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Copyright Limitations and Exceptions in an E-Education Environment

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Abstract

E-education plays an important role in improving access to knowledge for the present and the next generation society. New and emerging technologies give the possibility to educators to reach individuals and communities in numbers and in manners that were in the past unimaginable. Nevertheless, capacity without content is useless; e-education involves -if not always at least in most of the cases- the use of pre-existing copyrighted works. The 'e-educational institution' has two options: either to seek license from the copyright owner or to rely on the existing copyright exceptions or limitations. Obtaining license is not always easy due to difficulties in locating the copyright owner, due to the unreasonable process or terms and due to delays in getting a timely response. On the other hand it is questionable whether the existing limitations or exceptions do cover all the uses of the copyrighted works during -or for- the e-education activities.

The aim of this paper is to present the relevant copyright exceptions or limitations and to analyze whether and to what extent these copyright exceptions, designed for the 'analogue' world and for the traditional 'face-to-face' education could be also applied in the digital world and in the 'e-education'. The analysis will not be restricted only to exceptions and limitations specifically designed for education purposes but also others that they can be used in this regard, such as the quotation exception and the exception in favour of libraries. Most importantly though the three-step-test will be scrutinized in order to decide whether the limitation for 'e-education' purposes could successfully pass this test. Basis for this analysis will be the international and the community legal framework, and some selected national laws. Exploring the issue of the relevant exemptions and limitations mention will be made to the technological protection measures that are applied to works. Finally, the question of contractual overridability will be explored, i.e. the intersection between contractual agreements between the rightholders and the users and the teaching exception.

1. Introduction

Distance education is a vibrant and burgeoning field. The term is applied to a range of educational processes that is extremely diffuse. The most fundamental definition (and the simplest one) of the distance education is the following: 'a form of education in which

students are separated from their instructors by time and/or space' (Report on Copyright and Digital Distance Education, U.S. Copyright Office, 1999). A detailed analysis of the relevant terminology exceeds far the scope of this paper.

In the focal point of this paper stands 'e-education'. E-education revolves around the use of Information and Communication Technologies (ICT) to accelerate the achievement of education goals with the ability to: apply ICT skills to access, analyze, evaluate, integrate, present and communicate information; to create knowledge and new information; to enhance teaching and learning through communication and collaboration by using ICT; and function in a knowledge society by using appropriate technology and mastering communication and collaboration skills (Natarajan, 2005, p.1849). E-education involves e-teaching and e-learning along with the various administrative and strategic measures needed to support teaching and learning in an internet environment (Campbell, 2001).

For the needs of this paper we will use the terms 'e-education', 'e-learning' and 'digital distance education' interchangeably to refer to all educational activities, conducted by means of online digital technologies.

Classroom activities rely increasingly on a variety of basic and advanced telecommunications technologies to serve teachers and students including for example one-way and two-way open or scrambled broadcast, cable and satellite delivery, fiber-optics and microwave, cds and internet. The use of network based learning represents a significant part of the regular teaching acts. Nevertheless, capacity without content is useless; e-education involves -if not always at least in most of the cases- the use of pre-existing copyrighted works. Not only digital born works but also analogue works such as books, articles, music, photographs, drawings and maps are digitised and used for educational purposes (Guibault, 2003, p.26).

In order to determine in which way copyright law is involved with e-education, it is necessary to describe briefly the general principles of copyright law, to see which authors' rights are implicated by digital distance education uses and the extent to which existing copyright limitations and exceptions permit such uses. Are the provisions of copyright law concerning the educational use of content among the most important obstacles to realizing the potential of digital technology in education? Are innovative educational uses of digital technology hampered by the restrictions of copyright? (McGeveran & Fisher, 2006, p.7). To those crucial questions the present paper will attempt to give answers.

Copyright law grants the creator of an original work of authorship a set of exclusive rights involving different means of exploiting the work (economic rights) and of protecting the author's personality in connection with his work (moral rights). The economic rights include inter alia, the right to reproduce, the right to distribute, the right to communicate the work to the public, as well as the right to transform it. All the rights come into existence automatically, once the work has been expressed in any form. The economic rights are transferable. In practice the creator of a work licenses or transfers some or all of these rights to others. The owner of copyright can sue others who infringe on the exclusive rights covered by copyright during its protection term (fifty years after the author's death according to Berne Convention (article 7(1)) and seventy according to European community law (Article 1(1) Directive 2006/116 [2]). Rightholders though do not have unlimited power to control all potential uses of their works. Some of the most

fundamental elements of copyright support this balance. For example, copyright does not confer any control over ideas and facts, while the term of protection is limited. Additionally, legislators have fashioned a number of exceptions and limitations allowing uses of content notwithstanding the exclusive rights granted to creators.

Some limitations are adopted on the basis of major public interest considerations, some others are founded on the defence of fundamental rights and freedoms; the promotion of education is definitely one of them. [3] The public interest in using copyright protected works is particularly compelling in respect of education, which is not only a public good in itself, but is a necessary prerequisite for other public goods, such as the development of skills necessary for both the economy and the state, and an informed and empowered citizenry. Exceptions and limitations for education play also an important role within copyright schemes, since education is almost always necessary for the development of future creators and users of works and inventions. Even in the first modern copyright statute in the world, the Statute of Anne, was not only entitled an 'Act for the Advancement of Learning' but it contained provisions to ensure that works were available for education (Rens, 2008, p.6).

So, although copyright consists of exclusive rights on the author's work, it does take into consideration access to knowledge. Legislators (international, European and national ones) provide for exceptions to the exclusive rights based also on teaching and research purposes of certain uses of the protected work. For the last decades, the question of how to best structure conditions of access to knowledge goods has been one of the most contested issues in international copyright law. [4]

The necessity for establishing teaching exceptions in online educational context is best illustrated by an example.

A professor creates an online course that includes a section on the historical significance of Normandy landings during the Second World War. If the professor writes his own material, he may then make it available for education, even online. If he needs to make use of a photograph, however, he must look to another source, as he was not present of course to photograph this event. The exclusive rights regarding the use of the photo belong to somebody else, usually the photographer or a rightholder. The professor normally has to ask for his permission, before he uses the photo, unless a limitation or an exception applies for this use. If he decides additionally to compile a number of texts for the teaching of the upcoming online course, he will have to scan digitally some excerpts from a textbook and download various articles from a scientific electronic database, working from his own office library. He will store both the excerpts and the articles on his hard drive. Finally, he will upload the scanned file and the electronic copies of the articles on his university web server and give passwords to the students enrolled in his class, so that they can access the materials from their personal computer at home and copy them on the computer's hard disk, or on a flash memory stick, or in print (in the meanwhile the digital transmission and reception of the work on recipient's computer, including ram copying have been occurred) (Ernst and Haeusermann, 2006, p.5; Xalabarder, 2003, p.5). All those acts made by the professor have a direct copyright effect. The scanning of some print material involves the reproduction right. The uploading of a work on a server includes both reproduction and communication to the public. The digital transmission and

reception of the work are enabled by temporary reproductions of the works and some RAM copies enable the work to be displayed on the computer. Finally, the downloading involves again the right of reproduction.

Thus, there is a tension between copyright in the works and the educational imperative. E-learning is unquestionably beneficiary for the quality of education, but it may infringe copyright as to the copyright protected study materials that are used. Education requires that learning materials including copyright protected works and material should be available as examples, illustration and as object of study. Copyright law obliges to ask for a license before the use of a work, unless a copyright exception or limitation applies. The 'e-educational institution' has two options: either to seek license from the copyright owner or to rely on the existing copyright exceptions or limitations (Xalabarder, 2003, p.107). Obtaining licence for those educational uses is not always easy for the educators due to difficulties in locating the copyright owner, due to the unreasonable process or terms and due to delays in getting a timely response. But even if copyright holders were located and were willing to give the necessary license, this could turn out to be prohibitively expensive. Therefore an exception that provides for educational uses without requiring permission is necessary. In the pre-digital world some of those educational uses were allowed under detailed exceptions. However, in a digital environment the situation is more confused and blurred (Rens, 2008, p.6). Education exceptions set out in the copyright spectrum seem to be too limited for the digital age, where information is no longer confined to textbooks but can be shared over electronic whiteboards and computer networks (Gowers Review of Intellectual Property, 2006, p.47).

The aim of this paper is to present the relevant copyright exceptions or limitations and to analyze whether and to what extent these copyright exceptions, designed for the 'analogue' world and for the traditional 'face-to-face' education could be also applied in the digital world and cover all the uses of the copyrighted works during - or for - the educational activities in the framework of e-education. Object of our analysis will be the limitations specifically designed for teaching purposes but also others that they can be used in this regard, such as the quotation exception and the exception in favour of libraries. At the first part we will analyze the relevant provisions for limitations and exceptions in the international context (Berne Convention, Trade-Related aspects of Intellectual Property Rights (TRIPs), Rome Convention, WIPO Copyright Treaty (WCT) and *WIPO Performances and Phonograms Treaty (WPPT*)) and we will conclude with the relevant provisions in the European community law.

