and (e) apply.

(2C) Subject to subsection (2B) but without limiting subsection (2), an electronic use system (whether determined by agreement or by the Copyright Tribunal) may be based upon a records system, a sampling system or any other process or system.

(2D) For the purposes of subsection (1), different amounts may be determined (whether by agreement or by the Copyright Tribunal) in relation to different institutions administered by the administering body.

(3) If:

(a) an electronic use notice is given by, or on behalf of, an administering body to a collecting society; and

(b) during any period the administering body does not comply with one or more of the requirements of the electronic use system determined under this section in relation to the notice;

sections 135ZJ, 135ZK, 135ZL, 135ZMC, 135ZMD, 135ZP and 135ZS do not apply to any reproduction, copy or communication of a work or other subject-matter made during that period by, or on behalf of, the administering body, being a reproduction, copy or communication to which the electronic use notice applies.

(4) In this section:

prescribed period means the period of 12 months, or if another is agreed between the relevant administering body and collecting society for the purposes of subsection (2A), that other period.

135ZX Records notices and sampling notices: marking and record-keeping requirements

(1) Where a records notice is given by, or on behalf of, an administering body to a collecting society in respect of licensed copies made in hardcopy form or analog form, the administering body shall:

(a) mark, or cause to be marked, in accordance with the regulations, each such licensed copy made by it, or on its behalf, while the notice is in force, or any container in which such a copy is kept;

(b) make, or cause to be made, a record of the making of each such licensed copy that is carried out by it, or on its behalf, while the notice is in force, being a record containing such particulars as are prescribed;

(c) retain that record for the prescribed retention period after the making of the copy to which it relates; and

(d) send copies of all such records to the collecting society in accordance with the regulations.

(2) For the purposes of subsection (1), a record of the making of a licensed copy:

(a) may be kept in writing or in any other manner prescribed; and

(b) if it is kept in writing, shall be in accordance with the prescribed form.

(3) If a sampling notice is given by, or on behalf of, an administering body to a collecting society in respect of licensed copies made in hardcopy form or analog form, the administering body must mark, or cause to be marked, in accordance with the regulations, each such licensed copy made by it, or on its behalf, while the notice is in force, or any container in which such a copy is kept.

(4) Regulations made for the purposes of paragraph (1)(a) or (b) or subsection (3) may prescribe different marks or particulars, and impose different requirements, in relation to different kinds of licensed copies or different kinds of works or eligible items.

135ZXA Electronic use notices: notice requirements etc.

If an electronic use notice is given by, or on behalf of, an administering body to a collecting society, in respect of licensed copies made in electronic form or licensed communications, the administering body must:

(a) give a notice, in accordance with the regulations, in relation to each such copy or communication made by it, or on its behalf, while the electronic use notice is in force, containing:

(i) statements to the effect that the copy or communication has been made under this Part and that any work or other subject-matter contained in the copy or communication might be subject to copyright protection under this Act; and

(ii) such other information or particulars (if any) as are prescribed; and

(b) in the case of each such communication made by it, or on its behalf, while the electronic use notice is in force—take all reasonable steps to ensure that the communication can only be received or accessed by persons entitled to receive or access it (for example, teachers or persons receiving educational instruction or other assistance provided by the relevant institution); and

(c) comply with such other requirements (if any) as are prescribed in relation to each such copy or communication made by it, or on its behalf, while the electronic use notice is in force.

135ZY Inspection of records etc.

(1) Where a remuneration notice is or has been in force, the relevant collecting society to which the notice was given may, in writing, notify the administering body which gave the notice that the society wishes, on a day specified in the notice, being an ordinary working day of the institution specified in the notice not earlier than 7 days after the day on which the notice is given to do such of the following things as are specified in the notice:

(a) assess the amount of licensed copying or licensed communication carried out at the premises of the institution;

(b) inspect all the relevant records held at those premises that relate to the making of licensed copies or licensed communications;

(c) inspect such other records held at those premises as are relevant to the assessment of the amount of equitable remuneration payable by the administering body to the society.

(2) Where a collecting society gives a notice, a person authorised in writing by the society may, during the ordinary working hours of the relevant institution on the day specified in the notice (but not before 10 a.m. or after 3 p.m.), carry out the assessment, or inspect the records, to which the notice relates and, for that purpose, may enter the premises of the institution.

(3) An administering body shall take all reasonable precautions, and exercise reasonable diligence, to ensure that a person referred to in subsection (2) who attends at the premises of an institution administered by the body for the purpose of exercising the powers conferred by that subsection is provided with all reasonable and necessary facilities and assistance for the effective exercise of those powers.

(4) An administering body that contravenes subsection (3) is guilty of an offence punishable, on conviction, by a fine not exceeding \$500.

135ZZ Revocation of remuneration notice

A remuneration notice may be revoked at any time by the relevant administering body by notice in writing given to the relevant collecting society and the revocation takes effect at the end of 3 months after the date of the notice or on such later day as is specified in the notice.

135ZZA Request for payment of equitable remuneration

(1) Subject to this section, where a remuneration notice is or has been in force, the relevant collecting society may, by notice in writing given to the administering body which gave the notice, request the body to pay to the society, within a reasonable time after the date of the notice, the amount of equitable remuneration specified in the notice, being an amount payable under section 135ZV, 135ZW or 135ZWA, as the case may be, for licensed copies or licensed communications made by, or on behalf of, the body while the remuneration notice is or was in force.

(3) If an amount specified in a request is not paid in accordance with the request, it may be recovered from the relevant administering body by the relevant collecting society in the Federal Court of Australia or in any other court of competent jurisdiction as a debt due to the society.

(4) Jurisdiction is conferred on the Federal Court of Australia with respect to actions under subsection (3).

Appendix B

Part III—Copyright in original literary, dramatic, musical and artistic works

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Division 5—Copying of works in libraries or archives

48 Interpretation

In this Division, a reference to an article contained in a periodical publication shall be read as a reference to anything (other than an artistic work) appearing in such a publication.

49 Reproducing and communicating works by libraries and archives for users

- (1) A person may furnish to the officer in charge of a library or archives:
 - (a) a request in writing to be supplied with a reproduction of an article, or a part of an article, contained in a periodical publication or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and
 - (b) a declaration signed by him or her stating:
 - (i) that he or she requires the reproduction for the purpose of research or study and will not use it for any other purpose; and
 - (ii) that he or she has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorised officer of the library or archives.
- (2) Subject to this section, where a request and declaration referred to in subsection (1) are furnished to the officer in charge of a library or archives, an authorised officer of the library or archives may, unless the declaration contains a statement that to his or her knowledge is untrue in a material particular, make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person who made the request.
- (2A) A person may make to an authorised officer of a library or archives:
 - (a) a request to be supplied with a reproduction of an article, or part of an article, contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library or archives; and
 - (b) a declaration to the effect that:
 - (i) the person requires the reproduction for the purpose of research or study and will not use it for any other purpose;
 - (ii) the person has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorised officer of the library or archives; and

- (iii) by reason of the remoteness of the person's location, the person cannot conveniently furnish to the officer in charge of the library or archives a request and declaration referred to in subsection (1) in relation to the reproduction soon enough to enable the reproduction to be supplied to the person before the time by which the person requires it.
- (2B) A request or declaration referred to in subsection (2A) is not required to be made in writing.
- (2C) Subject to this section, where:
 - (a) a request and declaration referred to in subsection (2A) are made by a person to an authorised officer of a library or archives; and
 - (b) the authorised officer makes a declaration setting out particulars of the request and declaration made by the person and stating that:
 - (i) the declaration made by the person, so far as it relates to the matters specified in subparagraphs (2A)(b)(i) and (ii), does not contain a statement that, to the knowledge of the authorised officer, is untrue in a material particular; and
 - (ii) the authorised officer is satisfied that the declaration made by the person is true so far as it relates to the matter specified in subparagraph (2A)(b)(iii);

an authorised officer of the library or archives may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the person.
- (3) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) or (2A) relates, subsection (2) or (2C), as the case may be, does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.
- (4) Subsection (2) or (2C) does not apply in relation to a request for a reproduction of, or parts of, 2 or more articles contained in the same periodical publication unless the articles relate to the same subject matter.
- (5) Subsection (2) or (2C) does not apply to a request for a reproduction of the whole of a work (other than an article contained in a periodical publication), or to a reproduction of a part of such a work that contains more than a reasonable portion of the work unless:
 - (a) the work forms part of the library or archives collection; and
 - (b) before the reproduction is made, an authorised officer has, after reasonable investigation, made a declaration stating that he or she is satisfied that a reproduction (not being a second-hand reproduction) of the work cannot be obtained within a reasonable time at an ordinary commercial price.
- (5A) If an article contained in a periodical publication, or a published work (other than an article contained in a periodical publication) is acquired, in electronic form, as part of a library or archives collection, the officer in charge of the library or archives may make it available online within the premises of the library or archives in such a manner that users cannot, by using any equipment supplied by the library or archives:

- (a) make an electronic reproduction of the article or work; or
 - (b) communicate the article or work.
- (6) The copyright in an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the article, or of a part of the article, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.
- (7) The copyright in a published work other than an article contained in a periodical publication is not infringed by the making, in relation to a request under subsection (1) or (2A), of a reproduction of the work, or of a part of the work, in accordance with subsection (2) or (2C), as the case may be, unless the reproduction is supplied to a person other than the person who made the request.
- (7A) Subsections (6) and (7) do not apply to the making under subsection (2) or (2C) of an electronic reproduction of:
- (a) an article, or a part of an article, contained in a periodical publication; or
 - (b) the whole or part of a published work, other than such an article;
- in relation to a request under this section for communication to the person who made the request unless:
- (c) before or when the reproduction is communicated to the person, the person is notified in accordance with the regulations:
 - (i) that the reproduction has been made under this section and that the article or work might be subject to copyright protection under this Act; and
 - (ii) about such other matters (if any) as are prescribed; and
 - (d) as soon as practicable after the reproduction is communicated to the person, the reproduction made under subsection (2) or (2C) and held by the library or archives is destroyed.
- (7B) It is not an infringement of copyright in an article contained in a periodical publication, or of copyright in a published work, to communicate it in accordance with subsection (2), (2C) or (5A).
- (8) The regulations may exclude the application of subsection (6) or (7) in such cases as are specified in the regulations.
- (9) In this section:

library does not include a library that is conducted for the profit, direct or indirect, of an individual or individuals.

supply includes supply by way of a communication.

50 Reproducing and communicating works by libraries or archives for other libraries or archives

- (1) The officer in charge of a library may request, or cause another person to request, the officer in charge of another library to supply the officer in charge of the first-mentioned library with a reproduction of an article, or a part of an article,

contained in a periodical publication, or of the whole or a part of a published work other than an article contained in a periodical publication, being a periodical publication or a published work held in the collection of a library:

- (a) for the purpose of including the reproduction in the collection of the first-mentioned library;
 - (aa) in a case where the principal purpose of the first-mentioned library is to provide library services for members of a Parliament—for the purpose of assisting a person who is a member of that Parliament in the performance of the person's duties as such a member; or
 - (b) for the purpose of supplying the reproduction to a person who has made a request for the reproduction under section 49.
- (2) Subject to this section, where a request is made by or on behalf of the officer in charge of a library to the officer in charge of another library under subsection (1), an authorised officer of the last-mentioned library may make, or cause to be made, the reproduction to which the request relates and supply the reproduction to the officer in charge of the first-mentioned library.
- (3) Where, under subsection (2), an authorised officer of a library makes, or causes to be made, a reproduction of the whole or part of a work (including an article contained in a periodical publication) and supplies it to the officer in charge of another library in accordance with a request made under subsection (1):
 - (a) the reproduction shall, for all purposes of this Act, be deemed to have been made on behalf of an authorised officer of the other library for the purpose for which the reproduction was requested; and
 - (b) an action shall not be brought against the body administering that first-mentioned library, or against any officer or employee of that library, for infringement of copyright by reason of the making or supplying of that reproduction.
- (4) Subject to this section, if a reproduction of the whole or a part of an article contained in a periodical publication, or of any other published work, is, by virtue of subsection (3), taken to have been made on behalf of an authorised officer of a library, the copyright in the article or other work is not infringed:
 - (a) by the making of the reproduction; or
 - (b) if the work is supplied under subsection (2) by way of a communication—by the making of the communication.
- (5) The regulations may exclude the application of subsection (4) in such cases as are specified in the regulations.
- (6) Where a charge is made for making and supplying a reproduction to which a request under subsection (1) relates, subsection (4) does not apply in relation to the request if the amount of the charge exceeds the cost of making and supplying the reproduction.
- (7) Where:
 - (a) a reproduction (in this subsection referred to as the **relevant reproduction**) of, or of a part of, an article, or of the whole or a part of another work, is supplied under subsection (2) to the officer in charge of a library; and

- (b) a reproduction of the same article or other work, or of the same part of the article or other work, as the case may be, has previously been supplied under subsection (2) for the purpose of inclusion in the collection of the library;

subsection (4) does not apply to or in relation to the relevant reproduction unless, as soon as practicable after the request under subsection (1) relating to the relevant reproduction is made, an authorised officer of the library makes a declaration:

- (c) setting out particulars of the request (including the purpose for which the relevant reproduction was requested); and
- (d) stating that the reproduction referred to in paragraph (b) has been lost, destroyed or damaged, as the case requires.

(7A) If:

- (a) a reproduction is made of the whole of a work (other than an article contained in a periodical publication) or of a part of such a work, being a part that contains more than a reasonable portion of the work; and
- (b) the work from which the reproduction is made is in hardcopy form; and
- (c) the reproduction is supplied under subsection (2) to the officer in charge of a library;

subsection (4) does not apply in relation to the reproduction unless:

- (d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person’s duties as such a member; or
- (e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorised officer of the library makes a declaration:
 - (i) setting out particulars of the request (including the purpose for which the reproduction was requested); and
 - (ii) stating that, after reasonable investigation, the authorised officer is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.

(7B) If:

- (a) a reproduction is made of the whole of a work (including an article contained in a periodical publication) or of a part of such a work, whether or not the part contains more than a reasonable portion of the work; and
- (b) the work from which the reproduction is made is in electronic form; and
- (c) the reproduction is supplied under subsection (2) to the officer in charge of a library;

subsection (4) does not apply in relation to the reproduction unless:

- (d) in a case where the principal purpose of the library is to provide library services for members of a Parliament—the reproduction is so supplied for the purpose of assisting a person who is a member of that Parliament in the performance of the person’s duties as such a member; or
- (e) as soon as practicable after the request under subsection (1) relating to the reproduction is made, an authorised officer of the library makes a declaration:

- (i) setting out particulars of the request (including the purpose for which the reproduction was requested); and
- (ii) if the reproduction is of the whole, or of more than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the work cannot be obtained in electronic form within a reasonable time at an ordinary commercial price; and
- (iii) if the reproduction is of a reasonable portion, or less than a reasonable portion, of a work other than an article—stating that, after reasonable investigation, the authorised officer is satisfied that the portion cannot be obtained in electronic form, either separately or together with a reasonable amount of other material, within a reasonable time at an ordinary commercial price; and
- (iv) if the reproduction is of the whole or of a part of an article—stating that, after reasonable investigation, the authorised officer is satisfied that the article cannot be obtained on its own in electronic form within a reasonable time at an ordinary commercial price.

(7C) If:

- (a) a reproduction is made in electronic form by or on behalf of an authorised officer of a library of the whole of a work (including an article contained in a periodical publication) or of a part of such a work; and
- (b) the reproduction is supplied under subsection (2) to the officer in charge of another library;

subsection (4) does not apply in relation to the reproduction unless, as soon as practicable after the reproduction is supplied to the other library the reproduction made for the purpose of the supply and held by the first-mentioned library is destroyed.

- (8) Subsection (4) does not apply to a reproduction or communication of, or of parts of, 2 or more articles that are contained in the same periodical publication and that have been requested for the same purpose unless the articles relate to the same subject matter.
- (9) In this section, a reference to a library shall be read as a reference to a library other than a library that is conducted for the profit, direct or indirect of an individual or individuals, and as including a reference to archives.
- (10) In this section:

supply includes supply by way of a communication.

51 Reproducing and communicating unpublished works in libraries or archives

- (1) Where, at a time more than 50 years after the expiration of the calendar year in which the author of a literary, dramatic or musical work, or of an artistic work being a photograph or engraving, died, copyright subsists in the work but:
 - (a) the work has not been published; and

- (b) a reproduction of the work, or, in the case of a literary, dramatic or musical work, the manuscript of the work, is kept in the collection of a library or archives where it is, subject to any regulations governing that collection, open to public inspection;

the copyright in the work is not infringed:

- (c) by the making or communication of a reproduction of the work by a person for the purposes of research or study or with a view to publication; or
 - (d) by the making or communication of a reproduction of the work by, or on behalf of, the officer in charge of the library or archives if the reproduction is supplied (whether by way of communication or otherwise) to a person who satisfies the officer in charge of the library or archives that the person requires the reproduction for the purposes of research or study, or with a view to publication, and that the person will not use it for any other purpose.
- (2) If the manuscript, or a reproduction, of an unpublished thesis or other similar literary work is kept in a library of a university or other similar institution, or in an archives, the copyright in the thesis or other work is not infringed by the making or communication of a reproduction of the thesis or other work by or on behalf of the officer in charge of the library or archives if the reproduction is supplied (whether by communication or otherwise) to a person who satisfies an authorised officer of the library or archives that he or she requires the reproduction for the purposes of research or study.

...

51A Reproducing and communicating works for preservation and other purposes

- (1) Subject to subsection (4), the copyright in a work that forms, or formed, part of the collection of a library or archives is not infringed by the making or communicating, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work:
- (a) if the work is held in manuscript form or is an original artistic work—for the purpose of preserving the manuscript or original artistic work, as the case may be, against loss or deterioration or for the purpose of research that is being, or is to be, carried out at the library or archives in which the work is held or at another library or other archives;
 - (b) if the work is held in the collection in a published form but has been damaged or has deteriorated—for the purpose of replacing the work; or
 - (c) if the work has been held in the collection in a published form but has been lost or stolen—for the purpose of replacing the work.
- (2) The copyright in a work that is held in the collection of a library or archives is not infringed by the making, by or on behalf of the officer in charge of the library or archives, of a reproduction of the work for administrative purposes.
- (3) The copyright in a work that is held in the collection of a library or archives is not infringed by the communication, by or on behalf of the officer in charge of the

library or archives, of a reproduction of the work made under subsection (2) to officers of the library or archives by making it available online to be accessed through the use of a computer terminal installed within the premises of the library or archives with the approval of the body administering the library or archives.

- (3A) The copyright in an original artistic work that is held in the collection of a library or archives is not infringed in the circumstances described in subsection (3B) by the communication, by or on behalf of the officer in charge of the library or archives, of a preservation reproduction of the work by making it available online to be accessed through the use of a computer terminal:
- (a) that is installed within the premises of the library or archives; and
 - (b) that cannot be used by a person accessing the work to make an electronic copy or a hardcopy of the reproduction, or to communicate the reproduction.
- (3B) The circumstances in which the copyright in the original artistic work is not infringed because of subsection (3A) are that either:
- (a) the work has been lost, or has deteriorated, since the preservation reproduction of the work was made; or
 - (b) the work has become so unstable that it cannot be displayed without risk of significant deterioration.
- (4) Subsection (1) does not apply in relation to a work held in published form in the collection of a library or archives unless an authorised officer of the library or archives has, after reasonable investigation, made a declaration stating that he or she is satisfied that a copy (not being a second-hand copy) of the work cannot be obtained within a reasonable time at an ordinary commercial price.
- (5) Where a reproduction of an unpublished work is made under subsection (1) by or on behalf of the officer in charge of a library or archives for the purpose of research that is being, or is to be, carried out at another library or archives, the supply or communication of the reproduction by or on behalf of the officer to the other library or archives does not, for any purpose of this Act, constitute the publication of the work.
- (6) In this section:

preservation reproduction, in relation to an artistic work, means a reproduction of the work made under subsection (1) for the purpose of preserving the work against loss or deterioration.

52 Publication of unpublished works kept in libraries or archives

- (1) Where:
- (a) a published literary, dramatic or musical work (in this section referred to as ***the new work***) incorporates the whole or a part of a work (in this section referred to as ***the old work***) to which subsection 51(1) applied immediately before the new work was published;
 - (b) before the new work was published, the prescribed notice of the intended publication of the work had been given; and

- (c) immediately before the new work was published, the identity of the owner of the copyright in the old work was not known to the publishers of the new work;

then, for the purposes of this Act, the first publication of the new work, and any subsequent publication of the new work whether in the same or in an altered form, shall, in so far as it constitutes a publication of the old work, be deemed not to be an infringement of the copyright in the old work or an unauthorised publication of the old work.

- (2) The last preceding subsection does not apply to a subsequent publication of the new work incorporating a part of the old work that was not included in the first publication of the new work unless:
 - (a) subsection 51(1) would, but for this section, have applied to that part of the old work immediately before that subsequent publication;
 - (b) before that subsequent publication, the prescribed notice of the intended publication had been given; and
 - (c) immediately before that subsequent publication, the identity of the owner of the copyright in the old work was not known to the publisher of that subsequent publication.
- (3) If a work, or part of a work, has been published and, because of this section, the publication is taken not to be an infringement of the copyright in the work, the copyright in the work is not infringed by a person who, after the publication took place:
 - (a) broadcasts the work, or that part of the work; or
 - (b) electronically transmits the work, or that part of the work (other than in a broadcast) for a fee payable to the person who made the transmission; or
 - (c) performs the work, or that part of the work, in public; or
 - (d) makes a record of the work, or that part of the work.

53 Application of Division to illustrations accompanying articles and other works

Where an article, thesis or literary, dramatic or musical work is accompanied by artistic works provided for the purpose of explaining or illustrating the article, thesis or other work (in this section referred to as *the illustrations*), the preceding sections of this Division apply as if:

- (a) where any of those sections provides that the copyright in the article, thesis or work is not infringed—the reference to that copyright included a reference to any copyright in the illustrations;
- (b) a reference in section 49, section 50, section 51 or 51A to a copy of the article, thesis or work included a reference to a copy of the article, thesis or work together with a copy of the illustrations;
- (c) a reference in section 49 or section 50 to a copy of a part of the article or work included a reference to a copy of that part of the article or work together with a copy of the illustrations that were provided for the purpose of explaining or illustrating that part; and

- (d) a reference in section 51A or section 52 to the doing of any act in relation to the work included a reference to the doing of that act in relation to the work together with the illustrations.

**Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project**

BELGIUM

**by Pr. Alain Strowel and Charles-Henry Massa,
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PRELIMINARY REMARKS

Sources

The relevant law is the « loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins » (LDA).

The reference textbooks are:

- *F. de Visscher et B. Michaux, Précis du droit d'auteur et des droits voisins, Bruylant, Bruxelles, 2000, 1104 p. (« de Visscher & Michaux ») ;*
- *Strowel et E. Derclaye, Droit d'auteur et numérique, Bruylant, Bruxelles, 2001, 488 p. (« Strowel & Derclaye »).*

The two following studies remain of interest although Article 22, §1, 4° LDA was substantially amended in 1998:

- *F. Dubuisson, L'exception de reproduction d'œuvres fixées sur un support graphique ou analogue dans un but privé ou didactique (analyse de l'article 22, §1, 4° de la loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins), J.T. 1997, pp. 652-659 (« Dubuisson ») ;*
- *M.C. Janssens, Rapport belge, in Les Frontières du droit d'auteur – Ses limites et exceptions, Journées d'étude de l'ALAI, 1998, pp. 175-203 (« Janssens »).*

Back to March 2001, a MP had already submitted a draft Bill implementing the Copyright Directive 2001/29/EC (the « implementing Bill »). The implementing Bill has been repeatedly amended ever since and is still dragging on before the Parliament. Anticipated changes are mentioned below, under each specific provision. Generally, the implementing Bill would also subject all exceptions to a three-step test as well as a requirement of lawful acquirement.

An incomplete and vague system

Please prepare yourself for some disappointment as the system of exceptions to Belgian copyright is rather incomplete and vague.

It is incomplete owing to several major loopholes.

- (1) *Not all works are covered. The general reprography exception for literary and graphic works (Art. 22, §1, 4° LDA) “most probably” (see below) covers works fixed on analog medium only, as opposed to those fixed on digital medium. Nevertheless, the specific reprography exception for teaching and research covers literary and graphic works fixed on analog (Art. 22, §1, 4°bis LDA) and digital (Art. 22, §1, 4°ter LDA) media alike. The general private copying exception (Art. 22, §1, 5° LDA) solely covers sound and audiovisual works.*

- (2) Not all uses are covered. Crucially, the exceptions for literary and graphic works – the general reprography exception for (Art. 22, §1, 4°bis LDA) and the specific reprography exceptions for teaching and research (Art. 22, §1, 4°bis and 4°ter LDA) – only cover reproduction, and **not communication to the public** (thus not CDDE)! By contrast, the exceptions for sound and audiovisual works cover reproduction (Art. 22, §1, 5° LDA) and communication (Art. 22, §1, 3° LDA) alike; however, such permitted reproductions and communications are limited to the “family circle” and are accordingly of no use for CDDE purposes.

The system of exceptions to Belgian copyright is also vague. The legal provisions are terse and there is hardly any case-law. No study on the exceptions, in particular their application to teaching and research, has ever been carried out by educational institutions or the competent Ministries. Mostly, we can only conjecture. Therefore your refined, discriminating questions will often find no (satisfactory) answer.

I.- EXCEPTION FOR TEACHING PURPOSES.

0.- Identify any specific exception that allows for the use of copyrighted works for teaching purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Article 22 § 1, 4°bis et 4°ter currently reads:

« 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 ;) » (introduit par la loi du 31 août 1998 entrée en vigueur le 14 novembre 1998)

The implementing Bill would amend Article 22 § 1, 4°bis et 4°ter as follows :

« Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (...)

4°bis la reproduction fragmentaire ou intégrale sur papier ou sur un support analogue, à l'aide 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 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, à moins que cela ne s'avère impossible, que la source, y compris le nom de l'auteur, soient indiquée ;

4°ter la reproduction fragmentaire ou intégrale sur tout support autre que sur papier ou sur support 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, pour autant, à moins que cela ne s'avère impossible, que la source, y compris le nom de l'auteur, soient indiquée ».

1.- Exclusive Rights covered by the exception.

- a) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered?

Yes, it covers reproduction. Apparently all means of reproduction are covered (in parallel to the comprehensive right of reproduction “in any manner and form whatsoever” under Article 1, §1, al. 1 LDA). Digital reproductions are thus covered. Moreover, unlike the general reprography exception (see below), works fixed on a digital medium are covered by Article 22 § 1, 4° ter (“œuvres fixées sur un support autre qu’un support graphique ou analogue”).

- b) Can a work be digitized for use as part of the instruction? Would digitization qualify as a reproduction or also as a transformation?

A work can probably be digitized for use as part of the instruction. Digitization would qualify as a reproduction.

- c) How many copies can be made? Is it somehow limited, i.e., to the number of students in a class?

The number of copies is not limited. However, the reproductions must not prejudice the normal exploitation of the work (see the three-step tests under the Berne Convention and the Copyright Directive). This calls for an economic assessment of competing uses.

- d) Does it cover communication to the public? Does it cover the storage of the copyrighted work on the server, thus allowing asynchronous teaching?

*No, it (arguably) does not cover communication to the public (compare with Article 22 **bis** §1, 4° LDA permitting communication to the public of copyright-protected databases for purposes of illustration for teaching or of scientific research). This major loophole has been pointed out from the outset.*

It covers the storage of the copyrighted work on the server – but not its making available to the public, thus disallowing asynchronous teaching.

- e) How does your system qualify a digital transmission/delivery of a work? Have the WCT or WPPT had any effect on this matter? Has the EU Directive, if applicable, had any effect on this matter?

The extremely broad right of reproduction under Article 1 §1, al. 1 LDA covers reproduction “in any manner or form whatsoever” (“par quelque moyen et sous quelque forme que ce soit”). So digital transmission/delivery of a work involves some reproduction before communication to the public.

Belgium is not (yet) a member of WCT and WPPT. The EU Directive is still due for transposition into Belgian law, but it will only clarify, not modify, this matter.

- f) Does the exception cover subsequent reproductions made in the course of transmission (routing copies, caché copies, etc) and reception (RAM copies, screen displays and downloads) of these works by each student? (Please note that this last issue is intertwined with the question of eligibility: who is allowed to make reproductions for teaching purposes—just professors, or also students?)

Most probably so (thus covering students, too).

2.- Eligibility under the exception.

a) Eligibility as to institutions:

- Which institutions may benefit from a copyright exception for teaching purposes? Educational institutions? Schools? Universities? etc. How are those terms defined? How do they apply to the Internet?

All institutions may benefit, provided that the reproduction is made for purposes for illustration of teaching or of scientific research to the extent justified by the not-for-profit purpose and does not prejudice the normal exploitation of the work.

- Is there any specific condition as to the nature (for-profit or not-for-profit, public or private) of the teaching activity or of the institution? How does this apply to digital distance education?

The reproduction must be made for purposes of illustration for teaching or of scientific research to the extent justified by the not-for-profit purpose and must not prejudice the normal exploitation of the work. The "reproduction" relates to the teaching activity. The "not-for-profit purpose" probably relates to the institution as a whole, not just the teaching activity.

- May libraries benefit from such an exception, and therefore provide copies (and also distribute? communicate to the public?) of works for teaching purposes? *(Please note that this last issue may have a connection with any exception provided for in favor of libraries. If libraries cannot benefit from a specific teaching exception, the scope of the "remaining" library exceptions becomes paramount to cover the use of works for teaching purposes.*

Libraries may benefit, under the above proviso. Note that communication to the public is not covered anyway (see above).

b) Eligibility as to individuals:

- May only teachers benefit from the exception or also students (and guest-lecturers, etc)?

Teachers, guest-lecturers and students may all benefit.

- If students cannot benefit from that exception, may a general private use/private copying exception (or fair use) "fill that gap" (as it seems to be the case in the analog world)? *(Please note that this last issue may be considered under a separate section III dealing with the private use/ copying exception)*

No. The private copying exception (Art. 22, §1, 5° LDA) only applies to sound and audiovisual works, and to the family circle. The general reprography exception (Art. 22, §1, 4° LDA) only applies to works fixed on analog medium. See Section III.

c) Some teaching-related exceptions refer to or imply physical concepts related to face-to-face teaching activities—concepts like classroom, school premises, etc. If so, does this specific language limit or curtail the applicability of the exception in the digital world?

No such concepts are referred to. Not applicable.

d) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

It is to be recalled that the reproduction must be made for purposes of illustration for teaching or of scientific research to the extent justified by the not-for-profit purpose and must not prejudice the normal exploitation of the work.

3.- Purposes. What is “teaching purposes”?

- a) What constitutes “teaching purposes”? (*Please, substitute by the specific language used in your national exception; for instance, the EU Directive art.5.3(a) what is “illustration for teaching”*). Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

The new wording of 1998 (“purposes of illustration for teaching or of scientific research”) is intended to be broader than the old wording (“didactic purpose”). There is no interpretative tool available.

- b) Does it cover use of a work for preparing the lesson? Does it cover use of a work in the course of the instruction? Does it cover the making and distribution of copies for teaching purposes? Does it cover communication to the public for teaching purposes? What is the scope of such uses covered under this exception?

Yes, yes and yes: use for preparing the lesson, use in the course of the instruction (without communication to the public) and making and distributing copies are covered. But it (arguably) does not cover communication to the public (compare with Article 22 bis §1, 4° LDA permitting communication to the public of copyright-protected databases for purposes of illustration for teaching or of scientific research) so CDDE is arguably not allowed.

- c) Does it cover the making of a teaching compilation or anthology? Would it cover the asynchronous posting of teaching material on the Internet? And if so, within which limits? Is there a specific exception (or licensing system) covering the making of teaching compilations? Would it apply to digital teaching compilations?

There is a specific exception permitting the making of a teaching compilation or anthology after the author's death (Article 21 al. 3 LDA), which relates to the quotation exception (see below).

- d) Is the exception subject to any technological measures to ensure that only students will have access to the works used for teaching?

No (not yet?).

4.- Extent and Nature of Works.

- a) Which works (and to what extent) may be subject to the exception?

Works fixed on both analog (Art. 22, §1, 4°bis LDA) and digital (Art. 22, §1, 4°ter LDA) media are covered.

- b) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

No.

- c) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

All works fixed on a medium, whether analog or digital, are covered.

- d) May works be used for teaching purposes in whole or only fragments?

Articles and artworks may be reproduced in whole but (say) books may only be reproduced in “short” (“courts”) fragments.

- e) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

No, it makes no difference how the work has been obtained. It is not entirely clear whether the copy must have been lawfully obtained, in particular as regards unlawfully obtained copies of lawfully published works (see the chapeau of Article 22 §1: “Where the work has been lawfully published...”). The addition of a lawful acquirement requirement by the implementing Bill (see preliminary remarks) suggests its previous absence.

- f) How does the exception interact with the possible existence of a license which specifically prohibits any further uses (other than those licensed)?

By virtue of Article 23 bis LDA, the exceptions to Belgian copyright are mandatory (“impératives”). This is so irrespective of the law otherwise applicable to the contract (see Article 7.2 of the EC Rome Convention on the Law Applicable to Contractual Obligations). Such a prohibition in a license would accordingly be null and void.

5.- Remuneration.

- a) Is the teaching use free or subject to remuneration?

Art. 22, §1, 4°bis LDA: Subject to remuneration (see Articles 59 to 61 LDA and the implementing Royal Decrees, as well as de Visscher & Michaux, pp. 384-391).

Art. 22, §1, 4°ter LDA: Subject to remuneration (see Articles 61bis to 61quater LDA, as yet unimplemented by Royal Decrees, as well as de Visscher & Michaux, pp. 392-393).

- b) If subject to remuneration, how is that established? Criteria used to set the fees.

Art. 22, §1, 4°bis LDA: The fees are twofold:

- *A lump sum on copying machines put on the Belgian market (whether manufactured or imported) (Article 59 LDA);*
- *A remuneration proportionate to the number of copies made (Article 60 LDA).*

Art. 22, §1, 4°ter LDA: The remuneration shall be proportionate to the acts of reproduction performed (Article 61bis LDA).

- c) How is it collected? Which collecting society? How is it distributed among the copyright owners ?

Art. 22, §1, 4°bis LDA: It is collected through a common collecting society called REPROBEL, grouping together SAJ, SABAM, SACD, SCAM, SOFAM, etc. as well as a college of publishers. Equal shares are allocated to authors and publishers (Article 61 LDA).

Art. 22, §1, 4°ter LDA: There is no implementing Royal Decree yet.

- d) Does this system also apply to digital uses? How?

Art. 22, §1, 4°bis LDA: Apparently so, since the machines subject to remuneration are copiers, duplicators, office offset machines as well as scanners (yet not printers).

Art. 22, §1, 4°ter LDA: Inherently so.

II.- QUOTATIONS

0.- Identify any exception that allows for the use of copyrighted works for purposes of quotation, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Article 21 LDA currently reads :

« Les courtes citations, tirées d'œuvres licitement publiées, effectuées dans un but de critique, de polémique ou d'enseignement, ou dans des travaux scientifiques, conformément aux usages honnêtes de la profession et dans la mesure justifiée par le but poursuivi, ne portent pas atteinte au droit d'auteur.

Les citations visées à l'alinéa précédent devront faire mention de la source et du nom de l'auteur.

La confection d'une anthologie destinée à l'enseignement requiert l'accord des auteurs dont les extraits d'œuvres sont ainsi regroupées. Toutefois, après le décès de l'auteur, le consentement de l'ayant droit n'est pas requis à condition que le choix de l'extrait, sa présentation et sa place respectent les droits moraux de l'auteur et qu'une rémunération équitable soit payée, à convenir entre les parties ou, à défaut, à fixer par le juge conformément aux usages honnêtes. »

The implementing Bill would amend Article 21 LDA as follows:

« Les courtes citations, tirées d'œuvres licitement publiées, effectuées dans un but de critique, de polémique ou d'enseignement, ou dans des travaux scientifiques, conformément aux usages honnêtes de la profession et dans la mesure justifiée par le but poursuivi, ne portent pas atteinte au droit d'auteur.

Les citations visées à l'alinéa précédent devront faire mention de la source et du nom de l'auteur, à moins que cela ne s'avère impossible.

La confection d'une anthologie destinée à l'enseignement qui ne recherche aucun avantage commercial ou économique direct ou indirect requiert l'accord des auteurs dont les extraits d'œuvres sont ainsi regroupées. Toutefois, après le décès de l'auteur, le consentement de l'ayant droit n'est pas requis à condition que le choix de l'extrait, sa présentation et sa place respectent les droits moraux de l'auteur et qu'une rémunération équitable soit payée, à convenir entre les parties ou, à défaut, à fixer par le juge conformément aux usages honnêtes » (our emphasis).

1.- Exclusive Rights covered by the exception.

a) Reproduction? Distribution? Communication to the public? Transformation?

Reproduction, transformation (named adaptation in Belgium) and distribution. Nothing seems to prevent the exception from applying to communication to the public.

- b) Does it cover quotations made in digital formats (i.e., digital copies) and over the Internet (i.e., digital transmissions)?

Nothing seems to prevent the exception from applying to digital copies and transmissions.

2.- Eligibility under the exception.

- a) Who may benefit from the quotation exception? Is there any language that may allow or prevent its application to quotations made as part of the teaching over the Internet?

Everyone may benefit from the exception, but only for purposes of criticism, polemics or teaching or in scientific works. There is no language concerning the Internet.

3.- Purposes.

- a) What constitutes a quotation? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

The adjective "short" ("courte") precludes anyone from relying on Article 21 al. 1 LDA in order to compose an anthology for teaching purposes without the authors' consent (as required by Article 21 al. 3 LDA). Pursuant to Article 21 al. 3 LDA, the making of an anthology for teaching purposes requires the author's consent but, after his death, is exempted subject to respect of moral rights and equitable remuneration (see below).

- b) Is there any reference to any specific purposes (i.e., teaching, research, etc) the quotation must be made for, in order to qualify under the exception?

Yes. Those specific purposes are criticism, polemics, teaching or use in scientific works.

4.- Extent and Nature of Works.

- a) Which works (and to what extent) may be subject to the exception? Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

The exception probably applies to literary and graphic or audiovisual works alike (Strowel & Derclaye, p. 70). There are no such specific limitations.

- b) Are all kind of works covered? Are any specific materials excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

Nothing seems to prevent the exception from applying to works fixed on a digital medium.

- c) May works be quoted in whole or only fragments?

The quotation must be "short"; accordingly, it may never be in whole. Practice allows fifteen lines for standard literary works (Strowel & Derclaye, p. 71). The adjective "short" ("courte") precludes anyone from relying on Article 21 al. 1 LDA in order to compose an anthology for teaching purposes without the authors' consent (as required by Article 21 al. 3 LDA).

- d) Does it make any difference how the work has been obtained?

No, it makes no difference how the work has been obtained. It is not entirely clear whether the copy must have been lawfully obtained, in particular as regards unlawfully obtained copies of lawfully published works (see the wording: "from lawfully published works..."). The addition of a lawful acquirement requirement by the implementing Bill (see preliminary remarks) suggests its previous absence.

5.- Remuneration.

- a) Are quotations free or subject to remuneration?

Quotations are free. However, the making of anthologies for teaching purposes is exempted after the author's death, subject to an equitable remuneration to be agreed between parties or to be fixed by court in accordance with fair practices (Article 21 al. 3 LDA).

- b) If subject to remuneration, how is that established? Criteria used to set the fees.

Fair practices (only for the making of teaching compilations).

- c) How is it collected? Which collecting society? How is it distributed among the copyright owners ?

Ad hoc remuneration (only for the making of teaching compilations). Unlike other exceptions, this is a case-by-case compulsory licence, not a blanket statutory licence.

- d) Does this system also apply to digital uses? How?

Nothing seems to prevent the exception from applying to digital uses.

III.- PRIVATE USE / PRIVATE COPYING EXCEPTION.

The purpose of this section is to address the importance of the private use/ private copying exception as far as teaching uses. To what extent may such an exception allow students (and teachers) to use works for teaching purposes through the Internet? This exception is especially important to the extent that downloads made by students do not qualify under the teaching exception. Please note that this last issue may be considered under a separate section dealing with the private use/ copying exception.

0.- Identify any exception that allows for the use of copyrighted works for private purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Article 22 § 1, 4° LDA (general reprography exception) currently reads:

« Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (...)

(4° 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 dans un but strictement privé et ne porte pas préjudice à l'exploitation normale de l'œuvre) » (tel que modifié par la loi du 31 août 1998 entrée en vigueur le 14 novembre 1998).

Article 22 § 1, 5° LDA (private copying exception) currently reads:

« Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (...)

5° les reproductions des œuvres sonores et audiovisuelles effectuées dans le cercle de famille et réservées à celui-ci ».

Article 22 § 1, 5° LDA is of no use for CDDE purposes as the family circle does most probably not extend to the classroom, be it virtual; moreover, as it stands now, the provision only covers sound and audio-visual works, as opposed to literary and graphic works. Accordingly, only Article 22 § 1, 4° LDA shall be considered below.

The implementing Bill would bring about dramatic changes, particularly with respect to Article 22 § 1, 5° LDA :

Article 22 § 1, 4° LDA would then provide as follows:

« Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (...)

4° la reproduction fragmentaire ou intégrale sur papier ou sur un 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 dans un but strictement privé et ne porte pas préjudice à l'exploitation normale de l'œuvre ».

Article 22 § 1, 5° LDA would then provide as follows:

« Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (...)

5° la reproduction, sur tout support autre que sur papier ou sur support analogue, d'œuvres, effectuée dans le cercle de famille et réservée à celui-ci ».

Article 22 § 1, 5° LDA would then cover all works, digital and analog, literary and audiovisual. However, the family circle restriction would hold firm.

1.- Exclusive Rights covered by the exception.

- a) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered? How many copies can be made? Is it somehow restricted, i.e., to non-collective use?

Yes, it covers reproduction. First, all graphical means of reproductions are covered, thus primarily reprography but also e.g. microfiches. Furthermore, although works fixed on a digital medium are not covered (see below), digital reproductions (e.g. scanings) of works fixed on an analog medium are probably covered as well (Dubuisson, pp. 653-655 and Janssens, p. 193).

The number of copies is not restricted but copies are subject to a right to remuneration (see below).

- b) Does it cover any other rights: distribution, transmission, performance, transformation ? Do they extend to digital means of exploitation? (See also *infra*, the questions concerning definition of “private”).

It does not cover rights other than reproduction, such as rental, lending or communication (see de Visscher & Michaux, p. 111). Transformation and distribution are probably covered as reproductions. Transmission and performance are probably not covered as they involve some communication to the public.

2.- Eligibility.

- a) Who may benefit from the private use/copying exception? Is there any specific reference to for-profit or not-for-profit uses, public or private, non-collective uses?

According to Dubuisson (at pp. 655-657), the copyist is the (natural or legal) person who effectively makes the copy, as distinct from, as the case may be, the mere commissioner or the organization that merely makes copying machines available.

There is no such reference but it is understood that commercial uses (i.e. against financial compensation), even ultimately not-for-profit ones, are not covered (see Strowel & Derclaye, p. 75).

- b) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

The reproduction must not prejudice the normal exploitation of the work (see the three-step tests under the Berne Convention and the Copyright Directive). This calls for an economic assessment of competing uses, in particular with respect to scientific publishing.

3.- Purposes. What is “private”?

- a) What is the definition of “private use/private copying” in your country? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

The “strictly private use” most probably covers the professional use of natural persons and the internal use of companies (e.g. law firms) and institutions (e.g. universities) (see de Visscher & Michaux, p. 112, and Strowel & Derclaye, p. 75, both referring to the Rapport De Clerck, p. 193).

By contrast, any person (e.g. a photocopying office or a library) making copies for another’s use is not covered (see Dubuisson, p. 657). But a university library making copies for a visiting scholar may be covered by Article 22, § 1, 4° bis and ter LDA (see above).

- b) How does this exception translate on the Internet? Would students’ downloads of material transmitted for teaching purposes over the Internet qualify as private?

This exception does not translate to the Internet as it does not cover works fixed on a digital medium (see below).

4.- Extent and Nature of Works.

- a) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

Works fixed on a digital medium (whether a CD-ROM, a virtual library or on-line) are implicitly not covered (compare with Article 22, § 1, 4°ter LDA above) – this limitation indirectly stems from that in Article 6, §2 (a) of the Database Directive on reproduction for private purposes of non-electronic databases.

Dubuisson (at p. 653) argues that only the initial publication should be decisive so that subsequent digital copies of works initially published on an analog medium should be covered – but he acknowledges that the letter of Article 22, § 1, 4° LDA seems to exclude all works fixed on a digital medium, irrespective of their analog initial publication.

- b) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

Only articles, artworks or other literary or artistic works fixed on a graphic or analogue medium are covered by the general reprography exception; sound and audiovisual works are covered by the private (family circle) copying exception. Educational materials are not excluded from the scope of Article 22, § 1, 4° LDA but fall more appropriately under Article 22, § 1, 4° bis and ter LDA (see above).

- c) May works be used for private purposes in whole or only fragments?

Articles and artworks may be reproduced in whole but (say) books may only be reproduced in “short” (“courts”) fragments.

- d) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

No, it makes no difference how the work has been obtained. It is not entirely clear whether the copy must have been lawfully obtained, in particular as regards unlawfully obtained copies of lawfully published works (see the chapeau of Article 22 §1: “Where the work has been lawfully published...”). The addition of a lawful acquirement requirement by the implementing Bill (see preliminary remarks) suggests its previous absence.

- e) How does the exception interact with the possible existence of a license which specifically prohibits any further uses?

By virtue of Article 23 bis LDA, the exceptions to Belgian copyright are mandatory ("impératives"). This is so irrespective of the law otherwise applicable to the contract (see Article 7.2 of the EC Rome Convention on the Law Applicable to Contractual Obligations). Such a prohibition in a license would accordingly be null and void.

5.- Remuneration.

- a) Is this exception free or subject to remuneration?

Subject to remuneration (see Articles 59 to 61 LDA and the implementing Royal Decrees, as well as de Visscher & Michaux, pp. 384-391).

- b) If subject to remuneration, how is that established? Criteria used to set the fees.

The fees are twofold:

- *A lump sum on copying machines put on the Belgian market (whether manufactured or imported) (Article 59 LDA);*
- *A remuneration proportionate to the number of copies made (Article 60 LDA).*

NB. As regards private copying under Article 22 § 1, 5° LDA, the implementing Bill would repeal the lump sum on recording equipment, only maintaining the remuneration on blank media. No similar development would apparently affect reprography under Article 22 § 1, 4° LDA.

- c) How is it collected? Which collecting society? How is it distributed among the copyright owners ?

It is collected through a common collecting society called REPROBEL, grouping together SAJ, SABAM, SACD, SCAM, SOFAM, etc. as well as a college of publishers. Equal shares are allocated to authors and publishers.

- d) Does this system also apply to digital uses? How?

Apparently so, since the machines subject to remuneration are copiers, duplicators, office offset machines as well as scanners (yet not printers).

IV.- LIBRARY EXCEPTIONS.

The main purpose of this section is to address the interaction between library privileges and teaching uses: to what extent may library exceptions assist teaching activities conducted through the Internet (either exempted or licensed teaching uses). Please feel free to provide any information concerning the general scope of such exceptions, even though not especially helpful as far as teaching purposes.

0.- Identify any exception that allows for the use of copyrighted works by libraries, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Article 23 §1 LDA reads:

« L'auteur ne peut interdire le prêt d'œuvres littéraires, (de bases de données, d'œuvres photographiques,) de partitions d'œuvres musicales, d'œuvres sonores et d'œuvres audiovisuelles lorsque ce prêt est organisé dans un but éducatif et culturel par des institutions reconnues officiellement à cette fin par les pouvoirs publics. » (tel que modifié par la loi du 31 août 1998 entrée en vigueur le 14 novembre 1998).

The implementing Bill would introduce a new Article 22 §1, 9° LDA :

« Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (...)

9° la communication ou mise à disposition à des particuliers, à des fins de recherches ou d'études privées, d'œuvres qui ne sont pas offertes à la vente ni soumises à des conditions particulières en matière de licence, et qui font partie de collections des bibliothèques accessibles au public, des établissements d'enseignement et scientifiques, des musées ou des archives qui ne recherchent aucun avantage commercial ou économique direct ou indirect, au moyen de terminaux spéciaux accessibles dans les locaux de ces établissements » (our emphasis).

The highlighted words seem to rule out any application to distance communication such as CDDE.

1.- Exclusive rights covered by the exception.

- a) Reproduction? Distribution? Communication to the public? Transformation? Does it cover digital copies? Does it cover digital transmissions of works?

Only lending. Apparently, it does not cover digital copies.

- b) Would it be permissible for a library to make digital copies of the works in its catalogue, and post them on its web page, or transmit them to their teachers and/or students (for teaching purposes), or even for inter-library loans?

Not under Article 23 §1 LDA.

2.- Eligibility

- a) Which libraries may benefit from the exception? Only public libraries? Non-for-profit libraries? What about on-line libraries?

Private libraries may be officially recognized as well (see Article 23 §1 LDA, in fine). On-line libraries were probably not envisioned.

- b) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect digital (on-line) libraries?

There is no such limitation. On-line libraries were probably not envisioned.

3.- Purposes.

- a) Conservation, lending, studying, research, teaching purposes, etc.?

Only lending for educational and cultural purposes.

- b) Could the library supply material to be used for teaching purposes?

Nothing seems to prevent this.

- c) Since the library privilege granted under article 5.2.(c) Copyright Directive is not limited to any specific purposes, it leaves the door open for coverage of reproductions for teaching purposes, provided such reproductions are not for direct or indirect economic or commercial advantage. Has your national legislator implemented (or intends to implement) such an exception? If so, how?

The implementing Bill would transpose Article 5.2.(c) Copyright Directive into Article 22 §1, 8° LDA :

« Lorsque l'œuvre a été licitement publiée, l'auteur ne peut interdire : (...)

8° la reproduction limitée à un nombre de copies déterminé en fonction de et justifié par le but de préservation du patrimoine culturel et scientifique, effectué par des bibliothèques accessibles au public, des musées ou des archives qui ne recherchent aucun avantage commercial ou économique direct ou indirect, pour autant que cela ne porte pas atteinte à l'exploitation normale de l'œuvre ni ne cause un préjudice aux intérêts légitimes de l'auteur » (our emphasis).

As emphasized, the exception for reproduction by libraries would have its scope limited by specific purposes of cultural and scientific preservation. Note that such reproduction by educational and scientific institutions is expressly intended to be covered by Article 22 § 1, 4°bis et 4°ter (see above).

4.- Extent and Nature of works.

- a) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

By contrast, artworks (oeuvres plastiques) are not covered.

- b) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

Educational materials are not excluded. Works fixed on a digital medium were probably not envisioned.

- c) May works be used in whole or only fragments?

Either way.

- d) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

It seems to make no difference how the work has been so obtained. Yet whether the copy has been lawfully obtained does matter as institutions lending unlawful copies would not be recognized.

- e) How does the exception interact with the possible existence of a license which specifically prohibits any further use?

By virtue of Article 23 bis LDA, the exceptions to Belgian copyright are mandatory ("impératives"). This is so irrespective of the law otherwise applicable to the contract (see Article 7.2 of the EC Rome Convention on the Law Applicable to Contractual Obligations). Such a prohibition in a license would accordingly be null and void.

5.- Remuneration.

- a) Is this exception free or subject to remuneration?

Subject to remuneration (see Articles 62 to 64 LDA, as yet unimplemented by Royal Decrees, as well as de Visscher & Michaux, pp. 393-395).

- b) If subject to remuneration, how is that established? Criteria used to set the fees.

This has yet to be determined by Royal Decree.

- c) How is it collected? Which collecting society? How is it distributed among the copyright owners ?

Through collecting societies except if the King appoints a common collecting society. As for literary works, the whole remuneration is allocated to authors.

- d) Does this system also apply to digital uses? How?

Digital uses were probably not envisioned.

V.- TECHNOLOGICAL MEASURES VS. EXCEPTIONS.

The purpose of this section is to evaluate the interaction between exceptions and technological measures i.e., how is copyright balanced against the public interest?

1. Are technological measures protected in your country? To what extent (access control, anti-copy, etc.)?

The implementing Bill would introduce an Article 79bis LDA which closely resembles Article 6 Copyright Directive. That provision would also apply by analogy to the sui generis database right.

2. How do exceptions relate to technological measures? Has the legislator implemented any specific provision to ensure that exceptions will continue to apply despite the existence of any technological measures implemented by the copyright owners? How has art.6.4 EU Directive (if so) been implemented?

The future article 79bis §§2-5 LDA would mandate rightholders to take voluntary measures, including agreements with other concerned parties, within one year from its entry into force. Failing that, the King would take appropriate measures.

3. Is there any case law or trade use that balances the interaction of exceptions between technological measures? Is there any agreement (contracts, collective bargaining, etc.) that permits certain categories of users (e.g., libraries, teaching institutions, etc) to circumvent a technological measure in order to benefit from a use covered by an exception?

Not that we know.

VI.- Please add any further comments and information you deem interesting for this project.

We find this project extremely interesting and would very much appreciate it if you would keep us informed on its future developments.

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Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project

FRANCE

by Prof. Valérie-Laure Benabou
Université de Versailles

I.- EXCEPTION FOR TEACHING PURPOSES.

0.- Identify any specific exception that allows for the use of copyrighted works for teaching purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

There is no such exception in the part of the IPC dedicated to author's right. For the moment, the various past occasions to do so were passed up. The transposition of the database directive which had opened the possibility to introduce such an exception for the databases did not create any specific provision, unlike Belgium or Spain. The actual process of transposition of the info-soc directive arose a discussion on the opportunity to introduce a broad exception, but there is not yet any "official" proposal of the ministry of Education on that point.

Nevertheless and, weirdly, there is a provision in the part dedicated to design and model. It is not an exception for mere quotation but a plain exception for purposes of teaching (citations or teaching)

Article L513-6

(Inserted by Order No. 2001-670 of 25 July 2001 art. 1 Official Journal of 28 July 2001)

The rights conferred by the registration of a design or model shall not be exercised concerning:

- a) Acts done privately and for non-commercial purposes;
- b) Acts done for experimental purposes;
- c) Acts of reproduction for the purposes of making citations or teaching, if these acts mention the registration and the name of the rightholder, provided they are compatible with fair business practices and do not prejudice the normal exploitation of that design or model.

This may be a source of difficulties as there is in France the principle said of "unité de l'art" which means that the same form can be protected by both copyright and design protections if the criteria are fulfilled – originality and novelty-. The case is not yet submitted to court where someone claims for the benefit of the exception on the ground of art. L. 513-6 ICP for a form which is also protected by the copyright. Shall we consider that there is a right for the user that cannot be withdraw or on the contrary that copyright protection prevails so as there won't be any exception each time the protections are cumulated.

L'hostilité du droit français à consacrer des exceptions spécifiques au monde de l'enseignement et de la recherche est une constante¹. La directive de 1996 sur les bases de données, dans son article 6 paragraphe 2, prévoyait la

¹ - A. et H.-J. Lucas, op. cit., n° 348 : « Il faut s'engager avec beaucoup de précautions sur une voie qui ne correspond pas à la tradition française. »

possibilité pour les Etats membres d'adopter une telle exception² mais cette option n'a pas été retenue, au contraire de la législation belge³ et espagnole.

Il apparaît toutefois que la transposition de la directive relative à la protection des dessins et modèles dans le Code de la propriété intellectuelle a introduit de façon subreptice « le loup dans la bergerie ». L'article L. 513-6 CPI écarte de la protection accordée au titulaire au titre des dessins et modèles : les actes accomplis à titre privé et à des fins non commerciales ; les actes accomplis à des fins expérimentales ; les actes de reproduction à des fins d'illustration ou d'enseignement, si ces actes mentionnent l'enregistrement et le nom du titulaire des droits, sont conformes à des pratiques commerciales loyales et ne portent pas préjudice à l'exploitation normale du dessin ou modèle⁴. Or le système français prévoyant le principe de l'unité de l'art, cette exception est susceptible de « déborder » en droit d'auteur. Aucun contentieux n'a pour l'instant tranché l'épineuse question du jeu de l'exception en cas de protection cumulative.

Article L513-6

(inséré par Ordonnance n° 2001-670 du 25 juillet 2001 art. 1 Journal Officiel du 28 juillet 2001)

Les droits conférés par l'enregistrement d'un dessin ou modèle ne s'exercent pas à l'égard :

- a) D'actes accomplis à titre privé et à des fins non commerciales ;
- b) D'actes accomplis à des fins expérimentales ;
- c) D'actes de reproduction à des fins d'illustration ou d'enseignement, si ces actes mentionnent l'enregistrement et le nom du titulaire des droits, sont conformes à des pratiques commerciales loyales et ne portent pas préjudice à l'exploitation normale du dessin ou modèle.

Due to what has been justly said the following questions are not relevant.

1.- Exclusive Rights covered by the exception.

- g) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered?
- h) Can a work be digitized for use as part of the instruction? Would digitization qualify as a reproduction or also as a transformation?
- i) How many copies can be made? Is it somehow limited, i.e., to the number of students in a class?
- j) Does it cover communication to the public? Does it cover the storage of the copyrighted work on the server, thus allowing asynchronous teaching?
- k) How does your system qualify a digital transmission/delivery of a work? Have the WCT or WPPT had any effect on this matter? Has the EU Directive, if applicable, had any effect on this matter?

² - Directive 96/9/CE du Parlement européen et du Conseil, du 11 mars 1996, concernant la protection juridique des bases de données, *Journal officiel* n° L 077 du 27/03/1996 p. 20 : Art. 6 para 2. Les États membres ont la faculté de prévoir des limitations aux droits visés à l'article 5 dans les cas suivants:

- a) lorsqu'il s'agit d'une reproduction à des fins privées d'une base de données non électronique;
- b) **lorsqu'il y a utilisation uniquement à des fins d'illustration de l'enseignement ou de recherche scientifique, toujours sous réserve d'indiquer la source, dans la mesure justifiée par le but non commercial poursuivi;**
- c) lorsqu'il s'agit d'une utilisation à des fins de sécurité publique ou aux fins d'une procédure administrative ou juridictionnelle;
- d) lorsqu'il s'agit d'autres exceptions au droit d'auteur traditionnellement prévues par leur droit interne, sans préjudice des points a), b) et c).

³ - F. Dubuisson, Le régime des exceptions au droit d'auteur après la loi du 31 août 1998 concernant la protection juridique des bases de données, *Auteurs et Médias*, 2001, p. 200.

⁴ - F. Pollaud-Dulian, L'ordonnance du 25 juillet 2001 et la réforme du droit des dessins et modèles, JCP éd. G Aperçu rapide, 17 oct. 2001, p. 1922.

- l) Does the exception cover subsequent reproductions made in the course of transmission (routing copies, caché copies, etc) and reception (RAM copies, screen displays and downloads) of these works by each student? *(Please note that this last issue is intertwined with the question of eligibility: who is allowed to make reproductions for teaching purposes—just professors, or also students?)*

2.- Eligibility under the exception.

- e) Eligibility as to institutions:
- Which institutions may benefit from a copyright exception for teaching purposes? Educational institutions? Schools? Universities? etc. How are those terms defined? How do they apply to the Internet?
 - Is there any specific condition as to the nature (for-profit or not-for-profit, public or private) of the teaching activity or of the institution? How does this apply to digital distance education?
 - May libraries benefit from such an exception, and therefore provide copies (and also distribute? communicate to the public?) of works for teaching purposes? *(Please note that this last issue may have a connection with any exception provided for in favor of libraries. If libraries cannot benefit from a specific teaching exception, the scope of the “remaining” library exceptions becomes paramount to cover the use of works for teaching purposes.)*
- f) Eligibility as to individuals:
- May only teachers benefit from the exception or also students (and guest-lecturers, etc)?
 - If students cannot benefit from that exception, may a general private use/private copying exception (or fair use) “fill that gap” (as it seems to be the case in the analog world)? *(Please note that this last issue may be considered under a separate section III dealing with the private use/ copying exception)*
- g) Some teaching-related exceptions refer to or imply physical concepts related to face-to-face teaching activities—concepts like classroom, school premises, etc. If so, does this specific language limit or curtail the applicability of the exception in the digital world?
- h) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

3.- Purposes. What is “teaching purposes”?

- e) What constitutes “teaching purposes”? *(Please, substitute by the specific language used in your national exception; for instance, the EU Directive art.5.3(a) what is “illustration for teaching”).* Is there any caselaw, uses, doctrine to describe the specific language used in the exception?
- f) Does it cover use of a work for preparing the lesson? Does it cover use of a work in the course of the instruction? Does it cover the making and distribution of copies for teaching purposes? Does it cover communication to the public for teaching purposes? What is the scope of such uses covered under this exception?
- g) Does it cover the making of a teaching compilation or anthology? Would it cover the asynchronous posting of teaching material on the Internet? And if so, within which limits? Is there a specific exception (or licensing system) covering the making of teaching compilations? Would it apply to digital teaching compilations?
- h) Is the exception subject to any technological measures to ensure that only students will have access to the works used for teaching?

4.- Extent and Nature of Works.

- g) Which works (and to what extent) may be subject to the exception?
- h) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- i) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?
- j) May works be used for teaching purposes in whole or only fragments?

- k) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?
- l) How does the exception interact with the possible existence of a license which specifically prohibits any further uses (other than those licensed)?

5.- Remuneration.

- e) Is the teaching use free or subject to remuneration?
- f) If subject to remuneration, how is that established? Criteria used to set the fees.
- g) How is it collected? Which collecting society? How is it distributed among the copyright owners ?
- h) Does this system also apply to digital uses? How?

II.- QUOTATIONS

0.- Identify any exception that allows for the use of copyrighted works for purposes of quotation, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Article L122-5

(Act No. 94-361 of 10 May 1994 art. 5 II Official Journal of 11 May 1994)

(Act No. 97-283 of 27 Mars 1997 art. 17 Official Journal of 28 Mars 1997)

(Act No. 98-536 of 1 July 1998 art. 2 and art. 3 Official Journal of 2 July 1998)

(Act No. 2000-642 of 11 July 2000 art. 47 Official Journal of 11 July 2000)

Once a work has been disclosed, the author may not prohibit:

1°. private and gratuitous performances carried out exclusively within the family circle;

2°. copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Article L. 122-6-1, as well as copies or reproductions of an electronic database;

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;

b) press reviews;

c) dissemination, even in their entirety, through the press or by broadcasting, as current news, of speeches intended for the public made in political, administrative, judicial or academic gatherings, as well as in public meetings of a political nature and at official ceremonies;

d) complete or partial reproductions of works of graphic or three-dimensional art intended to appear in the catalogue of a judicial sale held in France, in the form of the copies of the said catalogue made available to the public prior to the sale for the sole purpose of describing the works of art offered for sale.

A decree by the Conseil d'Etat shall determine the characteristics of the documents and the conditions governing their distribution.

4°. parody, pastiche and caricature, observing the rules of the genre.

5°. acts necessary to access the contents of an electronic database for the purposes of and within the limits of the use provided by contract.

Art. L. 122-5 CPI

(Loi n° 94-361 du 10 mai 1994 art. 5 II Journal Officiel du 11 mai 1994)

(Loi n° 97-283 du 27 mars 1997 art. 17 Journal Officiel du 28 mars 1997)

(Loi n° 98-536 du 1 juillet 1998 art. 2, art. 3 Journal Officiel du 2 juillet 1998)

(Loi n° 2000-642 du 11 juillet 2000 art. 47 Journal Officiel du 11 juillet 2000)

Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire :

1° Les représentations privées et gratuites effectuées exclusivement dans un cercle de famille ;

2° Les copies ou reproductions strictement réservées à l'usage privé du copiste et non destinées à une utilisation collective, à l'exception des copies des oeuvres d'art destinées à être utilisées pour des fins identiques à celles pour lesquelles l'oeuvre originale a été créée et des copies d'un logiciel autres que la copie de sauvegarde établie dans les conditions prévues au II de l'article L. 122-6-1 ainsi que des copies ou des reproductions d'une base de données

électronique;

3° Sous réserve que soient indiqués clairement le nom de l'auteur et la source :

a) Les analyses et courtes citations justifiées par le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre à laquelle elles sont incorporées ;

b) Les revues de presse ;

c) La diffusion, même intégrale, par la voie de presse ou de télédiffusion, à titre d'information d'actualité, des discours destinés au public prononcés dans les assemblées politiques, administratives, judiciaires ou académiques, ainsi que dans les réunions publiques d'ordre politique et les cérémonies officielles ;

d) Les reproductions, intégrales ou partielles d'oeuvres d'art graphiques ou plastiques destinées à figurer dans le catalogue d'une vente judiciaire effectuée en France pour les exemplaires mis à la disposition du public avant la vente dans le seul but de décrire les oeuvres d'art mises en vente.

Un décret en Conseil d'Etat fixe les caractéristiques des documents et les conditions de leur distribution.

4° La parodie, le pastiche et la caricature, compte tenu des lois du genre.

5° Les actes nécessaires à l'accès au contenu d'une base de données électronique pour les besoins et dans les limites de l'utilisation prévue par contrat.

1.- Exclusive Rights covered by the exception.

c) Reproduction? Distribution? Communication to the public? Transformation?

The law does not distinguish the rights covered by the exception. Therefore, we can affirm that the two rights of exploitation so far recognized by the French Law – reproduction and representation – are covered by the exception. To a certain extent, the exception also covers moral rights for the purpose of the exception is to give to the user a certain freedom of use without having to request the consent of the author. Therefore, the exercise of the right of “divulcation”, which is mentioned at the beginning of the article is still possible and the right of authorship shall be respected for the exception is delivered “on condition that the name of the author and the source are clearly stated”.

d) Does it cover quotations made in digital formats (i.e., digital copies) and over the Internet (i.e., digital transmissions)?

In principle, the kind of media used for the transmission or the mean of reproduction are not relevant for the granting of the rights and, by the way, of the exception. But, the French Case-Law has developped a very narrow interpretation of the quotation exception for certain types of works. In fact, there is no exception is for musical works, nor for artistic work. For artistic works the quotation is rendered particularly difficult as the “short” quotation of the artistic work can nor be understood as a quick representation of the entire work – for example in a tv broadcast- for the work is then represented in total, nor as a reproduction or representation of a mere part of the work –detail of a painting for example – which would be contrary to the moral right of respect and integrity of the work.... The user seems to be in a quandary.

La seule disposition du droit d'auteur français qui fasse directement référence aux usages d'enseignement et de recherche est précisément l'exception de courte citation et d'analyse. Sous réserve que soient indiquées clairement le nom de l'auteur et la source : l'auteur ne peut interdire : (...)

a) *Les analyses et courtes citations justifiées par le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre à laquelle elles sont incorporées*

La jurisprudence se montre hostile à la citation de certaines catégories d'oeuvres : oeuvres musicales et oeuvres d'art plastiques ou graphiques et n'admet en réalité la citation que pour les oeuvres littéraires. Rien dans la loi n'autorise pourtant cette discrimination entre des oeuvres d'expression différentes.

2.- Eligibility under the exception.

- b) Who may benefit from the quotation exception? Is there any language that may allow or prevent its application to quotations made as part of the teaching over the Internet?

The beneficiaries of the exception are not determined by the Law. There is no list of pre-determined bodies or institutions which could use the exception. Only the purpose of the quotation matters and not the people doing it. To my opinions, the quotation exception can be recognized for either public or private institutions, at any level of the education system, included the "permanent" education for adults.

There is a debate on an important question for some authors consider that the exceptions can only benefit to the "legitimate user" –mostly for private copying-. The question is, in this case : can the professor downloading illegitimate copies of works on the Internet use these on behalf of short quotation exception ? In other terms, does the legitimacy of the purpose of the use whitewashes the previous illegitimate reproduction of the work. The condition of using a "legitimate" source is not expressly required by the provision of art. L. 122-5 ICP but some authors consider it implied.

3. - Purposes.

- c) What constitutes a quotation? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

The exception supposes the work to be quoted in another (protected ?) work and to be short – vis-à-vis the genuine work and the work which quotes. Those conditions may be a problem for the use of the exception in the digital age. For example, it is hard to conceive that the list of homeworks send via Internet or Intranet to the pupils can be considered as a "work" in itself. May be we could consider that the whole teaching of the professor is a work to extend the scope of the exception but this is only a suggestion...

The exception covers also "analysis" which must be understood not as a right to discuss the ideas included in the work for copyright does not protect ideas - and that use is therefore always permitted – but as the right to reproduce or represent the structure of a work and certain elements of it to realize a critical comment. This exception is not listed in the Info-soc directive but might be considered as included in the quotation provision (art. 5. 3 d).

L'exception est interprétée de façon stricte par la jurisprudence. En premier lieu, il faut souligner que l'exception ne joue que si l'œuvre empruntée est réutilisée dans une nouvelle œuvre. Par conséquent, la copie par un professeur d'un extrait d'œuvre à des fins d'analyse n'entre pas en principe dans le champ de l'exception, faute pour le professeur d'avoir inclus cette œuvre dans une œuvre nouvelle, à moins de considérer le cours du professeur comme étant une œuvre citante. A cet égard, il est loisible de s'interroger sur la pratique des fiches de TD : peuvent-elles être considérées comme des œuvres (bases de données, anthologies) et la condition d'originalité sera-t-elle admise ? L'envoi du travail à faire à la maison via un cartable électronique – exemple : commenter cette extrait de... - ne semble pas pouvoir répondre à cette condition d'intégration dans une œuvre citante.

La citation doit également être courte et au regard de l'œuvre citée et au regard de l'œuvre citante. Mais l'évaluation de la « courteté » est subjective et difficile à appréhender a priori par celui qui utilise la citation. Enfin le critère de la courteté n'a pas grand sens s'agissant d'œuvres citantes dont la lecture n'est pas linéaire (œuvres multimédias par exemple).

*A côté de l'exception de citation stricto sensu figure l'exception d'**analyse**. Ceci surprend si on envisage l'analyse comme une étude du contenu de l'œuvre, car le droit d'auteur ne protégeant pas le fond ne saurait prévoir dès lors une exception sur un élément qu'il ne couvre pas. L'analyse est plus précisément définie comme un résumé servant de support à une discussion faite par le rédacteur de l'article, des sources de l'auteur, du plan de l'œuvre et de ses éléments essentiels ainsi que de sa méthode d'exposition étant généralement accompagnée d'un commentaire*

critique⁵. Il a été admis que l'analyse pouvait se concevoir en l'absence même d'une œuvre de destination. Ainsi, « l'analyse purement signalétique réalisée dans un but documentaire, exclusive d'un exposé substantiel de l'œuvre et ne permettant pas de se dispenser de recourir à cette œuvre elle-même » a été reconnue possible⁶.

L'exception ne figure plus dans la liste exhaustive des exceptions de la directive société de l'information. Toutefois, l'article 5. 3 d) vise la possibilité d'introduire ou de conserver une exception « lorsqu'il s'agit de citations faites, par exemple, à des fins de critique ou de revue, pour autant qu'elles concernent une œuvre ou un autre objet protégé ayant déjà été licitement mis à la disposition du public, que, à moins que cela ne s'avère impossible, la source, y compris le nom de l'auteur, soit indiquée et qu'elles soient faites conformément aux bons usages et dans la mesure justifiée par le but poursuivi. » La condition de courteté ne figurant pas, on peut considérer que l'exception d'analyse pourrait continuer à prospérer sous le vocable général de citation. Cette interprétation conduirait néanmoins à supprimer ou à minorer la condition de brièveté de la citation.

- d) Is there any reference to any specific purposes (i.e., teaching, research, etc) the quotation must be made for, in order to qualify under the exception?

Les analyses et courtes citations justifiées par le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre à laquelle elles sont incorporées.

Analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated

To my knowledge, there is no specific Case-Law defining what is supposed to be the educational nature of the work...

4.- Extent and Nature of Works.

- e) Which works (and to what extent) may be subject to the exception? Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- f) Are all kind of works covered? Are any specific materials excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

See 1.b. The legal text does not settle any limitation regarding the work but the Case Law is reluctant to admit it for musical, artistic and graphic or audiovisual works.

- g) May works be quoted in whole or only fragments?

As said, the quotation has to be short, which certainly means the work can not be reproduced or represented in whole. It has also to be short considering the work the quotation is incorporated in, which means several "short" quotations in the same work can be considered outside the scope of the exception.

- h) Does it make any difference how the work has been obtained?
See question on benefit of the exception.

⁵ - TGI Paris 25 avril 1968, D. 1968, 740 ; RTDCOm. 1970, p. 120, obs. Desbois.

⁶ - Dans un arrêt très controversé, Civ. 1^{ère}, 9 novembre 1983, Microfor, JCP 1984, II, 20189, note A. Françon ; D. 1984, IR, 290, obs. Colombat.

5.- Remuneration.

e) Are quotations free or subject to remuneration?

Free.

f) If subject to remuneration, how is that established? Criteria used to set the fees.

g) How is it collected? Which collecting society? How is it distributed among the copyright owners?

h) Does this system also apply to digital uses? How?

III.- PRIVATE USE / PRIVATE COPYING EXCEPTION.

The purpose of this section is to address the importance of the private use/ private copying exception as far as teaching uses. To what extent may such an exception allow students (and teachers) to use works for teaching purposes through the Internet? This exception is especially important to the extent that downloads made by students do not qualify under the teaching exception. Please note that this last issue may be considered under a separate section dealing with the private use/ copying exception.

0.- Identify any exception that allows for the use of copyrighted works for private purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

See above art. L. 122-5 IPC.

Once a work has been disclosed, the author may not prohibit:

1°. Private and gratuitous performances carried out exclusively within the family circle;

2°. copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Article L. 122-6-1, as well as copies or reproductions of an electronic database;

1.- Exclusive Rights covered by the exception.

- c) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered? How many copies can be made? Is it somehow restricted, i.e., to non-collective use?

Private copying covers reproduction. The Law makes no distinction between the different means of reproduction and does not limit the number of copies that can be made. Collective use is contradictory with the exception. There is nevertheless a controversy between authors on the possibility to claim that a copy made for professional purpose is a "private" copy.

