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# Copyright limitations in distance learning education

*A study of the European Legal Context*

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## **ABSTRACT**

This dissertation was written as part of the MA in Art, Law and Economy at the International Hellenic University.

The starting point of the present study is the realization that distance education can play a very important role in disseminating knowledge. New technologies nowadays enable learning process to “escape” the boundaries of the physical classroom and spread even in the most inaccessible areas. However, it should be pointed out that capacity without content is actually pointless. During the teaching process, the teacher usually uses copyright protected works. The fact that these original works are legally protected means that the user-teacher should request permission for their use. Of course, several European countries have provided for exceptions allowing educational institutions to use these works without authorization from the rightholder and in some cases without the obligation of a fee. Consequently, the teacher should either seek license from the copyright owner or rely on the domestic exceptions and limitations for educational purposes. However, this is not always an easy task since it is questionable whether the teaching exceptions (as provided in each Member State) covers all the uses of the original works and more precisely whether the exceptions provided for analogue uses do cover the digital uses in distance learning education as well.

The aim of this paper is to present the exceptions and limitations for teaching purposes and examine how and to what extent the teaching exceptions provided for the analogue uses are also applicable to the digital distance education in the majority of the Member States. The study also considers the degree of harmonization between the Member States in the certain field and cites certain suggestions on how we could face the legal uncertainty on the online use of copyright protected educational materials within the internal market.

Kakoura Antonia

January 2016

## **PREFACE**

**I would like to thank my supervisor, Irimi Stamatoudi, for her continuous guidance and support during this process. I would like also to thank my parents for their support during my post graduate studies. My partner, George Serdaris, deserves a particular note of thanks: your wise counsel and kind words served me well.**

## **LIST OF ABBREVIATIONS**

Art.	Article
BC	Berne Convention
DCA	Danish Copyright Act
DDE	Digital Distance Education
ECL	Extended Collective Licensing
EU	European Union
EUCD	Directive 2001/29/EC (Information Society Directive)
ICA	Italian Copyright Act
MOOC	Massive Open Online Course
No	number
par.	paragraph
UK	United Kingdom
WIPO	World Intellectual Property Organization

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## CHAPTER I: Introduction

### 1.1 General remarks

In recent years, distance learning gains substantial ground in spreading the knowledge and improving access to education. Contemporary technology enables new forms of communication between teachers and students, which in the past were impossible. The new teaching process involves, in most of the cases, the use of pre-existing copyright protected works. As a result, the educational establishment has two options: either to seek license from the rightholder, or to rely on the exceptions and limitations according to the legal order of the state where the establishment is located.<sup>1</sup>

Before we move on with our analyses, we should first give some insight on copyright protection and how it relates to educational activities.

### 1.2 Copyright protection

Irrespective of legal order or country, copyright is a right on the original products of one's intellect expressed in any "perceptible" form.<sup>2</sup> Copyright law grants to the creator of original works a variety of rights which are divided into two categories: the economic rights (which allow the author to exploit his work-commercially) and the moral rights (which protect the author's personal bond with his work).<sup>3</sup> Among the economic rights, the law (irrespective of the country concerned) recognizes to the author the exclusive right to reproduce, publicly perform and communicate to the public (including the making available to the public) his work. Upon their creation the rights in the works are exclusively granted to their authors. All these exclusive rights

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<sup>1</sup> Papadopoulou, M.D., (2010), 'Copyright Limitations and Exceptions in an E-Education Environment', *European Journal of Law and Technology*, 1(2), available at <http://ejlt.org/article/view/38/56> , [Accessed 30 August, 2015].

<sup>2</sup> Kallinikou, D. (2008), *Copyright and Related Rights*, 3rd Edition, P.N. Sakkoulas Editions (in Greek), pp. 30-35.

<sup>3</sup> Koumantos,G. and Stamatoudi,I. (2014), *Greek Copyright Law*, Sakkoulas Publications Athens-Thessaloniki, p.71.

exist without the need of formalities.<sup>4</sup> The economic rights are also transferable. In practice, their exclusive nature allows the creator to take legal action against those who infringe his rights and ask for the recognition of his right or the omission of the infringement in the future as well as compensation for his damage (according to the legal jurisdiction at issue). The infringer is also subject to criminal penalties.<sup>5</sup>

### *1.3 The ratio of exceptions and limitations to the economic rights*

However, simultaneously Copyright law restrains the extent of the author's rights in recognition of certain fundamental values to the public, as the unobstructed access to artistic, literature and scientific works.<sup>6</sup> Therefore, although the law attributes to the author exclusivity to exploit their own creation, it simultaneously ensures the public access without requiring the authors' permission and regularly without paying a fee. These "liberties" granted to the public origin from the conflict of interest of fundamental human rights which are protected on constitutional level in a democratic society.<sup>7</sup> According to Anne Lepage in e-Copyright Bulletin the philosophy of Copyright (both in common and civil law countries) is to safeguard the access of the public to the scientific and artistic "benefits".<sup>8</sup>

### *1.4 The ratio of exceptions and limitations for educational purposes*

Amongst other important values, the dissemination of education is thought to be a fundamental right in European law and the 'teaching exception' is almost universally recognized by EU states.<sup>9</sup> Its extensive recognition is justified by the fact that they balance the conflict between two fundamental freedoms: the Copyright as a property

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<sup>4</sup> See Goldstein, Paul (2001), *International Copyright: Principles, Law, and Practice*. Oxford University Press. p. 187: In many countries the requirement for any formalities for the safeguard of copyright protection was eliminated with the adoption of the Berne Convention. However in some common law states like the United States the existence of copyright protection requires registration at a competent authority in order for the creator to safeguard full protection (information found in *Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code*, available at <http://copyright.gov/title17/92chap4.html>, [Accessed at 27 September, 2015].

<sup>5</sup> Id at pp.372-385.

<sup>6</sup> Dreier, T. (2010), 'Limitations: The Centerpiece of Copyright in Distress', *JIPITEC*, 1(1), p.50.

<sup>7</sup> Lepage, A. (2003), 'Overview of exceptions and limitations to copyright in the digital environment', e-Copyright Bulletin, available at <http://unesdoc.unesco.org/images/0013/001396/139696E.pdf>, [Accessed 3 September, 2015], p.3.

<sup>8</sup> Id at p.3.

<sup>9</sup> Papadopoulou, supra note 1.



right on the products of one's intellect and the public's interest to have access to artistic, literary and scientific progress.<sup>10</sup> According to Wagner although Copyright law was initially established to protect the author's right, it was simultaneously used so as to protect the dissemination of knowledge and the facilitation of the public's access to literary and artistic creations. In that case the economic incentive of the author or rightholder can be overridden in favor of the education progress.<sup>11</sup>

In our paper we are going to examine the issue of copyright exception for teaching purposes in distance learning education. DDE (digital distance education) is an educational mode where the instructors are separated from the students on time and place and their communication is achieved via the use of technology. In distance learning education and in education in general there is an extensive use of copyright protected works, which are necessarily used for educational purposes. In order to understand more clearly the association of Copyright with the online education imperative we cite the following fictitious example:

A history professor of a famous university located in London creates an online course which includes a section for World War II. Except for his own notes, he includes relevant articles and photographs produced by different historians and photographers, which the professor found in electronic databases and other scientific webpages and stored them in his hard drive. We assume that the articles and photographs are still under the copyright protection and therefore the teacher had to ask for permission from the rightholder before the use; by downloading and storing those works in his computer the professor infringes inter alia the economic right of reproduction of the rightholder. Subsequently, he uploads these electronic copies on the university web server, from which the enrolled students may have access with their personal passwords so as to read or even download those materials. In that case, with the act of uploading the articles and photographs on the e-learning platform the teacher

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<sup>10</sup> Favale, M. (2008), 'Fine-tuning European Copyright Law to strike balance between the rights of owners and users', *European Law Review*, 33(5), p. 705.

<sup>11</sup> Wagner & Karen. I. (1998), 'Intellectual property: Copyright implications for higher education', *The Journal of Academic Librarianship*, 24(1), p.12.

infringes both the reproduction and communication to the public right. From the student's part, every single download is an infringement of the reproduction right.