In this paper we will focus only on the activities involving the use of pre-existing copyrighted works or otherwise protected material for the needs of e-education and not on activities involving the creation and subsequent exploitation of the works originated in connection with the instruction conducted through the online university 'campus' (that is, authored by professors, students, and other personnel of the educational institution). [5]

Finally, at this point we have to make a short clarification: Exceptions and limitations as regulated in international and national copyright law can be broken down into three categories:

Firstly, there are limitations of copyright, which expressly remove certain categories of works from the field of protection (no protection is required for the particular kind of

subject matter in question). Secondly, exceptions to copyright protection exist which allow the giving of immunity (usually on a permissive basis) from infringement proceedings for specific acts or where certain conditions are met. Thirdly, the category of compulsory licensing mechanisms exists which guarantee permission to perform an otherwise restricted act in relation to a protected work, under the condition that is subject to the payment of the compensation to the copyright owner (Ricketson, 2003, p.3; Garnett, 2006, p.1).

From here on for ease of reference we use the terms limitation and exception interchangeably. Where the context requires specificity though, the precise terminology is used.

2. International Legal Framework

2.1. Berne Convention

Berne Convention provides for two exceptions that may affect teaching related uses in the digital world: the exception for teaching purposes and the imperative exception for quotation. In addition, countries that are members of the Berne Union may introduce any other exception to the reproduction right provided that the three-step test is fulfilled (see below) .

2.1.1. Use of Works for Teaching Purposes (Article 10(2) Berne Convention)

Requirements

The relevant provision is Article 10(2) Berne Convention, which provides as follows:

'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 use, 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 that such use is compatible with fair practice.' [6]

This exception regulating the use of works for teaching purposes is not mandatory for the members of the Berne Convention; it still remains a matter for national legislation. All what this Article does, is to set the limits within which such regulation may be carried out.

Since it is the only provision that relates per se with the education in the international legal framework, it is considered necessary to analyze it and to draw some conclusions in relation to the subject in question: the drafting of the copyright boundaries as to e-education.

First, the term 'teaching' should be examined. In conformity with the Records of the Stockholm Conference (WIPO, Records of the Intellectual Property Conference of Stockholm, June 11- July 14 1967: Proposals for Revising the Substantive Copyright Provisions, p.1148) the 'word 'teaching' was to include teaching at all levels - in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general

public but not included in the above categories, should be excluded'. It seems that the 'teaching' should lead to an official degree; other programmes, such as adult education programmes, commercial courses or courses arranged by organizations for their members or employees, should be excluded, for they could not fit in the exception (Ricketson, 2003, p.14; Xalabarder, 2003, p.155; Dreier, in Dreier/Hugenholtz, 2006, p.45). Furthermore, the use made under a teaching exception must be for illustration of the subject matter taught and it must relate to the teaching activities (Dreier, in Dreier/Hugenholtz, 2006, p.45).

Two additional requirements of Article 10(2) are that the use of the works should be: a) to the 'extent justified by the purpose'; and b) 'compatible with fair practice'. The first condition, i.e. that the extent of illustrations for teaching should be justified by the teaching purpose means that the amount of the work used should not be more than necessary in order to illustrate the subject matter taught. Consequently, the utilisation of works for teaching purposes is not subject to any determined quantitative restriction. Even if the use of a whole work is necessary for teaching purposes, it should be allowed under the appropriate circumstances (e.g. in the case of an artistic work or a short literary work) (Ricketson, 1987, § 9.27(2); Dreier, in Dreier/Hugenholtz, 2006, p.45). The words 'by way of illustration' could be interpreted that they impose some limitation to the extent of a work used, albeit it could not exclude the use of a whole work in certain limited circumstances (Ricketson, 1987, § 9.27(2)). According to one opinion, this is not an additional requirement of the exception but only a reminder that the exception begins and ends with the teaching purpose (Xalabarder, 2003, fn. 318; Xalabarder, 2009, p.15). Nothing is mentioned though regarding the number of copies allowed under this exception and so no limitations exist. The only limitation is that the making of multiple copies must be 'compatible with fair practice'.

This brings us to the second requirement: 'compatible with fair practice'. In view of this requirement it should be underlined that the use of a work made under this teaching limitation must be 'fair' and must keep the balance between the different stakeholders' interests (the education needs of the general public and the authors' rights to exploit their works). Different technologies and different means of exploitation may require different treatment as to copyright exceptions and may affect the interpretation of 'fair practice' towards them. Educational activities conducted on the internet pose far greater risks for the authors' rights on those works, than similar activities involving publications, recordings, or even educational broadcasts for teaching purposes in the 'analogue' world (Xalabarder, 2003, p.157). This is the reason why this requirement should be treated in the light of the three-step test, that it will be examined later (II.A.3).

Finally, works that are covered by the teaching exception are 'literary or artistic' ones. It is accepted that the term refers to Article 2(1) Berne Convention and it includes not only the works mentioned specifically there but every production in the literary, scientific and artistic domain that falls under the Berne Convention (Dreier, in Dreier/Hugenholtz, 2006, p.45).

Apart from the requirements set in this paragraph a further one is included in Article 10(3) Berne Convention. According to this one, where use is made in accordance with the exception for teaching (or for quotation), the name of the author (or his pseudonym) - if it appears on the work - and the source should be mentioned. Consequently, no such

obligation exists when the work is anonymous (Dreier, in Dreier/Hugenholtz, 2006, p.46). This requirement seems at first sight unnecessary, since the moral right of attribution (paternity right) is safeguarded in Article 6bis Berne Convention and there was no apparent need to repeat it. From the legislative history of the provision though turns out that the intent of the legislator was to underline that the paternity right has to be applied in any case on the exceptions for teaching and quotation, while no mention is made regarding the integrity right. Modifications and alterations to a work are often unavoidable, when a work is used for teaching purposes and certain flexibility is needed for a functional teaching exception (Ricketson, 1987, 9.28; Ricketson 2003, p.16). Therefore, the application of the right of integrity is more relaxed in the exception for teaching purposes (and for quotation). In addition to the author's name also the source should be indicated (e.g. all the publication details), so as to become easier to locate the work in question (Dreier, in Dreier/Hugenholtz, 2006, p.46; Ricketson, 2003, p.16).

E-education

The next important question is whether this exception could refer apart from 'face-to-face' also to distance education and more specifically, whether it could be applied for digital distance education. It is supported that there is no reason to exclude e-education from the exception for teaching purposes in the Berne Convention context (Ricketson, 2003, p.15; Xalabarder, 2003, p.158; Xalabarder, 2007, p.378).

To this conclusion champion several facts: firstly, the range of use that is permitted by Article 10(2) Berne Convention; it covers the right of users to utilise works through illustrations not only in publications but also in broadcasts or sound or visual recordings for teaching purposes. Is this list exhaustive? According to Ricketson's interpretation, sound and visual recordings include tapes and videograms, as well as phonograph records and cinematographic films (1987, § 9.27(5)) (*contra* Dreier, in Dreier/Hugenholtz, 2006, p.46). In this case also digital media, such as cds and dvds could be included under the exception.

For the clarification of the international legislator's intent, useful tool could be the legislative history of this Article. Based on this, it turns out that the intent was to enable educators 'to take full advantage of the new means of dissemination provided by modern technology' (Ricketson, 1987, § 9.27(5); Xalabarder, 2003, p.159; Xalabarder, 2004, p.5). Since the today modern technologies encompass the massive use of internet, e-education should be covered under this exception, if and to the extent that the rest prerequisites of this Article are met.

Secondly, in the case of broadcasting, the works could be disseminated to a wider audience than those for whom the instruction was intended. Evoking again the legislative history of the provision, it becomes obvious that the Main Committee decided against the proposal to impose restrictions on broadcasting (limit the scope of the exception to educational broadcasts carried out in teaching establishment or in schools), accepting the risk of being the broadcasting receivable by a much larger section of the general population (Ricketson, 1987, § 9.27(5)). Therefore we could draw the conclusion that the notion of 'broadcasts' implies the acceptance of digital distance education under the exception.

Besides, this limitation allows teachers at all levels of education to incorporate selections of copyrighted works as illustrations using different types of media, under the condition that the use is compatible with fair practice. This provision of Berne Convention refers to the 'use' of the work and it does not restrict this limitation only to the right of reproduction but also to other authors' rights; thus it is broad enough to encompass digital distance learning, which involves at least the rights of reproduction and communication to the public. Accordingly, so long as the purpose is teaching, the use of digital technology to transmit or conduct such teaching should not threaten the legitimacy of the limitation in any way (Ok ediji, 2006, p.21; Xalabarder, 2003, p.156; Ricketson, 2003, p.15).