Les copies ou reproductions strictement réservées à l'usage privé du copiste et non destinées à une utilisation collective. Sont donc en principe admises les copies privées quel que soit le genre, à l'exception :

- des copies des œuvres d'art destinées à être utilisées pour des fins identiques à celles pour lesquelles l'œuvre originale a été créée, ici, la loi ajoute la condition de finalité de la reproduction qui ne doit pas conduire à se substituer à l'original (a contrario, la copie à des fins d'études n'est pas visée si elle remplit les autres exigences),
- des copies d'un logiciel autre que la copie de sauvegarde établie dans les conditions prévues au II de l'article L. 122-6-1 CPI ainsi que,
- des copies ou reproductions d'une base de données électroniques.

Interprétation des conditions. L'exception étant réservée à l'usage privé du copiste, elle ne peut donc fonder une multiplication en nombre à destination des élèves de l'enseignant. En revanche, elle serait susceptible de couvrir la plupart des utilisations réalisées par les chercheurs dans le cadre de leur travail de recherche. L'exception est, a priori, de nature à permettre à l'étudiant ou au chercheur isolé de copier les ouvrages nécessaires à sa formation ou à sa recherche sans demander l'autorisation de l'auteur ni acquitter des redevances. La généralité de la formule retenue ne limite ni le nombre de copies identiques, ni le volume de copies par rapport à l'œuvre copiée. Les seules

limites tiennent à la qualité du copiste, au caractère privé de l'usage, dont on ajoute qu'il doit être de surcroît non collectif. Cependant la conception restrictive retenue par la jurisprudence tend à réserver cette conclusion.

Définition du copiste. Une célèbre affaire qui opposa en 1974 le CNRS aux éditeurs conclut que l'organisme de recherche ne pouvait pas se prévaloir de l'exception de copie privée au motif qu'il n'avait pas justifié de la qualité de chercheur des copistes et de leur engagement à ne pas faire une utilisation commerciale des copies⁷. A contrario, le tribunal avait donc reconnu la légitimité de la prétention des chercheurs à bénéficier de l'exception de copie privée, considérant qu'est copiste, non celui qui procède matériellement à la reproduction, mais qui choisit le contenu de la copie.

La Cour de cassation a ultérieurement précisé sa position⁸ dans l'arrêt Ranou-Graphie. Elle y a estimé que le copiste est celui qui, détenant dans ses locaux le matériel nécessaire à la confection des photocopies, exploite ce matériel en le mettant à la disposition de ses clients. Mais la portée de la décision, s'agissant en l'espèce d'une officine de photocopies, n'est pas claire dans la mesure où la Cour de cassation a entouré sa décision de nombreuses références aux faits. La Cour d'appel de Paris⁹ a repris la solution en déterminant que le copiste n'est pas l'étudiant mais l'officine de photocopie. Cette conception met en avant le critère du bénéfice dégagé par l'officine.

Le TGI d'Aix-en Provence¹⁰ a refusé le bénéfice de l'exception pour des photocopies délivrées aux élèves d'un établissement privé en soulignant toutefois que ces copies entraient de façon indifférenciée dans la prestation globale offerte aux élèves moyennant rémunération.

Le copiste est-il celui qui fournit les moyens de reproduction ou celui qui en fait effectivement usage ? Pour certains auteurs (P-Y. Gautier), c'est la mise à disposition des moyens qui constitue le copiste. Pour d'autres c'est la personne physique qui réalise la copie. On peut encore envisager une troisième hypothèse, retenue dans la décision CNRS, à savoir voir dans le copiste celui qui choisit le contenu de la copie, qu'il effectue personnellement ou non l'opération de reproduction.

Le fait que la fourniture de moyens soit source de bénéfice pour l'organisme ne devrait normalement pas influencer sur le jeu de l'exception pour la qualification de copiste. Partant, les décisions précitées ne conduisent donc pas nécessairement à la même solution s'agissant des bibliothèques ou établissements d'enseignement qui offrent un service de reproduction. Il est vrai que la jurisprudence a ajouté pour le jeu de l'exception la condition que le copiste ne réalise pas de bénéfice dans l'opération – optique concurrentielle -. Une telle conception est de nature à semer le trouble quant à l'étendue de l'exception.

Copie à l'usage du copiste. Doit-il y avoir identité entre le copiste et le bénéficiaire de la copie ? La question est évidemment tributaire de la définition du copiste. Si le copiste est celui qui réalise matériellement la reproduction cela signifie-t-il que l'exception intervient à son bénéfice seul ou y a-t-il une possibilité de dissociation entre l'auteur de la copie et le bénéficiaire – usage privé du bénéficiaire - ? Si le copiste est celui qui choisit le contenu de la copie, l'usage privé doit alors concerner seulement ce dernier. Certaines hypothèses sont plus claires. Ainsi, dans le cas d'un envoi d'une œuvre par courrier électronique, la copie étant destinée à une autre personne que le copiste, on se trouve hors de l'exception.

Usage privé et non collectif du copiste. Cette condition est interprétée dans le sens de l'exclusion d'un usage commercial mais certains auteurs en ont une conception plus large. Ainsi ils estiment que « Dès lors que l'usage n'est plus personnel, sa finalité ne doit pas être prise en compte. Spécialement, il est indifférent que la reproduction

⁷ - TGI Paris, 3^e ch., 28 janvier 1974 ; D. 1974, p. 337, note Desbois ; JCP G 1975 II 18163, note Françon.

⁸ - Cass. 1^{ère} civ., 7 mars 1984, RIDA 3/1984, p. 151.

⁹ - CA Paris, 4^{ème} ch. A, 25 juin 1997, D. Aff. 1997, p. 936 : le copiste n'est pas l'étudiant concerné mais bien la société de reproduction.

¹⁰ - TGI Aix-en Provence, 20 mai 1996, Légipresse 1996, III, p. 95

n'ait pas été faite dans un but lucratif. Que le copiste n'ait tiré aucun bénéfice d'un usage public n'en fait pas moins un contrefacteur. » (P-Y. Gautier est néanmoins favorable au jeu de l'exception de copie privée dans le cercle de famille).

L'usage personnel peut-il être un usage professionnel ? Plusieurs auteurs (Desbois, Colombet, Lucas) y sont favorables. Ainsi, l'exception pourrait jouer au profit du professionnel ou de l'étudiant amassant de la documentation pour son travail personnel. Tout le problème vient en réalité de la disjonction temporelle entre le moment de réalisation de la copie et l'exploitation faite à partir de l'œuvre. Le bénéfice de la copie privée peut être reconnu au chercheur lorsqu'il réalise sa copie car, à ce moment la destination est l'usage privé du copiste, mais quid lorsqu'il rendra compte de ses travaux publiquement ? Il ne pourra plus exciper de cette exception pour tous les actes qui induiront une communication directe ou indirecte de l'œuvre reproduite initialement à des fins privées....

Le terme utilisation collective serait à interpréter comme affectation collective. Ainsi, on considère en doctrine que l'utilisation pédagogique constitue en elle-même une utilisation collective prohibée. Chaque élève pourrait en tant que copiste se prévaloir de l'usage privé pour la reproduction qu'il aurait réalisé personnellement mais le fait que le document soit étudié collectivement empêcherait la dérogation légale de jouer. Ce système bloque totalement le recours à l'exception de copie privée pour les documents étudiés en classe.

La copie et l'utilisation en réseau. La jurisprudence s'est prononcée à plusieurs reprises dans des affaires concernant la mise à disposition d'œuvres via des sites internet :

- TGI Paris, réf. 14 août 1996 : en permettant à des tiers connectés au réseau Internet de visiter ses pages privées et d'en prendre éventuellement copie, il favorise l'utilisation collective de ses reproductions
- TGI Paris (référé) 5 mai 1997 « Queneau », JCP 1997 II 22906, F. Olivier, RTDCom. 1997, p. 458, obs. Françon qui refuse l'exception de copie privée en notant que l'accès aux pages privées de l'intéressé se faisait sans aucune restriction
- TGI Paris (Référé) 10 juin 1997, « CNRS », JCP 1997 II 22974, F. Olivier, D. 1998, Jur., p. 621, note B. Edelman : « ce serveur, réservé à l'usage des chercheurs, bénéficie d'un système de protection le rendant en principe inaccessible à des tiers... Il n'existe aucun lien entre le fichier privé de X et le site web du laboratoire, accessible au public, le nom du fichier arbitraire de X ne fait l'objet d'aucune communication au public...le laboratoire dispose d'un réseau interne... qui est destiné à un usage privé. Le réseau interne d'une unité de recherche du CNRS, s'il utilise une structure et des protocoles techniques ressemblant à ceux du Web, n'en est pas moins destiné à un usage privé puisqu'il est réservé à l'usage des chercheurs, lesquels peuvent y réaliser des programmes ou des pages strictement personnelles¹¹..

Il apparaît dans la jurisprudence précitée que certaines juridictions se sont montrées favorables à la reconnaissance d'une sphère d'usage privé sur les réseaux, dès lors que l'accès aux pages est réservé à une communauté identifiée et non destiné à une communication publique.

Bilan. En l'état actuel du droit, l'exception pour copie privée a vocation à jouer de manière très restrictive :

- elle écarte les œuvres logicielles ou les bases de données, et donc, par voie de conséquence, toutes les œuvres qui intègrent de tels éléments ;
- elle ne paraît pas pouvoir fonder la plupart des usages entraînant des « croisements de ressources » ;
- elle compte des conditions d'application peu claires pour les utilisateurs.

- d) Does it cover any other rights: distribution, transmission, performance, transformation ? Do they extend to digital means of exploitation? (See also *infra*, the questions concerning definition of "private").

¹¹ - Solution critiquée P. Sirinelli, Internet et droit d'auteur, Dr. Patr, déc. 1997, p. 77 .

There is an exception for performance in the “family circle”. But once more the Courts have interpreted this provision narrowly – relatives and friends only- and the performance has to be free. Unlike in Switzerland where there is an “educational circle”, the family circle cannot cover the performance of works within a classroom and certainly not more performance on the Net.

Les représentations privées et gratuites effectuées exclusivement dans le cercle de famille. *La jurisprudence est hostile à une interprétation extensive de la notion et considère le cercle de famille comme constitué de la seule famille stricto sensu et des alliés. Par exemple, les enfants d’une crèche ne constituent pas un cercle de famille (CA. Grenoble, 28 février 1968).*

Par conséquent, les actes de communication effectués

- dans le cadre d’une classe, ou
- dans le cadre d’un colloque, ou
- par une communauté de chercheurs via un Intranet (voir néanmoins affaire Queneau),
- dans le cadre de l’exposition d’un travail pour le labo ou pour la soutenance d’une thèse,

ne peuvent en aucun cas bénéficier de l’exception du cercle de famille. La condition de gratuité est nécessaire mais non suffisante.

Ainsi un thésard en histoire de l’art ne peut normalement pas présenter son travail sans autorisation du titulaire, au titre de l’exception du cercle de famille, dans le cadre de son laboratoire ou en soutenance s’il est amené à projeter des diapositives de tableaux qu’il décrit.

2.- Eligibility.

- c) Who may benefit from the private use/copying exception? Is there any specific reference to for-profit or not-for-profit uses, public or private, non-collective uses?

Anybody can benefit from the exception. The unresolved question is : has the user to be legitimate to raise the benefit of private copying ? To our opinion the Law does not require the user to be the owner of a tangible copy of the work to be authorized to make other copies of it. The traditionnal example of the student hand-copying the extracts or the books he has borrowed from a library is sufficient to affirm that the property of the tangible copy is not a condition for private copying. The use is supposed to be private and non-collective. The private copying is intended to be for personal use only. Some authors (PY Gautier) consider that the private copy can be used within the “family circle” which allows certain domestic general use as lending the copy to relatives or friends. At the digital age, lending has become useless and the people are generally reproducing the work for a friend, which is, in a strict interpretation of the exception, incompatible with the “private use of the copist”.

- d) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

See. 1. a) in French....

3.- Purposes. What is “private”?

- c) What is the definition of “private use/private copying” in your country? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

See. 1. a) in French....

- d) *How does this exception translate on the Internet? Would students’ downloads of material transmitted for teaching purposes over the Internet qualify as private?*

From the point of view of the student, the act of downloading might be a private copy but the question is : Is it a legitimate use for it is not sure that the teacher has uploaded the protected work with the authorization of the right owner. In the French situation, generally teachers are infringing copyright legislation while spreading documents –either papers or files-. Depending on the issue of the “legitimate” user, the circumstance that the initial uploading was not authorized by Law or rightholder can contaminate the downloading operation of the students.

4.- Extent and Nature of Works.

- f) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- g) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

Not all kinds : electronic databases, software and “ works of art” to be used for purposes identical with those for which the original work was created are excluded, with the consequence that the right holders of such works can not be paid any remuneration for private copying.

L'exception de copie privée n'est pas prévue en matière de logiciel et de bases de données électroniques, ce qui n'est pas sans susciter de questions, notamment quant aux bases de données réalisées par les enseignants et chercheurs pour les utilisations documentaires. La question des travaux d'indexation réalisés par les bibliothèques dans le cadre, par exemple, de la mise en ligne de bibliographies ou par l'utilisation de meta-tags ou d'hyperliens dans des sites pédagogiques n'est pas résolue.

- h) May works be used for private purposes in whole or only fragments?
In whole.

- i) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

See above. The mainstream doctrine considers that the user is entitled to make private copies only if he had obtained lawfully the copy. But there is no specific provision on that question, nor a relevant jurisprudence.

- j) How does the exception interact with the possible existence of a license which specifically prohibits any further uses?

This question is a core problem at the moment of the transposition of art. 6.4 Infosoc directive. The IPC does not expressly settle that the exception for private copying is mandatory. It seems the doctrine considers it is mere an exception guided by the respect of privacy and inability to control the uses and not a right granted for the users. Consequently, there is no legal impediment for a contract to deprive the party from private copying.

To strengthen this interpretation, it shall be reminded that private copying is allowed only after the act to “divulge” is done, which could be interpreted as the recognition of a preliminary exercise of the moral right. On this ground, the right owner has the power to choose the scope of the communication to public he authorizes. Therefore, it is implied that if he has the material power to exclude private copying from authorized uses he can do it. Such an interpretation is consistent with the system of the directive but causes problems of understanding within the public, used to realize private copies.

There is at the moment a huge movement of contest on that interpretation and an association of consumers has recently arose the problem before the French Courts and claim for a right to copy that could not be prevented by technical measures. It underlines that the consumers do pay a levy on the recording material for the purpose of private copying and that it is not possible therefore to ask for payment for something you are not allowed anymore to do. A recent action has been undertaken on that ground before civil courts but the solution is pending.

5.- Remuneration.

b) Is this exception free or subject to remuneration?

For private performance, the performance has to be free and it does not entitle the rightholder for remuneration.

For private copying, both free and subject to remuneration! That is to say that the person copying does not necessarily have to pay something to the right holder of the work she is actually copying. But there is a provision on remuneration for private copying which establishes a levy on the supports for recording – blank audio, video tapes, blank CD-R, etc...). Initially the levy was only redistributed for right holder of works fixed in phonograms or videos. Since an act of 18th July 2001, the remuneration is due to right holder for any work in case of reproduction on digital recording medium.

Article L311-1

(Act No. 98-536 of 1 July 1998 art. 4 Official Journal of 2 July 1998)
(Act No. 2001-624 of 17 July 2001 art. 15 I Official Journal of 18 July 2001)

The authors and performers of works fixed on phonograms or videograms and the producers of such phonograms or videograms shall be entitled to remuneration for the reproduction of those works made in accordance with item 2 of Article L122-5 and item 2 of Article L211-3.

The authors and publishers of works fixed on any other medium are also entitled to remuneration for the reproduction of those works made in accordance with item 2 of Article L122-5 and item 2 of Article L211-3, on a digital recording medium.

c) If subject to remuneration, how is that established? Criteria used to set the fees.

The remuneration is established by a Committee created at article L311-5 (see below). The Committee determines in "decisions" what medium are submitted to the levy and the rates. An important decision of 4th July 2002 has broaden the scope of the digital recording devices. The question whether to fix a fee on the computers is debated and controversial. The lobby of computers industry have until now succeeded in preventing such an extension.

Article L311-3

(Act No. 98-536 of 1 July 1998 art. 4 Official Journal of 2 July 1998)

The remuneration for private copying shall be assessed, under the conditions defined below, as a lump sum as laid down in the second paragraph of Article L131-4.

Article L311-4

(Act No. 92-677 of 17 July 1992 art. 119 Official Journal of 19 July 1992 in force on 1 January 1993)

(Act No. 98-536 of 1 July 1998 art. 4 Official Journal of 2 July 1998)

(Act No. 2001-624 of 17 July 2001 art. 15 III Official Journal of 18 July 2001)

The remuneration provided for in Article L.311-3 shall be paid by the manufacturer, the importer or the person making an intra-Community acquisition, within the meaning of paragraph 3 of point I of Article 256 bis of the Code général des impôts, of recording mediums that may be used for reproduction of works for private use, at the time these mediums enter into circulation in France.

The amount of the remuneration shall depend on the type of medium and the recording time it provides.

Article L311-5

(Act No. 98-536 of 1 July 1998 art. 4 Official Journal of 2 July 1998)

The types of medium, the rates of remuneration and the conditions of payment of such remuneration shall be determined by a Committee chaired by a representative of the State and composed, in addition, in half of persons designated by organizations representing the beneficiaries of the right of remuneration, in quarter of persons designated by the organizations representing the manufacturers or importers of the mediums referred to in the first paragraph of the preceding Article and in quarter of persons designated by the organizations representing the consumers.

The organizations entitled to designate members of the Committee and the number of persons that each organization shall be entitled to designate shall be determined by an order of the Minister responsible for culture.

The Committee shall take its decisions on a majority of the members present. In the event of equally divided voting, the Chairman shall have a casting vote.

The decisions of the Committee shall be enforceable if, within one month, its Chairman has not requested a second decision.

The decisions of the Committee shall be published in the Official Journal of the French Republic.

d) How is it collected? Which collecting society? How is it distributed among the copyright owners?

The remuneration is collected by two specific collecting societies: SORECOP (copy of phonogram) and COPY FRANCE (audiovisual copy), (both of them being managed by the SACEM). The levy is taken from the maker or the importer and is then redistributed to owners by their own collecting societies.

It should be underlined that art. 311-8 ICP settles a mechanism of refund of the levy for certain kind of "professional" users. The teaching or research institutions are not listed. Apparently the refund is sometimes very difficult to obtain.

The system is subject to several criticisms either on legitimacy of the Committee to establish fees on medium not entirely dedicated to the copy of protected works and on the efficiency of the redistribution to the right owners.

Article L311-2

(Act No. 98-536 of 1 July 1998 art. 4 Official Journal of 2 July 1998)
(Act No. 2001-624 of 17 July 2001 art. 15 II Official Journal of 18 July 2001)

Subject to the international conventions, the right to remuneration referred to in Articles L214-1 and in the first paragraph of article L311-1, shall be shared between the authors, performers, phonogram or videogram producers in respect of phonograms and videograms fixed for the first time in France.

Article L311-6

(Act No. 98-536 of 1 July 1998 art. 4 Official Journal of 2 July 1998)

The remuneration referred to in Article L311-1 shall be collected on behalf of the entitled persons by one or more bodies as referred to in Title II of this Book.

It shall be distributed between the entitled persons by the bodies referred to in the preceding paragraph as a function of the private reproductions of which each work has been the subject.

Article L311-7

(Act No. 95-4 of 3 January 1995 art. 2 Official Journal of 4 January 1995)
(Act No. 98-536 of 1 July 1998 art. 4 Official Journal of 2 July 1998)
(Act No. 2001-624 of 17 July 2001 art. 15 IV Official Journal of 18 July 2001)

The remuneration for private copying of phonograms shall belong in half to the authors within the meaning of this Code, in quarter to the performers and in quarter to the producers.

The remuneration for private copying of videograms shall belong in equal parts to the authors within the meaning of this Code, the performers and the producers.

The remuneration for private copying of the works referred to in Article L311-1 shall belong in equal parts to the authors and the publishers.

Article L311-8

The remuneration for private copying shall be refunded when the recording medium is acquired for their own use or production by:

- 1°. audiovisual communication enterprises;
- 2°. phonogram or videogram producers and persons who carry out the reproduction of phonograms or videograms on behalf of the producers;
- 2° bis. The publishers of works published on digital mediums;
- 3°. legal persons or bodies, of which the list shall be established by the Minister responsible for culture, that use recording mediums for the purpose of assisting persons with sight or hearing disability.

e) Does this system also apply to digital uses? How?

Yes. The remuneration is assessed on digital recording devices. See decision of 4th July 2002.

(J.O n° 174 du 27 juillet 2002 page 12877)

Décision n° 3 du 4 juillet 2002 de la commission prévue à l'article L. 311-5 du code de la propriété intellectuelle relative à la rémunération pour **copie privée**

NOR: MCCB0200522S

La commission,

Vu le code de la propriété intellectuelle, et notamment ses articles L. 311-1 et suivants et R. 311-1 et suivants ;

Vu l'arrêté du 23 septembre 1986 fixant la liste des personnes morales ou organismes mentionnés au 3° de l'article 37 de la loi n° 85-660 du 3 juillet 1985 (art. L. 311-8 du code de la propriété intellectuelle) ;

Vu l'arrêté du 13 mars 2000 modifié fixant la composition de la commission ;

Vu l'avis du Conseil d'Etat en date du 10 octobre 2000 ;

Vu la décision du 30 juin 1986 de la commission prévue à l'article 34 de la loi n° 85-660 du 3 juillet 1985 (art. L. 311-5 du code de la propriété intellectuelle) publiée au Journal officiel du 23 août 1986 ;

Vu la décision n° 1 du 4 janvier 2001 de la commission relative à la rémunération pour copie privée publiée au Journal officiel du 7 janvier 2001 ;

Vu la décision n° 2 du 6 décembre 2001 de la commission portant conversion en euros de la décision n° 1 du 4 janvier 2001 publiée au Journal officiel du 30 décembre 2001 ;

Vu les délibérations de la commission en date du 12 juin 2002 et du 4 juillet 2002 ;

Considérant qu'elle est chargée par la loi :

- d'une part, de déterminer les types de supports éligibles au versement de la rémunération pour copie privée due aux ayants droit des catégories d'oeuvres déterminées par le code de la propriété intellectuelle, lorsque lesdits supports sont utilisables aux fins de copie privée et qu'une rémunération doit être versée en compensation ;
- d'autre part, de fixer les taux de ladite rémunération en fonction de la durée d'enregistrement permise par ces supports ;
- enfin, de préciser les modalités de son versement ;

Considérant qu'elle a réuni les éléments d'information et d'appréciation nécessaires et suffisants pour lui permettre, sur les bases des conditions fixées dans sa décision n° 1 du 4 janvier 2001, modifiée par la décision n° 2 du 6 décembre 2001, de fixer la rémunération pour copie privée au titre des supports numériques intégrés dans certains appareils électroniques grand public qui sont, dans leur usage en copie privée, dédiés à l'enregistrement de phonogrammes ou de vidéogrammes en vue de leur restitution ;

Considérant qu'elle ne dispose pas d'éléments nécessaires et suffisants pour lui permettre de fixer, sans préjudice de leur éventuel examen au vu des résultats des études et réflexions en cours en son sein comme au niveau des autorités publiques, les rémunérations concernant les supports d'enregistrement intégrés dans certaines catégories d'appareils informatiques ;

Considérant qu'elle ne peut que continuer à écarter de sa décision, sous réserve de leur éventuel examen ultérieur,

les types de supports pour lesquels elle a relevé l'absence, l'insignifiance ou la non-pertinence des pratiques ou des perspectives de copie privée au sens des droits consentis au public par le code de la propriété intellectuelle ;

Considérant qu'elle entend néanmoins poursuivre les études et analyses complémentaires lui permettant, en tenant compte de l'évolution des technologies, des matériels, des usages de consommation et des pratiques de copie privée, de procéder, le cas échéant, à la révision de ses décisions antérieures, à l'intégration de nouveaux bénéficiaires de la rémunération, ou à l'élection de nouveaux types de supports d'enregistrement,

Décide :

Article 1

Sont éligibles à la rémunération due au titre des articles L. 311-1 et suivants du code de la propriété intellectuelle les supports d'enregistrement intégrés aux appareils tels que définis ci-après :

Disques durs intégrés à un téléviseur, un magnétoscope ou un boîtier assurant l'interface entre l'arrivée des signaux de télévision et le téléviseur (« décodeur ») comportant une fonctionnalité d'enregistrement numérique de vidéogrammes sur disque dur (« PVR ») ;

Disques durs intégrés à un baladeur ou un appareil de salon dédiés à la lecture d'oeuvres fixées sur des phonogrammes.

Article 2

Pour chaque support intégré aux appareils visés, le montant de la rémunération est assis sur une capacité d'enregistrement nominale faisant l'objet :

- a) D'une pondération selon la proportion du support dédiée effectivement à la copie privée et, au sein de celle-ci, la proportion non utilisée par le copiste, telles que définies à partir des informations portées à la connaissance de la commission sur les caractéristiques techniques des appareils et les usages permis en copie privée ;
- b) D'un coefficient de conversion horaire des capacités nominales correspondant aux pratiques de compression reconnues et, le cas échéant, aux caractéristiques techniques des programmes copiés, appréciées par la commission à partir des informations portées à sa connaissance ;
- c) D'un abattement correspondant à la possibilité que lesdits appareils soient utilisés conjointement avec d'autres supports sur lesquels une rémunération aurait été perçue au profit des ayants droit.

Article 3

Par application des règles susvisées, le montant de la rémunération unitaire est fixé par type d'appareils et par palier de capacité conformément au tableau annexé à la présente décision.

En conséquence, les déclarations faites par les redevables aux sociétés chargées de percevoir ladite rémunération mentionneront de façon distincte, pour chaque catégorie d'appareil, le nombre d'appareils assujettis à la

rémunération ainsi que, pour chacun d'eux, leur capacité d'enregistrement. La capacité d'enregistrement desdits appareils est présumée être celle déclarée par le redevable concerné.

Les modalités de versement de la rémunération arrêtée par la présente décision sont celles prévues par les dispositions de l'article 6 de la décision du 30 juin 1986 susvisée.

Article 4

Pour les supports d'enregistrement du type de ceux mentionnés au tableau figurant en annexe, dont les caractéristiques techniques et les pratiques d'utilisation ne diffèrent de celles des supports mentionnés audit tableau que par une capacité nominale supérieure d'enregistrement, la rémunération prévue pour la capacité nominale maximale des supports mentionnés audit tableau sera appliquée à titre conservatoire, dans l'attente de la fixation d'une rémunération spécifique pour cette capacité nominale d'enregistrement.

Article 5

La présente décision sera publiée au Journal officiel de la République française.

Fait à Paris, le 4 juillet 2002.

Le président,

F. Brun-Buisson

TABLEAU DE LA RÉMUNÉRATION DUE

EN APPLICATION DE L'ARTICLE 3

Tableau de la rémunération due sur les disques durs intégrés à un téléviseur, un magnétoscope ou un boîtier assurant l'interface entre l'arrivée de signaux de télévision et le téléviseur (« décodeur ») et comportant une fonctionnalité d'enregistrement numérique de vidéogrammes sur disque dur (« PVR ») :

Tableau de la rémunération due sur les disques durs intégrés à un baladeur ou à un appareil de salon dédiés à la lecture d'oeuvres fixées sur des phonogrammes :

A N N E X E

TABEAU DE LA RÉMUNÉRATION DUE
 EN APPLICATION DE L'ARTICLE 3

Tableau de la rémunération due sur les disques durs intégrés à un téléviseur, un magnétoscope ou un boîtier assurant l'interface entre l'arrivée de signaux de télévision et le téléviseur (« décodeur ») et comportant une fonctionnalité d'enregistrement numérique de vidéogrammes sur disque dur (« PVR ») :

RÉMUNÉRATION	CAPACITÉ NOMINALE d'enregistrement
10 € 15 €	Jusqu'à 40 Go. Au-delà de 40 Go et jusqu'à 80 Go.

Tableau de la rémunération due sur les disques durs intégrés à un baladeur ou à un appareil de salon dédiés à la lecture d'œuvres fixées sur des phonogrammes :

RÉMUNÉRATION	CAPACITÉ NOMINALE d'enregistrement
8 € 10 € 12 € 15 € 20 €	Jusqu'à 5 Go. Au-delà de 5 Go et jusqu'à 10 Go. Au-delà de 10 Go et jusqu'à 15 Go. Au-delà de 15 Go et jusqu'à 20 Go. Au-delà de 20 Go et jusqu'à 40 Go.

IV.- LIBRARY EXCEPTIONS.

The main purpose of this section is to address the interaction between library privileges and teaching uses: to what extent may library exceptions assist teaching activities conducted through the Internet (either exempted or licensed teaching uses). Please feel free to provide any information concerning the general scope of such exceptions, even though not especially helpful as far as teaching purposes.

0.- Identify any exception that allows for the use of copyrighted works by libraries, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

There is none. The only provision which can be linked to the missions of conservation assumed by certain libraries is the obligation of legal deposit. It is not per se an exception to copyright. The scope of the obligation will be extended to all digital works in the forthcoming provisions of the text discussed on transposition of the Infosoc directive.

Article 2 of Act n° 92-546 of 20 June 1992 settles :

« Le dépôt légal est organisé en vue de permettre :

1° la collecte et la conservation des documents

2° la constitution et la diffusion de bibliographies nationales

3° la consultation des documents, sous réserve des secrets protégés par la loi, dans des conditions conformes à la législation sur la propriété intellectuelle et compatibles avec leur conservation »

According to article 6:

«Le conseil scientifique du dépôt légal est composé de représentant des organismes dépositaires et est présidé par l'administrateur générale de la Bibliothèque Nationale. Il est chargé de veiller à la cohérence scientifique et à l'unité des procédures du dépôt légal. Il peut rendre des avis et formuler des recommandations sur toutes questions relatives au dépôt légal. Il est associé à la définition des modalités d'exercice de la consultation des documents déposés, prévue à l'article 2 de la présente loi dans le double respect des principes définis par le CPI et de ceux inhérents au droit, pour le chercheur d'accéder à titre individuel, dans le cadre de ses recherches, et dans l'enceinte de l'organisme dépositaire, aux documents conservés ».

1.- Exclusive rights covered by the exception.

- c) Reproduction? Distribution? Communication to the public? Transformation? Does it cover digital copies? Does it cover digital transmissions of works?
- d) Would it be permissible for a library to make digital copies of the works in its catalogue, and post them on its web page, or transmit them to their teachers and/or students (for teaching purposes), or even for inter-library loans?

2.- Eligibility

- c) Which libraries may benefit from the exception? Only public libraries? Non-for-profit libraries? What about on-line libraries?
- d) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect digital (on-line) libraries?

3.- Purposes.

- d) Conservation, lending, studying, research, teaching purposes, etc.?
- e) Could the library supply material to be used for teaching purposes?
- f) Since the library privilege granted under article 5.2.(c) Copyright Directive is not limited to any specific purposes, it leaves the door open for coverage of reproductions for teaching purposes, provided such

reproductions are not for direct or indirect economic or commercial advantage. Has your national legislator implemented (or intends to implement) such an exception? If so, how?

4.- Extent and Nature of works.

- f) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- g) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?
- h) May works be used in whole or only fragments?
- i) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?
- j) How does the exception interact with the possible existence of a license which specifically prohibits any further use?

5.- Remuneration.

- e) Is this exception free or subject to remuneration?
- f) If subject to remuneration, how is that established? Criteria used to set the fees.
- g) How is it collected? Which collecting society? How is it distributed among the copyright owners ?
- h) Does this system also apply to digital uses? How?

V.- TECHNOLOGICAL MEASURES VS. EXCEPTIONS.

The purpose of this section is to evaluate the interaction between exceptions and technological measures i.e., how is copyright balanced against the public interest?

4. Are technological measures protected in your country? To what extent (access control, anti-copy, etc.)?

For the moment, before the transposition, the technological measures can be protected but not on the ground of a copyright legislation (for the other legal basis, see the French reports in the NY ALAI Congress by G. Vercken and Antoine Latreille joined).

5. How do exceptions relate to technological measures? Has the legislator implemented any specific provision to ensure that exceptions will continue to apply despite the existence of any technological measures implemented by the copyright owners? How has art.6.4 EU Directive (if so) been implemented?

The process of transposition is at work. The draft implements art. 6.4 and creates a mechanism of mediation for the core question of the benefit of the exception in case the rights holder do not comply with their obligation to let a certain access to the users.

6. Is there any case law or trade use that balances the interaction of exceptions between technological measures? Is there any agreement (contracts, collective bargaining, etc.) that permits certain categories of users (e.g., libraries, teaching institutions, etc) to circumvent a technological measure in order to benefit from a use covered by an exception?

Not yet, to my knowledge.

VI.- Please add any further comments and information you deem interesting for this project.

**Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project**

GERMANY

by Christophe Geiger, Max Planck Institute, Munich.

**Droit d'auteur et éducation à distance par voie numérique
L'utilisation d'œuvres préexistantes lors de l'éducation à distance par le biais du réseau Internet**

Droit allemand – réponses au questionnaire

Par Christophe Geiger

*Collaborateur du département France de l'Institut Max Planck pour le droit de la propriété intellectuelle, le droit
de la concurrence et le droit fiscal
DEA droit des créations immatérielles
Examen d'Etat en droit allemand*

***Traducteur juridique auprès de la Cour de Justice des
Communautés Européennes***

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Remarque préliminaire:

Deux remarques préliminaires s'imposent :

- D'une part, quant à la forme, à la structure du questionnaire. Il a en effet été préféré d'adapter les réponses au questionnaire aux spécificités du droit allemand en la matière. En effet, contrairement à certaines législations (comme la France p.ex.), le droit allemand prévoit un dispositif très détaillé d'exceptions. Les exceptions bénéficient de cas d'application très particuliers et sont rédigées de manière très précises. Il existe notamment quatre exceptions à des fins d'enseignement, alors que le questionnaire semble partir du principe de l'existence d'une seule exception. L'une d'entre elle est une sous- catégorie de l'exception à des fins d'utilisation privé, de la sorte que son étude pouvait être envisagée également sous cette rubrique. Il n'existe pas non plus d'exception spécifique pour les bibliothèques ¹², mais celles-ci sont amenées à jouer un rôle dans la mise en œuvre des exceptions à des fins d'enseignement, de sorte qu'une présentation groupée s'impose sous peine de nuire à la clarté de la démonstration. Enfin, certains recoupements sont inévitables. Il sera donc fait référence au passage précédemment étudié, afin d'éviter les répétitions. Pour le reste, il sera essayé de respecter la structure du questionnaire le plus fidèlement possible.

- D'autre part, quant au fond, au contenu du questionnaire. Il faut souligner d'emblée que l'intégralité du système allemand, et en particulier les différentes exceptions ont été imaginé en se basant sur un modèle d'utilisation dans un univers *analogique*. Si dans le système continental, les droits s'adaptent plus facilement au contexte numérique, cela n'est pas forcément le cas des exceptions, puisqu'elle sont rédigées de manière étroite. Une extension au delà de la lettre du texte (notamment par analogie) n'est en général pas possible en raison du principe de l'interprétation restrictive des exceptions, qui vaut également en droit allemand ¹³. En l'absence de décisions jurisprudentielles et d'analyses doctrinales, leur transposition dans le monde numérique se révèle pas toujours facile et il sera parfois nécessaire de recourir à des hypothèses, en défaut de certitudes. Là où le questionnaire requière des réponses exactes, force est constater qu'une réponse définitive ne sera

¹² Mis à part l'art. 53 al. 2 chiffre 2, lequel est interprété de manière très restrictive et ne se révèle pas d'un grand intérêt pour l'éducation à distance. Sur cette disposition, v. *infra*.

¹³ À l'instar de la doctrine française, la doctrine majoritaire en Allemagne considère que les exceptions au droit d'auteur sont à interpréter de manière restrictive. En faveur d'une interprétation restrictive des exceptions, v. W. Nordemann in F. K. Fromm et W. Nordemann (éd.), *Urheberrecht. Kommentar zum Urheberrechtsgesetz und zum Urheberrechtswahrnehmungsgesetz*, 9^e éd., Stuttgart, Verlag W. Kohlhammer, 1998, p. 377 ; F. Melichar in G. Schricker (éd.), *Urheberrecht Kommentar*, 2^e éd., Munich, Beck, 1999, p. 742 ; J. Bornkamm, *Ungeschriebene Schranken des Urheberrechts ?*, in W. Erdmann, W. Gloy et R. Herber (éd.), *Festschrift H. Piper*, Munich, Beck, 1996, p. 642.

pas toujours possible. De plus, une grande part des réponses dépend notamment de la transmission de la directive du 22 mai 2001 sur le droit d'auteur et les droits voisins dans la société de l'information, laquelle n'a pas eu lieu encore en Allemagne ¹⁴. Certains éléments de réponse pourront être trouvés dans les divers projets de loi de transposition. Cependant, en raison des fréquents remaniements du texte, notamment à propos des questions étudiées (exceptions à des fins d'enseignement), ces projets ne pourront servir que d'indices, non pas de réponses complètes et définitives.

¹⁴ Il est probable que de nombreuses questions relatives aux exceptions dans l'environnement numérique restent sans réponses, car le projet de loi se présente comme une transposition minimum, évitant de prendre position sur les sujets sensibles. Ceci s'explique par la volonté exprimée par le ministère d'une transposition dans les plus brefs délais. À une telle fin, il a été considéré préférable que les exceptions, traditionnellement un sujet politiquement très sensible, ne fassent pas l'objet de modifications substantielles. D'importantes questions ont donc été repoussées à une date ultérieure.

I. Les exceptions à des fins d'enseignement

Il existe en droit d'auteur allemand quatre exceptions au droit d'auteur spécifiques pour les utilisations à des fins d'enseignement, que nous étudierons successivement. Elles sont toutes d'origine légale et se trouvent réglementées par la loi sur le droit d'auteur allemand, le *Urheberrechtsgesetz* (en abrégé : UrhG). Il s'agit des reproductions d'œuvres ou d'extraits d'œuvres imprimées à des fins d'enseignement (art. 53 et s. UrhG), des reproductions d'œuvres audiovisuelles à des fins pédagogiques (art. 47 UrhG), la représentation publique d'œuvres dans le cadre scolaire (art. 52 UrhG) et la reproduction d'œuvres et d'extraits d'œuvres dans les ouvrages scolaires (art. 46 UrhG).

1. La reproduction d'œuvres ou d'extraits d'œuvres imprimées à des fins d'enseignement (art. 53 et s. UrhG)

Il s'agit d'une sous-catégorie de l'art. 53 UrhG intitulé « reproductions à des fins d'utilisation privée et autres utilisations personnelles », article réglementant toutes les reproductions d'œuvres permises à des fins privées¹⁵.

A- Le texte de l'exception

La traduction de la disposition en question se présente de manière suivante¹⁶ :

Art. 53

(3) Il est permis de réaliser ou de faire réaliser une reproduction de petites parties d'un ouvrage imprimé ou de certains articles isolés parus dans des journaux ou des revues, à des fins d'utilisation personnelle

1. lors de l'enseignement scolaire dans des établissements pédagogiques non commerciaux ainsi que dans les établissements de formation professionnelle, en quantité appropriée aux besoins de la classe ; ou

¹⁵ Il aurait donc été également envisageable d'étudier cette disposition antérieurement, lors des exceptions permettant la reproduction pour usage privé. Comme il s'agit de la plus importante exception à des fins d'enseignement en pratique, il a été préféré de l'analyser dès à présent.

¹⁶ Certaines des dispositions légales concernées ont été traduites personnellement en l'absence d'une traduction officielle. La traduction s'inspire d'une traduction du texte de loi allemand réalisée par les services de l'OMPI, mais n'est cependant pas toujours entièrement identique avec celle-ci.

2. lors d'examens étatiques et d'examens dans les établissements scolaires, les établissements d'enseignement supérieur, les établissements pédagogiques non commerciaux ainsi que les établissements de formation professionnelle, en quantité appropriée,

dans la mesure où la reproduction est nécessaire à des fins pédagogiques.

B- Les droits exclusifs couverts par l'exception

Comme le texte de l'exception l'établi clairement, il s'agit uniquement d'une exception au droit de reproduction. Elle concerne essentiellement en pratique les photocopies d'œuvres par les enseignants pour leurs cours ou pour les examens. La reproduction est strictement limitée au nombre d'exemplaires appropriés, la plupart du temps au nombre d'élèves de la classe ou au nombres d'élèves passant l'examen.

Mais comme le texte de l'exception ne le précise pas, il est possible d'estimer qu'une reproduction par numérisation ¹⁷ (p.ex. par le biais d'un scanner) est possible ¹⁸, afin ensuite d'effectuer des copies par le biais d'une imprimante. Cependant, le droit de communication au public n'étant pas visé, il n'est pas certain que la consultation sur écran d'ordinateur de l'œuvre numérisée par les élèves soit couverte par l'exception ¹⁹. Le droit de communication au public ²⁰ est un droit exclusif de l'auteur, rattaché à l'art. 15 al. 2 UrhG sans y être nommé ²¹. Suite aux traités OMPI et à la directive du 22 mai 2001, le projet de loi de transposition allemand dans sa dernière version ²² prévoit de concrétiser expressément ce droit en l'incluant dans la liste de l'art. 15 al. 2 et en insérant un art. 19 a dans la loi, qui reprend à l'identique la définition de la directive. On peut donc en déduire

¹⁷ Il faut rappeler qu'une telle numérisation constitue une reproduction au sens de l'art. 16 UrhG et est donc soumise, sauf exception, au droit exclusif de l'auteur. Selon l'art. 16, al. 1 UrhG, « le droit de reproduction est le droit de confectionner des exemplaires de l'œuvre, quels que soient le procédé employé et le nombre des exemplaires confectionnés ».

¹⁸ Ainsi que tout acte de téléchargement (« download »). Sur la question v. M. Fröhlich, *Zentrale Institutionen des deutschen Urheberrechts und des französischen Droit d'auteur auf dem Prüfstand der elektronischen Netzwerke*, Frankfurt sur le Main, Peter Lang, 2001, p. 155.

¹⁹ Au contraire, l'art. 53, al. 6 UrhG précise même que « les exemplaires ou copies ne peuvent être mis en circulation ni utilisés à des fins de communication publique ». Sauf à considérer qu'il ne s'agit là que d'une communication privée, et non publique, ce qui est tout à fait envisageable (sur la différence v. *infra*). Dans ce cas, il est possible d'estimer que l'enseignant pourrait envoyer les parties d'œuvres numérisées à ses élèves par courrier électronique (car on resterait alors dans le cadre privé). V. néanmoins l'art. 52 a du projet de loi de transposition du 31 juill. 2002, qui prévoit une nouvelle exception pour ces cas là. Cette exception sera étudié ci-après.

²⁰ En allemand, « Recht der öffentlichen Zugänglichmachung ».

²¹ H. Schack, *Urheber- und Urhebervertragsrecht*, 2^e éd., Tübingen, Mohr Siebeck, 2001, p. 196 et s..

²² La dernière version date du 31 juillet 2001. Le projet est reproduit dans la revue *KUR* 2002, p. 97.

que la reproduction sur un serveur d'une œuvre à des fins de consultation par les élèves ne serait pas possible²³.

C- Bénéficiaires de l'exception

a) Institutions visées

- L'utilisation n'est permise que dans le cadre des institutions énumérées dans l'art. 53 al. 3 chiffre 1 UrhG. Ce qui est certain, c'est qu'il ressort clairement de l'exposé des motifs que le législateur a entendu *exclure les universités* de l'application de l'art. 53 al. 3 chiffre 1 UrhG²⁴. Par contre, l'utilisation de reproductions est permise lors des examens dans les universités (art. 53 al. 3 chiffre 2). Cependant, cette disposition a un champ d'application particulièrement limité, car ne sont concernés que les examens étatiques, c'est à dire les épreuves officielles de fin d'année ou ceux qui clôturent un cycle d'études. Il ne s'agit pas des interrogations écrites dans le cadre de la formation. Est donc procédé à une différenciation entre les utilisations à des fins d'enseignement et les utilisations à des fins d'examen. La différenciation est justifiée dans les motifs de la loi par le fait que dans le domaine de la formation supérieure, les étudiants sont à même de se procurer les documents nécessaires à la formation, ce qui n'est pas possible pour les examens, les étudiants ne devant pas être informés du contenu des épreuves.

- Sont également exclus de l'application les séminaires de courte durée, les cours privés, les cours de rattrapage, les cours dispensés par des établissements privés pendant les vacances, les cours dans les instituts de langue²⁵. Par contre, il ressort également des motifs de la loi que les établissements visés sont les établissements scolaires *publics et privés*. La gratuité n'est donc pas un critère requis. Les établissements d'enseignement professionnel sont explicitement visés par l'art. 53 al. 3 chiffre 1 UrhG.

b) Personnes visées

- Le bénéficiaire de l'exception est celui qui réalise la copie à des fins d'enseignement, la plupart du temps l'enseignant. Il peut également faire réaliser la copie par un tiers, par un magasin de reprographie ou une

²³ En effet, dans ce cas, il est certain qu'il s'agirait d'une communication publique et non plus privée, à moins que le serveur ne soit accessible uniquement aux élèves de la classe, p.ex. par un mot de passe déterminé.

²⁴ V. l'exposé des motifs de la loi de 1965, reproduit in *UFITA* 1965, n° 45, p. 280 et *UFITA* 1966, n° 46, p. 184. Cette exclusion des universités a d'ailleurs fait l'objet de critiques en doctrine, v. notamment M. Rehinder, *Urheberrecht*, 12^e éd., Munich, Beck, 2002, n° 259.

²⁵ En ce sens T. Neumann, *Urheberrecht und Schulgebrauch*, Baden-Baden, Nomos, 1994, p. 62.

bibliothèque ²⁶, même à titre onéreux. Le bénéficiaire sera alors le tiers. L'usage est limité à l'utilisation à des fins d'enseignement dans les établissements visés. Une exploitation commerciale de l'œuvre est donc exclue. Cela ne veut pas dire que l'enseignement est forcément gratuit, car les écoles privées sont également visées par l'exception.

- Les élèves ne sont donc pas visés par l'exception. Ils pourront néanmoins réaliser des reproductions, mais ils bénéficieront alors d'une autre exception, celle de l'art. 53 al. 2 chiffre 1 UrhG permettant la reproduction d'œuvres à des fins de recherche ²⁷.

D- Objectifs de l'exception

Les utilisations visées doivent être nécessaires à l'utilisation à des fins d'enseignement ou d'examen. Il ne s'agit pas ici d'une estimation de l'utilité pédagogique de l'utilisation des reproductions, décision qui est laissée à l'enseignant. Ce critère permet seulement d'exclure les autres utilisations, c'est à dire les reproductions effectuées par l'administration scolaire. Sont donc couvertes toutes les reproductions faites par l'enseignant lors de la préparation de son cours, ainsi que celles effectuées pour être distribuées en classe.

Encore une fois, le droit de communication au public n'étant pas visé, l'exception ne permettrait pas l'accès en différé par les élèves par le biais du réseau internet.

Il est difficile de se prononcer définitivement sur la licéité d'établir une compilation d'œuvres à des fins d'enseignement. Dans l'esprit du texte, quelques articles rassemblés dans un dossier à destination des élèves devrait être possible, mais en raison du principe de l'interprétation restrictive des exceptions, il est permis de douter qu'un élargissement serait prohibé. D'autant plus qu'il existe une autre exception permettant la reproduction d'œuvres et d'extraits d'œuvres dans les ouvrages scolaires (art. 46 UrhG) ²⁸.

E- Œuvres visées

²⁶ En ce sens la décision de la Cour fédérale de Justice (*Bundesgerichtshof*, en abrégé : BGH) « service d'envoi de copies », *ZUM* 1999, p. 566. De la sorte, même en l'absence d'une exception particulière en faveur des bibliothèques, celles-ci sont tout de même amenées à jouer un rôle.

²⁷ Cette exception sera étudiée *infra* sous le titre « Exceptions permettant la reproduction pour usage privé ».

²⁸ Sur cette exception v. *infra*.

- Il est permis uniquement de reproduire une petite partie d'un ouvrage ou certains articles en entier. Il est cependant interdit de reproduire l'ouvrage en entier, ainsi que de reproduire un journal ou une revue dans son intégralité (art. 53 al. 4 b). De plus, le art. 53 al. 4 a UrhG exclu explicitement les partitions musicales de l'exception à des fins d'enseignement, mais également de l'exception pour copie privée. Les partitions restent dans tous les cas soumises au droit exclusif.

- Les programmes d'ordinateur ainsi que les bases de données sont exclues de l'application car il ne s'agit pas d'ouvrages imprimés ²⁹. Cette condition pourrait être supprimée lors de la transposition de la directive du 22 mai 2001. En effet, le projet de loi allemand de transposition envisage la suppression de l'adjectif « imprimé » ³⁰, ainsi que l'ajout de la référence à la communication au public en plus du critère de la parution des articles ³¹. De la sorte, il serait possible de réaliser des reproductions également d'œuvres disponibles uniquement sous format numérique, notamment sur le réseau Internet.

- Par contre, en l'absence de précisions, la manière dont a été obtenue l'œuvre semble être indifférente.

F- Rémunération

L'art. 54 a UrhG prévoit un système de compensation financière pour les reproductions par reprographie.

§ 54 a al. 1 UrhG prévoit une compensation générale qui est à verser par tous les fabricants d'appareils destinés à effectuer des reprographies. Il n'est pas nécessaire que l'appareil soit exclusivement destiné à effectuer des reprographies, les appareils multifonctions sont également visés. C'est ce qu'a précisé la jurisprudence en appliquant cet article aux fabricants d'appareils de télécopie ³² et de scanners ³³. La question

²⁹ Il faut néanmoins mentionner l'art. 87 c, al. 1, n° 3 UrhG, introduit par la loi du 22 juillet 1997 en transposition de la directive « bases de données », prévoyant la possibilité de reproduction d'une bases de données à des fins d'enseignement. Cet article ne vise cependant pas uniquement les bases de données imprimées, mais également celles accessibles par des moyens électroniques (pour lesquelles la copie privée est interdite : UrhG, art. 87 c, al. 1, n° 1, chiffre 2).

³⁰ Qui serait remplacé par « ouvrage et œuvre de petite ampleur »

³¹ Ce qui donnerait alors : « Il est permis de réaliser ou de faire réaliser une reproduction de petites parties d'un ouvrage, d'œuvres de petite ampleur ou de certains articles isolés parus ou communiqué au public dans des journaux ou des revues, à des fins d'utilisation personnelle... »

³² BGH ZUM 2002, p. 218.

³³ BGH ZUM 1999, p. 649.

reste ouverte pour les ordinateurs et leurs accessoires ³⁴. Une décision du LG Stuttgart du 21 juin 2001 a cependant considéré que le fabricant de graveurs de CD était tenu de s'acquitter de la rémunération prévue par les art. 54 et 54 a UrhG ³⁵, de sorte que l'on peut s'attendre à une extension prochaine de l'exception à ce type d'appareils.

De plus, l'art. 54 a al. 2 UrhG prévoit une compensation sous forme d'une redevance à verser par l'exploitant d'un appareil de reprographie, et donne une liste limitative des exploitants visés : il s'agit des magasins de reprographie évidemment, mais également des établissements scolaires, des universités, des instituts de recherche, ainsi que des bibliothèques publiques ³⁶.

La hauteur de la redevance est fixée par la loi dans l'art. 54 d UrhG. Le législateur a prévu un tarif supérieur pour les ouvrages à vocation pédagogique comme les livres d'école afin de décourager ces photocopies, et afin que l'acquisition d'ouvrages pédagogiques ne soit pas remplacée par la reprographie.

Selon l'art. 54 h UrhG, la redevance ne peut être collectée que par les sociétés de gestion collective, qui redistribuent aux auteurs les sommes collectées selon des critères objectifs et non discriminatoires comme la fréquence de l'utilisation d'une œuvre. Les sociétés de gestion conduisent des études et des tests afin de déterminer ces utilisations, auxquels les exploitants sont obligés de collaborer. Il s'agit pour la reprographie de la société de gestion VG Wort.

G- Avenir de l'exception dans l'environnement numérique

a- L'étude du Max Planck

Des réflexions ont été conduites pour adapter les art. 53, 54 et s. UrhG, conçus pour la reproduction mécanique, à l'environnement numérique, environnement permettant une reproduction digitale facilitée de

³⁴ L'extension aux fabricants de PC, revendiquée par certains (v. en ce sens, S. Winghardt, *Kopiervergütung für den PC*, ZUM 2002, n° 5, p. 349 ; D. Burchard, *Urheberrechtsabgabe für den PC ?*, in ITRB 2003, 3, p. 57) est actuellement étudiée par le gouvernement (v. le 2^e rapport du gouvernement sur le développement de la rémunération prévue aux articles 54 et 54 a UrhG du 11 juillet 2000, reproduit in E.-J. Mestmäcker et E. Schulze, *Urheberrechtskommentar*, t. 1, 1^{re} partie, Les limitations aux droits, Remarque introductive aux art. 54 et s., Neuwied, Luchterhand, 2001, p. 33 ; v. également l'article de l'ancienne ministre fédérale de la Justice, H. Däubler-Gmelin, *Private Vervielfältigung unter dem Vorzeichen digitaler Technik*, ZUM 1999, n° 11, p. 771)

³⁵ LG Stuttgart, ZUM 2001, p. 614.

³⁶ Le législateur a visé les institutions susceptibles d'utiliser de manière accrue les appareils de reprographie pour photocopier des contenus protégés, et donc instauré une redevance pour combler le manque à gagner.

contenus protégés sans grands efforts et avec une qualité de reproduction identique à l'original. À la demande du ministère allemand de la Justice en 1996, l'Institut Max Planck pour le droit étranger et international de la propriété intellectuelle a conduit une étude visant à moderniser les exceptions existantes au droit d'auteur ³⁷. Les auteurs de l'étude se sont notamment penchés sur le cas de l'art. 53 UrhG et ont estimé que l'exception pour copie privée devait être maintenue dans l'environnement numérique, mais réduite à certains cas particuliers, c'est à dire à la copie à des fins personnelles (art. 53 al. 1) et à des fins de recherche (art. 53 al. 2 chiffre 2). Toutes les autres cas de reproduction numérique devrait être exclus de l'application de l'art. 53 UrhG, ce qui veut dire que l'exception à des fins d'enseignement ne vaudrait pas pour les reproductions numérique. Ils ont également estimé que la possibilité de faire réaliser les copies par un tiers devait être supprimée. Outre la suppression des montants légaux fixés dans l'art. 54 d, il a été également proposé d'étendre la redevance aux fabricants d'appareils permettant la reproduction numérique de contenus protégés, de même qu'aux supports numériques vierges (DAT, mini-disc, disquettes, CD enregistrables etc...).

b- Le projet de loi du 31.07.2002

Il faut encore faire état de l'insertion dans le projet de loi de transposition d'une nouvelle exception, l'art. 52 a UrhG, intitulé *Communication au public à des fins d'enseignement et de recherche*. Cet article n'est apparu que dans la deuxième version du projet de loi datant du 31 juillet 2002, la première version du 18 mars 2002³⁸ étant muette à ce sujet. Il a fait d'hors et déjà l'objet d'une grande opposition de la part des éditeurs et d'une certaine partie de la doctrine ³⁹. Il semble que sa rédaction ait été déjà depuis modifiée plusieurs fois par le gouvernement et il n'est pas certain qu'elle soit maintenue au final. Mais cette exception se révélerait d'une très grande importance pour l'éducation à distance, de sorte qu'il se doit de l'étudier ci-après.

Son texte est le suivant ⁴⁰:

³⁷ Cette étude a fait l'objet d'une publication : G. Schricker (éd.), *Urheberrecht auf dem Weg zur Informationsgesellschaft*, Baden-Baden, Nomos, 1997, notamment T. Dreier, p. 166-167.

³⁸ Pour une brève présentation du projet de loi, v. F. Kretschmer, *Gesetzentwurf zur Regelung des Urheberrechts in der Informationsgesellschaft*, GRUR 2002, p. 501 ; le texte est notamment disponible sur le site Internet de l'Institut pour le droit d'auteur et le droit des médias (*Institut für Urheber- und Medienrecht*) : www.urheberrecht.org/topic/Info-RiLi/, qui propose, outre le texte du projet de loi, de nombreux documents concernant la transposition de la directive en droit allemand.

³⁹ V. les critiques de W. von Bernuth, *Die öffentliche Zugänglichmachung geschützter Werke für Unterrichtszwecke* (§ 52 a UrGE), in KUR 2002, p. 123.

⁴⁰ Dans sa dernière version présentée dans la réponse du gouvernement aux critiques du projet de loi formulées le 27 septembre 2002 par le Bundesrat, reproduit in KUR 2002, p. 131 et s..

Art. 52 a

(1) Il est permis de communiquer au public de petites parties d'un ouvrage, des œuvres de petite ampleur ou de certains articles isolés de journaux ou de revues

1. à des fins d'illustration de l'enseignement dans les établissements scolaires et les universités uniquement pour le cercle délimité des participants au cours ; ou

2. uniquement pour un cercle délimité de personnes pour leur recherche scientifique

dans la mesure où la communication au public est nécessaire à ces fins et justifiée par des objectifs non commerciaux.

(2) Il est également permis dans les cas de l'alinéa 1 d'effectuer les reproductions en rapport avec la communication au public dans la mesure nécessaire à ces fins.

(3) La communication au public dans les cas visées aux alinéas 1 et 2 ainsi que les reproductions réalisées en rapport avec celle-ci donnent droit au versement d'une rémunération équitable au profit de l'auteur. Ces droits ne peuvent être exercés uniquement par l'entremise d'une société de gestion collective.

La mise en place d'une telle exception pourrait donc permettre de consulter sur l'écran des œuvres numérisées à des fins d'enseignement ⁴¹. Il faut cependant rester très prudent car le texte de cette exception n'a cessé d'être modifié. Dans la dernière version, les universités ont fait pour la première fois leur apparition, alors que le projet de loi ne les mentionnaient pas ⁴². La rémunération équitable a également été étendue par rapport au projet de loi. Vu l'opposition rencontrée, le gouvernement pourrait donc décider de renoncer à cette exception.

⁴¹ Pour ce qui est des reproductions éphémères, dans la mémoire vive de l'ordinateur (RAM) notamment, la doctrine considère qu'il s'agit d'une reproduction soumise au droit de reproduction (H. Schack, *Urheber- und Urhebervertragsrecht*, 2^e éd., op. cit., p. 179 et s.). Mais l'utilisateur bénéficie la plupart du temps d'une exception pour usage privé ou autres fins personnelles (art. 53 et s.), de sorte que ces reproductions seront permises. Le projet de loi, en transposition de la directive, clarifie la question en précisant expressément les reproductions éphémères sont couvert par le droit de reproduction (art. 16 al. 1 UrhG), mais prévoit une nouvelle exception à cette fin (art. 44 a).

⁴² Il est fort probable qu'une telle extension aux universités aura du mal à se maintenir, puisque le reste des exceptions n'est applicable qu'aux établissements scolaires. Une telle extension est néanmoins souhaitée par le gouvernement afin de répondre à besoin pratique et surtout de garantir « la compétitivité des universités allemandes » (réponse du gouvernement aux critiques du projet de loi formulées le 27 septembre 2002 par le Bundesrat, op. cit., p. 132).

2. La reproduction d'œuvres audiovisuelles à des fins pédagogiques (art. 47 UrhG)

A- Le texte de l'exception

La traduction de la disposition en question se présente de manière suivante :

Art. 47

- (1) Les établissements scolaires ainsi que les établissements de formation du corps enseignant peuvent réaliser quelques reproductions isolées d'œuvres diffusées lors d'une émission à vocation scolaire, en les enregistrant sur des supports visuels ou sonores. Les institutions spécialisées d'aide à la jeunesse ainsi que les organismes publics spécialisés dans la fourniture de matériel pédagogique aux écoles peuvent faire de même.**
- (2) Les reproductions ne peuvent être utilisées que dans le cadre de l'enseignement. Elles doivent être effacées au plus tard à la fin de l'année scolaire qui suit la diffusion du programme, sauf versement d'une rémunération équitable à l'auteur.**

B- Les droits exclusifs couverts par l'exception

Il s'agit d'une exception au droit de reproduction. Comme le texte ne le précise pas, il semble que la reproduction sur support numérique soit donc possible. La diffusion, c'est à dire la communication au public de l'œuvre est ensuite possible, car elle est couverte par l'art. 15, al. 2 UrhG, permettant les représentations à titre privé. En effet, le droit de communication au public ne comprend que le droit d'interdire les représentations publiques. Selon l'art. 15, al. 3 UrhG, une représentation est publique lorsqu'elle a lieu pour plusieurs personnes, sauf si le cercle de personnes est clairement délimité et que ces personnes sont liées entre elles soit par des relations mutuelles, soit par une relation personnelle à celle qui organise la communication. C'est donc la nature du lien entre les personnes qui est déterminant ⁴³. Il est unanimement admis par la doctrine que, dans une classe, ce lien existe entre l'enseignant et ses élèves, ou du moins entre les élèves entre eux ⁴⁴. Les travaux parlementaires de la loi de 1985 ⁴⁵ vont d'ailleurs également dans ce sens, précisant que la

⁴³ Il n'est cependant pas nécessaire que les personnes composant le public soit réunis au même endroit (H. Schack, *Urheber- und Urhebervertragsrecht*, 2^{ème} éd., op. cit., p. 196). C'est pour cela qu'une œuvre accessible sur un serveur Internet constitue une communication au public, ce que clarifie le nouvel article 19 a prévue en transposition de la directive du 22 mai 2001.

⁴⁴ En ce sens M. Rehbindner, *Urheberrecht*, 12^e éd., op. cit., n° 201.

représentation d'œuvres protégées par le droit d'auteur pendant les cours ne constitue pas une représentation publique. Cette exception devrait donc permettre à l'enseignant de diffuser sur son ordinateur l'œuvre enregistrée à la classe. On imagine qu'il pourrait être possible, en théorie, d'enregistrer une émission à vocation scolaire sur un serveur et que les élèves puisse ensuite la visionner. Mais il faudrait que le serveur ne soit alors accessible qu'aux élèves de la classe. La mise à disposition sur une page Internet, accessible on-line à tous le monde, dépasserait le cadre la communication privée ⁴⁶.

C- Bénéficiaires de l'exception

a) Institutions visées

- Il s'agit surtout des établissements scolaires ⁴⁷. En principe, la reproduction ne peut être effectuée qu'au sein de l'établissement scolaire, ce qui exclut en principe une reproduction effectuée par l'enseignant à son domicile (ce qui est en pratique néanmoins le cas fréquemment). Ces reproductions ne sont pas non plus couvertes par l'exception pour copie privée (art. 53 al. 1 UrhG), car la reproduction dans ce cas doit être faite en vue d'une utilisation à des fins privées, ce qui n'est pas le cas lors de l'enregistrement par l'enseignant à domicile d'un programme scolaire à des fins d'enseignement.

- Il s'agit également des établissements de formation du corps enseignant, les enseignants pendant leur formation devant être familiarisés avec ces émissions et initiés à leur utilisation pédagogique. Bénéficient de l'exception également les institutions spécialisées d'aide à la jeunesse, ainsi que les organismes publics spécialisés dans la fourniture de matériel pédagogique aux écoles. Ces organismes existent dans chaque *Land* et produisent également eux-mêmes des émissions à vocation scolaire.

b) Personnes visées

Il s'agit des enseignants. Les élèves ne bénéficient donc pas de cette exception.

D- Objectifs de l'exception

⁴⁵ Reproduits in *UFITA* 1986, 102, p. 169 et s..

⁴⁶ La jurisprudence est de toute manière très réticente à l'extension des exceptions dans l'environnement numérique. À titre d'exemple, v. la décision « archives de presse électroniques », BGH *ZUM* 1999, p. 240

⁴⁷ Pour la définition, v. *supra*.

Il s'agit uniquement de reproductions à des fins d'enseignement. Ne peuvent être effectuées que quelques reproductions, limité à un petit nombre d'exemplaires nécessaires (p. ex. pour une diffusion dans une classe, uniquement un seul exemplaire sera nécessaire). Cela vaut également pour les organismes publics en principe. Cependant, en pratique, ceux-ci effectuent des reproductions en grande quantité afin de les redistribuer ensuite aux écoles.

E- Œuvres visées

Il s'agit des œuvres diffusées lors d'une émission à vocation scolaire. Ces émissions peuvent donc être enregistrées afin d'être ensuite diffusées pendant les cours. La loi ne définit pas ce qu'est une œuvre audiovisuelle à vocation scolaire. Les radio-diffuseurs allemands en pratique précisent dans leur grille de programme, ainsi que par le biais d'annonces qu'il s'agit d'une émission à vocation scolaire. Il s'agit exclusivement des programmes destinés à cet effet. La reproduction des autres émissions générales radiodiffusées (films, téléfilms, séries, émissions d'information et émissions culturelles, reportages, journaux télévisés...) est exclue de l'application de l'exception. Ces programmes, bien que pouvant faire l'objet d'une utilisation pédagogique (et d'ailleurs souvent utilisés par les enseignants en pratique) ⁴⁸, ont été exclus volontairement de l'exception par le législateur, celui-ci faisant référence dans l'exposé des motifs aux décisions de la Cour Constitutionnelle Fédérale du 7 juill. 1971 ⁴⁹ et au risque d'inconstitutionnalité d'une telle extension ⁵⁰, créant un préjudice important aux titulaires des droits.

F- Rémunération

Selon l'art. 47 al. 2 UrhG, les œuvres audiovisuelles reproduites doivent être effacées au plus tard à la fin de l'année scolaire suivant l'année de diffusion du programme, sauf paiement d'une rémunération équitable à

⁴⁸ L'enseignant peut cependant diffuser pendant les cours une œuvre audiovisuelle que lui ou son école a acquise dans le commerce (comme nous l'avons déjà souligné, cette diffusion est pas considérée comme une communication privée et non publique au sens de l'art. 15 al. 3). Il ne peut pas cependant faire de reproduction afin de les diffuser pendant les cours.

⁴⁹ V. les quatre décisions de la Cour constitutionnelle allemande (*Bundesverfassungsgericht*) du 7 juillet 1971, « livres scolaires », *GRUR* 1972, p. 481 ; « bibliothèques publiques », *GRUR* 1972, p. 485 ; « reproduction sur bandes magnétiques », *GRUR* 1972, p. 488 ; « émissions scolaires », *GRUR* 1972, p. 487

⁵⁰ Qui serait alors considéré comme une atteinte au droit de propriété garanti par la loi fondamentale allemande (*Grundgesetz*), art. 14. Le législateur est donc extrêmement prudent quant à l'extension des exceptions, puisqu'il fait l'objet d'un contrôle étroit par le juge constitutionnel.

l'auteur. L'établissement scolaire a donc la possibilité de conserver les reproductions en s'acquittant d'une redevance. Le montant de la redevance n'est pas fixé par la loi.

En pratique, les établissements doivent donc contacter les ayants droits concernés pour négocier le montant de la redevance. Vu le nombre élevé d'ayants droits concernés par de tels programmes audiovisuels scolaires (auteurs du programme, en cas d'utilisation d'œuvres musicales les auteurs ou leurs éditeurs, les titulaires de droits voisins), une telle tâche se révèle extrêmement compliquée, et d'ailleurs force est de constater que depuis l'entrée en vigueur de la loi de 1965 pratiquement aucune redevance n'a été versée. Un accord uniquement avec les radio-diffuseurs n'est en général pas possible, car ceux-ci ne détiennent la plupart du temps que les droits de diffusion des œuvres, non le droit de reproduction. Le fait qu'aucune redevance n'ait été versé ne signifie cependant pas que les programmes ont été effacés, et on estime au contraire que ceux-ci sont en général conservés. L'inefficacité du système de rémunération équitable pour cette exception permet d'estimer que toute extension de celle-ci dans sa forme actuelle à l'environnement numérique rencontrerait une vive opposition. Le projet de loi du 31 juillet 2002 n'envisage cependant aucune modification de cette disposition.

3. La représentation publique d'œuvres dans le cadre scolaire (§ 52 UrhG)

A- Le texte de l'exception

Art. 52

(1) La communication publique d'une œuvre parue est permise, lorsque l'organisateur ne poursuit pas des fins lucratives, que les spectateurs y accèdent gratuitement et que, dans le cas où elle est effectuée par des artistes- interprètes, ceux-ci ne perçoivent aucune rémunération. La représentation donne néanmoins droit au paiement d'une rémunération équitable. Sont exemptées du paiement de la rémunération les représentations faites dans le cadre des manifestations des services de l'aide à la jeunesse, l'aide sociale, l'assistance aux personnes âgées, l'encadrement des détenus, ainsi que celles faites dans le cadre d'une manifestation scolaire, lorsque celle-ci a un but social ou pédagogique et qu'elle n'est accessible qu'à un cercle clairement délimité de personnes.

Ceci n'est cependant pas le cas lorsque la représentation profite à l'activité commerciale d'un tiers ; dans ce cas il revient au tiers de verser la rémunération.

...

(3) Les représentations théâtrales et les représentations radiodiffusées d'une œuvre, ainsi que la représentation publique d'une œuvre audiovisuelle ne sont permises qu'avec l'accord du titulaire des droits.

B- Les droits exclusifs couverts par l'exception

Il s'agit du droit de représentation ou droit de communication au public. Il est cependant probable que l'exception ne joue pas dans l'environnement numérique. En effet, l'art. 52 al. 3 UrhG exclut explicitement du champ de l'exception les représentations d'œuvres radiodiffusées. La mise à disposition d'œuvre on-line, même sur des pages privées, s'apparente à une telle radiodiffusion. À des fins de clarification, l'étude conduite par l'institut Max Planck concernant les adaptations nécessaires du droit d'auteur allemand à l'environnement numérique préconise néanmoins que soient exclues explicitement de l'application de l'exception les représentations d'œuvres on-line, c'est à dire qu'il soit procédé à une modification de l'art. 52 al. 3 UrhG en rajoutant à la liste des autres œuvres exclues les représentations on-line ⁵¹. Dans cet esprit, le projet de loi du 31 juillet 2002 prévoit de rajouter à la liste « les œuvres communiquées publiquement ». Il est donc probable qu'elle ne joue aucun rôle pour les systèmes d'éducation à distance. Afin d'être complet, cette exception sera néanmoins présentée, mais de manière plus brève que les autres.

C- Bénéficiaires de l'exception

Il s'agit uniquement des établissements scolaires.

D- Objectifs de l'exception

Il s'agit de privilégier la représentation faite dans le cadre d'une manifestation scolaire, lorsque celle-ci a un but social ou pédagogique et qu'elle n'est accessible qu'à un cercle clairement délimité de personnes. Elle doit en premier avoir un but pédagogique. Il n'est pas évident de savoir ce qu'a voulu le législateur, et les interprétations divergent. Selon les ministères de la Culture des *Länder*, le législateur a uniquement procédé à une clarification. En effet, la nécessité d'un but pédagogique serait à comprendre au sens large du terme, toute manifestation scolaire réaliserait de près ou de loin une finalité pédagogique. La doctrine majoritaire au contraire défend une interprétation restrictive en s'appuyant sur l'exposé des motifs de la loi selon lesquels de telles représentations répondent à un but pédagogique lorsqu'elles sont effectuées dans le cadre de la mission

⁵¹ T. Dreier in G. Schricker (éd.), *Urheberrecht auf dem Weg zur Informationsgesellschaft*, op. cit., p. 162.

éducative de l'établissement. De cette manière, en principe, les fêtes scolaires ou les manifestations caritatives dans les écoles ne bénéficieraient pas de l'exception, car elles ne poursuivent pas en premier lieu un but pédagogique. Cependant, ceci doit être déterminé au cas par cas.

E- Représentations visées et rémunération

L'art. 52 UrhG différencie deux catégories de représentations publiques bénéficiant de l'exception : les représentations permises ouvrant droit à une rémunération équitable (art. 52 al. 1 1^{ère}, 2^{ème} et 4^{ème} phrase) et les représentations permises n'ouvrant pas droit à une rémunération équitable).

a) La condition générale : une représentation publique

Il doit s'agir d'une représentation publique au sens de l'art. 15 al. 3 UrhG. Comme nous avons déjà vu *supra*, les représentations privées ne sont pas couvertes par le droit de représentation, qui est défini comme le droit de l'auteur d'interdire les représentations publiques d'une œuvre. Les représentations privées sont donc hors du champs du droit d'auteur ⁵². Nous avons déjà vu *supra* qu'une représentation d'une œuvre dans une classe n'est donc pas considérée comme une représentation publique. L'enseignant pourra donc sans difficulté passer un film sur vidéo, passer un disque ou faire jouer un extrait d'une pièce à ses élèves. L'accès à des œuvres communiquées au public par le biais du réseau Internet pendant les cours est donc également possible. Par contre, une représentation faite devant toute l'école, par exemple lors d'une fête de fin d'année, sera considérée comme une représentation publique car il est impossible d'admettre l'existence d'une relation mutuelle entre tous les élèves de l'école ⁵³.

b) Les représentations visées par l'exception

Il s'agit des représentations ouvrant droit à rémunération, ainsi que des représentations exemptées d'un tel paiement parce que remplissant certaines conditions supplémentaires.

- Les représentations ouvrant droit à rémunération (art. 52 al. 1 1^{ère} phrase UrhG)

⁵² Selon l'art. 15 al. 3 UrhG une représentation est publique lorsqu'elle a lieu pour plusieurs personnes, sauf si le cercle de personnes est clairement délimité et que ces personnes sont liées entre elles soit par des relations mutuelles, soit par une relation personnelle à la personne qui organise la représentation. C'est donc la nature du lien entre les personnes qui est déterminant.

⁵³ Cette stricte nécessité d'une relation mutuelle exclue de pouvoir étendre l'exception à la mise à disposition d'œuvre sur un serveur accessible à un grand nombre d'élèves. Il est évident qu'il ne s'agirait alors plus d'une communication privé, mais d'une communication publique.

Trois conditions doivent être réunies afin de bénéficier de l'exception. Tout d'abord, la représentation ne doit pas être faite dans un but commercial. En général, les manifestations scolaires n'ont pas un tel objectif ⁵⁴. Deuxième condition, les spectateurs doivent pouvoir accéder gratuitement à la représentation. Cela ne sera pas le cas lorsque les spectateurs devront payer un droit d'entrée, même s'il ne s'agit que d'une participation aux frais. La même chose vaudra si les spectateurs sont incités à faire des dons lors de la représentation. Enfin, dans le cas où la représentation est faite par des artistes- interprètes, ceux-ci ne doivent percevoir aucune rémunération ⁵⁵. En pratique, cela signifie qu'en général, la prestation sera effectuée soit par les élèves ou les enseignants, à la limite des parents d'élèves. Dans le cas où une des conditions n'est pas remplie, la représentation est soumise à l'autorisation de l'auteur.