Thus, there is an obvious association between Copyright and the teaching process. The teacher's obligation to always ask for permission is not only costly but also a laggard and furious process, since the copyright owners and their rights are not always clear.<sup>12</sup>

In the sections that follow, the present dissertation will examine the function of those limitations and exceptions in a specific mode of education: the distance learning education. We will first define the notion of DDE and its particularities in relation to the Copyright protection and the troubling issue of applicable law. Consequently, we will cite the European legal instruments and how that law is implemented into the domestic texts of the EU countries. Finally, solutions and ideas will be presented in order to achieve a more universal treatment on copyright limitations to DDE in the internal market.

## **CHAPTER II: Distance learning education**

### ***2.1 The notion of distance learning***

Distance learning can be defined as a mode of education where the students are separated from their instructors regarding time and space.<sup>13</sup>

Distance education is facilitated through the use of digital technologies and is used in all levels of educational institutions, with an emphasis on higher education. DDE can be divided into two basic categories, having as parameters the time and space of interaction between the instructors and the students: asynchronous and synchronous ones.<sup>14</sup>

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<sup>12</sup> Papadopoulou, supra note 1.

<sup>13</sup> Report on Copyright and Digital Distance Education (ID: CSD1866), U.S. Copyright Office, May, 1999, A report of the Register of Copyrights, available at [http://www.copyright.gov/reports/de\\_rprt.pdf](http://www.copyright.gov/reports/de_rprt.pdf), [Accessed 6 September, 2015], p.10.

<sup>14</sup> IbidJK.

In synchronous mode the instructors and the students communicate with each other (via the Internet) simultaneously while being in different places.<sup>15</sup> On the other side, the type of communication between the instructors and the teachers may be asynchronous on time and space. Modern methods of communication are the use of computer software and more frequently courses supported by the World Wide Web, bulletin boards in the World Wide Web and electronic post (e-mail).<sup>16</sup>

## ***2.2 Different modes of distance learning***

### ***2.2.1 E-learning as a complementary tool accessible to students enrolled in a face-to-face course***

In several cases, traditional education is supplemented by an e-learning platform where the instructors upload additional materials or copies of their presentations. These platforms are accessed by the enrolled students, who may read and download the posted materials. The cross border dimension of this e-learning educational mode is limited since the teachers and the students are usually located at the same place within the university. However, the occasional mobility of the students or the teachers may create private international law issues since different territories will be concerned by the possible use of copyright protected works (the State where the establishment is located and the States where the students occasionally get access to the course).<sup>17</sup>

### ***2.2.2 E-learning as a stand-alone distance education course offered by a single university***

Nowadays, many institutions, especially in higher education, provide distance learning programs offered to students located in different countries. For these programs, the universities offer wholly or substantially online courses to enrolled learners, without requiring physical presence, even for the exams. The territories concerned in that case will be primarily the State where the university is located and the States where the

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<sup>15</sup> Panagiotakopoulos, C., Lionarakis, A., Xenos, M. (2003), 'Open and Distance Learning: Tools of Information and Communication Technologies for Effective Learning', Proceedings of the sixth Hellenic European Research on Computer Mathematics and its Applications Conference, HERCMA2003, Athens, Greece, p.4 .

<sup>16</sup> Id at p.5.

<sup>17</sup> Triaille, J-P. (ed.), (2013), 'Study on the application of Directive 2001/29/EEC ON Copyright and Related Rights in the Information Society (the "InfoSoc Directive")', funded by European Commission, p.381.

enrolled students live as well as the territories where the students occasionally access the course.<sup>18</sup>

### ***2.2.3 E-learning in MOOC***

Massive Open Online Course is a modern type of DDE which was first introduced in 2008 and was widely developed until 2012. MOOC is defined as an unlimited online course openly accessed via the Internet, with theoretically no limit to enrollment. The structure of MOOCs resembles the traditional online higher education. The students watch the lectures, read assigned material and are tested on the course.<sup>19</sup>

The ultimate objective of MOOC is to eliminate the “territorial barriers” and provide free education to everyone with a web access. The openness of MOOC raises cross-border dimension issues concerned with the use of Copyright protected materials since the territory of the use can be considered the location of the university as well as the location of each one of the undefined students.<sup>20</sup>

### ***2.2.4 E-learning provided by virtual universities***

Virtual Universities or virtual teaching/learning environments can be defined as a computer-based environment where the courses are exclusively offered online.<sup>21</sup> In other words, those universities operate completely in cyberspace and their environments are in fact open systems, which permit interactions with other participant and access to a wide range of resources.<sup>22</sup>

The phenomenon of Virtual Universities is one of the latest trends of the 20th century in education. A number of initiatives from universities and higher education

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<sup>18</sup> Id at p. 382.

<sup>19</sup> EDAUCAUSE, (2011), ‘7 Things You Should Know about MOOCs’, available at <http://www.educause.edu/library/resources/7-things-you-should-know-about-moocs-ii>, [Accessed 8 September, 2015].

<sup>20</sup> Trialle, supra note 17, p.382.

<sup>21</sup> Anderson, M., 1999, ‘Virtual universities : future implications for students and academics’, Conference paper edition, appears in ASCILITE. See also; Curran, C., (2001), ‘The Phenomenon of On-Line Learning’, *European Journal of Education*,36(2), p. 116.

<sup>22</sup> Piccoli, G., Ahmad, R. and Ives B. (2001), ‘Web-Based Virtual Learning Environments: A Research Framework and a Preliminary Assessment of Effectiveness in Basic IT Skills Training’, *MIS Quarterly*, 25(4), pp.402-403.

institutions have been funded and fostered by the European Union so as to offer common e-learning programs.<sup>23</sup>

The cross border dimension of virtual universities is complicated since the courses might be hosted on the servers of two or more universities located in different States, the teachers may 'intervene' to the courses and upload materials from various locations and the students are able to access the course all over the world.<sup>24</sup>

We already mentioned that the above cited modes of e-learning present a minimum or maximum grade of cross border dimension. In all of them the implication of Internet raises conflict of law issues.

Before we move on the applicable law issues we should first make a brief mention on jurisdiction. First of all, a court can be seized only after a lawsuit is brought to that court. When different national courts have jurisdiction, the choice between them belongs to the plaintiff. Within Europe we are going to apply the Brussels I Regulation to intellectual property cases, as they are after all civil and commercial cases and fall therefore within the scope of the Brussels I Regulation. Article 4 of the Regulation allows for the separate prosecution of every defendant in the country of his/her residence.<sup>25</sup> Moreover, jurisdiction is also given to the courts of the place of the harmful event and to the courts of the place of the damage [Article 5(3)].<sup>26</sup> However, in the last case that court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated. Furthermore, Article 6 par. 1 states that *'A person domiciled in a Member State may also be sued: where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine*

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<sup>23</sup> ibid. see also Curran, C. (2001), 'The Phenomenon of On-Line Learning', *European Journal of Education*, 36(2), p.116.

<sup>24</sup> Trialle, supra note 17, p.382.

<sup>25</sup> Article 4 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Official Journal L 012 , 16/01/2001 P. 0001 – 0023, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R0044> , [Accessed 18 November 2015].

<sup>26</sup> Id at Article 5(3).

*them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.*<sup>27</sup>

Regarding the applicable law even in an introductory approach it is necessary to first make a distinction between the infringement of intellectual property right as such and the contractual transfer of the right. In that case different laws such as the *lex loci protectionis* on the one hand and the *lex contractus* on the other hand may apply.

Moreover, issues of categorization emerge; which topics are covered by which category and its corresponding connecting factor and governing law. In the European Union we cite that Regulation No 593/2008<sup>28</sup> applies for the contractual obligations in civil and commercial matters. The general rule is that a contract shall be governed by the law chosen by the parties. In case of absence of choice Article 4 applies. On the other hand, Regulation No 864/2007 applies for torts.<sup>29</sup> According to Article 4 the dispute is governed by the law of the country where the damage occurred. However, if the alleged offender and the injured party have the same residence then the law of that country applies. Eventually, the same Article states that if the tort is more closely connected with a country other than that already indicated, then the law of that country applies.<sup>30</sup>

In addition, we indicatively mention the analysis of Trialle on the Impact of the cross-border dimension on the localization of the use. According to him the teaching exception will generally be governed by the law of the State where the educational use occurred. Berne Convention states that the applicable law should be defined by the rule of *lex loci protectionis* (the location where the protection is claimed). This rule should be combined with the principle of territoriality applying to the teaching

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<sup>27</sup> Id at Article 6(1).

<sup>28</sup> Regulation(EC) No 593/2008 Of The European Parliament And Of The Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. L177/6, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN>, [Accessed 18 November, 2015].