So, to wind up, Article 10(2) Berne Convention provides for an open, flexible and technology neutral exception for teaching purposes which instead of any specific quantative or qualitative restrictions on exempted uses, is only limited on two grounds: the extent justified by the purpose and fair practice. Ultimately the three-step test must also apply, as we will analyse it later. Additionally, the teaching exception applies to all kind of works that may be used in full or in part, provided that the conditions are met, and it is open to include teaching uses on an online environment.

Nevertheless, most of the countries through the enactment of domestic legislation were more reluctant in this concern and they have significantly narrowed the scope of this Berne exception (e.g. The Technology, Education and Copyright Harmonization (TEACH) Act, 17 U.S.C.§110(2)(2000), Ok ediji, 2006, p.21).

2.1.2. Exception for Quotations (Article 10(1) Berne Convention)

Another exception that, although it does not refer per se to teaching, it could be considered relevant for e-education purposes is the exception for quotations (Article 10(1) Berne Convention):

'It shall be permissible to make quotations from a work which has already been lawfully made 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'.

Article 10(1) Berne Convention uses a mandatory language to confer an exception for quotations to copyrighted works. The quotation exception does not distinguish between different kinds of works; quotations may be taken from any category of works, including literary works, films, records, radio or television programmes etc., provided they have been 'lawfully made available to the public,' without any restriction as to the amount that may be quoted, except that only the amount 'justified by the purpose' is each time allowed. No more may be quoted than necessary in order the purpose of the quotation to be fulfilled (Dreier, in Dreier/Hugenholtz, 2006, p.45). Usually the quotation means a small part of the work but in certain circumstances a full quotation of the whole work is indispensable, as for example in the case of artistic works (Ricketson, 2003, p.12; Dreier, in Dreier/Hugenholtz, 2006, p.45).

Furthermore, the making of quotations should be compatible with 'fair practice' and consistent with the purpose for which quotations are necessary. The practice is 'fair' when quotations are used in support of the ideas expressed by the person quoting, when

quotations are used to illustrate someone's views or to criticize someone else's work, and, generally speaking, when the quotations do not merely substitute for the use of the work that has been quoted from (Dreier, in Dreier/Hugenholtz, 2006, p.45).

The previous statement constitutes exactly the specific distinction and the key difference of this exception. Unlike other exceptions in Berne Convention, this one is not restricted to certain, prescribed uses; quotations may be used for any purpose, so long as they are made within the stipulated context . Therefore, quotations made for educational purposes are also covered by this exception, just as those made for scientific, critical, informational, judicial, political and entertainment purposes.

Thus, since there is no restriction, this exception could be used also for the education needs. But what is the benefit thereof, since a specific exception for teaching already does exist? The mandatory character of the exception for quotations leaves no discretion to the members of the Union to apply this limitation to their national laws, while they do have discretion regarding the exception for teaching. The exception for quotation requires though the incorporation of the quoted work into a new work ('quotations ... in the form of') and only some teaching uses would comply with this requirement (Xalabarder, 2003, p.160). Hence, the two exceptions are complementary to each other: quotations made for educational purposes are of a mandatory character and other teaching uses that do not fit under the quotation exception are covered by the teaching exception of Article 10(2).

The next crucial for our purposes question is whether this exception for quotation could be also evoked for e-education purposes. Quotations are not limited only to reproduction right but cover all different means of exploitation, thus the making of quotations within the digital context and the internet is also included (Dreier, in Dreier/Hugenholtz, 2006, p.44; Xalabarder, 2003, p.160; Ricketson, 2003, p.12). As a result, the quotation exception could be useful for our needs to justify the use of works for e-education purposes not only in cases where no exception for education purposes is provided for but also in cases where although such teaching exception does exist, its application in the online environment is explicitly excluded.

2.1.3. The 'three-step test' - the general exception

Apart from the detailed exceptions Berne Convention provides a more general one in Article 9(2), which has the form of a test for determining whether or not an unauthorised reproduction is lawful. The three-step test, as it is known, provides as follows:

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

This Article stipulates three distinct conditions that must be complied with before an exception to the reproduction right can be justified under national law:

1. Limitation of application to 'certain special cases';
2. The unauthorized reproduction 'does not conflict with the normal exploitation of the work'; and
3. The unauthorized reproduction 'does not unreasonably prejudice the legitimate

interests of the author'.

The three-step test constitutes a vague and general criterion that allowed countries to grant exceptions to the - then - newly enshrined reproduction right and a formulation of compromise broad enough to cover all exceptions included in the legislation of the signatory countries. [7]

Although this provision in the framework of the Berne Convention refers only to the reproduction right, the TRIPs Agreement and the WCT (and the WPPT for the neighboring rights) extended the application of the three-step test to all exclusive rights, to exceptions granted under Berne Convention (because of the incorporation of the latter into TRIPs) and also to any new exceptions that Member States may adopt in the future (Xalabarder, 2003, p.163). Therefore the three-step test applies not only to the reproduction right but also to all the exceptions and consequently also to the exception for teaching purposes (and for quotation).

No authoritative interpretation was given to the three-step test under Berne Convention (such an interpretation could only be given by the International Court of Justice). The only case in international context that has been heard was the IMRO case in front of the WTO Panel (hereinafter US Section 110(5) Report) (Xalabarder, 2003, p.163). Despite the complexity that the interpretation of the three-step test presents, we will look shortly at the three-step test itself and afterwards we will examine how it is applied on the digital distance education. All three steps of the test are cumulative.

First step: 'Certain Special Cases'

The limitations and exceptions should be confined to 'certain special cases'. The term 'certain' means that the cases (i.e. the exceptions) should be clearly defined, known and particularized, without though being explicitly identified but guaranteeing a sufficient degree of legal certainty. 'Special' is interpreted as of a narrow scope or reach, or exceptional in quality or degree. The exception should be narrow in a quantitative as well, as in a qualitative sense. An exception should be the opposite of a non-special, that is to say a normal, case (US Section 110(5) Report, § 6.109; Ricketson, 2003, p.21).

Second step: 'Does not conflict with the normal exploitation of the work'

Regarding the second step it is accepted that it means that there should not be a conflict between the exception and the ways in which an author might reasonably be expected to exploit his work in the normal course of events (e.g. in the case of judicial proceedings) (Ricketson, 1987). More specifically the exempted uses should not enter into economic competition with the ways that authors normally extract economic value from that right and deprive them (the authors) of significant or tangible commercial gain (US Section 110(5) Report, § 6.180). If we would accept though a completely economic approach of the second step, considering that any free use permitted under Article 9(2) would have the potential of being in conflict with a normal exploitation of the work, this would have as a consequence that the third step would never be reached. Therefore, we should include in the consideration of the second step non-economic normative considerations, namely whether this particular kind of use is one that the rightholder should control or not. In this way there may be uses that will not be in conflict with what should be within the normal exploitation of the work (in a normative sense) but it may not satisfy the third step

(Ricketson, 2003, p.25).

Furthermore, there are other parameters that have to be considered and in any event there has to be a case-by-case assessment by national courts. There is some uncertainty but the ultimate touchstone is that the use must be 'fair' (Ricketson, 2003, p.69).

Third step: 'Does not unreasonably prejudice the legitimate interests of the author'

It is a fact that any exception prejudices to a certain degree the author's interests. The key factor is the term 'unreasonably'. Prejudice to the legitimate interests of authors could turned out to be 'unreasonable', if the exception causes, or could cause, an unreasonable loss of income to the respective rightholder taking into account also the importance of the other interest at stake, that justify the exception (US Section 110(5) Report, § 6.229). The unreasonable prejudice implies the lack of proportionality. The unreasonableness of this economic harm, i.e. the prejudice, that such an exception could cause, might be countered by placing some conditions on the use of the work or even by a payment made for this use Xalabarder, 2003, p.165; Knights, 2000, p.5; Ricketson, 2003, p.27). The exception may take the form of either a free use or a legal (compulsory or statutory) license, depending essentially on the concrete circumstances, among them and the number of the uses made (Ricketson, 2003, p.27). Although the unreasonable prejudice to the legitimate interests of the authors could be avoided by the payment of remuneration, this would not cure a use that conflicts with the normal exploitation of the work (second step) (Ricketson, 1987, § 9.8).