- Les représentations exemptées (art. 52 al. 1 3^{ème} phrase UrhG)

La représentation faite dans le cadre d'une manifestation scolaire sera exemptée du paiement d'une rémunération équitable, lorsqu'en plus des conditions déjà évoquées, elle a un but social ou pédagogique et qu'elle n'est accessible qu'à un cercle clairement délimité de personnes. Il s'agit de la condition de l'art. 15 al. 3 UrhG. Déterminant est donc à nouveau le lien entre les personnes présentes. Selon la doctrine, un tel lien peut être admis lorsque la représentation est destinée aux élèves, parents et proches des élèves et enseignants. Ce ne sera pas le cas si la représentation est ouverte à tout public, lorsque la manifestation est annoncée par voie d'affichage ou par voie de presse ⁵⁶.

4. La reproduction d'œuvres et d'extraits d'œuvres dans les ouvrages scolaires (art. 46 UrhG)

A- Le texte de l'exception

La traduction de la disposition en question se présente de manière suivante :

⁵⁴ La doctrine considère néanmoins que doit être assimilé à un but commercial le cas où l'école entend dégager des profits lors de la manifestation, p.ex. afin de financer un voyage de classe. Dans le cas où un tiers organise la manifestation dans un but commercial (p.ex. un restaurateur met à disposition ses locaux pour une manifestation scolaire dans l'objectif de vendre des boissons), la manifestation pourra néanmoins bénéficier de l'exception. La rémunération devra alors être payée par le tiers (art. 52 al. 1 4^{ème} phrase UrhG).

⁵⁵ L'artiste- interprète doit donc effectuer sa prestation gratuitement. Un simple défraiement ne sera tout de même pas considéré comme une rémunération

⁵⁶ F. Melichar in G. Schricker (éd.), *Urheberrecht Kommentar*, op. cit., p. 828 et s..

Art. 46

- (1) Il est permis de reproduire et de mettre en circulation des extraits d'œuvres, des œuvres écrites ou des œuvres musicales de peu d'ampleur, des œuvres d'art et des œuvres photographiques isolées lorsque celles-ci ont été incorporées, après leur parution, dans un recueil réunissant les œuvres d'un grand nombre d'auteurs et destiné de par sa nature exclusivement aux églises ou aux établissements d'enseignement. La destination du recueil doit être clairement indiquée sur la page du titre ou à un autre endroit approprié.**
- (2) L'alinéa 1) n'est applicable aux œuvres musicales reproduites dans un recueil destiné à l'enseignement de la musique que si ce recueil est destiné à l'enseignement de la musique dans des écoles autres que les écoles de musique.**
- (3) Ne peut être procédé à la reproduction que si l'auteur ou, lorsque son domicile ou sa résidence est inconnu, le titulaire du droit exclusif a été avisé par lettre recommandée de l'intention de faire usage de la possibilité offerte à l'alinéa 1) et que deux semaines se sont écoulées depuis l'expédition de la lettre. Dans le cas où le domicile ou la résidence du titulaire du droit exclusif est également inconnu, l'avis peut être communiqué par voie de publication au Bulletin officiel.**
- (4) La reproduction et la mise en circulation donnent droit au versement d'une rémunération équitable au profit de l'auteur.**
- (5) L'auteur peut interdire la reproduction et la mise en circulation lorsque son œuvre ne répond plus à sa conviction, de sorte que l'on ne puisse pas raisonnablement attendre qu'il consente à son exploitation et qu'il a, pour cette raison, déjà fait usage de son droit de retrait (art. 42). Les dispositions de l'art. 136 I et II sont applicables mutatis mutandis.**

B- Les droits exclusifs couverts par l'exception

Cette exception a traditionnellement eu pour but de permettre l'illustration des livres scolaires avec des œuvres protégées. Il s'agit donc principalement du droit de reproduction et du droit de mise en circulation ⁵⁷. La reproduction par voie numérique est également permise puisque le texte ne le précise pas ⁵⁸. Cependant, il est

⁵⁷ Selon l'art. 17 al. 1 UrhG, « le droit de mise en circulation est le droit d'offrir au public ou de mettre dans le commerce l'original ou des exemplaires de l'œuvre ».

⁵⁸ D'ailleurs, comme nous allons le voir *infra*, il est admis que l'ouvrage scolaire peut prendre la forme d'un CD ROM.

fortement probable que le texte de l'art. 46 soit modifié et étendu au droit de communication au public lors de la transposition de la directive du 22 mai en droit allemand. En effet, le projet de loi du 31 juillet 2002 prévoit l'ajout, au coté du droit de reproduction et du droit de mise en circulation, du droit de communication au public⁵⁹. De la sorte, les recueils pourraient être accessibles également on-line.

C- Bénéficiaires de l'exception

Il s'agit la plupart des éditeurs d'ouvrages scolaires⁶⁰, mais cela pourrait être également un enseignant ou une administration scolaire⁶¹. Un certain nombre de critères imposés au recueil par la loi et la doctrine confinent cependant l'exception dans un cadre assez limité. En effet, le recueil doit tout d'abord clairement faire apparaître qu'il est *exclusivement destiné à l'usage scolaire*. Son organisation, c'est à dire le choix des œuvres et leur disposition, ainsi que les explications accompagnant celles-ci doivent être faites dans un but pédagogique.

De plus, l'aspect extérieur doit faire apparaître la destination scolaire de l'ouvrage : l'art. 46 al. 1 2^{ème} phrase impose que la destination du recueil soit clairement indiquée sur la page de titre ou à un autre endroit approprié⁶². Cette destination peut résulter de la présentation graphique du recueil, de son titre ou de même de son format, c'est à dire que l'aspect extérieur doit laisser reconnaître immédiatement à l'acheteur du livre dans une librairie qu'il s'agit d'un recueil à vocation scolaire⁶³. Tous ces critères évitent que l'exception ne puisse bénéficier à d'autres ouvrages que les recueils strictement à usage scolaire, ce qui est important dans la mesure où la définition du recueil est large et comprend les supports digitaux et les œuvres multimédias tels les CD-Rom.

⁵⁹ Ceci correspond à l'avis émis par l'étude conduite par l'institut Max Planck concernant les adaptations nécessaires du droit d'auteur allemand à l'environnement numérique, qui préconisait l'extension de l'exception à la diffusion des recueils on-line (T. Dreier in G. Schricker (éd.), *Urheberrecht auf dem Weg zur Informationsgesellschaft*, op. cit., p. 156). Un risque d'abus est peu probable vu les conditions strictes d'utilisation scolaire posées par la disposition. De plus, l'étude suggère d'étendre la liste des œuvres pouvant être reproduites dans le recueil aux œuvres multimédias de peu d'ampleur. Cette dernière proposition n'a cependant semble t'il pas été retenue.

⁶⁰ Sont donc exclues les ouvrages à destination des étudiants.

⁶¹ Ce qui néanmoins peu probable vu les coûts importants liés au versement d'une rémunération équitable (v. *infra*).

⁶² La jurisprudence se montre assez sévère, estimant que ne remplit pas cette condition l'indication sur le dos de la page du titre ou bien l'indication dans la préface de l'ouvrage (v. notamment la décision « recueil de chansons » du BGH, *GRUR* 1991, p. 906)

⁶³ S'il s'agit d'un format numérique, la destination scolaire doit être indiquée lors de la consultation à l'écran.

D- Objectifs de l'exception

Le recueil doit être exclusivement destiné à l'enseignement scolaire. Il doit être destiné à l'usage dans les classes, ce qui exclut du bénéfice de l'exception les recueils destinés aux enseignants. Les établissements visés sont les mêmes que pour les autres exceptions déjà étudiées ci-dessus, à l'exclusion des universités et des établissements d'enseignement pour adultes.

Sont exclus explicitement de l'exception par l'alinéa 2 de l'art. 46 les recueils regroupant des œuvres musicales destinés à l'enseignement au sein des écoles de musique. La raison est le domaine d'exploitation déjà très restreint pour les partitions musicales, dont l'inclusion risquerait de causer un grand préjudice aux auteurs.

E- Œuvres visées- domaine de l'exception

a) Conditions de fond

- Conditions à remplir par le recueil

Il n'est pas nécessaire que les reproductions servent à illustrer et à démontrer un contenu propre ⁶⁴. En effet, le recueil peut être une compilation de matériel préexistant, l'originalité se manifestant alors par l'agencement et la disposition de ce matériel. Le recueil ne doit pas nécessairement se présenter sous la forme d'un livre, mais il peut également s'agir d'un phonogramme, d'une cassette audio ou vidéo, ainsi que d'un CD-Rom. Le recueil doit cependant réunir les œuvres d'un grand nombre d'auteurs. Le nombre d'auteurs requis dépend des circonstances de l'espèce ⁶⁵.

- Conditions à remplir par l'œuvre reproduite

Il doit s'agir d'une œuvre déjà parue. En principe, seuls des fragments de l'œuvre peuvent être reproduits, ce qui exclut la reproduction intégrale de l'œuvre. Une exception est faite pour les œuvres écrites et les œuvres musicales de peu d'ampleur, qui peuvent être reproduites intégralement. La reproduction intégrale de courts poèmes, de courts textes, éventuellement même d'une courte nouvelle ou d'une courte chanson est donc

⁶⁴ À la différence des citations par exemple. Là dessus v. *infra*.

⁶⁵ Les opinions divergent en doctrine sur le nombre minimum d'auteurs nécessaires, certains évoquant le nombre de 7, d'autres le nombre de 10, en référence au nombre inclus dans les accords entre sociétés de gestion et les établissements scolaires (sur ces accords voir ci-après).

permise. De même, des œuvres d'art et des photographies isolées peuvent être reproduites afin d'éclairer le contenu.

b) Conditions de forme

Celui qui entend effectuer une reproduction dans le cadre de l'art. 46 UrhG, en général un éditeur de livres scolaires, a l'obligation d'informer l'auteur de son intention par lettre recommandée. Il doit ensuite attendre deux semaines après l'envoi de la lettre avant de procéder à la reproduction. Cette disposition entend permettre à l'auteur d'exercer son droit d'interdire l'utilisation de son œuvre lorsque celle-ci ne correspond plus à sa conviction et de faire savoir qu'il a exercé son droit de retrait (art. 42 UrhG). Cela permet également à l'auteur de vérifier si les conditions étroites de l'art. 46 al. 1 et 2 UrhG sont effectivement réunies. Dans le cas d'un non-respect des conditions de forme, la reproduction, même si elle respecte les conditions de fond, constitue une contrefaçon.

Selon l'art. 46 al. 3, la lettre est à adresser à l'auteur de l'œuvre. Dans le cas où son adresse est inconnue, elle est à adresser au titulaire des droits, en général donc à l'éditeur de l'œuvre. Dans le cas où l'adresse de celui-ci est également inconnue, une publication au bulletin officiel est nécessaire. En pratique, les éditeurs d'ouvrages scolaires utilisent un formulaire élaboré dans le cadre de l'accord collectif passé le 31 mars 1977 avec la société de gestion collective VG Wort. Ils adressent le formulaire, contenant toutes les informations nécessaires à celle-ci, qui le transmet ensuite aux auteurs concernés.

F- Rémunération

Selon l'art. 46 al. 4 UrhG, la reproduction au sein du recueil à vocation scolaire d'une œuvre ou d'un extrait d'œuvre donne droit au versement d'une rémunération équitable au profit de l'auteur. Le législateur n'a pas précisé ce qu'il entendait par rémunération équitable. Il n'a pas fixé de tarifs en annexe comme pour la reproduction par reprographie. La doctrine considère comme équitable la rémunération qui aurait été payée si la reproduction avait été soumise au droit exclusif, dans le cadre d'une autorisation pour reproduction octroyée par l'auteur pour un ouvrage similaire. En pratique, les sociétés de gestion concernées ont fixé le montant des tarifs à payer dans des accords avec les groupements d'éditeurs. En effet, si la perception de la rémunération n'est pas soumise à la gestion collective obligatoire, en pratique, les titulaires de droit cèdent aux sociétés de gestion collective le droit à rémunération. De même, ils transmettent le droit de recevoir la lettre d'information de la reproduction. Cette lettre est donc dans la plupart des cas envoyée aux sociétés de gestion.

II. Les citations

L'art. 51 de la loi allemande sur le droit d'auteur autorise les citations. Pour les utilisations dans le cadre de l'enseignement, c'est la citation d'œuvres à des fins scientifiques (art. 51 chiffre 1) qui s'applique et qu'il convient d'étudier. La citation à des autres fins (art. 51 chiffre 2) sera également évoquée dans le cadre de l'étude du chiffre 1.

1. La citation d'œuvres à des fins scientifiques (art. 51 chiffre 1 UrhG)

A- Le texte de l'exception

Art. 51

La reproduction, la mise en circulation et la communication publique est permise lorsque, dans la mesure justifiée par le but à atteindre,

1. quelques œuvres isolées sont incorporées, après leur parution, dans une œuvre scientifique indépendante pour en éclairer le contenu ;

B- Les droits exclusifs couverts par l'exception

Tous les droits exclusifs sont visés : le droit de reproduction, de mise en circulation et le droit de communication au public. Les œuvres citées pourront donc être numérisées et communiquées sur le réseau Internet.

C- Bénéficiaires de l'exception

Il n'existe aucune restriction quant aux bénéficiaires de l'exception. Les citations peuvent donc être utilisées à des fins d'enseignement à distance, sous condition de respecter les critères requis.

D- Objectifs de l'exception, Œuvres visées : domaine de l'exception

Vu sa justification particulièrement forte, venant concrétiser au sein du droit d'auteur la liberté d'expression et le droit du public à l'information consacré par l'article 5 de la Loi fondamentale, son domaine est particulièrement

étendu ⁶⁶. La Cour suprême fédérale a d'ailleurs estimé dans une décision de 1972 que le droit de citation était « le fondement de la liberté d'échanger des opinions et des idées » ⁶⁷, précisant par la suite qu'il avait pour objectif « d'encourager le développement de la vie culturelle et scientifique dans l'intérêt de la collectivité » ⁶⁸.

a.) L'œuvre citante

- Il doit tout d'abord s'agir d'une œuvre scientifique. Ce qu'est une œuvre scientifique n'est pas défini par la loi. La jurisprudence a interprété la notion de manière large, prenant en compte l'objectif de la disposition qui est de favoriser le développement culturel en général ⁶⁹. Elle a donc considéré que les œuvres de banalisation scientifique, telle qu'une émission télévisée ⁷⁰ ou une revue populaire ⁷¹, pouvaient bénéficier de l'exception à partir du moment où elles traitent d'un thème scientifique au sens large du terme. En effet, ces émissions permettent de véhiculer des informations sur l'état de la science à une large partie de la population, même si la démarche se caractérise par une simplification et une généralisation qui ne correspond pas toujours à une démarche du scientifique à proprement dit. Cependant, il ne faut pas que l'œuvre en question serve en premier lieu de divertissement. De telle manière, un jeu télévisé, même si son organisation traite de sujets scientifiques, notamment dans les questions aux participants, ne pourra en aucun cas être considérée comme une œuvre scientifique.

⁶⁶ Le droit de citation a d'ailleurs été souvent analysé à la lumière de l'article 5 de la Loi fondamentale (GG), et la jurisprudence a fréquemment étendu le bénéfice de l'exception à des cas non expressément prévus par le texte de la loi (v. notamment LG Berlin, *GRUR* 1978, p. 108 ; LG Berlin, *NJW* 1995, p. 881). Même si certains auteurs ont fait valoir que le législateur allemand avait, lors de l'élaboration du texte de la loi, déjà procédé à cette mise en balance des intérêts en présence (v. en sens notamment J. Bornkamm, *Ungeschriebene Schranken des Urheberrechts* ?, in W. Erdmann, W. Gloy et R. Herber (éd.), *op. cit.*, p. 648), la doctrine majoritaire considère néanmoins que certains correctifs peuvent être apportés en procédant par analogie (en ce sens notamment E. Ulmer, *Urheber- und Verlagsrecht*, 3^e éd., Berlin, Heidelberg, New York, Springer Verlag, 1980, p. 315 ; G. Wild in G. Schricker (éd.), *Urheberrecht Kommentar*, *op. cit.*, p. 1502 ; M. Löffler, *Presserecht, Kommentar*, 4^e éd., Munich, C. H. Beck, 1997, p. 357 ; E. Pahud, *Die Begrenzung des Urheberrechts im Interesse Dritter*, *UFITA* 2000, I, p., p. 134). La possibilité d'un raisonnement par analogie étant dans le cas des autres exceptions clairement rejetée, ceci constitue une particularité de taille, résultat de la justification particulièrement forte de l'exception.

⁶⁷ Décision de la Cour suprême fédérale (*Bundesgerichtshof*, en abrégé : BGH), 22 sept. 1972, « manuel de citations modernes », *GRUR* 1973, p. 217.

⁶⁸ Décision « citation de film » du BGH, 4 déc. 1987, *GRUR* 1987, p. 363.

⁶⁹ Un cours scolaire ou universitaire illustré par des citations répondrait donc sans aucun doute à la qualification d'œuvre scientifique.

⁷⁰ LG Berlin, *GRUR* 1962, p. 209.

⁷¹ LG Munich I, *AfP* 1994, p. 326.

Selon la doctrine, l'œuvre scientifique doit s'adresser en premier lieu à l'intellect, et non pas au sentiments et aux émotions. De la sorte sont exclues comme œuvre citante les œuvres plastiques et les œuvres musicales. De même, certaines œuvres qui, bien qu'elles véhiculent des idées et des informations, n'ont pas de prétention scientifique tels que les romans, les pièces de théâtre ou les reportages au caractère descriptif ne peuvent pas servir d'œuvre citante. Enfin, les œuvres contenant en premier lieu une opinion, telle qu'une brochure électorale d'un parti ou une publicité, sont exclues car elles ne véhiculent pas des connaissances objectives.

- Il doit s'agir d'une œuvre scientifique indépendante, c'est à dire que l'œuvre citante doit être une création de forme originale et doit pouvoir résister à la suppression des citations. Une compilation de citations assorties de brefs commentaires ne remplirait pas la condition d'indépendance ⁷². Les citations doivent donc toujours avoir un rôle exclusivement secondaire.

b.) L'œuvre citée

Est permise la reproduction, mise en circulation et représentation de quelques œuvres isolées ⁷³. L'art. 51 chiffre 1 UrhG autorise ce que la doctrine a appelé la « grande citation », dans le sens où des œuvres peuvent être reproduites dans leur intégralité, dans la mesure justifiée par le but à atteindre ⁷⁴. Combien d'œuvres pourront être reproduites concrètement dépendra du cas de l'espèce, notamment de l'ampleur de l'œuvre citante. Si une partie de la doctrine prône une application restrictive à un nombre très restreint d'œuvres ⁷⁵, la doctrine majoritaire adopte un point de vue différencié ⁷⁶: dans le cas où n'est cité qu'un seul auteur, une application restrictive s'impose, à cause du danger que présentent les citations pour l'exploitation de l'œuvre. Par contre, si un nombre important d'auteurs sont cités, le nombre de reproductions permises augmentera également. Un ouvrage sur l'histoire de l'art moderne ou de la poésie moderne doit pouvoir contenir un nombre

⁷² À titre d'exemple, l'auteur d'une base de donnée composée de différentes citations ne pourra pas invoquer le bénéfice de l'exception car il y aura absence d'une œuvre scientifique indépendante. Il n'est donc pas possible de composer une anthologie ou une compilation d'œuvres à destination des élèves ou étudiants en invoquant le bénéfice de l'exception de citation.

⁷³ À la différence de l'art. 51 chiffre 2, l'art. 51 chiffre 1 ne connaît pas de restrictions quant au type d'œuvres visés. Il ne s'agit donc pas uniquement d'œuvres littéraires, mais également des œuvres audiovisuelles ou musicales.

⁷⁴ Pour toutes les œuvres autres que scientifiques, l'art. 51, chiffre 2 UrhG ne permet que la « petite » citation, c'est à dire uniquement la citation d'extraits d'œuvres afin d'illustrer le propos. En effet, selon l'art. 51, chiffre 2, « la reproduction, la mise en circulation et la communication publique est permise lorsque, dans la mesure justifiée par le but à atteindre, des passages d'une œuvre sont repris, après sa publication, dans une œuvre littéraire indépendante ».

⁷⁵ En ce sens P. Möhring et K. Nicolini, *Urheberrechtsgesetz- Kommentar*, 2^e éd., Munich, Verlag Franz Vahlen, 2000, p. 468 et 503.

⁷⁶ v. notamment G. Schricker, in G. Schricker (éd.), *Urheberrecht Kommentar*, op. cit., p. 809.

plus important de citation d'œuvres des auteurs en question. Le préjudice pour les auteurs restera réduit car les reproductions resteront cantonnées à quelques œuvres isolées par auteur.

c.) La fonction de la citation

La citation n'est permise que pour éclairer le contenu. Vu les possibilités extrêmement larges offertes par l'art. 51 chiffre 1, cette condition fait l'objet d'une application relativement sévère. En effet, la citation n'est permise qu'à l'appui d'une démonstration propre de l'auteur. La citation doit apporter un élément à l'argumentation, elle ne doit pas avoir une fonction d'illustration, ni remplir des fins esthétiques⁷⁷. De plus, l'œuvre ne doit pas être utilisée afin de remplacer les développements personnels de l'auteur. La jurisprudence veille à l'application scrupuleuse de cette condition, la Cour suprême fédérale ayant eu l'occasion de souligner que « le droit de citation ne constituait pas un blanc-seing pour le pillage des œuvres d'autrui »⁷⁸.

E- Rémunération

Aucun système de compensation financière est prévu pour les citations à des fins scientifiques.

III. Exceptions à des fins d'utilisations privées

1. La reproduction d'œuvres à des fins de recherche (art. 53 al. 2 chiffre 1 UrhG)

Il s'agit d'une sous-catégorie de l'art. 53 UrhG intitulé « reproductions à des fins d'utilisation privée et autres utilisations personnelles »

A- Le texte de l'exception

Art. 53

(2) Il est permis de réaliser ou de faire réaliser quelques reproductions isolées d'une œuvre

⁷⁷ Il a été p.ex. jugé que dans un ouvrage consacrée au mouvement artistique du « Blaue Reiter », la reproduction de 69 œuvres de Kandinsky était excessive et ne servait pas à éclairer le contenu, d'autant plus qu'uniquement 6 œuvres étaient mentionnées dans le texte et faisait l'objet d'une analyse par l'auteur (v. la décision *Kandinsky I* du BGH, *GRUR* 1968, p. 609 ; v. également la décision *Jawlensky* de l'OLG Munich, *ZUM* 1989, p. 531).

⁷⁸ Décision de la Cour suprême fédérale du 22 sept. 1972, « manuel de citations modernes », *op. cit.*, p. 218.

1. pour son propre usage à des fins scientifiques, dans la mesure où une telle reproduction est nécessaire à ces fins ;

B- Les droits exclusifs couverts par l'exception

Selon le texte de l'exception, il s'agit du droit de reproduction. En l'absence de précision, la reproduction peut être faite par numérisation ou la reproduction digitale sous forme de téléchargement (« download »). Dans le cadre de l'éducation à distance, cette exception pourrait couvrir toutes les copies effectuées par les étudiants à partir d'un serveur Internet dans le cadre du cursus universitaire. Mais l'on peut imaginer que cette disposition puisse avoir un rôle plus large, puisque l'université n'a pas uniquement une fonction éducative, mais également une fonction de recherche. En effet, un certain nombre de centre de recherche sont fréquemment intégrés à l'université. La reproduction pourra être également effectué par le professeur pour ces étudiants dans le cadre de petit groupe de recherche. Dans le cas d'un institut de recherche, la reproduction sur un serveur interne (p.ex. intranet) devrait être possible. Se pose ensuite le problème de la communication au public lors de la consultation de l'intranet par les étudiants. Il serait tout d'abord possible de considérer qu'il ne s'agit pas d'une communication publique, mais uniquement privée. Comme nous l'avons vu, c'est alors la nature du lien entre les personnes qui est déterminant. Il faut que ces personnes soient liées entre elles soit par des relations mutuelles, soit par une relation personnelle à celle qui organise la communication. Dans un groupe d'étudiant travaillant sur un projet de recherche, il serait possible d'admettre une telle hypothèse ⁷⁹. C'est pour clarifier cette situation que l'art. 52 a chiffre 2 du projet de loi allemand du 31 juillet 2002 prévoit qu'« il est permis de communiquer au public de petites parties d'un ouvrage, des œuvres de petite ampleur ou de certains articles isolés de journaux ou de revues uniquement pour un cercle délimité de personnes pour leur recherche scientifique dans la mesure où la communication au public est nécessaire à ces fins et justifiée par des objectifs non commerciaux » ⁸⁰.

Selon l'art. 52 al. 2 UrhG, il est permis de réaliser ou de faire réaliser ⁸¹ « quelques » reproductions. La loi ne précise pas le nombre exact de reproductions permises. La jurisprudence a estimé qu'il ne pouvait s'agir que

⁷⁹ La jurisprudence est cependant assez restrictive, et elle a pu préciser qu'il n'existait pas une telle relation entre les étudiants au sein d'un cours d'université (OLG Koblenz, *NJW-RR* 1987, p. 699). L'hypothèse est donc clairement limitée à un petit groupe d'étudiant au sein d'un institut et à la condition que le serveur ne soit accessible qu'à ces personnes, et non pas librement accessible sur le réseau.

⁸⁰ Sur cette disposition v. également *supra*.

⁸¹ Donc par un tiers, notamment par une bibliothèque (v. *supra*).

d'un nombre restreint d'exemplaires, et a fixé un maximum de sept copies ⁸², ce qui a été critiqué en doctrine, vu le caractère arbitraire de ce chiffre ⁸³.

C- Bénéficiaires de l'exception

À la différence de la reproduction à des fins privées ⁸⁴, les cas énumérés à l'al. 2 permettent des reproductions à des fins professionnelles. Bénéficient de l'exception également les personnes morales. Les cas énumérés à l'alinéa 2, les reproductions « à des autres fins personnelles », concernent donc également les reproductions à usages internes que réalisent les entreprises, les administrations, les universités, les bibliothèques, les professions libérales. Dans le cas des reproductions à des fins scientifiques, un institut de recherche peut donc faire réaliser par son personnel quelques reproductions à des fins d'usages scientifiques internes ⁸⁵.

Il faut néanmoins que l'usage de la reproduction soit un usage « propre », c'est à dire que la reproduction ne soit pas réalisée pour des tiers. Ne sont donc pas couvertes les reproductions réalisées pour des chercheurs externes ainsi que celles prévues pour un autre institut, même si ceux-ci travaillent dans le même domaine. La même chose vaut pour les reproductions qui restent au sein de l'institut, mais dont la consultation est possible par des tiers. Un institut de recherche ne peut donc pas alimenter le fond de sa bibliothèque avec des copies. Il ne peut non plus se constituer une archive à partir des reproductions effectuées ⁸⁶.

D- Objectifs de l'exception

Sont visées par l'exception les utilisations à des fins scientifiques. Cette condition est interprétée de manière très large. En effet, il n'est pas nécessaire que la personne qui effectue la reproduction soit un scientifique. De la sorte, un praticien qui écrit un article dans une revue scientifique bénéficie également de l'exception. De

⁸² BGH, *GRUR* 1978, p. 476.

⁸³ v. notamment H. Schack, *Urheber- und Urhebervertragsrecht*, 2^e éd., op. cit., p. 228.

⁸⁴ V. l'art. 53 al. 1 UrhG.

⁸⁵ Pour ce qui est de la reproduction et mise à disposition sur un serveur, il faut toujours garder à l'esprit que les personnes qui ont accès à la reproduction doivent être liées personnellement, ce qui est interprété de manière très restrictive. Il ne faut pas oublier l'art. 53, al. 6 UrhG, qui précise que « les exemplaires ou copies ne peuvent être mis en circulation ni utilisés à des fins de communication publique ».

⁸⁶ La constitution d'archives n'est permise par l'art. 53 al. 2 chiffre 2 UrhG que lorsque la reproduction est faite à partir d'une œuvre qui appartient à la personne qui effectue la reproduction. De la sorte, un institut de recherche pourra numériser uniquement des œuvres qui lui appartiennent, et uniquement si l'archive constituée n'est pas accessible aux tiers. Sur cette disposition v. également *infra*.

même, il y a utilisation à des fins scientifiques lorsqu'une personne entend s'informer sur l'état de la science : l'avocat lors d'une consultation ou tout simplement une personne privée qui s'intéresse à une question particulière bénéficieront de l'exception. Les élèves et les étudiants qui réalisent des reproductions dans le cadre de leurs études le feront donc « à des fins scientifiques ».

E- Œuvres visées

L'art. 53 al. 2 chiffre 1 UrhG ne contient pas de restrictions quant aux œuvres visées. Peuvent être reproduites les œuvres imprimées, mais également les œuvres audiovisuelles. L'art. 53 al. 5 2^{ème} phrase précise même que peuvent être reproduites des bases de données à des fins scientifiques (exclue par ailleurs de l'exception pour copie privée), à condition que l'usage à des fins scientifiques ne serve pas des objectifs commerciaux ⁸⁷.

Pour ce qui est des œuvres écrites, il est interdit de reproduire l'ouvrage en entier, ni de reproduire un journal ou une revue dans son intégralité (art. 53 al. 4 b). De plus, l'art. 53 al. 4 a UrhG exclu explicitement les partitions musicales. Les partitions restent dans tous les cas soumises au droit exclusif. De plus, la reproduction doit se faire dans la mesure nécessaire à des fins scientifiques. Ce n'est pas le cas lorsque l'acquisition de l'œuvre pourrait être réalisée à peu de frais. Il n'est cependant pas nécessaire que la reproduction soit effectivement utilisée pour la recherche. En effet, les reproductions effectuées par le chercheur ou l'étudiant, même si elles se révèlent à posteriori superflues, sont également couvertes par l'exception.

En principe, la reproduction ne peut être effectuée qu'à partir d'un exemplaire obtenu de manière légale ⁸⁸. Mais l'exemplaire servant à la reproduction peut cependant être une copie illégale ⁸⁹, surtout s'il s'agit d'une œuvre proposée sur le réseau ⁹⁰.

F- Rémunération

⁸⁷ Il faut également mentionner l'art. 87 c, alinéa 1, chiffre 2 UrhG, introduit par la loi du 22 juillet 1997 transposant la directive « bases de données », qui prévoit la possibilité de reproduire des bases de données à des fins scientifiques.

⁸⁸ Un exemplaire volé serait reproduit p.ex.

⁸⁹ En ce sens H. Schack, *Urheber- und Urhebervertragsrecht*, 2^e éd., op. cit., p. 228.

⁹⁰ En effet, l'utilisateur n'a aucun moyen de savoir la provenance de la copie.

Le système de compensation prévu par la loi a été déjà partiellement étudié ci-dessus lors de l'étude de l'exception de reproduction à des fins d'enseignement (art. 53 al. 3 UrhG). Nous avons déjà vu que le législateur avait mis en place un système de compensation financière pour les reproductions par reprographie (art. 54 a UrhG). En effet, l'art. 54 a met en place une double redevance, l'art. 54 a al. 1 UrhG prévoit une compensation générale qui est à verser par tous les fabricants d'appareils destinés à effectuer des reprographies, tandis que l'art. 54 a al. 2 UrhG prévoit une compensation sous forme d'une redevance à verser par l'exploitant d'un tel appareil. Un institut de recherche, une université ou une bibliothèque qui met à disposition des photocopieuses moyennant paiement des copies sera donc considéré comme exploitant et devra payer la redevance ⁹¹.

La reproduction à des fins de recherche ne concernant pas uniquement les œuvres écrites, mais également les autres œuvres, il faut faire état de l'autre système de compensation mis en place par l'art. 54 UrhG. En effet, ce paragraphe met à la charge des fabricants de matériels permettant d'effectuer des reproductions audiovisuelles ou sonores ⁹², ainsi qu'à la charge des fabricants de supports vierges, le paiement d'une rémunération équitable en compensation de la possibilité d'effectuer des reproductions. Ces fabricants répercutent ces frais ensuite sur le prix de vente, de sorte que c'est l'utilisateur qui supporte la charge de la redevance.

Le texte de l'art. 54 est le suivant :

Art. 54

(1) Si, en raison de la nature d'une œuvre, on peut s'attendre à ce qu'elle soit reproduite, conformément aux dispositions de l'article 53 al. 1 ou al. 2, par enregistrement d'une émission radiodiffusée sur un support visuel ou sonore ou par ré-enregistrement d'un support visuel ou sonore sur un autre, l'auteur de l'œuvre a droit au paiement, par le fabricant

- 1. d'appareils ; et**
- 2. de supports visuels ou sonores,**

manifestement destinés à une telle reproduction, d'une rémunération équitable en compensation de la possibilité d'effectuer une telle reproduction qui résulte de la vente de ces appareils et support visuels et sonores.

⁹¹ À propos de la double redevance de l'art. 54 a UrhG, v. également *supra*.

⁹² Pour un graveur de CD v. la décision *préc.* (LG Stuttgart, ZUM 2001, p. 616).

La hauteur de la redevance est fixée par la loi dans une annexe à l'art. 54 d UrhG.

IV- Exceptions au profit des bibliothèques

Il n'existe pas d'exception spécifique au profit des bibliothèques. Comme nous l'avons déjà souligné, elles peuvent néanmoins être amenées à jouer un rôle dans les activités d'enseignement. En effet, les reproductions à des fins d'enseignement et recherche peuvent être effectuées par des tiers, notamment des bibliothèques ⁹³.

Il n'existe qu'une seule exception susceptible de s'appliquer directement aux bibliothèques, c'est l'art. 53 al. 2 chiffre 2 UrhG.

Art. 53

(2) il est permis de réaliser ou de faire réaliser quelques reproductions isolées d'une œuvre

2. pour l'inclusion dans ses propres archives, pour autant que la reproduction soit nécessaire à ces fins et que l'on utilise son propre exemplaire comme modèle de la reproduction .

Une bibliothèque peut donc numériser des œuvres à des fins d'archivage. Il est cependant probable que cette exception n'intéresse pas directement les activités d'enseignement à distance puisqu'elle fait l'objet d'une interprétation très restrictive par la jurisprudence ⁹⁴ et que la doctrine estime que reproductions ne sont couvertes par l'exception que dans la mesure où les archives ne peuvent être consultés par des tiers ⁹⁵. La reproduction ne peut donc servir qu'à des utilisations strictement interne.

Il semble bien que le gouvernement ait été conscient du problème que constitue les archives électroniques et les bibliothèques on-line. Il a considéré néanmoins dans la question méritait encore d'être approfondie et a reporté la solution à une loi ultérieure, en raison de la nécessité d'une transposition rapide de la directive ⁹⁶.

⁹³ Là dessus, v. supra

⁹⁴ V. notamment la décision du BGH « archives de presse électronique » *préc.* .

⁹⁵ U. Loewenheim, in G. Schricker (éd.), *Urheberrecht Kommentar*, op. cit., p. 847.

⁹⁶ En ce sens les explications du gouvernement accompagnant le projet de loi (A. I. « Objectifs »).

V- Rapport entre exceptions et mesures techniques de protection des œuvres

La loi allemande dans sa version actuelle n'évoque pas les mesures techniques comme moyen de protection des œuvres dans l'environnement digital. À la suite de l'étude conduite par l'Institut Max Planck ⁹⁷, un premier projet de loi datant de juillet 1998 avait été élaboré, qui évoquait pour la première fois les mesures techniques comme moyen de protection des œuvres dans l'environnement numérique, mais il a été « mis aux oubliettes », un nouveau texte devant être élaboré afin de transposer la directive sur le droit d'auteur dans la société de l'information du 22 mai 2001.

Le projet de loi de transposition du 31 juillet 2002 vise à introduire en droit d'auteur allemand des règles concernant la protection des mesures techniques (§ 95 a al. 1). Cette disposition prévoit une interdiction de tout contournement des mesures techniques, même lorsque le contournement a pour objectif de permettre une utilisation autorisée par le biais d'une exception. Néanmoins, afin de garantir le fonctionnement des exceptions et d'éviter que celui-ci soit bloqué par les mesures techniques, le § 95 b, alinéa 1 du projet prévoit que « le titulaire du droit est tenu de fournir aux bénéficiaires des exceptions ⁹⁸ les moyens techniques nécessaires à l'utilisation exemptée », toute disposition contraire étant privée d'effet. De plus, il accorde au bénéficiaire de certaines exceptions ⁹⁹ le droit de demander au titulaire du droit de fournir les moyens techniques afin de pouvoir bénéficier de celles-ci (art. 95 b al. 2), droit qu'il peut faire valoir en justice. L'art. 95 b al. 3 précise cependant, conformément à la directive, que les deux premiers alinéas ne sont pas applicables aux œuvres communiquées au public par le biais de services à la demande.

⁹⁷ G. Schricker (éd.), *Urheberrecht auf dem Weg zur Informationsgesellschaft*, préc..

⁹⁸ Ne sont cependant pas concernées toutes les exceptions. En effet, le § 95 b al. 1 dresse une liste des paragraphes visés, dans laquelle toutes les exceptions à des fins d'enseignement et de recherche sont cependant incluses.

⁹⁹ Celles visées par l'al. 1.

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**Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project**

ITALY

by Massimo Pavolini.

On march 28th 2003 the Italian Counsel of Ministers has approved the Decreto Legislativo that shall implement in the Italian system of law the EC Directive 29/2001.

The above mentioned Decreto Legislativo will deeply modify the actual Italian Copyright Law (Legge 633/41) amending a certain number of provisions and introducing a certain number of new provisions that should rule many of the subject matters that are part of the present study. The Digital Distance Education issue is never expressly mentioned or faced by our system of law.

I. EXCEPTION FOR TEACHING PURPOSES

0 Identify any specific exception that allows for the use of copyrighted works for teaching purposes without the previous authorization of the copyright owner

In the Italian system of law the teaching purposes exception is ruled mainly by article 68, section 2, and 70 of the Italian Copyright Law (Law n° 633/41).

The above mentioned article 70 allows, for teaching purposes, the summary, quotation, reproduction and the communication to the public of portions of copyrighted works provided that such use is made for the sole purpose of illustration and without any commercial end.

Following article 68, section 2, it is allowed the reproduction of entire copyrighted works only if the works are located in educational libraries or in publicly accessible libraries provided that the reproduction is made by members of such institution and for their services.

In any event the summary, quotation or reproduction shall always carry a mention of the title of the work and the names of the author, of the publisher and, in case of a translation, of the translator, as far as such indications appear on the reproduced work.

1 - Exclusive rights covered by the exception

As stated above, this exception covers the right to reproduce, summarize and quote portions of copyrighted works and their communication to the public. The exception also covers the right to reproduce entire works if the works are located in educational libraries or in a publicly accessible library provided that the reproduction is made by members of such institution and for their services.

Digitalization can be qualified as reproduction following the definition provided by article 13 of the Italian Copyright Law (as amended by the above mentioned Decreto Legislativo).

In addition to the above, article 68 bis of the Italian Copyright Law (introduced by the Decreto Legislativo) allows, without the authorization of the right holders, acts of temporary reproduction, as far as they do not have any commercial and economic ends and are part of a technological procedure.

Following article 71 ter, it is also allowed the use by communication and making available for the purpose of research or private study, to individual members of the public by dedicated terminals located in educational libraries or in a publicly accessible libraries, of works that are contained in their collection.

Digital transmission is qualified as communication to the public.

Article 71 quinquies of the Italian Copyright Law, as amended by the Decreto Legislativo, states that, following the request made by the beneficiaries of the teaching exception, the copyright owners should remove the technological protection measures applied to their works, in order to allow their free use.

2 Eligibility under the exception

Only the members of educational institution, publicly accessible libraries, museums and archives may benefit from this exception.

3. Purposes. What is teaching purposes

Neither the law nor the case law provides a definition of teaching purposes.

4. Extent and nature of works

For works contained in educational or publicly accessible libraries there are no limitations.

Article 70 of the Italian Copyright Law provides that with regard to scholastic anthologies, reproduction shall not exceed the extent indicated in the SIAE (Italian Collecting Society) regulation, which shall also set the manner for determining the fair compensation for the rightholders.

5 - Remuneration

A fair compensation is provided only for scholastic anthologies and the procedure for determining the amount is set following art. 22 of the R.D. 18/05/1942 n. 1369. The remuneration is collected by the Italian Collecting Society (S.I.A.E.).

Our system of law does never mention the digital distance education issue.

II QUOTATIONS

0 - Identify any specific exception that allows for the use of copyrighted works for purposes of quotation without the previous authorization of the copyright owner

In the Italian system the quotation purposes exception is ruled mainly by article 70 section 1 and 3 of the Italian Copyright Law (Law n° 633/41).

Section 1 of the mentioned article, allows the quotation and its communication to the public for teaching and criticism purposes in the limit justified by such purposes, provided that such use is made for the sole purpose of illustration and without commercial ends.

The quotation shall always carry a mention of the title of the work and the names of the author, of the publisher and, in case of a translation, of the translator, as far as such indications appear on the quoted work.

Our system of law does not provide any further and specific rule with regard to the Quotation Exception.

5. Remuneration

No compensation is provided for the authors quoted.

III PRIVATE USE PRIVATE / COPYING EXCEPTION

0 Identify any specific exception that allows for the use of copyrighted works for private purposes without the previous authorization of the copyright owner

In the Italian system of law the private use exception is ruled mainly by article 68 (first, third, and fifth section) and 69 of the Italian Copyright Law (Law n° 633/41) as amended by the Decreto Legislativo.

Article 68, section 1, allows the reproduction of single works or of portions of works for personal use of readers provided that such reproduction is made by hand or by means of reproduction unsuitable for circulating or diffusing the work in public.

As stated above, article n. 71 quinquies of the Italian Copyright Law (newly introduced by the Decreto Legislativo) states that, following the request made by the beneficiaries of the personal use exception, the copyright owners should remove the technological protection measures applied to their works, in order to allow their free use.

Article 71 sexies of the Italian Copyright Law (newly introduced by the Decreto Legislativo) allows the private reproduction of phonograms and videograms, as far as such reproduction is not made by a third party. The reproduction shall be made for personal use only and respecting the technological measures provided at article 102 quater.

Section 4 of the same article allows the individual that has acquired the legitimate ownership of the copyrighted work to make just one private copy. Such provision shall not apply to works made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

2 Eligibility under the exception

Single individual.

4 Extent and nature of works

The Italian Copyright Law does not provide any limitation of the exception somehow related to the nature of the work.

If the reproduction is made by mean of xerocopia (or any other mechanical means) article 68, section 3, provides a limit of 15 % of the work.

No other limits are provided.

5 Remuneration

Article 68, forth section, provides that the owner of the copy centers shall pay a compensation to the authors and publishers of the works that have been reproduced at their center. Such compensation, determined on the amount of pages reproduced, is collected and distributed by the collecting societies.

Article 68, fifth section, provides a fair compensation for the reproductions made in public libraries.

Article 71 septies (introduced by the Decreto Legislativo) provides a fair compensation for the private reproduction of phonograms and videograms. Such compensation shall be paid to the authors of the work, to the original producer of the phonograms or videograms that contain the work and to the artist who has interpreted the work.

IV LIBRARY EXCEPTIONS

0 Identify any specific exception that allows for the use of copyrighted works by libraries, without the previous authorization of the copyright owner

In the Italian system the library exception is ruled mainly by article 69 of the Italian Copyright Law (Law n° 633/41).

1 Exclusive rights covered by the exception

Such article mentions exclusively the right to loan to the public the copyrighted works and notably provides that public libraries and public record libraries (discoteche di Stato) are allowed to loan to the public copyrighted works, without the authorization of the copyright owners, as far as such laoning is made for purpose of personal study or cultural promotion. No other rights are mentioned.

For the services of the public libraries is also allowed the reproduction in one single copy of the phonogram and videogram containing an audio visual work that is located in the libraries. Such reproduction shall be made without any commercial or economic goal.

2 – Eligibility

Article 69 mentions public libraries and public record libraries

Public on line libraries are not expressly mentioned by the Italian law.

3 – Purposes

As stated above article 69 does not mention the right to loan for teaching purpose but it only refers to the loan for personal study.

4 – Extent and nature of the works

Such exception covers only two categories of works and notably:

- printed works with the exclusion of music sheets;
- phonogram and videogram containing audiovisual works provided that the first economical exploitation of such works has taken place at least 18 months before.

There are no limitations with regard to the extent.

5 – Remuneration

For the copyright owners of the works is not provided any compensation.

V. TECHNOLOGICAL MEASURES VS. EXCEPTIONS

1. The use of technological measures by the right holders is ruled mainly by article 102 quater of the Italian Copyright Law, section introduced by the Decreto Legislativo.

Following such article the right holders have the right to apply technological measures to their works in order to prevent or restrict acts, which have not been authorised by the right holders themselves.

Section 2 of the same article provides that technological measures shall be deemed "effective" when the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

2. Article 71 quinquies, section 2 (introduced by the Decreto Legislativo) provides that the right holders, following the request of the beneficiary, shall remove the technological measures in presence of the exceptions mentioned at articles 68 section 1 and 2 (personal use / private copying, libraries exception); 69 section 2 (libraries exception); 70 section 1 (teaching and scientific research exception); 71 bis (and handicapped people exception) 71 quater article (public hospital exception).

Roma april 10th 2003

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Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project

THE NETHERLANDS

by Dr. Lucie Guibault and Annemarie Jansen

I.- EXCEPTION FOR TEACHING PURPOSES.

0.- Identify any specific exception that allows for the use of copyrighted works for teaching purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

DUTCH COPYRIGHT ACT 1912

Article 12

The communication to the public of a literary, scientific or artistic work includes:

- 1°. the communication to the public of a reproduction of the whole or part of a work;
- 2°. the distribution of the whole or part of a work or of a reproduction thereof, as long as the work has not appeared in print;
- 3°. the rental or lending of the whole or part of a work, with the exception of works of architecture and works of applied art, or of a reproduction thereof which has been brought into circulation by or with the consent of the rightholder;
- 4°. the recitation, performance or presentation in public of the whole or part of a work or a reproduction thereof;
- 5°. the broadcasting of a work incorporated in a radio or television programme by satellite or other transmitter or by a closed-circuit system as referred to in article 1 sub g of the *Wet op de Telecommunicatievoorzieningen*.

(...)

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.

Article 15c

1. The lending as referred to in article 12, paragraph 1, sub 3°, of the whole or part of a work or a reproduction thereof brought into circulation by or with the consent of the rightholder shall not be deemed an infringement of copyright, provided the person doing or arranging the lending pays an equitable remuneration. The first sentence shall not apply to a work referred to in article 10, paragraph 1, sub 12°, unless that work is part of a data carrier containing data and serves exclusively to make the said data accessible.
2. Educational establishments and research institutes, the libraries attached to them, and the *Koninklijke Bibliotheek* are exempt from payment of a lending remuneration as referred to in paragraph 1.

Article 16

1. The following shall not be deemed an infringement of copyright in a literary, scientific or artistic work:
 - a. the taking over of parts of works in publications or sound or visual recordings made for use as illustrations for teaching purposes, provided:

1°.	the work from which was taken over has been lawfully communicated to the public;
2°.	the taking over is in conformity with that which may be reasonably accepted in accordance with social custom;
3°.	the provisions of article 25 have been taken into account;
4°.	the source is clearly indicated, together with the indication of the author if it appears in the source; and
5°.	an equitable remuneration be paid to the author or his successors in title;
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:
1°.	the work from which is taken over has been lawfully communicated to the public;
2°.	the communication to the public is in conformity with that which may be reasonably accepted in accordance with social custom;
3°.	the provisions of article 25 have been taken into account;
4°.	the source is clearly indicated, together with the indication of the author if it appears in the source; and
5°.	an equitable remuneration be paid to the author or his successors in title.
2.	In the case of a short work or a work as referred to in article 10, paragraph 1, sub 6°, 9° or 11°, the entire work may be taken over for the same purpose and subject to the same conditions.
3.	Where the taking over in a compilation is concerned, only short works or short passages of works by one and the same author may be taken over and, in the case of works referred to in article 10, paragraph 1, sub 6°, 9° or 11°, only a small number of those works and only if they are reproduced in such a way that they differ considerably in size or process of manufacture from the original work, with the proviso that where two or more such works were communicated to the public together, the reproduction of only one of them shall be permitted.
4.	The provisions of this article shall also apply where the reproduction is in a language other than the original.
5.	We reserve the right to lay down rules by order in council concerning the equitable remuneration to be paid in accordance with paragraph 1 sub a, 5° and sub b, 5°, and also to determine, by order in council, what is to be understood in paragraph 3 by "short works or short passages of works".

Lower House of Dutch Parliament

Meeting year 2001-2002

28 482

- NOT ENACTED YET – AMENDED BY PROPOSAL OF 17 MARCH 2003; NOT YET TRANSLATED ¹⁰⁰

Act relating to an amendment to the 1912 Copyright Act, the Neighbouring Rights Act and the Database Act implementing Directive no. 2001/29/EC of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ EC L 167) (Act relating to the implementation of EC Directive on copyright and related rights in the information society)

Article 16 shall read as follows:

1. The reproduction or communication of a literary, scientific or artistic work for the sole purpose of illustration for teaching shall not be deemed an infringement of copyright, to the extent justified by the intended, non-commercial purposes, provided:

¹⁰⁰ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, 2002/03, 28482, nr. 6.

1° the work from which was taken over has already been lawfully made available; 2° the taking over is in conformity with that which may be reasonably accepted in accordance with social custom; 3° the provisions of Article 25 have been taken into account; 4° insofar as is reasonably possible, the source, including the author's name, is clearly indicated; and 5° an equitable remuneration is paid to the author or his legal successor(s).
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1.- Exclusive Rights covered by the exception.

- m) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered?
- n) Can a work be digitized for use as part of the instruction? Would digitization qualify as a reproduction or also as a transformation?

Article 16 of the Copyright Act of 1912 uses the phrase “taking over of parts of works”. This includes, among other things, reproduction. The means of reproduction covered are, according to Article 16 § 1a, taking over in publications and sound or visual recordings and according to § 1b radio or television program. Whether these means of reproduction include digital reproduction is not quite clear. In literature it is said that ‘publications’ are considered to be publications solely on paper and therefore do not include digital reproductions. But it is also said that this narrow interpretation cannot be right or desirable and other means should and will also be covered. The same discussion occurs with sound or visual recordings and (educational) radio or television program. They can be in digital form, but it is said in literature that reproductions on CD-ROM are included under the exception and online-reproductions are not. Others think however that other digital forms can be included under the exception, since the ratio of the exception is to prevent right owners from blocking the production of educational material¹⁰¹.

This should change with the proposed law. Article 16 has been made technology-neutral/independent, so that digital reproductions will also be covered. The proposed article 16 refers to “the reproduction or communication of parts of a literary, scientific or artistic work (...)”. This means that in principle all reproductions and communications that comply with the conditions set out in the article are covered. The proposed law was changed by an amendment¹⁰² in March 2003 rephrasing the first sentence of article 16. The condition that only “parts of” works can be reproduced or communicated was put back in. (No official translation is yet available, so we were not able to insert the amendment in the law frame above.)

The concept of reproduction in the Copyright Act of 1912 covers also transformation. In Dutch the word used is ‘*verveelvoudiging*’. In literature it is said that *verveelvoudiging*/reproduction also contains reproduction in modified/alterd form.¹⁰³ The concept of transformation is therefore not used in the Dutch Copyright Act 1912.

- c) How many copies can be made? Is it somehow limited, i.e., to the number of students in a class?

No direct limitation on the number of copies is set out in article 16 Copyright Law 1912. But note that the conditions of article 16 should be complied with. This means, inter alia, that only parts of works can be taken over; that the publication, the sound or visual recording or the program should be made for use as illustrations for teaching purposes; that the taking over must be in conformity with that which may be reasonably accepted in accordance with social custom; and that equitable remuneration must be paid. Also, the provisions of article 25 deals with ‘moral rights’ or ‘*droits moraux*’ must be taken into account.

¹⁰¹ Spoor and Verkade 1993, p. 214; Visser 1998, p.72; Van Lingen 2002, p. 131.

¹⁰² Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber 2002/03, 28482, nr. 6. p.2.

¹⁰³ Van Lingen 2002, p.77; Spoor and Verkade 1993, p. 142 ff.

This remains the same in the proposed article 16.

- d) Does it cover communication to the public? Does it cover the storage of the copyrighted work on the server, thus allowing asynchronous teaching?

Article 12 § 5 states that “a recitation, performance or presentation which is exclusively for the purpose of education (...), 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”. This exception covers communication to the public (in a classroom). Article 16 § b sets some conditions under which communication to the public of parts of work by “broadcasting a radio or television program made to serve as an illustration for teaching purposes” is not an infringement.

(Notice that in article 12 sub 2 ° Copyright Act is stated that communication to the public also contains distribution of (part of) a work or a reproduction thereof, as long as the work has not appeared in print)

This will not cover storage of the copyrighted work on the server. The Copyright Committee declared in its report of August 1998 that article 12 § 5 is “not meant for the situation where an education institute will act as virtual shop for educational information”.¹⁰⁴ According to the Commission the exception of article 16 can be extended to taking over in CD-ROMS and on-line databases but not to the storage on a server.

The proposed law does not modify article 12 § 5 nor does it change the current situation. Article 16 will be technology-independent and allowing storage on a server. Recital 42 of the Directive expressly declares that distance education is also covered. Online education will be covered by the proposed exception of article 16.

- e) How does your system qualify a digital transmission/delivery of a work? Have the WCT or WPPT had any effect on this matter? Has the EU Directive, if applicable, had any effect on this matter?

A digital transmission/delivery of work through the Internet is in Dutch qualified as “*openbaarmaking*” meaning ‘communication to the public’ in a broad sense (see article 12 Copyright Act 1912). Making works available on the Internet is deemed covered by the act of ‘communication to the public’.¹⁰⁵ Article 12 lists what is considered, inter alia, to fall under the expression ‘communication to the public’, but it does not define it however.¹⁰⁶ The proposed law does not change this, since the concept of ‘communication to the public’ in the Dutch Copyright Act is considered to cover digital transmission effectively.¹⁰⁷

- f) Does the exception cover subsequent reproductions made in the course of transmission (routing copies, cache copies, etc) and reception (RAM copies, screen displays and downloads) of these works by each student? (Please note that this last issue is intertwined with the question of eligibility: who is allowed to make reproductions for teaching purposes—just professors, or also students?)

Every reproduction covered by the exception of article 16 Copyright Act 1912 has to be made for use as illustration for teaching purposes. When no compliance with this condition is established the exception cannot be used (see answer to question 2b of part 1).

2.- Eligibility under the exception.

- i) Eligibility as to institutions:

¹⁰⁴ Recommendation of the Copyright Committee 1998; ‘*Advies Commissie Auteursrecht 1998*’, p. 37.

¹⁰⁵ Recommendation of the Copyright Committee 1998; ‘*Advies Commissie Auteursrecht 1998*’, p. 14.

¹⁰⁶ Van Lingen 2002, p. 83 ff.

¹⁰⁷ Recommendation of the Copyright Committee 1998; ‘*Advies Commissie Auteursrecht 1998*’, p. 14.

- Which institutions may benefit from a copyright exception for teaching purposes? Educational institutions? Schools? Universities? etc. How are those terms defined? How do they apply to the Internet?
- Is there any specific condition as to the nature (for-profit or not-for-profit, public or private) of the teaching activity or of the institution? How does this apply to digital distance education?

All institutions that provide materials made for use as illustration for teaching purposes can benefit from the teaching exception. This does include commercial institutions, for instance companies that publish education books. 'Teaching' can be interpreted widely; not only education on schools and universities, but some commentators even argue that it can be about 'hobby' education and commercial courses¹⁰⁸.

According to the proposed law this will change. The proposal states that the taking over from parts of work shall not be deemed an infringement of copyright only to the extent justified by the intended, non-commercial purposes. The meaning of non-commercial is not quite clear yet, but according to the Minister of Justice the nature of the activity of taking over the protected material is decisive. If this activity only takes place with the intention of using the material exclusively for teaching purposes, it will be covered by the exception of article 16. Recital 42 of the Directive stresses that organization and means of funding of the education institute is *not* decisive. Agreements between right owners themselves and between right owners and users of copyright protected material will have to determine the line between commercial and non-commercial use according to the Minister.¹⁰⁹

- May libraries benefit from such an exception, and therefore provide copies (and also distribute? communicate to the public?) of works for teaching purposes? *(Please note that this last issue may have a connection with any exception provided for in favor of libraries. If libraries cannot benefit from a specific teaching exception, the scope of the "remaining" library exceptions becomes paramount to cover the use of works for teaching purposes.)*

As set out above all institutions can in principle benefit from the application of article 16 Copyright Act 1912 provided they comply with the conditions set out in the article. So libraries are also allowed to take over parts of works in publications or sound or visual recordings made for use as illustrations for teaching purposes, provided that the conditions in sub 1° to 5° of § 1 of article 16 are complied with.

In the proposed law, the situation will remain the same for non-commercial libraries, but will change for libraries that are considered commercial. These libraries will no longer be entitled to benefit from the application of the exception.

(See further part IV; library exceptions)

- j) Eligibility as to individuals:
- May only teachers benefit from the exception or also students (and guest-lecturers, etc)?

When students use the material as illustrations for teaching purposes, they can benefit from the exception. For their own study purposes, they can benefit from the private use exception.

¹⁰⁸ Spoor and Verkade 1993, p. 214.

¹⁰⁹ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Report issued on 16 May 2003, Parliament Documents, Second Chamber, 28482, nr. 8, p. 11.

- If students cannot benefit from that exception, may a general private use/private copying exception (or fair use) “fill that gap” (as it seems to be the case in the analog world)? *(Please note that this last issue may be considered under a separate section III dealing with the private use/ copying exception)*

Article 16c Copyright Act 1912 can fill this gap. See part III; Private Use/Private Copying Exception.

- k) Some teaching-related exceptions refer to or imply physical concepts related to face-to-face teaching activities—concepts like classroom, school premises, etc. If so, does this specific language limit or curtail the applicability of the exception in the digital world?

- l) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

3.- Purposes. What is “teaching purposes”?

- i) What constitutes “teaching purposes”? *(Please, substitute by the specific language used in your national exception; for instance, the EU Directive article 5.3(a) what is “illustration for teaching”).* Is there any case law, uses, and doctrine to describe the specific language used in the exception?

Article 16 uses the expression ‘illustration for teaching purposes’. Only publications, sound or visual recordings and radio and TV program that are made for use as *illustration* are covered by the exception. This means that taking over of a work must have a supplementary aim and cannot serve as substitute to the ‘normal’ teaching offered.¹¹⁰ The proposed article 16 uses the same wording.

- j) Does it cover use of a work for preparing the lesson? Does it cover use of a work in the course of the instruction? Does it cover the making and distribution of copies for teaching purposes? Does it cover communication to the public for teaching purposes? What is the scope of such uses covered under this exception?

See answer to questions 1a-d in Part I.

- k) Does it cover the making of a teaching compilation or anthology? Would it cover the asynchronous posting of teaching material on the Internet? And if so, within which limits? Is there a specific exception (or licensing system) covering the making of teaching compilations? Would it apply to digital teaching compilations?

Article 16 § 3 Copyright Act 1912 lays down the rule for the reproduction of works in a compilation as follows: “(...) only short works or short passages of works by one and the same author may be taken over (...)”. Remuneration is required. The collection system is explained in the answer to question 5.

In recital 42 of the Directive online distance education is explicitly included under the exception for teaching purposes; the proposed article 16 will allow asynchronous posting on the Internet for this purpose, within the limits set out in the article.

¹¹⁰ Spoor and Verkade 1993, p. 214.

- l) Is the exception subject to any technological measures to ensure that only students will have access to the works used for teaching?

No

4.- Extent and Nature of Works.

- m) Which works (and to what extent) may be subject to the exception?
- n) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- o) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?
- p) May works be used for teaching purposes in whole or only fragments?

See question 1a/b of part I

- q) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

In art 16 § 1a sub 1° the condition is set out that the work from which was taken over should have been lawfully communicated to the public. This condition can also be found in the proposed article 16.

- r) How does the exception interact with the possible existence of a license which specifically prohibits any further uses (other than those licensed)?

The Dutch Copyright Act 1912 is silent on the issue of the contractual overridability of the majority of copyright limitations. According to Cohen Jehoram, it would seem that in the Netherlands 'private parties are free to contractually do away with – between them – statutory restrictions to copyright'.¹¹¹ Cohen Jehoram bases his opinion on the silence of the legislator in this respect. In Guibault's opinion, the silence of the Dutch legislator should not be construed as a definite indication that the limitations on copyright are only default rules from which contracting parties can freely depart.¹¹² The implementation of the provisions of the Computer Programs Directive concerning the right of the lawful user to make a 'black-box' analysis or a decompilation of a computer program offers the most obvious example of this assertion. For, although these limitations have not been expressly declared mandatory, the Explanatory Memorandum to the Implementation Act clearly shows that the Government considered them to be imperative. Of course, this approach of the Dutch legislator does contrast with the one later followed in the implementation of the Database Directive, where the relevant limitations have been expressly declared mandatory. However, the fact that the legislator has not deemed it necessary to declare the limitations relating to computer programs mandatory might suggest that the other limitations provided under the Dutch Copyright Act must also be regarded as imperative. This position could find some support in the fact that the Dutch copyright system also purports to meet objectives of intellectual and cultural usefulness to society.¹¹³ Limitations thus form an integral part of the balance of interests established by the Dutch copyright system, from which contracting parties should not derogate, least of all in standard form contracts.

The latter view would seem to roughly coincide with the approach taken by the Dutch courts when interpreting contracts that attempt to derogate from such copyright rules as the exhaustion doctrine or the limitations on

¹¹¹ Cohen Jehoram 1999, p. 311.

¹¹² Guibault 2002, p. 220.

¹¹³ Spoor and Verkade 1993, p. 8; Van Lingen 1999, p. 18; Quaedylied 1996, p. 7.

copyright. The Dutch Supreme Court's decision in the *Leesportefeuille* case¹¹⁴ offers one example of a court's assessment of a restrictive contractual clause relating to the exhaustion doctrine. In this case, a magazine publisher had put a notice in his publications prohibiting the legal acquirer from re-using the printed material in subsequent 'reading portfolios', known as *leesportefeuilles*. The defendant disregarded the notice, published a portfolio and distributed it to his clients. The plaintiff filed suit on the grounds of copyright infringement. The Dutch Supreme Court found in favour of the defendant, considering that the plaintiff's copyrights were exhausted as soon as he had made his magazines available to the public and had therefore no right to restrict the user's subsequent actions. The notice prohibiting further reproduction was contrary to the exhaustion doctrine found under the Dutch Copyright Act. Relying on its ruling in the *Leesportefeuille* case, the Dutch Supreme Court rendered a similar decision in *Stemra v. Free Record Shop*.¹¹⁵ Like in the earlier case, the producers of sound recordings, whose interests were represented by the collective society Stemra, had printed a notice on each CD that forbade purchasers from further transferring the CD to others. The Court reiterated the principle expressed in its earlier decision, saying that once a work is lawfully made available to the public, the further distribution of the work to third parties, through rental for example, does not constitute an act of making available to the public in the sense of the Copyright Act.

More recently, the District Court of The Hague rendered one of the few known European decisions where the relationship between a contractual restriction on use and a statutory limitation on copyright is briefly analyzed.¹¹⁶ The case involved the posting on a student's website of parts of a commercial CD-ROM containing Dutch legislation. The plaintiff, a Dutch publisher, sued for copyright infringement. In support of his claim, the publisher argued that the student had breached the contract that was clearly printed on the product's packaging and that prohibited 'any unauthorized downloading or any other kind of copying of the CD-ROM'. The District Court admitted as a common practice the fact that producers of data and sound supports inscribe such statements on their products (as producers of gramophones did in the past) and that the restrictions included therein are usually broader, sometimes much broader, than what the law provides.¹¹⁷ The Court considered that there is for the buyer of a CD-ROM little reason to see in such a statement anything more than a warning about the existence statutory limitations on use. The defendant could and might therefore have understood the statement in such a way that the word 'unauthorized' meant nothing else than 'legally unauthorized'. In other words, the Court interpreted the contract clause as aiming only at the limitations provided under the Dutch Copyright Act, rather than at any other broader limitation flowing from the contract.

5.- Remuneration.

- i) Is the teaching use free or subject to remuneration?
- j) If subject to remuneration, how is that established? Criteria used to set the fees.

According to article 16 of the Copyright Act of 1912, the taking over of parts of works in publications or sound or visual recordings made for use as illustrations for teaching purposes is not an infringement of copyright in a literary, scientific or artistic work, provided that an equitable remuneration is paid to the author or his successors in title. The applicable tariff – also called the 'Reader Agreement' – is negotiated between the Publishers' Association and the educational institutions. The fees are paid to the *Stichting PRO*, which re-distributes the money collected to the rights owners concerned. Distinct tariffs have been negotiated for colleges and universities, as well as for commercial and non-commercial institutions and for electronic and analogue material. These tariffs are published together as a general tariff, established on a per-page basis to be multiplied by the number of 'readers' made, as follows:

¹¹⁴ *De N.V. Drukkerij «de Spaarnestad» v. Leesinrichting 'Favoriet'*, HR, 25 January 1952, NJ 1952, No. 95.

¹¹⁵ *Stichting Stemra v. Free Record Shop B.V.*, HR 20 November 1987, NJ 1988, p. 280, AA 1989/38, p. 941-948 with comment from H. Cohen Jehoram.

¹¹⁶ *Vermande v. Bojkovski*, District Court of The Hague, decision of March 20, 1998, in *Informatierecht/ AMI* 1998, pp. 65-67.

¹¹⁷ *Vermande v. Bojkovski*, District Court of The Hague, decision of March 20, 1998, in *Informatierecht/ AMI* 1998 I, p. 67.

Non-commercial institutions:

for electronic material: for the period between 01.01.2002 and 31.12.2002

from Dutch publications: € 0,025

from foreign publications: € 0,035

for analogue material: for the period between 01.01.2002 and 31.12. 2002

from Dutch publications: € 0,03

from foreign publications: € 0,04

Commercial institutions:

Unique price for electronic/analogue and Dutch/foreign publications:

for the period between 01.01.2002 and 31.12. 2002: € 0,07

Poetry and music: € 11,50 for the reproduction of complete poems or music texts.

- k) How is it collected? Which collecting society? How is it distributed among the copyright owners?

The fees are paid to the Stichting PRO, which re-distributes the collected money to the rights owners concerned.

- l) Does this system also apply to digital uses? How?

See above.

II.- QUOTATIONS

0.- Identify any exception that allows for the use of copyrighted works for purposes of quotation, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

DUTCH COPYRIGHT ACT 1912

Article 15a

1. Quotations in an announcement, criticism, polemic or scientific treatise shall not be deemed an infringement of copyright in a literary, scientific or artistic work where:
 - 1°. the work from which the quotation is taken has been lawfully communicated to the public;
 - 2°. the quotation is in conformity with that which may be reasonably accepted in accordance with social custom and the number and length of the quoted passages are justified by the purpose to be achieved;
 - 3°. the provisions of article 25 have been taken into account;
 - 4°. the source is clearly indicated, together with the indication of the author if it appears in the source.
2. In the case of a short work or a work as referred to in article 10, paragraph 1, sub 6°, 9° or 11°, the entire work may be reproduced for the purpose and under the conditions stated in paragraph 1, if done in such a way that the reproduction differs appreciably in size or process of manufacture from the original work.
3. For the purposes of this article quotations includes quotations from articles that have appeared in daily or weekly newspapers, weeklies or other periodicals in the form of press reviews.
4. The provisions of this article shall also apply to quotations in a language other than the original.
5. We reserve the right to determine, by order in council, what is to be understood in paragraph 1 sub 2° by "reasonably accepted in accordance with social custom".

Lower House of Dutch Parliament

Meeting year 2001-2002

28 482

- NOT ENACTED YET – AMENDED BY PROPOSAL OF 17 MARCH 2003; NOT YET TRANSLATED ¹¹⁸

Act relating to an amendment to the 1912 Copyright Act, the Neighbouring Rights Act and the Database Act implementing Directive no. 2001/29/EC of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ EC L 167) (Act relating to the implementation of EC Directive on copyright and related rights in the information society)

D

Article 15a shall read as follows:

Article 15a

¹¹⁸ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, 2002/03, 28482, nr. 6.

1. Quotations in an announcement, criticism, polemic or scientific treatise or for similar purposes shall not be deemed an infringement of copyright in a literary, scientific or artistic work provided that:

- 1°. the work from which the quotation has been taken has been lawfully communicated to the public;
- 2°. the quotation is in conformity with that which may be reasonably accepted in accordance with social custom and the number and length of the quoted passages are justified by the purpose to be achieved;
- 3°. the provisions of Article 25 have been taken into account;
- 4°. insofar as reasonably possible, the source, including the author's name, is clearly indicated.

2. For the purposes of this article, quotations include quotations from articles that have appeared in daily or weekly newspapers, weeklies or other periodicals in the form of press reviews.

3. The provisions of this article shall also apply to quotations in a language other than the original.

1.- Exclusive Rights covered by the exception.

e) Reproduction? Distribution? Communication to the public? Transformation?

Article 15a of the Copyright Act 1912 states that quotations in an announcement, criticism, polemic or scientific treatise shall not be deemed an infringement of copyright in a work if the conditions set out in the article are met. The conditions are similar to that of the teaching provision of article 16, except for the fact that for quotations no equitable remuneration has to be paid. The scope of an announcement, criticism, polemic or scientific treatise is wide. For instance oral presentations are also covered by these terms.¹¹⁹ This means that reproduction and communication to the public are covered under the current Dutch Copyright Act. (In Part I, question 1a, is explained why transformation is not used as a separate concept).

f) Does it cover quotations made in digital formats (i.e., digital copies) and over the Internet (i.e., digital transmissions)?

The exception of article 15a does not limit the quotation to any sort of data carrier, so quotations in digital formats are covered. This will remain the same in the proposed law. The article does include communication to the public of the quotations¹²⁰, so digital transmissions should also be covered, provided that the quotation is in an announcement, criticism, polemic or scientific treatise.

2.- Eligibility under the exception.

c) Who may benefit from the quotation exception? Is there any language that may allow or prevent its application to quotations made as part of the teaching over the Internet?

Anyone who makes/produces an announcement, criticism, polemic or scientific treatise can benefit from the quotations exception. No special teaching provision is given in article 15a. The proposed law changes article 15 a § 1. This provision covers not only quotations in an announcement, criticism, polemic, or scientific treatise, but expressions of similar purposes will also fall under the exception.¹²¹

3.- Purposes.

e) What constitutes a quotation? Is there any case law, uses, doctrine to describe the specific language used in the exception?

¹¹⁹ Spoor and Verkade 1993, p. 208-209.

¹²⁰ Spoor and Verkade 1993, p. 208 ff.

¹²¹ The proposal was amended in March 2003 (Amendment of 17 March 2003, 28482, nr. 9, p. 2.); Art 15a § 1 now states "quotations in an announcement, criticism, polemic or scientific treatise or *expressions with a comparable aim* (...)". This amendment was not yet translated, so we did not insert it in the law frame above.

- f) Is there any reference to any specific purposes (i.e., teaching, research, etc) the quotation must be made for, in order to qualify under the exception?

In the Netherlands, authors hold that copyright law recognises the right to make quotations as a means to exchange opinions and to develop culture and science within society.¹²² The same remark holds true for the right to reproduce public documents and to make news reports. However, article 15(a) of the Dutch Copyright Act 1912 allows the making of quotations only in an 'announcement, criticism, polemic or scientific treatise'. For many authors, the circumstances listed in the Act are the most controversial element of the provision.¹²³ Such restriction on the scope of the limitation appears strange not only in light of the neutral concept of 'quotation', but also in light of the social reality.

The quotation must furthermore be in conformity with that which may be reasonably accepted in accordance with social custom and the number and length of the quoted passage must be justified by the purpose to be achieved. This means that some connection between context and quotation must be present.

4.- Extent and Nature of Works.

- i) Which works (and to what extent) may be subject to the exception? Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
- j) Are all kind of works covered? Are any specific materials excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?
- k) May works be quoted in whole or only fragments?
- l) Does it make any difference how the work has been obtained?

Article 15a does not limit the works or data carriers from which the quotations can be taken, provided that the work has been lawfully communicated to the public.¹²⁴ We already mentioned above that the quotation can only be used in an announcement, criticism, polemic or scientific treatise and that in the proposed law this is extended to 'expressions with a comparable aim'. Article 15a § 2 Copyright Act 1912 states that short works (and some specific described art works of art 10) can be quoted entirely, if done in such a way that the reproduction differs appreciably in size or process of manufacture from the original work. This last provision cannot be found in the proposed law.

5.- Remuneration.

- i) Are quotations free or subject to remuneration?

Quotations are free under the Dutch Copyright Act of 1912 and there is no indication that this will change with the implementation of the Copyright Directive.

- j) If subject to remuneration, how is that established? Criteria used to set the fees.
- k) How is it collected? Which collecting society? How is it distributed among the copyright owners?
- l) Does this system also apply to digital uses? How?

¹²² Hugenholtz 1989, pp. 150-70; Verkade 1990; Spoor and Verkade 1993, p. 5 and ff.; Quaadvlieg 1987, p. 286; and De Zwaan 1995, p. 183.

¹²³ De Zwaan 1995, p. 183; and Spoor and Verkade 1993, p. 208.

¹²⁴ Spoor and Verkade 1993, p. 206.

III.- PRIVATE USE / PRIVATE COPYING EXCEPTION.

The purpose of this section is to address the importance of the private use/ private copying exception as far as teaching uses. To what extent may such an exception allow students (and teachers) to use works for teaching purposes through the Internet? This exception is especially important to the extent that downloads made by students do not qualify under the teaching exception. Please note that this last issue may be considered under a separate section dealing with the private use/ copying exception.