<sup>29</sup> Regulation(EC) No 864/2007 Of The European Parliament And Of The Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J. L. 199/40, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF>, [Accessed 18 November, 2015].

<sup>30</sup> Grammatikaki-Alexiou A., Papasiopi-Pasia, Z. And Vasilakakis,E., supra note 25, pp.297-358.

exceptions. This principle means that the exception provided by a national copyright law apply solely to the acts occurred in that State. In regard with the online uses, the principle of territoriality does not automatically lead to the application of multiple laws. In fact, one could define one single point where the use can be located, so as to apply that single law to the aforementioned use.<sup>31</sup>

However, this is not an easy task for DDE. For the localization of the online uses (reproduction and making available online) the Report, delivered to the European Commission, on the localization of the making available and of the reproduction of a copyright protected work proposed different options (location of the servers; location of the material act of upload, location of the centers of activities of the uploader, location of the exploitation). These options equally define the localization of the educational use and the territorial application of the use. On this point Trialle highlights that *“the purpose of such localization is rather different, as it leads here at defining whether one educational use in an e-learning program is covered by an exception, in which country and upon what conditions. By contrast, determining where an act of exploitation takes place, aims at assessing where and for which territories the exploitant should clear copyright and require the needed authorization by the copyright owners”*. In case we accept that several countries have been acknowledged as countries of exploitation, then for the act of making available online we need authorization from each one of the countries of exploitation. In our case of teaching exception this means that the multiplication of countries corresponding to the use could lead to situations where in country A the use is authorized and in country B it is not authorized under the teaching exception. Consequently, the situation may cause difficulties on the cross-border dimension of online educational uses.<sup>32</sup>

The above mentioned analysis on jurisdiction and applicable law is by no means exhaustive. Our scope is just to “give a picture” of the fact that the cross border dimension of e-learning causes uncertainty on how to locate the online uses

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<sup>31</sup> Trialle, supra note 17, p. 383.

<sup>32</sup> Ibid.

concerned by an exception to copyright and whether an educational use is legitimate or not.

### **2.3 The European Union legal framework**

In 22 May, 2001 the European Union adopted a new Directive on the harmonization of certain aspects of copyright and related rights in the information society, differently called the 'InfoSoc' Directive. The said legal instrument embodies inter alia the effort of the EU states to harmonize the exceptions and limitations to copyright and related rights.<sup>33</sup> The legal provision (as it was stated in the preamble) is about to promote learning and culture by protecting works. Meanwhile, in parallel to the protection granted to the rightholders, the text introduces specific exceptions and limitations in favor of the public in order to access those works in the merits of education and teaching.

It should be noted that in the Explanatory Memorandum accompanying the initial Proposal of 'InfoSoc' Directive it is stated that these exceptions and limitations should be also expanded "in the light of the new electronic environment".<sup>34</sup>

The exceptions and limitations are cited in Articles 5 of the Directive.<sup>35</sup> The list of limitations and exceptions proposed is both exhaustive and closed which means that the Members States are not allowed to provide any other exceptions than those mentioned in the legal text.<sup>36</sup> Furthermore, the Directive includes only one mandatory exception while the others are optional.<sup>37</sup> In other words, the EU States have the discretion to implement in their domestic legislation as many exceptions as they want

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<sup>33</sup> See the Preamble of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, published in Official Journal L 167, 22/06/2001 P. 0010 – 0019 :*"The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonization of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives."*

<sup>34</sup> Explanatory Memorandum accompanying the Commission's Proposal for a Directive of 10.12.1997 COM(97)628 final, OJ C108/6 (07.04.1998), available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.1998.108.01.0006.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.1998.108.01.0006.01.ENG), [Accessed 20 September, 2015].

<sup>35</sup> Id at Article 6.

<sup>36</sup> Dreier, supra note 6, p.52.

<sup>37</sup> Stamatoudi, I, and Torremans, P. (ed), (2014), EU Copyright Law: A Commentary, (Elgar Commentaries series) , Edward Elgar Pub., p.438.



and in whichever way they think is appropriate to cover their national needs. Therefore, EU States are free to determine the limits and conditions of permissible uses under the exception.<sup>38</sup>

Teaching exception is clearly cited in Article 5(3) where the law states that any '*use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the authors name, is indicate, unless this turns out to be impossible and to the extent justified by non-commercial purposes to be achieved*'.<sup>39</sup>

Beforehand it is worth mentioning that the Recital 42 of the Preamble of the said Directive highlights that the same exceptional rules may apply to both the typical and distance learning education when it is done for non-commercial purposes.<sup>40</sup>

- Rights covered by the teaching exceptions:

Limitations can be adopted with respect to both the right of reproduction and communication to the public (including the making available online). As a result, the exemption meets the needs of both typical face-to-face education and DDE.<sup>41</sup> Regarding the distribution right, it should be noted that where the law [as it is clarified in Article 5(4)] allows the act of reproduction, the same exceptions are applicable for the act of distribution, as well.<sup>42</sup>

We already stated that according to Explanatory Memorandum these exceptions and limitations should be also expanded "in the light of the new electronic environment."<sup>43</sup>

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<sup>38</sup> Green Paper, Copyright in the Knowledge Economy, Brussels, COM (2008) 466/3, available at [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/greenpaper\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf), [Accessed 4 September, 2015], p.16.

<sup>39</sup> Directive, supra note 34, Article 5(3).

<sup>40</sup> Directive, supra note 34, par.42 of the Preamble.

<sup>41</sup> Xalabarder, R (2007) 'On-line teaching and copyright: any hopes for an EU harmonized playground?' in Torremans, P (2007) Copyright Law, A handbook of Contemporary Research (Cheltenham, Northampton: Edward Elgar), p.380.

<sup>42</sup> Papadopoulou, supra note 1.

<sup>43</sup> Explanatory memorandum, supra note 35 ,p.40.

Consequently, any acts (uploading, transmission and downloading), which are necessary for the function of distance learning are exempted under the Directive.<sup>44</sup>

Regarding the permanent downloads from the transmitted materials, they may be governed by the exception for private use (Article 5(2), b). However, we should note that in face-to-face education the exception of Article 5(2), b does not permit the reproduction of multiple copies to be distributed to the students. In fact, there are countries which clearly exclude from their private exception copies done for collective use. Finally, we note that since Directive remains neutral on that topic, nothing prevents an EU state from including the permanent student copies into the exception for teaching purposes.<sup>45</sup>

Similarly, the law remains silent on two key issues concerning mainly the distance education. One concerns the transformation and the other the digitalization. Therefore, it is left to the domestic legislation of each Member State to decide whether these uses must be included in the teaching exception.<sup>46</sup> We cite the personal opinion of professor Xalabarder that *“Digitization amounts to a reproduction and since the exception is technologically neutral (not limited to specific means of exploitation, there seems to be no reason not to exempt digitization of a work under the teaching exception”*.

- Nature and extension of works

Article 5(3) does not impose conditions neither on the nature of the works nor the extension which are permitted to be used. Consequently, we assume that both analogue and digital forms may be used under the exception.

Regarding the extension of the works the sole conditions mentioned is that the work should be used only ‘to the extent justified by the non –commercial purpose to be

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<sup>44</sup> *“Temporary reproductions that enable the digital transmission and reception of the work may be covered by the mandatory temporary copies exception of Art. 5(1) EU CD”* (quote found in Xalabarder, R (2007) 'On-line teaching and copyright: any hopes for an EU harmonized playground?' in Torremans, P. (2007) *Copyright Law, A handbook of Contemporary Research* (Cheltenham, Northampton: Edward Elgar), p.380.)

<sup>45</sup> Xalabarder, supra note 42, p.380.

<sup>46</sup> Id at p.383.

achieved'.<sup>47</sup> According to Papadopoulou in the 'European Journal of Law and Technology' the said phraseology 'derives' from Article 10(2) of the Berne Convention.