Application of the three-step test on the e-education exception

The digital revolution commanded an adaptation of the underlying balance between the different stakeholders in order to preserve a fair equilibrium. The first step was to adapt the economic rights to the digital environment and to guarantee the legal protection of the technological protection measures. [8] No definite solution though is given regarding the thorny question of limitations and exceptions in this environment (the only relevant provision was the Agreed Statement of the Article 10 WCT, see below) (Geiger, 2007a, p.2). The national legislators hesitate to intervene in order to adapt fully the system to the imperatives of the information society. This causes inconsistency, since the status of exclusive rights is modernized, while limitations and exceptions remain old fashioned and confined to a narrow conception. The balance of interests is modified in favour of the rightholders and against the users, leaving some aspects of copyright's social function uncovered. The three-step test could become the necessary instrument of flexibility to adopt each case to the modern digital world and to insure a balanced application of copyright limitations. The rightholder should not have the power to control all uses of his works, as some harm may be justified in light of values deemed superior to his interest. A proportionality test should be invoked by the judge to consider the justification behind the limitation (Geiger, 2007a, p.2). Bringing this discussion into the subject in question, it is relevant to consider whether the expanded in digital online environment exception for education purposes (in other words the digital distance education) could pass successfully the three-step test. The following analysis of the three-step test in the context of e-education exception does not apply only for the Berne Convention but also for any other international or European legal instrument, where it is mentioned (TRIPs, WCT, WPPT and Directive 2001/29/EC).

First step

Regarding the first requirement, in order the use of a work for teaching purposes in the context of e-education to be qualified as an exception, it should be a 'certain special case'. This means, as it is already analyzed, that the case in question should be clearly defined, known and particularized, without though being explicitly identified but satisfying a certain degree of legal certainty, narrow in quantitative as well as in a qualitative sense. This first step intends to keep the scope of the exception qualitatively and quantitatively restricted, so that it may be deemed a 'special case'. Applying this requirement to our case leads us to the necessity to define a wide, but well specified exception and to determine for this purpose the educational institutions, which could evoke this one, to determine the allowed teaching activities, that should benefit from the teaching exception and the exclusive rights that would be limited (Xalabarder, 2003, p.165).

The beneficiaries of this exception - apart from teachers and students - should be educational institutions. There is no reason to limit the application scope of the exception to cover only non-profit educational institutions. What is being protected is the public interest regardless of the non-profit or for-profit nature of the institution (nevertheless this parameter could be taken into account when establishing the price that the institution may pay for the use in question in the context of the third step). The use of the works should be made only for the purpose of teaching; any other kind of 'cultural activities', especially on the internet, where any webpage may be deemed to 'teach' something to its visitor should be excluded from the exception's scope. The use of works to cover the needs of instruction is allowed but not the supplementary readings or studying materials (Xalabarder, 2003, p.165-166).

When applied to a digital networked environment, teaching uses should be limited to those rights that are necessary to post, transmit and download the work used for teaching purposes.

Second step

The use of a copyrighted work in the context of e-education should not conflict with the normal exploitation of the work, so as the second step to be satisfied. Unquestionably digital distance education is a new, growing, and potentially lucrative market. This extension of teaching exception to cover also the e-education needs could be considered to enter into economic competition with the ways that authors (or rightholders) normally extract significant commercial economic gain. We will consider the economic analysis of this digital teaching exception, however, at the third step. At this point our previous remark about the second step acquires significance: non-economic normative considerations should also be taken into account, since otherwise there would be little - if any - work to be done by the third step, which is concerned specifically with the interests of the author (Ricketson, 2003, p.25). According to this approach the use of works for teaching purposes is not included to the ones that the rightholder should control, even if it is realized in the digital networking environment, since education constitutes a public interest concern and a fundamental right. Nonetheless, the judgement whether the second step is satisfied, as the others, should be done *in concreto* by the national judges.

Third step

Assuming that at the second step we have accepted that the conflict of the proposed e-education exception with the uses that rightholders may reasonably expect to exploit for themselves is displaced by the educational purpose that the exception is intended to confer. Concerning the third step we have to deliberate what limits should be placed on the use that is allowed, so that any prejudice caused to the rightholder would not to be unreasonable.

The third step requires that the use of the work for the digital distance education does not unreasonably prejudice the author's legitimate interests. This use would not only result in the loss of an important economic market for licensing works but it would also increase the risk of unauthorized downstream works for use, having an impact on the market for sales of tangible copies and consequently harming the primary and secondary markets of the rightholders. This statement though does not lead automatically to the exclusion of educational exception of the digital world but to the ascertainment that it should be applied with caution in order to minimize the potential harm to author's interests (so actually not to prejudice 'unreasonably' the author's legitimate interests) (Xalabarder, 2003, p.167). Depending upon the amount of the works that may be taken, the persons by whom the use can be done, and whether or not the use is subject to an obligation to pay fair compensation, the third step may be satisfied (Ricketson, 2003, p.76).

Thus, this caution could be interpreted as an establishment of one further requirement. The educational institution must implement some conditions and technological measures to ensure that the work will not be reused beyond the teaching use and additionally that the recipients will be only the ones that are supposed to be (students).

Some examples of necessary conditions on the teaching exception are the following: access to works used under the teaching exception should be limited to students enrolled in the particular class (by means of passwords, firewalls, encryption, etc.); post the teaching material on the course of study and not on a library e-reserve, open to all university members and possibly to the general public; download in digital format should be limited to one per student, per course; and downloaded copies should be neither further reproduced nor altered by their recipients (Xalabarder, 2003, p.167).

Nonetheless, the strict measures taken by the educational institutions to safeguard the scope of the exception, they are not a panacea. Technological measures could be circumvented and in this case the harm to the author's legitimate interests is unavoidable. Therefore, the author should be duly compensated for this use of his work for e-education purposes taking into account, when establishing the price, the particularities that the digital world presents (new potential market and risk for increase of infringement). As a result, the educational institution must pay an equitable remuneration to the rightholder, turning in that way the exception into a legal (statutory or compulsory) license. This remuneration should take account of the kind of use (reading, transforming, etc.), the number of uses (e.g. once per semester or once a year), the number of students that will receive the work, and the like, plus the non-profit or for-profit nature of the educational institution. The educational institutions should declare the material used for teaching purposes and should be charged accordingly; the remuneration fee could be administered by collecting societies (Xalabarder, 2003, p.167; Ricketson, 2003, p.76).

Legal licenses is one means to ensure that there is no unreasonable prejudice to the

legitimate interests of rightholders, while safeguarding at the same time that an appropriate balance is struck between them and those seeking educational objectives (Ricketson, 2003, p.76).

The teaching exception should not be excluded from the digital world but abuse should be prevented in order to achieve a fair balance between the rightholders' interests and the general public interest for education. At the same time flexibility is necessary to adjust the conditions of that exception (Xalabarder, 2003, p.167-168).

2.2 TRIPS

The three-step test, as already mentioned, reappears in Article 13 of GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). TRIPs does not provide for specific limitations and exceptions but merely limits the freedom of Members to enact or maintain limitations to exclusive rights with the adoption of the three-step test. The limitations that Members may impose should apply in certain special cases, should not conflict with a normal exploitation of the work and should not unreasonably prejudice the legitimate interests of the rightholders. Apart from the fact that TRIPs refers to the rights of the 'rightholder' and not of the author, as it is the case with Article 9(2) Berne Convention, the major difference with the latter is also that subject to the three-step test are all the rights guaranteed by TRIPs and the Berne Convention, and not only the reproduction right (Article 9(2) Berne Convention). The incorporation of the three-step test in TRIPs grew its importance not only by applying to all exclusive rights but - most importantly - by being subject to WTO dispute settlement and sanctions (Dreier/Hugenholtz, in Dreier/Hugenholtz, 2006, p.204; Knights, 2000, p.3).

Thus, according to TRIPs, Parties could impose limitations on the exclusive rights of the rightholders for e-education purposes under the condition that all prerequisites of the three-step test are fulfilled.

2.3 WCT

A specific teaching exception is likewise not provided in WCT, the first copyright treaty that deals with copyright issues raised by digital technologies. Once more, merely the general rule of the three-step test exists and applies for any limitation or exception that the Contracting Parties will decide to introduce in their legislation in order to limit the rights that WCT provides protection for, i.e. the rights of distribution, of rental and of public communication (including the new right of making copyrighted works available to the public) (respectively Articles 6, 7 and 8 WCT). So, the limitations should be provided for certain special cases, they should not conflict with a normal exploitation of the work and should not unreasonably prejudice the legitimate interests of the author (Article 10(1) WCT).

Besides, WCT mentions in Article 10(2) that all rights granted under Berne Convention are subject to the three-step test, serving as an additional safeguard. Therefore, the limitations provided in the Berne Convention should not simply comply with the prerequisites in each regulating them Article but they should also comply with the requirements of the three-step test. This means for the case in question that, when

applying the teaching exception of Berne Convention for e-education purposes, all three requirements of the three-step test must be met. The importance though of this provision seems to be minimized from the second paragraph of the Agreed Statement Concerning Article 10 stating that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention. The underlying scope is the three-step test to serve as guidance for the clarification of some Berne Convention's provisions, such as the 'fair practice' mentioned in Article 10(1) and (2) Senftleben, in Dreier/Hugenholtz, 2006, p.108, 111).