0.- Identify any exception that allows for the use of copyrighted works for private purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

DUTCH COPYRIGHT ACT 1912

Article 16b

1. It shall not be deemed an infringement of the copyright in a literary, scientific or artistic work to reproduce it in a limited number of copies for the sole purpose of private practice, study or use of the person who makes the copies or orders the copies to be made exclusively for himself.
2. (Act of 28 March 2002) In the case of a daily or weekly newspaper or periodical or book or the score or parts of score of a musical work and other works that are reproduced in these works, the reproduction shall furthermore be limited to a small portion of the work, except in the case of:
 - a. works of which it may reasonably assumed that no new copies will be made available to third parties for payment of any kind;
 - b. short articles, news items or other texts which have appeared in a daily or weekly newspaper or weekly or other periodical.
3. In the case of a work as referred to in article 10, paragraph 1, sub 6°, the reproduction must differ considerably in size or process of manufacture from the original work.
4. The provisions of paragraph 1 concerning a reproduction made to order shall not apply to a reproduction made by fixing a work or part thereof on an object which is intended to play a work or to show it.
5. In the case of a reproduction permitted under this article, the copies made may not be given to third parties without the consent of the copyright owner, except in connection with judicial or administrative proceedings.
6. We may determine by order in council that, with respect to the reproduction of works as referred to in article 10, paragraph 1, sub 1°. the provisions of one or more of the preceding paragraphs may be departed from for the purposes of the public service and the performance of the tasks with which institutions serving the general interest have been charged. Further rules and conditions may be laid down to this end.
7. The preceding provisions of this article shall not apply to the imitating of works of architecture.

Article 16c

1. A remuneration is owed to the author or his successor in title for the reproduction in accordance with article 16b, paragraph 1, for personal practice, study or use, of a work or part thereof by fixing it on an object which is intended to show the images or play the sounds recorded upon it.
2. The manufacturer or importer of the objects referred to in paragraph 1 shall be liable for payment of the remuneration.
3. The manufacturer shall be obliged to pay the remuneration at the time that the objects manufactured by him can be brought into circulation. The importer shall be obliged to pay the remuneration at the time of import.

4. The obligation to pay the remuneration shall lapse if the person liable for payment pursuant to paragraph 2 exports the objects referred to in paragraph 1.
5. The remuneration shall be paid only once for each object.

Article 16d

1. The remuneration referred to in article 16c shall be paid to a legal person to be designated by Our Minister of Justice who is, in his opinion, representative and who shall be entrusted with the collection and distribution of such remunerations on the basis of regulations approved by Our Minister. The legal person referred to in the preceding sentence shall represent the authors or their successors in title at law and otherwise in matters relating to the collection of the remuneration. The said legal person shall be subject to supervision by Our Minister of Justice.
2. Further regulations regarding the exercise of supervision over the legal person referred to in paragraph 1 may be laid down by order in council.

Article 16e

1. The level of the remuneration referred to in article 16c shall be determined by a foundation to be designated by Our Minister of Justice, the board of which shall be so composed as to represent in an balanced manner the interests of the authors or their successors in title and the persons liable for payment pursuant to article 16c, paragraph 2. The chair of the board of the said foundation shall be appointed by Our Minister of Justice.
2. The running or playing time of the object in question shall be of particular importance in determining the level of the remuneration.

Article 16f

Persons required to pay the remuneration referred to in article 16c shall be obliged to submit to the legal person referred to in article 16d, paragraph 1, either immediately or within a period agreed with the said legal person, the number and running or playing time of the objects imported or manufactured by him as referred to in article 16c, paragraph 1. They shall also be obliged to give the said legal person, at the latter's request, immediate access to the documents needed to establish indebtedness and the level of the remuneration.

Article 16g

Disputes concerning the remuneration referred to in article 16c shall be exclusively decided at first instance by the *Arrondissementsrechtbank* at The Hague.

Article 16h (*Act of 28 March 2002 amending the Copyright Act of 1912 concerning reprographic reproductions, Official Gazette 186*)

1. The reprographic reproduction of an article in a daily or weekly newspaper or periodical or of a small portion of a book and of other works that are reproduced in these works shall not be deemed an infringement of the copyright in the works, provided that remuneration is paid.
2. The reprographic reproduction of an entire work shall not be deemed an infringement of the copyright in the works, in the case of a book of which it may reasonably assumed that no new copies will be made available to third parties for payment of any kind, in any form, provided that remuneration is paid.

Article 16i (*Act of 28 March 2002*)

The level of the remuneration referred to in article 16h shall be calculated for every page upon which a work referred to in the first and second paragraph of that article is reproduced.

The level of the remuneration shall be determined by order in council and further regulations and conditions may be laid down.

Article 16j (*Act of 28 March 2002*)

In the case of a reproduction permitted under article 16*h*, the copies made may, without the consent of the author or his successor in title, only be given to persons working in the same enterprise, organization, or institution, except in connection with judicial or administrative proceedings.

Article 16*k* (Act of 28 March 2002)

The obligation to pay the remuneration referred to in article 16*h* shall lapse after a delay of three years from the date upon which the reproduction is made. No payment is needed in the case where the author or his successor in title has waived the right to remuneration.

Article 16*l* (Act of 28 March 2002)

The remuneration referred to in article 16*h* shall be paid to a legal person to be designated by Our Minister of Justice who is, in his opinion, representative and who shall be exclusively entrusted with the collection and distribution of such remuneration.

The legal person referred to in the preceding sentence shall represent the authors or their successors in title and otherwise in matters relating to the collection of the remuneration.

The legal person referred to in the first sentence shall apply regulations for the distribution of the remuneration collected. The regulations shall be approved by Our Minister of Justice.

The legal person referred to in the first sentence shall be subject to supervision by a Board of Supervision, the members of which shall be appointed by Our Minister of Justice. Further regulations regarding the supervision shall be laid down by order in council.

The first and second paragraphs of this article do not apply insofar as the person who is required to pay the remuneration can prove the existence of an agreement between herself and the author or his successor in title according to which payment of the remuneration shall be made directly to the latter.

Article 16*m* (Act of 28 March 2002)

Persons required to pay the remuneration referred to in article 16*h* shall be obliged to report to the legal person referred to in article 16*l*, paragraph 1, the total amount of reprographic reproductions that they make per year.

The report referred to in the first sentence does not need to be submitted in case the total amount of reprographic reproductions made in a year is inferior to the amount fixed by order in council.

Lower House of Dutch Parliament

Meeting year 2001-2002

28 482

- NOT ENACTED YET – AMENDED BY PROPOSALS OF 17 MARCH AND 16 MAY 2003; NOT YET TRANSLATED ¹²⁵

Act relating to an amendment to the 1912 Copyright Act, the Neighbouring Rights Act and the Database Act implementing Directive no. 2001/29/EC of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ EC L 167) (Act relating to the implementation of EC Directive on copyright and related rights in the information society)

¹²⁵ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, 2002/03, 28482, nr. 6 and nr. 9.

Article 16b shall be amended as follows:

1. The first paragraph shall read as follows:

1. It shall not be deemed an infringement of copyright in a literary, scientific or artistic work to reproduce it in a limited number of copies for the sole purpose of private practice, study or use of the natural person who makes the copies or orders the copies to be made exclusively for himself and for non-commercial ends.

2. The fourth paragraph shall read as follows:

4. In the case of a reproduction permitted under this article, the copies made may not be given to third parties without the consent of the author or his successors, except in connection with judicial or administrative proceedings.

3. The fifth paragraph shall read as follows:

5. We may determine by order in council that, with respect to the reproduction of a work as referred to in the first paragraph, the author or his legal successor(s) must receive a reasonable reward. We may thereby lay down further rules and regulations.

4. The sixth paragraph shall read as follows:

6. The provisions of this article shall neither apply to reproductions in the sense of Article 16c nor to the imitating of works of architecture.

5. The seventh paragraph shall be deleted.

L

Article 16c shall read as follows:

Article 16c

1. It shall not be deemed an infringement of copyright in a literary, scientific or artistic work to reproduce (part of) this work for non-commercial ends on an object intended to play or show the work provided that the sole purpose of the reproduction is for personal practice, study or use of the natural person making the reproduction.

2. The author or his legal successor(s) must receive a reasonable reward for the reproduction referred to in the first paragraph

3. The obligation for payment of the reasonable reward shall rest with the manufacturer or the importer of the objects referred to in the first paragraph.

4. The manufacturer's obligation for payment of the reward arises when the objects manufactured by it may be brought into circulation. The importer's obligation arises upon the importation.

5. The obligation for payment of the reward shall lapse upon the exportation of the objects referred to in the first paragraph by the person obliged to pay the reward under the third paragraph.

6. The reward is owed once per object.

7. We may lay down further rules and conditions, having heard the foundation as referred to in article 16e, first paragraph, by order in council with respect to the objects regarding which the reasonable reward referred to in the second paragraph is owed. We may furthermore lay down further rules and conditions by order in council with respect to the performance of the provisions in this article, regarding the form and the amount of the reasonable reward.

8. If a reproduction permitted under this article has been made, the objects referred to in the first paragraph may not be given to third parties without the consent of the copyright owner except in connection with judicial or administrative proceedings.

9. The provisions in this article shall neither apply to reprographic reproductions nor to the reproduction of a collection accessible by electronic means as referred to in Article 10, third paragraph.

I

In article 16d, first paragraph, each occurrence of “remuneration” shall be replaced by: reward.

K

Article 16e shall be amended as follows:

1. In the first paragraph, “remuneration” shall be replaced by: reward.
2. The second paragraph shall be deleted.

L

Article 16f shall be amended as follows:

1. In the first and second sentences, “remuneration” shall be replaced by: reward.
2. The phrase “and the duration of play” shall be deleted.

M

Article 16g shall read as follows:

Article 16g

Any disputes regarding the reasonable reward referred to in Article 16b, fifth paragraph, and the reward referred to in Article 16c, shall be settled exclusively at the first instance by the *Arrondissementsrechtbank* of The Hague.

N

A paragraph shall be added to article 16h that reads as follows:

3. We may lay down by order in council that with respect to the reproductions of works as referred to in Article 10 first paragraph under 1°, any of the provisions in the preceding paragraphs may be departed from for the purposes of the public service and the performance of the tasks with which institutions serving the general interest have been charged. Further rules and conditions may be laid down to this end.

1.- Exclusive Rights covered by the exception.

- a) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered? How many copies can be made? Is it somehow restricted, i.e., to non-collective use?
- b) Does it cover any other rights: distribution, transmission, performance, transformation? Do they extend to digital means of exploitation? (See also *infra*, the questions concerning definition of “private”).

It is important to emphasize that private copying levies are essentially meant to cover acts conducted in the private sphere, whereas levies for reprographic activities are in most countries directed towards acts accomplished in an institutional setting, e.g. by libraries, government institutions and businesses. In the Netherlands, individuals are indeed free to make photocopies of works for purely private purposes without being subject to a levy.¹²⁶

Article 16b § 1 Copyright Act 1912 lays down the basic rules on private copying. It grants the right for everyone to reproduce a work, in a limited number of copies, for the sole purpose of private practice, study or use of the person who makes the copies or orders the copies to be made exclusively for himself. This means that, in principle, all means of reproduction (and transformation; see Part I, question 1a/b) are covered by the exception: in other words digital reproductions may be made without the consent of the right owner. Although the Act contains no mention of this, the number of copies is limited to 2 or 3 copies according to the literature.¹²⁷ Legal persons making reproductions are considered covered by the exception.¹²⁸ In article 16b § 2 a special rule is laid down with the aim to prevent works on paper (daily or weekly newspaper, periodical, book or the score or parts of the score of a musical work) to be entirely copied.¹²⁹ It is stated that reproductions of these works can only be limited to a small portion of the work, with the exception of some specially described works in article 16§ 2 sub a and b. According to article 16 § 4, copies of sound or image cannot be made on order: only the person who intends to use these copies is allowed under the exception to make them. 16b § 5 states that a reproduction permitted under article 16b may not be given to third parties without the consent of the copyright owner, except in connection with judicial or administrative proceedings.

Articles 16 c-16 g deal with the specific issue of home taping and provide for a remuneration system for reproductions of works by fixing it on an object used for the purpose of showing the images or play the sounds recorded upon it. The manufacturer or importer of the supports will be liable for payment of the remuneration. Important is that, in article 16c, the concept of reproduction does not include transformation. This is because in the Dutch version of article 16c the term ‘*reproductie*’ is used, meaning reproduction in a narrow sense (see also Part I, answer to question 1a/b, last paragraph).

Articles 16 h- 16 m provide for a remuneration system for the reprographic reproduction of an article in a daily or weekly newspaper or periodical or of a small portion of a book and of other works that are reproduced in these works. A reprographic reproduction is described as ‘reproduction techniques that lead directly to a readable copy of a writing on paper or microfiche’. Examples mentioned are copying by hand, copying by typewriter, photocopying and faxing.¹³⁰ It is explicitly said that saving works on a computer is not covered by this exception. This remains the same in the proposed law.

The proposed law excludes legal persons from the benefit of the exception in art 16b § 1 by specifying that private copying is authorized only when done by ‘natural’ persons. It also introduces the condition that the

¹²⁶ Hugenholtz, Guibault and van Geffen 2003, p. 13.

¹²⁷ Spoor and Verkade 1993, p. 230.

¹²⁸ Spoor and Verkade 1993, p. 231; Supreme Court of the Netherlands, 23 May 1952, *NJ* 1952, nr. 438 (Stemra/NRU).

¹²⁹ Van Lingen 2002, p. 139 ff.

¹³⁰ Law proposal 22.600, Explanatory Memorandum, p. 8.

copies are made exclusively for non-commercial ends. Art 16c is considerably changed and amended. Not all amendments are yet translated; they are not in the law frame above.¹³¹

2.- Eligibility.

- e) Who may benefit from the private use/copying exception? Is there any specific reference to for-profit or not-for-profit uses, public or private, non-collective uses?

Everyone, including natural and legal persons, can currently benefit from the home taping exceptions as long as the conditions set out in the article are met. This will change under the proposed law, where legal persons will no longer be entitled to benefit from the exception. (See also answer to question 1 a/b)

By decree of 27 November 2002, specific rules are laid down for reprographic reproductions for, inter alia, libraries and educational institutions. They are defined as:

c. Libraries:

1°. Not-for-profit libraries having as primary task the supply of services to the public;

2°. Other libraries, but only insofar as these are involved in an inter-library loan service with a library aimed at under paragraph 1;

d. Educational institutions: institutions where education is provided either by the government or by a non-profit legal person;¹³²

This Decree is not yet translated into English; the precise rules are not given in the law frame. The rules can, in short, be described as providing some 'broader' rights for reprographic reproductions for libraries and educational institutions.

- f) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

3.- Purposes. What is "private"?

- e) What is the definition of "private use/private copying" in your country? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

There is very little jurisprudence in the Netherlands concerning what can be considered as a private use. For example, the residents of an elderly home were not considered as a private or family circle by the Supreme Court of the Netherlands.¹³³ The Supreme Court stated in another decision that private use can only be considered use in a person's own, private, closed circle.¹³⁴ The reproduction cannot become public. According to the literature, private use does not cover the copying sheet of music by a pianist with the purpose of using it for a public performance. Problems arise when the pianist first practices the piece of music and plays it by heart during a public performance. Is this covered by the private use exception? Opinions diverge concerning the scope of the phrase 'private use', but for most commentators this is mainly an academic question considering the fact that the boundaries of the private use exception are violated every day on a large scale.¹³⁵

¹³¹ By the amendment of 17 March 2003 the proposal was changed; 'exclusively for non-commercial ends' is changed into 'exclusively for direct or indirect non-commercial ends'. However this amendment was not yet translated, therefore we did not put in the law frame above (Amendment of 17 March 2003, 28482, nr. 6, p. 3.).

¹³² Order of 27 November 2002 containing rules regarding the reprographic reproduction of copyrighted works by public institutions (Order on reprographic reproductions), Year 2002, Gazette 2002, No. 575.

¹³³ Supreme Court of the Netherlands, 9 March 1979, NJ 1979, Nr. 341 (Willem Dreeshuis/BUMA).

¹³⁴ Supreme Court of the Netherlands, 23 May 1952, NJ 1952, Nr. 438 (Stemra/Radio-Unie).

¹³⁵ Spoor and Verkade 1993, p.231; Van Lingen 2002, p. 138.

- f) How does this exception translate on the Internet? Would students' downloads of material transmitted for teaching purposes over the Internet qualify as private?

In the Explanatory Memorandum to the latest amendment of the proposed article 16c, the Minister of Justice declares that downloading material through peer-to-peer software and storage on the hard disc will be covered by the private use exception.¹³⁶ Remuneration has to be paid by the manufacturer, but no collection system is yet established.

4.- Extent and Nature of Works.

- k) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

In paragraph 2 of article 16b is stated that in the case of a daily or weekly newspaper or periodical or book or the score or parts of the score of a musical work and other works that are reproduced in these works, the reproduction shall furthermore be limited to a small portion of the work, except in the case of:

1. works of which it may reasonably assumed that no new copies will be made available by third parties for payment of any kind;
2. short articles, news items or other texts which have appeared in a daily or weekly newspaper or weekly or other periodical.

- l) Are all kinds of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

Article 16 § 7 states that the provisions of article 16b shall not apply to the imitating of works of architecture. All other works are covered by the exception, but not all works are covered in the way of the basic rule set out in article 16b § 1.

In article 16b § 2, the taking over of printed works is regulated by a special provision (explained in question 1 a/b of part III).

Article 16c § 3 provides that in the case of a work as referred to in article 10, paragraph 1, sub 6°, the reproduction must differ considerably in size or process of manufacture from the original work. The works referred to are works like drawings, paintings, buildings, sculptures, litographs etc.

Furthermore some special rules are given for works on an object which is intended to play a work or to show it (see article 16c § 4 and 16c –16g).

- m) May works be used for private purposes in whole or only fragments?

See answer to question a)

- n) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

¹³⁶ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Report issued on 16 May 2003, Parliamentary documents, Second Chamber, 2002/03, 28482, nr. 8.

-
- e) How does the exception interact with the possible existence of a license which specifically prohibits any further uses?

See the answer to question 4f) in part I.

5.- Remuneration.

- f) Is this exception free or subject to remuneration?

'Stichting Thuiskopie' ('Private Copy Foundation') collects and distributes the remunerations of article 16 c-16 g. The remuneration constitutes a levy on 'empty' carriers of sound and image (analogue and digital), paid by the manufacturer or importer. 15% of the profits intended for distribution is spend on social and cultural purposes.¹³⁷

One of the modifications to the private copying regime deals with the manner in which the level of remuneration and the types of supports to which it applies are determined. Until now, these two aspects of the remuneration for private copying were determined solely by the *Stichting Onderhandeligen Thuiskopievergoeding* (SONT), according to article 16(e) of the Copyright Act 1912. Although the SONT is still the designated organization in the area, the government would be given the task to determine, by statutory instrument, the types of supports to which the remuneration would apply. The government would also be given the power to specify rules and conditions for the determination of the form and level of the 'fair compensation' due for private copying. In addition, the Proposal would abolish Article 16(e)(2) of the Dutch Copyright Act of 1912, according to which the 'running or playing time of the object in question is of particular importance in determining the level of the remuneration'. This was a welcomed suggestion, since interested circles consider that the parties, i.e. the SONT and the *Stichting de Thuiskopie*, are in the best position to know which factors should be taken into consideration in determining the level of remuneration.

The Dutch Proposal makes no express reference to the requirement of Article 5(2) of the Copyright Directive, according to which the fair compensation due to authors and other rights holders for private copying must 'take account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned'. In the Explanatory Memorandum accompanying the Proposal, the Minister of Justice declares on this point that, for the time being, the current private copying regime should be applied to analogue and digital storage media, since the reasons initially invoked for the creation of such a regime are still valid and since there are no practical alternatives currently available.¹³⁸ The Minister adds that it is to be expected that the technology will in the future allow the regulation of private copying activities so that there will then be little or no need for a levy system. The task is thus given to the Minister of Justice to determine the types of supports to which the remuneration would apply, on the belief that his involvement would ensure a better transition between a levy regime and a technical protection regime.¹³⁹

According to articles 16h- 16m of the Dutch Copyright Act of 1912, it is not an infringement of copyright to reproduce an article in a daily or weekly newspaper or periodical or of a small portion of a book and of other works. Such reproductions may only be made provided that they are limited to the number of copies which the enterprise, organization, or establishment may reasonably need and that the person who makes copies or orders the making of copies pays an equitable remuneration to the author of the work thus reproduced or his successors in title. The remuneration, the level of which is determined by the *Stichting Reprorecht*, is

¹³⁷ Guibault 2003, p. 15.

¹³⁸ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, Year 2001-2002, 28 482, No. 3, p. 46.

¹³⁹ Hugenholtz, Guibault and van Geffen 2003, p. 28.

proportional to the amount of copies realised in a year. The general tariff per page reproduced is € 0,045, which applies to governmental institutions, libraries, educational institutions and other institutions active in areas of public interest as well as private enterprises. A reduction in price has been created in favour of educational institutions that are not part of an academic institution, for which the applicable tariff is € 0,011 per page copied. The reason invoked for this difference in treatment is that educational institutions that do not provide academic education or that do not conduct scientific research generally reproduce works that are significantly less costly than their academic counterparts.¹⁴⁰

- g) If subject to remuneration, how is that established? Criteria used to set the fees.
- h) How is it collected? Which collecting society? How is it distributed among the copyright owners?
- i) Does this system also apply to digital uses? How?

The Dutch debate about the private copy is centered on the interpretation of Recital 35 of the Directive: “in cases where rightsholders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due... In certain situations where the prejudice to the rightsholder would be minimal, no obligation for payment may arise.”

The Dutch government has always held the view that under the Directive it should be possible not to demand financial compensation for the digital private copy, but instead to rely on levies to compensate rightsholders. As described previously in the timeline, government officials have actively promoted this point of view in Brussels, at least since 1999, when they made their intentions known in a letter to Parliament. With the report from the copyright committee, this line of reasoning becomes clearer. With regards to the future, the Dutch government has high hopes that digital rights management will make levies in a digital environment superfluous in the near future.¹⁴¹

¹⁴⁰ Staatsblad 2002, Nr. 574, p. 1.

¹⁴¹ Brown 2003, p. 102.

IV.- LIBRARY EXCEPTIONS.

The main purpose of this section is to address the interaction between library privileges and teaching uses: to what extent may library exceptions assist teaching activities conducted through the Internet (either exempted or licensed teaching uses). Please feel free to provide any information concerning the general scope of such exceptions, even though not especially helpful as far as teaching purposes.

0.- Identify any exception that allows for the use of copyrighted works by libraries, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

DUTCH COPYRIGHT ACT 1912

Article 15c

1. The lending as referred to in article 12, paragraph 1, sub 3°, of the whole or part of a work or a reproduction thereof brought into circulation by or with the consent of the rightholder shall not be deemed an infringement of copyright, provided the person doing or arranging the lending pays an equitable remuneration. The first sentence shall not apply to a work referred to in article 10, paragraph 1, sub 12°, unless that work is part of a data carrier containing data and serves exclusively to make the said data accessible.

2. Educational establishments and research institutes, the libraries attached to them, and the *Koninklijke Bibliotheek* are exempt from payment of a lending remuneration as referred to in paragraph 1.

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- NOT ENACTED YET – AMENDED BY PROPOSAL OF 17 MARCH; NOT YET TRANSLATED ¹⁴²

Act relating to an amendment to the 1912 Copyright Act, the Neighbouring Rights Act and the Database Act implementing Directive no. 2001/29/EC of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ EC L 167) (Act relating to the implementation of EC Directive on copyright and related rights in the information society)

E

After Article 15g a new article shall be inserted that shall read as follows:

Article 15h

Unless otherwise agreed, making available a literary, scientific or artistic work by means of a closed network by libraries and museums accessible to the public or by archives that do not aim for obtaining economic or commercial benefit for consultation of the work in the premises of those institutions destined for

¹⁴² Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, 2002/03, 28482, nr. 6.

public consultation for the purpose of research or private study by individual members of the public shall not be deemed an infringement of copyright.

O

After article 16m an article shall be inserted that reads as follows:

Article 16n

Any reproduction of a literary, scientific or artistic work by publicly accessible libraries, educational establishments or museums, or by archives which are not for economic or commercial advantage, shall not be deemed an infringement of copyright, provided that the reproduction is made for the purpose of preservation of copies of the work or, in case the technology with which it can be made accessible falls into disuse, in order to make consultation of the work possible.

1.- Exclusive rights covered by the exception.

- e) Reproduction? Distribution? Communication to the public? Transformation? Does it cover digital copies? Does it cover digital transmissions of works?
- f) Would it be permissible for a library to make digital copies of the works in its catalogue, and post them on its web page, or transmit them to their teachers and/or students (for teaching purposes), or even for inter-library loans?

Art 15c states that lending of (part of) a work or a reproduction thereof brought into circulation by or with the consent of the rightholder shall not be deemed an infringement of copyright, provided the person doing or arranging the lending pays an equitable remuneration (computer program are excluded).

Educational establishments and research institutes, the libraries attached to them, and the *Koninklijke Bibliotheek* are exempt from the payment of the remuneration.

Communication to the public includes lending according to the Dutch Copyright Act 1912 (article 12 paragraph 1, sub 3°, see law frame part I). It does not cover (digital) reproduction or transmission.¹⁴³

The proposed law does not change this. Art 15c will stay in the Act and although it will be possible under the exception of art 15h to make works available by means of a closed network, this does not make it possible to make works available through the Internet. This has been explicitly confirmed by the Minister of Justice in response to some Parliament questions concerning the making available of works for the elderly and disabled.¹⁴⁴

2.- Eligibility

- e) Which libraries may benefit from the exception? Only public libraries? Non-for-profit libraries? What about on-line libraries?

All libraries can benefit from the exception, but remuneration is required. Only educational establishments and research institutes, the libraries attached to them and the *Koninklijke Bibliotheek* are exempt from the payment of remuneration. As explained in the answer to question 2a in part III, the exception of article 16b is explicitly

¹⁴³ Recommendation of the Copyright Committee 1998; 'Advies Commissie Auteursrecht 1998', p. 33.

¹⁴⁴ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, report issued on 16 May 2003, Parliamentary documents, Second Chamber, 28482, nr. 8, p. 9-10.

limited to certain particular libraries. On-line libraries cannot benefit from the exception of article 15c, because lending requires a physical copy of a work.¹⁴⁵

- f) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect digital (on-line) libraries?

3.- Purposes.

- g) Conservation, lending, studying, research, teaching purposes, etc.?

The exception of article 15c only covers lending. However in the proposed law article 16n does cover the reproduction of works for the purpose of preservation.

- h) Could the library supply material to be used for teaching purposes?
i) Since the library privilege granted under article 5.2.(c) Copyright Directive is not limited to any specific purposes, it leaves the door open for coverage of reproductions for teaching purposes, provided such reproductions are not for direct or indirect economic or commercial advantage. Has your national legislator implemented (or intends to implement) such an exception? If so, how?

In practice libraries use the exception of article 16b to deliver (in order) reproductions for purpose of private practice, study. The Copyright Committee however doubts whether this is lawful.¹⁴⁶ (See the answer to question 2a in part I).

The exception of article 16 can be used by libraries. See answer to question 2a Part I.

4.- Extent and Nature of works.

- k) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?
l) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

Only computer programs are excluded from the exception of article 15c. According to article 15h and 16n of the proposed law no works are excluded.

- m) May works be used in whole or only fragments?

The works can be lend in whole or in parts, see article 15c paragraph 1.

- n) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

The copy has to be brought into circulation by or with the consent of the rights holder according to article 15c paragraph 1.

- o) How does the exception interact with the possible existence of a license which specifically prohibits any further use?

¹⁴⁵ Recommendation of the Copyright Committee 1998; 'Advies Commissie Auteursrecht 1998', p. 33.

¹⁴⁶ Recommendation of the Copyright Committee 1998; 'Advies Commissie Auteursrecht 1998', p. 33.

See the answer to question 4f in part I.

5.- Remuneration.

- i) Is this exception free or subject to remuneration?
- j) If subject to remuneration, how is that established? Criteria used to set the fees.
- k) How is it collected? Which collecting society? How is it distributed among the copyright owners ?

'Stichting Leenrecht' is the collecting society that collects the remunerations of article 15c. This foundation is exclusively appointed by the Ministers of Justice and OCW (Teaching, Culture and Science). The society distributes the collected remunerations to the right owners (writers, translators, publishers). 70% of the profits go to the rights owners and 30% to the publishers. The level of the remuneration is determined in negotiation with the right owners and those who have the obligation of payment.

- j) Does this system also apply to digital uses? How?

V.- TECHNOLOGICAL MEASURES VS. EXCEPTIONS.

The purpose of this section is to evaluate the interaction between exceptions and technological measures i.e., how is copyright balanced against the public interest?

7. Are technological measures protected in your country? To what extent (access control, anti-copy, etc.)?

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- NOT ENACTED YET - AMENDED BY PROPOSAL OF 17 MARCH; NOT YET TRANSLATED ¹⁴⁷

Act relating to an amendment to the 1912 Copyright Act, the Neighbouring Rights Act and the Database Act implementing Directive no. 2001/29/EC of the European Parliament and the Council of the European Union of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ EC L 167) (Act relating to the implementation of EC Directive on copyright and related rights in the information society)

W

After Article 29 two articles shall be inserted that read as follows:

Article 29a

1. For the purposes of this article, the term “technological measures” shall mean any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts in respect of works, which are not authorized by the rightholder of any copyright. Technological measures shall be deemed “effective” where the use of a protected work is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism, which achieves the protection objective.

2. Any person who circumvents any effective technological measures shall act unlawfully.

3. Any person who provides services, or manufactures, imports, distributes, sell, rents, advertises or possesses devices, products or components for commercial purposes which

a) are offered, promoted or marketed for the purpose of circumvention of any effective technological measures, or

b) have only a limited commercially significant purpose or use other than to circumvent the protective effect of effective technological measures, or

c) are primarily designed, produced or adopted for the purpose of enabling or facilitating the circumvention, shall act unlawfully.

4. Rules and regulations may be laid down by order in council obliging the author or his successors to make available to the user of a literary, scientific or artistic work for purposes as described in Articles 16, 16b, 16c, 16h, 16n, 17b and 22 of this Act the means of benefiting from that exemption or limitation, to the extent necessary to benefit from that exemption of limitation and where that beneficiary has legal access to the

¹⁴⁷ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Parliamentary documents, Second Chamber, 2002/03, 28482, nr. 6.

protected work concerned. The provision in the preceding sentence shall not apply to works that are made available to users under contractual conditions at a place and time chosen by them individually.

8. How do exceptions relate to technological measures? Has the legislator implemented any specific provision to ensure that exceptions will continue to apply despite the existence of any technological measures implemented by the copyright owners? How has article 6.4 EU Directive (if so) been implemented?

According to article 29a paragraph 4 of the proposed law 'rules and regulations may be laid down by order in council obliging the author or his successors to make available to the user of a literary, scientific or artistic work for the purposes as described in article 16, 16b, 16c, 16h, 16n (...) of this Act the means of benefiting from that exemption or limitation (...)'.¹⁴⁸

According to the Minister of Justice, it is to be expected that the technology will in the future allow the regulation of private copying activities so that there will then be little or no need for a levy system. The Explanatory Memorandum explains that, when the technical protection measures will have replaced the levy regime, the compensation will be deemed included in the price asked for the purchase of the support or for the on-line delivery of protected material. Other calculation methods would also be possible, according to the Minister. The requirement set out in Article 5(2)(b) of the Copyright Directive means that consideration must not only be taken of whether technical protection measures are actually applied, but also of whether these techniques are really available, for whom, and for which type of protected material. If technical protection measures are available in practice, i.e. if they can be used on an economical basis, the levies should not become a bonus for rights holders who make no use of technical protection measures. In such a case, there would be, depending on the state of things, less need for a compensation system as the levy regime. The Minister of Justice believes that the current Proposal is able to take account of the developments in the area. The report of the parliamentary committee did not react on this issue.¹⁴⁸ At this stage, the conclusion of the debate about consumer rights is that the Minister refused to take any preemptive measures to protect consumers. Industry and users should first try to sort it out amongst themselves, no matter how unfair the negotiation position of consumers dealing with multinationals. Further legislation is an "ultimate remedy" that will only be introduced when everything else fails.¹⁴⁹

Other than for the home taping exception, little attention has been given in the proposed law or the Explanatory Memorandum to the interaction between exceptions on copyright and the technological measures.

9. Is there any case law or trade use that balances the interaction of exceptions between technological measures? Is there any agreement (contracts, collective bargaining, etc.) that permits certain categories of users (e.g., libraries, teaching institutions, etc) to circumvent a technological measure in order to benefit from a use covered by an exception?

We are not aware of any case law or trade use that balances the interaction of exceptions between technological measures or of any agreement (contracts, collective bargaining, etc.) that permits certain categories of users (e.g., libraries, teaching institutions, etc) to circumvent a technological measure in order to benefit from a use covered by an exception.

VI.- Please add any further comments and information you deem interesting for this project.

None

¹⁴⁸ Proposal for an Amendment to the Copyright Act 1912, the Neighbouring Rights Act, and the Database Act with respect to the implementation of the European Copyright Directive, Report issued on 26 November 2002, Parliamentary documents, Second Chamber, Year 2002-2003, No. 4.

¹⁴⁹ Brown 2003, p. 108.

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**Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project**

NEW ZEALAND

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Introduction

The New Zealand Copyright Act 1994 is based on the Copyright, Designs and Patents Act 1988 (UK), but there are important differences. English case law is influential, but there is no obligation on the New Zealand courts to follow it in interpreting the New Zealand legislation.

The New Zealand Copyright Act has detailed limitation and exception provisions in Part 3 of the Act which is headed "Act Permitted in Relation to Copyright Works". The acts listed in the exceptions do not constitute infringements of copyright. The exceptions that relate to Digital Distance Education have rarely been interpreted in the courts. As a result there is scope for a number of possible interpretations, and uncertainty about how a court would rule. I have set out the relevant statutory provisions, with my comments. Where case law exists I have made reference to it in answering the questions. However there remain areas of considerable uncertainty about how a New Zealand court would answer some of your questions: we will only know the answers when cases arise in the courts. The leading case is *Copyright Licensing Ltd v University of Auckland & Ors*¹⁵⁰. The case arose from a dispute between the parties over the terms of copyright licenses. The parties co-operated in putting questions to the Court interpreting provisions of the Copyright Act 1994.

The New Zealand Ministry of Economic Development is responsible for administration of the Copyright Act 1994. The Ministry is currently involved in a review of Digital Technology and the Copyright Act 1994.¹⁵¹ This process involves public consultation and policy development, and the Ministry released a Position Paper in December 2002, on which it is inviting submissions.¹⁵² In answering the questionnaire I have referred to the Position Paper, where relevant.

All statutory references and reproduced sections are from the Copyright Act 1994 (NZ). The complete statute is available at <www.legislation.govt.nz>.

I.- EXCEPTION FOR TEACHING PURPOSES.

0.- Identify any specific exception that allows for the use of copyrighted works for teaching purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

¹⁵⁰ [2002] 3 NZLR 76, (2002) 53 IPR 618, (2002) 7 NZBLC 103,585 (HC)

¹⁵¹ http://www.med.govt.nz/buslt/int_prop/digital/index.html

¹⁵² http://www.med.govt.nz/buslt/int_prop/digital/index.html

Copyright Act 1994 (NZ) ss 44-49

44. Copying for educational purposes of literary, dramatic, musical, or artistic works or typographical arrangements

(1) Copyright in a literary, dramatic, musical, or artistic work or the typographical arrangement of a published edition is not infringed by the copying of the whole or part of the work or edition if -

(a) The copying is done by means of a reprographic process or by any other means; and

(b) The copying is done -

(i) In the course of preparation for instruction; or

(ii) For use in the course of instruction; or

(iii) In the course of instruction; and

(c) The copying is done by or on behalf of the person who is to give, or who is giving, a lesson at an educational establishment; and

(d) No more than one copy of the whole or part of the work or edition is made on any one occasion.

(2) Copyright in a literary, dramatic, musical or artistic work or the typographical arrangement of a published edition is not infringed by the copying of the whole or part of the work or edition if-

(a) The copying is not done by means of a reprographic process; and

(b) The copying is done-

(i) In the course of preparation for instruction; or

(ii) For use in the course of instruction; or

(iii) In the course of instruction; or

(iv) After the course of instruction; and

(c) The copying is done by a person who is to give, is giving, or has given the lesson or by a person who is to receive, is receiving, or has received the lesson; and

(d) One or more copies of the whole or part of the work or edition is or are made on any one occasion.

(3) Copyright in a literary, dramatic, or musical work or the typographical arrangement of a published edition is not infringed by the copying of part of the work or edition if -

(a) The copying is done by means of a reprographic process or by any other means; and

(b) The copying is done for an educational purpose; and

(c) The copying is done by or on behalf of an educational establishment; and

(d) One or more copies of part of the work or edition is or are made on any one occasion; and

(e) No charge is made for the supply of a copy to any student or other person who is to receive, is receiving, or has received a lesson; and

(f) Subject to subsection (4) of this section, either, -

(i) In the period beginning with the commencement of this Act and ending with the close of the 31st day of December 1997, the copying is of no more than the greater of 5 percent of the work or edition or 5 pages of the work or edition; or

(ii) On and after the 1st day of January 1998, the copying is of no more than the greater of 3 percent of the work or edition or 3 pages of the work or edition.

(4) If the effect of subparagraph (i) or subparagraph (ii) of subsection (3)(f) of this section would be that the whole of a work or edition is copied, those subparagraphs shall not apply and the copying that is permitted under subsection (3) of this section shall be of no more than 50 percent of the whole work or edition.

(5) Copyright in an artistic work is not infringed by the copying, by means of a reprographic process or by any other means, of the whole or a part of that work if the artistic work is included within the part of any work or edition copied under subsection (3) of this section.

(6) Where any part of a work or edition is copied under subsection (3) of this section by or on behalf of an educational establishment, -

- (a) That part of that work or edition may not, within 14 days of that copying, be copied again under that subsection by or on behalf of that educational establishment; and
- (b) No other part of that work or edition may, within 14 days of that copying, be copied under that subsection by or on behalf of that educational establishment.

(7) In subsections (3) to (6) of this section, -

published edition or **edition**, in relation to a collective work, means that part of the edition containing each work or part of a work:

work, in relation to a collective work, means each of the works or parts of works in the collective work.

s 2(1) Interpretation

...

“Educational establishment” means-

(a) Any school to which the Education Act 1989 or the Private Schools Conditional Integration Act 1975 applies:

(b) Any-

- (i) Special school; or
- (ii) Special class; or
- (iii) Special clinic; or
- (iv) Special service-

established under section 98(1) of the Education Act 1964:

(c) Any special institution within the meaning of section 92(1) of the Education Act 1989:

(d) Any early childhood centre within the meaning of section 308(1) of the Education Act 1989:

(e) Any—

- (i) Institution; or
- (ii) Private training establishment; or
- (iii) Government training establishment—

within the meaning of section 159(1) of the Education Act 1989, that is not conducted for profit:

(f) Any body, or class of body, that is not conducted for profit and that is approved by the Minister of Education as an educational establishment for the purposes of this Act by a notice published in the Gazette:

...

“Instruction” means

(a) Giving a lesson, either in person or by correspondence, to a student or a group of students, at an educational establishment or elsewhere; or

(b) Receiving a lesson, either in person or by correspondence and either alone or in a group of students, at an educational establishment or elsewhere:

1.- Exclusive Rights covered by the exception.

Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered?

The exceptions generally cover copying. Copying is defined in the Copyright Act 1994 s 2(1):

“Copying”-

- (a) Means, in relation to any description of work, reproducing or recording the work in any material form; and
- (b) Includes, in relation to a literary, dramatic, musical, or artistic work, storing the work in any medium by any means; and
- (c) Includes, in relation to an artistic work, the making of a copy in 3 dimensions of a two-dimensional work and the making of a copy in 2 dimensions of a three-dimensional work; and
- (d) Includes, in relation to a film, television broadcast, or cable programme, the making of a photograph of the whole or any substantial part of any image forming part of the film, broadcast, or cable programme;-

and “copy” and “copies” have corresponding meanings.

Comments

The definition is broad. The phrase “storing the work in any medium by any means” covers digital reproductions.

Section 44 applies copying for educational purposes of literary, dramatic, musical or artistic works.

Section 44(1) only permits the making, by the person giving the lesson, of one copy, for instruction purposes.

Section 44(2) permits multiple copies for instruction if the copying is not done by means of a reprographic process, it would not apply to digitization.

Section 44(3) permits copying of parts of works or editions comprising no more than the greater of 3% or 3 pages of the work or edition, to a maximum of 50% of the whole work or edition. No part of the work may be copied under s 44(3) within 14 days of that copying. No charge may be made for the copy. The copying contemplated under s 44(3) is for an educational purpose, as distinct from the purposes of instruction as in s 44(1) and (2).

The leading case interpreting s 44 is *Copyright Licensing Ltd v University of Auckland & Ors*¹⁵³. In that case the High Court of New Zealand (Salmon J) held that under s 44(1) it was not permissible for the university defendants:¹⁵⁴

to make by reprographic process a master copy of the whole or part of a work or edition and then:

- (a) To provide an individual reprographic copy or individual reprographic copies of it to students (enrolled in a course of instruction); or
- (b) To make it available for students (enrolled in a course of instruction) to copy themselves.

The Court further held that¹⁵⁵:

...under s 44(3)(e) a “charge is made for the supply of a copy to any student or other person who is to receive, is receiving, or has received a lesson” in each of the following circumstances:

- (a) Where the defendants charge the student a separately identified sum in addition to or as part of course/tuition fees covering (in whole or in part) reprographic copying;
- (b) Where the defendants charge the student a specific fee per course pack; or
- (c) Where the defendants recover (in whole or in part) the cost of the reprographic copying as part of the student's overall course fee.

¹⁵³ [2002] 3 NZLR 76, (2002) 53 IPR 618, (2002) 7 NZBLC 103,585 (HC)

¹⁵⁴ [67]-[74]

¹⁵⁵ [76]-[82]

In relation to compilations, the Judge held that the reference to “work” in s 44(3)(f)(ii) referred to each of the works in a compilation, and not to the compilation as a whole.

Section 44 applies to literary, dramatic, musical or artistic works. Section 45 applies to films and sound recordings and s 46 applies to anthologies for educational use. Section 49 provides that performing, playing or showing literary, dramatic or musical works to students or staff of an educational establishment is not “in public” for the purposes of s 32. It is arguable that this exemption could be interpreted to apply to online performances, but there is no New Zealand case law on this point.

Can a work be digitized for use as part of the instruction? Would digitization qualify as a reproduction or also as a transformation?

Digitization would qualify as “copying” (see above).

The statute does not explicitly state whether digital copies can be made for instruction. However it seems likely that this is possible, but only within the strict limits of s 44(1), (3) and (4). It would be an infringement to upload a whole work for transmission and downloading.

How many copies can be made? Is it somehow limited, i.e., to the number of students in a class?

Multiple copies can be made for educational purposes under s 44(3) and (4), but only of very small parts of a work, and provided no charge is made. (see above).

Does it cover communication to the public? Does it cover the storage of the copyrighted work on the server, thus allowing asynchronous teaching?

The provisions apply principally to copying. Section 47 applies to performing, playing or showing of works.

How does your system qualify a digital transmission/delivery of a work? Have the WCT or WPPT had any effect on this matter? Has the EU Directive, if applicable, had any effect on this matter?

New Zealand is not a party to the WCT or WPPT, although it is considering becoming a party.¹⁵⁶

The exceptions allow copying which will cover all of these acts. However since this would involve making multiple copies users would generally have to rely on s 44(3) and (4) which allow copying of only small parts of works. Under these provisions the copying must be done “by or on behalf of an educational establishment”.

The exceptions principally apply to copying by or on behalf of teachers, the exception being films and sound recordings in s 45 where students may make copies. Section 45 allows for students to copy a sound recording for instruction where the lesson relates to the learning of a language or is conducted by correspondence, provided that no charge is made.

**2.- Eligibility under the exception.
Eligibility as to institutions:**

¹⁵⁶ Ministry of Economic Development: Manatu Ohanga, Digital Technology and the Copyright Act 1994: Position Paper December 2002. < http://www.med.govt.nz/buslt/int_prop/digital/position/index.html > Part Nine.

Which institutions may benefit from a copyright exception for teaching purposes? Educational institutions? Schools? Universities? etc. How are those terms defined? How do they apply to the Internet?

The exceptions apply to “educational establishments”, defined very broadly in s 2(1) to include schools, universities and other education providers. The definition would cover all recognised and accredited education providers in New Zealand, including providers of distance education. The definition is as follows:

Copyright Act 1994 s 2(1) Interpretation

...

“Educational establishment” means-

(a) Any school to which the Education Act 1989 or the Private Schools Conditional Integration Act 1975 applies:

(b) Any-

(i) Special school; or

(ii) Special class; or

(iii) Special clinic; or

(iv) Special service-

established under section 98(1) of the Education Act 1964:

(c) Any special institution within the meaning of section 92(1) of the Education Act 1989:

(d) Any early childhood centre within the meaning of section 308(1) of the Education Act 1989:

(e) Any—

(i) Institution; or

(ii) Private training establishment; or

(iii) Government training establishment—

within the meaning of section 159(1) of the Education Act 1989, that is not conducted for profit:

(f) Any body, or class of body, that is not conducted for profit and that is approved by the Minister of Education as an educational establishment for the purposes of this Act by a notice published in the Gazette:

May libraries benefit from such an exception, and therefore provide copies (and also distribute? communicate to the public?) of works for teaching purposes? (Please note that this last issue may have a connection with any exception provided for in favor of libraries. If libraries cannot benefit from a specific teaching exception, the scope of the “remaining” library exceptions becomes paramount to cover the use of works for teaching purposes.)

Eligibility as to individuals:

May only teachers benefit from the exception or also students (and guest-lecturers, etc)?

Under s44(1) the copying must be by the person giving the lesson. Under s 44(3) the copying must be done “by or on behalf of an educational establishment”, so that guest lecturers will qualify. Students are not likely to qualify unless they are copying on behalf of the educational establishment.

If students cannot benefit from that exception, may a general private use/private copying exception (or fair use) “fill that gap” (as it seems to be the case in the analog world)? (Please note that this last issue may be considered under a separate section III dealing with the private use/ copying exception)

Student copying is generally covered by s 43.

Copyright Act 1994 s 43

43. Research or private study

- (1) Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work.
- (2) For the avoidance of doubt, it is hereby declared that fair dealing with a published edition for the purposes of research or private study does not infringe copyright in either the typographical arrangement of the edition or any literary, dramatic, musical, or artistic work or part of a work in the edition.
- (3) In determining, for the purposes of subsection (1) of this section, whether copying, by means of a reprographic process or by any other means, constitutes fair dealing for the purposes of research or private study, a court shall have regard to -
- (a) The purpose of the copying; and
 - (b) The nature of the work copied; and
 - (c) Whether the work could have been obtained within a reasonable time at an ordinary commercial price; and
 - (d) The effect of the copying on the potential market for, or value of, the work; and
 - (e) Where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work.
- (4) Nothing in this section authorises the making of more than one copy of the same work, or the same part of a work, on any one occasion.

Comments

In *Copyright Licensing Ltd v University of Auckland & Ors*¹⁵⁷, Salmon J held that it was not fair dealing with a work for the purposes of research or private study under s 43, for universities (or their authorised employees or agents):

to make by reprographic process and retain a master copy of the whole of that work or part of that work and to then:

- (a) Make it available for students (enrolled in a particular course of instruction) to copy themselves; or
- (b) Provide an individual reprographic copy or individual reprographic copies of it to students (enrolled in a course of instruction).

The Judge reasoned that in that situation the copying would not be for the purposes of research or private study, but for the purposes of making it available to students to copy themselves or to make further copies to provide to students.

Some teaching-related exceptions refer to or imply physical concepts related to face-to-face teaching activities—concepts like classroom, school premises, etc. If so, does this specific language limit or curtail the applicability of the exception in the digital world?

This language does not appear in s 44.

Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

Nothing not previously discussed.

3.- Purposes. What is “teaching purposes”?

What constitutes “teaching purposes”? (Please, substitute by the specific language used in your national exception; for instance, the EU Directive art.5.3(a) what is “illustration for teaching”). Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

¹⁵⁷ [2002] 3 NZLR 76, (2002) 53 IPR 618, (2002) 7 NZBLC 103,585 (HC), [51]-[54]

As previously discussed, s44 distinguishes between educational purposes and "instruction". "Educational purposes" is not defined in the Copyright Act. "Instruction" is defined as follows in s 2(1):

"Instruction" means

- (a) Giving a lesson, either in person or by correspondence, to a student or a group of students, at an educational establishment or elsewhere; or*
- (b) Receiving a lesson, either in person or by correspondence and either alone or in a group of students, at an educational establishment or elsewhere:*

Does it cover the making of a teaching compilation or anthology? Would it cover the asynchronous posting of teaching material on the Internet? And if so, within which limits? Is there a specific exception (or licensing system) covering the making of teaching compilations? Would it apply to digital teaching compilations?

New Zealand universities currently have licenses from Copyright Licensing Ltd which cover copying, such as for compilations, which is not otherwise permitted under the Copyright Act 1994.

Is the exception subject to any technological measures to ensure that only students will have access to the works used for teaching?

There is nothing express in the statute on this point. However the provisions would not cover making the material available to the public.

4.- Extent and Nature of Works.

Which works (and to what extent) may be subject to the exception?

Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

May works be used for teaching purposes in whole or only fragments?

Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

How does the exception interact with the possible existence of a license which specifically prohibits any further uses (other than those licensed)?

All of these questions are covered above.

5.- Remuneration.

Is the teaching use free or subject to remuneration?

Free.

II. QUOTATIONS

0.- Identify any exception that allows for the use of copyrighted works for purposes of quotation, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Generally a quotation would not constitute an infringement if it did not involve copying of a substantial part of the work. (ss 29, 30). If a substantial part was taken this could constitute an infringement.

The statutory exemption which might potentially apply is s 42.

Copyright Act 1994 s 42

42. Criticism, review, and news reporting

(1) *Fair dealing with a work for the purposes of criticism or review, of that or another work or of a performance of a work, does not infringe copyright in the work if such fair dealing is accompanied by a sufficient acknowledgement.*

(2) *Fair dealing with a work for the purposes of reporting current events by means of a sound recording, film, broadcast, or cable programme does not infringe copyright in the work.*

(3) *Fair dealing with a work (other than a photograph) for the purposes of reporting current events by any means other than those referred to in subsection (2) of this section does not infringe copyright in the work if such fair dealing is accompanied by a sufficient acknowledgement.*

Comments

Section 42 was interpreted in *Copyright Licensing Ltd v University of Auckland & Ors*¹⁵⁸. The Judge said:¹⁵⁹

In Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs* (3rd ed, 2000) at para 20.16, three factors are identified in assessing whether a dealing is a fair dealing:

1. Whether the alleged fair dealing is commercially competing with the copyright proprietor's exploitation of the copyright work;
2. Whether the work has already been published; and
3. The amount and importance of the work that has been taken.

The Judge observed that the question of whether there has been a fair dealing with a work is one to be determined on the facts of a particular case, and that a critical element is the purpose of the otherwise infringing activity. The purpose must be that of the person doing the copying. The copying must be done by, or for, the person undertaking the criticism or review.¹⁶⁰ The Judge emphasised "the need to consider the real purpose of the copying in the context of the fair dealing exception. *Bona fides* must be of crucial importance".¹⁶¹ The Judge accepted that a university lecturer may wish to copy a work to criticise or review it as part of a lecture. He did not accept that it would be possible for a lecturer to genuinely copy for the purposes of review or criticism on behalf of a student unless that student had specifically requested the copy. He was asked:¹⁶²

Under s 42(1) is it fair dealing with a work for the purposes of criticism or review for the defendants (or their authorised employees or agents) to make by reprographic process multiple copies of the whole of the work

¹⁵⁸ [2002] 3 NZLR 76, (2002) 53 IPR 618, (2002) 7 NZBLC 103,585 (HC)

¹⁵⁹ [27]

¹⁶⁰ [27]-[35]

¹⁶¹ [35]

¹⁶² [26]-[27]

or part of the work for inclusion in course packs, compilations or class sets provided to students (enrolled in a course of instruction)?

The Judge said that the answer would “depend upon whether the copying has been undertaken by or on behalf of a person for the purposes of criticism or review of the work copied and is included by that person in the course pack, compilation or class set for those purposes”.¹⁶³

The Court also considered s 42(3), fair dealing for the purposes of reporting current events. The Judge held that once again the purpose of the person doing the copying was important. He said:

It is difficult to think of any circumstances where the reporting of current events would occur other than in some section of the news media. Such an activity certainly does not spring to mind as being a function of a university. Again, this being one of the fair dealing provisions, genuineness is an important consideration.

The Judge held that s 42 would not permit the making of a master copy of a work from which copies could be made by staff or students, because the making of the master copy would not be for the purposes specified in the section.

Section 42 will not therefore permit copying a printed work into digital form for uploading for the purposes of DDE.

1.- Exclusive Rights covered by the exception.

Reproduction? Distribution? Communication to the public? Transformation?

Does it cover quotations made in digital formats (i.e., digital copies) and over the Internet (i.e., digital transmissions)?

Section 42 potentially covers a range of exclusive rights.

2.- Eligibility under the exception.

Who may benefit from the quotation exception? Is there any language that may allow or prevent its application to quotations made as part of the teaching over the Internet?

See above.

3.- Purposes.

What constitutes a quotation? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

Is there any reference to any specific purposes (i.e., teaching, research, etc) the quotation must be made for, in order to qualify under the exception?

See above

4.- Extent and Nature of Works.

Which works (and to what extent) may be subject to the exception? Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

Are all kind of works covered? Are any specific materials excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

May works be quoted in whole or only fragments?

¹⁶³ [38]

Does it make any difference how the work has been obtained?

Section 42 covers all works. The principal limitation is that there must be "fair dealing" for the relevant purpose.

5.- Remuneration.

Are quotations free or subject to remuneration?

Free

III. PRIVATE USE / PRIVATE COPYING EXCEPTION.

The purpose of this section is to address the importance of the private use/ private copying exception as far as teaching uses. To what extent may such an exception allow students (and teachers) to use works for teaching purposes through the Internet? This exception is specially important to the extent that downloads made by students do not qualify under the teaching exception. Please note that this last issue may be considered under a separate section dealing with the private use/ copying exception.

0.- Identify any exception that allows for the use of copyrighted works for private purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Copyright Act 1994 s 43

43. Research or private study

(1) *Fair dealing with a work for the purposes of research or private study does not infringe copyright in the work.*

(2) *For the avoidance of doubt, it is hereby declared that fair dealing with a published edition for the purposes of research or private study does not infringe copyright in either the typographical arrangement of the edition or any literary, dramatic, musical, or artistic work or part of a work in the edition.*

(3) *In determining, for the purposes of subsection (1) of this section, whether copying, by means of a reprographic process or by any other means, constitutes fair dealing for the purposes of research or private study, a court shall have regard to -*

(a) The purpose of the copying; and

(b) The nature of the work copied; and

(c) Whether the work could have been obtained within a reasonable time at an ordinary commercial price; and

(d) The effect of the copying on the potential market for, or value of, the work; and

(e) Where part of a work is copied, the amount and substantiality of the part copied taken in relation to the whole work.

(4) *Nothing in this section authorises the making of more than one copy of the same work, or the same part of a work, on any one occasion.*

Comments

Section 43 was also interpreted in *Copyright Licensing Ltd v University of Auckland & Ors*¹⁶⁴. The Judge's comments in relation to fair dealing under s 42 are also relevant to s 43. He said:

In Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs* (3rd ed, 2000) at para 20.16, three factors are identified in assessing whether a dealing is a fair dealing:

1. Whether the alleged fair dealing is commercially competing with the copyright proprietor's exploitation of the copyright work;

2. Whether the work has already been published; and

3. The amount and importance of the work that has been taken.

The Judge observed that the question of whether there has been a fair dealing with a work is one to be determined on the facts of a particular case, and that a critical element is the purpose of the otherwise infringing activity. The purpose must be that of the person doing the copying.¹⁶⁵

¹⁶⁴ [2002] 3 NZLR 76, (2002) 53 IPR 618, (2002) 7 NZBLC 103,585 (HC)

¹⁶⁵ [27]-[35]

The Judge considered the meaning of "research or private study", accepting the definition in *Television New Zealand Ltd v Newsmonitor Services Ltd*¹⁶⁶:

Research or private study

What is meant by the expression 'research or private study'? The defendants, by means of the *Oxford Dictionary*, defined research as the searching into a matter or subject or the investigation or close study of it. That definition seems appropriate. 'Research' and 'study' are obviously connected with one another. Research involves the study of things, including written materials or those captured in electronic form. In *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 298 Beaumont J of the Federal Court of Australia described it as "a diligent and systematic enquiry or investigation into a subject in order to discover facts or principles". It is, I think, significant that the word 'private' qualifies only the word 'study'. 'Private study' connotes a form of study which is personal to the person undertaking it.

Salmon J held that it was not fair dealing with a work for the purposes of research or private study under s 43, for universities (or their authorised employees or agents)¹⁶⁷

to make by reprographic process and retain a master copy of the whole of that work or part of that work and to then:

- (a) Make it available for students (enrolled in a particular course of instruction) to copy themselves; or
- (b) Provide an individual reprographic copy or individual reprographic copies of it to students (enrolled in a course of instruction).

The Judge reasoned that in that situation the copying would not be for the purposes of research or private study, but for the purposes of making it available to students to copy themselves or to make further copies to provide to students.

He did not address the question of students copying in this situation.

1.- Exclusive Rights covered by the exception.

Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered? How many copies can be made? Is it somehow restricted, i.e., to non-collective use?

The exception applies to copying, including digital copying under the s 2(1) definition of copying. It is limited to single copies on any one occasion.

It is arguable that it is broader than copying, although other rights would be difficult to accommodate as research or private study.

2.- Eligibility.

Who may benefit from the private use/copying exception? Is there any specific reference to for-profit or not-for-profit uses, public or private, non-collective uses?

No specific reference, but the nature of the copying is a factor.

¹⁶⁶ [1994] 2 NZLR 91 at pp 105 - 106

¹⁶⁷ [51]-[54]

3.- Purposes. What is “private”?

What is the definition of “private use/private copying” in your country? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

Research or private study

What is meant by the expression 'research or private study'? The defendants, by means of the *Oxford Dictionary*, defined research as the searching into a matter or subject or the investigation or close study of it. That definition seems appropriate. 'Research' and 'study' are obviously connected with one another. Research involves the study of things, including written materials or those captured in electronic form. In *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, 298 Beaumont J of the Federal Court of Australia described it as ' "a diligent and systematic enquiry or investigation into a subject in order to discover facts or principles" '. It is, I think, significant that the word 'private' qualifies only the word 'study'. 'Private study' connotes a form of study which is personal to the person undertaking it. ¹⁶⁸

How does this exception translate on the Internet? Would students' downloads of material transmitted for teaching purposes over the Internet qualify as private?

There is no court decision on this point, but it seems likely that a court would say yes.

4.- Extent and Nature of Works.

Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

The nature of the work copied is a factor to which the court should have regard.

All kind of works are covered

May works be used for private purposes in whole or only fragments?

Either whole or parts, provided the other requirements are met.

Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

No

How does the exception interact with the possible existence of a license which specifically prohibits any further uses?

5.- Remuneration.

Is this exception free or subject to remuneration?

Free

¹⁶⁸ *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91 at pp 105 – 106. Definition accepted by the High Court in *Copyright Licensing Ltd v University of Auckland & Ors* 2002] 3 NZLR 76, (2002) 53 IPR 618, (2002) 7 NZBLC 103,585 (HC)

IV.- LIBRARY EXCEPTIONS.

The main purpose of this section is to address the interaction between library privileges and teaching uses: to what extent may library exceptions assist teaching activities conducted through the Internet (either exempted or licensed teaching uses). Please feel free to provide any information concerning the general scope of such exceptions, even though not especially helpful as far as teaching purposes.

0.- Identify any exception that allows for the use of copyrighted works by libraries, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Copyright Act 1994 ss 51, 52, 53, 56

51. Copying by librarians of parts of published works

(1) *The librarian of a prescribed library may, if the conditions contained in subsection (2) of this section are complied with, make from a published edition (other than a published edition that is an article in a periodical), for supply to any person, a copy of a reasonable proportion of any literary, dramatic, or musical work, and may include in the copy any artistic work that appears within the proportion copied, without infringing copyright in the literary, dramatic, musical, or artistic work or the typographical arrangement of the published edition.*

(2) *The conditions referred to in subsection (1) of this section are -*

(a) That no person is supplied on the same occasion with more than one copy of the same material; and

(b) That, where any person to whom a copy is supplied is required to pay for the copy, the payment required is no higher than a sum consisting of the total of the cost of production of the copy and a reasonable contribution to the general expenses of the library.

(3) *Where any person is supplied with, or otherwise comes into possession of, a copy made in accordance with this section, that person may use the copy only for the purposes of research or private study.*

(4) *This section does not apply to a literary work that is a computer program.*

52. Copying by librarians of articles in periodicals

(1) *The librarian of a prescribed library may, if the conditions contained in subsection (2) of this section are complied with, make for supply to any person a copy of -*

(a) A literary, dramatic, or musical work, and any artistic work included in that work, that is contained in an article in a periodical; or

(b) A published edition that is an article in a periodical, - without infringing copyright in the literary, dramatic, musical, or artistic work or the typographical arrangement of the published edition.

(2) *The conditions referred to in subsection (1) of this section are -*

(a) That no person is supplied on the same occasion with more than one copy of the same article; and

(b) That no person is supplied on the same occasion with copies of more than one article contained in the same issue of a periodical, unless the copies supplied all relate to the same subject-matter; and

(c) That, where any person to whom a copy is supplied is required to pay for the copy, the payment required is no higher than a sum consisting of the total of the cost of production of the copy and a reasonable contribution to the general expenses of the library.

(3) *Where any person is supplied with, or otherwise comes into possession of, a copy made in accordance with this section, that person may use the copy only for the purposes of research or private study.*

53. Copying by librarians for users of other libraries-

- (1) The librarian of a prescribed library may, if the condition contained in subsection (2) of this section is complied with, make from a published edition, for supply to another prescribed library, a copy of,-
- (a) Subject to paragraph (b) of this subsection, a reasonable proportion of any literary, dramatic, or musical work (and the librarian may include in the copy any artistic work that appears within the proportion copied):
 - (b) In relation to a literary, dramatic, or musical work that is contained in an article in a periodical,—
 - (i) The whole article and any artistic work included in that article; and
 - (ii) If there is any other article in the same issue of the periodical relating to the same subject-matter as the first article copied, the whole of that other article and any artistic work included in that article,-without infringing copyright in the literary, dramatic, musical, or artistic work or the typographical arrangement of the published edition.
- (2) The condition referred to in subsection (1) of this section is that a person has requested the library to which the copy is being supplied to supply him or her with the copy for the purposes of research or private study.
- (3) Where any person is supplied with, or otherwise comes into possession of, a copy made in accordance with this section, that person may use the copy only for the purposes of research or private study
- (4) This section does not apply to a literary work that is a computer program

56. Copying by librarians of archivists of certain unpublished works-

- (1) The librarian of a prescribed library or the archivist of an archive may, if the conditions contained in subsection (3) of this section are complied with, copy for supply to any person a copy of an unpublished work in the library or archive, without infringing copyright in that work.
- (2) This section does not apply if the copyright owner has prohibited copying of the work and at the time the copy is made the librarian or archivist making it is, or ought to be, aware of that fact.
- (3) The conditions referred to in subsection (1) of this section are-
- (a) That no person is supplied on the same occasion with more than one copy of the same work; and
 - (b) That, where any person to whom a copy is supplied is required to pay for the copy, the payment required is no higher than a sum consisting of the total of the cost of production of the copy and a reasonable contribution to the general expenses of the library or archive.
- (4) Where any person is supplied with, or otherwise comes into possession of, a copy made in accordance with this section, that person may use the copy only for the purposes of research or private study
- (5) The provisions of this section do not apply to the sound archive maintained by Radio New Zealand Limited, the film archive maintained by Television New Zealand Limited, or the film archive maintained by the New Zealand Film Archive Incorporate

There are additional provisions relating to libraries that are less relevant to DDE:

s 54 allows copying by librarians for collections of other libraries

s 55 allows copying by librarians or archivists to replace copies of works

1.- Exclusive rights covered by the exception.

Reproduction? Distribution? Communication to the public? Transformation? Does it cover digital copies? Does it cover digital transmissions of works?

Would it be permissible for a library to make digital copies of the works in its catalogue, and post them on its web page, or transmit them to their teachers and/or students (for teaching purposes), or even for inter-library loans?

The provisions were interpreted quite narrowly in *Copyright Licensing Ltd v University of Auckland & Ors*¹⁶⁹.

In relation to s 51 the High Court was asked:

Under s 51, are librarians of university libraries permitted to make from a published edition (other than a published edition that is an article in a periodical), multiple or repeated copies by reprographic process of a reasonable proportion of literary or dramatic works (or artistic works that appear within the proportion copied) for provision to individual students (enrolled in a particular course of instruction) as part of course packs, course compilations or class sets without infringing copyright:

- (a) Where the multiple or repeated copying is undertaken all at the same time; or
- (b) Where the reprographic copying is done each time a student asks for a copy?

The Court held that the answer to part (a) was No. The answer to part (b) was that¹⁷⁰

a copy may be made on successive occasions upon request by different students. The use to be made of the copied material is a matter for the student rather than the librarian. However, if a librarian knew that a student was obtaining a copy for a purpose other than research for private study he would, no doubt be a party to a non-permissible copying.

The Court also held that a student may copy on behalf of a librarian from an original published edition provided the librarian is satisfied that s 51(2) is complied with (request for supply of a copy for the purposes of research and private study). However, a librarian may not make a master copy from which copies can be made, in anticipation of requests.

Section 51 is therefore limited in its application to DDE. A librarian may only supply a copy on request for purposes of research and private study. However, the decision suggests the librarian may not upload a copy onto a website for students to access, as this would constitute making a master copy in anticipation of requests.

In relation to copying of articles in periodicals under s 52, the Court in *Copyright Licensing Ltd v University of Auckland & Ors*. was asked¹⁷¹

Under s 52 are librarians of university libraries permitted to make from a published edition that is an article in a periodical, multiple or repeated copies by reprographic process for provision to individual students as part of course packs, course compilations or class sets without infringing copyright where either:

- (a) Where the multiple or repeated copying is undertaken all at the same time; or
- (b) Where the reprographic copying is done each time a person asks for a copy?

The Court held that the answer to part (a) was No. The answer to part (b) was that “a copy may be made on successive occasions upon request by different students. The use to be made of the copied material is a matter for the student rather than the librarian. However, if a librarian knew that a student was obtaining a copy for a purpose other than research for private study he would, no doubt be a party to a non-permissible copying.”

¹⁶⁹ [2002] 3 NZLR 76, (2002) 53 IPR 618, (2002) 7 NZBLC 103,585 (HC)

¹⁷⁰ [104]

¹⁷¹ [2002] 3 NZLR 76, (2002) 53 IPR 618, (2002) 7 NZBLC 103,585 (HC), [116]

2.- Eligibility

Which libraries may benefit from the exception? Only public libraries? Non-for-profit libraries? What about on-line libraries?

The provisions apply to prescribed libraries, defined in s 50 as follows:

Copyright Act 1994 s 50

“Prescribed library” means-

- (a) The National Library; or*
- (b) The Parliamentary Library; or*
- (c) Every law library provided and maintained pursuant to section 26(2) of the Law Practitioners Act 1982; or*
- (d) A library maintained by an educational establishment, government department, or local authority; or*
- (e) A library of any other class of library prescribed by regulations made under this Act, not being a library conducted for profit.*

Comments

The definition covers all public libraries, all government libraries, all libraries maintained by educational institutions, and potentially all non-profit libraries. There is no provision for on-line libraries unless they come under the above categories. It is likely that a digital on-line library used for DDE would be covered by either “library maintained by an educational establishment” or qualify as a non-profit, in which case it could seek to be prescribed by regulation under s 50(e).

3.- Purposes.

Conservation, lending, studying, research, teaching purposes, etc.?

Could the library supply material to be used for teaching purposes?

As above. Generally research and private study.

4.- Extent and Nature of works.

Section 51 applies to published works.

Section 52 applies to articles in periodicals.

Section 56 applies to unpublished works.

5.- Remuneration.

Is this exception free or subject to remuneration?

Free

V.- TECHNOLOGICAL MEASURES VS. EXCEPTIONS.

The purpose of this section is to evaluate the interaction between exceptions and technological measures i.e., how is copyright balanced against the public interest?

Are technological measures protected in your country? To what extent (access control, anti-copy, etc.)?

Section 226 of the Copyright Act 1994 provides some limited protection for technological protection measures.

Copyright Act 1994 s 226

226. Devices designed to circumvent copy protection

(1) Where copies of a copyright work are issued to the public, by or with the licence of the copyright owner, in an electronic form that is copy-protected,-

(a) The person issuing the copies to the public has the same rights against a person specified in subsection (2) of this section as a copyright owner has in respect of an infringement of copyright; and

(b) The person issuing the copies to the public has the same rights under section 122 or section 132 of this Act in relation to any device or means (of the kind referred to in subsection (2)(a) of this section) that a person has in his or her possession, custody, or control with the intention that it should be used to make infringing copies of copyright works, as a copyright owner has in relation to an infringing copy

(2) The person referred to in subsection (1) of this section is a person who—

(a) Makes, imports, sells, lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, any device or means specifically designed or adapted to circumvent the form of copy-protection employed; or

(b) Publishes information intended to enable or assist persons to circumvent that form of copy-

knowing or having reason to believe that the devices, means, or information will be used to make infringing copies.

(3) References in this section to copy-protection include any device or means intended to prevent or restrict copying of a work or to impair the quality of copies made.

Comments

The provision protects copy-protection measures rather than access control. It applies to devices or means “specifically designed or adapted” to circumvent copy-protection.

The provision provides for civil remedies only, and the Ministry of Economic Development has recommended against additional criminal offence provisions.¹⁷²

It is possible that courts will interpret s 226 to extend to access control as in the United Kingdom where the equivalent provision was interpreted to apply to DVD regional zone protection technology.¹⁷³

¹⁷² Ministry of Economic Development: Manatu Ohanga, Digital Technology and the Copyright Act 1994: Position Paper December 2002. < http://www.med.govt.nz/buslit/int_prop/digital/position/index.html >.26.

¹⁷³ *Sony Computer Entertainment v Paul Owen and Others* [2002] EWHC 45 (CH)

The Ministry of Economic Development has recommended against legislative protection controlling access.¹⁷⁴ The Ministry has also recommended against creating an action against the actual use of a circumvention device or means, as opposed to provision of devices.¹⁷⁵

How do exceptions relate to technological measures? Has the legislator implemented any specific provision to ensure that exceptions will continue to apply despite the existence of any technological measures implemented by the copyright owners? How has art.6.4 EU Directive (if so) been implemented?

The Ministry of Economic Development is currently receiving submissions on how the means of circumvention might be provided to allow the exercise of permitted acts.¹⁷⁶ The Ministry is considering two possible solutions, as follows:¹⁷⁷

114. There seem to be two possible solutions to this problem. One option is to provide an exception to section 226 to allow the manufacture of circumvention devices (for example, CD or DVD writers, software, personal video recorders) or the provision of information on circumvention to enable users to carry out permitted acts. In Australia the manufacture or supply of a circumvention device or service is allowed if a declaration is received that it is required for a permitted purpose. There are, however, practical difficulties with the application of this approach.

115. Another approach is to put the onus on copyright owners to take steps to ensure that users of copyright material can exercise permitted acts, as is the approach in the European Union, which potentially alleviates the need for an exception in respect of circumvention devices. This might be achieved through applications from users (such as libraries) to the suppliers of digital works.

Is there any case law or trade use that balances the interaction of exceptions between technological measures? Is there any agreement (contracts, collective bargaining, etc.) that permits certain categories of users (e.g., libraries, teaching institutions, etc) to circumvent a technological measure in order to benefit from a use covered by an exception?

I am not aware of any formal collective agreements, there may be informal agreements or arrangements in place, for example between libraries and database producers.

The Ministry of Economic Development has reported that “anecdotal evidence suggests that users have little need to circumvent TPMs to exercise permitted acts, as TPMs are not yet being used to any significant degree.”¹⁷⁸

¹⁷⁴ Ministry of Economic Development: Manatu Ohanga, Digital Technology and the Copyright Act 1994: Position Paper December 2002. < http://www.med.govt.nz/busit/int_prop/digital/position/index.html> 22

¹⁷⁵ Ministry of Economic Development: Manatu Ohanga, Digital Technology and the Copyright Act 1994: Position Paper December 2002. < http://www.med.govt.nz/busit/int_prop/digital/position/index.html> 23

¹⁷⁶ Ministry of Economic Development: Manatu Ohanga, Digital Technology and the Copyright Act 1994: Position Paper December 2002. < http://www.med.govt.nz/busit/int_prop/digital/position/index.html> 24

¹⁷⁷ Ministry of Economic Development: Manatu Ohanga, Digital Technology and the Copyright Act 1994: Position Paper December 2002. < http://www.med.govt.nz/busit/int_prop/digital/position/index.html> 24

¹⁷⁸ Ministry of Economic Development: Manatu Ohanga, Digital Technology and the Copyright Act 1994: Position Paper December 2002. < http://www.med.govt.nz/busit/int_prop/digital/position/index.html> 25

Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project

SPAIN

by Prof. Ramon Casas, Universitat de Barcelona

I.- EXCEPTION FOR TEACHING PURPOSES.

0.- Identify any specific exception that allows for the use of copyrighted works for teaching purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

En la vigente legislación española (Texto Refundido de la Ley de Propiedad Intelectual, LPI) no hay ninguna disposición que, de forma general y coherente, aborde la cuestión de las excepciones destinadas a facilitar el desarrollo de actividades educativas. Los intereses y necesidades de éstas se contemplan, de forma un tanto dispersa, en varias excepciones. Concretamente, tres: cita (art. 32 LPI); utilización de bases de datos “con fines de ilustración de la enseñanza” [arts. 34.2,b) y 135.1,b) LPI]; y préstamo bibliotecario (art. 37.2 LPI). A estas excepciones cabe añadir la de copia privada [art. 31.1.1º LPI y, para bases de datos no electrónicas, arts. 34.2,a) y 135.1,a) LPI], en la medida en que también puede servir para satisfacer intereses educativos. Otras excepciones, como la que afecta a obras “situadas permanentemente en [...] vías públicas” (art. 35.2 LPI), podrían tener asimismo aplicación, aunque de forma ocasional y completamente marginal en el ámbito de la enseñanza.