- The eligible institutions

Article 5(3) does not provide any conditions for the institutions that may benefit from the teaching exceptions. As a result, domestic laws of the EU states can permit every kind of learning institutions to benefit from the teaching exception. Subsequently, schools, universities or any other educational establishments may benefit from the exception.<sup>48</sup>

However, the sole condition imposed by the Directive is the "non-commercial" purpose of the teaching activity. It should be clarified that the "non-commercial purpose" is defined by the activity as such and not by the nature or the means of funding of the institution.<sup>49</sup> According to Xalabarder in '*Copyright exceptions for teaching purposes in Europe*' the fact that the courses offered by an educational institution are subject to a fee is not enough to exclude those institutions from the exception.<sup>50</sup>

- *For the sole purpose of illustration*

The phrase "for the sole purpose of illustration" in Article 5(3) raises questions on how it should be interpreted. We agree with the opinion that nothing leads to a narrow interpretation, resulting to cover only uses that exemplify the teaching. We cite that during the parliament proceedings alternative phrases were proposed such as 'education, learning and research' and 'education, learning, research and for private purposes'. However, "illustration for teaching" prevailed as more familiar to Article 10(2) of the Berne Convention wording. At this point, we should also note that the

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<sup>47</sup> Papadopoulou, supra note 1.

<sup>48</sup> Xalabarder, R (2004) 'Copyright exceptions for teaching purposes in Europe', Internet Interdisciplinary Institute (IN3) UOC ,Working Paper Series: WP04-004. Available at: <http://www.uoc.edu/in3/dt/eng/20418/20418.pdf>, [Accessed 31 August, 2015], p.13.

<sup>49</sup> Papadopoulou, supra note 1.

<sup>50</sup> Xalabarder, supra note 42, p.383.

phrase used in BC was not supposed to limit the educational purpose as such but to elucidate the amount of works authorized to be used for teaching purposes.<sup>51</sup>

Consequently, the making of teaching compilations (anthologies) and their dissemination to students is not excluded by the teaching exception of the 'InfoSoc' Directive. In fact, in the Explanatory Memorandum, the Commission clearly used the form of 'compilation of an anthology'<sup>52</sup> as an example for teaching uses. Incidentally, it is worth mentioning that teaching compilations are extensively used in distance learning education; frequently, the teaching materials are eventually posted (compiled) in a bulletin board or an e-reserve webpage or even a common digital storage, forming a teaching compilation.<sup>53</sup>

- Subject to compensation?

The teaching exception of Article 5(3) does not require the payment of fair compensation as it is clearly asked for the exceptions in Articles 5(2) a,<sup>54</sup> b<sup>55</sup> and e<sup>56</sup>. However, according to the Recital 36, EU Member States are allowed to impose fair compensation to the other exceptions-limitations set in Article 5.<sup>57</sup> Also, some general guidelines for the level of compensation are provided on the Preamble of the Directive.

Moreover, the criterion set by the Directive, for the imposition of fair compensation, is the possible harm to the right-holders of the works used for educational purposes. This

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<sup>51</sup> Id at p. 384.

<sup>52</sup> Explanatory Memorandum, supra note 35, p.40.

<sup>53</sup> Xalabarder, supra note 42, p.384.

<sup>54</sup> Directive, supra note 34, Article 5(2a): "*...(a) in respect of 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, with the exception of sheet music, provided that the rightholders receive fair compensation;*"

<sup>55</sup> Id at Article 5(2b): "*...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;*"

<sup>56</sup> Id at Article 5, (2e): "*...in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.*"

<sup>57</sup> Directive, supra note 34, par. 36 of the Preamble.

statement reminds us of the three step set, which is also present in Article 5 of the Directive. According to Article 5(5) all the limitations (including the teaching exception) should satisfy the conditions of the three step test.<sup>58</sup>

As a result, we conclude that the EU states are free to decide on the remuneration, as soon as the compensation meets the requirements of the three step test and does not prejudice the legitimate interest of the author.<sup>59</sup>

As we already stated the list provided by the Directive is not compulsory, which means that the EU states have full discretion in determining the conditions of the implementation into their national law. In the following Chapter we are going to examine how and to what extent the teaching exception in distance learning education [as stated and protected in Article 5(3)] has been implemented by the EU member states. For the purpose of our paper we are going to focus on the rights (reproduction and/or communication to the public) permitted by the teaching exception of the relevant domestic laws of the states. We will also make a separate reference to the special case of the Nordic countries where the extended collective license system has been developed.

## **CHAPTER III: Implementation by the EU Member States**

### ***3.1 Country analysis***

#### ***3.1.1 Permitted use of reproduction, communication to the public and making available online***

In the previous Chapter we cite that 'InfoSoc' Directive does recognize the extension of teaching limitation (as stated in Article 5) to the new forms of education and more precisely to DDE. In this sub-paragraph we are going to examine the EU states, which have implemented in their domestic legislation the respective imperatives of the said Directive. Those countries, except from the reproduction and distribution right, do

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<sup>58</sup> Papadopoulou, supra note 1.

<sup>59</sup> The origins of the so-called are found in Article 9(2) of the Berne Convention where it is stated that: *"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"*.

permit the right of communication to the public (including the making available online) as an exception for teaching purposes. This is the case of Luxembourg, Portugal, France, Belgium, Italy and Germany.

To begin with, according to the WIPO (World Intellectual Property Organization) study in 2009, Luxembourg law permits not only the reproduction but also the right to communicate to the public short extracts of published works used for the purposes of illustration of teaching. Two conditions are required:

-the fair practice

-and the non-commercial purpose of the teaching activity

When those conditions are met, no remuneration is required for the use.<sup>60</sup> In the same sense, Portugal allows both the reproduction and making available online of parts of works, provided that the use is of no commercial purpose and serves exclusively the teaching purpose.<sup>61</sup> Therefore, Portugal and Luxemburg both cover the needs of DDE.

An interesting case is Italian Copyright Act (ICA) one. According to Article 70 both reproduction and communication to the public of short fragments of works is permitted when it is done for illustrative purposes. Moreover, the law requires two other conditions to be met under the teaching exception: the use does not conflict with the normal exploitation and the teaching activity has no commercial character.<sup>62</sup> No remuneration is required for the use except for the use of teaching anthologies (Art.70.2). Thus, we may conclude that the law permit both the typical and DDE to benefit from the teaching exception. However, at this point we cite that according to Mazzioti the boundaries of teaching exemption are vague and Article 70 can hardly be

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<sup>60</sup> Xalabarder, R. (2009), 'WIPO Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' WIPO Doc SCCR/19/8 , available at: [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_19/sccr\\_19\\_8.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_8.pdf), [Accessed 27 August, 2015], p.72.

<sup>61</sup> Ibid.

<sup>62</sup> Article 70 of Italian Law for the Protection of Copyright and Neighboring Rights (Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68, of April 9, 2003), (Unofficial Draft English Version – Revised February 2004), available at [http://portal.unesco.org/culture/en/files/30289/11419173013it\\_copyright\\_2003\\_en.pdf/it\\_copyright\\_2003\\_en.pdf](http://portal.unesco.org/culture/en/files/30289/11419173013it_copyright_2003_en.pdf/it_copyright_2003_en.pdf), [Accessed 2 September, 2015].

applied in a specific way. He cites that for the shorter kinds of works, such as poems or lyrics there is no harmonization in case law. Instead for the larger works, such as books, the law vagueness on the limits of the use and the beneficiaries of the teaching exception renders the implementation of Article 70 almost impossible.

For example the law is vague on whether the reproduction and distribution of copies or communication to the public (ex. movies, scientific articles etc.) on an e-learning platform is legitimate without the previous consent of the author or rightholder. He concludes that for the enforcement of the teaching exception beyond the boundaries of traditional classroom the law should provide more accuracy on which uses and to what extent are permitted in typical and distance learning education separately.<sup>63</sup> Moreover, he adds that the existing legislation seems to be moving to exempt only the distance learning mode where there is a close network platform accessible by a specific number of students.

The statement is based on Article 71-ter ICA where it is stated that *“the communication or making available to individual members of the public is free if made for the purpose of research or private study by dedicated terminals on the premises of publicly accessible libraries, educational establishment, museums or archives, limited to the works and other subject matter contained in their collections that are not subject to purchase or licensing terms”*.