Nonetheless, the most important element of this Agreed Statement exists in the first paragraph, where it is clearly stated that any exceptions and limitations that a Contracting State may introduce to its national legislation in compliance with Berne Convention could extend into the digital environment. So, even more interesting is that the Contracting Parties are permitted also to devise new exceptions and limitations that are appropriated in the digital network environment. Even if there was a doubt regarding the application or not of the teaching exception (Article 10(2) Berne Convention) and the quotation exception (Article 10(1) Berne Convention) in the digital environment (e-education) the Agreed Statement dissolves it. Consequently, it is left in the hands of the Contracting Countries to extend the limitation for teaching purposes to the needs of digital distance education. The international framework's arsenal offers them this possibility. Unfortunately, though, very few of the Contracting Parties took advantage of this provision.

2.4 Rome Convention

In the international legal framework another provision regulating the limitation of the neighboring rights for teaching purposes is Article 15(1)(d) Rome Convention. [9] Under this provision any Contracting State may provide in its domestic laws for an exception concerning use solely for the purposes of teaching.

The exception includes all the rights for which the Rome Convention provides protection, i.e. fixation, reproduction and communication to the public. The term 'teaching' is not further clarified but it should permit the dissemination of such material as part of the instructional function, whether in schools or tertiary institutions (Ricketson, 2003, p.45). It is to the discretion of the Contracting States to grant this exception and to limit the scope of this exception imposing additional conditions.

2.5 WPPT

In another international treaty that deals also with neighboring rights at the light of digital and networking technologies, the WPPT, no specific mention is made of an exception for teaching purposes. Instead WPPT leaves it at the discretion of its Member States to provide for the same kind of limitations concerning the protection of the traditional rightholders of neighboring rights (performers, phonogram producers and broadcasting organizations), as they provide for in their national legislation in connection with the protection of copyright in literary and artistic works (Article 16(1) WPPT). [10] In the second paragraph of the same Article (16) the three-step test is evoked once more and all the possible limitations and exceptions to the exclusive neighboring rights are subject to

this test.

The second Agreed Statement as to Article 16 declares that the Agreed Statement concerning Article 10 WCT applies *mutatis mutandis* to this Article 16 WPPT. Accordingly, the Contracting Parties may extend their limitations and exceptions introduced into their national legislation based on the Berne Convention also into the digital environment. Additionally the Contracting Parties could devise new exceptions and limitations for neighboring rights appropriate in the digital environment and could extend the teaching exception at the networked environment.

3. The community legal framework

3.1 The Information Society Directive 2001/29/EC

With the implementation of the Information Society Directive [11] all the EU Member States brought their national laws in conformity with the WCT's and WPPT's provisions. One of the most controversial provisions during its legislative process was Article 5, which regulates limitations and exceptions (Bechtold, in Dreier/Hugenholtz, 2006, p.342).

The list of limitations and exceptions that was finally introduced was exhaustive and optional, apart from one (the mandatory one is the temporary acts of reproduction, Article 5(1) Information Society Directive). Member States are not allowed to introduce any other limitation into their national legislation apart from the ones listed in the Information Society Directive, with one exception. In certain cases, where exceptions or limitations already exist under national law, Member States may maintain them under the conditions that:

i. they are of minor importance;
ii. they concern only analogue uses; and
iii. they do not affect the free circulation of goods and services within the community (Article 5(3)(o) Information Society Directive).

So, the Information Society Directive did not take advantage of the Agreed Statement Concerning Article 10 WCT, where it is ruled that the Contracting Parties are permitted to devise new exceptions and limitations that are appropriated in the digital network environment. The European legislator preferred to set an exhaustive list of exceptions and limitations in order to discourage the creation of a disharmony in the internal market. [12] Even the possibility to introduce new limitations or exceptions to reproduction right by applying the three-step test at the framework of Berne Convention does not exist. Nonetheless, the three-step test exists with a slight different function; all the enacted limitations should conform to the three-step test (Article 5(5) Information Society Directive).

Thus, the Directive in question provides for a number of limitations and exceptions; education is one fundamental right justifying one of those exceptions. [13]

3.1.1. The teaching exception

Article 5(3)(a) Information Society Directive 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 non-commercial purpose to be achieved'.

Beforehand it is worth to be mentioned that the Information Society Directive itself specifies that distance learning activities may benefit from Article 5(3)(a) when it is done for non-commercial educational purposes (Preamble 42). It is left to us to examine to what extent the digital distance education is covered by this limitation.

Rights covered by the teaching exception

Limitations can be adopted with respect to both the right of reproduction and the right of communication to the public. [14] This means that also online digital means are subject to this limitation. Regarding the distribution right (Article 4), Article 5(4) applies, which prescribes that when Member States provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception and limitation to the right of distribution to the extent justified by the purpose of the authorized act of reproduction. For our purposes the limitation of this right is of limited importance, since it refers to dissemination of tangible objects. But it could play a role, since cds and dvds are also tangible objects (physical copies) (Bechtold, in Dreier/Hugenholtz, 2006, p.364). A compilation of educational materials in physical format, which is sold or delivered to the students as part of teaching material, would be subject to the first sale doctrine and there is a great chance to fail the three-step test, since it could conflict with the normal exploitation of the work and harm the legitimate interests of the authors (Xalabarder, 2003, p.147).

Also the Explanatory Memorandum accompanying the initial Proposal of Information Society Directive further confirms its application to the new electronic environment. [15]

Consequently, according to Article 5(3)(a) Information Society Directive any acts of reproduction and communication to the public that are necessary to realize the digital distance education needs (uploading, transmission, reception and downloading) are exempted, under the condition that the rest requirements are met; the same applies for the technical copies necessary to carry out those acts and they are exempted pursuant to Article 5(1).

Nature and extension of works

Article 5(3)(a) Information Society Directive imposes no conditions regarding the nature of works allowed for teaching purposes and the permissible extent that they could be used. As the Information Society Directive does not specify the nature of the works, they could be analogue or digital. Although not mentioned precisely at this point, works should be already lawfully published. Concerning the work's extension the only mentioned condition is that the work should be used only 'to the extent justified by the non-commercial purpose to be achieved'. The phraseology refers to Article 10(2) Berne Convention (see analysis above); the only additional element is the 'non-commercial' character of the purpose that is repeated in the Preamble regarding the non-commercial nature of the educational activity (Recital 42).

Eligible institutions to invoke the limitation

Article 5(3)(a) Information Society Directive does not provide for the institutions that can invoke the limitation in question. It does not mention the permitted categories (universities, schools, etc.) or the nature of the educational establishment (private or public, for profit or non-profit, etc.). Only Recital 42 gives some guidance in this regard providing: 'When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by the activity as such. The organizational structure and the means of funding the establishment concerned are not the decisive factors in this respect'. Decisive factor is the 'non-commercial nature' of the educational activity and not the 'non-commercial nature' of the establishment itself or the means of its funding. Although this shift of the commercial nature from the institution to the activity itself is not clarified in the Directive, one explanation that could be given is that there was a wish to offer more malleability to Member States to allow both free and compensated uses, but to exclude in any case commercial uses by any kind of establishments [16] (Xalabarder, 2003, p.142). Possibly it would be easier to rely the eligibility to invoke this limitation on the basis of the nature of the institution but this would not be necessarily fair. Education is a fundamental right that justifies this exception. The fact that the majority of the courses are offered in exchange for some payment is not enough to disqualify them from the exception in question (Xalabarder, 2007, p.383).

As already mentioned, Recital 42 of the Preamble provides explicitly that distance learning establishments could benefit from Article 5(3)(a) Information Society Directive.

Finally, since it is left open and it is not further specified in the Information Society Directive, both teachers and students could take advantage of the teaching exception.

For the sole purpose of illustration for teaching

The above analyzed non-commercial purpose that justifies this exception is teaching and more precisely illustration for teaching. There have been long discussions regarding the term 'illustration' (Xalabarder, 2003, p.146). Definitely this terminology is selected to follow the wording of the respective provision in Berne Convention (Article 10(2) 'by way of illustration'). To make a long story short 'illustration for teaching' means, at least in the context of the Information Society Directive, that any use of a work is allowed, if it is being used as part of an educational activity. It is supported in the framework of the Berne Convention that the language 'by way of illustration' refers to the amount of the work used (Ricketson, 1987, § 9.27(2)). The addition of the term 'sole' before the purpose indicates that, if the use of the work services at the same time a purpose, other than teaching, then this would not be covered by the exception in question (Bechtold, in Dreier/Hugenholtz, 2006, p.378).