Sin desdeñar el protagonismo de la cita (vid. infra) y si no fuera por su estrecho ámbito objetivo (sólo bases de datos), en rigor la denominación excepción educativa habría que reservarla para las excepciones o –para simplificar– excepción contemplada en los arts. 34.2,b) y 135.1,b) LPI. Seguidamente se reproducen en la parte que interesa:

- *Art. 34 [Use of Databases by the Lawful User, and Limitations on the Exploitation Rights of the Owner of a Database].- [...] (2) Without prejudice to the provisions of Article 31, authorization from the author of a database that is protected under Article 12 of this Law and has been disclosed is not necessary [...] (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; [...]*
- *Art. 135. [Exceptions to Sui Generis Rights].- (1) The lawful user of a database, regardless of the form in which the database has been made available to the public, may, without authorization from the maker, extract and/or re-utilize a substantial part of the contents thereof in the following cases: [...] (b) extraction for the purposes of illustration for teaching or scientific research, to the extent justified by the non-commercial objective to be achieved and provided that the source is mentioned; [...]*

Las dos disposiciones anteriores se incluyeron en la LPI mediante la Ley 5/1998, destinada a incorporar la Directiva 96/9/CE sobre protección jurídica de bases de datos. Son normas análogas que afectan, respectivamente, a las bases de datos que tienen la condición de obra y a aquellas que, por haber requerido una inversión sustancial, se benefician del llamado derecho sui generis. Pese a su analogía, cabe señalar que el art. 34.2 LPI, a diferencia del art. 135.1 LPI, no exige que el beneficiario sea “lawful user”¹⁷⁹.

Conviene tener presente que esta excepción afecta a la base de datos en sí misma, pero no a las obras protegidas que puedan formar parte de ella. Huelga decir que ello limita extraordinariamente su utilidad. Cuanto se diga en

¹⁷⁹ Esta diferencia está ya presente en la Directiva. Cfr. arts. 6 y 9. **Comprobar y analizar el porqué**

adelante irá pues referido a la propia base o, para ser más precisos, a aquella parte de la misma que merezca protección y que no es otra que la estructura en cuanto expresión formal de un criterio original de selección y/o disposición. No obstante y pese a tan limitado ámbito objetivo, muchos de los comentarios que siguen tienen un alcance más general.

1.- Exclusive Rights covered by the exception.

- o) Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered?.-**

El art. 34.2,b) LPI no se refiere a actos concretos. Habla, en general, de “*utilización*” (*use*). Por tanto, la reproducción está comprendida sin restricción alguna en cuanto a sus modalidades, comprendida la digital. La distinción entre bases electrónicas y no electrónicas sólo es relevante en materia de copia privada. El art. 135.1 LPI sólo contempla la “*extracción*” (*extraction*). En cualquier caso, este término cubre cualquier forma de reproducción (cfr. art. 133.3, b) LPI y art. 7.2,a) Directiva 96/9/CE.

- p) Can a work be digitized for use as part of the instruction? Would digitization qualify as a reproduction or also as a transformation?.-**

Sin olvidar lo dicho en cuanto al ámbito objetivo de esta excepción, la digitalización está comprendida en ella. En principio, la digitalización es sólo –o implica sólo– un acto de reproducción. Sólo en algunos casos (p.e obras plásticas o fotografías) cabría sostener que también hay o puede haber transformación. Interesa señalar, no obstante, que en rigor la transformación exige la creación de una nueva obra de carácter derivado (art. 21 LPI). La simple *modificación* sin nueva creación sólo supone reproducción. Fotocopiar en blanco y negro una imagen en color implica reproducirla y *modificarla*, pero no necesariamente *transformarla*.

- q) How many copies can be made? Is it somehow limited, i.e., to the number of students in a class?**

No se establece limitación cuantitativa alguna, aunque parece razonable que el número guarde relación con el de estudiantes.

- r) Does it cover communication to the public? Does it cover the storage of the copyrighted work on the server, thus allowing asynchronous teaching?**

De nuevo hay que insistir en el hecho de que el art. 34.2,b) LPI, a diferencia de lo que hacen otros, no alude a derechos concretos. Permite la “*utilización*” (*use*), lo que comprende cualquier acto objeto de un derecho de explotación, incluida la comunicación pública y el almacenamiento con fines de puesta a disposición interactiva. El art. 135.1,b) LPI, en cambio, se refiere específicamente a “*extracción*” (*extraction*), término equivalente a “*reproducción*”. No se contempla la “*reutilización*” (*re-utilization*), que ampararía tanto la distribución como la comunicación pública. El caso es, no obstante, dudoso pues cabe preguntarse qué sentido tiene permitir sólo la “*extracción*” cuando (a diferencia de lo que sucede con la hipótesis sub a): “*extracción para fines privados*”), la ilustración de la enseñanza normalmente exigirá distribuir o comunicar.

- s) How does your system qualify a digital transmission/delivery of a work? Have the WCT or WPPT had any effect on this matter? Has the EU Directive, if applicable, had any effect on this matter?**

La legislación española no contiene ningún pronunciamiento al respecto. La doctrina y los tribunales dudaron entre considerarlo como un caso de distribución (art. 19 LPI) o de comunicación pública. Es significativo a este respecto que una de las primeras resoluciones que se enfrentaron al problema lo

rehuyera buscando resolver el litigio en el terreno indiscutible de la reproducción¹⁸⁰. Con todo, poco a poco a ido calando la idea de que la puesta a disposición a través de red constituye un acto de comunicación pública, subsumible en la amplia noción de ésta establecida en el art. 20.1 LPI. A ello han contribuido tanto elementos internos como externos. En cuanto a los primeros, no hay que olvidar que la española era una de las pocas leyes europeas –si no la única– que contemplaba el acceso a través de red como un caso de comunicación pública¹⁸¹. En cuanto a los segundos, los Tratados de OMPI y, sobre todo, la Directiva europea de la Sociedad de la Información han sido decisivos para corroborar esa conclusión. De acuerdo con ella, el Borrador de Anteproyecto de Ley para la Reforma de la LPI (BALPI) elaborado por el Ministerio de Educación, Cultura y Deporte para incorporar la citada Directiva ha incluido la puesta a disposición interactiva en la relación ejemplificativa del art. 20.2 LPI, mediante un nuevo párrafo i)¹⁸². Cualquiera que sea el destino de dicho Borrador¹⁸³, no parece que la calificación de la puesta a disposición interactiva como un acto de comunicación pública vaya a cuestionada por nadie¹⁸⁴.

- t) **Does the exception cover subsequent reproductions made in the course of transmission (routing copies, caché copies, etc) and reception (RAM copies, screen displays and downloads) of these works by each student? (Please note that this last issue is intertwined with the question of eligibility: who is allowed to make reproductions for teaching purposes—just professors, or also students?)**

La excepción cubre todas las reproducciones mencionadas en la pregunta.

2.- Eligibility under the exception.

¹⁸⁰ Caso *Weblisten* (sentencia de 11.04.2001 del Juzgado de 1ª Instancia num. 31 de Barcelona y sentencia de 27.06.2002 de la Audiencia Provincial de Barcelona, sección 15). El demandante, *Ediciones Musicales Horus*, era un productor de fonogramas y la demandada la titular de un sitio web desde el cual se vendía música. *Weblisten* disponía de licencias otorgadas por las sociedades de gestión SGAE y AIE, pero no de los productores. La naturaleza jurídica de la puesta a disposición era, en cierto modo, decisiva pues los productores tenían un derecho exclusivo de distribución en tanto que carecían del de comunicación pública (había sido eliminado al elaborarse el Texto Refundido de 1996 y sólo sería restaurado más adelante, mediante sentencia del Tribunal Supremo de 01.03.2001). El Juzgado de Primera Instancia y la Audiencia –siguiendo el planteamiento de la demandante– se refugiaron en la evidente infracción del derecho de reproducción, rehusando calificar el acto de puesta a disposición como distribución o comunicación.

¹⁸¹ El art. 20.2 LPI, en su redacción original de 1987, ya consideraba como un caso típico de comunicación al público: “h) *El acceso público a bases de datos de ordenador por medio de telecomunicación, cuando éstas incorporen o constituyan obras protegidas*”. Posteriormente, al incorporarse la Directiva 96/9/CE sobre bases de datos (Ley 5/1998), se dio al párrafo correspondiente del art. 20.2 LPI una redacción más genérica: “(2) *The following in particular shall be considered acts of communication to the public: [...] (i) any kind of public access to works incorporated in a database, even where the said database is not protected by the provisions of Book I of this Law*”

¹⁸² “j) *La puesta a disposición del público de obras, por procedimientos alámbricos o inalámbricos, de tal forma que cualquier persona pueda acceder a ellas desde el lugar y en el momento que elija*”. El BALPI fue difundido por el Ministerio en su sitio web (www.mcu.es) en noviembre de 2002. Posteriormente, como consecuencia de la polémica abierta, sufrió algunas modificaciones. En enero de 2003 se hizo circular mediante fotocopias una segunda versión. No obstante, el art. 20.2.i) proyectado se mantuvo sin cambios.

¹⁸³ En la actualidad parece que el BALPI ha sido abandonado o, al menos, congelado *sine die*.

¹⁸⁴ Únicamente cabría especular en relación con el tratamiento que reciba en el marco de los derechos afines o conexos. En este sentido, sería posible considerar la puesta a disposición como un caso más de comunicación pública, siguiendo así la línea de fortalecer este derecho y darle un sentido y alcance análogos al que tiene para los autores. Pero también cabría configurarla como un derecho exclusivo en sí mismo.

a) Eligibility as to institutions:

- Which institutions may benefit from a copyright exception for teaching purposes? Educational institutions? Schools? Universities? etc. How are those terms defined? How do they apply to the Internet?

Ni el art. 34.2,b) ni el art. 135.1,b) LPI se refieren a instituciones concretas. La fórmula utilizada es muy amplia: “*ilustración de la enseñanza*”. La concreta definición de su alcance deberá venir dada: en primer lugar, por la norma de procedencia [arts. 6.2,b) y 9,b) de la Directiva 96/9/CE sobre bases de datos]¹⁸⁵; en segundo, por el art. 10.2 del Convenio de Berna¹⁸⁶; y, en tercero, por el art. 5.3,a) de la Directiva de la Sociedad de la Información, en el que se recoge, con alcance general, la excepción de “*ilustración con fines educativos o de investigación científica*”¹⁸⁷. A la vista de todos esos elementos se diría que, en principio, debería beneficiarse de la excepción todo establecimiento que desarrolle actividades educativas, en cualquier nivel. No obstante, esa conclusión sería excesiva y seguramente contraria al *three step test*. Para reconducir la excepción a límites razonables será básico el sentido que se dé al requisito de que el objetivo o fin perseguido sea “*no comercial*”. Como indica el transcrito Considerando 42 de la Directiva de la Sociedad de la Información¹⁸⁸, la “*organisational structure*” y los “*means of funding*” no son “*decisive factors*”. Pero, sin duda, se trata de elementos a valorar. Acaso habría que introducir –por ley o mediante la jurisprudencia- algunas distinciones adicionales, como la que separa la enseñanza reglada y la no reglada. A este respecto, el art. 37.2 LPI maneja un criterio que podría proporcionar una guía: las beneficiarias deben ser “*instituciones docentes integradas en el sistema educativo español*”. Ello nos remite a la legislación educativa, aunque no es seguro que de ésta

¹⁸⁵ Los Considerandos de la Directiva no incluyen comentarios en relación con la excepción cuando afecta a derechos de autor. Pero sí cuando se trata del derecho *sui generis*. Concretamente en su Considerando 51: “*Whereas the Member States, where they avail themselves of the option to permit a lawful user of a database to extract a substantial part of the contents for the purposes of illustration for teaching or scientific research, may limit that permission to certain categories of teaching or scientific research institutions*”. La legislación española, sin embargo, no ha hecho uso de esta facultad. Como ya ha habido ocasión de señalar, tanto el art. 34.2,b) como el art. 135.1,a) LPI se refieren a “*enseñanza*”, sin limitar la excepción a instituciones determinadas; a diferencia de lo que se hace en otras disposiciones (*cfr.* art. 37.2 LPI: préstamo bibliotecario).

¹⁸⁶ Sería pues de aplicación la observación hecha a este respecto con ocasión de la revisión de Estocolmo (1967) y que recoge la *Guía del Convenio*: “*El término «enseñanza» debe entenderse como comprensivo de la enseñanza en todos sus grados, es decir, en los establecimientos u otros centros escolares y universitarios, en las escuelas públicas (del municipio o del Estado) lo mismo que en las privadas*”

¹⁸⁷ Esta excepción absorbe la prevista por la Directiva 96/9/CE para bases de datos, con la que no se aprecia diferencia alguna (salvo –acaso- la relativa a la imposibilidad de indicación de fuente y autor, que la Directiva de la Sociedad de la Información contempla de forma expresa). En cuanto a la cuestión que es objeto de la pregunta, el Considerando 34 de esta última Directiva alude a “*organismos públicos*” (*public institutions*), aunque no parece referirse tanto a establecimientos educativos como, únicamente, a bibliotecas, archivos y establecimientos análogos. Más útil es el Considerando 42, en el que se aclara que la enseñanza puede ser a distancia y se solventan los problemas que podrían derivar de la existencia de centros privados junto a los públicos: “*When applying the exception or limitation for noncommercial 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 decisive factors in this respect*”

¹⁸⁸ *Vid. supra*, nota anterior.

resulte un criterio claro y, sobre todo, suficientemente estricto para no chocar con el *three step test*¹⁸⁹.

Importa señalar que la cuestión de las instituciones beneficiarias de la excepción contemplada en el art. 5.3, a) de la Directiva de la Sociedad de la Información parece haber sido uno de los obstáculos con los que ha topado su incorporación a la LPI de forma general (no limitada a bases de datos). La primera versión del BALPI (noviembre de 2002) remitía esta y otras cuestiones a una norma reglamentaria. En la segunda (enero de 2003), en cambio, la excepción ha desaparecido; sin perjuicio de mantenerla para las bases de datos [arts. 34.2,b) y 135.1,a) LPI]

- Is there any specific condition as to the nature (for-profit or not-for-profit, public or private) of the teaching activity or of the institution? How does this apply to digital distance education?

Como se ha indicado, la única exigencia legal se refiere al fin u objetivo ("*no comercial*"). No está claro, sin embargo, si esta exigencia se predica de la institución o establecimiento en sí o, simplemente, de la actividad docente desarrollada. Aunque esto último es lo que parece resultar de la norma, parece que debe descartarse que una institución con ánimo de lucro pueda beneficiarse de la excepción, pues dicho ánimo se proyectaría sobre todas y cada una de sus actividades. Las instituciones podrán ser públicas o privadas. Pero, en este último caso, deberán adoptar la forma de asociación o de fundación. En ningún caso, la de sociedad, sea civil o mercantil. Tampoco podrá tratarse de cooperativas. En sentido contrario, cabe preguntarse si la falta de ánimo de lucro de la institución la hace beneficiaria de la excepción siempre y en todo caso. En otras palabras: ¿Puede una institución sin ánimo de lucro desarrollar actividades que persigan una "*finalidad comercial*" y quedar excluida de la excepción en cuanto a ellas?... Se trata de una cuestión sobre la que no hay criterios asentados.

Hay que decir no obstante que, contra las opiniones expuestas en el párrafo precedente, alguna sentencia se ha inclinado por interpretaciones muy laxas, llegando a admitir que una editorial (sociedad anónima) puede beneficiarse de la excepción de cita/ilustración en relación con la utilización de ilustraciones en manuales y libros de texto¹⁹⁰

En lo que atañe a la distinción entre enseñanza tradicional (presencial o a distancia) y DDE, en principio no es relevante. Cuanto se ha dicho es predicable de ambas.

- May libraries benefit from such an exception, and therefore provide copies (and also distribute? communicate to the public?) of works for teaching purposes? (*Please note that this last issue may have a connection with any exception provided for in favor of libraries. If libraries cannot benefit*

¹⁸⁹ Para responder a este cuestionario no ha sido posible, sin embargo, realizar un examen de esta legislación que, sin embargo y como queda dicho, se juzga de todo punto necesario. En otro orden de cosas, la integración en el sistema educativo "*español*" podría plantear problemas en el caso de la DDE pues, por su propia naturaleza, es transfronteriza.

¹⁹⁰ *Caso Baranova*: Sentencia de 31.10.2002 de la Audiencia Provincial de Barcelona (Sección 15). A destacar la siguiente argumentación (FJ 10): "*Esa función de la ilustraciones [facilitar la enseñanza o aprendizaje] priva a las mismas de significación como instrumentos al servicio de fines comerciales, pese a que los libros de texto se venden y la demandada actúa con ánimo de lucro. Con otras palabras, obtener un lucro no era, a los efectos de que se trata, la causa concreta de la ilustración, por más que resulte una consecuencia normal en el mercado de la calidad del producto, resultante a la finalidad educativa*". Como se ve, la sentencia refiere los "*fines comerciales*" no a la institución o establecimiento demandado (una sociedad anónima), sino a la concreta actividad (ilustración de manuales). Por lo demás, conviene insistir en que esta sentencia no se produce en el marco de los arts. 34.2,b) o 135.1,a) LPI ("*ilustración de la enseñanza*"), sino del art. 32 LPI ("*cita*") del que, sin embargo, realiza una amplia interpretación.

from a specific teaching exception, the scope of the “remaining” library exceptions becomes paramount to cover the use of works for teaching purposes.)

La cuestión no se ha planteado. Las bibliotecas y otras instituciones análogas disponen de una excepción que les permite llevar a cabo copias, si bien “*exclusivamente para fines de investigación*”, restricción ésta que, sin embargo, no tiene una aplicación muy estricta: en la práctica, se admite una noción muy laxa de “*investigación*” y, en cualquier caso, no parece que existan controles efectivos al respecto.

En mi opinión, las bibliotecas no pueden ampararse en la excepción de “*ilustración de la enseñanza*” para facilitar copias a sus usuarios; tampoco para digitalizar obras y llevar actos de comunicación al público. La existencia de excepciones *ad hoc* para las bibliotecas sería un argumento en este sentido.

Cabría plantearse, como particular, el caso de las bibliotecas de los propios centros educativos. Pero, incluso entonces, debería rechazarse toda actividad que no estuviese directamente encomendada y supervisada por el personal docente. En otras palabras: sólo si la biblioteca actúa como mero instrumento del enseñante, facilitándole las copias o incluso digitalizando y colocando en la correspondiente *intranet* las obras o fragmentos seleccionados por éste, cabría incluir la biblioteca –pero no como tal– en el ámbito de la excepción.

m) Eligibility as to individuals:

- May only teachers benefit from the exception or also students (and guest-lecturers, etc)?

De nuevo se trata de una cuestión no planteada en la práctica; cosa lógica si se recuerda el limitadísimo ámbito de aplicación de la excepción de ilustración en el derecho español. Sería razonable que sólo los enseñantes pudieran beneficiarse de la excepción. La noción de “*enseñante*” (*teacher*) es, sin embargo, bastante abierta. Puede incluir a todos los sujetos habilitados a tal efecto por la institución, tanto profesores de plantilla como visitantes. No, en cambio, a los estudiantes.

En relación con la “*ilustración de la enseñanza*” –y como observación de carácter general, no limitada a esta pregunta– hay que llamar la atención sobre el hecho de que el límite de cita se condiciona a la presencia de “*fines docentes o de investigación*” (art. 32 LPI). Dada la frecuencia de las citas, ello podría haber dado lugar a alguna jurisprudencia sobre el concepto de “*fines docentes*”. Sin embargo, aunque pueda sorprender, no hay mucha jurisprudencia sobre cita. Por otra parte, es dudoso que, aun habiéndola, pudiera extrapolarse a la excepción de “*ilustración de la enseñanza*” pues sin duda, en el marco de la cita, los juzgados tenderían a aplicar una noción amplísima de “*fines docentes*”, hasta desactivar lo que no es sino una exigencia absurda¹⁹¹.

- If students cannot benefit from that exception, may a general private use/private copying exception (or fair use) “fill that gap” (as it seems to be the case in the analog world)? (*Please note that this last issue may be considered under a separate section III dealing with the private use/ copying exception*)

La excepción de copia privada no está condicionada por finalidad alguna. Por tanto, los estudiantes pueden hacer copias –analógicas o digitales– para uso personal, incluyendo las que

¹⁹¹ Como muestra, cabe mencionar de nuevo el *Caso Baranova* (*vid. supra*), en el que se admite que una editorial lleva a cabo actividades de enseñanza.

tengan por objeto su propia formación. En la práctica, no obstante, el problema está en la noción de copia privada. Los estudiantes normalmente recurrirán a terceros empresarios (servicios de fotocopias), lo que excluirá –al menos en España- que las copias puedan considerarse “*privadas*”. Conviene recordar, por otra parte, que no cabe copia privada de bases de datos electrónicas.

- n) **Some teaching-related exceptions refer to or imply physical concepts related to face-to-face teaching activities—concepts like classroom, school premises, etc. If so, does this specific language limit or curtail the applicability of the exception in the digital world?**

No hay en la legislación española nada que permita relacionar la *excepción educativa* (es decir, la excepción de “*ilustración de la enseñanza*”) con los espacios físicos en los que se desarrollan las correspondientes actividades¹⁹². Las aulas y otros locales del establecimiento serán los espacios naturales de la excepción. Pero nada obliga a limitarse a ellos.

- o) **Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?**

No hay ningún otro dato relevante.

3.- Purposes. What is “teaching purposes”?

- m) **What constitutes “teaching purposes”? (Please, substitute by the specific language used in your national exception; for instance, the EU Directive art.5.3(a) what is “illustration for teaching”). Is there any caselaw, uses, doctrine to describe the specific language used in the exception?**

La legislación española habla –como las Directivas sobre Bases de Datos y Sociedad de la Información- de “*ilustración de la enseñanza*”. Otros preceptos se refieren a “*finés docentes*” (art. 32 LPI: cita) e “*instituciones docentes*” (art. 37.2 LPI: préstamo bibliotecario). No hay jurisprudencia¹⁹³. En cuanto a la doctrina, no se ha preocupado de profundizar en estos conceptos, siendo patente, no obstante, una clara tendencia a efectuar una lectura o interpretación generosa.

En relación con la “*ilustración de la enseñanza*”, como es lógico, sólo las obras posteriores a la Ley 5/1998 (de incorporación de la Directiva 96/9/CE sobre bases de datos), de la que proceden los arts. 34.2,b) y 135.1,a) LPI, podrían incluir alguna referencia. Sin embargo, no dicen gran cosa. A título de mero ejemplo:

- a. M.A.BOUZA (*El derecho «sui generis» del fabricante de bases de datos*, ed. Reus, Madrid, 2001, p. 99), se limita a decir: “*Las extracciones permitidas se han de utilizar para fines de enseñanza, pudiendo los Estados limitar dicha autorización a determinadas categorías de establecimientos de enseñanza*”.

¹⁹² La única excepción vinculada a espacios físicos determinados –y no tanto por los actos que se permiten como por las obras afectadas- es la prevista en el art. 35.2 LPI, según el cual: “*Works permanently located in parks or on streets, squares or other public thoroughfares may be freely reproduced, distributed and communicated by painting, drawing, photography and audiovisual processes*”. Ya se ha dicho, no obstante, que esta excepción es completamente marginal en lo que se refiere a actividades educativas. También podría considerarse que hay un indicio de localización en las excepciones del art. 37 LPI, cuya rúbrica se refiere a “*Libre reproducción y préstamo «en» determinadas instituciones*” (*Free Reproduction and Lending in Specific Establishments*). Sin embargo, el texto de la norma desautoriza esa lectura, pues en él –de forma muy razonable- se habla de reproducciones y préstamos efectuados “*por*” determinadas instituciones.

¹⁹³ Salvo el tan repetido *Caso Barcanova*.

- b. R.BERCOVITZ (*“La protección jurídica de las bases de datos”*, Pe.I.- Revista de Propiedad Intelectual, num. 1, 1999, p. 29): *“Tanto la enseñanza como la investigación científica pueden ser entendidas en su sentido más amplio”*

Mayor extensión tienen los comentarios relativos a las expresiones *“fines docentes”* e *“instituciones docentes”* de los arts. 32 y 37.2 LPI, respectivamente. Pero, como se ha dicho, la primera se ve afectada por el deseo de la doctrina de desactivar una exigencia que nada tiene que ver con la cita y así se llega a admitir que prácticamente cualquier fin puede ser *“docente”*. En cuanto a la segunda, no puede separarse del requisito adicional de *“integración en el sistema educativo español”*. Baste aquí lo dicho. Sobre ambas expresiones habrá ocasión de volver más adelante, al responder a las preguntas del cuestionario relativas a las excepciones correspondientes.

- n) **Does it cover use of a work for preparing the lesson? Does it cover use of a work in the course of the instruction? Does it cover the making and distribution of copies for teaching purposes? Does it cover communication to the public for teaching purposes? What is the scope of such uses covered under this exception?**

Los amplios términos en que la Ley 5/1998 decidió incorporar –aunque sólo para bases de datos- la excepción de *“ilustración de la enseñanza”* cubren cualquier uso que se lleve a cabo *“in the course of the instruction”*, tanto si trata de distribuir copias de la obra como de llevar a cabo su comunicación pública. Cabría quizás suscitar la duda en relación con la preparación de las clases por parte del profesor pues, en rigor, no se trata de *“ilustración de la enseñanza”* sino de algo previo. Pese a ello, creo que debe prevalecer una interpretación amplia. En todo caso, si así no entendiera, el profesor siempre podría ampararse en la excepción de copia privada¹⁹⁴.

- o) **Does it cover the making of a teaching compilation or anthology? Would it cover the asynchronous posting of teaching material on the Internet? And if so, within which limits? Is there a specific exception (or licensing system) covering the making of teaching compilations? Would it apply to digital teaching compilations?**

Una vez más: tal como están redactados los arts. 34.2,b) y 135.1,a) LPI, nada impediría realizar compilaciones o antologías (crestomatías); por más que, en el caso de las bases de datos, sea una hipótesis un tanto absurda. Seguramente por tal motivo, cuando el BALPI (versión de noviembre de 2002) decidió incorporar el límite del art. 5.3,a) de la Directiva de la Sociedad de la Información (o, más bien, darle el alcance general que este contempla), se descartó la pura y simple transcripción o –lo que es lo mismo- la repetición de la fórmula empleada en los arts. 34.2,b) y 135.1,a) LPI.

Actualmente, dado el estrecho ámbito objetivo de los arts. 34.2,b) y 135.1,a) LPI, la realización de crestomatías (*readings*) cae dentro de los derechos exclusivos de reproducción, distribución y –en su caso- comunicación pública. Son precisas licencias que deben gestionarse a través de las correspondientes sociedades de gestión¹⁹⁵. En relación con *digital compilations –off line u on line-* no hay experiencia práctica, pues las editoriales no suelen encomendar a las sociedades de gestión la administración de los derechos correspondientes. Por lo general, hay una fuerte resistencia de los titulares a permitir la realización de tales *crestomatías digitales*.

¹⁹⁴ Esta excepción no cubriría la distribución de copias o la comunicación pública a partir de la copia realizada. Pero sí la utilización personal para la preparación de las lecciones. El hecho de que la copia se aplique a fines profesionales no es, a mi juicio, un argumento en contra.

¹⁹⁵ En el caso de obras literarias, CEDRO. Para obras visuales, VEGAP. Tratándose de otros tipos de obras y/o prestaciones habría que acudir a las entidades competentes conforme a sus estatutos.

- p) **Is the exception subject to any technological measures to ensure that only students will have access to the works used for teaching?**

No. De nuevo se trata de una de las cuestiones que, en la ampliación objetiva de la excepción planteada por el BALPI (versión de noviembre de 2002), se consideraron fundamentales para la correcta definición de la misma. Cabe suponer que era otro de los aspectos que la norma proyectada remitía al reglamento.

4.- Extent and Nature of Works.

- s) **Which works (and to what extent) may be subject to the exception?**

Como se viene diciendo, el art. 34.2,b) LPI sólo se refiere a bases de datos. Además no afecta a las obras protegidas incluidas en las mismas. Sólo a la base de datos en sí misma considerada. En este sentido, el Considerando 35 de la Directiva 96/9/CE explica: “[...]Whereas, however, this option [to provide for exceptions in certain cases] should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database”. La excepción afecta pues al continente, no al contenido. La utilización de las obras incluidas en la base estará sujeta a las reglas generales, entre las que no se incluye –en el caso de España- ningún límite en favor de la “*ilustración de la enseñanza*”, debiendo acudir a la cita.

- t) **Does the exception provide for any specific limitations regarding the extent and nature of the works covered?**

No. Véase lo dicho en el anterior párrafo a). Probablemente este era uno de los puntos que el BALPI (versión de noviembre de 2002) pretendía remitir al desarrollo reglamentario.

- u) **Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?**

Véase lo dicho en los anteriores párrafos a) y, en cuanto al BALPI, b).

- v) **May works be used for teaching purposes in whole or only fragments?**

Ciñéndonos al caso de las bases de datos, la formulación del art. 34.2,a) LPI permitiría utilizar con fines de ilustración de la enseñanza la integridad de los elementos protegidos; es decir, la integridad de su estructura. Una vez más, la generalización de la excepción planteada por el BALPI (versión de noviembre de 2002) habría obligado a reconsiderar este criterio.

- w) **Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?**

La legislación vigente no establece distinción alguna en función de los criterios señalados en la pregunta. No obstante, como ya se ha señalado, cabe apreciar una diferencia entre el art. 34.2,a) y el art. 135.1,b) LPI. Mientras éste requiere que el beneficiario de la excepción de “*ilustración de la enseñanza*” sea un “*usuario legítimo*”, aquel omite tal exigencia¹⁹⁶.

¹⁹⁶ Tradicionalmente, los límites se habían venido definiendo al margen de que la obra o la copia hubiera sido obtenida lícitamente. Sólo con los programas de ordenador y bases de datos ha hecho aparición la noción de “*usuario legítimo*”. La

x) How does the exception interact with the possible existence of a license which specifically prohibits any further uses (other than those licensed)?

Con carácter general, y salvo que se diga lo contrario¹⁹⁷, las excepciones son de orden público y no admiten pacto en contra. Con todo, no cabe ignorar que la Directiva de la Sociedad de la Información ha reconocido amplios espacios a la autonomía de la voluntad. Por ejemplo, en el contexto de red (art. 6.4,IV). También en cuanto a la posible excepción en favor de la utilización de terminales en bibliotecas con fines de investigación o estudio personal [art. 5.3,n)]

5.- Remuneration.

m) Is the teaching use free or subject to remuneration?

La legislación vigente no prevé remuneración alguna por los actos realizados al amparo de la excepción de “*ilustración de la enseñanza*”. Parece, sin embargo, que la previsión de una remuneración equitativa¹⁹⁸ fue considerada en la preparación del BALPI (versión de noviembre de 2002), siendo seguramente una más de las diversas cuestiones remitidas al desarrollo reglamentario.

n) If subject to remuneration, how is that established? Criteria used to set the fees.

Vid. la respuesta al anterior párrafo a). Si se estableciese una remuneración equitativa el planteamiento del BALPI –común a todos los derechos de simple remuneración- nos remitiría a la negociación entre las partes interesadas, a partir de una propuesta de las correspondientes sociedades de gestión, con intervención dirimente de la *Comisión de Propiedad Intelectual* en caso de desacuerdo.

o) How is it collected? Which collecting society? How is it distributed among the copyright owners ?

Vid. la respuesta a los anteriores párrafos a) y b). Suponiendo que se estableciese el derecho de los titulares a una remuneración equitativa por las utilizaciones amparadas por la excepción, parece razonable suponer que sería objeto de gestión colectiva obligatoria. De nuevo, cabe suponer que esta es otra de las cuestiones que el BALPI pretendía solventar mediante desarrollo reglamentario.

p) Does this system also apply to digital uses? How?

Vid. la respuesta a los anteriores párrafos. Por lo demás, conviene recordar que muchos titulares de derechos (p.e. empresas editoras) no quieren encomendar la administración de *derechos electrónicos* a las sociedades de gestión colectiva, prefiriendo optar por la gestión individual.

Directiva de la Sociedad de la Información hace uso también de este criterio cuando aborda el conflicto entre excepciones y medidas tecnológicas (vid. su art. 6.4,I)

¹⁹⁷ Vid., por ejemplo, art. 100.1 LPI (excepciones en materia de programas de ordenador).

¹⁹⁸ En línea con el Considerando 36 de la Directiva de la Sociedad de la Información: “*The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation*”

II.- QUOTATIONS

0.- Identify any exception that allows for the use of copyrighted works for purposes of quotation, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

La excepción de cita está prevista en el art. 32 LPI cuyo texto es como sigue:

- *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. Periodical compilations made in the form of press summaries or reviews shall be treated as quotations.*

1.- Exclusive Rights covered by the exception.

g) Reproduction? Distribution? Communication to the public? Transformation?

El art. 32 LPI no se refiere a derechos concretos. Permite “to include in one's own work fragments of the works of others”. Ello abarca todos los derechos aludidos en la pregunta. El autor de la obra que incluye la cita podrá explotarla con plena libertad y, al hacerlo, reproducirá, distribuirá y comunicará el fragmento o, en su caso, obra íntegra utilizados. Por lo demás, la utilización de fragmentos u obras aisladas para incluirlos en otra obra entraña en sí mismo una transformación.

h) Does it cover quotations made in digital formats (i.e., digital copies) and over the Internet (i.e., digital transmissions)?

Sin duda. Como se ha dicho, el art. 32 LPI no establece restricción alguna.

2.- Eligibility under the exception.

d) Who may benefit from the quotation exception? Is there any language that may allow or prevent its application to quotations made as part of the teaching over the Internet?

En principio, todo el mundo. No hay restricciones subjetivas. Cualquiera puede citar. No hay que olvidar que la cita está estrechamente asociada a la libertad de expresión y, en particular, de opinión. Por ello llama la atención que la ley española decidiera condicionar la cita a “teaching or research purposes”, añadiendo así una restricción carente de sentido.

A la vista de lo anterior, es claro que no hay nada que impida utilizar la cita en el marco de las actividades educativas (al contrario, casi es su único cauce al margen de la autorización de los titulares de derechos). Lo mismo hay que decir en el particular caso de la enseñanza a través de la Internet.

Importa señalar que la eventual eliminación de las exigencia de que la cita responda a “teaching or research purposes” no alteraría lo que acaba de decirse en cuanto a la amplitud de la aplicación de la cita en el ámbito de la enseñanza.

3.- Purposes.

g) What constitutes a quotation? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

No hay acuerdo acerca de si el art. 32 LPI incluye una definición de cita o, por el contrario, deja abierto el concepto. En este sentido, la doctrina ha puesto el acento en la disyuntiva “o”: “*by way of quotation «or» for analysis, comment or critical assessment*”. Según esta lectura, el art. 32 LPI recogería no uno sino dos límites. De un lado, la cita o, si se quiere, la mera cita. De otro la utilización de fragmentos para su análisis, comentario o juicio crítico. Es posible que los autores de la norma no quisieran tanto formular una disyuntiva como definir o explicar la noción de cita. En este sentido, la cita sería, precisamente, la utilización de fragmentos para hacerlos objeto de análisis, comentario o juicio crítico. Sin embargo, lo anterior no pasa de ser una conjetura. Lo cierto es que la mayoría de la doctrina entiende que el uso “*a título de cita*” y “*para análisis comentario o juicio crítico*” son cosas diferentes. A esta línea se ha sumado la Audiencia de Barcelona en el tantas veces citado *Caso Barcanova*¹⁹⁹

h) Is there any reference to any specific purposes (i.e., teaching, research, etc) the quotation must be made for, in order to qualify under the exception?

Como resulta de lo dicho, es discutible si la primera serie de objetivos (“*analysis, comment or critical assessment*”) resulta aplicable a la cita en todo caso. Expresamente lo ha negado la Audiencia de Barcelona, siguiendo una línea doctrinal mayoritaria²⁰⁰. La cita (en su caso: la cita y la utilización para análisis, comentario o crítica) no puede escapar, sin embargo, a los “*teaching or research purposes*”; cosa que, como se viene diciendo, es francamente absurda: una restricción excesiva, que doctrina y jurisprudencia se han aplicado a desactivar, aun a costa de desvirtuar el sentido estricto de los términos “*teaching*” y “*research*”.

4.- Extent and Nature of Works.

m) Which works (and to what extent) may be subject to the exception? Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

La excepción afecta a todo tipo de obras. El art. 32 LPI no establece restricción alguna. La referencia a obras de “*written, sound or audiovisual character*” debe considerarse ejemplificativa²⁰¹. Incluso debe ser posible la cita de programas de ordenador, pese a la pretensión de especialidad e independencia de su sistema de excepciones²⁰². Si en alguna ocasión no es posible la cita de una obra, ello no dependerá tanto de su naturaleza como de otras circunstancias, a menudo relacionadas con la obra de acogida (p.e. cita de una obra musical en otra obra musical). En lo que sí puede influir la naturaleza de la obra es en la extensión de la cita [*vid. infra* párrafo c)]

¹⁹⁹ Cabe citar, entre varios, los siguientes párrafos de la sentencia de 31.10.2002 (FF.JJ. 7 y 8): “*El precepto se refiere a un análisis, un comentario, un juicio crítico y, además, a una mera cita (ahora en sentido estricto). [...] La cita en sentido estricto constituye una de las cuatro posibilidades que el art. 32 del Texto Refundido legitima. Se trata de una actividad distinta de las otras tres, por lo que cabe afirmar, aplicando un argumento excluyente, que la reproducción puede ser lícita aunque no se analice, comente o critique la obra [...] ajena reproducida*”

²⁰⁰ *Caso Barcanova*. *Vid.* nota anterior.

²⁰¹ Ello no ha impedido que la doctrina plantee dudas en relación con algún tipo de obras (p.e. las musicales).

²⁰² Lo mismo hay que decir de las bases de datos, a las que innecesariamente la ley española ha dedicado un artículo especial (el art. 34 LPI).

- n) **Are all kind of works covered? Are any specific materials excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?**

Como se ha dicho la cita puede afectar a todo tipo de obras. No hay exclusiones. Tampoco se exige que la obra citada se haya presentado en una forma específica. Aunque puede plantear problemas prácticos, parece que debe admitirse, por ejemplo, la cita escrita de una obra oral.

- o) **May works be quoted in whole or only fragments?**

El art. 32 LPI expresamente se refiere a "*fragments*". No obstante, excepcionalmente, se admite la cita de obras íntegras. Así cuando se trate de obras isolated "*works of three-dimensional, photographic, figurative or comparable art character*". Por tanto, pinturas, esculturas, fotografías etc. podrán citarse íntegramente. Ahora bien, deberá tratarse de "*isolated works*": sólo cabrá incluir una o algunas obras; nunca la totalidad o un número importante de las creadas por un autor.

- p) **Does it make any difference how the work has been obtained?**

No. La forma –lícita o ilícita- en que se haya obtenido la obra citada es irrelevante, siempre que se trate de obras lícitamente "*disclosed*". En el caso de obras protegidas con medidas tecnológicas, habrá que esperar a la incorporación de la Directiva de la Sociedad de la Información y su polémico art. 6.4. Cabe suponer que la cita no legitimará la elusión de tales medidas. Asimismo que quien haya accedido lícitamente a la obra podrá citarla con plena libertad, sin admitirse cláusulas en contra.

5.- Remuneration.

- m) **Are quotations free or subject to remuneration?**

El art. 32 LPI no se pronuncia. No hay en la ley española un criterio general. En algún caso se prevé de forma expresa la compensación (p.e. art. 33 LPI: trabajos sobre temas de actualidad), en tanto que en otros se prevé la gratuidad (p.e. art. 37.2 LPI: préstamo bibliotecario). Lo normal, sin embargo, es el silencio. La opinión mayoritaria –y la práctica- entienden que ese silencio debe entenderse como ausencia de remuneración. En particular, nadie ha pretendido jamás que la cita deba ser objeto de una remuneración. Es significativo que la doctrina ni siquiera se lo haya planteado como mera especulación.

- n) **If subject to remuneration, how is that established? Criteria used to set the fees.**

Vid. anterior párrafo a)

- o) **How is it collected? Which collecting society? How is it distributed among the copyright owners ?**

Vid. anterior párrafo a)

- p) **Does this system also apply to digital uses? How?**

Vid. anterior párrafo a)

III.- PRIVATE USE / PRIVATE COPYING EXCEPTION.

The purpose of this section is to address the importance of the private use/ private copying exception as far as teaching uses. To what extent may such an exception allow students (and teachers) to use works for teaching purposes through the Internet? This exception is specially important to the extent that downloads made by students do not qualify under the teaching exception. Please note that this last issue may be considered under a separate section dealing with the private use/ copying exception.

0.- Identify any exception that allows for the use of copyrighted works for private purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

De acuerdo con la legislación española, en principio, los usos de obras protegidas que no tengan como destinatario al público quedan fuera del contenido del derecho de autor. En este sentido, el art. 19 LPI define el derecho de distribución como “*the making available «to the public»*”. En el mismo sentido, en relación con el derecho de comunicación al público, el art. 20.1,II LPI aclara que: “*Communication shall not be considered public where it takes place in a strictly «domestic environment» that is not an integral part of or connected to a dissemination network of any kind*”. Y otro tanto hay que decir en relación con el derecho de transformación (art. 21 LPI): la transformación que no tenga trascendencia pública es irrelevante. Es cierto que para el derecho de reproducción no hay ninguna precisión semejante a las de los arts. 19 y 20 LPI. Pero el planteamiento es semejante en la medida en que la llamada *copia privada* es objeto de un límite específico:

- Art. 31 [Reproduction Without Authorization].- (1) *Works already disclosed may be reproduced without authorization from the author and without prejudice, where applicable, to the provisions of Article 34 of this Law in the following cases: [...] 2º. for the private use of the copier, without prejudice to the provisions of Articles 25 and 99(a) of this Law, provided that the copy is not put to either collective or profit-making use; [...]*²⁰³

La copia privada está también admitida para bases de datos no electrónicas. Éstas, así como los programas de ordenador, están excluidas de la excepción de copia privada:

- Art. 34 [Use of Databases by the Lawful User, and Limitations on the Exploitation Rights of the Owner of a Database].- [...] (2) Without prejudice to the provisions of Article 31, authorization from the author of a database that is protected under Article 12 of this Law and has been disclosed is not necessary: (a) where, in the case of a non-electronic database, a copy is made for private purposes; [...].

²⁰³ Esta disposición debe completarse con el art. 10 del RD 1434/1992, que –bajo la rúbrica “*Supuestos no incluidos en la obligación [legal de remuneración compensatoria por copia privada]*”- dispone:

“1. A los efectos de lo dispuesto en el presente título no tiene la consideración de reproducciones para uso privado del copista, en el sentido del apartado 2 del artículo 31 de la Ley de Propiedad Intelectual:

- a) Las efectuadas en establecimientos dedicados a la realización de reproducciones para el público, o que tengan a disposición del público los equipos, aparatos y materiales para su realización.
- b) Las que sean objeto de utilización colectiva o de distribución mediante precio

2. Para poder efectuar las reproducciones a que se refiere el número anterior, deberá obtenerse la previa autorización de los titulares de los derechos.

3. Lo dispuesto en los apartados anteriores se entiende sin perjuicio de lo previsto en el artículo 37 de la Ley de Propiedad Intelectual”

- Art.99 [Content of Exploitation Rights].- Without prejudice to the provisions of Article 100 of this Law, the exclusive rights in the exploitation of a computer program by the person who is the owner thereof in terms of Article 97 shall include the right to do or authorize the following: (a) total or partial reproduction, including for personal use, of a computer program by any means and in any form, whether permanent or temporary. Where the loading, display, operation, transmission or storage of a program calls for such reproduction, the authorization to do so, which is granted by the owner of the rights, must have been obtained;[...]

El ya citado art. 31.1 LPI contempla un segundo caso de reproducción para uso privado, que se aparta de la copia privada por admitirse la “utilización colectiva” de las copias. Los invidentes deben usar las copias en Braille o sistema similar para su “uso privado”. Pero una misma copia puede estar a disposición de varios invidentes. Incluso parece que cabría –aunque la norma sólo habla de “reproducción” sin autorización- efectuar varias copias, de modo que se facilite una a cada invidente. La norma es como sigue:

- Art. 31 [Reproduction Without Authorization].- (1) Works already disclosed may be reproduced without authorization from the author and without prejudice, where applicable, to the provisions of Article 34 of this Law in the following cases: [...] 3º for the private use of the blind, provided that the reproduction is done using the Braille system or another specific method, and that the copies are not put to profit-making use.

Asimismo es –o puede ser²⁰⁴- un caso de uso personal, que no de copia privada²⁰⁵, el contemplado en el art. 34.1 LPI, según el cual el usuario legítimo de una base de datos puede realizar todos los actos necesarios para su utilización:

- Art. 34 [Use of Databases by the Lawful User, and Limitations on the Exploitation Rights of the Owner of a Database] —(1) The legitimate user of a database protected under Article 12 of this Law, or copies thereof, may, without authorization from the author of the database, engage in whatever acts may be necessary for access to be had to the contents of the database and for its normal use by the user himself, even where they are subject to an exclusive right of the author. Insofar as the lawful user is authorized to use only a part of the database, this provision shall be applicable only to that part. Any agreement contrary to the terms of this provision shall be null and void as of right.[...]

Pese a los diversos preceptos que acaban de citarse, las respuestas se limitarán –salvo que se indique lo contrario- a la hipótesis de la copia privada (art. 31.1.2º LPI)

1.- Exclusive Rights covered by the exception.

- e) **Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered? How many copies can be made? Is it somehow restricted, i.e., to non-collective use?**

²⁰⁴ Así cuando el usuario legítimo sea una persona física.

²⁰⁵ *En relación con la disposición equivalente de la Directiva 96/9/CE, sobre bases de datos, el Considerando 35 de la misma distingue entre “excepciones a título de uso privado” y “reproducción con fines privados”: “[...] whereas a distinction should be drawn between exceptions for private use and exceptions for reproduction for private purposes, which concerns provisions under national legislation of some Member States on levies on blank media or recording equipment”*

La excepción de copia privada, lógicamente, cubre la reproducción. Y, además, se limita a ella. Sólo en el caso de las copias “para uso privado de invidentes” (art. 31.1.3º LPI) cabría pensar en la posible extensión de la excepción al derecho de distribución; y no es seguro.

*En cuanto a la naturaleza de las copias, la ley no distingue. Por tanto, pueden hacerse en cualquier formato o soporte, analógico o digital. Las sentencias recaídas en los Casos Traxdata y Verbatim así lo confirman*²⁰⁶.

En relación con el número de copias tampoco hay previsión alguna, a diferencia –por ejemplo- de lo que sucede con la copia de seguridad (“una”) autorizada en el caso de programas de ordenador (art. 100 LPI *Limitations of the Right of Exploitation*.- [...] (2) *The making of a reserve copy by the person who holds the right to use the program may not be prevented by contract insofar as it is necessary for such use*.[...]). Ciertamente sería llamativo que alguien hiciera muchas copias y, en determinadas circunstancias, un indicio claro de que su destino no es privado. Pero lo relevante desde el punto de vista legal no es el número sino que, efectivamente, sean “for the private use of the copier”, quien –no se olvide- habrá pagado por todos y cada uno de los soportes el canon correspondiente. Desde luego, que alguien haga dos o tres copias de una obra debe considerarse completamente normal, siempre que las conserve y sea él mismo quien las use. Por supuesto, una vez incorporada la Directiva de la Sociedad de la Información y cuando la obra esté protegida con medidas tecnológicas, el titular de derechos podrá establecer el número de copias que permite y ello incluso si el Estado decidiera intervenir en favor del usuario para hacer posible la realización de copias privadas a pesar de las referidas medidas (vid. art. 6.4,II de la citada Directiva)²⁰⁷

Como resulta del propio tenor literal del art. 31.1.2º LPI, está excluida la “*utilización colectiva*” de la copia, entendiéndose por tal la utilización que lleven a cabo personas que no pertenecen al círculo familiar o doméstico del copista. Esta es la razón, por ejemplo, por la cual una empresa no puede fotocopiar una obra protegida y ponerla a disposición de sus empleados; y menos aún hacer múltiples copias y distribuir las entre ellos.

- f) **Does it cover any other rights: distribution, transmission, performance, transformation ? Do they extend to digital means of exploitation? (See also *infra*, the questions concerning definition of “private”).**

De nuevo, como resulta de lo dicho hasta ahora, la excepción de *copia privada* sólo alcanza al derecho de reproducción. No obstante, hay que recordar que la transformación –no así la explotación de la obra resultante- es libre. Nada impide, por ejemplo, traducir un artículo u otra obra. Y lo mismo hay que decir probablemente en cuanto a la distribución y la comunicación no públicas que, como se ha dicho, quedan fuera del ámbito del derecho de explotación.

2.- Eligibility.

²⁰⁶ Caso *Traxdata* (SGAE c. *Traxdata Ibérica SL*), Sentencia de 2 de enero de 2002 del Juzgado de Primera Instancia num. 22 de Barcelona. Caso *Verbatim* (SGAE c. *Verbatim España SA*), Sentencia de 13 de marzo de 2002 del Juzgado de Primera Instancia num 2 de Esplugues de Llobregat . En ambos casos la demanda se planteó dando por sentado que los soportes electrónicos eran adecuados para realizar *copias privadas* y así lo admitieron las sentencias correspondientes.

²⁰⁷ Cabe observar que el BALPI no prevé intervención estatal alguna en favor de la copia privada cuando esta se vea bloqueada por medidas tecnológicas empleadas por los titulares de derechos. En otras palabras: la copia privada podría desaparecer de la mano de la tecnología. No está de más recordar, a este propósito, que la excepción de copia privada no es obligatoria sino facultativa. Los Estados de la Unión no están obligados a reconocerla en sus ordenamientos.

g) Who may benefit from the private use/copying exception? Is there any specific reference to for-profit or not-for-profit uses, public or private, non-collective uses?

La Ley no refiere la *copia privada* a sujetos concretos. En principio, cualquiera puede hacer *copias privadas*. No obstante, la exigencia de que la copia obtenida no sea objeto de utilización colectiva impide aplicar la excepción a las personas jurídicas. En otras palabras: aunque el art. 31.1.2º LPI no lo diga expresamente, sólo las personas naturales o físicas pueden beneficiarse de esta excepción. Las copias hechas o encargadas por personas jurídicas están por definición destinadas a un uso colectivo.

En cuanto a si el uso puede ser “*for profit*”, la norma lo excluye de forma expresa. No cabe la utilización “*lucrativa*” (*for profit*). De todas formas, hay cierta confusión en cuanto a cuándo la utilización no es “*lucrativa*”. Hay quien entiende que si quien hace la copia pretende ahorrarse la adquirirla existiría ánimo de lucro por su parte y, por tanto, no podría ampararse en la excepción. A mi juicio, sin embargo, esta tesis llevaría a reducir en exceso el ámbito de la misma. El mero ahorro no debe servir para excluir el carácter “no lucrativo” de la copia.

Se ha suscitado también el problema de las copias hechas con un objetivo profesional o en el marco de la actividad profesional. Hay quien entiende que las copias hechas por un profesional para aplicarlas a su actividad estarían excluidas de la excepción. Sería el caso del abogado que fotocopia un artículo o el capítulo de un libro para preparar un caso. O –más cerca de lo que nos ocupa- el del profesor que hace otro tanto para preparar una clase o una publicación. En mi opinión, sin embargo, nada hay en el art. 31.1.1.º LPI que excluya del ámbito del “*uso privado*” ese tipo de usos en el marco de la actividad profesional. Mientras la copia en sí no sea objeto de utilización colectiva, no dejaremos de estar en el ámbito de la excepción.

h) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE?

La utilización de medios propios es una exigencia no escrita que algunos reclaman. Sólo sería copia privada la que hace alguien utilizando sus propios medios. Es cierto que si, para obtener la copia, se recurre a quien se dedica a ello como servicio o actividad profesional, no habrá copia privada. Tampoco si se usan máquinas o medios puestos a disposición de los usuarios por empresas dedicadas a ello. Así lo aclara el art. 10 del RD 1434/1992, transcrito antes en nota y cuyos aparatos 1 y 2 se reproducen seguidamente de nuevo para mayor comodidad:

“1. A los efectos de lo dispuesto en el presente título no tiene la consideración de reproducciones para uso privado del copista, en el sentido del apartado 2 del artículo 31 de la Ley de Propiedad Intelectual:

a) Las efectuadas en establecimientos dedicados a la realización de reproducciones para el público, o que tengan a disposición del público los equipos, aparatos y materiales para su realización.

b) Las que sean objeto de utilización colectiva o de distribución mediante precio

2. Para poder efectuar las reproducciones a que se refiere el número anterior, deberá obtenerse la previa autorización de los titulares de los derechos.

La jurisprudencia es clara a la hora de excluir que las copias hechas por servicios empresariales o con máquinas explotadas por empresas puedan ampararse en la excepción de *copia privada*²⁰⁸. Ahora bien, de

²⁰⁸ Ha habido, no obstante, alguna sentencia (penal) que ha aplicado el criterio contrario, precisamente en relación con aparatos para la realización de copias digitales. Se trata de una decisión errónea, sólo explicable –acaso- por el deseo de evitar imponer una sanción penal.

lo dicho no resulta que el copista deba ser en todo caso propietario de los medios. Lo que importa es que no haya una intervención o mediación profesional o empresarial. Si, por ejemplo, una persona obtiene su copia sirviéndose del equipo reproductor de un familiar o de un amigo no parece que por ello debamos escluir que se trate de copia privada. A este respecto, sin embargo, no es posible ser muy preciso. No es fácil definir con total nitidez el concepto de “*privado*”.

Una última cuestión a considerar es la naturaleza lícita o no del acceso al ejemplar o, en su caso, servicio utilizados para realizar la copia privada. Contra lo que algunos defienden, lo cierto es que la ley no introduce exigencia alguna al respecto. La copia puede hacerse sirviéndose de un ejemplar o servicio lícitamente adquiridos. Pero si no es así, no por ello dejará de ser de aplicación el art. 31.1.2º LPI.

3.- Purposes. What is “private”?

- g) **What is the definition of “private use/private copying” in your country? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?**

No hay una definición legal de ni de “*uso privado*” ni de “*copia privada*”, aunque –como se ha visto- la ley proporciona algunas precisiones muy relevantes: no puede haber utilización colectiva ni lucrativa; tampoco es copia privada –aunque se destine a un uso privado- la copia hecha por una empresa a requerimiento de un particular, ni la que pueda hacer éste mismo valiéndose de medios proporcionados o puestos a su disposición por empresas²⁰⁹.

- h) **How does this exception translate on the Internet? Would students’ downloads of material transmitted for teaching purposes over the Internet qualify as private?**

De nuevo se trata de una cuestión que ha dado lugar a diversas opiniones. Por ejemplo, se ha dicho que no hay copia privada en la medida en que el usuario (estudiante en nuestro caso) no se vale de medios propios o de medios enteramente propios. A mi juicio, no obstante, las copias a las que se refiere la pregunta entran sin duda en el ámbito de la excepción de *copia privada*.

4.- Extent and Nature of Works.

- o) **Does the exception provide for any specific limitations regarding the extent and nature of the works covered?**

Tanto esta pregunta como la mayoría de las que siguen han sido ya respondidas de una u otra forma. No obstante, para mayor comodidad, se responderán de nuevo. La “*extent and nature*” de la obra copiada son irrelevantes. Se pueden copiar para uso privado todo tipo de obras, cualquiera que sea su forma de expresión, siempre que hubieran sido lícitamente divulgadas: obras literarias, obras musicales²¹⁰, obras plásticas, obras audiovisuales... Las únicas excepciones que hace la ley se refieren –como ya ha habido ocasión de señalar- a programas de ordenador y bases de datos electrónicas²¹¹.

²⁰⁹ En cuanto a la jurisprudencia. Ver las BBDD de CEDRO y SGAE

²¹⁰ Incluidas las partituras.

²¹¹ Cabría plantearse si cabe la copia privada de ciertas obras, como las arquitectónicas. Pero ello carece de interés a los efectos de este cuestionario.

- p) **Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?**

La excepción cubre todo tipo de obras. También las obras educativas (manuales etc.). Incluso aquel tipo de materiales que suelen quedar excluidos de las licencias reprográficas, como los libros de ejercicios (idiomas...), problemas (matemáticos, de física o química...) o actividades de entretenimiento (crucigramas...).

- q) **May works be used for private purposes in whole or only fragments?**

La ley no distingue ni impone restricciones. Por tanto, la conclusión es clara: la copia privada puede ser de fragmentos o de obras íntegras.

- r) **Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?**

El art. 31.1.2º LPI no contiene exigencia alguna en el sentido que se indica en la pregunta. Es indiferente cómo se haya obtenido la obra copiada. Lo es incluso que se haya obtenido ilegalmente. Cabe recordar que tampoco la Directiva de la Sociedad de la Información se refiere a este último requisito. Al menos de forma expresa. Sólo indirectamente, en la medida en que se hayan empleado medidas tecnológicas de protección, cabría considerar la legalidad del acceso como un condicionante o requisito de la excepción de copia privada (vid. art. 6.4,II de la citada Directiva; compárese además con el inciso final del art. 6.4,I: “[...] and where that beneficiary has legal access to the protected work or subject matter concerned”). En la vigente legislación española las únicas excepciones que requieren que el beneficiario sea un “usuario legítimo” son las previstas para programas de ordenador (art. 100 LPI) y para el derecho “sui generis” sobre bases de datos (art. 135 LPI).

- s) **How does the exception interact with the possible existence of a license which specifically prohibits any further uses?**

En principio, las excepciones deben considerarse de orden público. También la de copia privada. Su prohibición en una licencia carecería de consecuencias. Las cosas podrían cambiar si la obra está protegida tecnológicamente. En este sentido, el BALPI (en sus dos versiones conocidas) no contempla la posibilidad de que un usuario pueda vulnerar tales medidas para hacer una copia privada. Tal como permite la Directiva (vid. su art. 6.4,II), en ese caso, el efecto combinado del contrato y la tecnología –incluso de esta sola– impediría la copia privada.

5.- Remuneration.

- j) **Is this exception free or subject to remuneration?**

Sí, pero no en todo caso. El derecho a obtener una remuneración por copia privada fue reconocido en la LPI de 1987, pero su aplicación práctica ha resultado muy difícil. Han sido necesarias varias reformas legales (1992, 1994) hasta lograr su efectividad práctica. El larguísimo texto hoy vigente reza como sigue:

- *Art. 25. Right to Remuneration for Private Copying —(1) Reproduction carried out exclusively for private use, as authorized in item 2 of Article 31 of this Law, by means of non-typographical technical apparatus or instruments, of works publicly exploited in the form of books or publications assimilated thereto by regulation*

for those purposes, and also in the form of phonograms, videograms or other sound, visual or audiovisual media, shall give rise to a single equitable remuneration for each of the three forms of reproduction mentioned, payable to the persons specified in subparagraph (b) of paragraph (4) of this Article and intended to compensate for the intellectual property royalties that are not received on account of the said reproduction. This entitlement shall be unrenounceable for authors and performers.

(2) The remuneration shall be determined for each form of reproduction in relation to the equipment, apparatus and material required for carrying out the reproduction that is manufactured on Spanish territory or acquired outside the said territory for commercial distribution or use therein.

(3) The provisions of the foregoing paragraphs shall not be applicable to computer programs.

(4) With regard to the legal obligation referred to in paragraph (1) of this Article

(a) "debtors" means the manufacturers in Spain, and also the acquirers outside Spanish territory for commercial distribution or use therein, of equipment, apparatus and material that permits any of the forms of reproduction provided for in paragraph (1) of this Article.

The successive distributors, wholesalers and retailers who acquire the said equipment, apparatus and material shall, with the debtors who have supplied it, be jointly responsible for the payment of the remuneration, except where they give proof of having actually paid the remuneration to the latter, and without prejudice to the provisions of paragraphs (13), (14) and (19) of this Article;

(b) "creditors" means the authors of the works publicly exploited in any of the forms mentioned in paragraph (1) of this Article, together, in the respective cases and forms of reproduction, with the publishers and phonogram and videogram producers and the performers whose performances have been fixed on the said phonograms and videograms.

(5) The amount of the remuneration to be paid by each debtor shall be that resulting from the application of the following rates:

(a) equipment or apparatus for book reproduction:

1o 7,500 pesetas for equipment or apparatus with a copying capacity of up to nine copies per minute,

2o 22,500 pesetas for equipment or apparatus with a copying capacity of 10 to 29 copies per minute,

3o 30,000 pesetas for equipment or apparatus with a copying capacity of 30 to 49 copies per minute,

(b) equipment or apparatus for phonogram reproduction: 100 pesetas per unitary recording;

(c) equipment or apparatus for videogram reproduction: 1,100 pesetas per unitary recording;

(d) sound reproduction material: 30 pesetas per hour of recording or 0.50 pesetas per minute of recording;

(e) visual or audiovisual recording material: 50 pesetas per hour of recording or 0.833 pesetas per minute of recording.

(6) The following shall be exempted from the payment of remuneration:

(a) the producers of phonograms or videograms and broadcasting organizations for equipment, apparatus or material intended for the pursuit of their activity, provided that they have the required authorization to effect the said reproduction of works, performances, phonograms or videograms, as the case may be, in the course of that activity, which fact they shall prove to the debtors and to any persons jointly responsible with them, by means of a certificate from the administration entity or entities concerned in the event of the equipment, apparatus or material having been acquired on Spanish territory;

(b) natural persons who acquire the said equipment, apparatus and material outside Spanish territory under the arrangements for travelers and in such a quantity that it may be reasonably presumed that they are intended for private use on the said territory.

(7) The right of remuneration referred to in paragraph (1) of this Article shall be asserted through entities for the administration of intellectual property rights.

(8) Where two or more administrative entities are involved in the management of one and the same kind of remuneration, they may engage in dealings with the debtors for all matters concerning the collection of royalties, whether contentious or not, by joint and several representation, in which case the provisions governing community property shall be applicable to the relations between the said entities. In that case also, the administration entities may become associated and constitute a legal entity under the laws in force for the purposes specified.

(9) The administration entities of creditors shall communicate to the Ministry of Culture the name or business style and address of the individual representative or of any association that has been formed. In the latter case, they shall in addition submit the documents proving the formation of the said association, with an itemized account of its member organizations in which the name and address thereof shall be given.

The provisions of the foregoing paragraph shall be applicable to any change of sole representative or any change in the association formed, in their addresses and in the names and capacities of the administration entities, whether represented or associated, and also in the event of amendment of the statutes of the association.

(10) The Ministry of Culture shall exercise control over the administration entity or entities or, as the case may be, over the representative or association responsible for the management of the collection of royalties, in the manner laid down in Article 159 of the Law, and where appropriate shall publish in the Official Bulletin of the State [Boletín Oficial del Estado] an account of the representative entities or managing associations, specifying their addresses, the kind of remuneration for which they are responsible and the administration entities that they represent or that are associated with them. Such publication shall be carried out whenever a change occurs in the particulars specified.

For the purposes specified in Article 159 of the Law, the administration entity or entities or, as the case may be, the management representative or association appointed, shall be obliged to submit to the Ministry of Culture, on June 30 and December 31 of each year, a detailed account of settlement declarations and of payments made as referred to in paragraph (12) of this Article and corresponding to the preceding six-month period.

(11) The obligation to pay remuneration shall arise in the following circumstances:

(a) for manufacturers and acquirers of equipment, apparatus and material outside Spanish territory for commercial distribution therein, at the time when the transfer of ownership on the part of the debtor occurs or, as the case may be, when the assignment of the use or enjoyment of any of them occurs;

(b) for the acquirers of equipment, apparatus and material outside Spanish territory that is intended for use therein, from the moment of acquisition thereof.

(12) The debtors mentioned in subparagraph (a) of paragraph (11) of this Article shall submit to the corresponding administration entity or entities or, where applicable, to the representative or association mentioned in paragraphs (7) to (10) inclusive of this Article, within the 30 days following the end of every calendar quarter, a settlement declaration which shall specify the numbers and technical characteristics, as required by paragraph (5) of this Article, of the equipment, apparatus and material regarding which the obligation to pay remuneration has arisen in the course of the said quarter. The same detail shall be used to deduct the amounts corresponding to equipment, apparatus and material destined to be taken out of Spanish territory and those relating to such as is exempted under the provisions of paragraph (6) of this Article.

The debtors mentioned in subparagraph (b) of paragraph (11) of this Article shall file the settlement declaration provided for in the foregoing paragraph within five days after the obligation arose.

(13) Distributors, wholesalers and retailers as referred to in the second paragraph of paragraph (4)(a) of this Article shall comply with the obligation provided for in the first paragraph of paragraph (12) of this Article with respect to equipment, apparatus and material acquired by them on Spanish territory from debtors that have not invoiced and passed on to them the corresponding remuneration.

(14) Unless otherwise agreed, the payment of remuneration shall be effected

(a) by the debtors mentioned in subparagraph (a) of paragraph (11) within the month following the date of the end of the period for the filing of the settlement declaration referred to in the first paragraph of paragraph (12);

(b) by other debtors and by distributors, wholesalers and retailers in relation to the equipment, apparatus and material referred to in paragraph (13) of this Article, at the time of the submission of the settlement declaration, without prejudice to the provisions of paragraph (19) thereof.

(15) The debtors, and where applicable those jointly responsible with them, shall be considered depositaries of the remuneration credited until such time as it is actually paid as provided in paragraph (14) above.

(16) For the purposes of the monitoring of the payment of remuneration, the debtors mentioned in subparagraph (a) of paragraph (11) of this Article shall state separately on their invoices the amount of that remuneration, which they shall pass on to their clients and retain for payment in accordance with the provisions of paragraph (14).

(17) The obligations relating to the invoicing and passing on of remuneration to clients, as laid down in the foregoing paragraph, shall apply to the distributors, wholesalers and retailers, being jointly responsible with the debtors. They shall also fulfill the obligation to hold and to pay, provided for in the said paragraph, in the circumstances provided for in paragraph (13).

(18) In no case shall distributors, wholesalers and retailers, being jointly responsible with the debtors, accept from their respective providers the supply of equipment, apparatus and material subject to remuneration if it is not invoiced in accordance with the provisions of paragraphs (16) and (17) of this Article.

(19) Without prejudice to the provisions of the foregoing paragraph, where the amount of remuneration is not specified in an invoice, it shall be presumed, in the absence of proof to the contrary, that the remuneration payable for the equipment, apparatus and material specified has not been paid.

(20) In the circumstances described in the foregoing paragraph, and in any other case of non-payment of remuneration, the administration entity or entities or, as the case may be, the management representative or association may, without prejudice to any civil and criminal actions that may be available to them, apply to the court, using the procedure laid down in Article 142 of this Law, for the seizure of the equipment, apparatus and material concerned.

The property thus seized shall be held against payment of the remuneration claimed and such indemnification for damages and prejudice as may be appropriate.

(21) The debtors and those jointly responsible with them shall allow the administration entity or entities or, as the case may be, the management representative or association, to oversee operations subject to remuneration and those affected by the obligations imposed by paragraphs (12) to (20) inclusive of this Article. Consequently, they shall provide the data and documents necessary to verify the actual fulfillment of the said obligations, and especially the accuracy of settlement declarations submitted.

(22) The administration entity or entities or, as the case may be, the management representative or association, and also the represented or associated entities themselves, shall respect the principles of commercial confidentiality or discretion regarding any information to which they may be privy in the exercise of the rights provided for in paragraph (21).

(23) *The Government shall specify by regulation the types of reproduction that should not be regarded as for private use for the purposes of the provisions of this Article, the equipment, apparatus and material exempted from the payment of remuneration owing to the specific nature of the use or exploitation for which they are intended, such requirements as may derive from the development of technology and of the market sector concerned, and the distribution of remuneration in each of the fields of activity among the different categories of creditors, in order that they in turn may distribute them among themselves, due regard being had to the provisions of Article 154 of this Law.*

Como resulta de la lectura del apartado 1 del art. 25 transcrito, las copias privadas permitidas al amparo de la excepción del art. 31.1.2º LPI sólo darán lugar a una remuneración en el caso de obras cuando se realicen *“by means of non-typographical technical apparatus or instruments”* y se trate de *“works publicly exploited in the form of books or publications assimilated thereto by regulation for those purposes, and also in the form of phonograms, videograms or other sound, visual or audiovisual media”*²¹². Si se trata de obras explotadas de otra forma, no habrá lugar a remuneración. Esto significa que puede haber copias realizadas al amparo de la excepción que, sin embargo, no se vean compensadas mediante remuneración específica alguna. Es el caso, por ejemplo, de las obras publicadas en diarios y en revistas no asimiladas a libros. O de las obras plásticas y fotográficas no incluidas en libros o publicaciones asimiladas. Ello parece apartarse de la exigencia del art. 5.2,b) de la Directiva de la Sociedad de la Información, que admite la excepción de copia privada *“on condition that the rightholders receive fair compensation”*. No obstante, como es sabido, el término *“compensation”* usado en la Directiva no significa que necesariamente deba establecerse un *“derecho de remuneración”*. En este sentido, el Considerando 35 de la misma, entre otras cosas, dice: *“In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due”*. A la luz de este criterio, podría asumirse que el BALPI (primera y segunda versiones) mantenga el planteamiento actualmente vigente, consistente en limitar el derecho de remuneración a las copias que afecten a obras explotadas de determinadas formas.

k) If subject to remuneration, how is that established? Criteria used to set the fees.

El transcrito art. 25 LPI es claro al respecto. La remuneración se establece mediante un canon que grava los equipos o aparatos y materiales utilizados para la realización de las copias privadas. La cuantía del canon resulta de una valoración que, en líneas generales, se basa en la capacidad de copia de los equipos o aparatos y en la capacidad de almacenamiento de los materiales.

l) How is it collected? Which collecting society? How is it distributed among the copyright owners ?

El derecho de remuneración por copia privada es, como todos los derechos de remuneración²¹³, de gestión colectiva obligatoria (art. 25.7 LPI: *“The right of remuneration referred to in paragraph (1) of this Article shall be asserted through entities for the administration of intellectual property rights”*). Las entidades de gestión representan pues tanto a sus miembros como a quienes carecen de esta condición. Podría discutirse si la imposibilidad de gestión individual desprovee a los titulares de toda capacidad de decisión, más allá del derecho a escoger entidad en el caso de concurren varias (por ejemplo, lo hacen SGAE y DAMA). En otras palabras: ¿podrían los titulares decidir no ejercitar el derecho?²¹⁴. En la práctica, sin embargo, se viene

²¹² La Directiva distingue entre reprografía [art. 5.2,a)] y copia privada [art. 5.2,b)]. Esa distinción no existe en la Ley española. La reprografía no es objeto de excepción alguna. Las únicas *“reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects”* [art. 5.2,a)] permitidas sin autorización, son las que se ajustan a las exigencias previstas para la copia privada [art. 5.2,b)].

²¹³ Con la excepción del derecho de participación o seguimiento sobre obras plásticas (art. 24 LPI, *droit de suite*)

²¹⁴ “No ejercitar”, obviamente, no es lo mismo que “renunciar”

entendiendo que las entidades recaudan el derecho globalmente, aunque alguno o alguno de los titulares pudieran no querer ejercerlo.

No hay una única entidad de gestión para la recaudación de la remuneración por copia privada. Intervienen todas y cada una de las ocho autorizadas en España (SGAE, CEDRO, VEGAP, AISGE, AIE, AGEDI, EGEDA y DAMA). Lo hacen además de forma independiente, aunque a veces llegan a acuerdos entre ellas (por ejemplo, hay un acuerdo por el que CEDRO recauda también por cuenta de VEGAP). Cabría incluso que todas las entidades actuasen bajo una única representación (art. 25.8 LPI). Pero nunca se han acogido a esta posibilidad; salvo en la limitada medida a la que se ha hecho referencia.

La distribución debe hacerse entre todos los titulares, sean o no miembros de la entidad de que se trate. El procedimiento de reparto está previsto en los Estatutos de las diversas entidades y, en líneas generales, se hace a partir de estimaciones basadas en la presunción de que cuanto más leída, oída o vista sea una obra, más afectada se verá por la copia privada.

m) Does this system also apply to digital uses? How?

Actualmente esa es una cuestión polémica. Las entidades de gestión entienden que el vigente art. 25 LPI cubre tanto las copias analógicas como las digitales. El art. 25.1 se refiere a toda copia realizada empleando "*non-typographical technical apparatus or instruments*" y el art. 25.2 habla de equipos, aparatos y materiales "*idóneos*" (*required for*) para realizar dicha reproducción. Se trataría pues de un planteamiento tecnológicamente neutral, susceptible de extenderse a los nuevos medios digitales. Este punto de vista ha sido asumido por algunas sentencias de Juzgados de Primera Instancia (*Casos Traxdata* y *Verbatim*, ya citados). Los recursos siguen pendientes de solución.

El BALPI (primera y segunda versión), sin rechazar –antes al contrario– que el derecho de remuneración se aplique a los medios digitales, prevé, sin embargo, un cambio de planteamiento. En vez de partir de una genérica declaración de idoneidad, a concretar en vía judicial, encomienda al Gobierno la determinación de los equipos o aparatos y materiales sujetos al canon.

IV.- LIBRARY EXCEPTIONS.

The main purpose of this section is to address the interaction between library privileges and teaching uses: to what extent may library exceptions assist teaching activities conducted through the Internet (either exempted or licensed teaching uses). Please feel free to provide any information concerning the general scope of such exceptions, even though not especially helpful as far as teaching purposes.

0.- Identify any exception that allows for the use of copyrighted works by libraries, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

Las excepciones previstas en favor de las bibliotecas y otras instituciones análogas están previstas en el art. 37 LPI:

- *Art. 37 (Free Reproduction and Lending in Specific Establishments) .—(1) The owners of copyright may not object to reproductions of works where they are made without gainful intent by museums, libraries, record libraries, film libraries, newspaper libraries or archives which are in public ownership or form part of institutions of cultural or scientific character, and where the reproduction is effected solely for research purposes.*

(2) Museums, archives, libraries, newspaper libraries, record libraries or film libraries in public ownership or belonging to institutions of general cultural, scientific or educational interest without gainful intent, or to teaching institutions integrated in the Spanish educational system, shall not require the authorization of the owners of copyright or pay remuneration to them for the loans that they make.

1.- Exclusive rights covered by the exception.

- g) Reproduction? Distribution? Communication to the public? Transformation? Does it cover digital copies? Does it cover digital transmissions of works?**

Hay que distinguir entre la reproducción con fines de investigación (apartado 1) y el préstamo (apartado 2).