Literally, the aforementioned restriction does not exist in the teaching exception for illustrative purposes under Article 70 where the sole requirement is that copyright free uses should exclusively serve the purpose of illustration. However, this is a requirement that could be met in distance learning education mode where the students access the uploaded material (on a close e-learning platform) with their passwords. Thus, we conclude that although Italian Copyright Act literally tries to

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<sup>63</sup> Mazziotti, G. (2011), 'Copyright and Educational Uses: the unbearable case of Italian law from a European and Comparative perspective', EUI Working Paper, department of Law 2011/17, available at [http://cadmus.eui.eu/bitstream/handle/1814/19697/LAW\\_2011\\_17\\_Mazziotti.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/19697/LAW_2011_17_Mazziotti.pdf?sequence=1), [Accessed 2 October, 2015], p.9.

implement Article 5(3) of the 'InfoSoc' Directive so as to cover DDE, in fact the laws inaccuracy may lead to a multiple interpretation by the courts.<sup>64</sup>

Another, interesting case is Belgian Copyright Act. Article 22(1) of the respective law defines both the act of reproduction (including digital formats) and communication to the public as permitted uses under the teaching exception. However, communication to the public right (Art.22.1-4quater) is solely exempted to the extent that "*it takes place within the context of the normal activities of the establishment*" and that it is conducted "*solely by means of closed transmission networks of the establishment*".<sup>65</sup>

It has been supported that these two wordings may hurdle the effectiveness of this exemption. Of course, the law does not explicitly require that the access to the closed network should be done only in the premises of the educational establishment. Though, if we accept a more restricted interpretation of these wordings, then the application of online teaching would be hindered.<sup>66</sup> It should be also stated that fair compensation is required for the use of copyright protected materials under the teaching exception.<sup>67</sup>

Article 53(3) of the German Copyright Act exempts the making of analogue copies for the illustration of teaching in quantities necessary for the participants in the classroom and for examination purposes.<sup>68</sup> Moreover, except for the digital education, Article 52a states that the making available online of short extracts of published works is permitted to a limited circle of enrolled students and other participants in schools, universities and non-commercial career training institutions.<sup>69</sup> As a result, German Law clearly exempts the making available online should be allowed as long as it serves the teaching purpose and there is no commercial pursuit from the use. Additionally, in the

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<sup>64</sup> Ibid.

<sup>65</sup> Xalabarder, supra note 64, p.90.

<sup>66</sup> Ibid.

<sup>67</sup> Xalabarder, supra note 47, p.393.

<sup>68</sup> German Copyright Act, supra note 34, Article 53(3).

<sup>69</sup> Id at Article 52a (1).



same Article the law requires the provision of an equitable remuneration to the rightholder for the use of the materials.<sup>70</sup>

Similarly, French Copyright Act (L122-5(3) e) exempts both the reproduction (including the distribution right) and performance (including also any mode of communication to the public)<sup>71</sup> of fragments of published works. In addition, the use should be for purposes of illustration “in the course of teaching” and the activity should not have a lucrative character. However, the law renders fair compensation to rightholders of specific works which are used for teaching purposes.<sup>72</sup>

### *3.1.2 Permitted use of reproduction*

However, in contrast to the previous states, some EU countries include teaching limitations but they exempt only the reproduction of works and fail to include the right of communication to the public. ‘Communication to the public’ refers as we already stated to making copyright material available online on the Internet or making them available by uploading them in an intranet or through an ‘electronic transmission’. As a result, the distance learning in those countries cannot benefit from the teaching exception. This is the case of UK, Austria, Slovenia, Spain and Greece.

Section 32 of the UK Copyright Act permits the reproduction of works in order to be used in the instruction of the course or for its preparation and provided the reproduction is done by the instructor and not by means of a reprographic process. In addition to those conditions the mention of the author’s name is required and the instruction should be for non-commercial purposes.<sup>73</sup> As a result, we conclude that UK law is not flexible in its exception and therefore fail to cover the needs of DDE.<sup>74</sup>

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<sup>70</sup> Id at Article 52a (4).

<sup>71</sup> See Article 122-2 of Code de la propriété intellectuelle (France)(version consolidée au 22 décembre 2014), available at <http://www.wipo.int/wipolex/en/details.jsp?id=14667>, [Accessed 4 September, 2015].

<sup>72</sup> Xalabarder, supra note 64, p.73.

<sup>73</sup> Section 32 of United Kingdom Copyright, Designs and Patents Act 1988 (Chapter 48), available at <http://www.wipo.int/wipolex/en/details.jsp?id=13284>, [Accessed 4 September, 2015].

<sup>74</sup> Wahid, R. & Azmi, G. (2012), ‘Comparative Study on Copyright Exception for Teaching Purposes: Australia, Malaysia and the United Kingdom’, *Journal of International Studies*, 8, p.36.

Similarly, Austrian law fails to cover DDE. The law [in Article 42(6)] expressly exempts both the reproduction and distribution of copies in the quantities necessary to cover the needs of a specific class and on supports provided for under paragraph 1 (paper and any similar supports). Additional requirement is the non-commercial purpose of the academic activity.<sup>75</sup>

In the same sense, Slovenia Copyright Act permits educational or scientific establishments to reproduce, *'on any medium, works from their own copies for internal use, provided that this is not done for direct or indirect economic advantage'*.<sup>76</sup> Thus, we conclude that Slovenia Law restricts the teaching exception only to the act of reproduction of copies and does not permit the upload of copies to password protected web server. Subsequently, the online education cannot benefit from the teaching exception under the Slovenia Copyright Act.<sup>77</sup>

Moreover, we cite the case of Spain which is a bit complicated one. According to the Spanish Copyright Act [Art. 32(2)] the act of reproduction, distribution and communication to the public are permitted provided that they are done for the purpose of 'illustration of teaching activities' and the uses take place only in the merits of a classroom.<sup>78</sup> According to Xalabarder in 'Copyright Law' the wording 'classroom' could be interpreted not only as a physical classroom, but as a 'virtual classroom' as well, so as to cover the needs of an on-line course. However, he supports that the legislative history makes a narrow interpretation and therefore only the students of a physical classroom may benefit from the teaching exception.<sup>79</sup> In short, we conclude that although Spain tried to implement Art. 5(3) EUCD (in a way so as to cover DDE), in

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<sup>75</sup> Section 42(6) of Federal Law on Copyright in literary works, works of art and related rights (Copyright Act) (as last amended by Federal Law BGB1 . I No. 58/2010), available at <http://www.wipo.int/wipolex/en/details.jsp?id=9748>, [Accessed 29 September, 2015].

<sup>76</sup> Article 50(3) of Slovenia Copyright And Related Rights Act of 30 March 1995 as last amended on 1 February 2006, in English, available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=133435](http://www.wipo.int/wipolex/en/text.jsp?file_id=133435), [Accessed 4 September, 2015].

<sup>77</sup> Ernst, S. & Haeusermann, D. (2006), 'Teaching Exceptions in European Copyright Law – Important Policy Questions Remain', *Berkman Center for Internet & Society, Harvard Law School, Research Publication No. 2006-10*, p.14.

<sup>78</sup> Xalabarder, supra note 42 , p.393

<sup>79</sup> *ibid*

practice it was ineffective and the distance learning is not covered by the Spanish teaching exception.

Another interesting case is the teaching exception provided by the Greek Copyright Act. Article 21 of the Law No 2121/1993 states that the reproduction of 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 is permissible without the agreement of the author and without the obligation of paying royalties to him. Mandatory requirement is that the reproduction should be done exclusively for teaching or examination purposes and at an educational establishment.

Moreover, the reproduction should be in accordance with the aforementioned purpose which is the accommodation of the educational needs and should be also compatible with the fair practice as well as not conflict with the normal exploitation.<sup>80</sup>

At a first approach, it seems to be a typical case where the Copyright Act exempts only the act of reproduction (and unavoidable the distribution one) of photocopies by the teacher in order to be used for the needs of teaching illustration and for the exams. However, Xalabarder makes an interesting approach and supports that Article 27<sup>81</sup>, where it is stated that public performance and display of works is permitted by both the teachers and students at a teaching institution, 'opens the door' to the distance learning education. Yet, he states that his approach and the application of the teaching exception to DDE are blurred; and in fact the application of Article 27 may include only theater and musical performances at schools.<sup>82</sup> We agree with the last statement and believe that the Greek legislator formulated the provision in that way so as to be limited in the use and distribution of photocopies in the classroom.

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<sup>80</sup> Article 21 of Greek Copyright Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters (as amended up to Law No. 4281/2014), available at <http://www.wipo.int/wipolex/en/details.jsp?id=15581>, [Accessed 4 September, 2015].

<sup>81</sup> Id at Article 27: "*The public performance or presentation of a work shall be permissible, without the consent of the author and without payment on the following occasions... within the framework of staff and pupil or student activities at an educational establishment provided that the audience is composed exclusively of the aforementioned persons*".

<sup>82</sup> Xalabarder, supra note 49, p. 11.