The term teaching is not further defined in the Directive or even in its Preamble. It is asserted that in the case of teaching the use of the work is not necessary to be made during teaching. It could be sufficient if the use of the work is made as a teaching material that will be used later (Bechtold, in Dreier/Hugenholtz, 2006, p.378). Teaching should encompass any use of a work as part of a lesson, even the ones necessary to prepare the lesson, or for the needs of exercise or exams (Xalabarder, 2007, p.384). In short, teaching should include any use 'that is directly related and of material assistance to the teaching content' (§ 110(2)(B) US Copyright Act - US TEACH Act).

Indication of the source and the author's name

Following again the same language and the same prerequisites that Berne Convention demand, Article 5(3)(a) Information Society Directive provides that necessary condition of the teaching exemption is the indication of the source of the work (or of any other copyright protected material) and of the author's name (or the name of the rightholder of neighboring right). Although moral right is not harmonized within the European community, the community legislator underlines the importance of the right of attribution repeating the relevant provision of Berne Convention, with a nuance; this indication could be omitted in the case that the indication turns out to be impossible.

Fair compensation

Article 5(3) Information Society Directive is not one of the exceptions or limitations for which a fair compensation must be given to the rightholders (the only ones that demand such a compensation are Articles 5(2)(a), (b) and (e), i.e. the exceptions for reprography, for private use and for hospitals and prisons). Pursuant to Recital 36, however, Member States may provide for such compensation also in the case of other limitations or exceptions. Regarding the level of the compensation the Directive gives some vague guidelines in the Preamble (Recital 35). An interesting criterion that is set, evaluating the particular circumstances of each case, is the possible harm to the rightholders resulting from the act in question. This statement reminds us of the third step that we have already analyzed. Weighing the different parameters of the three-step test, the fact that an equitable remuneration does exist could play an important role in justifying the limitation. The three-step test is also present in Article 5 Information Society Directive, which regulates the limitations and exceptions, having though a slight different function than the one in Berne Convention. All the limitations provided in Article 5(1-4), including the teaching exception, should satisfy the requirements of the three-step test (Article 5(5)). Thus, this provision in combination with Recitals 35 and 36 enables the establishment of a statutory system of equitable remuneration, even if the limitation in question does not explicitly provides for such a system. In the relevant analysis of the third step and its application on the digital distance education we have concluded that a legal license may be one means to ensure that there is no unreasonable prejudice to the legitimate interests of authors, and this conclusion could be repeated also at this point.

National implementation of Member States in EU

The teaching exception, as the overwhelming majority of the exceptions in Information Society Directive, is an optional one. Some Member States gave a very narrow interpretation of the exception and others have not introduced it at all (see analytically Xalabarder, 2009). But even if Member States have decided to introduce it into their national legislation, each one has done it in a quite different way. Some Member States have implement it as an exception (Greece), while in others the use of works for teaching purposes is subject to payment of a fair compensation to the rightholders (Belgium, France, Germany and the Netherlands). Some others though remain silent, such as Luxemburg, Portugal and Italy (see analytically Ernst and Haeusermann, 2006).

In some Member States, such as Denmark, Finland, Sweden and France, the use of works for educational purposes is subject to the conclusion of extended collective agreements

between the collective societies and educational establishments. In extended license system an agreement concluded between a collecting society and a user does not cover only the contracting parties (the collecting societies, the right owners that have given them mandate to act on their behalf and the users) but also obtains directly on the basis of the law a binding effect on non-represented owners. The extension effect provides the users a protection against claims by non-represented owners. The overall purpose of the extended license is to create favourable conditions for the use of protected materials from the viewpoint of the rightholders and the users. Non-represented right owners have a right to individual remuneration and in most cases an 'opt-out' right, that means a right to prohibit the use of their works. The system of extended collective license originally was designed to apply to literary and musical works for use in sound radio and television broadcasts but it has been expanded also to reprographic reproduction of printed material for educational use and for internal information in administration and businesses, to recording of radio and television programmes for educational use, to retransmission by cable or rebroadcasting and to library uses of material in digital form (Koskinen-Olsson, 2006, p.265). It is unquestionable that this system has certain advantages but also creates legal uncertainty to the educational establishments, since there is a risk that no agreement or a restricted one will be reached (e.g. in Denmark no agreement has been reached on digital copying between the collective rights societies and educational institutions, apart from one with teacher training colleges, Green Paper, 2008, p.16).

Many differences exist also regarding the nature of institutions that are eligible to invoke this exception; some Member States do not refer at all to the eligible institutions (France), some use a generic term 'educational establishments' (UK) and others refer concretely to 'schools, universities, post-secondary institutions and non-commercial career training institutions' (Germany). [17] Some others refer to establishments 'officially recognized or organized for teaching purposes by public authorities' (Belgium) or to 'institutions which are not aimed at obtaining a direct or indirect economic commercial advantage' (Portugal).

Regarding the length of the works that educational institutions are permitted to reproduce, some Member States refer to the whole work (Malta), some to journal articles and short excerpts of works (Belgium, Germany and France), and some remain silent, following the approach of Information Society Directive (Luxemburg and Netherlands).

Finally, regarding the possibility to make this material available to students through distance learning networks (Guibault, et al., 2007, p.49) some Member States confine the teaching exception only to reproduction right (Austria, Greece and Slovenia) and some others cover both the reproduction right and the right of the communication to the public (e.g. Belgium, Luxemburg, Malta, Netherlands and France) [18] or allow communication to the public only inside the premises of educational institutions (UK and Germany, for the last one also via intranet) (Green Paper, 2008, p.17; see analytically Xalabarder, 2004, p.10; Xalabarder, 2007, p.371, 390ff; Westkamp, 2007).

The majority of the countries do provide for teaching exception (Austria, Belgium, Germany, Greece, Luxemburg, Netherlands, UK, Ireland, Denmark, Finland, Sweden and Norway) but many fail to cover distance digital education.

The different ways that the Member States have incorporated the teaching exception in their national legislation, if at all, have a number of (negative) implications: a) the desired

harmonization of the exceptions and limitation in European community legal framework was not succeeded; b) there is legal uncertainty between the Member States, since e-education takes place within a transnational framework. Depending on which country the teaching activities take place or where the students and/or teachers are, the same acts could be illegal or not.

The proper balance should be found in order to ensure an adequate level of protection of exclusive rights and at the same time to enhance the competitiveness of European education (Green paper, p.17-18).

3.1.2 Quotation exception in the Information Society Directive

We have already analyzed the beneficial use of quotation exception for teaching purposes in the context of Berne Convention.

The exception for Article 5(3)(d) Information Society Directive provides for exception or limitation to the reproduction right and the right of the communication to the public in the case of 'quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns 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'.

This exception is based on Article 10(1) Berne Convention with a major difference though; this exception is not of a mandatory nature as in Berne Convention (see analytically concerning the problems that this difference creates at Xalabarder, 2007, p.397; Xalabarder, 2009, p.20). The reason that we refer to this exception for quotations although one for teaching already does exist, is the same as the one mentioned in the relevant exception in Berne Convention. This exception is more open from the point of view of purposes covered and eligibility; no limits are set regarding who is eligible to invoke it (teachers, educational public or private, profit or non-profit establishments). It is more flexible, since regarding the extent of the quotation, the only limit set is that it is required to be in accordance with the 'fair practice' and 'the extent required by the specific purpose'. The exception applies to all kind of works, provided that they have been made lawfully available to the public. Besides, this exception is technologically neutral as to the means of exploitation, meaning that it is also applicable over digital networks (the exclusive rights that are limited are the right of reproduction and the right of the communication to the public). Last, but not least, no compensation is required for the exception for quotation and till now no national law requires it either.

Although the Directive allows for a wide application of this quotation exception, most of the national legislations chose one more restricted (see analytically Xalabarder, 2004, p.18; Westkamp, 2007).

In the cases where no specific limitation exists for teaching purposes the exception for quotations could fill in the gap (as it was the case till recently with Spain and France) (quotations exceptions are allowed in all Member States). Even if a specific teaching exception does exist, it is possible to apply the quotation exception to cover the digital distance education. For instance, in Spain where despite the fact that the new Article

32(2) of the Copyright Act has incorporated the teaching exception in national legislation, the online teaching is explicitly excluded, since a necessary precondition of the provision is that the acts for reproduction, distribution and communication to the public should occur 'in classroom'. So, only through the quotation exception could the online teaching be covered. In general, though, quotations exceptions are insufficient to cover per se all the uses of e-education.