En relación con la reproducción con fines de investigación y como resulta del propio tenor literal de la norma, lo único que se permite es la reproducción. No se alude a ningún otro derecho, lo que ha hecho dudar incluso de que quepa entregar las copias realizadas, en la medida en que ello supondría llevar a cabo un acto de distribución. Sin embargo, sería absurdo impedir la entrega de la copia, a menos que se entendiera que la biblioteca tan sólo puede hacer el tipo de copias de que se trata para disponer de un ejemplar al que los usuarios accederían mediante consulta in situ o mediante préstamo, sin perjuicio de la posibilidad de llevar a cabo una copia privada. El BALPI (en su primera versión, de noviembre de 2002) permitía que las bibliotecas hicieran copias “*para conservación o investigación*”. Sin ser totalmente claro, ello permitía entender con más facilidad que las copias hecha con fines de investigación podían entregarse a los investigadores. En el mismo sentido cabe señalar que se preveía modificar el vigente art. 40 bis (en el que se contiene el *three step test*) para añadir un nuevo apartado 1 según el cual los límites (excepciones) afectarían en cada caso a los derechos “*exigidos por la finalidad a la que aquellos responden*”. La expresa adición del derecho de distribución contaría además con la cobertura del art. 5.4 de la Directiva de la Sociedad de la Información. La segunda versión conocida del BALPI (enero de 2003) mantiene la referencia a “*fines de conservación o investigación*”, aunque añadiendo “*siempre que éstos le fueran reconocidos como propios a la institución en la normativa correspondiente*”. También se elimina la frase transcrita del nuevo apartado 1 del art. 40 bis.

La distribución –al margen de lo que acaba de explicarse en el párrafo precedente- sólo está prevista para el préstamo (apartado 2 del art. 37). Cabe observar que las instituciones beneficiarias de las excepciones previstas en los apartados 1 (reproducción con fines de investigación) y 2 (préstamo) no son exactamente las mismas. Sobre esta diferencia, vid. infra “Eligibility”.

Ninguna de las dos excepciones previstas en el art. 37 LPI permite llevar a cabo actos de comunicación al público. Tampoco de transformación.

Las copias permitidas por el art. 37.1 LPI (fines de investigación) pueden hacerse tanto en formato analógico como digital. La ley no distingue. Cabría plantearse si la digitalización implica transformación. A mi juicio no, por las razones que ya habido ocasión de exponer con anterioridad.

En cuanto a la posible transmisión digital, la respuesta es negativa. No se autorizan actos de comunicación pública. Ni en formato analógico ni en formato digital. El préstamo autorizado por el art. 37.2 LPI tiene por objeto soportes físicos (original o ejemplares). No cabe hablar de “préstamo digital”.

- h) Would it be permissible for a library to make digital copies of the works in its catalogue, and post them on its web page, or transmit them to their teachers and/or students (for teaching purposes), or even for inter-library loans?**

No. Todos esos actos requieren autorización de los titulares de derechos.

Cabe observar que el BALPI (primera versión, noviembre de 2002) recogía –aunque limitando los beneficiarios y añadiendo algunas precisiones- la excepción prevista en el art. 5.3,n) de la Directiva de la Sociedad de la Información (*“use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections”*). En la segunda versión del BALPI (enero de 2003), no obstante, la referencia al *“private study”* ha desaparecido.

La posibilidad de *“inter-library loans”* sólo se contempla con relación a soportes físicos. Cabe señalar que la primera versión del BALPI incluía a este respecto una referencia expresa que, sin embargo, ha desaparecido de la segunda.

2.- Eligibility

- g) Which libraries may benefit from the exception? Only public libraries? Non-for-profit libraries? What about on-line libraries?**

Como se ha advertido, las entidades beneficiarias de la excepción de reproducción con fines de investigación no coinciden exactamente con aquellas a las que se permite la realización de préstamos.

El apartado 1 del art. 37 LPI (reproducciones *“made without gainful intent”* y *“solely for research purposes”*) se refiere a: *“museums, libraries, record libraries, film libraries, newspaper libraries or archives which are in public ownership or form part of institutions of cultural or scientific character”*. Nótese que se requiere que sean de titularidad pública (*“public ownership”*), no bastando la mera accesibilidad al público [que es el criterio, más amplio, contemplado en el art. 5.2,c) de la Directiva de la Sociedad de la Información²¹⁵]. Sólo

²¹⁵ Las dudas que podría suscitar el texto español acerca de si la accesibilidad pública se predica sólo de los museos, se disipan a la vista de la versión inglesa de la Directiva: *“acts [...] made by publicly accessible libraries, educational establishments or museums”*. No hay duda de que las bibliotecas deben ser –y basta con que sean- accesibles al público. Tampoco hay duda

escapan de la exigencia de titularidad –no de la accesibilidad- pública las bibliotecas que “*form part of institutions of cultural or scientific character*”. La comparación del art. 37.1 LPI con el art. 5.2,c) de la Directiva de la Sociedad de la información pone de relieve la ausencia en aquel de toda referencia a “*centros de enseñanza*” (“*educational establishments*”). A la misma conclusión se llega a la vista del art. 37.2 LPI.

El apartado 2 del art. 37 LPI alude a: “*Museums, archives, libraries, newspaper libraries, record libraries or film libraries in public ownership or belonging to institutions of general cultural, scientific or educational interest without gainful intent, or to teaching institutions integrated in the Spanish educational system*”. Como puede verse, en este caso si se incluye entre los beneficiarios de la excepción a las instituciones de “*general [...] educational interest without gainful intent*”, así como a las “*teaching institutions integrated in the Spanish educational system*”.

En principio, la diferencia entre los apartados 1 y 2 del art. 37 LPI puede considerarse coherente con el hecho de que el art. 37.1 LPI se limite a los fines de investigación, sin contemplar los meramente educativos o de enseñanza, sólo presentes en el art. 37.2 LPI.

El BALPI (primera versión, noviembre 2002) procedía a unificar los sujetos beneficiarios de ambas excepciones (reproducciones con fines de investigación y préstamo), añadiendo –como ya ha habido ocasión de señalar- una tercera, relativa a consultas mediante terminales especializados [art. 5.3,n) de la Directiva de la Sociedad de la Información]. Los beneficiarios de las tres excepciones eran las bibliotecas e instituciones análogas “*accesibles al público*” (no necesariamente “*in public ownership*”) o “*que pertenezcan a instituciones docentes integradas en el sistema educativo español*”, así como los museos y archivos²¹⁶. Como puede verse, las bibliotecas pertenecientes a instituciones docentes integradas en el sistema educativo español²¹⁷ veían ampliadas sus posibilidades, pues ya no se les permitía sólo el préstamo, sino también la reproducción y la consulta en terminales especializados. Esta ampliación, no obstante, era más aparente que real, pues en ambos casos se incluía la exigencia de los fines de investigación.

La segunda versión del BALPI (enero 2003) mantiene el planteamiento de la primera, pero exigiendo que las bibliotecas y establecimientos análogos sean de “*public ownership*”.

h) Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect digital (on-line) libraries?

Como resulta de cuanto se viene diciendo, las “*digital (on-line) libraries*” sólo son posibles en la medida en que cuenten con la autorización de los titulares. A lo sumo, de aprobarse el BALPI, se permitiría lo que autoriza la excepción del art. 5.3,n) de la Directiva de la Sociedad de la Información, es decir, la consulta mediante terminales especializados. Pero sólo con fines de investigación. Es decir, excluyendo el “*estudio personal*” que, en cambio, la Directiva contempla.

3.- Purposes.

respecto a la accesibilidad pública de los museos (un museo no accesible al público no es un museo: es una colección). A lo sumo cabría plantear algún interrogante acerca de la accesibilidad pública de los establecimientos educativos. Pero no hay que olvidar que la accesibilidad pública no significa acceso indiscriminado y sin condiciones de cualquier sujeto.

²¹⁶ La exigencia de accesibilidad pública de los museos está implícita en el propio concepto (recuérdese lo dicho en cuanto a la diferencia entre “museo” y “colección”). En el caso de los archivos, en cambio, la accesibilidad pública no es un requisito legal [tampoco lo exige el art. 5.3,c) de la Directiva de la Sociedad de la Información].

²¹⁷ Cabría preguntarse si esta exigencia es compatible con el espacio único europeo. La respuesta exigiría un análisis detenido de la exigencia de integración en el sistema educativo español.

k) Conservation, lending, studying, research, teaching purposes, etc.?

Como se ha visto, la reproducción (art. 37.1 LPI) sólo cabe con fines de investigación. El BALPI (primera y segunda versiones) incluye también los fines de conservación.

En cuanto al préstamo, no hay finalidad alguna. Lo que importa son los sujetos beneficiarios²¹⁸. Quien obtiene la obra en préstamo puede aplicarla al uso que desee (estudio, investigación, enseñanza...²¹⁹)

l) Could the library supply material to be used for teaching purposes?

Como acaba de decirse, el material proporcionado por la biblioteca sólo puede usarse “*for teaching purposes*” de forma muy limitada. Puede usarse para preparar las clases o para preparar materiales que incluyan fragmentos a título de cita (art. 32 LPI). No cabe distribuir copias entre los alumnos, ni llevar a cabo actos de comunicación pública en el aula. Menos aun a través de red; aunque se trate de una red cerrada (*intranet*)

m) Since the library privilege granted under article 5.2.(c) Copyright Directive is not limited to any specific purposes, it leaves the door open for coverage of reproductions for teaching purposes, provided such reproductions are not for direct or indirect economic or commercial advantage. Has your national legislator implemented (or intends to implement) such an exception? If so, how?

Ciertamente, el art. 5.2, c) de la Directiva no se refiere a “*specific purposes*”, aunque sí a “*specific acts*” (en el mismo sentido, Considerando 40). ¿Qué debe entenderse por “*specific acts*”? Cabe una lectura simplemente cuantitativa (un número limitado de reproducciones). Pero también cualitativa, es decir, asociada a finalidades o justificaciones específicas. En mi opinión, no cabe prescindir de ninguna de las dos. Una de las finalidades específicas permitidas puede ser la de conservación. Otra la de investigación²²⁰. Probablemente, cabría admitir los “*teaching purposes*” como un caso más de “*actos específicos*”. En cualquier caso, la ley española no comparte este criterio. El vigente art. 37.1 LPI, como sabemos, sólo admite las reproducciones con fines de investigación. Tampoco el BALPI se ha mostrado favorable a la extensión de la excepción a los fines educativos. Los únicos actos específicos de reproducción que este contempla (en sus dos versiones) son los realizados con fines de conservación o investigación; o bien para permitir la consulta en terminales especializados prevista en el art. 5.3,n) de la Directiva.

4.- Extent and Nature of works.

p) Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

²¹⁸ Es claro, a la vista de lo que se viene diciendo, que el vigente art. 37.1 LPI pone más el acento en la finalidad (investigación) que en los sujetos beneficiarios. El art. 37.2 LPI, en cambio, prescinde de toda finalidad (o, al menos, es más amplio en materia de fines), lo que centra la cuestión en los sujetos beneficiarios.

²¹⁹ Esto último, claro está, siempre que se limite a la preparación de las clases. La lectura de un libro, audición de una composición musical o visionado de una película en clase, serían actos de comunicación pública, no autorizados por ninguna excepción, salvo –cumpliendo con las exigencias correspondientes (fragmentos...)- la de cita (art. 32 LPI).

²²⁰ La Propuesta inicial de la Directiva (cuyo artículo equivalente –como el finalmente aprobado- no mencionaba ninguna finalidad específica concreta) ponía el ejemplo de la reproducción de obras agotadas. La Propuesta Modificada cambió este planteamiento y limitó las reproducciones a “*finas de archivo o conservación*”. La Posición Común volvió al planteamiento inicial, dejando abierto al concreto alcance de la fórmula “*actos específicos*”

Ninguna de las dos excepciones previstas en el vigente art. 37 LPI (reproducción con fines de investigación y préstamo) prevé limitaciones del tipo de las que se aluden en la pregunta.

La reproducción con fines de investigación puede aplicarse a cualquier obra protegida, con independencia de su lenguaje expresivo (obras literarias, musicales, plásticas...). Nótese que el art. 37.1 LPI incluye entre los beneficiarios de la excepción a fonotecas y filmotecas²²¹. En cuanto a la extensión, tampoco hay restricciones expresas. Cabe la reproducción íntegra, si así lo exige la finalidad pretendida.

En cuanto al préstamo (art. 37.2 LPI) la respuesta debe ser la misma. Puede prestarse todo tipo de obras. También esta norma incluye entre los beneficiarios a filmotecas y hemerotecas. Pueden pues prestarse incluso obras musicales y audiovisuales²²². En su caso, las restricciones deberían venir de la mano del *three step test* (art. 40 bis LPI)

q) Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

No hay exclusiones en función de distinciones como las apuntadas en la pregunta. Ni los lenguajes expresivos [cuestión a): "*nature of the works*"] ni su finalidad [cuestión b): "*kind of works*"] tienen importancia. En particular, nada impide que las obras de carácter educativo sean objeto de reproducción. Ahora bien, conviene no olvidar que estas reproducciones sólo caben con fines de investigación. En cuanto a la modalidad analógica o digital, la ley no distingue. Ambas deben pues entenderse incluidas en el ámbito de la excepción. En particular, la excepción no se limita a obras "*in printed form*".

Lo mismo sucede en materia de préstamo. Puede prestarse cualquier obra, incluidas las de carácter educativo; en este caso, con independencia de la finalidad pretendida por quien obtiene la obra en préstamo. Asimismo es irrelevante la naturaleza del soporte analógica o digital. Pero sí debe haber un soporte físico. De otra forma no cabría hablar de préstamo.

En cuanto a la nueva excepción añadida por el BALPI (en sus dos versiones conocidas), relativa a consulta en terminales especializados (art. 5.3, n) de la Directiva de la Sociedad de la Información), tampoco hay restricción alguna relacionada con los criterios a los que se refiere la pregunta. Ahora bien, hay que recordar que, en la segunda versión del BALPI, ha desaparecido el fin de "*estudio personal*".

r) May works be used in whole or only fragments?

Como ya ha habido ocasión de señalar, las excepciones previstas en el vigente art. 37 LPI no exigen que el uso se limite a fragmentos. Tampoco lo hace el BALPI en relación con la excepción del art. 5.3,n) de la Directiva de la Sociedad de la Información.

s) Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

XXXXXXXXXXXXXXXXX **ACLARAR EL SENTIDO DE LA PREGUNTA**

²²¹ Hay que llamar la atención, no obstante, acerca del estatuto de los programas de ordenador y de las bases de datos, en la medida en que disponen de sistemas propios de excepciones cuya relación con el sistema general requeriría un análisis más detenido.

²²² Conviene recordar, sin embargo, la observación de la nota anterior en cuanto a programas y bases de datos.

t) How does the exception interact with the possible existence of a license which specifically prohibits any further use?

A menudo las obras de que se trata no serán objeto de licencia sino de compraventa. No obstante, si las bibliotecas las adquiriesen en el marco de una licencia, no por ello cambiarían las cosas. En otras palabras: las dos excepciones previstas en el vigente art. 37 LPI son, a mi juicio, inmunes a eventuales prohibiciones contenidas en licencias de uso.

No es este el caso, en cambio, de la tercera excepción añadida por el BALPI (en sus dos versiones). La consulta mediante terminales especializados (art. 5.3,n) de la Directiva de la Sociedad de la Información está expresamente sometida a las eventuales “condiciones de adquisición o de licencia”

5.- Remuneration.

l) Is this exception free or subject to remuneration?

La reproducción con fines de investigación no está condicionada al pago de remuneración alguna. Aunque la ley no se pronuncia –ni a favor ni en contra- el silencio debe entenderse en sentido negativo. Las dos versiones del BALPI así lo declaran expresamente., con carácter general, en un nuevo apartado 1 añadido al art. 40 bis LPI.

En cuanto al préstamo, el art. 37.2 LPI efectúa una declaración expresa de gratuidad (*“shall not require the authorization of the owners of copyright or pay remuneration to them for the loans that they make”*). El BALPI –que incluye una referencia al préstamo interbibliotecario- la omite. Pero queda cubierta por la declaración general del nuevo apartado 1 del art. 40 bis a la que se acaba de hacer referencia en el párrafo anterior.

Tampoco se prevé remuneración alguna por la consulta mediante terminales especializados, añadida por el BALPI.

m) If subject to remuneration, how is that established? Criteria used to set the fees.

Vid. respuesta a la anterior pregunta b)

n) How is it collected? Which collecting society? How is it distributed among the copyright owners ?

Vid. respuesta a la anterior pregunta b)

o) Does this system also apply to digital uses? How?

Vid. respuesta a la anterior pregunta b)

V.- TECHNOLOGICAL MEASURES VS. EXCEPTIONS.

The purpose of this section is to evaluate the interaction between exceptions and technological measures i.e., how is copyright balanced against the public interest?

10. Are technological measures protected in your country? To what extent (access control, anti-copy, etc.)?

La legislación vigente sólo tutela las medidas tecnológicas empleadas para proteger programas de ordenador, de acuerdo con lo exigido con la correspondiente Directiva. La disposición de referencia es el art. 102,c) LPI:

- *Art. 102. (Infringement of Rights) .- For the purposes of this Title and without prejudice to the provisions of Article 100, those persons shall be considered infringers of copyright who, without authorization from the owner thereof, perform the acts provided for in Article 99, and who, in particular,*
 - (a) bring into circulation one or more copies of a computer program when they know or can assume that they are unlawful;*
 - (b) stock for commercial purposes one or more copies of a computer program when they know or can assume that they are unlawful;*
 - (c) bring into circulation or stock for commercial purposes any instrument whose sole purpose is the unauthorized removal or disablement of any technical device used to protect a computer program.²²³*

Como puede verse lo único que se sanciona son los actos preparatorios o actos de tráfico. No los simples actos de elusión. Además las medidas tecnológicas tuteladas son sólo las que tienen como “sole purpose” la protección de un programa.

El BALPI, por su parte, prevé incorporar las normas sobre protección de medidas tecnológicas en los mismos términos –casi de forma literal- que la Directiva de la Sociedad de la Información (art. 6)²²⁴. A este objeto se añade un nuevo Título VI al Libro III de la Ley. El primero de los preceptos de dicho nuevo Título dispone:

- *Art. 172 (Actos de elusión y preparatorios).- 1. Los titulares de derechos de propiedad intelectual reconocidos en esta Ley, podrán ejercitar las acciones previstas en el Título I del Libro III de la misma contra quienes, a sabiendas o teniendo motivos razonables para saberlo, eludan cualquier medida tecnológica eficaz.*
 - 2. Las mismas acciones podrán ejercitarse contra quienes fabriquen, importen, distribuyan, vendan, alquilen, publiciten para la venta o el alquiler, o posean con fines comerciales, cualquier dispositivo, producto o componente, así como quienes presten algún servicio que, respecto de cualquier medida tecnológica eficaz:*
 - *sea objeto de promoción, publicidad o comercialización con la finalidad de eludir la protección, o*
 - *sólo tenga una finalidad o uso comercial limitado al margen de la elusión de la protección, o*
 - *esté principalmente concebido, producido, adaptado o realizado con la finalidad de permitir o facilitar la elusión de la protección.*
 - 3. Se entiende por medida tecnológica [...]*
Las medidas tecnológicas se consideran eficaces [...]

²²³ Esta disposición tiene su equivalente en el Código penal (art. 270,III); aunque entre una y otra norma hay algunas diferencias importantes.

²²⁴ Cabe observar que la tutela penal será en este caso anterior a la civil, toda vez que la reforma del Código penal está ya prácticamente concluida, en tanto que el BALPI parece no progresar.

4. Lo dispuesto en los apartados anteriores no es de aplicación a las medidas tecnológicas utilizadas para la protección de programas de ordenador, que quedarán sujetas a su propia normativa

11. How do exceptions relate to technological measures? Has the legislator implemented any specific provision to ensure that exceptions will continue to apply despite the existence of any technological measures implemented by the copyright owners? How has art.6.4 EU Directive (if so) been implemented?

En el art. 102,c) LPI no se incluye pronunciamiento alguno al respecto; aunque –acaso- la referencia a “supresión o neutralización «no autorizadas»” podría interpretarse en favor de las excepciones a la propiedad intelectual (“autorizadas” no sólo por los titulares de derechos sino también por la ley, mediante alguna excepción). En cualquier caso, hay que recordar que en el art. 102,c) LPI no se sancionan los actos de elusión sino sólo los de tráfico.

El BALPI aborda el problema en los mismos términos que la Directiva de la Sociedad de la Información, dando prevalencia –en caso de conflicto con medidas tecnológicas- a los límites consignados en el art. 6.4,I de ésta. En relación con la copia privada, dado que la Directiva no impone la intervención estatal en su favor (se limita a permitirla, cfr. art. 6.4,II), el BALPI ha optado por excluir esta posibilidad. Si la copia privada se ve imposibilitada por medidas tecnológicas eficaces, no se obligará a quienes las hayan empleado a levantarlas o de cualquier otra forma hacer posible la referida copia.

En los casos en que se prevé, la intervención estatal (encomendada al Ministerio de Educación, Cultura y Deporte, previa propuesta de la Comisión de Propiedad Intelectual), respeta los planteamientos de la Directiva. La referida intervención se producirá sólo en defecto de la actuación de los titulares de derechos. Si estos ponen los medios para que los beneficiarios puedan disfrutar de las excepciones de que se trata –o mejor, si quedan satisfechos los objetivos pretendidos con éstas- el Estado se abstendrá de intervenir.

El eventual conflicto entre excepciones y medidas tecnológicas se aborda en las siguientes disposiciones, que prevé añadir el BALPI:

- Art. 173 (Límites a la propiedad intelectual y medidas tecnológicas).- 1. Los titulares de derechos sobre obras o prestaciones protegidas con medidas tecnológicas eficaces, deberán facilitar a los beneficiarios de los límites previstos en los artículos 31 bis [seguridad y procedimientos oficiales y minusvalías], 32 apartado 2 [utilización con fines de ilustración de la enseñanza o de investigación], 36 apartado 3 [copias técnicas para radiodifusión autorizada], 37 párrafo a) [reproducción por bibliotecas y otras instituciones con fines de investigación] y 135 apartado 1 párrafos b) y c) [excepciones al derecho sui generis] de esta Ley, medios adecuados para disfrutar de ellos conforme a su finalidad, siempre y cuando tales beneficiarios tengan legalmente acceso a la obra o prestación de que se trate.
- 2. Cuando los titulares de derechos de propiedad intelectual no hayan adoptado medidas voluntarias, incluidos los acuerdos con otros interesados, para el cumplimiento del deber previsto en el anterior apartado, el Ministerio de Educación, Cultura y Deporte impondrá las medidas que considere oportunas para su adecuada satisfacción, por el procedimiento establecido en el siguiente artículo.
- 3. Tanto las medidas tecnológicas adoptadas voluntariamente por los titulares de los derechos de propiedad intelectual, incluidas las derivadas de acuerdos con otros interesados, como las que lo hayan sido a instancia del Ministerio de Educación, Cultura y Deporte, disfrutarán de la protección jurídica prevista en el apartado 1 del artículo 172 de esta Ley.

4. Lo dispuesto en los apartados 1 y 2 de este artículo no será de aplicación a obras o prestaciones que se hayan puesto a disposición del público con arreglo a lo convenido por contrato, de tal forma que personas concretas del público puedan acceder a ellas desde el lugar y en el momento que individualmente elijan.

- Art. 174 (Adopción de medidas a instancia del Ministerio de Educación, Cultura y Deporte).- 1. En el caso y a los fines contemplados en el apartado 2 del artículo 173 de esta Ley, los beneficiarios de los límites de que se trata podrán solicitar, a través de una agrupación, asociación o entidad representativa de sus intereses, la intervención de la Comisión de Propiedad Intelectual, que también podrá actuar de oficio.

2. La Comisión, tras el procedimiento reglamentario establecido al efecto, elevará al Ministro una propuesta de resolución, indicando las medidas que, en su caso, corresponda adoptar a los titulares de derechos de propiedad intelectual para facilitar el disfrute del límite o límites de que se trate.

3. A la vista de la propuesta de la Comisión, el Ministro de Educación, Cultura y Deporte adoptará la resolución correspondiente y la comunicará a quienes hayan sido parte en el procedimiento, dándoles plazo para cumplirla. Asimismo podrá comunicarla a terceros y darle la publicidad que considere oportuna. La resolución del Ministro será directamente impugnabile ante la jurisdicción competente.

4. Si en el plazo señalado al efecto, los titulares de derechos no diesen cumplimiento a la resolución del Ministro, serán sancionados con multa de hasta 6000 € por día

12. **Is there any case law or trade use that balances the interaction of exceptions between technological measures? Is there any agreement (contracts, collective bargaining, etc.) that permits certain categories of users (e.g., libraries, teaching institutions, etc) to circumvent a technological measure in order to benefit from a use covered by an exception?**

No se dispone de información acerca de las cuestiones o materias objeto de la pregunta.

VI.- Please add any further comments and information you deem interesting for this project.

**Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project**

SWITZERLAND

by Jacques de Werra, Zurich.

**Le droit d'auteur et l'éducation numérique à distance:
L'utilisation d'œuvres préexistantes dans le cadre de l'éducation à distance sur Internet**

Projet de l'Universitat Oberta de Catalunya (UOC) - IN3

Rapport relatif au droit d'auteur suisse

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Le présent rapport a pour but de répondre aux questions figurant dans le questionnaire intitulé "*Copyright and Digital Distance Education: the Use of Pre-Existing Works in Distance Education Through the Internet*" (Copyright and DDE / UOC - IN3) daté de janvier 2003 rédigé par Mme le Prof. Raquel Xalabarder.

Ce rapport se fonde sur la législation suisse existante, à savoir sur la loi fédérale suisse sur le droit d'auteur et les droits voisins du 9 octobre 1992 (LDA, Recueil systématique suisse, RS 231.1, accessible en ligne à l'adresse: http://www.admin.ch/ch/f/rs/c231_1.html).

Ce rapport se réfère également aux travaux de révision de la LDA qui sont en cours, dans le cadre desquels un avant-projet de loi fédérale (AP LDA) a été préparé par l'Institut fédéral de la propriété intellectuelle (IFPI) en juillet 2000 (le texte de l'AP LDA est accessible à: http://www.ige.ch/F/jurinfo/pdf/ap_lda.pdf). Le but de cette révision est de permettre à la Suisse de ratifier les "Traités Internet" de l'OMPI, soit le Traité de l'OMPI sur le droit d'auteur du 20 décembre 1996 (*World Copyright Treaty*, WCT), entré en vigueur le 6 mars 2002 et le Traité de l'OMPI sur les interprétations et exécutions et les phonogrammes du 20 décembre 1996 (*World Performances and Phonograms Treaty*, WPPT), entré en vigueur le 20 mai 2002.

Dans ce cadre, il convient de noter que, même si la Suisse ne fait pas partie de l'Union européenne et n'est donc pas tenue à ce titre de mettre en œuvre la Directive 2001/29/CE du Parlement européen et du Conseil du 22 mai 2001 sur l'harmonisation de certains aspects du droit d'auteur et des droits voisins dans la société de l'information ("Directive Société de l'Information"), il est vraisemblable que le droit d'auteur suisse va suivre dans une large mesure les solutions adoptées dans la Directive Société de l'Information (pour autant que cette Directive propose effectivement des solutions, ce qui n'est pas toujours le cas, en particulier en ce qui concerne les exceptions au droit d'auteur pour lesquelles la Directive Société de l'Information ne fait pour l'essentiel que de proposer une liste d'exceptions facultatives aux Etats Membres).

Selon des informations récentes obtenues de l'IFPI, la révision de la LDA ne devrait pas aboutir dans un avenir très proche dans la mesure où les parties intéressées, qui sont consultées dans le cadre des processus de révision législatifs en Suisse, ne semblent pas avoir trouvé un consensus sur plusieurs des questions critiques faisant l'objet de la révision. Dans cette perspective, on peut considérer que la législation actuelle risque de rester en vigueur encore un certain temps. Il convient en tous les cas de noter que les dispositions de l'AP LDA citées dans le présent rapport sont susceptibles d'être passablement modifiées par rapport au texte légal final qui sera finalement adopté par le Parlement suisse.

I. Exception pour l'enseignement

0. L'art. 19 al. 1 LDA dispose que:

"L'usage privé d'une œuvre divulguée est autorisé. Par usage privé, on entend :

- a. [...]
- b. *toute d'utilisation d'œuvres par un maître et ses élèves à des fins pédagogiques ;"*

Il convient de noter d'emblée que l'art. 19 LDA intitulé "utilisations de l'œuvre à des fins privées", vise, outre l'exception d'usage privé au sens strict (cf. infra III), également l'utilisation à des fins d'enseignement. Ainsi, l'utilisation à des fins d'enseignement est conçue en droit d'auteur suisse comme une variation de l'exception d'usage privé.

1. Droits exclusifs visés par l'exception

a. L'exception couvre le droit de reproduction, y compris le droit de reproduction numérique (cf. Barrelet/Egloff, Le nouveau droit d'auteur, commentaire de la loi fédérale sur le droit d'auteur et les droits voisins, 2ème éd., Berne 2000, no 13 ad art. 19).

b. Les œuvres peuvent être numérisées pour être utilisées à des fins pédagogiques (Barrelet/Egloff, no 13 ad art. 19). La numérisation comme telle constitue une simple reproduction de l'œuvre, et non pas nécessairement une transformation de cette œuvre (Barrelet/Egloff, no 12 ad art. 10).

c. La loi ne spécifie pas le nombre précis de copies autorisées par l'exception. Cependant, l'exception étant octroyée « *par un maître et ses élèves à des fins pédagogiques* », le nombre de copies doit être adapté à celui des élèves (Barrelet/Egloff, no 14 ad art. 19) et au but de l'enseignement (Gasser, p. 84).

d. L'exception légale visant toute « utilisation » de l'œuvre (art. 19 al. 1 lit. b LDA), et non pas seulement le droit de reproduction, l'exception porte également sur le droit de mise à disposition (défini à l'art. 10 al. 2 lit. c LDA comme le droit de faire « *voir ou entendre l'œuvre en un lieu autre que celui où elle est présentée* », voir Barrelet/Egloff, no 22a ad art. 10). Selon certains auteurs, l'exception pourrait ainsi porter potentiellement sur l'enregistrement de l'œuvre sur un serveur, en vue de permettre un enseignement asynchrone (Barrelet/Egloff, no 13 ad art. 19). Cependant, le texte légal semble limiter l'application de l'exception à l'enseignement *en classe* (selon la version allemande du texte légal « *Unterricht in der Klasse* »), ce qui signifierait que l'exception légale ne vaudrait qu'en cas d'utilisation de l'œuvre faite dans une véritable classe d'école, limitant ainsi le champ d'application spatial de l'œuvre (Gasser, p. 82, notant qu'une œuvre numérique pourrait être utilisée en classe par transmission par réseau informatique; voir aussi I. Cherpillod, p. 275). En somme, et en l'absence de jurisprudence du Tribunal fédéral rendue sur cette question, l'étendue de l'exception semble se limiter à l'utilisation *en classe* d'œuvres protégées. On peut ainsi douter que cette exigence "spatiale" pourra être remplie en cas de classe totalement virtuelle, soit lorsque les élèves accèdent par réseau aux œuvres protégées au moment et de l'endroit qu'ils choisissent (Effenberger, 2000, p. 1414). Dans cette hypothèse en effet, il n'y aura potentiellement plus de relation directe d'enseignement entre le maître et ses élèves (face à face physique), dans la mesure où l'utilisation des œuvres faite par les élèves se rapprochera davantage d'une utilisation à des fins d'études privées ("*Selbststudium*", cf. Gasser, p. 78 note 34), d'ailleurs couverte par l'exception d'usage privé au sens strict (cf. infra III). En outre, la constitution d'un centre de documentation en ligne, interne à une école, ne sera pas couverte par l'exception de l'art. 19 al. 1 lit. b LDA (Cherpillod, p. 275).

e. La transmission numérique d'une œuvre numérique, soit la mise à disposition de l'œuvre sur un réseau numérique et sa consultation ultérieure, est couverte par le droit de mise à disposition (défini à l'art. 10 al. 2 lit. c LDA comme le droit de faire « *voir ou entendre l'œuvre en un lieu autre que celui où elle est présentée* »).

f. La loi ne comprend actuellement aucune exception spécifique concernant les reproductions techniquement nécessaires effectuées dans le cadre de la transmission numérique d'œuvres (routing, copies caches, etc.), ni pour les copies temporaires effectuées lors de la réception des œuvres numériques (copies sur la mémoire vive RAM, dont pourraient bénéficier les élèves dans le cadre de l'exception légale de l'art. 19 al. 1 lit. b LDA. Si l'on admettait que l'exception légale s'applique à la mise à disposition de l'œuvre sur un réseau à des fins pédagogiques pour autant que l'utilisation finale des œuvres soit effectivement faite "en classe" (cf. ci-dessus d), il paraîtrait logique d'admettre que cette exception couvre également tous les actes de reproduction et de transmission de l'œuvre numérique, ce afin que les élèves puissent bénéficier de cette exception (voir dans ce sens, Barrelet/Egloff, no 13 ad art. 19, admettant généralement que l'exception s'applique dans le cas du chargement d'une œuvre sur le réseau informatique interne d'une école). Selon le texte légal, tant le maître que les élèves peuvent bénéficier de l'exception légale pour autant que l'exception soit faite à des fins pédagogiques.

2. Bénéficiaires de l'exception

a. Les institutions bénéficiaires: la loi, qui ne définit pas le cercle des institutions susceptibles de bénéficier de l'exception, ne distingue pas selon le type d'école, leur but ou l'âge des élèves. Par conséquent, toute institution d'enseignement, publique ou privée, poursuivant ou non un but lucratif, de niveau scolaire ou universitaire, est susceptible de bénéficier de l'exception (Gasser, p. 75 ss). Les institutions d'enseignement à distance numérique ne seraient susceptibles de bénéficier de l'exception qu'à condition que l'on admette que cette exception n'est pas *spatialement* limitée à l'enseignement en direct d'un maître avec ses élèves, ce qui paraît délicat (comme on l'a noté supra sous d), compte tenu du texte actuel de la loi.

Selon l'art. 19 al. 2 LDA, «*la personne qui est autorisée à reproduire des exemplaires d'une œuvre pour son usage privé peut aussi en charger un tiers; les bibliothèques qui mettent à disposition de leurs utilisateurs un appareil pour la confection de copies sont également considérées comme tiers au sens du présent alinéa*». En vertu de cette disposition, les bibliothèques peuvent donc confectionner des copies de l'œuvre, étant noté que de telles copies sont sujettes à rémunération en vertu de l'art. 20 al. 2 LDA (sur ces questions, voir infra IV). Par contre, les bibliothèques ou tout autre tiers ne sont pas autorisés à distribuer ou communiquer l'œuvre au public à des fins pédagogiques, seuls le maître et ses élèves pouvant y procéder.

b. Les personnes bénéficiaires: tant le maître que les élèves peuvent bénéficier de l'exception légale, de même que toute personne chargée de l'enseignement (le texte allemand se référant à la «*Lehrperson*»).

c. Comme souligné plus haut, l'exception légale vise essentiellement l'enseignement *en classe* («*Unterricht in der Klasse*»). Dans cette mesure, la formulation légale étroite de cette exception pourrait empêcher l'application de cette exception dans le cadre de l'enseignement numérique à distance.

d. La principale contrainte du champ d'application de l'exception tient à la restriction spatiale de l'exception, soit à l'enseignement en classe (cf. supra 1 d).

3. Utilisation à des fins pédagogiques

a. Selon la doctrine, l'utilisation de l'œuvre à des fins pédagogiques vise toute utilisation entrant dans le cadre de l'enseignement habituel (Barrelet/Egloff, no 13 ad art. 19). Par contraste, ne seront pas considérées comme entrant dans le cadre de l'enseignement habituel des représentations théâtrales d'œuvres destinées à une présentation aux parents des élèves (Barrelet/Egloff, no 13 ad art. 19).

b. L'utilisation de l'œuvre «*à des fins pédagogiques*» vise essentiellement l'utilisation faite de l'œuvre dans le cadre de l'instruction proprement dite, y compris la distribution de copies de l'œuvre et la communication publique de l'œuvre (notamment le visionnage d'un film vidéo). Par contre, l'utilisation de l'œuvre faite dans le cadre de la *préparation* de l'enseignement ne sera pas visée par cette exception, mais sera potentiellement couverte par l'exception pour usage privé au sens strict (cf. *infra* III).

c. La préparation de compilations ou d'anthologies destinées à l'enseignement est en principe autorisée dans le cadre de l'exception, étant donné que l'exception couvre tous les modes d'utilisation des œuvres et couvre ainsi également le droit de créer un recueil (art. 4 LDA).

d. Ni la loi, ni la pratique ne permettent de constater que l'exception serait soumise à des mesures techniques de protection visant à garantir que seuls les étudiants peuvent avoir accès aux œuvres. Cependant, a priori, il semble indispensable, pour autant que l'exception puisse s'appliquer dans le cadre numérique, que le cercle des bénéficiaires potentiels de l'exception soit clairement défini, faute de quoi cette exception pourrait conduire à des abus et pourrait miner la protection effective du droit d'auteur. Pour cette raison, la mise en œuvre de mesures techniques de protection (sous forme d'identification des étudiants qui peuvent accéder aux œuvres) paraît indispensable.

4. Etendue et nature des œuvres reproduites

a. En principe, tout type d'œuvres (littéraires, musicales, audiovisuelles) peut faire l'objet de l'exception, à l'exclusion des programmes d'ordinateur (art. 19 al. 4 LDA).

b. L'art. 19 al. 3 LDA exclut cependant l'application de l'exception dans les cas suivants:

"Ne sont pas autorisés en dehors du cercle de personnes étroitement liées:

a. la reproduction de la totalité ou de l'essentiel des exemplaires d'œuvres disponibles sur le marché;

b. la reproduction d'œuvres des beaux-arts;

c. la reproduction de partitions d'œuvres musicales;

d. l'enregistrement des interprétations, représentations ou exécutions d'une œuvre sur des phonogrammes, vidéogrammes ou autres supports de données".

La limitation du champ d'application de l'exception pour enseignement contenue à l'art. 19 al. 3 lit. a LDA (pas de reproduction de la totalité ou de l'essentiel des exemplaires d'œuvres disponibles sur le marché) est très importante en pratique. Cette limitation signifie qu'un maître ne peut pas photocopier, ou faire photocopier des livres entiers pour ses élèves, si ces livres sont disponibles dans le commerce (Barrelet/Egloff, no 14 ad art. 19). Le but de cette limitation est ainsi d'éviter que des exemplaires de l'œuvre ne soient *pas* vendus à cause des copies de l'œuvre faites par le maître pour ses élèves (l'exception porterait alors une brèche trop importante dans le marché de la vente des livres). Par contre, le maître pourra copier des *extraits* tirés de ces livres, même si ces livres sont disponibles dans le commerce.

c. Sous réserve des œuvres exclues en vertu de l'art. 19 al. 3 LDA (en particulier les œuvres des beaux-arts) et des logiciels informatiques (exclus de tout exception d'usage privé en vertu de l'art. 19 al. 4 LDA), toutes les œuvres peuvent en principe bénéficier de l'exception. Les œuvres éducatives ne sont pas exclues du champ d'application de l'exception. L'exception n'est pas limitée aux œuvres littéraires (sur support imprimé), mais vise également d'autres types d'œuvres, notamment les œuvres musicales et audiovisuelles.

d. En raison de la limitation de l'exception de l'art. 19 al. 3 lit. a LDA en vertu de laquelle la reproduction de la totalité ou de l'essentiel des exemplaires d'œuvres disponibles sur le marché est interdite (cf. b supra), les œuvres disponibles sur le marché (p.ex. des livres éducatifs) ne peuvent pas être reproduits dans leur entier, seuls des extraits de ces livres pouvant être reproduits dans le cadre de l'exception d'enseignement. En outre, comme noté plus haut, certains types d'œuvres mentionnés à l'art. 19 al. 3 lit. b et c. LDA (œuvres des beaux-arts, partitions d'œuvres musicales) ne peuvent pas être reproduits du tout dans le cadre de l'exception d'enseignement. Pour ces œuvres, des autorisations d'utilisation doivent donc être requises auprès des titulaires des droits d'auteur.

e. L'exception peut s'appliquer indépendamment de savoir comment l'œuvre a été obtenue (prêt inter-bibliothèque, etc.). Par contre, on considère généralement que les exceptions au droit d'auteur en général, et particulièrement l'exception en faveur de l'enseignement ne s'applique pas lorsque la personne a eu accès à l'œuvre de manière illicite (Gasser, p. 81).

f. La question concerne l'éventuel caractère impératif des exceptions au droit d'auteur, en particulier l'exception d'enseignement. En droit suisse, les exceptions au droit d'auteur sont considérées comme de droit impératif selon la jurisprudence du Tribunal fédéral (cf. V.2 infra).

5. Rémunération

a. Les reproductions de l'œuvre faites dans le cadre de l'exception (p.ex. les photocopies d'œuvres destinées à être distribuées aux élèves) sont soumises à redevance selon l'art. 20 al. 2 LDA. Par contre, les autres utilisations des œuvres, par exemple, la diffusion d'une œuvre audiovisuelle, ne sont soumises à aucune redevance.

b. Les redevances sont calculées selon les critères légaux et sont fixées dans des tarifs approuvés par la Commission arbitrale fédérale pour la gestion des droits d'auteur et des droits voisins (art. 59 al. 1 LDA), ces tarifs liant les tribunaux (art. 59 al. 3 LDA). L'exception en faveur de l'enseignement doit être soumise à des tarifs préférentiels (art. 60 al. 3 LDA). En pratique, cette exception bénéficie ainsi d'une réduction d'environ un tiers par rapport aux tarifs ordinaires (Dessemontet, p. 488).

c. Les rémunérations sont perçues par les sociétés de gestion suivantes: PRO LITTERIS pour les œuvres littéraires selon le tarif commun 8 II et SUISSIMAGE pour les œuvres audiovisuelles selon le tarif commun 7a. Selon la loi, *« les sociétés de gestion doivent répartir le produit de leur gestion proportionnellement au rendement de chaque œuvre et de chaque prestation. Elles doivent entreprendre tout ce qu'on peut raisonnablement attendre d'elles pour identifier les ayants droit »* (art. 49 al. 1 LDA).

d. La reproduction d'œuvres numériques et leur utilisation numérique dans le cadre des institutions d'éducation, sont en principe également soumise à rémunération et seront vraisemblablement réglementées dans un nouveau tarif commun 9, qui est actuellement en cours de négociation entre les parties intéressées (ces négociations étant confidentielles, il n'est pas possible d'en connaître la teneur). Ce tarif doit encore être approuvé par la Commission arbitrale pour la gestion des droits d'auteur et des droits voisins afin qu'il puisse entrer en vigueur (pas avant 2004). Ce tarif commun visera à définir les redevances dues pour l'utilisation d'œuvres numériques dans le cadre des exceptions de l'art. 19 LDA.

II. Exception de citation

0. L'art. 25 al. 1 LDA dispose:

"Les citations tirées d'œuvres divulguées sont licites dans la mesure où elles servent de commentaire, de référence ou de démonstration et pour autant que leur emploi en justifie l'étendue"

1. Droits exclusifs couverts par l'exception

- a. La loi ne limite pas l'exception de citation au seul droit de reproduction, et peut donc également s'étendre au droit de distribution, au droit de communication publique, et de transformation de l'œuvre (ce dernier, sous réserve du droit de l'auteur à l'intégrité de son œuvre qui empêchera que l'œuvre puisse être citée d'une manière blessante pour la personnalité de l'auteur, art. 11 al. 2 LDA).
- b. Les citations d'œuvres numériques sont en principe couvertes par l'exception.

2. Bénéficiaires de l'exception

- a. La loi ne limite pas le cercle des bénéficiaires potentiels de l'exception. Ainsi, rien n'exclut que cette exception s'applique dans le cadre de l'enseignement sur Internet.

3. But de l'exception

- a. La citation d'œuvres protégées est justifiée pour autant que la citation des œuvres en justifie l'étendue. Ceci signifie que la citation n'est licite que si elle est proportionnée au but de citation poursuivi. Ainsi, il n'est pas justifié de citer une chanson entière si seul un extrait suffit compte tenu du but de la citation. Il n'existe à ma connaissance aucune jurisprudence rendue concernant la définition du droit de citation selon la LDA.
- b. Selon le texte de la loi, la citation doit être faite dans un but de « *commentaire, de référence ou de démonstration* ». La citation doit ainsi poursuivre le but d'appuyer ou d'illustrer une affirmation (Barrelet/Egloff, no 3 ad art. 25).

4. Etendue et nature des œuvres citées

- a. La loi ne fait aucune distinction concernant le type d'œuvres susceptibles d'être citées. La doctrine majoritaire considère cependant qu'il n'est pas licite de citer ni les œuvres des arts graphiques ni les œuvres photographiques (Barrelet/Egloff, no 2 ad art. 25). Par contre, les œuvres musicales et audiovisuelles peuvent être citées.
- b. Les œuvres non divulguées ne peuvent pas être citées. Par contre, même les œuvres qui ne sont pas incorporées sur un support papier peuvent être citées, comme les œuvres musicales.
- c. Les œuvres peuvent être citées dans leur intégralité, pour autant que cela soit justifié par le but de la citation (Barrelet/Egloff, no 4 ad art. 25).
- d. La loi ne pose pas de conditions quant à l'accès à l'œuvre, la loi exigeant seulement que l'œuvre ait été divulguée.

5. Rémunération

- a. Les citations sont libres de tout paiement de redevances.

III. L'exception d'usage privé

0. L'art. 19 al. 1 LDA dispose

"L'usage privé d'une œuvre divulguée est autorisé. Par usage privé, on entend:

a. toute utilisation à des fins personnelles ou dans un cercle de personnes étroitement liées, tels des parents ou des amis,"

1. Droits exclusifs couverts par l'exception

a. L'exception couvre le droit de reproduction, y compris le droit de reproduction numérique (cf. Barrelet/Egloff, Le nouveau droit d'auteur, commentaire de la loi fédérale sur le droit d'auteur et les droits voisins, 2ème éd., Berne 2000, no 8 ad art. 19), sans que le nombre précis de copie autorisée ne soit défini dans la loi (étant entendu que ce nombre ne devra pas dépasser celui nécessaire à l'usage privé du bénéficiaire de l'exception, y compris pour l'utilisation dans un cercle de personnes étroitement liées, cf. infra 3.a).

b. L'exception légale visant toute «utilisation» de l'œuvre (art. 19 al. 1 lit. a LDA), et non pas seulement le droit de reproduction, celle-ci porte également sur le droit de mise à disposition (défini à l'art. 10 al. 2 lit. c LDA comme le droit de faire « voir ou entendre l'œuvre en un lieu autre que celui où elle est présentée », voir Barrelet/Egloff, no 22a ad art. 10). L'usage privé couvre également l'envoi d'une œuvre numérique par courrier électronique à un parent ou à un ami (de Werra, 1997, p. 135).

2. Bénéficiaires de l'exception

a. Seules les personnes physiques peuvent bénéficier de l'exception (Barrelet/Egloff, no 8 ad art. 19). La loi ne se réfère pas au caractère pécuniaire (*for profit*) ou non pécuniaire de l'utilisation, de sorte qu'il est possible qu'une manifestation payante au cours de laquelle une œuvre est utilisée tombe encore sous le coup de l'exception pour autant que le cercle des utilisateurs corresponde aux conditions légales (par exemple concert privé de musique donné par des musiciens professionnels rémunérés dans le cadre d'une fête familiale, Barrelet/Egloff, no 9 ad art. 19). L'exception d'usage privé exclut par nature l'utilisation publique de l'œuvre en dehors du cercle de personnes étroitement liées (cf. infra 3.a).

b. Il n'y a pas de limitation spécifique de cette exception concernant la personne des bénéficiaires, qui serait susceptible de restreindre le champ d'application de cette exception dans le cadre de l'enseignement numérique à distance. Les étudiants sont donc potentiellement susceptibles de bénéficier de cette exception.

3. But de l'exception

a. Outre l'usage purement privé et individuel de l'utilisateur (« utilisation à des fins personnelles »), l'exception s'applique également aux utilisations faites « dans un cercle de personnes étroitement liées, tels des parents et des amis ». La jurisprudence interprète de manière restrictive la notion de cercle restreint de personnes. Par exemple, des interprétations d'œuvres musicales dans des soirées d'entreprise ne sont pas des utilisations privées (Barrelet/Egloff, no 8 ad art. 19 et référence citée).

b. L'exception est applicable aux utilisations se produisant sur Internet. En particulier, cette exception permettrait aux étudiants d'accéder et de télécharger (*download*) les œuvres numériques mises à leur disposition sur un réseau dans le cadre de l'enseignement.

4. Etendue et nature des œuvres

- a. La loi ne prévoit aucune limitation quant à l'étendue et à la nature des œuvres susceptibles d'entrer dans le cadre de l'exception.
- b. En principe, tout type d'œuvres (littéraires, musicales, audiovisuelles) peut faire l'objet de l'exception, à l'exclusion des programmes d'ordinateur (art. 19 al. 4 LDA). Les œuvres éducatives ne sont pas exclues de l'exception. La loi ne limite pas l'exception aux œuvres sous forme de support matériel.
- c. Les œuvres peuvent être utilisées en tout ou en partie dans le cadre de l'usage privé (les limitations de l'art. 19 al. 3 LDA ne s'appliquant pas à l'exception d'usage privé au sens strict).
- d. L'exception peut s'appliquer indépendamment de savoir comment l'œuvre a été obtenue (prêt interbibliothèque, etc.). Par contre, on considère généralement que les exceptions au droit d'auteur en général, et particulièrement l'exception en faveur de l'usage privé ne s'applique pas lorsque la personne a eu accès à l'œuvre de manière illicite (Gasser, p. 60).
- e. En vertu d'une décision récente rendue par le Tribunal fédéral, toutes les exceptions au droit d'auteur, y compris l'exception d'usage privé ont été considérées comme étant de droit impératif (cf. ATF 127 III 26, 27). Cependant, selon l'avant-projet de révision de la LDA (art. 19 al. 4 AP LDA), il apparaît que l'exception d'usage privé ne pourra s'appliquer en matière d'œuvres numériques si ces œuvres sont protégées par des mesures technologiques de protection, ce qui signifie que l'exception d'usage privé pourra être mise en échec par des mesures techniques de protection.

5. Rémunération

- a. Aucune rémunération directe n'est due pour l'usage privé (art. 20 al. 1 LDA). Cependant, une rémunération indirecte est due par les producteurs et importateurs de cassettes vierges ainsi que d'autres phonogrammes ou vidéogrammes propres à l'enregistrement d'œuvres (soit les fabricants et importateurs de supports de données), qui sont tenus de verser une rémunération à l'auteur pour l'utilisation de l'œuvre (art. 20 al. 3 LDA).
- b. Les redevances sont calculées selon les critères légaux et sont fixés dans des tarifs approuvés par une commission arbitrale pour la gestion des droits d'auteur et des droits voisins (art. 59 al. 1 LDA), ces tarifs liant les tribunaux (art. 59 al. 3 LDA).
- c. Les rémunérations sont perçues auprès des producteurs ou des importateurs des cassettes et supports vierges par la société de gestion SUISA selon les tarifs communs 4a, 4b et 4c. Selon la loi, « *les sociétés de gestion doivent répartir le produit de leur gestion proportionnellement au rendement de chaque œuvre et de chaque prestation. Elles doivent entreprendre tout ce qu'on peut raisonnablement attendre d'elles pour identifier les ayants droit* » (art. 49 al. 1 LDA).
- d. La rémunération indirecte est également perçue pour les supports numériques d'œuvres, soit les CD-R/RW Data (tarif commun 4b) et les DVDs enregistrables (tarif commun 4c).

IV. Exception pour les bibliothèques

0. La LDA ne comporte aucune exception au droit d'auteur qui bénéficierait *directement* aux bibliothèques (et qui pourrait ainsi être comparée à l'art. 5 al. 2 lit. c de la Directive Société de l'Information qui consacre une exception au droit de reproduction "*lorsqu'il s'agit d'actes de reproduction spécifiques effectués par des bibliothèques accessibles au public, des établissements d'enseignement ou des musées ou par des archives, qui ne recherchent aucun avantage commercial ou économique direct ou indirect*"). Par contre, les bibliothèques bénéficient *indirectement* des exceptions octroyées à leurs utilisateurs selon l'art. 19 al. 2 LDA qui dispose:

"La personne qui est autorisée à reproduire des exemplaires d'une œuvre pour son usage privé peut aussi en charger un tiers; les bibliothèques qui mettent à la disposition de leurs utilisateurs un appareil pour la confection de copies sont également considérées comme tiers au sens du présent alinéa".

Selon l'art. 20 al. 2 LDA, *"la personne qui, pour son usage privé au sens de l'art. 19, al. 1, let. b ou c, reproduit des œuvres de quelque manière que ce soit pour elle-même ou pour le compte d'un tiers selon l'art. 19, al. 2, est tenue de verser une rémunération à l'auteur."*

En vertu de ces dispositions, les bibliothèques sont ainsi en droit de se prévaloir du fait que leurs utilisateurs, soit en particulier potentiellement les maîtres et les élèves peuvent se prévaloir de l'exception d'enseignement (cf. supra I).

Par ailleurs, la LDA comporte également une exception de copie pour la confection d'exemplaires d'archives, cette exception pouvant également bénéficier aux bibliothèques. Selon l'art. 24 al. 1 LDA en effet, *"pour assurer la conservation d'une œuvre, il est licite d'en faire une copie. L'original ou la copie sera déposé dans des archives non accessibles au public et désigné comme exemplaire d'archives"*. Les bibliothèques peuvent ainsi effectuer des copies d'œuvres afin d'en assurer la conservation.

Il convient donc d'examiner les deux types d'exceptions: l'exception d'usage privé pour lequel des bibliothèques reproduisent des œuvres pour le compte de tiers (art. 19 LDA) et l'exception pour les exemplaires d'archives (24 LDA).

1. Droits exclusifs couverts par l'exception

a. Selon le texte légal, l'exception d'usage privé dont peuvent se prévaloir les bibliothèques qui agissent pour le compte de leurs utilisateurs (art. 19 al. 2 LDA) couvre seulement le droit de reproduction. Comme le souligne la doctrine (Gasser, p. 111), l'art. 19 al. 2 LDA a été conçu par le législateur comme une disposition concernant essentiellement la mise à disposition et l'utilisation de photocopieuses par une bibliothèque en faveur de ses utilisateurs (soit la confection de copies papier - analogiques - des œuvres), à l'exclusion de toute utilisation numérique des œuvres. De ce point de vue, l'application de l'art. 19 al. 2 LDA dans le cadre de réseaux numériques en général, et dans le cadre d'enseignement à distance en particulier, reste peu claire, ce d'autant que les travaux de révision de la LDA (AP LDA) ne clarifient pas ce point.

L'exception d'archive (art. 24 al. 2 LDA) concerne seulement le droit de reproduction.

2. Bénéficiaires

Toute bibliothèque (privée, publique, d'intérêt public ou commercial) peut être qualifiée de "tiers" au sens de l'art. 19 al. 2 LDA, et peut donc effectuer (ou permettre d'effectuer) des copies d'œuvres en se prévalant de l'exception d'usage privé de ses utilisateurs. Comme indiqué plus haut (1), il n'est pas établi de manière claire si et dans quelle mesure les activités des bibliothèques numériques tombent sous le coup de l'exception de l'art. 19 al. 2 LDA.

En réalité, il convient en tous les cas de souligner que ce sont les utilisateurs des bibliothèques qui sont les bénéficiaires véritables de l'exception d'usage privé de l'art. 19 al. 2 LDA, car celle-ci leur permet de faire réaliser les copies par des tiers (p.ex. par des bibliothèques) au lieu de devoir les faire eux-mêmes.

Le titulaire des archives (p.ex. une bibliothèque) est le bénéficiaire de l'exception de l'art. 24 al. 1 LDA.

3. Buts

Le but de permettre aux utilisateurs de faire réaliser les copies des œuvres par des tiers est de faciliter l'exercice de l'exception d'usage privé, les utilisateurs ayant le droit de copier les œuvres dans le cadre de l'usage privé, ces utilisateurs pouvant en particulier se prévaloir soit de l'exception d'usage privé au sens strict, soit de l'exception d'enseignement (par un maître ou par ses élèves). Ainsi, cette exception permet aux utilisateurs d'utiliser les œuvres à leurs propres fins de recherche, d'études et d'enseignement. Par exemple, un maître peut faire copier des œuvres par une bibliothèque pour utiliser ces œuvres dans le cadre de son enseignement.

L'exception d'exemplaire d'archives a pour but de permettre la conservation de l'œuvre.

4. Etendue et nature des œuvres

[Même réponse que sous 1.4 supra]

5. Rémunération

a. Les bibliothèques sont tenues à rémunération pour les utilisations des œuvres faites pour le compte de leurs clients.

b. Les redevances sont calculées selon les critères légaux et sont fixées dans des tarifs approuvés par la commission arbitrale fédérale pour la gestion des droits d'auteur et des droits voisins (art. 59 al. 1 LDA), ces tarifs liant les tribunaux (art. 59 al. 3 LDA). L'exception en faveur de l'enseignement doit être soumise à des tarifs préférentiels (art. 60 al. 3 LDA). En pratique, cette exception bénéficie ainsi d'une réduction d'environ un tiers par rapport aux tarifs ordinaires (Dessemontet, p. 488).

c. Les rémunérations pour la reprographie (photocopies) d'œuvres littéraires dues par les bibliothèques sont perçues par la société de gestion PRO LITTERIS selon le tarif commun 8 II. Selon la loi, « *les sociétés de gestion doivent répartir le produit de leur gestion proportionnellement au rendement de chaque œuvre et de chaque prestation. Elles doivent entreprendre tout ce qu'on peut raisonnablement attendre d'elles pour identifier les ayants droit* » (art. 49 al. 1 LDA).

d. Seules les photocopies (reproductions analogiques) sont actuellement soumises à redevance en vertu du tarif commun 8 II (cf. supra c). Comme indiqué plus haut (cf. supra 1.a), l'application de l'art. 19 al. 2 LDA aux actes de reproduction d'œuvres numériques par des bibliothèques n'est pas claire. En tout état, ces actes de reproduction seront assurément soumis à rémunération et tomberont peut-être sous le coup du nouveau tarif commun 9, qui est actuellement en cours de négociation entre les parties intéressées (ces négociations étant confidentielles, il n'est pas possible d'en connaître la teneur). Ce tarif commun 9 doit en tous les cas encore être approuvé par la Commission arbitrale afin qu'il puisse entrer en vigueur (pas avant 2004). Ce tarif commun visera à définir les redevances dues pour certaines utilisations numériques d'œuvres protégées dans le cadre des exceptions de l'art. 19 LDA.

V. Mesures technologiques de protection et exceptions

1. La LDA ne comporte à l'heure actuelle aucune protection légale contre la neutralisation de mesures techniques de protection. Une telle protection est cependant garantie - dans une mesure restreinte - par le droit commun, en particulier par le droit pénal. On peut ainsi citer l'art. 143^{bis} du Code pénal suisse réprimant l'accès indu à un système informatique qui dispose:

"Celui qui, sans dessein d'enrichissement, se sera introduit, sans droit, au moyen d'un dispositif de transmission de données, dans un système informatique appartenant à autrui et spécialement protégé contre tout accès de sa part, sera, sur plainte, puni de l'emprisonnement ou de l'amende".

Ainsi, selon le droit actuel, seule la protection contre l'accès indu à un système informatique est garantie, à l'exclusion de toute protection contre la copie non autorisée d'un contenu. Par contraste, le droit actuel ne comporte aucune protection juridique contre la neutralisation de mesures techniques de protection anti-copie.

L'avant-projet de révision de la LDA contient une disposition visant précisément à introduire une protection juridique spécifique contre la neutralisation des mesures techniques de protection des œuvres protégées par le droit d'auteur.

L'art. 70a AP LDA dispose ainsi:

"1 Sur plainte du lésé, sera puni de l'emprisonnement pour un an au plus ou de l'amende quiconque aura, intentionnellement et sans droit:

- a. neutralisé ou rendu inutilisable toute mesure technique destinée à protéger un droit d'auteur ou un droit voisin;*
- b. fabriqué ou commercialisé des dispositifs qui sont principalement conçus pour neutraliser des mesures techniques au sens du premier alinéa ou pour fournir des services correspondants.*

"2 Si l'auteur de l'infraction agit par métier, il sera poursuivi d'office. La peine sera l'emprisonnement et l'amende jusqu'à 100'000 francs."

En vertu de cet art. 70a AP LDA, la neutralisation de mesures techniques anti-accès et anti-copie sera légalement interdite.

2. Afin de déterminer la relation entre les mesures techniques de protection et les exceptions au droit d'auteur, la première question qui se pose est de définir si les exceptions au droit d'auteur sont de droit impératif (pour une étude de droit comparé, voir de Werra, 2003). Si l'on en croit la jurisprudence du Tribunal fédéral (ATF 127 III 26, 28 dans laquelle le Tribunal fédéral a constaté que *"La cour cantonale est partie de la prémisse que les règles de la LDA étaient impératives. Cette affirmation doit être confirmée"*), toutes les dispositions de la LDA sont impératives. Par conséquent, toutes les exceptions légales au droit d'auteur, notamment l'exception d'usage privé et l'exception de citation, sont de droit impératif et ne peuvent donc pas être écartées par contrat.

Compte tenu du caractère impératif reconnu aux exceptions au droit d'auteur, il semblerait logique que l'exercice effectif de ces exceptions ne puisse pas non plus être interdit par l'utilisation de mesures techniques de protection (qui empêcheraient précisément l'exercice de ces exceptions).

L'Avant-Projet de la LDA semble cependant adopter une solution inverse dans la mesure où il dispose que la reproduction numérique d'œuvres dans un cercle de personnes étroitement liées (qui est en principe couverte par l'exception pour usage privé) peut être restreinte par la mise en œuvre de mesures techniques de protection (qui interdiraient toute reproduction). L'art. 19 al. 4 AP LDA dispose en effet que, *"en ce qui concerne la reproduction numérique d'œuvres dans un cercle de personnes étroitement liées au sens du premier alinéa, lettre a, la protection des mesures techniques selon l'article 70a est réservée"*. L'Avant-Projet LDA prévoit ainsi que l'exercice de l'exception d'usage privé pourrait être valablement écarté par l'utilisation de mesures techniques de protection, sans qu'il ne prévoit une système permettant, dans certaines circonstances spécifiques, à l'utilisateur de neutraliser les mesures techniques de protection, afin d'exercer effectivement son exception d'usage privé.

En somme, le droit actuel qui ne prévoit aucune protection des mesures techniques de protection spécifique au droit d'auteur, ne contient aucune réglementation de la question du rapport entre les mesures techniques de protection et les exceptions au droit d'auteur. Quant au projet de révision de la LDA (AP LDA), la réglementation proposée prévoit en principe que les mesures techniques de protection prévalent sur l'exception d'usage privé (il ne serait pas licite de

contourner une mesure technique de protection pour exercer l'exception d'usage privé), alors que rien n'est prévu pour les autres exceptions au droit d'auteur (p.ex. l'exception de citation).

3. Faute de réglementation juridique spécifique au droit d'auteur interdisant la neutralisation de mesures techniques de protection (voir supra 1), il n'existe aucune jurisprudence suisse relative à la question de l'interaction entre les exceptions au droit d'auteur et les mesures techniques de protection, pas plus qu'il ne semble exister d'accords conclus entre parties intéressées en vertu desquels certains types d'utilisateurs seraient autorisés à neutraliser des mesures techniques de protection afin d'exercer des exceptions au droit d'auteur.

VI. Projet "Campus Virtuel Suisse"

Il convient de signaler que la Confédération suisse (par l'intermédiaire de l'Office fédéral de l'Education et de la Science, OFES) finance un projet dirigé par la Conférence Universitaire Suisse (CUS) intitulé: "Campus Virtuel Suisse"/"Swiss Virtual Campus" (<http://www.virtualcampus.ch/>), ayant pour but de mettre sur pied des cours virtuels, soit un enseignement numérique à distance par réseau. Dans ce projet, certaines questions de droit d'auteur ont été discutées (cf. les deux articles de Effenberger cités dans la bibliographie).

Il semble cependant que les questions de droit d'auteur pouvant se poser dans le cadre d'un tel campus virtuel, visant en particulier à faciliter la mise sur pied d'institutions d'enseignement à distance, par une clarification de l'étendue des exceptions légales au droit d'auteur existantes, tout particulièrement l'exception d'enseignement de l'art.19 al. 1 lit. b LDA, n'ont pas été résolues à ce jour. Dans ce cadre, une première étape de solution sera atteinte par l'adoption du nouveau tarif commun 9, qui est encore en cours de négociation entre les parties intéressées (soit les sociétés de gestion des droits d'auteur d'une part et les milieux des utilisateurs des œuvres d'autre part), sur la base duquel seront perçues des redevances pour certaines utilisations numériques des œuvres tombant sous le coup des exceptions au droit d'auteur.

Zurich, le 30 mai 2003.

* * *

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Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project

UNITED KINGDOM

by Richard McCracken, The Open University

I.- EXCEPTION FOR TEACHING PURPOSES.

0.- Identify any specific exception that allows for the use of copyrighted works for teaching purposes, without the previous authorization of the copyright owner.

Please provide full text (in English or French)

In UK law (Copyright, Designs and Patents Act 1988) only one exception applies specifically to “teaching” – though some other exceptions may be open to teachers creating on-line materials and others apply to research and use in bone fide examinations. The exceptions for education in UK law are:

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 is done by a person giving or receiving instruction and is not by means of a reprographic process. **This is a definition based on an understanding of a classroom being a physical place. It is difficult to apply in on-line or virtual classrooms.**

Sound recordings, films, broadcasts and cable programmes may be copied by teachers and students and used for the purposes of instruction in the skills of film making and recording.

Copyright is not infringed by anything done for the purposes of an examination – setting the questions, communicating the questions to the students, or answering the questions. (Except for sheet music in the case of an assessed performance.) **This applies only to the context of the examination – past exam papers, for example are not covered. But examination may be taken to mean any assessment that affects the student’s final award.**

Broadcast and cable programmes may be recorded freely for the educational purposes of an educational institution if no licensing scheme is in place. Two schemes are in place and output produced by those licensors must be recorded only under licence. Not all rights holders are part of these schemes and so their output may be recorded freely.

Educational establishments may make reprographic copies of copyright works unless licensing schemes are in place. The Copyright Licensing Agency, representing publishers and authors societies, was established to offer licences to schools, colleges and universities. Therefore, copying books, journals and so on must be done under licence. The Newspaper Licensing Agency was established to offer a licence for newspapers. DACS has a similar scheme in place for artistic works – but images imbedded in journals, books, etc are covered under the CLA licence. Under an agreement they have with DACS.

Other exceptions include fair use of material for research or private study, quotations used for the purposes of criticism or review and provisions specific to libraries.

1.- Exclusive Rights covered by the exception.

Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered? *The exception for classroom use excludes reproduction – defined as a ‘reprographic process’. Off air recording and copying from journals, books etc refer to ‘reprographic processes’ or ‘reprographic copies’.*

Can a work be digitized for use as part of the instruction? Would digitization qualify as a reproduction or also as a transformation? *There is some disagreement between educational users and rights holders. In copying text and still images, the exception allows for ‘reprographic copies’ for ‘the purposes of instruction’. The licensing agencies argue that this excludes digitisation. They are currently seeking to develop a licence covering digitisation but their members*

are reluctant to mandate a digital licence. Off-air recording of broadcasts or cable programmes has been interpreted more widely to allow for the distribution of recordings on digital networks 'for the educational purposes of the institution', though, again, some rights holders disagree with this interpretation.

How many copies can be made? Is it somehow limited, i.e., to the number of students in a class? *Under the CLA licence, the number of copies is limited to one per student.*

Does it cover communication to the public? Does it cover the storage of the copyrighted work on the server, thus allowing asynchronous teaching? *It does not cover communication to the public – use is restricted to the educational staff/student context. Some exceptions – for example criticism or review – will allow for communication to the public but the exceptions specifically targetted at education do not.*

How does your system qualify a digital transmission/delivery of a work? Have the WCT or WPPT had any effect on this matter? Has the EU Directive, if applicable, had any effect on this matter? *The incorporation of the Directive into UK law has been delayed due to the weight of responses received during the consultative period before December 2002. Adoption of the Directive is now delayed to Marh 31st at the soonest. The draft legislation seeks to define a digital transmission as 'making the work available to or communicating with the public' and draws a definition to cover broadcasts and on-demand or near on demand services would apply equally to on-line access to publishers sites as to on-demand video and broadcast services. It's not yet clear whetehr the drafting was intended to cover on-demand print or if this is an oversight.*

Does the exception cover subsequent reproductions made in the course of transmission (routing copies, caché copies, etc) and reception (RAM copies, screen displays and downloads) of these works by each student? *Teachers and students alike may make the copies – but also support staff at the educational institution on behalf of teachers – for example, in creating course materials. The definition is aimed at the purpose – the educational purpose of the institution. (Please note that this last issue is intertwined with the question of eligibility: who is allowed to make reproductions for teaching purposes—just professors, or also students?)*

2.- Eligibility under the exception.

Eligibility as to institutions:

- Which institutions may benefit from a copyright exception for teaching purposes? Educational institutions? Schools? Universities? etc. How are those terms defined? How do they apply to the Internet? *Educational institutions are defined by the government's Secretary of State responsible for this area. This could cover any institution defined as 'educational' by the government minister – but in practice covers universities, schools and colleges. The draft UK legislation following the Directive defines educational more widely to cover cultural and social institutions with an educational remit – for example, museums.*
- Is there any specific condition as to the nature (for-profit or not-for-profit, public or private) of the teaching activity or of the institution? How does this apply to digital distance education? *Not for profit isn't specifically addressed. It's dependent on purpose. Distance education is covered by the paper copying licensing schemes and is expected to be covered by the digital licence when it is developed.*
- May libraries benefit from such an exception, and therefore provide copies (and also distribute? communicate to the public?) of works for teaching purposes? *Under the implementation of the Directive into UK, law libraries will increasingly benefit – and at the moment educational libraries benefit under the educational as well as library provisions.*

Eligibility as to individuals:

- May only teachers benefit from the exception or also students (and guest-lecturers, etc)? *Both – plus anyone connected with the institution and acting in support of its educational aims and teaching purposes.*
- If students cannot benefit from that exception, may a general private use/private copying exception (or fair use) "fill that gap" (as it seems to be the case in the analog world)? *(See answer above)*

Some teaching-related exceptions refer to or imply physical concepts related to face-to-face teaching activities—concepts like classroom, school premises, etc. If so, does this specific language limit or curtail the applicability of the exception in the digital world? Yes, *the UK legislation limits copying for classroom use to that which does not involve a 'reprographic process' so, for example, a teacher writing a poem on a blackboard does not infringe – but would infringe if she photocopied the poem without a licence. The same applies to on-line discussion or tuition – a tutor may write a poem by keying it in but would infringe if using a scanned image of the same poem.*

Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE? No.

3.- Purposes. What is “teaching purposes”?

What constitutes “teaching purposes”? (*Please, substitute by the specific language used in your national exception; for instance, the EU Directive art.5.3(a) what is “illustration for teaching”*). Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

There are several exceptions that apply to teaching, The area is defined under UK law in s 32 (i) of the Act as “Things done for purposes of instruction or examination”, in s34 as “Performing, playing or showing work in course of activities of educational establishment”, in s35 as “Recording by educational establishments of broadcasts and cable programmes” and s36 as “Reprographic copying by educational establishments of passages from published works”. No case law exists on the definition of ‘teaching purposes’ but an Australian case is often cited in the UK as case law for what constitutes ‘authorising infringement’: Moorhouse v University of New South Wales. This concerned allowing students and staff access to photocopiers without adequate guidance as to respecting copyright.

Does it cover use of a work for preparing the lesson? Does it cover use of a work in the course of the instruction? Does it cover the making and distribution of copies for teaching purposes? Does it cover communication to the public for teaching purposes? What is the scope of such uses covered under this exception?

Copyright in a literary, dramatic, musical or artistic work is not infringed by its being copied in the course of instruction or preparation for instruction, providing the copying is done by a person giving or receiving instruction and is not by means of a reprographic process.

Copyright in a sound recording, film, broadcast or cable programme is not infringed by its being copied by making a film or film soundtrack in the course of instruction, or preparation for instruction in the making of films or film soundtracks providing the copying is done by a person giving or receiving instruction.

*Copyright is not infringed by anything done for the purposes of an **examination** by way of setting the questions, communicating them to the candidates or answering the questions (exception: sheet music in examination of performances).*

Communication to the public is not covered by the provision.

Anthologies for educational use have a limited exception to allow use of short extracts from published works if the anthology is mostly composed of out of copyright quotations.

Performing playing or showing. *Performance of a literary, dramatic or musical before an audience consisting mostly of teachers and pupils at an educational establishment is not a public performance for the purposes of infringement of copyright if the performance is by teachers or students in the course of the activities of the establishment or by any other person for the purposes of instruction. Playing a sound recording or film or broadcast or cable programme for the purposes of instruction at an educational establishment is not a playing or showing of the work in public for the purposes of copyright infringement.*

A person is not directly connected with the activities of the establishment just by being a parent or student. It is the purpose that is the criterion for exception rather than the person.

Broadcasts and cable programmes may be recorded or a copy of such an 'off-air' recording made by or on behalf of an educational establishment for the educational purposes of the establishment – if there is no licensing scheme in place to license such recordings. In fact, two licensing schemes are in place, covering the output of the five main UK terrestrial broadcasters. Broadcasts not covered by a licence fall under the provision of the Act. Use is limited to the educational purposes of the institution, generally taken to exclude issuing copies to the public.

Reprographic copying may be made by or on behalf of an educational establishment for the purposes of instruction – but only to the extent to which no licensing scheme is in place. Two schemes were introduced by representative rights organisations acting on behalf of publishers, authors, artists and other rights owners. One scheme, offered by the Copyright Licensing Agency, licences photocopying of journal and book content, the other scheme offered by the Newspaper Licensing Agency licences copying from newspapers. The schemes work on standard annual rate cards based on a per student fee negotiated, for example, by Universities UK on behalf of all UK Higher Education Institutions. UUK recently referred the terms of the CLA scheme to the UK Copyright Tribunal and the charge and licensing structures were amended as a result.