### *3.1.3 Nordic countries-the phenomenon of extended collective licenses system*

In Nordic countries we meet a special regime which is called the extended collective license system (ECL). Nordic countries were the first to introduce such a system in the beginnings of 1960s.<sup>83</sup> In this system it is presupposed that authors of the same kind are grouped together in organizations which are representative in the sector concerned and they are also authorized to conclude contracts on behalf of the authors.

The users can freely negotiate with the organization and conclude contracts on a certain type of exploitation in a certain field. Once the agreement is reached the respective Copyright law states that the users-parties may use both the works of the members and non-members authors, as soon as they belong to the same category with those who are represented by the organization. Right-owners who are not members of the contracting organization shall be treated in exactly the same way as the members. Moreover, those rightholders usually retain their right to claim for compensation through an individual lawsuit or prohibit the use of their works under the terms provided by the organization (always depending on the domestic legislation).<sup>84</sup>

We note that the system adopted in Nordic countries should be separated from the system adopted under the French Copyright Act. In France we meet the obligatory collective administration, which means that the right holders are obliged to claim their rights only via a collecting society. In fact, they should be solely satisfied with the compensation derived from the organization and they cannot demand their rights through an individual lawsuit. Contrary to it in ECL the contracts (including the compensation) are concluded via free negotiations and the unrepresented authors retain their independence to seek for his remuneration via individual claims.<sup>85</sup>

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<sup>83</sup> Axhamn, J. and Guibault, L. (2011), Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?, Instituut Voor Informatierecht, Final report prepared for Europeana Connect, available at <http://www.ivir.nl/publicaties/download/292>, [Accessed 11 October, 2015],p.25.

<sup>84</sup> Id at pp.30-38.

<sup>85</sup> Kopinor, (2015). The Extended Collective Licence as Applied in the Nordic Countries, available at: <http://www.kopinor.no/en/copyright/extended-collective-license/documents/the-extended-collective-license-as-applied-in-the-nordic-countries>, [Accessed 5 Nov. 2015].

Extended collective license system is found-with some differences- in Norway, Denmark, Sweden, Finland and Iceland. All these countries have adopted ECL provisions covering certain forms of reproduction within specific organization or for specific activities. We also clarify that the ECL provisions are sectorial, which means that their respective scope is defined in the statutory ECL provisions.<sup>86</sup> However the scope of application of the law varies between the Nordic domestic laws.<sup>87</sup>

Norwegian Copyright Act has adopted the system of voluntary and extended collective licensing with a back-up in the legislation. In voluntary collective licensing system, users and right-holders can freely negotiate the terms of the contractual agreement with the organization; once the agreement is reached the organization is been authorized to transfer specific rights (such as the reproduction) to the users in exchange for fee.<sup>88</sup> Norway law makes a mention to its extended license system in Section 36.<sup>89</sup> The system is applicable to the sector of reprography, specific digital uses as well as to reproductions of audiovisual works made by an educational establishment, under the terms of Section 13. According to it, “...copies of a published work can be made for use in own educational activities if the conditions for an extended collective license pursuant to section 36 first paragraph are fulfilled” as well as the originator of the work is subject to compensation for the use.<sup>90</sup> Similar to Norway, Danish ECL provisions covers all forms of education within public institutions.

Meanwhile, in 2008 Danish Copyright law introduced a general ECL provision, in order to create more sectors, in which ECL provision applies and –with the ultimate scope- to cover the needs of the new technical developments. We highlight that -as already mentioned- ECL provisions are sectorial in the sense that the “outer boundaries” of the ECL agreement are predefined by the legislator. Thus, Danish law introduced a general

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<sup>86</sup> Axhamn, J. and Guibault, L. supra note 84, p.30.

<sup>87</sup> Id at p.26.

<sup>88</sup> Anon, (2015), [online], available at:

[http://www.ifrro.org/sites/default/files/europe\\_northamerica.pdf](http://www.ifrro.org/sites/default/files/europe_northamerica.pdf), [Accessed 11 Oct, 2015].

<sup>89</sup> Section 36 of Norwegian Copyright Act, Act No. 2 of 12 May 1961 Relating to Copyright in literary, Sscientific and artistic works, etc., with subsequent amendments, latest of 22 December 2006, unofficial translation, available at <http://www.kopinor.no/en/copyright/copyright-act>, [Accessed 9 October, 2015].

<sup>90</sup> Id at Section 13.

ECL provision under Article 50 (2) so as to retrieve the legislator from the liability of constant alterations to the national legislation.

According to article 50(2) of the DCA, an ECL agreement “may also be invoked by users who, within a specified field, have made an agreement on the exploitation of works with an organization comprising a substantial number of authors of a certain type of works which are used in Denmark within the specified field.” This type of ECL provision differs from the traditional sectorial provisions to the point that they allow the free negotiation between the contracting parties on which certain uses are each time allowed by the ECL provision. We conclude that agreements under this system are more flexible, since the ECL provisions can encompass all types of works, as soon as the contracting parties have agreed to.<sup>91</sup> Subsequently, we assume that this form may cover the needs of distance learning; even if legislator has not included “communication to the public” into the uses permitted under the ECL regime for educational purposes, the parties are free to decide on it.

Regarding Sweden, Article 42a of the relevant Act states that the extended collective license is applicable to the exploitation of a work in a specific manner when an agreement has been reached with an organization which represents a substantial number of authors in the sector concerned.<sup>92</sup> The ECL provision is applicable to all forms of reproduction of works in educational activities<sup>93</sup> from photocopying within public institutions and organizations to fulfill their needs for domestic use.<sup>94</sup> We also note that Sweden in 2013 introduced a general collective license regime which enabled the users to digitize published works and make them available online (Article 42 h of the relevant Act).<sup>95</sup>

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<sup>91</sup> Axhamn, J. and Guibault, L., supra note 84, p. 30-31.

<sup>92</sup> Article 42a of Sweden Act on Copyright in Literary and artistic works (Swedish Statute Book, SFS, 1960:729, as amended up to November 1, 2013)-Unofficial translation, available at [file:///C:/Users/user/Downloads/URL\\_English.pdf](file:///C:/Users/user/Downloads/URL_English.pdf), [Accessed 4 October, 2015].

<sup>93</sup> Id at Section 42c.

<sup>94</sup> Id at Section 42b.

<sup>95</sup> The Sweden ECL for mass digitalization was set forth in Article 42h and was enacted in November of 2013, information found in <http://www.copyrightlink.org/issues/extended-collective-licence.html>, [Accessed 5 October, 2015].

An extended collective license system is also adopted under the Finnish Copyright Act, under Section 26 of the Finnish law<sup>96</sup>. Finnish ECL is applicable not only to reproduction in the form of photocopying but also in communicating to the public as soon as the use is done for educational purposes and the communication is made by means other than transmitting on radio or television.<sup>97</sup> Thus, we conclude that distance learning needs can be satisfied under the terms of Finland ECL provisions.

### **3.2 Cross comparison**

In the previous Chapter we overviewed the national laws of the EU states in order to define in which of them the DDE may benefit from the teaching exception. The research led to the classification of EU countries according to the “communication to the public right”. As we already mentioned Luxembourg, Portugal, France, Belgium, Italy and Germany provide copyright exceptions for both reproduction and communication to the public rights. As a result, those countries have implemented the teaching exception of Article 5(3) of the “InfoSoc” Directive in such a way so as to cover both the typical and distance learning education. Contrary to those states, UK, Austria, Slovenia, Spain and Greece exempt only the reproduction of works; consequently the teaching exception applies solely to the typical face-to-face education. Among these states, there are countries such as Greece in which the application of teaching exception is not clear. According to Xalabarder in “Copyright exceptions for teaching purposes in Europe” the same uncertainty as to DDE is also found in Nordic countries.<sup>98</sup> Other than Finnish law, we observed that Nordic ECL provisions are permitted only for reproduction in the merits of educational activities. Flexible regime is found, however, in Denmark where the general ECL gives to the private initiative the discretion to decide which uses will be included under the agreement. In this system the parties are free to agree on both the reproduction and communication to the public right.

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<sup>96</sup> Section 26 of Finland Copyright Act (404/1961, amendments up to 307/2010 included), unofficial translation in English, available at <https://www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf>, [Accessed 7 October, 2015].

<sup>97</sup> Id at Section 14.

<sup>98</sup> Xalabarder, supra note 49, p.11.