3.1.3 Exception in favour of libraries

It has been supported that relevant exception for e-education purposes could be also the for the benefit of libraries. Article 5(2)(c) Information Society Directive allows Member States to exempt only certain acts of reproduction made by specific non-profit establishments (libraries, educational establishments, museums and archives) from the right of reproduction. As regards the making available of content online, Recital 40 of the Preamble of the Information Society Directive provides that exceptions for the benefit of libraries should not encompass uses made in the context of online delivery of protected works or other subject matter protected by related rights. Despite that 'virtual libraries' could make digital copies under this exception, they could not post them on the internet and transmit them beyond the library premises Xalabarder, 2003, p.153). [19]

This exception is of minor importance regarding e-education purposes. Not only it cannot be applied in digital networks, not only it is restricted to specific acts for reproduction but most importantly the national implementation laws have not interpreted it in this way; nevertheless they do have this discretion, since this exception is not limited to any specific purpose, giving also the possibility to cover reproductions made for teaching purposes (see further analysis to the subject at Xalabarder, 2004, p.22; Xalabarder, 2003, p.152ff).

The crucial question is whether the teaching exception could be invoked by a library or an educational establishment that claims to act on behalf of a 'teacher' who wants a copy of an article contained in the collection of this institution. It is argued that those non-profit making establishments could not act like intermediaries, because all the necessary requirements should be checked prior to the reproduction of the work. [20]

3.2 The relation between the Information Society Directive and the other copyright Directives

It is important though to check the relation between the Information Society Directive and the other Directives, which regulate copyright matters, especially regarding the subject of limitations and exceptions.

3.2.1 Computer Programs Directive

Article 2(a) Information Society Directive does not alter any provision of the Computers Program Directive. [21] Thus, the exclusive rights on software and their limitations are prescribed in this Directive; however among those limitations educational purposes are not included (Articles 4-6 Computers Program Directive) (Bottis, 2006, p.91).

3.2.2 Database Directive

Article 2(e) Information Society Directive leaves the provisions of the Database Directive [22] intact. In this Directive the exclusive rights of author of a copyright protected database (Article 5 Database Directive) and the limitations there to (Article 6 Database Directive) are regulated. Note that the limitations apply only regarding the selection of arrangement, the structure of the database. One of the exceptions that Member States have the option of providing is (so, it is not mandatory and many Member States have not incorporated it, e.g. France), the use for the sole purpose of illustration for teaching, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved (Article 6(2)(b) Directive 96/9). [23] Permitted uses may involve all rights protected under Article 5 Database Directive, i.e. reproduction, adaptation, distribution and communication to the public. Respectively there is a similar limitation to the sui generis right of the maker of a database (Article 9(b) Database Directive) 'Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents: …(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; …'. [24] It is unusual that the beneficiaries of the last exception are only 'lawful' users and not all the users (Bottis, 2006, p.95). [25] A lawful user is any end user who is contractually authorized to use the database. This narrow approach though would minimize the benefit of the exception. A likely interpretation meaning of the term is a user who gained accessed to or acquired a copy of a database without breaking the law (Hugenholtz, in Dreier/Hugenholtz, 2006, p.333).

3.2.3 Rental and Lending Right Directive

Finally, Article 2(b) Information Society Directive does not in any way affect the certain rights related to copyright in the field of intellectual property law regulated in Rental and Lending Right Directive. [26] This Directive deals with the neighboring rights (or related rights, *i.e.* with the rights of performing artists, film producers, and broadcasting organizations). In Article 10(1)(d) Directive 92/100 the limitations of the neighboring rights are prescribed. Among other things, Member States may provide for limitations in respect of use solely for the purposes of teaching.

3.3 Technological protection measures and the teaching exception

The digital environment offers many possibilities regarding the different ways of the work's exploitation, the possibility to reproduce the works in countless perfect copies and to communicate them to million of users. On the other side of the coin, however, digital technologies enable the users to dictate the use terms of their works easier than before. Thus, a further addition to rightholders' arsenal is the ability to use technological protection measures to prevent unauthorized copying of their works. Such mechanisms are mostly known as Digital Rights Management (DRM) or Technological Protection Measures (TPMs), or copy prevention technology. By whatever name, DRM systems are encoded into digital content by a variety of means (such as encryption or watermarking),

so that users are incapable of accessing or using the content in a manner that the rightholder wishes to prevent (McGeveran and Fisher, 2006, p.9).

Article 11 WCT requires that TPMs 'shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts in respect of their works, which are not authorised by the authors concerned or permitted by law'. [27] The international obligations arising under Article 11 WCT are implemented in EU by Article 6 Information Society Directive. According to Article 6(1) and (2), Member States are obliged to provide for protection against the act of circumvention of effective TPMs as well as against the trafficking of circumvention devices and services. In both cases it is not important whether the act actually infringed an exclusive right or not - only the act of circumvention is of relevance. Article 6(3) Information Society Directive defines the term 'technological protection measures'. No explicit distinction between 'access control' (technological measures aimed at preventing access and uses of a work) and 'copy control' (technological measures that prevent certain uses being made of a work after it has been accessed) exist, since TPMs mean 'any technology, device or component that in the normal course of its operation, is designed to prevent or restrict acts …, which are not authorized by the rightholder of any copyright or any right related to copyright'. In this definition though the Directive mentions both 'access control' and 'protection process' without distinguishing between them and grants equal treatment to both types of technology. Regarding the effectiveness of technological protection measures, Article 6(3) gives also the definition explaining that effectiveness is assumed 'where the use of a protected work, or other subject-matter is controlled by the rightholders through application of an access control or protection access, such as encryption, scrambling or other transformation of the work or other subject matter or a copy control mechanism, which achieves the protection objectives' (Gasser and Girsberger, 2004, p.9).

What is the relation though between the legal protection of technological measures and the exceptions to copyright and related rights and more particularly to the teaching exception?

Those TPMs could hinder the beneficiaries of the teaching exception from taking advantage of the latter, exactly due to the TPMs put on the work. A solution should be found in order to secure the protection of TPMs without depriving users legally allowed uses of the copyrighted works, such as use of the works for teaching purposes. Article 6(4) Information Society Directive aims at resolving this intersection between legal protection of TPMs and the exercise of limitations or exceptions. According to Article 6(4) Information Society Directive Member States should take voluntary measures, including agreements between themselves and other parties concerned, to ensure that the beneficiary of certain limitations provided for in national law (among those the teaching exception is included) has the means of benefiting from that limitation, to the extent necessary and that beneficiary has legal access to the protected work or subject matter concerned (Casellati, 2001, p.369). The Directive remains silent regarding the nature of voluntary measures and it is at the right owners discretion to choose those ones [28] (Guibault, et al., 2007, p.107, where you can find also examples of Member States). Article 6(4) Information Society Directive provides further that 'in absence of voluntary measures

taken by rightholders, … Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided in national law'. Once more the Directive is silent what the 'appropriate measures' taken by the Member States could be. Therefore Member States have interpreted this provision in different ways; some have established a dispute resolution or mediation mechanism (Finland, Denmark, Estonia, Greece and Hungary), some have created an executive or administrative authority in order to prevent the abuse of such measures taken by the rightholders (France), some recourse to courts (Belgium, Germany, Spain and Ireland) and finally some others have not implemented it at all (Austria, Czech Republic and Netherlands) (Working Paper, First evaluation of Directive 2001/29/EC, 2007, p.41). Recital 51, however, stresses out that Member States should take appropriate measures only in absence of 'voluntary measures taken by rightholders including the conclusion and implementation of agreements between rightholders and other parties'. The nature of the Member States intervention could refer to 'modifying an implemented technological protection measure' or 'other means' (Recital 51). It is important to underline that, although the provision does create an obligation for rightholders and Member States to provide the means to exercise the limitation, it does not allow beneficiaries to circumvent technological protection measures. Its aim is to facilitate the exercise of an exception (Denmark and Norway have entitled though beneficiaries to circumvent technological measures under certain narrowly prescribed conditions) (Working Paper, First evaluation of Directive 2001/29/EC, 2007, p.40; Bechtold, in Dreier/Hugenholtz, 2006, p.391).

In short, and to apply this provision to the teaching exception, in the absence of voluntary measures taken by the rightholders and if the enjoyment of the teaching exception is prevented by the use of TPMs put on works, Member States have to intervene with appropriate measures. Nevertheless the whole effect of this provision is soft pedaled by the fourth subparagraph of Article 6(4) Information Society Directive that provides differently in the digital networked environment: 'the provisions of the first and second subparagraph (appropriate measures) shall not apply to works or other subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place at a time individually chosen by them'. This provision limits the possibility of Member States to intervene in the online environment and take appropriate measures described in Article 6(4)(1) and (2) Information Society Directive. In those cases the Directive offers a total preeminence of the TPMs over the exceptions (Martin-Prat, 2001, p.75). Recital 53 specifies that 'non-interactive forms of online use should remain subject to those provisions' (Article 6(4)1 to 3) (non-interactive forms of online use could be live web casting, web radio and similar transmissions) (Bechtold, in Dreier/Hugenholtz, 2006, p.394; Blázquez, 2007, p.5). This extension covers likewise every work offered on demand, including any work transmitted over internet, as long as the user is able to choose and initialize that transmission, meaning that the scope of the provision could be very broad.