Does it cover the making of a teaching compilation or anthology? Would it cover the asynchronous posting of teaching material on the Internet? And if so, within which limits? Is there a specific exception (or licensing system) covering the making of teaching compilations? Would it apply to digital teaching compilations?

Making anthologies and compilations ("course packs") is covered under the CLA licence. It is also possible to produce compilations of broadcast items recorded off air. There is some doubt about whether the exception or the licensing schemes extend to digital use. In the case of text, the exception refers specifically to reprographic copies – so digital is probably excluded. In the case of off-air recordings, no mention is made of format, only to the 'purposes of the institution' so the case for interpreting this to extend to digital media is much stronger.

Is the exception subject to any technological measures to ensure that only students will have access to the works used for teaching?

No explicit reference is made to technological measures, though this would be one way of ensuring that the use was limited to the educational purposes of the institution.

4.- Extent and Nature of Works.

Which works (and to what extent) may be subject to the exception?

See my earlier comments on the various educational exceptions – some exceptions refer only to a restricted range of works.

Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

The exception relating to photocopying covers use of not more than one percent of any work being copied in any quarter of the year. Any attempt to restrict this by a licensing scheme to a smaller amount would not be valid. In fact, the licensing schemes allow for much greater extracts than the one percent limit.

Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

No categories of printed works are excluded. Because the exception applies to reprography then, pending the introduction of a digital licence, the use of work under licence is limited to tangible forms.

May works be used for teaching purposes in whole or only fragments?

The exception is limited to one percent fragments – but the CLA licence allows for complete journal articles.

Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not?

No.

How does the exception interact with the possible existence of a license which specifically prohibits any further uses (other than those licensed)?

See answers given earlier in this section.

5.- Remuneration.

Is the teaching use free or subject to remuneration?

Both. The exception applies both to free, state provision and to paid-for education.

If subject to remuneration, how is that established? Criteria used to set the fees.

The CLA licence is calculated on the basis of the number of full time students, or in the case of part time students it is based on the number of equivalent full-time students.

How is it collected? Which collecting society? How is it distributed among the copyright owners ?

Collected by the CLA on behalf of the Publishers Licensing Society (representing publishers), the Authors Licensing and Collecting Society (on behalf of authors) and the Designers and Artists Collecting Society (on behalf of artists). Money is distributed to individual rights owners through the returns made by CLA to the PLS and ALCS for distribution to their members. The fees are apportioned in proportion to random sampling of photocopying in individual licensed institutions. The fees are set and collected annually through sectoral licensing schemes for Higher, Further, Secondary and Primary schools. Universities and Colleges pay individually using nationally negotiated rates, Schools are licensed collectively through local government education authorities. The NLA licence is not negotiated nationally but is taken out by individual establishments and is calculated on number of staff or students or, sometimes, on size of grant income.

Schemes in place for recording broadcasts off-air are also calculated according to the number of programmes recorded rather than the number of students. Licences may be offered to departments rather than to the entire institution.

Does this system also apply to digital uses? How?

No – though a digital licence is in development.

II.- QUOTATIONS

0.- Identify any exception that allows for the use of copyrighted works for purposes of quotation, without the previous authorization of the copyright owner.

The acts restricted by copyright are infringed if in "relation to the work as a whole or any substantial part of it..." So use of "insubstantial" parts of a work do not infringe. "Insubstantial" is not defined but case law shows that it is a measure of importance or significance to the work as a whole rather than a simple measurement of extent. Cases include: Ravenscroft v Herbert 1982 and Willaimson Music v Pearson Partnership 1987.

Quotes may also be use under the following exceptions: s29 Fair dealing for the purposes of Research or Private Study (shortly to be amended to apply to non-commercial research only); s30 Fair dealing for the purposes of Criticism, Review or News Reporting.

1.- Exclusive Rights covered by the exception.

Reproduction? Distribution? Communication to the public? Transformation?

It is possible for all to be covered – the exceptions apply to the purpose rather than the activity, i.e. the criticism may be in print, on broadcast television, on a web site, and so on.

Does it cover quotations made in digital formats (i.e., digital copies) and over the Internet (i.e., digital transmissions)?

Possibly (see previous answer).

2.- Eligibility under the exception.

Who may benefit from the quotation exception? Is there any language that may allow or prevent its application to quotations made as part of the teaching over the Internet?

Case law shows that it applies to criticism or review rather than mere illustration (see Sillitoe v McGraw Hill 1983). If it is possible to make use of the exception then the medium, including the internet, is not excluded. All exceptions (except for that covering use of materials for setting or answering examination questions) is dependent upon the extract carrying proper acknowledgement of the source.

3.- Purposes.

What constitutes a quotation? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

None – except those cases cited above.

Is there any reference to any specific purposes (i.e., teaching, research, etc) the quotation must be made for, in order to qualify under the exception?

There are several exceptions, such as teaching or education purposes of the institution or the activities of the institution or for research or private study – see previous answers.

4.- Extent and Nature of Works.

Which works (and to what extent) may be subject to the exception? Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

Not in general – see previous answers for instances where there is a limitation on the types of work under specific exceptions.

Are all kind of works covered? Are any specific materials excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)?

See previous answer.

May works be quoted in whole or only fragments?

As a general rule works may be quoted only as fragments but some exceptions may allow for entire works (for example in off-air recording) to be copied.

Does it make any difference how the work has been obtained?

It can make a difference – for example, television programmes must be obtained by recording off-air. The exception does not apply to copying the same work if obtained on videos or dvds, for example.

5.- Remuneration.

Are quotations free or subject to remuneration?

If used under an exception, then no fee is payable – there is no levy system in place in the UK. Works used under the various licensing schemes are accessed under annual standard licensing payments.

If subject to remuneration, how is that established? Criteria used to set the fees.

See previous answer about how photocopying schemes operated by CLA and NLA, and off-air recording schemes operated by ERA and OU, calculate their fees.

How is it collected? Which collecting society? How is it distributed among the copyright owners ?

See previous answers on this topic.

Does this system also apply to digital uses? How?

Recorded film and other moving images may be used digitally within a closed network but text is presently restricted by the terms of the licence to photocopying only.

Although no financial payment is specified in law, users making use of the various fair use exceptions in UK law are required to make a full acknowledgement of the rights owner and source of the work. This is essential. It is the first element of the circumstances that the court examines should the case go to law.

III.- PRIVATE USE / PRIVATE COPYING EXCEPTION.

The purpose of this section is to address the importance of the private use/ private copying exception as far as teaching uses. To what extent may such an exception allow students (and teachers) to use works for teaching purposes through the Internet? This exception is specially important to the extent that downloads made by students do not qualify under the teaching exception. Please note that this last issue may be considered under a separate section dealing with the private use/ copying exception.

0.- Identify any exception that allows for the use of copyrighted works for private purposes, without the previous authorization of the copyright owner.

This exception is termed 'research and private study' in s 29 of the UK Copyright Designs and Patents Act 1988. The full text reads:

"(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 or, in the case of a published edition, in the typographical arrangement.

(2) Fair dealing with the typographical arrangement of a published edition for the purposes mentioned in subsection (1) does not infringe any copyright in the arrangement.

(3) Copying by a person other than the researcher or student himself is not fair dealing if –

(a) in the case of a librarian, or a person acting on behalf of a librarian, he does anything which regulations under section 40 would not permit to be done under section 38 or 39 (articles or parts of published works: restriction on multiple copies of same material), or

(b) in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose."

1.- Exclusive Rights covered by the exception.

Does it cover reproduction? Which means of reproduction are covered by the exception? Are digital reproductions covered? How many copies can be made? Is it somehow restricted, i.e., to non-collective use? The medium isn't specified so it could apply in any medium, providing that the use is both 'fair dealing' and for the purposes of 'research' or 'private study'. 'Fair dealing' has been interpreted in case law to mean use of the work that is no greater than the amount needed for the purpose – for example, only that section of a book needed directly for the purposes of research may be copied – not the whole book – and also applies the WIPO three step principle. Though not imbedded or directly referenced in UK law, the three step principles are taken into account by UK courts. The change to UK legislation as a result of adopting the EC Directive also is likely to avoid direct mention of the three step test, though the principle is again very much behind the UK Act's provision for 'fair dealing'. 'Private study' has been taken to mean study that is under the student's own direction – either in formal or informal education or in pursuit of a personal interest – but is not under the direction or on instruction from a tutor or teacher.

*Does it cover any other rights: distribution, transmission, performance, transformation? Do they extend to digital means of exploitation? (See also *infra*, the questions concerning definition of "private").*

In theory it could be extended to cover other rights, but it's difficult to see how it could apply. Perhaps a research project looking at people's reaction to a film, for example, could use 'research' to cover the public screening of the film or extracts from it – and there could be other similar scenarios in which the exception could be used regardless of media.

2.- Eligibility.

Who may benefit from the private use/copying exception? Is there any specific reference to for-profit or not-for-profit uses, public or private, non-collective uses? Individuals benefit from the 'private study' exception but institutions may

benefit from the 'research. Though research at the moment applies to all research, one of the changes to UK legislation will be the limitation of this exception to 'non-commercial research' when the EC Draft is adopted by the UK.

Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect its application to DDE? *None.*

3.- Purposes. What is "private"?

What is the definition of "private use/private copying" in your country? Is there any caselaw, uses, doctrine to describe the specific language used in the exception?

'Private' is not defined by the Act. 'Private study' has become accepted as excluding group or class study but 'private' is otherwise quite broadly applied to mean any individual not just pupils or students and 'study' is applied to any kind of in-depth consideration, not just to formal educational contexts. Case law examples are:

- *Hawkes & Son (London) Ltd v Paramount Film Service Ltd [1934]- that the words 'research' and 'private study' are to be strictly construed and that what was 'fair' varied according to circumstance*
- *University of London Press v University Tutorial Press [1916] – publication of examination papers and specimen answers did not constitute 'private study'*

How does this exception translate on the Internet? Would students' downloads of material transmitted for teaching purposes over the Internet qualify as private? *Creation and distribution by a university or school of course materials imbedding third party copyright content would not be covered by research or private study (or any of the 'educational' or 'library' exceptions, though in some contexts other exceptions such as 'fair dealing for the purposes of criticism or review' could apply). Students accessing materials supplied by the university or school or under the direction of tutors and teachers would not constitute 'private study'.*

4.- Extent and Nature of Works.

Does the exception provide for any specific limitations regarding the extent and nature of the works covered?

- *'Instruction or examination' – exception applies only to literary, dramatic, musical or artistic work'*
- *'Research or private study' – applies only to literary, dramatic or musical work.*
- *'Criticism or review or news reporting' – applies to all work.*

Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)? *Sound recordings and films are excluded. The exception for instruction does not apply to any reprographic process.*

May works be used for private purposes in whole or only fragments? *Either – but the extent is taken into account in assessing whether the 'dealing' is 'fair'.*

Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not? *No. One key case under 'Criticism or review' centred on an unlawfully obtained copy of a film that was then incorporated into a broadcast television programme using it under 'fair dealing for the purpose of criticism or review'. The court held that the means of obtaining the film did not affect the strength of the defence. [Time Warner Entertainment v Channel Four Ltd [1994]]*

How does the exception interact with the possible existence of a license which specifically prohibits any further uses? *This is subject to debate at the moment. Changes to UK legislation will make it clear that a negotiated licence will override statutory fair use exceptions.*

5.- Remuneration.

Is this exception free or subject to remuneration? *Free – but subject to full and proper acknowledgement to the rights owner and source.*

If subject to remuneration, how is that established? Criteria used to set the fees. *Copying under the licensing schemes for photocopying and off-air recording is subject to fees – see my earlier answer for details of how fees are calculated.*

How is it collected? Which collecting society? How is it distributed among the copyright owners ? *Through a number of collecting societies:*

- *CLA for the publishers and authors (distributed by the Publishers Licensing Society to publishers and the Authors Copyright Licensing Society to authors.*
- *ERA for television broadcasts recorded off-air by schools and colleges – and distributed by ERA to the main broadcast stations, actors and musicians unions.*
- *NLA for newspaper copying – and distributed direct to newspaper publishers.*
- *DACS for use of images – and distributed direct to artists by DACS itself.*

Does this system also apply to digital uses? How? *Copying literary works and images under the CLA licence does not yet extend to digital. The newspaper licence allows for digital use – at a higher fee.*

The off-air ERA scheme permits digital copying and distribution within closed networks.

IV.- LIBRARY EXCEPTIONS.

The main purpose of this section is to address the interaction between library privileges and teaching uses: to what extent may library exceptions assist teaching activities conducted through the Internet (either exempted or licensed teaching uses). Please feel free to provide any information concerning the general scope of such exceptions, even though not especially helpful as far as teaching purposes.

0.- Identify any exception that allows for the use of copyrighted works by libraries, without the previous authorization of the copyright owner.

Ss 37 – 43 of the Act apply:

“37 Libraries and Archives: introductory

- (1) In sections 38 to 43 9copying by librarians and archivists)-*
 - (a) reference in any provision to a prescribed library or archive are to a library or archive of a description prescribed for the purposes of that description by regulations made by the Secretary of State; and*
 - (b) references in any provision to the prescribed conditions are to the conditions so prescribed.*
- (2) The regulations may provide that, where a librarian or archivist is required to be satisfied as to any matter before making or supplying a copy of a work –*
 - (a) he may rely on a signed declaration as to that matter by the person requesting the copy, unless he is aware that it is false in a materials particular, and*
 - (b) in such cases as may be prescribed, he shall not make or supply a copy in the absence of a signed declaration in such form as may be prescribed.*
- (3) Where a person requesting a copy makes a declaration which is false in a materials particular and is supplied with a copy which would have been an infringing copy if made by him –*
 - (a) he is liable for infringement of copyright as if he had made the copy himself, and*
 - (b) the copy shall be treated as an infringing copy.*
- (4) The regulations may make different provision for different descriptions of libraries or archives and for different purposes.*
- (5) Regulations shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of parliament.*
- (6) References in this section, and in sections 38 to 43, to the librarian or archivist include a person acting on his behalf.*

38 Copying by librarians: articles in periodicals

- (1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply a copy of an article in a periodical without infringing any copyright in the text, in any illustrations accompanying the text or in the typographical arrangement.*
- (2) The prescribed conditions shall include the following –*
 - (a) that copies are supplied only to persons satisfying the librarian that they require them for purposes of research or private study, and will not use them for any other purpose;*
 - (b) that no person is furnished with more than one copy of the same article or with copies of more than one article contained in the same issue of a periodical; and*
 - (c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production.*

39 Copying by librarians: parts of published works

- (1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply from a published edition a copy of part of a literary, dramatic or musical work (other than an*

article in a periodical) without infringing any copyright in the work, in any illustrations accompanying the work or in the typographical arrangement.

- (2) The prescribed conditions shall include the following –
 - (a) that copies are supplied only to persons satisfying the librarian that they require them for purposes of research or private study, and will not use them for any other purpose;
 - (b) that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work; and
 - (c) that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library) attributable to their production

40 Restriction on production of multiple copies of the same material

- (1) Regulations for the purposes of sections 38 and 39 (copying by librarian of article or part of published work) shall contain provision to the effect that a copy shall be supplied only to a person satisfying the librarian that his requirement is not related to any similar requirement of another person.
- (2) The regulations may provide –
 - (a) that requirements shall be regarded as similar if the requirements are for copies of substantially the same material at substantially the same time and for substantially the same purpose; and
 - (b) that requirements of persons shall be regarded as related if those persons receive instruction to which the material is relevant at the same time and place.

41 Copying by librarians: supply of copies to other libraries

- (1) The librarian of a prescribed library may, if the prescribed conditions are complied with, make and supply to another prescribed library a copy of –
 - (a) an article in a periodical, or
 - (b) the whole or part of a published edition of a literary, dramatic or musical work,

without infringing any copyright in the text of the article or, as the case may be, in the work, in any illustrations accompanying it or in the typographical arrangement.

- (2) Subsection (1)(b) does not apply if at the time the copy is made the librarian making it knows, or could by reasonable inquiry ascertain, the name and address of the person entitled to authorise the making of the copy.

42 Copying by librarians and archivists: replacement copies of works

- (1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make a copy from any item in the permanent collection of the library or archive –
 - (a) in order to preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it, or
 - (b) in order to replace in the permanent collection of another prescribed library or archive an item which has been lost, destroyed or damaged,

without infringing the copyright in any literary, dramatic or musical work, in any illustrations accompanying such a work or, in the case of a published edition, in the typographical arrangement.

- (2) The prescribed conditions shall include provision for restricting the making of copies to cases where it is not reasonably practicable to purchase a copy of the item in question to fulfil that purpose.

43 Copying by librarians or archivists: certain unpublished works

- (1) The librarian or archivist of a prescribed library or archive may, if the prescribed conditions are complied with, make and supply a copy of the whole or part of a literary, dramatic or musical work or any illustrations accompanying it.
- (2) This section does not apply if –
 - (a) the work had been published before the document was deposited in the library or archive, or

(b) *the copyright owner has prohibited copying of the work,*

and at the same time the copy is made the librarian or archivist making it is, or ought to be, aware of that fact.

(3) *The prescribed conditions shall include the following –*

- (a) *that copies are supplied only to persons satisfying the librarian or archivist that they require them for purposes of research or private study and will not use them for any other purpose;*
- (b) *that no person is furnished with more than one copy of the same material; and*
- (c) *that persons to whom copies are supplied are required to pay for them a sum not less than the cost (including a contribution to the general expenses of the library or archive) attributable to their production.*

44 Copy of a work required to be made as condition of export

If an article of cultural or historical importance or interest cannot lawfully be exported from the United Kingdom unless a copy of it is made and deposited in an appropriate library or archive, it is not an infringement of copyright to make that copy.

1.- Exclusive rights covered by the exception.

Reproduction? Distribution? Communication to the public? Transformation? Does it cover digital copies? Does it cover digital transmissions of works? Copying is not defined by medium, therefore covers a digital copy – but he circulation of the copy is limited to one person, for purposes of research or private study and no more than single copy may be made. Networking would not be covered, neither would communication to the public.

Would it be permissible for a library to make digital copies of the works in its catalogue, and post them on its web page, or transmit them to their teachers and/or students (for teaching purposes), or even for inter-library loans? Not under the provision for library exceptions – any such activity would have to be covered under license.

2.- Eligibility

Which libraries may benefit from the exception? Only public libraries? Non-for-profit libraries? What about on-line libraries?

- *Only non-profit UK libraries are prescribed as being able to copy under ss 38 and 39 (periodical and book copying for individual users);*
- *all UK libraries are prescribed for making and supplying copies under ss 41, 42 and 43;*
- *only non-profit, either UK or overseas, may receive copies under ss41 and 42;*
- *only individuals may receive copies under s43*
- *all UK archives may make and supply copies under ss42 and 43*
- *Any UK archive may receive stock under s42*
- *Individual requesters may receive copies under s43*

Digital libraries are not specifically excluded if the nature of their activities can fit the definitions set out in ss 37 – 44.

Is there any further specific limitation that may constrain the scope of eligibility under the exception? How may this affect digital (on-line) libraries? None, save for those set out in this section previously.

3.- Purposes.

Conservation, lending, studying, research, teaching purposes, etc.? Teaching is not covered by library exceptions. It is handled separately by the educational provisions, as distinct from library provisions.

Could the library supply material to be used for teaching purposes? *Only under licence or using exceptions other than those specifically addressing libraries.*

Since the library privilege granted under article 5.2.(c) Copyright Directive is not limited to any specific purposes, it leaves the door open for coverage of reproductions for teaching purposes, provided such reproductions are not for direct or indirect economic or commercial advantage. Has your national legislator implemented (or intends to implement) such an exception? If so, how? *The UK intention is to make as few changes as possible to existing legislation. Library provision seems unlikely to be extended in this way. Teaching exceptions would be covered elsewhere and probably under licensing schemes rather than statutory exceptions. DDE seems unlikely to benefit from an extension of the classroom to the virtual learning environments. However, UK implementation has been delayed from Dec 2002 to March 2003 (and possibly later) because of the number of submissions received during the consultative process on implementation – so further changes than were anticipated may be a possibility.*

4.- Extent and Nature of works.

Does the exception provide for any specific limitations regarding the extent and nature of the works covered? *Some works are excluded from the library provision – recordings, films and broadcasts – though these may be copies by librarians using other exceptions not specific to the library context..*

Are all kind of works covered? Are educational materials (or any other kind of materials) excluded from the exception? Is it limited to works in some specific tangible support (i.e., in printed form)? *See previous answer. No specific limitation to tangible/intangible form. For example, a literary work in the UK would cover an eBook.*

May works be used in whole or only fragments? *Articles may be copied in their entirety but books are restricted to part of the work.*

Does it make any difference how the work has been obtained (i.e., by means of an inter-library loan, or under an exception for research purposes, or by means of a private-owned copy)? Does it matter whether the copy has been lawfully obtained or not? *No matter how it's been acquired under the first sentence – but it may make a difference whether it's been lawfully obtained or not. I'm not clear about to what extent the criticism or review case law might extend to an unlawfully obtained copy in the library context.*

How does the exception interact with the possible existence of a license which specifically prohibits any further use? *See previous answers about negotiated licences overriding statutory exceptions under the proposed legislation.*

5.- Remuneration.

Is this exception free or subject to remuneration? *Subject to payment of a fee at least equivalent (it may be more) than the cost of making the copy plus a contribution to the upkeep of the library/archive.*

If subject to remuneration, how is that established? Criteria used to set the fees. *See previous answer.*

How is it collected? Which collecting society? How is it distributed among the copyright owners? *Straightforward copying fees are retained by the institution. Licensed copying fees are distributed as previously answered.*

Does this system also apply to digital uses? How? *Difficult to see if it could apply to networked systems using multiple copies – but would be possible to apply it to single digital copies being made available or to digital “inter-library loan”*

V.- TECHNOLOGICAL MEASURES VS. EXCEPTIONS.

The purpose of this section is to evaluate the interaction between exceptions and technological measures i.e., how is copyright balanced against the public interest?

Are technological measures protected in your country? To what extent (access control, anti-copy, etc.)? *Not at the moment – but will be under the new legislation following EC Directive.*

How do exceptions relate to technological measures? Has the legislator implemented any specific provision to ensure that exceptions will continue to apply despite the existence of any technological measures implemented by the copyright owners? How has art.6.4 EU Directive (if so) been implemented? *Not yet implemented but the proposed to introduce a new civil remedy against a person carrying out unauthorised acts to circumvent copy protection or to remove DRM information. This has been interpreted by some commentators to include persons making use of exceptions – though the legislators claim this is not their intention. May also include removal of copyright line.*

Is there any case law or trade use that balances the interaction of exceptions between technological measures? Is there any agreement (contracts, collective bargaining, etc.) that permits certain categories of users (e.g., libraries, teaching institutions, etc) to circumvent a technological measure in order to benefit from a use covered by an exception? *Not specifically, though some collecting societies are planning how to accommodate access under exceptions. Their preferred model at the moment is to calculate a proportion of the annual copying that would normally be done freely under exceptions and then reduce the annual rate by an equivalent amount. By this they would not have to design systems capable of allowing access for use under the statutory exceptions but instead reflect the benefit of the exceptions by reducing costs correspondingly.*

VI.- Please add any further comments and information you deem interesting for this project.

**Copyright and Digital Distance Education (CDDE)
IN3-UOC Research Project**

THE UNITED STATES

***National Response to the CDDE Questionnaire
by Dr. Raquel Xalabarder***

Under the U.S. Copyright Act of 1976,²²⁵ two major exceptions may apply to DDE: the general fair use exception under section 107²²⁶ and the specific instructional exceptions under section 110.²²⁷ The several issues raised in the CDDE Questionnaire will be answered, accordingly, under two separate chapters.

A.- U.S. Copyright Act of 1976, Section 110: Exceptions for Teaching Purposes²²⁸

Section 110(1) exempts the performance or display of works in the course of face-to-face teaching activities²²⁹ and section 110(2) does the same for distance education.²³⁰ How well suited is the language of section 110(2) to cover DDE? Although the technology-neutral definition ("any device or process") of transmission contained in section 101²³¹ would allow digital transmissions under section 110(2), its scope does not reach all teaching activities conducted through the Internet.²³² This is so, firstly, because the statute only exempts the transmission (communication to the public) of works performed or displayed, not the reproduction and distribution of works -which

²²⁵ 17 U.S.C. §§ 101-1332 (2002).

²²⁶ *Id.* § 107.

²²⁷ *Id.* § 110.

²²⁸ "Section 110 USCA.- Limitations on exclusive rights: Exemption of certain performances and displays.

Notwithstanding the provisions of § 106, the following are not infringements of copyright :

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a non-dramatic literary or musical work or display of a work, by or in the course of a transmission, if-

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

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

(C) the transmission is made primarily for-

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment."

17 U.S.C.S. § 110 (2002).

In order to simplify this study, we will no longer refer to governmental bodies (and their officers and employees) but only to educational institutions (and their students).

²²⁹ *Id.* § 110(1).

²³⁰ *Id.* § 110(2).

²³¹ "To 'transmit' a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C.S. § 101 (2002).

²³² One must conclude that the language of the exception is clearly limited to the forms of distance education existing in 1976 when the U.S. Copyright Act was enacted. See S. Rep. No. 107-31, 107th Cong., at 4 (2001), stating "section 110(2) . . . using then known forms of distance education".

may be exercised when a digital transmission occurs.²³³ Secondly, the exception only covers reception in classrooms or by disabled students. Thirdly, the exception only covers the performance of non-dramatic literary and musical works and the display of (any) works, although, strictly speaking, this is a limitation rather than a complete impediment.

In 1997, two bills were introduced proposing amendments to the Copyright Act so that section 110(2) would overcome these impediments and broadly cover digital distance education.²³⁴ The Copyright Office recommended alternative language for section 110(2) simply to update “the language and the policy balance of section 110(2)”,²³⁵ without broadening it (what could be called a “minimalist approach”). The Senate decided not to amend section 110(2) and mandated a study by the Copyright Office on distance education through digital technologies,²³⁶ which resulted in the *USCO Report on DDE*.

The Copyright Office acknowledged that “the technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery methods of systematic instruction,” and that “[u]pdating section 110(2) to allow the same activities to take place using digital delivery mechanisms, while controlling the risks involved, would continue the basic policy balance struck in 1976.”²³⁷ The Copyright Office then restated its 1997 proposal merely to “update” the exception, so that the same kind of distance education that was subject to the exception in section 110(2) could also be conducted through digital means.²³⁸ In March of 2001, the

²³³ 17 U.S.C. § 110 (2002). *Under the U.S. Copyright Act of 1976, the exploitation of works through the Internet is considered an exercise of the rights of reproduction and distribution.* Id.

²³⁴ *The Digital Copyright Clarification and Technology Education Act of 1997*, S. 1146, 105th Cong. § 204 (1997) and *The Digital Era Copyright Enhancement Act*, H.R. 3048, 105th Cong. § 5 (1997) proposed the following language for § 110(2):

“(2) performance, display or distribution of a work, by or in the course of an analog or digital transmission, if-
(A) the performance, display or distribution is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution;
(B) the performance, display or distribution is directly related and of material assistance to the teaching content of the transmission; and
(C) the work is provided for reception by-
(i) students officially enrolled in the course in connection with which it is provided; or
(ii) officers or employees of governmental bodies as part of their official duties or employment,”

²³⁵ See USCO REPORT ON DDE, *supra* note 4, at xvi.

²³⁶ A mandate that was ultimately adopted in the DMCA of 1998.

²³⁷ See USCO REPORT ON DDE, *supra* note 4, at xv.

²³⁸ The USCO proposed the following amendments to section 110(2) of the U.S. Copyright Act of 1976:

- a) Clarify the meaning of “transmission”... So that it covers transmissions by digital means as well as analog.
- b) Expand the coverage of rights to [the] extent technologically necessary... By adding the rights of reproduction and/or distribution, only to the extent technologically required to transmit the performance or display authorized by the exemption.
- c) Emphasize [the] concept of “mediated instruction”... To ensure that the performance or display is analogous to the type of performance or display that would take part in a live classroom setting [i.e., so that the work cannot be viewed repeatedly, whenever the student chooses and for an indefinite duration, as a substitute for the purchase of a copy].
- d) Eliminate [the] requirement of physical classroom... The nature of digital distance education makes this limitation conceptually and practically obsolete, therefore it was recommended permitting transmissions to be made to students officially enrolled in the course, regardless of their physical location.
- e) Add new safeguards to counteract new risks... Any transient copies permitted under the exception should be retained for no longer than reasonably necessary to complete the transmission; educational institutions benefiting from the exception should be required to institute policies regarding copyright, and technological measures should be in place to control unauthorized uses of works transmitted in digital form.
- f) Maintain [the] existing standards of eligibility... Although in the area of digital distance education, the lines between for profit and nonprofit have blurred, only nonprofit educational institutions should be eligible for the exception.
- g) Expand [the] categories of works covered... To include audiovisual works, sound recordings, musical works, and dramatic literary works, but with a limitation on the amount of these works that could be used (not the whole work).
- h) Require [the] use of lawful copies ... i.e., that the performance or display be made from a lawful copy.

Technology, Education and Copyright Harmonization Act of 2001 ("TEACH Act") was introduced in the Senate to amend the Copyright Act as recommended by the Copyright Office²³⁹. It was passed last November 2nd 2002, as Public Law 107-273 Let us now examine it.

i) Add [a] new ephemeral recording exception ... *To allow asynchronous digital distance education.*

See USCO REPORT ON DDE, *supra* note 4, at xvi – xxi and at 146-161.

²³⁹ The initial text introduced in the Senate on March 7th 2001, S. 487.IS, 107th Cong. (2001); subsequently amended, reported and passed in the Senate on June 5th and 7th 2001, S. 487.RS, 107th Cong. (2001); referred to the House Committee on the Judiciary on June 8th, S. 487.RFH, 107th Cong. (2001); reported by the Committee on the Judiciary on September 25th 2002, S.487.ES, 107th Cong. (2002). We will refer to both texts of March 7th and June 5th, as the "initial" and "current" texts. See, also, the Senate Report 107-31 of June 5th 2001 and the House of Representatives Report 107-687 of September 25th 2002. It was incorporated in H.R. 2215, which became Public Law 107-273 on 11/2/2002.

S 487, 107th CONGRESS, 1st Session

Sec. 1: SHORT TITLE-

This Act may be cited as the `Technology, Education, and Copyright Harmonization Act of 2001'.

Sec. 2: EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS FOR EDUCATIONAL USES-

Section 110 of title 17, United States Code, is amended--

(1) by striking paragraph (2) and inserting the following:

`(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if--

`(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

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

`(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to--

`(i) students officially enrolled in the course for which the transmission is made; or

`(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

`(D) the transmitting body or institution--

`(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

`(ii) in the case of digital transmissions--

`(I) applies technological measures that reasonably prevent--

`(aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

`(bb) *unauthorized further dissemination of the work in accessible*

form by such recipients to others; and

`(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;"; and

(2) by adding at the end the following:

`In paragraph (2), the term `mediated instructional activities' with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

`For purposes of paragraph (2), accreditation--

`(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the Council on Higher Education Accreditation or the United States Department of Education; and

`(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

`For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.'.

Sec.3: EPHEMERAL RECORDINGS-

(1) *IN GENERAL-* **Section 112** of title 17, *United States Code*, is amended--

(A) by re-designating subsection (f) as subsection (g); and

(B) by inserting after subsection (e) the following:

`(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if--

`(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

`(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

`(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if--

`(A) no digital version of the work is available to the institution; or

`(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).'

(2) *TECHNICAL AND CONFORMING AMENDMENT-* **Section 802(c)** of title 17, *United States Code*, is amended in the third sentence by striking `section 112(f)' and inserting `section 112(g)'.

Sec.4: PATENT AND TRADEMARK OFFICE REPORT-

(1) *IN GENERAL-* Not later than 180 days after the date of enactment of this Act and after a period for public comment, the Undersecretary of Commerce for Intellectual Property, after consultation with the Register of Copyrights, shall submit to the Committees on the Judiciary of the Senate and the House of Representatives a report describing technological protection systems that have been implemented, are available for implementation, or are proposed to be developed to protect digitized copyrighted works and prevent infringement, including upgradeable and self-repairing systems, and systems that have been developed, are being developed, or are proposed to be developed in private voluntary industry-led entities through an open broad based consensus process. The report submitted to the Committees shall not include any recommendations, comparisons, or comparative assessments of any commercially available products that may be mentioned in the report.

(2) *LIMITATIONS-* The report under this subsection--

(A) is intended solely to provide information to Congress; and

(B) shall not be construed to affect in any way, either directly or by implication, any provision of title 17, United States Code, including the requirements of clause (ii) of section 110(2)(D) of that title (as added by this Act), or the interpretation or application of such provisions, including evaluation of the compliance with that clause by any governmental body or nonprofit educational institution.

1.- Categorization. Rights Covered.

Without modifying the rights covered under the exception in section 110(2), which remains limited to the transmission of performances and displays,²⁴⁰ the TEACH Act adds a new paragraph (f)(1) to current section 112 (which deals with “ephemeral recordings”²⁴¹) to allow the storage of the performed or displayed copyrighted works on servers, thus allowing performances and displays to be made asynchronously on the Internet.²⁴² In other words, works used for teaching under the exception can be uploaded to a server and kept there (the first of the three basic DDE acts we identified above).

It remains to be seen whether temporary copies of a work transmitted through the Internet, made both in transit and at the destination site (RAM copies) constitute a violation of copyright. In theory, the definition of “fixation” in section 101 (“sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration”),²⁴³ would exclude purely transient reproductions from the monopoly of the author. RAM copies, despite being temporary, clearly qualify as copies subject to the owner’s exclusive right of reproduction, provided they persist long enough to be perceived, copied or communicated.²⁴⁴ This interpretation has

²⁴⁰ 17 U.S.C. § 110(2) (2002).

²⁴¹ Regardless of the title of § 112 (“Limitations on exclusive rights: Ephemeral recordings”), what will be permitted under this new § 112(f)(1) is far more than an “ephemeral” copy: it will allow that works (displayed or performed) remain on the server of the institution and may be accessed by a student each time the student logs on to participate in the particular class session of the course in which the display or performance is made. See S. REP. NO. 107-31, at 12 (2001). [hereinafter Senate Report]

²⁴² Senate Report, *supra* note 55, at 14: “In order for asynchronous distance education to proceed, organizations providing distance education transmissions must be able to load material that will be displayed and performed on their servers, for transmission at the request of students. The TEACH Act’s amendment to section 112 makes that possible.”

²⁴³ 17 U.S.C. §101 (2002).

²⁴⁴ Despite some contradictory case law (Apple Computer v. Formula International, 594 F. Supp. 617, 622 (C.D. Cal. 1984) (unlike ROM (read-only memory) copies, RAM copies are merely temporary)), recent case law has settled the issue (MAI Systems Corp. v. Peak Computer Inc., 991 F.2d 511, 518-519 (9th Cir. 1993), cert. dismissed, 114 S.Ct. 671 (1994): RAM temporary copies are copies subject to the copyright owner’s exclusive reproduction right.

been confirmed by the Copyright Office in its *DCMA Section 104 Report*,²⁴⁵ which examined, among other issues, the necessity of introducing an exemption for RAM copies.²⁴⁶ After concluding that there was “no compelling evidence presented in support of a blanket exemption for incidental copies,” the *USCO DMCA Report* found that temporary “buffer” RAM copies made in the course of digital musical streaming transmissions (i.e., webcasting transmissions) were a case of fair use.²⁴⁷ The *USCO DMCA Report* also noted, however, that “the case-by-case fair use defense is too uncertain a basis for making rational business decisions,”²⁴⁸ and recommended that Congress amend the Copyright Act to “preclude any liability arising out of . . . temporary buffer [RAM copying] that [is] incidental to a licensed digital transmission of a public performance of a sound recording and any underlying musical work.”²⁴⁹

Despite the limitation of this proposed partial exemption to include only RAM buffer copies necessary for web-casting transmissions of music, the fair use doctrine may apply generally to exempt RAM copies made during the transmission of works over the Internet²⁵⁰, as well as those made while browsing Internet web-pages, regardless of whether the posting of that work on the web-page was lawful or infringing.²⁵¹ But what about RAM copies, made in students’ computers, of works posted by the educational institution for teaching purposes?²⁵² In order to answer this question, we will briefly examine the four factors of section 107’s fair use exemption.

The same conclusion would apply to copies made by Internet Service Providers (ISP) for system caching purposes. Yet this would be covered by the provisions concerning safe-harbors and ISP responsibility for copyright infringements set in 17 USCA § 512 (2002) as introduced by the DMCA. Educational institutions may also benefit from the same limited-responsibility system.

²⁴⁵ U.S. COPYRIGHT OFFICE, *DMCA SECTION 104 REPORT* (2001) [hereinafter *USCO DMCA Report*], issued following the DMCA mandate of § 104, to evaluate the effects of the amendments made by the DMCA on the operation of §§ 109 and 117 of the Copyright Act and digital technologies. DMCA 105 P.L. 304 (1998).

²⁴⁶ *USCO DMCA REPORT*, supra note 59, at 106-148.

§ 109 deals with the so-called “first sale doctrine”: the owner of a lawful copy of a work is entitled to sell or further dispose of that particular copy; the Report examines the accuracy of extending § 109 to cover also digital copies (whether transmission of a work over the Internet from one person to another should fall within the scope of § 109), i.e., a “digital” first-sale doctrine (which was already proposed in the Boucher-Campbell bill of 1997), and concludes against it mainly for 2 reasons: a) the first sale doctrine is a limitation of the right of distribution (not of reproduction) and a transmission over the Internet always results in a new copy of the work (also when the original copy is deleted after transmission); and b) other countries are addressing digital transmissions under the right of communication to the public, where the first-sale doctrine does not apply. See *USCO DMCA REPORT*, supra note 59, Executive Summary at III.B.1.

§ 117 permits the owner of a copy of a computer program to make an additional copy of it for archival purposes; two different issues concerning § 117 are examined in the Copyright Office’s Study: the possibility of extending § 117 to other works (in addition to computer programs) and the introduction in § 117 of an exemption for incidental copies (also proposed in the Boucher-Campbell bill of 1997). During the hearings, “many commenters advocated a blanket exemption for temporary copies that are incidental to the operation of a device in the course of use of a work when that use is lawful under title 17.” *USCO DMCA Report*, Executive Summary at II.B. Other commenters opposed such an exemption, arguing that it would dramatically expand the scope of § 117, in contrast with the carefully calibrated adjustment made in the DMCA which reaffirms the conclusion reached in *MAI Systems Corp v. Peak Computer Inc.*, 991 F.2d 511 (9th Cir. 1993) that RAM temporary copies are copies subject to the copyright owner’s exclusive reproduction right.

²⁴⁷ As defined by the Copyright Office, “buffer” copies, which exist only for a short period of time and consist of small portions of the work, are incidental to the licensed performance of the work and should not be subject to an additional license for a reproduction that is only a means to an authorized end. *USCO DMCA REPORT*, supra note 59, Executive Summary at III.B.2.b

²⁴⁸ *USCO DMCA REPORT*, supra note 59, Executive Summary at III.B.2.c.

²⁴⁹ See *Id.*

²⁵⁰ See *USCO DMCA REPORT*, supra note 59, at 122: “exemptions, such as fair use, that apply to copying in other contexts apply in this [RAM copying] context as well.” See also the subsequent fair use analysis made in the *USCO DMCA Report*, at 133-141.

²⁵¹ Besides, as a commonly accepted practice, a user may be sued for an unlawful posting or perhaps also for a non-fair-use-downloading of a work, but not solely on the basis of RAM copies made in his computer while browsing the Internet. Unfortunately, this interesting issue goes beyond the scope of this article.

²⁵² Not the previous and subsequent acts of reproduction that have taken or may take place, which will be separately examined under the fair use doctrine at the end of this chapter.

The first factor, “the purpose and character of the use,”²⁵³ would weigh in favor of fair use, since the making of RAM copies is not transformative and has non-commercial purposes. There is no commercial exploitation intended or made of the RAM copy on the student’s computer, regardless of whether the students pay for the transmission or whether the educational institution is for-profit or not-for-profit. The second factor, “the nature of the copyrighted work,”²⁵⁴ may vary; it would be easier to find a fair use when the transmitted work is a scholarly article published in a journal than when it is a chapter of a treatise, let alone when the work is a musical composition, a sound recording, or a film originally intended for commercial exploitation. The third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”²⁵⁵ would clearly weigh against fair use when it is the whole work that is being copied into RAM. However, we should not forget that the RAM copy in itself is an act of reproduction which is necessary to make the transmission possible. Thus, if that transmission is lawful—either because it has been licensed by the owner or it falls under an exception, such as the teaching exception—this third factor should be given little weight and should always be subordinate to consideration of the lawfulness of the act of transmission itself.²⁵⁶ Finally, the fourth factor, “the effect of the use upon the potential market for the work,”²⁵⁷ seems to be minimal: RAM copies themselves have no negative effect on the market for the work. Transmission over the Internet and downloads made by students may have a negative effect on the market of the transmitted work, but RAM copies do not have any further negative effect.²⁵⁸ In short, it seems that RAM copies of works lawfully posted under the teaching exception—the second of the three basic DDE acts we identified above—could be considered fair use.

Far more precise and innovative is the solution adopted in the TEACH Act regarding permanent downloads made by students, the third of the three basic DDE acts we identified above. Reproductions allowed under the new section 112(f)(1) are only those made by the educational institution in order to transmit the work to its students. However, this section does not deal with reproductions made by the students upon receipt of the transmitted works.²⁵⁹ This omission seems to have been intentional,²⁶⁰ since, unlike the initial text²⁶¹, the current proposal not only avoids referring to “distribution”—thus excluding from the exception any downloads made by students—but also introduces a

²⁵³ 17 U.S.C. § 107(1) (2002).

²⁵⁴ 17 U.S.C. § 107(2) (2002).

²⁵⁵ 17 U.S.C. § 107(3) (2002).

²⁵⁶ Instead, if the posting for teaching purposes amounts to an infringement, then RAM copies made at reception must also be considered infringing copies.

²⁵⁷ 17 U.S.C. § 107(4) (2002).

²⁵⁸ However, see the *USCO DMCA Report* when considering the economic value of temporary copies: “in the digital world it is possible that the full commercial value of the work is contained in that temporary copy. For example, customers are becoming less interested in possessing a permanent copy of software, and more interested in having that copy available to them as they need it.” *USCO DMCA REPORT*, *supra* note 59, at 53-54.

²⁵⁹ TEACH Act, S. 487, 107th Cong. § 112(f)(1) (2002).

²⁶⁰ Furthermore, both 1997 bills expressly included “distribution,” along with performance and display, under § 110(2). See *supra* n.48.

²⁶¹ The initial text of the TEACH Act, S. 487.IS, 107th Cong. § 110(2) (2001) referred to both reproduction and distribution:

“(2) ... the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work, by or in the course of a transmission, reproduction of such work in transient copies or phonorecords created as a part of the automatic technical process of a digital transmission, and distribution of such copies or phonorecords in the course of such transmission, to the extent technologically necessary to transmit the performance or display, if-- ...

D) any transient copies are retained for no longer than reasonably necessary to complete the transmission;”

Furthermore, paragraph E(ii), simply referred to unauthorized access and dissemination of the work (by requiring the transmitting institution to apply “technological measures that reasonably prevent unauthorized access to and dissemination of the work”), which could be read as only attempting to prohibit further dissemination (not retention of copies). It could also be argued that in order to “complete the transmission” each recipient should be allowed to make a copy. Although the language does not flat out deny such an interpretation, it is not in harmony with the purpose of the Act. Yet, it seems more likely that the final scope of the initial TEACH Act was not larger than under the current one: it would have only covered transient copies and distribution of these transient copies, made in the course of the transmission allowed under § 110(2). ”

subparagraph (D)(ii) under section 110(2) stating that in the case of digital transmissions, the transmitting institution must apply “technological measures” to prevent both “retention of the work in accessible form by recipients . . . for longer than the class session,” and “unauthorized further dissemination of the work in accessible form by such recipients to others.”²⁶²

The application of technological measures to prevent, to the extent possible, “unauthorized further dissemination” is completely understandable; downstream infringements, which have nothing to do with the teaching use, must be prevented. On the other hand, “retention” of the work by the student is closer to, and may be part of, the teaching use itself. According to the TEACH Act, the work may remain “in accessible form” for as long as “the class session.”²⁶³ Senate Report 107-31 attempts to explain both terms:

The requirement that technological measures be applied to limit the retention for no longer than the “class session” refers back to the requirement that the performance be made as an “integral part of a class session.” The duration of a “class session” in asynchronous distance education would generally be that period during which a student is logged on to the server of the institution . . . making the display or performance, but is likely to vary with the needs of the student and with the design of the particular course. It does not mean the duration of a particular course (i.e., a semester or term), but rather is intended to describe the equivalent of an actual single face-to-face mediated class session . . . Although flexibility is necessary . . . a common sense construction will be applied so that a copy . . . would not remain in the possession of the recipient in a way that could substitute for acquisition or for uses other than use in the particular class session.

...

The reference to “accessible form” recognizes that certain technological protection measures that could be used to comply with subparagraph (d)(D)(ii) do not cause the destruction or prevent the making of a digital file; rather they work by encrypting the work and limiting access to the keys and the period in which such file may be accessed. On the other hand, an encrypted file would still be considered to be in “accessible form” if the body or institution provides the recipient with a key for use beyond the class session.²⁶⁴

“Accessible form” requires that access to the work be available only to students (that is, by means of password access or some other access-control system). But, does “accessible form” include downloads by students, or only streaming formats? Since, according to the Senate Report, “class session” does not extend to “the duration of a particular course” but rather “the period during which a student is logged on making the display or performance,” it seems only password-protected *streaming* formats will be allowed for transmission of works for teaching purposes under the exception.²⁶⁵ Was this the legislator’s intent?

Most likely, the answer is yes. And this is so for several reasons. First, by taking into account the recommendations made by the USCO on its Report on DDE to simply transpose the scope of the current exception in sec.110(2) “as is” into the digital world²⁶⁶, and the fact that under it, students are not allowed to make copies of the broadcast performances or displays²⁶⁷ Besides, according to the Senate Report, “the [TEACH] Act amends . . . the Copyright Act to permit storage of copyrighted material *on servers* in order to permit the performances and displays uathorized by section 110(2) to be made asynchronously in distance education courses”²⁶⁸ (emphasis added), while “*student downloading* of course materials will continue to be subject to the fair use doctrine”²⁶⁹ (emphasis added). Anybody

²⁶² TEACH Act, S.487, 107th Cong. § 110(2)(D)(ii) (2002)

²⁶³ TEACH Act, S.487, 107th Cong. § 110(2)(D)(ii)(I)(aa) (2002)

²⁶⁴ Senate Report, *supra* note 55, at 12 (2001).

²⁶⁵ Senate Report, *supra* note 55, at 12.

²⁶⁶ USCO REPORT ON DDE, *supra* note 4, at xvi-xxi and at 146-161.

²⁶⁷ 17 U.S.C. § 110(2) (2002). A student cannot bring a tape recorder with him into the classroom where the distance-education is being received and tape the broadcast.

²⁶⁸ Senate Report, *supra* note 55, at 4.

²⁶⁹ Senate Report, *supra* note 55, at 15.

who has taken an on-line course knows that asynchronous on-line teaching needs would be better served if the exception covered retention by students of the transmitted work at least for as long as the course lasts. Students could avoid having to log on to the course website just to take a look at the transmitted works. Of course, one may also argue that this argument merely addresses a convenience, rather than a real necessity of DDE students to download materials.

There may always be a back door, however, to the non-inclusion of end-users' copies under section 110(2): fair use. Private copies made by students of the works transmitted under section 110(2), for purposes of studying could be deemed fair use, as long as no further dissemination (infringing transmission and reproduction) occurs. If this is so, then the implementation of technical measures to comply with the new requirement in section 110(2)(D)(ii) of the TEACH Act would prohibit certain specific uses that may otherwise be deemed fair.²⁷⁰

As a corollary to section 112(f)(1), the TEACH Act expressly deals with the issue of liability of the transmitting institution for any infringements that may derive from transmissions covered under section 110(2).²⁷¹ A new paragraph to be added at the end of section 110(2) requires that copies made to transmit the performance or display shall be maintained on the institution's system or network neither "in a manner ordinarily accessible to anyone other than anticipated recipients" nor "for a longer period than is reasonably necessary to facilitate the transmissions."²⁷² As long as both requirements are fulfilled, the institution will not be responsible for any infringing copies made by third parties beyond its control.²⁷³

2.- The Extent and Nature of the Works Covered

- What is excluded?

Not all educational materials--or materials having educational value--are excluded from the TEACH Act exceptions, just works "produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks."²⁷⁴ As explained in Senate Report 107-31, "the reference to 'digital networks' is intended to limit the exclusion to only those materials whose primary market is the digital networked environment"; instructional materials developed and marketed for use in the physical classroom would clearly fall under the exception.²⁷⁵

Also excluded from the exception are "performances or displays given by means of a copy . . . that is not lawfully made and acquired," provided the transmitting institution "knew or had reason to believe [the copy] was not lawfully made and acquired."²⁷⁶ Notice that both conditions are required: unlawful copy and knowledge by the institution. This

²⁷⁰ As to the much debated issue of access control measures vs. fair use, see Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y USA 1 (1997); Tom W. Bell, *Fared Use v. Fair Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 101 (1998); Jessica Litman, *Digital Copyright*, at 122-150 (Prometheus Books 2001). The USCO DMCA Report did not address the issue, after concluding that the impact of § 1201 (prohibitions on circumvention of technological protection measures) on fair use and other copyright exceptions was outside the scope of its Report.

²⁷¹ TEACH Act, S.487, 107th Cong. § 110(2) *in fine* (2002).

²⁷² TEACH Act, S. 487, 107th Cong. § 110(2) *in fine* (2002).

²⁷³ TEACH Act, S. 487, 107th Cong. § 110(2) *in fine* (2002).

²⁷⁴ TEACH Act, S. 487, 107th Cong. § 110(2) (2002). Instead, under the initial text of the TEACH Act (S.487.IS, 107th Cong., §110(2)) of March 7th 2001, the scope of the exception was narrower, since it excluded all works "produced primarily for instructional use," in general.

²⁷⁵ Senate Report, supra note 55, at 8. Notice that this exclusion is not restricted to digital transmission only; and vice-versa, that a similar limitation does not exist for analog transmissions (paradoxically, instructional materials intended for analog transmission would fall under the coverage of the exception). Of course, this is already so under the current exception, but it is nevertheless surprising that when introducing the exclusion to the exception the legislator only thought of digital transmissions.

²⁷⁶ TEACH Act, S. 487, 107th Cong. § 110(2) (2002).

provision is not novel, since current section 110(1) already provides for a similar exclusion to the exception.²⁷⁷ In the DDE context, however, the concept of “lawful copy” poses two major questions.

First, the concept of “lawfully made or acquired” itself may be limited. The copy may have been lawfully obtained under a license or under an exception (i.e., fair use), but is that enough to qualify under the exception? Let’s assume that the copy has been lawfully obtained under a license that expressly restricts its subsequent use to specific purposes (i.e., research purposes only), can it be used beyond that scope for uses that are expressly exempted from copyright (i.e., for teaching purposes)?²⁷⁸ Should contracts prevail over exceptions²⁷⁹ or should it be the other way around? To what extent should contracts be preempted by copyright exceptions?²⁸⁰ Similarly, when the lawful copy has been made under the fair use doctrine or another statutory copyright exception,²⁸¹ may it be further used under another exception such as the teaching exception? The Copyright Office’s *DMCA Report* considered a somewhat similar issue of interaction between exceptions, concerning section 107’s fair use and section 109’s first sale doctrine.²⁸² Having previously defined the scope of the first sale doctrine as “conditioned on both ownership (as opposed to mere possession) and the requirement that such ownership be of a particular physical copy”²⁸³, the Copyright Office concluded that the first sale doctrine should not apply to fair use copies²⁸⁴, which could be freely transferred only in those cases where distribution itself qualified as a fair use.²⁸⁵ Following this latter rationale, if a fair use copy may be subject to other fair uses, it should also be subject to other statutorily-exempted uses.²⁸⁶

Second, the concept of “lawfully made or acquired” opens the possibility of making digital copies from non-digital works, and the TEACH Act does not overlook the issue. Although the TEACH Act states that it “does not authorize the conversion of print or other analog versions of works into digital formats,” the educational institution may make digital copies of analog works, but “only with respect to the amount of such works authorized to be performed or displayed under section 110(2),” in two cases: where no digital version is available to the institution, or where the available digital version is protected by technological measures.²⁸⁷ This measure should be praised to the extent that

²⁷⁷ 17 U.S.C. § 110(1) (2002).

²⁷⁸ *Of course, this would not prevent the educational institution from lawfully obtaining another copy of the work (from another source) free from any contractual restrictions, so that it may be freely used under the teaching exception.*

²⁷⁹ *Or, in Prof. Goldstein’s words, “whether contracts should be allowed to override an underlying copyright balance.” Paul Goldstein, Summary of Discussion, The Future of Copyright in a Digital Environment 241-248, 246 (Bernt P. Hugenholtz, ed., Information Law Series -4, Kluwer, 1996).*

²⁸⁰ The Copyright Office concluded that the question of whether the Copyright Act should (or should not) be amended to ensure that contractual provisions that override consumer privileges in the copyright law (or are otherwise unreasonable) are not enforceable, was outside the scope of the commissioned Section 104 Study (USCO DMCA REPORT, *supra* note 59, at 163).

Elsewhere, the issue of whether the statutory exceptions to copyright are imperative or default rules that may be overridden (waived or limited) by contract is still vastly unsolved and remains to be decided *in casu* (on the basis of each exception) mainly at a domestic level. See, for instance, article 23bis of the Belgian Copyright Act of 1994, stating the imperative nature of some exceptions. See generally Lucie M.C.R. Guibault, *Contracts and Copyright Exemptions*, in *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management* 125-163 (P. Bernt Hugenholtz ed., Information Law Series -8, Kluwer, 2000).

²⁸¹ *For instance, the copy may have been obtained (or made from a copy obtained) from another Library through an interlibrary loan. Is this a lawfully made or acquired copy that may be freely “re-used” under the teaching exception?*

²⁸² USCO DMCA REPORT, *supra* note 59, at 155-161.

²⁸³ USCO DMCA REPORT, *supra* note 59, at 89.

²⁸⁴ *“The statutory text [of § 109] only requires that the copy be lawfully made, and makes no reference to a prior authorized sale or other distribution” See USCO DMCA REPORT, supra note 59, at 156. Despite acknowledging the ambiguity of the 1976 House Report on this point and the existence of some important doctrine supporting the opposite view, the Copyright Office concluded that Congress intended that copies of works lawfully made under the fair use doctrine were not subject to the first sale doctrine (i.e., could not be freely distributed), and recommended to either amend § 109 to ensure that, or to create a new archival exemption that provides expressly that backup copies may not be freely distributed. See USCO DMCA REPORT at 157.*

²⁸⁵ See USCO DMCA REPORT, *supra* note 59, at 159.

²⁸⁶ However, it could also be argued that this rationale has to do with the first sale doctrine (rather than with the fair use exception), and should not be generalized beyond that doctrine.

²⁸⁷ TEACH Act, S.487, 107th Cong. § 112(f)(2) (2002).

it doesn't make the fact that the work is not available in digital format a *de facto* impediment to its use under the exception.²⁸⁸ Also notice that digital conversion is only allowed for the portion of the work that will be used for teaching purposes under the exception, and only according to the limitations of section 110(2); that is, in an exempted transmission (i.e., not for building an e-reserve). It is also true that current licensing practices expressly cover digitization.²⁸⁹ However, in either case (exempted or licensed digitization), the fundamental issue is how to protect the author/owner's (moral) right of integrity, when available, to ensure that what has been digitised and will be transmitted is the real work.

- What is included?

Section 110(2) covered only the "performance of a non-dramatic literary or musical work or display of [any] works."²⁹⁰ The TEACH Act expands the first category by adding the performance of "reasonable and limited portions of any other work,"²⁹¹ and limits the second category by limiting the display of works to "an amount comparable to that which is typically displayed in the course of a live classroom session."²⁹² This limitation is intended to prevent display of certain types of works (basically, literary works), that could substitute for traditional purchases of the work²⁹³, while at the same time being flexible enough to allow full display of certain works.²⁹⁴

²⁸⁸ Nevertheless, we are dealing here with the very nature of the digital exploitation: is it a new "means" of exploitation? is it also a new "right" ("of making the work available to the public" as presented under the WIPO Copyright Treaty of 1996)? Is digitisation a transformation of the work?. To answer all these questions, the issue at stake is where to draw the balancing-line between the author's exclusive rights and the exceptions. In other words, should the scope of uses allowed under the teaching exception be limited to the format in which the work has been made available by the author/owner? Or should the exception –limited in scope– prevail over the author/owner's exclusive rights? This seems to be a horizontal question that affects not only the teaching exception, but in general the balancing of all exceptions and author's rights, also when transposed into the digital world. Once again, it goes beyond the scope of this article.

²⁸⁹ For instance, the permission granted by the Copyright Clearance Center under the ECCS license (Electronic Course Content Service), available at <http://www.copyright.com/services/ECCSTerms.asp>, includes digitisation of the work. See also the 1998 Joint Statement on The Digitisation of Printed STM Materials available at <http://www.ifrro.org/papers/stmjoint2.html>, agreed by the International Federation of Reproduction Rights Organisations (IFRRO) and the International Group of Scientific, Technical and Medical Publishers (STM):

"authorisation by rights holders or their authorised representatives should always be a necessary condition for electronic storage of printed works and for retrieval and distribution in whatever form";

"the rights holder should be entirely free to determine the fee, including the right to set by type of content, type of user, or any other consideration deemed appropriate by the rights holder";

despite "rights holders can reserve to themselves exclusively the role of managing digitisation rights clearance", "centralised management of rights clearance will in many cases be preferable";

and "unless prohibited by the rights holder, RROs may grant digitisation licences even when the printed material is already available in other digital formats and databases".

Although the Joint Statement covers only copyright printed materials from books and periodicals, in or out of print, it may be a good indicator of both the interests at stake and the parties' reaction.

²⁹⁰ 17 U.S.C. § 110(2).

²⁹¹ According to the Senate Report, what constitutes a "reasonable and limited" portion should take into account both the nature of the market for that type of work and the pedagogical purposes of the performance. See Senate Report, *supra* note 55, at 7-8.

²⁹² TEACH Act, S. 487, 107th Cong. § 110(2) (2002).

²⁹³ Under the current exception, the transmission (i.e., broadcasting) of displays of works is limited (de facto) to works of visual art (very seldom will the display of a literary work be broadcast as part of the instruction). 17 U.S.C. § 110(2) (2002). Instead, in a digital transmission, literary works may be perfectly "displayed" (i.e., a scanned copy of any printed literary work constitutes a display of that work that may be transmitted under the exception).

²⁹⁴ Notice that the "limited portion" language is only used in conjunction with the performance and not with the display. As Senate Report explains, for certain works, "display of the entire work could be appropriate and consistent with displays typically made in a live classroom setting (e.g., short poems or essays, or images of pictorial, graphic or sculptural works, etc.)." Senate Report, *supra* note 55, at 8.

3.- Purpose of the Use

The TEACH Act sets further requirements concerning the purpose of the use (i.e., teaching use). In order to qualify under the exception, the performance or display of the work must be “an integral part of a class session offered as a regular part of the systematic mediated instructional activities.”²⁹⁵ The first part, “integral part of a class session,” is intended to require that the performance or display is analogous to what would take place in a live classroom setting.²⁹⁶ In other words, the performance or display must be part of a class, rather than ancillary to it (i.e. supplemental reading material).²⁹⁷ The second part, “systematic mediated instructional activities,” is specifically defined in section 110(2) of the TEACH Act²⁹⁸, while at the same time being limited by the exclusion of works primarily produced for digital instruction.

The work must also be “directly related and of material assistance to the teaching content of the transmission.”²⁹⁹ As Senate Report 107-31 explains, the portion performed or displayed may not be “for the mere entertainment of the students or as unrelated background material.”³⁰⁰ This requirement already existed under the previous section 110(2) USCA.³⁰¹

4.- Eligibility for the Proposed Exception

In order to be covered by the TEACH Act exception, both the institutions and the individuals (transmitter and recipient) involved in the transmission, must meet certain cumulative requirements:

- To be eligible, the performance or display made “by or in the course of a transmission” must be “part of the systematic mediated instructional activities” of “an accredited nonprofit educational institution.”³⁰² Accreditation is not defined in terms of particular courses or programs, but rather according to the nature of the institution: those providing elementary, secondary or post-secondary education.³⁰³ The only further requirement is that the institution must be “nonprofit.”³⁰⁴ The exception makes no distinction between public or private institutions (private nonprofit institutions may qualify), and does not require that the courses be free.³⁰⁵ It follows that, once accredited, the nonprofit institution will benefit from the exception with respect to all its courses, whether they are part of a degree or not. It is not difficult to foresee that in a networked environment, this exception may be subject to abuse. An accredited, nonprofit virtual university may offer a very expensive non-degree course on “Twentieth Century Rock Music,” for example, that could benefit from the teaching exception. It is easy to imagine the kind of works which will be transmitted as “an integral part of a class session . . . directly related and of material assistance to the teaching.”³⁰⁶
- In order to be covered by the TEACH Act exception, the transmission must also be “made by, at the direction of, or under the actual supervision of an instructor.”³⁰⁷ This language means that the performance

²⁹⁵ TEACH Act, S. 487, 107th Cong. § 110(2)(A) (2002).

²⁹⁶ *Id.*

²⁹⁷ *As explained in Senate Report, the bill does not want to displace textbooks, course packs, or other materials which are typically purchased or acquired by students for their independent use and retention. Senate Report, supra note 55, at 10.*

²⁹⁸ *See the definition of “mediated instructional activities” provided for in the TEACH Act, S. 487, 107th Cong. § 110(2) (2002). Previous section 110(2)(A) USCA refers to “systematic instructional activities.” 17 U.S.C. § 110 (2002).*

²⁹⁹ TEACH Act, S. 487, 107th Cong. § 110(2)(B) (2002).

³⁰⁰ Senate Report, *supra* note 55, at 11.

³⁰¹ 17 U.S.C. § 110(2) (2002).

³⁰² TEACH Act, S. 487, 107th Cong. § 110(2)(A) (2002).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* § 110(2)(B).

³⁰⁷ *Id.* § 110(2)(A).

or display covered under the exception may be made by the instructor but also by a student, under the direction or under the “actual supervision” of the instructor. According to Senate Report 107-31, “actual” does not mean constant, real-time supervision, or even pre-approval by the instructor, but simply supervision “in fact”, as opposed to “in name or theory only.”³⁰⁸

But how far does the exception go with regard to uses made by students? Are students allowed, under the exception, to make performances and displays to the same extent and under the same conditions as institutions and instructors?³⁰⁹ As we have seen, the remaining language of the proposed text--“performance . . . or display . . . by or in the course of a transmission,” and “offered as a regular part of the . . . instructional activities” of “an accredited nonprofit educational institution”--is not limited to the transmissions of performances and displays made by the institution or the instructor, and the language “made by, at the direction of, or under the actual supervision of” confirms the breadth of this exception.³¹⁰

The text may, however, hide an inconsistency, since the paragraph dealing with liability only refers to the educational institution.³¹¹ It does not cover the liability of students nor does it contemplate the acts lawfully made by students under the exception. To what extent is the student--or, by default, the educational institution--responsible for the acts or infringements committed by other students? Most likely, the legislator was not aware of the full range of uses and users covered by that language.

- Under the TEACH Act, reception in physical classrooms or by people with disabilities is no longer required for the exception to apply, the only requirement being that the transmission is “made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to (i) students officially enrolled in the course for which the transmission is made.”³¹² This requirement is not intended to impose network security obligations, but rather to require that the recipients should be identified, and that “the transmission should be technologically limited to such identified authorized recipients through systems such as password access or other similar measures.”³¹³ The words “to the extent technologically feasible” will therefore become crucial to the task of deciding whether a specific transmission will be covered by the exception.

In addition, the TEACH Act requires the transmitting institution to institute copyright protection policies, providing information regarding copyright to faculty, students and staff members, and giving notice to students that materials used in the course may be subject to copyright protection.³¹⁴

In short, the proposed amendments to section 110(2) would allow some, but not all, uses of works for teaching purposes within the VU to be covered under the exception. For instance, it would cover Professor Everbold's copying of a paragraph from *Nimmer on Copyright* and sending it to Mark, as well as her copying and distribution of the injunction and newspaper article to students for the Napster debate. In addition, if students are allowed to transmit performances and displays made as part of an educational activity, the proposed amendments may also cover the AOL chat room opinion and *New York Times* on-line article that Mark uploads as a contribution to the debate. On the other hand, it would hardly cover any of the full articles or chapters posted in the classroom e-reserve, specially if they are used as supplementary reading. But what about the article that Professor Everbold posted as an

³⁰⁸ Senate Report, *supra* note 55, at 9.

³⁰⁹ For instance, will a student be allowed to digitize a book he owns (since he has no digital version available) and transmit it to his fellow classmates for teaching purposes (i.e., as part of a debate initiated and moderated by the instructor)?

³¹⁰ Technology, Education, and Copyright Harmonization Act of 2001, S. 487, 107th Cong. § 110(2)(A)-(B) (2001). The Senate Report also confirms, “the performance or display may be initiated by the instructor. It may also be initiated by a person enrolled in the class as long as it is done either at the direction, or under the actual supervision, of the instructor.” Senate Report, *supra* note 55, at 9.

³¹¹ TEACH Act, S. 487, 107th Cong. § 110(2) (2002).

³¹² *Id.*

³¹³ Senate Report, *supra* note 55, at 11.

³¹⁴ TEACH Act, S. 487, 107th Cong. § 110(2)(D) (2002).

attachment in the tutor's board, to help students understand a common doubt? Would that qualify as a "display of a work . . . in an amount comparable to that which is typically displayed in the course of a live classroom session" that is "directly related and of material assistance to the teaching"?³¹⁵

In addition, the requirement that institutions implement technical measures to prevent students from retaining copies of the works transmitted under the exception may in practice become a *de facto* limitation on the kind of works covered by the exception: only those works that need not be retained by students and that may be "assimilated" in one only streaming session will be covered. Works that are substantial for teaching and that, therefore, should be retained by students to read, observe and study may not be covered by the exception. Once again, it is regrettably the case that by simply retaining the scope of the exception, and applying it to DDE "as is," we are missing an opportunity to address fully the specific needs of DDE. Of course, one may also argue--as we did above--that necessity should not be confused with mere convenience.³¹⁶ And digital copies of teaching material may still be made available for students to download and keep under license.

³¹⁵ *Id.* § 110(2)(B).

³¹⁶ One may also argue that the teaching exception should not extend to copies (or uses) made for studying purposes.

B.- Section 107: Fair Use

In addition to section 110(2) (before and after the TEACH Act),³¹⁷ the fair use provision in section 107 continues to be a critical exception for digital distance education. The fair use doctrine³¹⁸ is flexible and technology-neutral and for that reason—despite the lack of conclusive case law in the field—it may except certain digital distance educational uses, depending on the facts and circumstances of each case. When examining the factors listed in section 107 to determine the existence of fair use, we will revisit issues³¹⁹ similar to those presented above in discussion of the TEACH Act. We will concentrate on how the fair use doctrine would apply to both reproducing and posting a work for teaching purposes (the first of the three basic DDE acts we identified above), and its downloading by students (the third such act).³²⁰

1.- Purpose and Character of the Use

As to the purpose and character of the use³²¹, we must take into account the fact that “teaching (including multiple copies for classroom use), scholarship or research” is expressly cited in section 107 as an example of fair use purposes.³²² There is no reason to deny that Internet teaching qualifies as teaching, but on the Internet, teaching activities may certainly be more difficult to distinguish from other non-teaching uses. Thus, in considering whether the use is a teaching use, we may end up revisiting issues of whether the use is “an integral part of a class,” whether it is “directly related and of material assistance to the teaching,” and whether the use is made or directed by an instructor, or rather originates from a student for purposes unrelated to a specific teaching activity. We’ve been here before.

It will also be important the profit or non-profit character of the use³²³. Thus, a non-profit educational use is more likely to be fair than an educational use that earns a profit, which shows the connection existing between this factor and the fourth one (effect of the use on the potential market of the copyrighted work). Besides, as we will see, distinguishing between profit and non-profit educational uses is not an easy task.

Downloads made by students may be more easily accepted under the fair use doctrine than under the TEACH Act, which, as we’ve seen, does not allow them.³²⁴ To begin with, “multiple copies for classroom use”³²⁵ could cover digital copies received and retained for classroom use by students of the VU. Furthermore, student downloads are supposed to be used for private studying and non-commercial purposes. As we will see, however, the remaining

³¹⁷ Senate Report expressly acknowledges “the continued availability of the fair use doctrine.” Nothing in this Act is intended to limit or otherwise to alter the scope of the fair use doctrine.” Senate Report, *supra* note 55, at 14-15.

³¹⁸ Fair use is a doctrine based upon the analysis of all factors and circumstances of the individual case, including the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market or value of the work. 17 U.S.C. § 107 (2002). No single factor will determine whether the use is fair or not. All of them must be weighed together in light of the particular circumstances of each case: “since the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. ...the courts have evolved a set of criteria which, ...provide some gauge for balancing the equities ...[which] can all be reduced to the four standards which have been adopted in section 107.” H.R. Rep No. 94-1476, 94th Cong., 2d Sess. 65-66 (1976).

³¹⁹ Except for the issue of categorization, since the fair use exception is not limited to any particular category of rights.

³²⁰ We will neither examine its application to RAM copies made by students (see *supra*), nor to any temporary copies made to transmit the work or for system caching purposes (see section 17 U.S.C.A. § 512 (2002)).

³²¹ 17 U.S.C. § 107(1) (2002).

³²² 17 U.S.C. § 107 (2002).

³²³ See *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156 (W.D.N.Y. 1982). Furthermore, it is interesting to note that in *Association of American Medical Colleges v. Mikaelian*, 571 F. Supp. 144 (E.D. Pa. 1983), the court defined “educational purpose” as the free dissemination of information.

³²⁴ Senate Report, *supra* note 55, at 15: “student downloading of course materials will continue to be subject to the fair use doctrine”.

³²⁵ 17 U.S.C. § 107 (2002).

factors--especially the fourth factor--may not always weigh in favor of considering students' downloads to be "fair use."

2.- The Nature of the Copyrighted Work

As to the nature of the copyrighted work,³²⁶ courts generally look at whether the work is creative or factual³²⁷, whether it has been published or not³²⁸, and whether the work is commercially available or it is out of print. As we concluded before, in the analysis of RAM copies with respect to fair use, this factor depends on the nature of the original work, especially its intended commercial purposes. Also, if the use is based on a lawfully obtained copy, this factor would weigh in favor of a fair use defense.

3.- The Amount and Substantiality of the Use

As to the amount and substantiality of the portion used,³²⁹ although, as a general rule, it can be said that the smaller the portion used, the more likely to be fair, the importance of this factor will depend upon the type of work and the subject of the course, as well as on the purpose and character of the use (first factor). The third factor is addressed to ensure that only what is necessary to satisfy the specific purpose is taken³³⁰.

4.- The Effect of the Use upon the Potential Market of the Work

As we have seen, the effect of the use upon the potential market or value of the original work³³¹ turns out to be the most important factor of any fair use analysis. It depends upon the opportunities for sale or license of the work itself and derivative works, the availability of licenses for that use, the number of recipients of the presumed fair use copy, the character of the institution using the work,³³² and whether the use usurps the intended audience of the work, that is, whether it substitutes for the purchase of a copy (which in the case of downloads made by students may strongly weigh against fair use). In short, it aims at protecting the commercial market of the work, since the commercial market is what stimulates creativity³³³.

5.- The Guidelines.

Concerning these last two factors, the *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*,³³⁴ though written in reference to classrooms in the physical world, may become an influential standard to

³²⁶ 17 U.S.C. § 107(2) (2002).

³²⁷ This means that a scientific work will be more easily subject to fair uses than a movie or a musical work; See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). However, notice that the fourth factor (effect of the use upon the potential market) would once again prevent the finding of a fair use when school books, exercises, tests, etc are being copied for purposes of teaching and/or studying purposes [see H.R. Rep No. 94-1476, 94th Cong., 2d Sess. 69, 71 (1976)].

³²⁸ See *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

³²⁹ 17 U.S.C. § 107(3) (2002).

³³⁰ See *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987), the court rejected a fair use defense to justify the unauthorized taking of too many excerpts of Stravinsky's works, for bibliographical purposes. See also *Harper & Row*, 471 U.S. 539, 569 (1985).

³³¹ 17 U.S.C. § 107(4) (2002).

³³² *To the extent that the use is originated by a "nonprofit educational institution," it is more likely to be fair (although this does not exclude the possibility that for-profit educational institutions may also benefit from the fair use for teaching uses).*

³³³ See *Hustler Magazine Inc. v. Moral Majority, Inc.* 796 F.2d 1148 (9th Cir. 1986). The use will not be fair when it diminishes (or usurps) the potential market for the sale of the work.

³³⁴ *Ass'n of Am. Publishers, Inc., Ad Hoc Comm. on Educ. Orgs. on Copyright Law Revision & Authors League of Am., Inc., Agreement on GUIDELINES FOR CLASSROOM COPYING in Not-For-Profit Educational Institutions with Respect to Books and*

help determine what constitutes fair use in the digital world as well.³³⁵ According to the *Guidelines*, a teacher may make a single copy (of a chapter from a book, an article from a periodical or newspaper, a short story, an essay or poem, or a chart, graph, diagram, drawing, cartoon or picture) for his scholarly research or use in teaching or preparation to teach a class.³³⁶ Multiple copies (not more than one copy per pupil) may also be made for classroom use or discussion, provided that the tests of brevity,³³⁷ spontaneity³³⁸ and cumulative effect³³⁹ are met and that each copy includes a notice of copyright.³⁴⁰

If we apply the *Guidelines* to the VU, we may foresee that repeated use (each semester) of a whole chapter of a treatise as compulsory reading would diminish the number of copies of the treatise sold to students. Such use could hardly be considered a fair use, regardless of whether the material was posted as an attachment or under the classroom e-reserve, and regardless of whether students are being charged for accessing the material. By contrast, the use of a paragraph of a journal article to initiate a debate, as part of the instruction, should be deemed fair, no matter where the work is posted or how often it is used for the debate. Between these two poles, there are myriad possible combinations.