Finally, we conclude that within Europe the teaching exception of Article 5(3) of the Directive has been differently implemented by the Member States.

According to Guibault *“the fact that Member States have implemented the same limitation differently, giving rise to a variety of different rules applicable to a single situation across the European Community, constitutes a serious impediment to the establishment of cross-border services”*. He also adds that searching for all conditions needed per territory in order to conclude licensing agreements is a time consuming and worthless process.<sup>99</sup> Respectively, the cross border dimension of e-education in combination with the lack of harmonization between the EU states creates uncertainty and hampers the development of distance learning in the internal market. At this point it should be also noted the wording of Ernst and Haeuserman in *“Teaching Exceptions in European Copyright Law”* in which it is stated that *“sclerotic regime would have great potential to compromise the quality of higher education in Europe and elsewhere, and therefore be contradictory to the official policy of the EU”*.<sup>100</sup> Also, in 2009 in the Report following the consultation on copyright exceptions the Commission committed to creating a suitable ground and adopting further measures for the development of distance education within the Internal market.<sup>101</sup> Additionally, it should be mentioned that European Commission committed to take certain steps and consider legislative proposals by spring 2016 in order to *‘provide clarity on the scope of the EU exception for ‘illustration for teaching’, and its application to digital uses and to online learning.’* Moreover, we cite that the general objective of the EU -as it is stated in the European Commission Communication of 9/12/2015- is to *‘increase the level of harmonization between the Member States and make the relevant exceptions mandatory so as to ensure that they function across borders within the EU’*.<sup>102</sup>

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<sup>99</sup> Guibault, L. (2010), ‘Why Cherry-Picking Never Leads to Harmonisation The Case of the Limitations on Copyright under Directive 2001/29/EC’, *JIPITEC*, 2, pp.62-63.

<sup>100</sup> Ernst, S. & Haeusermann, supra note 78, p.20.

<sup>101</sup> Communication From The Commission Copyright in the Knowledge Economy, Brussels, 19.10.2009 COM(2009) 532 final, available at [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/20091019\\_532\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20091019_532_en.pdf), [Accessed 23 October, 2015],p.6.

<sup>102</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee Of the Regions, Towards a modern, more European copyright framework, Brussels, 9.12.2015 COM(2015) 626 final, available at



In the following paragraph, we are going to cite certain suggestions on how we could face the legal uncertainty on the online uses of copyright protected educational materials within the internal market and enhance the competitiveness of European distance education.

## CHAPTER IV: Suggestions

### *4.1 Introducing an interpretative document to the optional exception*

One possible solution for the Commission to remind the Member States that distance learning should not be prohibited by the teaching exception is the introduction of an interpretative document to Article 5(3) of “InfoSoc” Directive. The interpretative document will remind the EU states that the teaching exception as stated in Article 5(3) covers not only the typical face-to-face education but also is extended to DDE.<sup>103</sup> In fact, the document will repeat what has already been stated in Recital 42).<sup>104</sup>

By adopting this document, Commission will be able to clarify the objective of the exception without the necessity to detail further the conditions applying to illustration of teaching.

However, according to Trialle in *“Copyright limitations for libraries, teaching and research uses”* the European Commission does not usually issue interpretative texts in the field of Copyright. Moreover, such a text is in fact “soft law” and in no case the Member States will probably be obliged to embrace its content. The States could maintain or even adopt a more restrictive approach. Finally, he cites that *“It could also come a bit late as the directive has been implemented years ago in many EU countries. And it would only repeat what is clearly stipulated in Recital 42 of the directive”*.<sup>105</sup>

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<https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-626-EN-F1-1.PDF>, [Accessed 25 January, 2016].

<sup>103</sup> Trialle, supra note 17, p.398.

<sup>104</sup> Recital 42 of InfoSoc Directive, supra note 34: *“When applying the exception or limitation for noncommercial educational and scientific research purposes, including distance learning...by that activity as such.”*

<sup>105</sup> Trialle, supra note 17, p.398.

We believe that an interpretative document is a “convenient” solution to solve the lack of harmonization on distance learning in Europe, since due to its character as “soft law” it does not require stringent legal procedures to be forced. At the same time due to its “flexibility” we agree with Trialle that its publication would not change the situation within Europe.

#### *4.2 Making the exception mandatory*

Obviously a more drastic solution to issue the harmonization on distance learning is to make the teaching exception mandatory.<sup>106</sup> There are two grounds for granting a mandatory character to the exception. First of all, within the Internal Market an exception should be mandatory between the Member States when it induces discrepancies in the Internal Market. In fact, it can be argued that in the digital market there is some fragmentation due to divergent exceptions between the EU Member States. This can be used as a severe argument for making the exception mandatory. Moreover, since an exception is thought to be of public interest for European Union then EU may pursue some uniformity between the Member States. It can be supported that the development of e-learning is of public interest for the European Union market and this demands a minimum of uniformity between the Member States.<sup>107</sup>

The mandatory exception should either be worded in detail or at least set the minimum conditions in critical areas. However, in any case it should precisely define its conditions in order for the States to include distance learning in the beneficiaries of the teaching exception.<sup>108</sup>

We believe that the selection of making the exception mandatory would definitely induce legal certainty as to the scope of the exception and increase harmonization between the states. It is believed that the lack of harmonization hampers the cross border operation between the educational institutions. The harmonization would also lead to the development of e-learning within the internal market and European Union

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<sup>106</sup> Xalabarder, supra note 42, p.399.

<sup>107</sup> Trialle, supra note 17, p. 397.

<sup>108</sup> Ibid.

would demonstrate the safeguard of an EU e-learning offer as leading priority. However, at the same time making the exception mandatory would limit the present leeway of the Member States on the way of implementing the objectives of the Directive. And in some states the conditions imposed in the mandatory teaching may run counter to their domestic principles of copyright and culture. As a result, the option of making the teaching exception mandatory so as to promote the distance learning offer within Europe is not an undisputed idea.<sup>109</sup>

#### *4.3 Solving cross-border issues*

According to Trialle the assessment of whether the use of a work is a violation of copyright or could be excused under an exception depends on the place where the use was made; and therefore, the use should be complied with the legal provisions of that place. The reference to the principle of territoriality to online uses of copyright protected works does not automatically lead to application of different laws conforming to the countries where the work can be accessed. In fact, one could set a certain point where the use can be located, so as to apply that single law to the certain use.<sup>110</sup>

According to Xalabarder, the different domestic laws concerning the educational exception applied to the use of copyright protected works may create different standards to students domiciled in different states.<sup>111</sup> For example, the university may be obliged to obtain licenses to deliver specific articles to students residing in countries where the act of making available is not recognized as a permitted use to the teaching exception or exceptions for educational purposes are not recognized at all. Thus, should those students pay more fees to the university or should they be blockaded from delivering certain materials? He also adds that one possible solution to the conflict of laws matters is to apply the law of the country of upload and storage on the server where the communication to the public started. Yet, in order to avoid the creation of “copyright heavens” for educational institution, it would be better to apply

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<sup>109</sup> Ibid.

<sup>110</sup> Id at p.385.

<sup>111</sup> Xalabarder, supra note 49.

the law of the “degree-granting” country. In that case the prestige of the “copyright havens” countries from which the official degrees are granted will be diminished. The law of the “degree granting” country should be the exclusively applicable to decide whether and to what extent the use of copyright protected materials falls under the exception for educational purposes.<sup>112</sup>

The afore mentioned situation has been examined in Chapter B, where we made a brief reference to the conflict of laws issues of different e-learning educational modes. The analysis led us to the conclusion that irrespective of the minimum or maximum degree of the cross border dimension of the e-learning mode, there is uncertainty as to how to locate the use concerned by an exception to copyright and whether an educational use is legitimate or not. Thus, a more preferable solution to the problem of cross border dimension of e-learning is to pursue further harmonization of the national exceptions dealing with teaching purposes.

#### *4.4 Establishing extended collective licensing agreements*

Except for proposing ideas on modifying the existing legal status in Europe we may introduce a different system to be adopted by the EU member states. We have already commented on the features and flexibility of the extended collective license practiced in Denmark. The ECL has also been considered as a possible solution to the copyright issues by the European Commission’s Green Paper on Copyright in the Knowledge Economy.<sup>113</sup> This type of ECL provision differs to the traditional sectorial provisions to the point that the contracting parties are free to negotiate the uses that will be permitted under the teaching exception without the existence of legal restrictions. As a result, except for the “reproduction”, the use of “communication to the public” of educational materials (which is necessary for the function of distance learning) may be permitted if the parties agree on it.