Recital 53 of the Directive justifies this approach by expressing the need to ensure a secure environment for the provision of interactive on demand services, when such services are governed by contractual arrangements. It is not enough only to have a work offered on demand but it has to be available to the public over agreed contractual terms. This means that this provision may be applied in respect of online services for which the

contracting parties have negotiated the terms of use and not to services offered according to the terms of a non-negotiated standard form license. Unfortunately this kind of license constitutes the majority in the online exploitation market (Guibault, et al., 2007, p.112). But it is also supported that mass-market contracts are included in the contractual agreements (Bechtold, in Dreier/Hugenholtz, 2006, p.394).

Article 6(4)4 Information Society Directive is somewhat contradictory: it does not declare explicitly that limitations or exceptions are not applicable to on demand services. Nonetheless it leaves at the discretion of rightholders the (technical and legal) means of preventing the effective benefiting from those limitations or exceptions. This rule may have significant consequences for the future of copyright, especially as on demand services are expected to become the standard content distribution channel in the future (Blázquez, 2007, p.5).

In view of this provision vital copyright exceptions for digital distance learning do not apply, when material is provided on demand and on agreed contractual terms. The only solution, in order to avoid the application of the fourth subparagraph of Article 6(4) Information Society Directive and to have the legal possibility of TPM circumvention, is to accept either that the services for e-educational purposes are offered according to the terms of a non-negotiated standard form license or that mass-market contracts are included in the contractual agreements.

In the digital context, it is important to extend these limitations and exceptions specifically to works regardless of their protection by TPMs. In other words, neither WCT nor WPPT requires that TPMs should be protected in a manner inconsistent with copyright's fundamental goals. Thus, the protection of TPMs can and should be circumscribed by appropriately tailored limitations and exceptions that include access for educational purposes and for systematic instruction in a distance learning context, uses recognized in the print era (Okediji, 2006, p.27).

3.4 Contractual overridability

We have analyzed the intersection between contractual agreements regarding on demand works and the teaching exception in the light of TPMs. It is interesting to examine whether a contractual agreement between the rightholders and the users could override the teaching exception as a whole. In Information Society Directive there is no explicit provision dealing with the issue, as there is in the Computer Programs Directive (Article 9(1)(2) Computer Programs Directive prohibits the contractual overriding of the limitations found in that Directive) or the Database Directive (Article 15 of Database Directive declares that any contractual term that contradicts the limitations of that Directive is void). The only relevant provision is Article 9 Information Society Directive, which states that the Directive shall be without prejudice to the law of contract. Nevertheless, there is a tendency that supports that certain limitations based on protection of fundamental constitutional rights form imperative rules of Copyright whose application should not be waived by contractual agreements. Those agreements could be deemed to violate Article 10 of the European Convention of Human Rights (Guibault, 1998a, p.259). The next interesting question is whether the right to education is a fundamental right that could justify the non-overridability of its regulating exception. It is a difficult question to be

answered; some assert that limitations for education purposes should not be considered as an imperative rule from which parties may not deviate by contract (Guibault, 1998a, p.259). In our opinion the contractual overridability concerns the exception itself, whether it could be eliminated by a contractual agreement and whether deviations could exist from its regulation. In Information Society Directive this is evident in Recital 45, where it is declared that the exceptions and limitations provided in this Directive (Article 5(2), (3) and (4)) should not prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law. Thus, the teaching exception, since its justification reason is the right to education, should not be able to be eliminated by contractual agreements.

4. Conclusion

The teaching exception as regulated not only in the Information Society Directive but also - and most importantly - in the international legal framework (Berne Convention, TRIPs and WCT) could be applied in the national legislations so as to cover also the e-education needs. The problem is that due to the optional character of the relevant international and European provisions, very few national legislators took advantage of this possibility. The major differences in national laws bring legal uncertainty. There is a need to seek uniform solutions, if not at international at least at community level, in order to really harmonize the internal market and to avoid its fragmentation. Otherwise fear will govern on both sides: the educational institutions would seek licenses for uses that need not to be licensed (and maybe they will be refused) and the rightholders will be reluctant to grant license for online uses. Even the public policy for education will be uncertain, since the market power will rule (in the form of unreasonable prices and conditions, prohibition to use material online, and the like).

A curriculum may involve both face-to-face teaching and use of online resources and against this backdrop a copyright regime that allows the use of paper works in the classroom but not the use of digital works on e-learning platform appears at least anachronistic. This could be a factor to compromise the quality of higher education in Europe and elsewhere and therefore be contradictory to the official Policy of the EU (Lisbon Agenda). Copyright law should be flexible enough to adapt to the potential of networked learning in educational institutions and it is about time to construct a copyright regime that does not prevent factual developments. In doing this copyright law would move closer to its programmatic goal already declared in the title of the first copyright act, the Queen Anne's Statute of 1710: 'The Encouragement of Learning' (Ernst and Haeusermann, 2006, p.21).

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[1] Hellenic Copyright Organization, Greece.

[2] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) OJ L 372, 27/12/2006, pp.2-18 (a consolidated version of the former EU Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights OJ L 290 of 24/11/1993, pp.9-13.

[3] The UN Universal Declaration of Human Rights acknowledges as fundamental rights not only the author's right (Article 27(2): 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author') but also the education right (Article 26(1): 'Everyone has the right to education').

[4] See Preamble of WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) 'Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention' and the Preamble of Directive 2001/29/EC (Recital 31): 'A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded…'.

[5] For those cases see, Twigg, 2000; Channgern and Malisuwan, 2005, p.10.1-5).

[6] For the history of the provision and for the various forms it came through till it reached the final form, see Xalabarder, 2004, p.5 and other references there.

[7] See detailed analysis of the three-step test, Senftleben, 2004; Geiger, 2007a; Geiger, 2007b, p.486-491. For a new, different approach of the three-step test, see Declaration of the Max Planck Institute for Intellectual Property, A balanced interpretation of the 'three-step test' in Copyright law.

[8] See in this regard the WIPO Treaties 1996, WCT and WPPT.

[9] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, adopted in Rome 1961.

[10] Similar provision exists in Article 15(2) Rome Convention.

[11] 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 (EE L 167/22/6/2001) (OJ L 167, 22/6/2001, p.10-19 (hereinafter the Information Society Directive).

[12] Despite the initial ambition that the Information Society Directive had to harmonize the copyright limitations across European Union, it remained only an ambition. See in this regard Hugenholtz, 2000.

[13] Preamble (Recital 14) 'This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching' and (Recital 34) 'Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings'.

[14] Article 5(3) 'Member States may provide for exceptions or limitations to the rights provided for in Articles 2 [reproduction right] and 3 [right of communication to the public and right of making available to the public]…'.

[15] Explanatory Memorandum accompanying the Commission's Proposal for a Directive of 10.12.1997 COM(97)628 final, OJ C108/6 (07.04.1998).

[16] See in this regard, Recital 36 of the Preamble allowing to provide for fair compensation, when applying the optional provisions for exceptions.

[17] Due to heavy criticism this exception has expired at the end of 2006.

[18] In some cases when the communication to the public is exempted it is limited to live performances, e.g. plays recitals or performances in front of an audience (Ireland and Greece).

[19] Only one narrow exception exists to the making available right for the benefit of the non-profit making establishments (libraries, educational establishments, museums and archives), according to which those establishments can make works and other subject matter contained in their collections available to individual members of the public for the purpose of research and private study by dedicated terminals on the premises of such establishments. Those works though could not be subject to purchase or licensing (Article 5(3)(n) Directive 2001/29).

[20] Similar discussion regarding the private copying exception and libraries see Working Paper, First evaluation of Directive 2001/29/EC, 2007, p.25.

[21] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ *L 122, 17/05/1991, p.42-46.*

[22] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ L 077, 27/03/1996, p.20-28.*

[23] See relevant Recital 50 of the Preamble 'Whereas the Member States should be given the option of providing for exceptions to the right to prevent the unauthorized extraction and/or re-use of a substantial part of the contents of a database in the case of extraction for private purposes, for the purposes of illustration for teaching or scientific research, or where extraction and/or re-use are/is carried out in the interests of public security or for the purposes of an administrative or judicial procedure; whereas such operations must not prejudice the exclusive rights of the maker to exploit the database and their purpose must

not be commercial'.

[24] See relevant Recital 51 of the Preamble '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 institution'.

[25] See similar formulation only at the Article 5(1) Computer Programs Directive.

[26] Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on the certain rights related to copyright in the field of intellectual property OJ *L 346, 27/11/1992, p.61-66*).

[27] See also Article 18 WPPT concerning the performing rights.

[28] E.g. supply of a non-protected version of the work; supply of an encryption key to allow the user to circumvent the TPM; deposition of the encryption key with a third party, so that upon request the beneficiary of a limitation could obtain it; designing the TPM so that certain lawful uses are permitted.