In the United States, the practice of licensing the compilation of teaching materials (i.e., coursepacks) is widespread.³⁴¹ The *Guidelines* expressly state that “copying shall not be used to create or to replace or substitute for

Periodicals [hereinafter the Guidelines], contained in H.R. Rep. No. 94-1476, at 68 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681. In order to provide some predictability, several guidelines have been agreed upon over time to convey the minimum standards of educational fair use under section 107. Among them, the Guidelines were agreed upon by the representatives of the educational institutions and the authors to provide further certainty as to what is considered a minimum fair educational use. The Guidelines only state the minimum and not the maximum standards of educational fair use; uses that do not fall within the Guidelines may nonetheless be permitted under the criteria of fair use. Guidelines, supra, at 68. See also Circular 21: Reproduction of Copyrighted Works by Educators and Librarians, United States Copyright Office.

³³⁵ *The Guidelines have very limited application (if any) to DDE for the following reasons. As to the category of rights covered, they only cover photocopying (and implicitly, distribution); As to the nature of the works covered, only books and periodicals (they are not intended to apply to musical works, which have their own set of guidelines, nor to audiovisual works); As to the purposes covered: for scholarly research, for preparation of a class, and for use in the course of the instruction. The Guidelines also apply to the assembly of anthologies of portions of copyrighted works made by university professors for use in teaching activities, provided that the copying does not substitute or replace for the purchase of anthologies, compilations or collective works. Guidelines, supra note 148, at 68.*

³³⁶ *Guidelines, supra note 148, at 68.*

³³⁷ *Brevity means up to 250 words for a poem, or 1000 words or 10% of the work (whichever is less) for an article or essay. Id.*

³³⁸ *Spontaneity means at the instance and inspiration of the individual teacher within such a short time that it would be unreasonable to expect a timely reply to a request of permission. Id. at 69.*

³³⁹ *The cumulative effect means that the material is only for one course, that it consists of not more than one work from the same author and not more than three works from the same periodical or collective work, and that there are not more than nine instances of multiple copying for one course during one class term. Id.*

³⁴⁰ *Id. at 68.*

³⁴¹ *For the production of course packs, permission is requested from authors and publishers 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 Oct. 10, 2002). 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 Oct. 10, 2002). CCC keeps online catalogs that list the works registered with the different CCC services; users may obtain immediate permission to use these works for the specific use (pre-authorized by the copyright owner) and for the royalty fee (which is not set by CCC, but by the copyright owner and, therefore, royalty fees may vary widely). When the work is not in the CCC catalog, CCC will contact the copyright holder to request permission on behalf of the user.*

anthologies, compilations or collective works”³⁴², and case law has confirmed this position.³⁴³ It seems logical that the same rationale should apply for digital “coursepacks,” either on a website or in CD-ROM format.³⁴⁴

In recent years, several initiatives have unsuccessfully sought to develop a set of guidelines interpreting the application of fair use to distance learning through digital technologies.³⁴⁵ However, the lack of established guidelines for the particular type of uses involved in DDE does not mean that fair use is inapplicable there. The fact that section 110(2)³⁴⁶ does not cover DDE uses does not mean that all uses must be licensed. The fair use doctrine unquestionably applies to exempt certain teaching uses on the Internet. Deciding which particular uses are covered, and to what extent, will depend on the consideration of all the fair use factors in each case. It is not possible to make any predictions in the booming and ever-changing world of DDE. In fact, the real challenge is to distinguish between uses that form part of a “teaching compilation”--and are subject to licensing and compensation--and those that may be covered under section 110(2) and section 107³⁴⁷--and are, therefore, free and unlicensed. This task of

³⁴² *Guidelines*, supra note 148, at 68.

³⁴³ *This is true especially after the Kinko's decision. In Basic Books Inc. v. Kinko's Graphics Corp.*, 758 F.Supp.1522 (U.S. Dist. S.D.N.Y., 1991), the court examined the Guidelines, and decided that because of Kinko's profit making intent (Kinko's was a for-profit corporation) and because the copying was not spontaneous (copying coincided with the start of each semester), the copying of excerpts from books without the publishers' permission constituted an infringement of the publishers' copyright. After this decision, “copy shops that produce class packets for college and university courses obtain permission all the time as a matter of self preservation.” John Wm. Maddox, *Copyright Violation and Personal Liability in Education: A Current Look at “Fair Use,”* 1995 *BYU Educ. & L.J.* 97, 104 (Spring 1995).

³⁴⁴ In fact, the CCC already 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 Oct. 10, 2002).

³⁴⁵ Among them the Conference on Fair Use (CONFU)'s “Educational Fair Use Guidelines for Distance Learning” was a shy attempt to expand the provisions of section 110(2); but since they did not cover asynchronous delivery of distance learning over a computer network (“The issue of fair use guidelines for asynchronous computer network delivery of distance learning courses [should] be revisited within three to five years.” The Conference on Fair Use, Final Report to the Commissioner on the Conclusion of the Conference on Fair Use (Nov. 1998) (hereinafter CONFU Final Report), at 13, available at <http://www.uspto.gov/web/offices/dcom/olia/confu/> (last modified Nov. 24, 1998).), have now been completely overcome by the TEACH Act. The Conference on Fair Use is an informal gathering of stakeholders -publishers, authors, educators, librarians and others- who seek to develop fair-use guidelines applicable to a wide range of situations. Three sets of guidelines were proposed within the CONFU: “Educational Fair Use Guidelines for Distance Learning”, “Educational Fair Use Guidelines for Digital Images” and the “Fair use Guidelines for Educational Multimedia” (set by the CCUMC). None of these Guidelines were adopted: copyright owners argued that the proposed guidelines were too permissive, while online users felt that they were too restrictive. The Final Report to the Commissioner on the Conclusion of the Conference on Fair Use of Nov.1998 includes reports on the history and status of each of the proposed guidelines and the working groups (See “Report to the Commissioner on the Conclusion of the First Phase of the Conference on Fair Use,” at <http://www.uspto.gov/web/offices/dcom/olia/confu/concltoc.html> (last viewed October 10, 2002). Other issues were discussed but failed to reach any agreement on a proposal of Guidelines. They were: “Interlibrary Loan and Document Delivery”, “Use of Computer Software in Libraries” and “Electronic Reserve Systems” (under these, the CONFU discussed the issues involved in the application of fair use to the creation of electronic reserve systems that allow storage, access, display and downloading of electronic versions of materials to be used as instructional support for the course -only for courses offered by nonprofit educational institutions-).

Other attempts are the ACRL “Guidelines for Distance Learning Library Services” set in 1998 by the Association of College and Research Libraries (ACRL): “Guidelines for Disantce Learning Library Services,” at <http://www.ala.org/acrl/guides/distlrng.html> (last modified Jan. 24, 2002).; and the “Educational Fair Access and the New Media National Conference”, celebrated at the instigation of the Consortium of College and University Media Centers (CCUMC) and the Agency for Instructional Technology (AIT), which issued “The Educational Multimedia Fair Use Guidelines” (1996) which were later adopted by the CONFU.

³⁴⁶ 17 U.S.C. § 110(2) (2002).

³⁴⁷ 17 U.S.C. § 107 (2002).

differentiation is especially difficult since, as we've seen, both of these exceptions allow the use of a whole work for teaching purposes.

**Copyright and Digital Distance Education:
The Use of Pre-Existing Works in Distance Education Through the Internet.**

Research Group on Copyright and Digital Distance Education (CDDE)
IN3 – UOC Law Studies

Working Paper n.1

I.- FRAMEWORK.

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*¹, 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 to 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 VU campus (that is, authored by professors, students, and other personnel of the educational institution)².

¹ U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT AND DIGITAL DISTANCE EDUCATION (1999), *available at* http://lcweb.loc.gov/copyright/docs/de_rp.pdf [hereinafter USCO REPORT ON DDE]. The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 403, 112 Stat. 2860, 2889 (1998) [hereinafter DMCA] charged the United States Copyright Office with the responsibility to study the application of copyright law to distance education using digital technologies, and report back to Congress. 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.

² Teachers give their lessons through the web. Lessons are works protected by copyright. Students’ notes are derivative works of that lesson (assuming they qualify as a different work). Traditionally, lessons were lost (unless somehow “literally” recorded). In our Virtual University, lessons remain recorded from creation (either in words or in sounds and images). This material can be stored and re-used later. What rights does the University hold on them? Do current contracts with professors cover such works? Do current copyright law work-made-for-hire-like provisions envision such creations? See generally Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-For-Hire Doctrine’s Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C. L. REV. 549 (2000); Michele J. Le Moal-Gray, *Distance Education and Intellectual Property: The Realities of Copyright and the Culture of Higher Education*, 16 TOURO L. REV. 981 (2000). But students also participate in the creation of works through the Virtual university by posing questions and commenting with other students, or debating and this is all recorded. What can the University do with these contributions? Are these contributions to a collective work? Is it a joint-work? There is no employment relationship, nor a commission to create a work. Does registration include or entail a license of all exploitation rights to the Virtual University? Would such a clause be permissible under the limits on the transfer of copyright provided for in many copyright laws (for instance, article 43.3 of the Spanish *Ley de Propiedad Intelectual* prohibiting “any global transfer of exploitation rights in all the works that the author may create in the future”)?

Our research project will focus on the first group: Use of Preexisting Copyrighted Works.

When using a preexisting copyrighted (or otherwise protected) work, the educational institution or teacher³ has two options: either seek a license from the copyright owner or rely on the several existing exceptions to the copyright law.⁴

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").⁵ Site-licenses, usually library based, are used for databases, journals, and software. They may also be used for 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 our VU, this user group would be all students and professors who have access to the VU 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. Both EDIUOC, the UOC's publishing department, and the UOC's Virtual Library have extensive experience and information concerning this issue and will participate in this project. They will be the ones to provide with first hand and updated information concerning the challenges and pitfalls of this market, which will most likely confirm the conclusions reached by the USCO in 1998.

Many of these uses that take place as part of digital DDE activities may well be covered by copyright exceptions allowing the unauthorised (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*"⁶. Are these lawful uses? Should they be covered by a teaching exception? Or by any other exception?

Recent advances both in the technology used to protect works⁷ 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.⁸ Yet, just because licensing will be more easy in the digital world, this does not mean that exceptions 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

³ Unless specifically indicated, we will refer indistinctively to educators (teachers) and educational institutions.

⁴ Of course, as an alternative, teachers could simply avoid the use of any pre-existing copyrighted works in digital distance education. But we will refuse to accept that as an alternative.

⁵ 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).

⁶ See USCO Report on DDE, at 35.

⁷ 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.

⁸ 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).

specific public interests and the authors' rights.⁹ Exceptions 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.¹⁰

The **goal of this project** is to examine whether and to what extent these exceptions, 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 will 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.

As we will see 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, (aggravated by the territoriality of choice of law rules), or be simply ignored, with DDE functioning beyond compliance with any domestic copyright laws. In this project, we will focus on the solutions adopted in Europe (both at a EU and domestic level), the USA, Australia and New Zealand, as well as under the Berne Convention¹¹.

This analysis requires the creation of a framework for understanding what copyright exceptions may affect DDE and for **identifying the issues** raised when applying the **exceptions** to the **relevant acts** that take place in the Virtual University, in order to allow teaching activities.

A regular teaching activity in a VU may be dissected into the following **three basic acts**:

1. Upload--a digital copy of the work is uploaded to the VU server (usually by the teacher), so that it can be accessed (usually, by students);
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 of the work, as received, made on the computer's hard disk, or floppy disk, or in print.

The **teaching-related exceptions** we will be considering are the following:

- teaching exceptions,
- quotations,
- private use/copying exceptions,

⁹ 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. See, for instance, the right to participate of the cultural life and scientific progress of the community, granted under article 27 of the Declaration of Human Rights of 10 December 1948; while that same Declaration of Human Rights refers to copyright as "moral and material interests". Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810 (1948).

¹⁰ "[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, available at http://www.imprimatur.net/IMP_FTP/except.pdf

"L'économie actuelle de la propriété littéraire et artistique est un compromis visant à assurer un équilibre entre trois finalités sociales: une récompense accordée à l'auteur, la protection des investissements, la satisfaction des besoins des utilisateurs." Pierre Sirinelli, *Exceptions et Limites aux Droits d'Auteur et Droits Voisins*, OMPI, Geneva, 6-7 December 1999 (WCT-WPPT/IMP/1) at 42, available at

http://www.wipo.int/fre/meetings/1999/wtc_wppt/pdf/imp99_1.pdf

¹¹ Art. 9(2); Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979. [hereinafter Berne Convention].

- library exceptions,
- fair use doctrines,
- and the three-step-test, applicable to the construction of all exceptions.

When transposing these teaching-related exceptions to DDE, the following **legal issues** will be considered and studied for each of them :

- 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 uses?

II.- FIELD OF STUDY: TEACHING-RELATED EXCEPTIONS.

1.- Teaching exceptions.-

Most domestic copyright laws provide for a specific exception to allow uses of copyrighted works for the purpose of teaching, as does the **Berne Convention**:

“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”

Under the **U.S. Copyright Act** of 1976, two specific instructional exceptions already existed under section 110, to cover both face-to-face teaching uses and distance-teaching uses¹². However the later one was designed at a time where the only distance teaching conducted was by means of broadcasting (radio and/or TV), the exception being insufficient to cover the kind of acts and issues involved in digital distance teaching. For that reason, a TEACH Act has been recently adopted by the US Congress, in order to exempt some basic acts necessary to conduct education over the Internet (Annex 4).

¹² “Section 110 USCA.- Limitations on exclusive rights: Exemption of certain performances and displays.

Notwithstanding the provisions of § 106, the following are not infringements of copyright :

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a non-dramatic literary or musical work or display of a work, by or in the course of a transmission, if-

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

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

(C) the transmission is made primarily for-

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment
.”

In Europe, the **2001 Copyright Directive**¹³ was adopted by the EU Council and the Parliament 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, that each member country will decide whether or not to adapt into national law (therefore, no real harmonization should be expected), 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.”

Now, it is the national legislators’ turn to make it a reality when implementing it for digital uses.

At a national level, most domestic teaching exceptions fail to refer to distance education, (neither allowing nor prohibiting such use), let alone digital distance education, some teaching exceptions are broad enough to cover DDE (Annex 1). Uses covered by teaching exceptions may include anything from the simple reproduction of a work for the purpose of preparing the lesson, to any use of a work in the course of the instruction, or even to the reproduction, and further distribution, of a work in a compilation or anthology to be used in school (“teaching anthologies”).

We will, therefore, study the five issues presented above under the light of the *EU Copyright Directive* exception, and compare it with the teaching exceptions currently existing in domestic European laws, where this exception may (or may not) end up being implemented.

2.- Quotations.-

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

The **Berne Convention** provides for an imperative quotation exception (actually, the only imperative exception in the whole Berne Convention –which proves 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.”

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 copyright in the case of:

¹³ 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 EU Copyright Directive] . The EU Copyright Directive must be understood within the context of the two WIPO Treaties signed in 1996. The original aim of the UE Copyright Directive was to harmonize the laws in the EU Member States, for a later joint ratification by them and the EU Commission. As we will see, the Copyright Directive attempts to go beyond that goal. For a criticism, see Bernt Hugenholtz, Why the Copyright Directive is Unimportant and Possibly Invalid?, 22 Eur. Intell. Prop. Rev. 499, 500 (2000): “The Directive is a badly drafted, compromise-ridden, ambiguous piece of legislation.”

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

Once, again, we will examine how this exception may help in granting legal coverage to the teaching uses conducted on the Internet, and compare it with the existing domestic quotation exceptions. The scope of that exception may be very different depending on the applicable domestic law (Annex 2).

3.- Private use/copying exceptions.-

These exceptions allow the reproduction or use of a work for private purposes. The specific conditions and the scope of such a fundamental exception may vary widely among countries (see Annex 3). In some countries, the private use exception may be limited to specific purposes, such as research and studying. We can also find some countries where private copying is subject to equitable remuneration of the author, operated by means of collecting societies.

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 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;”

For our study, this exception is especially important to help “complete” the exempted teaching use; for example, where the teaching exception does not cover the reproduction or use made by students in the course of the instruction. The key issue is where to set the boundaries of private use/copying on the Internet.

The **Berne Convention** does not specifically 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.¹⁴ In addition, a general provision under **art.9.2** 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”

4.- Library exceptions.-

Some domestic laws contain very detailed provisions regarding the free reproduction and further use of works by libraries, archives and museums. The impact of these exceptions on the Internet¹⁵ is far beyond the scope of this study, which will be limited to the important role that libraries play with regard to teaching activities, namely, supplying

¹⁴ See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, §9.11, at 485-486 (1987). C. Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act, 1971), OMPI, §9.10 at 56 (1978).

¹⁵ 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).

the material used for teaching purposes. The relevant question is, to what extent may (or should) teaching exceptions cover any library copying necessary to allow that teaching?

Article 5.2(c) of the EU Copyright Directive does provide for an exception:

*"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."*¹⁶

This exception is specially important for a Virtual University, since it's the Digital Library the one that usually supplies the teaching materials: to what extent (if so) will a library privilege also cover a teaching use done on the basis of material obtained from/by the Library?

5.- Fair use.-

The fair use doctrine offers a flexible and technology-neutral approach to exempt uses of copyrighted works that will clearly apply to DDE. As we will see, the factors taken into account to decide whether, according to the specific circumstances in each case, the fair use exception is applicable, will be similar to those considered under the specific exceptions mentioned above.

For instance, the general fair use exception under **section 107 of the US Copyright Act**¹⁷ still remains a critical exception for digital distance education. Despite the lack of conclusive case law in the field, the fair use doctrine may except certain digital distance educational uses, depending on the facts and circumstances of each case. In order to

¹⁶ EU Copyright Directive, art. 5.2(c). The initial Commission Proposal only referred to "*establishments accessible to the public. Which are not for direct or indirect economic or commercial advantage*" [see Commission's 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, O.J. C-108/1998, art.5.2(c)]. The Parliament (in its first reading) introduced both the condition that the reproduction be made "*for documentation or conservation purposes*" and added "*such as, in particular, libraries and archives and other teaching, educational or cultural establishments*" [see European Parliament's legislative resolution on the Council common position for adopting a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society of 10 February 1999, A4-0026/1999, Amendment 38 to art.5.2(c)]. In its Amended Proposal of May 1999, the Commission accepted the Parliament's language with one minor alteration ("*for archiving or conservation purposes*") [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, art.5.2(c)]. And in September 2000, the Council's Common Position dropped the "*documentation/archiving and conservation purposes*" in favor of a more flexible formulation that would allow any acts of reproduction -also in digital means- as long as without economic or commercial advantage, and set an exhaustive list of establishments benefiting from the exception (instead of all establishments accessible to the public) [see Council's Common Position (EC) No.48/2000 of 28 September 2000, adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. C-344/2000, art.5.2(c)]

¹⁷ "Section 107 USCA. -Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any others means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- the nature of the copyrighted work;*
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- the effect of the use upon the potential market for or value of the copyrighted work.*

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

provide some predictability, several guidelines have been agreed upon over time to convey the minimum standards of educational fair use under section 107. Among them, the *Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*¹⁸ were agreed upon by the representatives of the educational institutions and the authors to provide further certainty as to what is considered a minimum fair educational use. Despite only written in reference to classrooms in the physical world, these *Guidelines* may become an influential standard to help determine what constitutes fair use in the digital world as well. No matter what, neither the fair use doctrine, nor the Guidelines will hardly cover each and all the teaching uses that need to be made as part of the instruction over the Internet. For that reason, in the United States, the practice of licensing the compilation of teaching materials (i.e., coursepacks) is widespread.¹⁹ And it seems logical that the same rationale should apply for digital “coursepacks,” either on a website or in CD-ROM format.²⁰

6.- The three-step-test.-

The origins of the so-called three-step-test must be found in art.9.2 of the Berne Convention, mentioned above. Although **art.9.2 BC** only refers to the reproduction right, the **1994 TRIPs Agreement**,²¹ and later the **1996 WCT**²² 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 **art.5.5**:

¹⁸ Ass'n of Am. Publishers, Inc., Ad Hoc Comm. on Educ. Orgs. on Copyright Law Revision & Authors League of Am., Inc., Agreement on GUIDELINES FOR CLASSROOM COPYING in Not-For-Profit Educational Institutions with Respect to Books and Periodicals [hereinafter the Guidelines], contained in H.R. Rep. No. 94-1476, at 68 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681. See also Circular 21: Reproduction of Copyrighted Works by Educators and Librarians, United States Copyright Office.

¹⁹ For the production of course packs, permission is requested from authors and publishers and royalties are paid. The Copyright Clearance Center (CCC), 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 Oct. 10, 2002).

²⁰ In fact, the CCC already 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 Oct. 10, 2002).

²¹ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (1994) [hereinafter TRIPs Agreement]. 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).

²² 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 [hereinafter WCT]. 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 [hereinafter WPPT].

*"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."*²³

There is, however, a fundamental difference between the 3ST in the BC and TRIPs and WCT and the one in the *UE Copyright Directive*: while the 3ST under the BC is a paradigm for the "introduction" of new exceptions, the 3ST under the *UE Copyright Directive* is a paradigm for the "application" of the listed exceptions, when implemented by member states. Article 5.5 of the *UE Copyright Directive* does not allow member states to introduce new exceptions "in certain special cases", since the only exceptions allowed are those listed in the Directive. Its goal, rather, is to "constrain" the domain of the copyright exceptions as applied, setting a final limit on the listed exceptions allowed.²⁴

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**²⁵ may provide some guidance to examine this provision.

III.- OBJECT OF STUDY: LEGAL ISSUES.

We have seen, so far, the map of the legal provisions currently existing under national and international law. That may affect the object of our study. We will now try to transpose them to our field of research: DDE.

The problem of applying these "teaching-related" exceptions on the Internet is twofold. First, there is the problem of drawing a line between these sets of teaching uses, just as in the "analog" world. Second, there is the new problem of interpreting the language and scope of these exceptions to determine whether they may be applied to DDE.

It would be too simple (and wrong) to conclude that, since these exceptions were drafted at a time when DDE did not exist, they do not apply to DDE uses. The public interests deemed worthy of protection, which the legislature had in mind when drafting these exceptions, must allow for some flexibility when interpreting the language of the exceptions.²⁶ However, we should never forget that we are dealing with exceptions to copyright and, as such, the principle of strict interpretation of exceptions should guide our task.

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 place²⁷, lessons in the VU (as well as any works used within these lessons) remain recorded and may be re-used over and over again. Instruction in the VU is mostly conducted asynchronously and works used in the course of the instruction,

²³ Beyond that, the *EU Copyright Directive* allows for a lot of flexibility, not only as to whether to implement these exceptions into national laws, but also as to their extent. Therefore, no real harmonization should be expected in that field.

²⁴ For this reason, although the factors taken into account are very similar, the *EU Copyright Directive* 3ST must be distinguished from the fair use doctrine in 17 U.S.C.A. § 107 (2002), which is closer to the BC 3ST paradigm.

²⁵ See The Report of the WTO Panel (WT/DS160/R) of June 15, 2000 (available at the WTO web page: <http://www.wto.org/>).

²⁶ Any interpretation of the language of these copyright exceptions (as any other legal provision) must be done according to the rules of interpretation existing in each country, which usually take into account not only the ordinary meaning of the specific terms used (and within their context), but also the intent of the legislator. For instance, see article 31.1 of the Vienna Convention on the Law of Treaties of 1969: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Vienna Convention on the Law of Treaties of 1969, U. N. Doc. A/CONF.39/27 (1969). Similar rules are usually accepted in all domestic laws.

²⁷ 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.

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 3ST. 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.

Altogether, the interpretation issues raised by the transposition of these teaching-related exceptions to DDE may be examined on the basis of the following **five issues**:

1. Which rights are covered by the exception?

First, we must deal with the categorization of the exclusive rights involved in the teaching use. The development of digital technologies has brought up new means of exploiting works that hardly conform to the definitions of the traditional exclusive rights of reproduction, distribution, communication to the public and adaptation/transformation granted to authors. In the digital world, boundaries between reproduction, distribution and communication (to the public) fade away²⁸.

In fact, it could be said that the end of the twentieth century saw the birth of a new kind of exploitation of copyrighted works: dissemination to the public by means of computer networks (i.e., the Internet). In 1996, two new treaties were adopted by the World Intellectual Property Organization (WIPO) to catch up with the latest developments in digital communication: the WIPO Copyright Treaty²⁹ and the WIPO Performances and Phonograms Treaty.³⁰ Together, they introduce a new right, the right of “making available to the public” by wire or wireless means, including interactive means.³¹ The *EU Directive on Copyright in the Information Society* also includes this right.³² However the introduction of this new right does not *per se* completely solve the issue of categorization since the applicable exceptions remain rooted in traditional concepts of reproduction, distribution and communication to the public.

If the teaching use involves a reproduction³³ (and DDE usually does), several issues arise, including: (1) which means of reproduction are covered by the exception (for example, digital reproductions), (2) how many *copies* can be made,

²⁸ Some interesting proposals to simplify the categorization of exclusive rights granted under copyright already exist. See Andrew Christie, *A Proposal for Simplifying United Kingdom Copyright Law*, EUR. INTELL. PROP. REV. 2001, 23(1), 26-43 (2001).

²⁹ World Intellectual Property Organization Copyright Treaty, adopted December 20, 1996 [hereinafter WCT].

³⁰ World Intellectual Property Organization Performances and Phonograms Treaty, adopted December 20, 1996 [hereinafter WPPT].

³¹ Under the WCT and the WPPT, the exploitation of works through the Internet is defined under a new sub-right of “making available to the public,” defined both under the right of reproduction and the right of communication to the public (so that each State may choose as it deems appropriate):

Article 6.- “Right of Distribution: (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.”

Article 8.- “Right of Communication to the Public: Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”

³² *EU Copyright Directive*, art. 3(2).

³³ The use of works through the Internet always implies a reproduction. In fact, one single act of transmission of a work through the Internet may entail several acts of reproduction: scanning (or somehow digitizing) a printed work, uploading the work to a server, transmitting the work from that computer to the user’s, viewing the work on the

and (3) whether the exception includes only the posting of works or also the subsequent reproductions (screen displays and downloads) of these works made by each student. This last issue is intertwined with the question of who is allowed to make reproductions for teaching purposes—just professors, or also students?

In addition to reproduction, the use of a work for teaching purposes over the Internet will necessarily entail a distribution of copies and/or a communication to the public, depending on the definitions of these rights given in domestic law.

2. Which institutions and persons may benefit from the exception?

Another issue that must be addressed is that of eligibility, both for institutions and for individuals.

Which educational institutions may benefit from a copyright exception for teaching purposes? Should all institutions receive the same treatment? If not, which parameters should distinguish between the different institutions? Would it be the financial source (private or public), the kind of education that they offer, or maybe, its nature (non-profit / for-profit)? These two conditions are difficult to separate, when transposing them to digital distance education courses, which are offered today by both non-profit and for-profit entities, on both a non-profit and for-profit basis, and through varieties of partnerships involving both educational institutions and corporations.

As for individual eligibility, may only teachers benefit from the exception or also students (and guest-lecturers)? In a live class, we would easily accept that a student may read a poem aloud, or copy the lyrics of a song on the blackboard or in his notebook, or somehow reproduce a work to share with his fellow students as part of the instruction—especially when asked to do so by the professor, but also *motu propi*. In other words, we may either construe that “teaching purposes” include all uses made as part of the instruction in a live class or we may complement this exception with the general private use/private copying exception. Are we ready to accept the same liberal application of either the teaching exception or the private use exception in a DDE context?

3. Which “teaching uses” are covered by the exception?

Both of the preceeding issues –categorization and eligibility– are linked to the fundamental issue of purposes. What constitutes “teaching purposes”? Which uses are “for teaching”? These questions usually are not answered in legal texts. Most teaching-related exceptions were written to accommodate teaching activities that take place in an analog world. For instance, their language may likely refer to or imply physical concepts related to face-to-face teaching activities—concepts like the classroom, school premises, teaching publications, etc. That specific language may strongly limit or curtail the applicability of these exceptions in the digital world. The fact that on the Internet most teaching activities may be conducted asynchronously further complicates the issue³⁴. In the physical world, a class occupies some physical space, and begins and ends in real time. On the Internet, the physical space may be simulated by means of interfaces and password-protected systems. However, the lack of time limitations is precisely what draws the use of a work—or even a simple quotation—dangerously close to including a work as part of a teaching compilation. In the Virtual University, teaching uses and teaching compilations are “virtually” impossible to differentiate; all material that is used as part of the instruction remains posted and available to students, like a teaching compilation, whether it was planned to be used as part of the instruction or was spontaneously uploaded by the professor or by a student.

4. Which works, and to what extent, can be used under the exception?

computer screen (which, in addition, necessarily entails temporary reproduction in the computer memory), and eventually downloading the work in a printed or digital copy.

³⁴ Let's not forget that in our Virtual University classes do not begin and end at a specific time.

We should also bear in mind that different exceptions (quotation, teaching use, and teaching compilation) may set specific limitations regarding the extent and nature of the works covered. Regardless of whether we are dealing with reproduction, public communication, or any other use, these limitations may render the whole exception useless for DDE. Should the same distinction survive in DDE?

5. Remuneration

Finally, We must take into account the issue of remuneration. Are these exempted uses free or are they subject to remuneration? If so, how and on which criteria fees are established? Remuneration is especially important under the light of compliance with the three-step-test provided for under the EU Directive, the WTO and the BC.

IV.- CONCLUSIONS.

DDE must face a major obstacle: the copyright exceptions provided for educational and teaching purposes in domestic laws are ill-suited to cover teaching uses conducted through the Internet.

It is undeniable that the public interest protected under the teaching exceptions deserves to be protected, regardless of the means (digital or otherwise) through which the educational activities take place. Educational purposes share the same interests whether conducted live, or by means of a telephone or a computer. However, different means may have different requirements and pose different dangers. Thus, if we want to protect the same public interest, we should design a new set of exceptions for digital education, with specific conditions and measures to ensure that both authors' interests and public interests are being protected. Because of the border-crossing nature of Internet, this can only be done by previously agreeing on a uniform paradigm for teaching uses at an international level.

On the other hand, the problem must be attacked from a uniform perspective at an international level, so as to diminish the inconsistencies resulting from the current choice of law rule in article 5.2 of the BC: *lex loci protectionis*.

It is now a good time both in Europe (where countries are implementing the *Copyright Directive* at a national level), in the United States of America (where the TEACH Act has just been passed) and in any other country subject to the WTO and the BC, to work in that direction. Any agreement, no matter how small, on fundamental issues would be a big step, a beginning.

In this project, we will attempt to make a comparative study of how digital distance education is being treated under copyright law and to draft some possible solutions--both as to choice of law and substantive provisions--that would draw domestic solutions closer to each other and allow for the development of DDE at an international level within a lawful copyright framework. As a result of this examination, we will draft a set of rules that allow for a teaching exception to survive also in the digital world.

ANNEX 1: TEACHING EXCEPTIONS

	Sec.110(2) USA ¹ (according to TEACH Act)	Art.5.3(a) EU Directive	Art.10.2 Berne Convention
RIGHTS	<ul style="list-style-type: none"> • “performance ...or display ...by or in the course of a transmission” • sec.112(f)(1): storage to enable such transmission; • sec.112(f)(2): digitisation to enable such transmission when no digital version is available; 	<ul style="list-style-type: none"> • Reproduction • Communication to the public • → (Distribution) “use”	<ul style="list-style-type: none"> • “utilization”
PURPOSES	2 cumulative purposes: <ul style="list-style-type: none"> • the performance or display must be “an integral part of a class session offered as a regular part of the systematic mediated instructional activities” • “directly related and of material assistance to the teaching content of the transmission” 	<ul style="list-style-type: none"> • “illustration for teaching or scientific research” → Teaching Anthologies	<ul style="list-style-type: none"> • “by way of illustration in publications, broadcasts or sound or visual recordings for teaching” → Teaching Anthologies
ELEGIBILITY	3 cumulative requirements: <ul style="list-style-type: none"> • transmission made by “an accredited nonprofit educational institution ...providing elementary or secondary or post-secondary education ”, • “solely for, and, to the extent technologically feasible, the reception of such transmission is limited to ... students officially enrolled in the course for which the transmission is made...” • of a performance or display “made by, at the direction of, or under the actual supervision of an instructor” 	No requirements	No requirements
EXTENT	<ul style="list-style-type: none"> • “performance of a nondramatic literary or musical work or reasonable and limited portions of any other work” • “display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session” 	<ul style="list-style-type: none"> • “justified by the non commercial purpose to be achieved” 	<ul style="list-style-type: none"> • “to the extent justified by the purpose”
NATURE	Any works, except: <ul style="list-style-type: none"> • “a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks” • “a performance or display that is given by means of a copy that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to 	Works and other subject matter	<ul style="list-style-type: none"> • “literary or artistic works”

¹ Any reference to governmental bodies omitted.

	<i>believe was not lawfully made and acquired"</i>		
OTHER REQUIREMENTS	<p>The transmitting institution must:</p> <ul style="list-style-type: none"> • institute "policies regarding copyright...to faculty, students and staff...and promote compliance with...copyright"; • in the case of digital transmissions, it must apply "reasonably effective technological measures to prevent (I) retention of the work in accessible form by recipients ...for longer than the class session, and (II) unauthorized further dissemination of the work in an accessible form by such recipients to others" 	<ul style="list-style-type: none"> • "as long as the source, including the author's name, is indicated, unless this proves impossible" • Art.5.5: Three-Step-Test 	<ul style="list-style-type: none"> • "compatible with fair practice"

ANNEX 1 (cont.) TEACHING EXCEPTION –DOMESTIC LAWS

	Austria (art.42)	Belgium (art.22(1)4ter)	Germany (art.53.3)	Greece (art.21 and 27)	Italy (art.70.1)	Luxembourg (art.13.2)	Netherlands (art.16.a)	Spain (art.34.2(b))	Switzerland (art.19)	Nordic Countries (Den., Nor., Swe.: sec.13) (Fin. sec.14) (Iceland sec.21)	UKCA (sec.32)
Rights Covered	<i>produce and distribute</i> <i>as many reproduction copies as are required for a certain class or lecture</i>	<i>"reproduction"</i>	<i>to make or to cause to be made copies</i> <i>in a quantity required for one school class</i> <i>Copies may neither be disseminated nor used for public communication</i>	(art.21): <i>reproduce</i> (art 27): <i>public performance or presentation</i>	<i>abridgement, quotation or reproduction</i>	<i>use</i>	<i>reproduce</i>	<i>use</i>	<i>any use</i>	(D,N,S.): photocopying (or similar means of reproduction) (Finland): <i>making copies by audio or video recording</i> (Iceland): <i>performed publicly</i>	(1)(2) <i>copied</i> (3) <i>anything done</i>
Purposes	<i>for the purpose of instruction and/or education</i>	<i>lorsque cette reproduction est effectuée à des fins d'illustration de l'enseignement ou de recherche scientifique</i>	<i>for personal use ...in teaching</i> <i>for examinations</i>	(art.21): <i>exclusively for teaching or examination purposes</i> (art.27): <i>within the framework of staff and pupil or student activities</i>	<i>for the purpose of criticism or discussion, or for instructional purposes</i>	<i>à titre d'illustration de l'enseignement, par le moyen de publications, d'émissions de radiodiffusion ou d'enregistrements sonores ou visuels</i>	<i>in anthologies and other works clearly intended for use in education or for other scientific purposes</i>	<i>for the purposes of illustration in teaching or scientific research</i>	<i>for private purposes... by a teacher for teaching in class"</i>	(D,N,S): for educational use (Finland) : <i>for use in educational activities</i> (Iceland): <i>for educational purposes</i>	(1)(2) <i>in the course of instruction or preparation for instruction</i> (3) <i>for the purposes of an examination</i>
Eligibility	<i>Schools and Universities</i>		<i>in non-commercial institutions of education and further education or in institutions of vocational education</i>	(art.21): <i>at an educational establishment</i> (art.27): <i>at an educational establishment</i>					<i>by a teacher for teaching in class"</i>		(1)(2) <i>by a person giving or receiving the instruction</i> (3) <i>by way of setting the questions, communicating the questions to the candidates or answering the questions</i>

Extent and nature of works used	Excluded: works destined for instructions and education by their nature and designation	<i>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</i>	<i>small parts of a printed work or of individual contributions published in newspapers or periodical"</i>	(art. 21): articles lawfully published in a newspaper or periodical, short extracts of a work or parts of a short work or a lawfully published work of fine art work (art.27): of a work	<i>of fragments or parts of a work</i>	<i>dans la mesure justifiée par le but à atteindre</i> literary or artistic works	<i>in whole or in part, in the original language or in translation</i> works already published <i>small number of brief portions of the work or to a small number of short essays or poems by the same author</i>	<i>of a database</i>	<i>Published works</i>	(D,N,S): published works (Finland): of a disseminated work included in a radio or television broadcast (Iceland) : a published literary or musical work which is not a dramatic work	(1) literary, dramatic, musical or artistic work (2) sound recording, film, broadcast or cable programme
Other Requirements ²	<i>to the extent justified thereby</i>	<i>dans la mesure justifiée par le but non lucratif poursuivi et ne porte pas préjudice à l'exploitation normale de l'oeuvre</i>		(art.21): 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. (art.27): provided that the audience is composed exclusively of the aforementioned persons, the parents of the pupils or students, persons responsible for the care of the pupils or students, or persons directly involved in the activities of the establishment	<i>shall be free within the limits justified for such purposes, provided such acts do not constitute competition with the economic utilization of the work</i>	<i>conforme aux bons usages</i>	subject to specific limitations as to number and length of the reproductions, etc.	<i>to the extent justified by the non-commercial purpose pursued,</i>		(D,N,S): provided that an extended collective agreement license applies (Iceland): the author is entitled to remuneration if admission is charged especially for the performance	(1) not by means of a reprographic process (1)(2)(3) copies made according to these exceptions cannot be subsequently ...sold or let for hire or offered or exposed for sale or hire

See also UKCA 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.
NO TEACHING EXCEPTION in BELGIUM, FRANCE, SPAIN, PORTUGAL

² Due to space limitations, the requirement to indicate the source and name of the author has been omitted in all exceptions that contain it.

ANNEX 1bis TEACHING ANTHOLOGIES EXCEPTIONS – DOMESTIC LAWS

	Austria (art.42)	Belgium (art.22(1)4ter)	Germany (art.53.3)	Greece (art.21 and 27)	Italy (art.70.1)	Luxembourg (art.13.2)	Netherlands (art.16.a)	Spain (art.34.2(b))	Switzerland (art.19)	Nordic Countries (Den., Nor., Swe.: sec.13) (Fin. sec.14) (Iceland sec.21)	UKCA (sec.32)
Teaching Anthologies	ART.45.1: to reproduce and distribute works in scholar or instructional compilations ART.45.2: use of published literary works in school radio broadcasts	Art.21.3: use in educational anthologies after the death of the author provided that moral rights are respected and an equitable remuneration is paid.	Art.46: reproduction and distribution of pre-existing works in a collection of works of other authors intended exclusively for religious, school or instructional use. The author must be notified, and can only prohibit it if the work no longer reflects his conviction.	Art.20: reproduction of published literary works in teaching materials for primary and secondary education, under the following conditions: that such reproduction only amount to a <i>short part</i> of the whole production of each author, ...and that such use do not conflict with the normal exploitation of these works	Art.70(2): <i>In anthologies for scholastic use, reproduction shall not exceed the extent specified in the Regulations</i> (n.633 of April 22 1941)		Art. 16.b: to reproduce a literary, scientific or artistic work...for the sole purpose of the personal practice, study or use; copies cannot be transmitted to third parties without the consent of the copyright owner.			(Denmark, Finland and Sweden sec.18) (Iceland sec.17): Minor portions from literary and musical works or short works of those categories may be reproduced in composite works consisting of works of a large number of authors compiled for use in educational activities, provided that five years have elapsed from the publication of these works.	Sec.33: <i>The inclusion of a short passage from a published literary or dramatic work in a collection which (a) is intended for use in educational establishments ... and (b)consists mainly of material in which no copyright subsists, does not infringe the copyright in the work if the work itself is not intended for use in such establishments and the inclusion is accompanied by a sufficient acknowledgment ... References in this section to the use of a work in an educational establishment are to any use for the educational purposes of such an establishment</i>

ANNEX 2 : QUOTATION EXCEPTION

	Art.5.3(d) EU Directive	Art.10.1 Berne Convention
RIGHTS COVERED	<ul style="list-style-type: none"> • Reproduction • Communication to the public • → (Distribution) 	<ul style="list-style-type: none"> • <i>make quotations</i> No specific rights
PURPOSES	<ul style="list-style-type: none"> • <i>such as criticism or review</i> → teaching purposes ?	No specific purposes → education purposes OK
ELEGIBILITY		
EXTENT of works used	<ul style="list-style-type: none"> • <i>required by the specific purpose</i> 	<ul style="list-style-type: none"> • <i>justified by the purpose</i>
NATURE of works used	<ul style="list-style-type: none"> • <i>a work or other subject matter which has already been lawfully made available to the public</i> 	<ul style="list-style-type: none"> • <i>a work which has already been lawfully available to the public</i>
OTHER REQUIREMENTS	<ul style="list-style-type: none"> • <i>in accordance with fair practice</i> • <i>that, unless this turns out to be impossible, the source, including the author's name, is indicated</i> • Art.5.5: Three-Step-Test 	<ul style="list-style-type: none"> • <i>compatible with fair practice</i>

ANNEX 2 (cont.) QUOTATIONS –DOMESTIC LAWS

	BELGIUM (art.21)	FRANCE art. L122-5(3)(a)	GERMANY (ART.51)	GREECE (art.19)	ITALY (art.70.1)	LUXEMBORUG (art.13.1)	NETHERLANDS (art.16.b)	SPAIN (art.32)	SWITZERLAND (art.25.1)	Nordic Countries (Denmark, Finland, sec.22) (Iceland sec.14)
Rights covered	Quotations		reproduction, distribution and communication to the public	quotation	abridgement, quotation or reproduction	citations en original ou en traduction	Quotation	to include in one's own work	Quoted	quote
Purposes	for the purpose of criticism, polemic or teaching or in scientific works	analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated		of short extracts of a lawfully published work by an author for the purpose of providing support for a case advanced by the person making the quotation or a critique of the position of the author	for the purpose of criticism or discussion, or for instructional purposes		In texts of announcements or criticisms, polemic writings or scientific treatises	by way of quotation or for analysis, comment or critical assessment ... for teaching or research purposes	as an explanation, a reference or illustration	(I) In the context of a critical or scientific public discussion, or other recognized purpose
Eligibility										(D, F) A person
Extent of works used	Short quotations taken from a lawfully published work	analyses and short quotations	individual works are included after their publication in an independent scientific work to illustrate its contents; Passages from a work are quoted after its publication in an independent work of language; Individual passages from a published musical work are quoted in an independent musical work.		fragments or parts of a work within the limits justified for such purposes	dans la mesure justifiée par le but à atteindre	-parts of writings, -parts of musical works -works of plastic art	-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 -have already been disclosed -to the extent justified by the purpose of the inclusion	justified for such purpose	(D, F) to the extent required for the purpose (I) of reasonable length"
Nature of works used	to the extent justified by the purpose	Once a work has been disclosed				y compris les citations d'articles de journaux et de recueils périodiques sous formes de revues de presse	all of them, already made public		published works	(D, F) a work which has been made public
Other Requirements	in accordance with the fair practice of the profession		to the extent justified by the purpose	provided that the quotation is compatible with fair practice and that the extent of the extracts does not exceed that justified by the purpose.	NOT constitute competition with the economic utilization of the work	conformes aux bons usages	NOT beyond what is reasonably acceptable to social custom			(D, F) in accordance with proper usage (I) correct

ANNEX 3: PRIVATE USE / COPYING EXCEPTIONS

	Sec.107 USA <i>Fair use</i>	Art.5.2(b) EU Directive	Art.9.2 Berne Convention Art.10 WIPO Copyright Treaty <i>Three-Step-Test</i>
RIGHTS	<ul style="list-style-type: none"> • <i>fair use</i> • <i>including ...reproduction in copies ...or by any other means</i> 	<ul style="list-style-type: none"> • Reproduction • <i>on any medium</i> 	<ul style="list-style-type: none"> • BC: <i>reproduction</i> • WCT: <i>rights granted to authors</i>
PURPOSES	<ul style="list-style-type: none"> • such as <i>criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research</i> 	<ul style="list-style-type: none"> • <i>for private use</i> • <i>and for ends that are neither directly or indirectly commercial</i> 	<ul style="list-style-type: none"> • BC/ WCT: <i>in certain special cases</i>
ELEGIBILITY		<ul style="list-style-type: none"> • <i>made by a natural person</i> 	
EXTENT			BC / WCT: <ul style="list-style-type: none"> • <i>do(es) not conflict with a normal exploitation of the work</i> • <i>do(es) not unreasonably prejudice the legitimate interests of the author</i>
NATURE	<ul style="list-style-type: none"> • <i>a copyrighted work</i> 		
OTHER REQUIREMENTS	<p><i>In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-</i></p> <p><i>(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;</i></p> <p><i>(2) the nature of the copyrighted work;</i></p> <p><i>(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and</i></p> <p><i>(4) the effect of the use upon the potential market for or value of the copyrighted work.</i></p> <p><i>The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.</i></p>	<ul style="list-style-type: none"> • <i>that rightholders receive fair compensation which takes account of the application or non application of technological measures referred to in Article 6 to the work or subject-matter concerned</i> • Art.5.5: Three-Step-Test 	

ANNEX 3 (cont.) PRIVATE USE / COPYING EXCEPTIONS – DOMESTIC LAWS

	AUSTRIA (art.42.1)	FRANCE art. L122-5(2)	GERMANY (art.53)	ITALY (art.68)	NETHERLANDS (art.16b)	PORTUGAL (art.81)	SPAIN (art.31)	SWITZERLAND (art.19.1)	Nordic Countries (Denmark and Finland sec.12)	UKCA (sec.29.1)
Rights covered	<i>Reproduce copies</i>	<i>copies or reproductions</i>	<i>(1) to make single copies (2) to make or cause to be made single copies</i>	<i>Reproduction</i>	<i>Reproduction</i>	<i>Reproduction</i>	<i>reproduction</i>	<i>Any use</i>	<i>(D) Make (or have made) single copies (F) reproduce in a few copies</i>	<i>Fair dealing</i>
Purposes	<i>For his/her own use</i>	<i>reserved strictly for the private use of the copier</i>	<i>(1) for private use (2) for other personal uses</i>	<i>For the personal use of the reader</i>	<i>for the sole purpose of the personal practice, study or use</i>	<i>For exclusive private use</i>	<i>for the private use of the copier</i>	<i>Private purposes: ...any use in the personal sphere or within a circle of persons closely connected to each other, such as relations or friends</i>	<i>(D) Private purposes (F) for private use</i>	<i>For the purposes of research or private study</i>
Extent of works used			<i>(1) of a work (2) (a) in case of small parts of published works or individual contributions that have been published in newspapers or periodicals, (b) in the case of a work that has been out of print for at least two years.</i>	<i>Of single works or of portions of works</i>	<i>literary, scientific or artistic work (specific restrictions as to length apply depending on the kind of works)</i>				<i>(D) Single copies</i>	
Nature of works used	<i>Of a work</i>	<i>Once a work has been disclosed</i>						<i>Published works</i>	<i>(D) Works which have been made public (F) A disseminated work</i>	<i>A literary, dramatic, musical or artistic work</i>
Other Requirements		<i>And not intended for collective use</i>		<i>when made by hand or by a means of reproduction unsuitable for marketing or disseminating the work in public</i>	<i>copies cannot be transmitted to third parties without the consent of the copyright owner</i>		<i>provided that the copy is not put to either collective or profit-making use</i>		<i>(D) Such copies must not be used for any other purposes</i>	<i>Sec.29.3.b: Systematic single copying is excluded from sec.29.1</i>

ANNEX 4.-

Sec.1: SHORT TITLE-

This Act may be cited as the `Technology, Education, and Copyright Harmonization Act of 2001'.

Sec.2: EXEMPTION OF CERTAIN PERFORMANCES AND DISPLAYS FOR EDUCATIONAL USES-

Section 110 of title 17, United States Code, is amended--

(1) *by striking paragraph (2) and inserting the following:*

`(2) except with respect to a work produced or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited nonprofit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of a transmission, if--

 `(A) the performance or display is made by, at the direction of, or under the actual supervision of an instructor as an integral part of a class session offered as a regular part of the systematic mediated instructional activities of a governmental body or an accredited nonprofit educational institution;

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

 `(C) the transmission is made solely for, and, to the extent technologically feasible, the reception of such transmission is limited to--

 `(i) students officially enrolled in the course for which the transmission is made; or

 `(ii) officers or employees of governmental bodies as a part of their official duties or employment; and

 `(D) the transmitting body or institution--

 `(i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright, and provides notice to students that materials used in connection with the course may be subject to copyright protection; and

 `(ii) in the case of digital transmissions--

 `(I) applies technological measures that reasonably prevent--

 `aa) retention of the work in accessible form by recipients of the transmission from the transmitting body or institution for longer than the class session; and

 `bb) unauthorized further dissemination of the work in accessible form by such recipients to others; and

 `(II) does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination;'; and

(2) *by adding at the end the following:*

`In paragraph (2), the term `mediated instructional activities' with respect to the performance or display of a work by digital transmission under this section refers to activities that use such work as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting. The term does not refer to activities that use, in 1 or more class sessions of a single course, such works as textbooks, course packs, or other material in any media, copies or phonorecords of which are typically purchased or acquired by the students in higher education for their independent use and retention or are typically purchased or acquired for elementary and secondary students for their possession and independent use.

`For purposes of paragraph (2), accreditation--

 `(A) with respect to an institution providing post-secondary education, shall be as determined by a regional or national accrediting agency recognized by the

Council on Higher Education Accreditation or the United States Department of Education; and

`(B) with respect to an institution providing elementary or secondary education, shall be as recognized by the applicable state certification or licensing procedures.

`For purposes of paragraph (2), no governmental body or accredited nonprofit educational institution shall be liable for infringement by reason of the transient or temporary storage of material carried out through the automatic technical process of a digital transmission of the performance or display of that material as authorized under paragraph (2). No such material stored on the system or network controlled or operated by the transmitting body or institution under this paragraph shall be maintained on such system or network in a manner ordinarily accessible to anyone other than anticipated recipients. No such copy shall be maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary to facilitate the transmissions for which it was made.'

Sec.3: EPHEMERAL RECORDINGS-

(1) *IN GENERAL-* **Section 112** of title 17, United States Code, is amended--

(A) by redesignating subsection (f) as subsection (g); and

(B) by inserting after subsection (e) the following:

`(f)(1) Notwithstanding the provisions of section 106, and without limiting the application of subsection (b), it is not an infringement of copyright for a governmental body or other nonprofit educational institution entitled under section 110(2) to transmit a performance or display to make copies or phonorecords of a work that is in digital form and, solely to the extent permitted in paragraph (2), of a work that is in analog form, embodying the performance or display to be used for making transmissions authorized under section 110(2), if--

`(A) such copies or phonorecords are retained and used solely by the body or institution that made them, and no further copies or phonorecords are reproduced from them, except as authorized under section 110(2); and

`(B) such copies or phonorecords are used solely for transmissions authorized under section 110(2).

`(2) This subsection does not authorize the conversion of print or other analog versions of works into digital formats, except that such conversion is permitted hereunder, only with respect to the amount of such works authorized to be performed or displayed under section 110(2), if--

`(A) no digital version of the work is available to the institution; or

`(B) the digital version of the work that is available to the institution is subject to technological protection measures that prevent its use for section 110(2).'

(2) *TECHNICAL AND CONFORMING AMENDMENT-* Section 802(c) of title 17, United States Code, is amended in the third sentence by striking `section 112(f)' and inserting `section 112(g)'

Sec.4: PATENT AND TRADEMARK OFFICE REPORT-

(1) *IN GENERAL-* Not later than 180 days after the date of enactment of this Act and after a period for public comment, the Undersecretary of Commerce for Intellectual Property, after consultation with the Register of Copyrights, shall submit to the Committees on the Judiciary of the Senate and the House of Representatives a report describing technological protection systems that have been implemented, are available for implementation, or are proposed to be developed to protect digitized copyrighted works and prevent infringement, including upgradeable and self-repairing systems, and systems that have been developed, are being developed, or are proposed to be developed in private voluntary industry-led entities through an open broad based consensus process. The report submitted to the Committees shall not include any recommendations, comparisons, or comparative assessments of any commercially available products that may be mentioned in the report.

(2) *LIMITATIONS-* The report under this subsection--

(A) is intended solely to provide information to Congress; and

(B) shall not be construed to affect in any way, either directly or by implication, any provision of title 17, United States Code, including the requirements of clause (ii) of section 110(2)(D) of

that title (as added by this Act), or the interpretation or application of such provisions, including evaluation of the compliance with that clause by any governmental body or nonprofit educational institution.

Copyright and Digital Distance Education:
The Use of Pre-Existing Works in Distance Education Through the Internet.

Research Group on Copyright and Digital Distance Education (CDDE)
IN3 – UOC Law Studies

Final Report

I.- FRAMEWORK.

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*¹, 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 VU campus (that is, authored by professors, students, and other personnel of the educational institution).

Our research project focuses 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.²

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”)³. Site-licenses, usually library based, are used for databases, journals, and software. They may also be used for 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 our VU, this user group would be all students and professors who have access to the VU 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.

¹ 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.

² Of course, as an alternative, teachers could simply avoid the use of any pre-existing copyrighted works in digital distance education. But we will refuse to accept that as an alternative.

³ 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).

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. Both EDIUOC, the UOC's publishing department, and the UOC's Virtual Library have extensive experience and information concerning this issue and have participated in this project, providing first hand and updated information concerning the challenges and pitfalls of this market.

Many of these uses that take place as part of digital DDE activities may well be covered by copyright exceptions/limitations allowing the unauthorised (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"⁴. 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 works⁵ 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.⁶ 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.⁷ 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.⁸

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 examined 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.

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

⁴ 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.

⁶ 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).

⁷ 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.

⁸ "[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, available at http://www.imprimatur.net/IMP_FTP/except.pdf

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

exception. On the Internet, where territorial borders have no significance, these differences may either become a serious impediment for the development of DDE (aggravated by the territoriality of choice of law rules), or be simply ignored, with DDE functioning beyond compliance with any domestic copyright laws. In this project, we focused on the solutions adopted in Europe (both at a EU and domestic level), the USA, Australia and New Zealand, as well as under the Berne Convention.

This analysis requires the creation of a framework for understanding what copyright exceptions/limitations may affect DDE and for **identifying the issues** raised when applying them to the **relevant acts** that take place in the Virtual University, in order to allow teaching activities.

A regular teaching activity in a VU may be dissected into the following **three basic acts**:

1. Upload--a digital copy of the work is uploaded to the VU server (usually by the teacher), so that it can be accessed (usually, by students);
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 of the work, as received, made on the computer's hard disk, or floppy disk, or in print.

The following **teaching-related exceptions/limitations** examined, to see whether/how were they applicable to cover teaching uses over the Internet:

- teaching exceptions,
- quotations,
- private use/copying exceptions,
- library exceptions,
- fair use doctrines,
- and the three-step-test, applicable to the construction of all exceptions/limitations.

When transposing these teaching-related exceptions/limitations to DDE, the following **legal issues** were considered and studied for each of them :

- 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 uses

II.- LEGAL ISSUES EXAMINED.

The problem of applying the several "teaching-related" exceptions/limitations on the Internet is twofold. First, there is the problem of drawing a line between these sets of teaching uses, just as in the "analog" world. Second, there is the new problem of interpreting the language and scope of these exceptions/limitations to determine whether they may be applied to DDE.

Altogether, the interpretation issues raised by the transposition of these teaching-related exceptions/limitations to DDE were examined on the basis of the following **five issues**:

1. Which rights are covered by the exception?

First, we must deal with the categorization of the exclusive rights involved in the teaching use. The development of digital technologies has brought up new means of exploiting works that hardly conform to the definitions of the traditional exclusive rights of reproduction, distribution, communication to the public and adaptation/transformation granted to authors. In the digital world, boundaries between reproduction, distribution and communication (to the public) fade away⁹.

The end of the twentieth century gave birth to a new kind of exploitation of copyrighted works: dissemination to the public by means of computer networks, i.e., the Internet. In 1996, two new treaties were adopted by the World Intellectual Property Organization (WIPO) to catch up with the latest developments in digital communication: the WIPO Copyright Treaty¹⁰ and the WIPO Performances and Phonograms Treaty.¹¹ Together, they introduce a new right, the right of “making available to the public” by wire or wireless means, including interactive means.¹² The *EU Directive on Copyright in the Information Society*¹³ also includes this right (art.3.2). However the introduction of this new right does not *per se* completely solve the issue of categorization since the applicable exceptions/limitations remain rooted in traditional concepts of reproduction, distribution and communication to the public.

If the teaching use involves a reproduction¹⁴ (and DDE usually does), several issues arise, including: (1) which means of reproduction are covered by the exception (for example, digital reproductions), (2) how many *copies* can be made, and (3) whether the exception includes only the posting of works or also the subsequent reproductions (screen displays and downloads) of these works made by each student. This last issue is intertwined with the question of who is allowed to make reproductions for teaching purposes—just professors, or also students?

In addition to reproduction, the use of a work for teaching purposes over the Internet will necessarily entail a distribution of copies and/or a communication to the public, depending on the definitions of these rights given in domestic law.

2. Which institutions and persons may benefit from the exception?

⁹ Some interesting proposals to simplify the categorization of exclusive rights granted under copyright already exist. See Andrew Christie, *A Proposal for Simplifying United Kingdom Copyright Law*, EUR. INTELL. PROP. REV. 2001, 23(1), 26-43 (2001).

¹⁰ World Intellectual Property Organization Copyright Treaty, adopted December 20, 1996 [hereinafter WCT].

¹¹ World Intellectual Property Organization Performances and Phonograms Treaty, adopted December 20, 1996 [hereinafter WPPT].

¹² Under the WCT and the WPPT, the exploitation of works through the Internet is defined under a new sub-right of “making available to the public,” defined both under the right of reproduction and the right of communication to the public (so that each State may choose as it deems appropriate):

Article 6.- “Right of Distribution: (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.”

Article 8.- “Right of Communication to the Public: Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them. “

¹³ 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 EU Copyright Directive].

¹⁴ The use of works through the Internet always implies a reproduction. In fact, one single act of transmission of a work through the Internet may entail several acts of reproduction: scanning (or somehow digitizing) a printed work, uploading the work to a server, transmitting the work from that computer to the user's, viewing the work on the computer screen (which, in addition, necessarily entails temporary reproduction in the computer memory), and eventually downloading the work in a printed or digital copy.

Another issue that has been addressed is that of eligibility, both for institutions and for individuals. Which educational institutions may benefit from a copyright exception for teaching purposes? Should all institutions receive the same treatment? If not, which parameters should distinguish between the different institutions? Would it be the financial source (private or public), the kind of education that they offer, or maybe, its nature (non-profit / for-profit)? These two conditions are difficult to separate, when transposing them to digital distance education courses, which are offered today by both non-profit and for-profit entities, on both a non-profit and for-profit basis, and through varieties of partnerships involving both educational institutions and corporations.

As for individual eligibility, may only teachers benefit from the exception or also students (and guest-lecturers)? In a live class, we would easily accept that a student may read a poem aloud, or copy the lyrics of a song on the blackboard or in his notebook, or somehow reproduce a work to share with his fellow students as part of the instruction—especially when asked to do so by the professor, but also *motu propi*. In other words, we may either construe that “teaching purposes” include all uses made as part of the instruction in a live class or we may complement this exception with the general private use/private copying exception. Are we ready to accept the same liberal application of either the teaching exception or the private use exception in a DDE context?

3. Which “teaching uses” are covered by the exception?

Both of the preceeding issues --categorization and eligibility-- are linked to the fundamental issue of purposes. What constitutes “teaching purposes”? Which uses are “for teaching”? These questions usually are not answered in legal texts. Most teaching-related exceptions/limitations were written to accommodate teaching activities that take place in an analog world. Their language may likely refer to or imply physical concepts related to face-to-face teaching activities—concepts like the classroom, school premises, teaching publications, etc. That specific language may strongly limit or curtail the applicability of these exceptions in the digital world. The fact that on the Internet most teaching activities may be conducted asynchronously further complicates the issue (let’s not forget that in a Virtual University classes do not begin and end at a specific time). In the physical world, a class occupies some physical space, and begins and ends in real time. On the Internet, the physical space may be simulated by means of interfaces and password-protected systems. However, the lack of time limitations is precisely what draws the use of a work—or even a simple quotation--dangerously close to including a work as part of a teaching compilation. In the Virtual University, teaching uses and teaching compilations are “virtually” impossible to differentiate; all material that is used as part of the instruction remains posted and available to students, like a teaching compilation, whether it was planned to be used as part of the instruction or was spontaneously uploaded by the professor or by a student.

4. Which works, and to what extent, can be used under the exception?

Different exceptions/limitations (quotation, teaching use, and teaching compilation) may set specific limitations regarding the extent and nature of the works covered. Regardless of whether we are dealing with reproduction, public communication, or any other use, these limitations may render the whole exception useless for DDE. Should the same distinction survive in DDE?

5. Remuneration

Finally, the issue of remuneration is paramount when dealing with uses that are excluded from the author’s monopoly. Remuneration is especially important under the light of compliance with the three-step-test provided for under the EU Directive, the WTO and the BC.

III.- A COMPARATIVE LAW SURVEY: TEACHING-RELATED EXCEPTIONS/LIMITATIONS.

All these issues have been structured under the light of the several exceptions/limitations for consideration under a common questionnaire that was answered according to the law of 11 countries: Australia, Belgium, France, Germany, Italy, Netherlands, New Zealand, Spain, Switzerland, U.K. and the USA (see Annex 5). National responses for each country were prepared by IP experts in each country. Based upon the comparative law study conducted within the research project, the following summary and conclusions are submitted.

1.- Teaching exceptions.-

Most domestic copyright laws provide for a specific exception to allow uses of copyrighted works for the purpose of teaching, as does the **Berne Convention**:

“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”

In Europe, the **2001 Copyright Directive** was adopted by the EU Council and the Parliament 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, that each member country will decide whether or not to adapt into national law (therefore, no real harmonization should be expected), 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.”

At a **European national level**, uses covered by teaching exceptions may include anything from the simple reproduction of a work for the purpose of preparing the lesson, to any use of a work in the course of the instruction, or even to the reproduction, and further distribution, of a work in a compilation or anthology to be used in school (“teaching anthologies”). Most domestic teaching exceptions fail to refer to distance education (neither allowing nor prohibiting such use), let alone digital distance education (Annex 1); although, it is true that a few teaching exceptions allow interpretation to cover –more or less convincingly- DDE (see Germany).

Some European legislators have introduced the art.5.3(a) teaching exception into their national laws, and it is clearly intended to cover DDE (i.e., Belgium). Others are still implementing the Directive (i.e., France and Spain), although the chances of introducing such an exception are fairly limited –due to the strong opposition raised by (in our opinion, misinformed) collecting societies and the lack of a unified position on behalf of the users. To our understanding, the main difficulty in transposing teaching exceptions envisioned for the analogue world to a digital environment is the potential damage that may be caused to the author, and to that extent the wisdom of a non-remunerated teaching exception is severely questioned. The challenge that interested parties are facing when dealing with the possibility of introducing an exception for teaching uses, is the preconception –supported by tradition- that exceptions are free (non-remunerated). One of the conclusions of our research project attempts to specifically address this issue, by considering the convenience of turning the teaching exception into a “statutory compulsory license” (or a non-voluntary license, depending on the terminology used in each country).

Under the **U.S.** Copyright Act of 1976, two specific instructional exceptions already existed under sec.110, to cover both face-to-face teaching uses and distance-teaching uses (by means of radio and/or TV broadcasting), thus being insufficient to cover the kind of acts and issues involved in digital distance teaching. The TEACH Act was adopted by the US Congress, in order to exempt some basic acts necessary to conduct education over the Internet (see Annex 4). Such an exception (non-remunerated) is completed with a strong -but voluntary- licensing system (remunerated) that allows the compilation of material for teaching purposes, also in digital format.

While **Australia** has a precise system to cover teaching uses which combines a free fair use/dealing (less than 10% of the work) and a remunerated statutory license scheme, thus depriving the author from authorizing use of his works for teaching purposes, but at the same time ensuring him a fair compensation for most teaching uses (such compensation is fixed and managed by a specific collecting society). The statutory licensing system has been successfully working for over 4 years now.

2.- Quotations.-

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 specially important in those countries where no specific exception is provided for teaching purposes, or where the existing teaching exception is not applicable to the digital world.

The **Berne Convention** provides for an imperative quotation exception (actually, the only imperative exception in the whole Berne Convention --which proves 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.”

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 copyright 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 out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.”

The scope of the quotation exception may be very different depending on the applicable domestic law (see Annex 2). In general terms, quotations are allowed in all countries for all media (analogue and digital) and, where limited to specific purposes, teaching is generally included. Yet, it proves insufficient *per se* to cover the needs of DDE since the exception is usually limited as to the extent (and even nature) of work that may be quoted (see France) and in some countries, further limited by the requirement that the quoted work must be included in a new work of authorship (see France and Spain).

3.- Private use/copying exceptions.-

These exceptions allow the reproduction or use of a work for private purposes. The specific conditions and the scope of such a fundamental exception may vary widely among countries (see Annex 3). In some countries, the private use exception may be limited to specific purposes, such as research and studying. In most countries, private copying is subject to equitable remuneration of the author, by means of levies (applied on equipment and tangible supports) operated by collecting societies.

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. The key issue is where to set the boundaries of private use/copying on the Internet, but also (and this may be an easier task) to set the boundaries of the teaching exception/limitation.

The **Berne Convention** does not specifically 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.¹⁵ In addition, a general provision under **art.9.2** 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”

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 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;”

Most European countries have adopted (or kept) the private copying exception in their domestic laws and extend it to digital means. However, the impact of technological measures on that exception remains to be seen. Most countries have chosen a wait-and-see position (see Netherlands) while others clearly support the “survival” of such an exception in the digital world (see Italy).

4.- Library exceptions.-

Some domestic laws contain very detailed provisions regarding the free reproduction and further use of works by libraries, archives and museums. The impact of these exceptions on the Internet¹⁶ is far beyond the scope of this study, which is limited to the important role that libraries play with regard to teaching activities, namely, supplying the material used for teaching purposes. The relevant question is to what extent may (or should) teaching exceptions cover any library copying necessary to allow that teaching?

Article 5.2(c) of the EU Copyright Directive does provide for an exception:

“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.”

This exception is specially important for a Virtual University, since it's the Digital Library the one that usually supplies the teaching materials: to what extent (if so) will a library privilege also cover a teaching use done on the basis of material obtained from/by the Library?

The comparative law study conducted in this project shows that, in general, library exceptions are better equipped to cover the needs for studying purposes than for teaching purposes; in other words, teaching exception/libraries fail to envision the role of libraries in obtaining the works that will be used for teaching purposes. Therefore, when providing

¹⁵ See Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, §9.11, at 485-486 (1987). C. Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works* (Paris Act, 1971), OMPI, §9.10 at 56 (1978).

¹⁶ 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).

for a teaching exception/limitation, it should be taken into account the fact that libraries are usually the ones to supply the teaching material.

5.- Fair use.-

The fair use doctrine offers a flexible and technology-neutral approach to exempt uses of copyrighted works that will clearly apply to DDE. The factors taken into account to decide whether -according to the specific circumstances in each case- the fair use exception is applicable, are similar to those considered under the specific exceptions mentioned above.

For instance, the general fair use exception under section 107 of the **US Copyright Act** still remains a critical exception for digital distance education. Despite the lack of conclusive case law in the field, the fair use doctrine may except certain digital distance educational uses, depending on the facts and circumstances of each case. In order to provide some predictability, several guidelines have been agreed upon over time to convey the minimum standards of educational fair use under section 107. Among them, the *Guidelines for Classroom Copying in Not-For-Profit Educational Institutions*¹⁷ were agreed upon by the representatives of the educational institutions and the authors to provide further certainty as to what is considered a minimum fair educational use. Despite only written in reference to classrooms in the physical world, these *Guidelines* may become an influential standard to help determine what constitutes fair use in the digital world as well. No matter what, neither the fair use doctrine, nor the *Guidelines* will hardly cover each and all the teaching uses that need to be made as part of the instruction over the Internet. For that reason, in the United States, the practice of licensing the compilation of teaching materials (i.e., coursepacks) is widespread.¹⁸ And it seems logical that the same rationale should apply for digital “coursepacks,” either on a website or in CD-ROM format.¹⁹

6.- The three-step-test.-

The origins of the so-called three-step-test must be found in art.9.2 of the Berne Convention, mentioned above. Although **art.9.2 BC** only refers to the reproduction right, the **1994 TRIPs Agreement**,²⁰ and later the **1996 WCT**²¹

¹⁷ Ass'n of Am. Publishers, Inc., Ad Hoc Comm. on Educ. Orgs. on Copyright Law Revision & Authors League of Am., Inc., Agreement on GUIDELINES FOR CLASSROOM COPYING in Not-For-Profit Educational Institutions with Respect to Books and Periodicals [hereinafter the Guidelines], contained in H.R. Rep. No. 94-1476, at 68 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5681. See also Circular 21: Reproduction of Copyrighted Works by Educators and Librarians, United States Copyright Office.

¹⁸ For the production of course packs, permission is requested from authors and publishers and royalties are paid. The Copyright Clearance Center (CCC), 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 Oct. 10, 2002).

¹⁹ In fact, the CCC already 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 Oct. 10, 2002).

²⁰ See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (1994) [hereinafter TRIPs Agreement]. 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).

extended application of the three-step-test to all exclusive rights and to any new exceptions/limitations that Member States may implement in the future.

Also the **EU Copyright Directive** expressly enshrines the three-step-test in **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.”²²

There is, however, a fundamental difference between the 3ST in the BC and TRIPs and WCT and the one in the *UE Copyright Directive*: while the 3ST under the BC is a paradigm for the “introduction” of new exceptions/limitations, the 3ST under the *UE Copyright Directive* is a paradigm for the “application” of the listed exceptions, when implemented by member states. Article 5.5 of the *UE Copyright Directive* does not allow member states to introduce new exceptions “in certain special cases”, since the only exceptions allowed are those listed in the Directive. Its goal, rather, is to “constrain” the domain of the copyright exceptions as applied, setting a final limit on the listed exceptions allowed.²³

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**²⁴ provides some guidance to examine this provision.

As far as the teaching exception is concerned, we believe that in order to comply with the 3ST and to avoid causing an unreasonable prejudice to the legitimate interests of the author, teaching uses which go beyond that of simple quotations, should be duly remunerated based on the amount of work used, the number of students that will be accessing the work, and the time it will be accessible for use. It is also fundamental that technological measures are adopted so as to avoid further (unauthorized) uses of these works by students.

IV.- CONCLUSIONS.

Digital Distance Education is facing a major obstacle: the copyright exceptions/limitations provided for educational and teaching purposes in domestic laws are ill-suited to cover teaching uses conducted through the Internet. And yet,

²¹ 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 [hereinafter WCT]

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 [hereinafter WPPT].

²² Beyond that, the *EU Copyright Directive* allows for a lot of flexibility, not only as to whether to implement these exceptions into national laws, but also as to their extent. Therefore, no real harmonization should be expected in that field.

²³ For this reason, although the factors taken into account are very similar, the *EU Copyright Directive* 3ST must be distinguished from the fair use doctrine in 17 U.S.C.A. § 107 (2002), which is closer to the BC 3ST paradigm.

²⁴ See The Report of the WTO Panel (WT/DS160/R) of June 15, 2000 (available at the WTO web page: <http://www.wto.org/>).

the public interest that lies behind teaching activities is the same, no matter whether they are conducted in a live-class or by means of the Internet.

It would be too simple (and wrong) to conclude that, since these exceptions/limitations were drafted at a time when DDE did not exist, they do not apply to DDE uses. The public interests deemed worthy of protection, which the legislature had in mind when drafting these exceptions/limitations, must allow for some flexibility when interpreting their language, while at the same time being guided by the general principle of strict interpretation of exceptions/limitations.

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, lessons in the VU (as well as any works used within these lessons) remain recorded and may be re-used over and over again. Instruction in the VU 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 3ST. 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.

It is undeniable that the public interest protected under the teaching exceptions/limitations deserves to be protected, regardless of the means (digital or otherwise) through which the educational activities take place. Educational purposes share the same interests whether conducted live, or by means of a telephone or a computer. However, different means may have different requirements and pose different dangers. Thus, if we want to protect the same public interest, we should design a new set of exceptions/limitations for digital education, with specific conditions and measures to ensure that both authors’ interests and public interests are being protected.

On the other hand, because of the border-crossing nature of Internet, this can only be done by previously agreeing on a uniform paradigm for teaching uses at an international level. The problem must be attacked from a uniform perspective at an international level, so as to diminish the inconsistencies resulting from the current choice of law rule in article 5.2 of the BC: *lex loci protectionis*. It is now a good time both in Europe (where countries are implementing the *Copyright Directive* at a national level), in the United States of America (where the TEACH Act has just been passed) and in any other country subject to the WTO and the BC, to work in that direction. Any agreement, no matter how small, on fundamental issues would be a big step, a beginning.

On July 14th 2003, several of the IP experts that contributed to the research project met in Barcelona, along with representatives of the UOC’s Library, EDIUOC and a major Spanish collecting society, to discuss the *status quo* at each national level, share thoughts and experiences and draw some conclusions on the issue of DDE.

As a result from the research conducted in this project, we favor the adoption of **a statutory compulsory licensing scheme** to allow the **use of works for teaching purposes over the Internet**, subject to **strict quantity limitations** and to **remuneration fees** (based on number of students, amount of work used and time) **operated by collecting societies**. Being a statutory (and compulsory) license, collecting societies have no need to prove that they have been granted the corresponding rights from the copyright owners (currently, this being a main impediment in the management of digital rights on works initially exploited in printed form). It is also **fundamental that technological measures be adopted so as to avoid further (unauthorized) uses of these works by students**.

In order to do so, Universities and Educational Institutions should adopt a united position to start negotiations (with all parties involved) and push towards the enactment of such a compulsory licensing scheme, which will be in favor of all (users and autors). The use of works for teaching purposes will (and must) continue to exist. It is in the interest of

both authors and the community that such use is done within a legal framework. Failing such a feasible framework, digital teaching uses will develop (or continue to develop) outside the borders of the Law, thus benefiting nobody. We cannot afford it.