The advantages of promoting such a system to all the EU states are various. First of all, the system ensures that all works and uses are contracted for educational purposes.

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<sup>112</sup> Ibid.

<sup>113</sup> Riis, T. and Schovsbo, J. (2010), ‘Extended Collective Licenses and the Nordic Experience - It’s a Hybrid but is It a Volvo or a Lemon?’, Columbia Journal of Law and the Arts, 33(4), p.8.

Moreover, the process is simplified and the legal uncertainty is diminished since all the uses and works permitted are written in the contracts. Finally, it is ensured that the authors or right-holders are at least equitably remunerated for the educational uses.<sup>114</sup> At this point it should be also stated that according to the Preamble of the 'InfoSoc' Directive <sup>115</sup>(paragraph 18) "is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses". Thus, the Directive classifies ECLs as "arrangements for rights management" and gives to the Member States the discretion to operate or not such rules.<sup>116</sup>

However, according to Ernst and Haeusermann in *"Teaching Exceptions in European Copyright Law"* there are also some drawbacks to this system. The existing situation in Denmark has shown that there is no guarantee that an agreement between the parties will eventually be concluded. They also add that *"even if a license agreement is finally reached, a lengthy and dissatisfying period of legal uncertainty would prevail in the meantime"*.<sup>117</sup> Additionally, another argument against this regime is that the educational institutions will be burdened with a fee which otherwise would be missed under the teaching exception.<sup>118</sup> Concerning the remuneration given to the rightholders the examination of ECL regime reveals that the foreign rightholders do not receive any compensation for the use of their works.<sup>119</sup> Remuneration is distributed to the foreign right-holders only in case there is an agreement between the organization that administers ECL and the foreign organization.<sup>120</sup> Moreover, the fact that under the regime of collective licenses a percentage of the compensation is kept to the benefit of the members of the organization has been criticized. Finally, it is worth mentioning

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<sup>114</sup> Xalabarder, R. (2009), 'WIPO Study on Copyright Limitations and Exceptions for Educational Activities in North America, Europe, Caucasus, Central Asia and Israel' WIPO Doc SCCR/19/8 , available at: [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_19/sccr\\_19\\_8.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_8.pdf) , [Accessed 27 August, 2015],p.133.

<sup>115</sup> See Preamble of the Directive, supra note , par. 18.

<sup>116</sup> Riis, T. and Schovsbo, J. (2010), 'Extended Collective Licenses and the Nordic Experience - It's a Hybrid but is It a Volvo or a Lemon?', *Columbia Journal of Law and the Arts*, 33(4), pp.1-26., p.7

<sup>117</sup> Ernst, S. & Haeusermann, D. (2006), 'Teaching Exceptions in European Copyright Law – Important Policy Questions Remain', Berkman Center for Internet & Society, Harvard Law School, Research Publication No. 2006-10, p.20.

<sup>118</sup> Ibid.

<sup>119</sup> Riis and Schovsbo, supra note 116, p.20

<sup>120</sup> Ibid.

that some scientists highlight a basic argument against the establishment of ECL regime: contracts should not be allowed to override limitations and exceptions which have been statutorily granted in the domestic legislation.<sup>121</sup> However, at the same time, Xalabarder comments that the recent trend shows that *“exceptions to copyright are default rules that can be overridden (waived or limited) by contract”*.<sup>122</sup>

We are of the opinion that the establishment of ECL system (as practiced in Denmark) in the majority or all the EU states could cover the gaps of the teaching exception which hinder the establishment of the distance learning educational mode in the internal market. In fact, in those countries where the teaching exception does not include communication to the public, the establishment of the ECL provisions will enhance the development of distance learning programs. Moreover, such a system will improve the legal certainty on which uses are permitted under the educational activities and the cross border cooperation between EU universities will be also encouraged. Finally, it is worth mentioning that the ECL regime provides for an equitable remuneration to the authors, which is at least an award for their creation, in comparison to some copyright systems, such as the Greek one, where the teaching exception provides the use of works without permission and without fee. However, at the same time the education is a public right. As a result, we believe that by assigning the conditions regarding the use of educational materials to the contracting parties, the opposing interests of authors-collecting societies and the educational institutions-users may risk the public right to knowledge and education. It has already been stated that the exceptions are justified in order to balance the opposing interest of the authors and the public right to knowledge. Thus, we believe that if we leave to the universities and the collecting societies representing the authors to exclusively decide on the conditions of educational uses, then the rights of the ultimate users, the students will be exclusively at the mercy of the contractual decisions of the first ones.

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<sup>121</sup> Xalabarder, supra note 61, p.129.

<sup>122</sup> Ibid.

## CHAPTER V: Conclusion

In this dissertation we exercised the copyright limitations in DDE within the European Union. First of all, we briefly analyzed the Copyright notion and the legal connection between Copyright and teaching activity. We noted that in both typical face-to-face education and DDE the teaching activity is usually based on the use of copyright protected materials. For that reason and since education is thought to be public right the majority of the Member States have adopted in their domestic legislation teaching exceptions.

In the second Chapter we focused on the notion of DDE and the different mode of e-learning programs. Distance learning is a mode of education which differs from the traditional education to the point that students are separated from their instructors on time and space. The different modes of education cited in order to demonstrate the cross border dimension of distance learning and the various principles and difficulties to define the applicable law for each educational activity.

The choice of law governing the educational use is based on the criterion adopted: location of the servers; location of the material act of upload, location of the centers of activities of the uploader, location of the exploitation. Respective to the criterion chosen the applicable law may differ for the same educational use. As a result, the universities operating e-learning programs are obliged to be confronted with the law provisions and teaching exceptions of different laws. This process is not only complicated but also wasteful.

Following those notes we referred to the European legal context relevant to the teaching exception. Article 5(3) of the 'InfoSoc' Directive provides for teaching exception in the meaning that the use of copyright protected works is permitted in case the author's name is indicated and the teaching activity is non-commercial. We also noted that the teaching exception applies to both the typical face-to-face education and distance learning mode according to the Recital 42 of the Preamble of the said Directive.

Furthermore, we examined the optional nature of the teaching exception and classified the differences observed between the national laws

- the rights covered by the teaching exceptions,
- the nature and extension of works which are covered by the exception,
- the eligible institution which can benefit from the teaching exception and
- the compensation which is required or not.

The most important difference which is relevant to the disputed theme of our paper is the rights covered by the teaching exception. Some countries covers both the reproduction and communication to the public right and some others covers solely the reproduction one. Thus, DDE may benefit from the teaching exception solely in countries where 'communication to the public' is included in the uses covered by the exception.

In the third Chapter we categorized the EU states in three categories. In the first category we examined the EU states which include in the teaching exception both the reproduction and communication to the public right. This is the case of Luxembourg, Portugal, France, Belgium, Italy and Germany. Following that, we commented on the states which cover solely the reproduction right and as a result fail to meet the needs of DDE. This is the case of UK, Austria, Slovenia, Spain and Greece. Finally, we commented on the extended collective license regime found in Nordic countries, where the educational uses are regulated by the free negotiations between the contracting parties. The outcome of those differences between the EU states is legal uncertainty and the impending of the development of DDE within the internal market.

In the last paragraph we cited some suggestions in order to enhance the position of DDE in Europe. First of all, one solution could be the introduction of an interpretative document to remind the Member States that the teaching exception as stated in Article 5(3) should be extended to DDE. Secondly, another possible solution is to make the exception mandatory with precisely defined conditions so as all the EU states include the 'communication to the public' use in their teaching exception. Furthermore, an additional solution would be to find a way to solve the cross border issues of DDE. However, we concluded that this is not an easy task. Finally, we



suggested the extension of the ECL system as operating in Denmark to all the EU states.

We conclude that education deserves more efficient exceptions in the domestic laws of the EU states and the solution should be given in European level. The current education is considered fundamental right in Europe and at the same time constitutes the basis for the development of the economy. The Internet may consist a huge 'asset' in the spread of education throughout Europe. At the same time the fragmentation and disparity of national laws aggravates the development of on-line teaching. We believe that the ECL system (as it is operating in Denmark) is a flexible system capable to solve the problem of different laws and fulfill the gaps between the national laws of the Member States. However, at the same time we cannot ignore the argument against the ECL system that contracts should not be allowed to override limitations.

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