

Practices and challenges in online distance education and research activities

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Education: any acts (uses) to convey instruction, studying (teaching, exercises, exams, etc)

Research: any acts (uses) necessary to gather and discover information...

1. Exceptions and Limitations in Copyright Laws (E&L)

- Uses authorized by Law
- For free or remunerated (non-voluntary licensing)

2. Voluntary Licensing

- Collective licensing (by CMOs – based on mandates)
- Individual licensing (by © owners – i.e. databases)

3. Plus... territoriality Challenges

1.- Exceptions and Limitations

All National laws provide for E&L:

→ For private study / purposes (Art.9.2 BC)

→ For quotations (Art.10.1 BC - mandatory)

→ For teaching and research purposes
(Art.10.2 BC)

→ For preparing teaching compilations ?

- Often under “fair dealing” (for free)
- Far from homogeneous – **no uniformity**

Exceptions and Limitations for Teaching and Research ... online

- E&L allow **Face to Face uses, analogue copies, performances in classrooms**
- **Online uses not always** exempted (not formally)
- When so: are exempted online uses enough? Or narrower in scope than analogue uses?
- When so: **Restrictive & intricate language** – difficult to understand and enforce, difficult to integrate with other E&L, tech. obsolescence?

Scope of E&L – Factors:

- **Purposes:** illustration for teaching, school, classroom use, lessons, lectures, instruction, exams, etc.
- **Exempted acts:** reproduction (photocopying), distribution, performance, communication to public, making available... translations? digitization?
- **Beneficiaries:** all educational levels? (schools, universities), non-profit / for-profit?
- **Individual users:** teachers, students, researchers, staff
- **Kind of works:** any kind of works? Only publications?
- **Amount of works:** 10%, 5% 15 pages, 1 image, etc.?
- **For free or Remunerated:** if so, mandatory collective licensing?

Only Face to Face: Reproduction & Performance

Bhutan, Fiji, Iran, Iraq, Kazakhstan, Oman (“use” in face to face), Papua New Guinea, Samoa, Sri Lanka, Tonga, Tuvalu, EUA, Vietnam (“duplication”).

*IRAN: Article 8. Public libraries, documentation centers, scientific institutions and **educational establishments**, which are **noncommercial**, may **reproduce** protected works **by a photographic or similar process**, in the numbers necessary, for the purposes of their activities, according to a decree to be issued by the Board of Ministers.*

*UAE: Art.22. Without prejudice to literary rights of the author stipulated in this law, the author after the publication of his work must not prohibit a third person to perform one of the following acts: ... (6) **Performing** the work in family meetings or **by students in an educational institute** against no direct or indirect remuneration.*

“Use”: Online uses covered?

Cambodia, North Korea, Lebanon, Malaysia, Philippines, Thailand

- Nepal: reproduce, broadcast and exhibit
 - Thailand: “reproduction, adaptation, exhibition or display”
 - Mongolia, Yemen: only private use + quotations!
 - India: reproduction + performance + communication (audience limited to staff and students)
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INDIA. Sec. 51(1) (i) the reproduction of any work— (i) by a teacher or a pupil in the course of instruction; or (ii) as part of the question to be answered in an examination; or (iii) in answers to such questions;
(j) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a sound recording if the audience is limited to such staff and students, the parents and guardians of the students and persons connected with the activities of the institution or the communication to such an audience of a cinematograph film or sound recording;

MALAYSIA. Art. 13 (2) Notwithstanding subsection (1), the right of control under that subsection does not include the right to control—
(a) the doing of any of the acts ... by way of fair dealing for purposes of non-profit research, private study, criticism, review or reporting of current events...
(f) the inclusion of a work in a broadcast, performance, showing, or playing to the public, collection of literary or musical works, sound recording or film, if such inclusion is made by way of illustration for teaching purposes and is compatible with fair practice, provided that mention is made of the source and of the name of the author which appears on the work used;
(ff) any use of a work for the purpose of an examination by way of setting the questions, communicating the questions to the candidates or answering the questions, provided that a reprographic copy of a musical work shall not be made for use by an examination candidate in performing the work;
(g) the recording made in schools, universities or educational institutions of a work included in a broadcast intended for such schools, universities or educational institutions;

Translation + Publication under compulsory licensing (Berne Annex) – *this may include digital reproduction+ distribution, but not making available online*

Afghanistan, China, India, Indonesia, Jordan, Kuwait,
Malaysia, Pakistan, Thailand, UAE

*UAE: Art. 21. Any person may ask the ministry to grant him **a compulsory license** for either **copying or translation** or for both of any work protected by the provisions of this law only after three years from the date of the work publication in case of translation license. The license shall be issued supported with reasons determining the time and place of exploitation, and the fair reward due to the author provided that the purpose of such grant of license always be exclusive **to meet the needs of education in all its types, levels** and to the needs of public libraries and archives in accordance with the specifications, conditions, and restrictions of the implementing regulations and this law for granting this license in a way to secure non-occurrence of unjustifiable damage to the legitimate interests of the author or his successors in title or effect ordinary exploitation of the work. The council of ministers shall issue a decision specifying the fees to be charged in this regard.*

Online teaching uses expressly allowed →

For free: Australia, Cook Islands, Singapore (*distance learning – insubstantial part of a work: 5 pages, 5%...*)

Remunerated: China (Reg.2006), Japan, South Korea, Singapore (*distance learning – an article, an out-of-commerce work*)

Also translations: India and Indonesia

→ **Non-voluntary licensing** (*compulsory / statutory*)

SINGAPORE

Copying by non-reprographic means for purpose of a course of education 50A.—(1)

Copyright in a work is not infringed by its being copied **for the purposes of a course of education**, provided the copying — (a) is **done by a person conducting or undergoing the course of education**; and (b) is not by means of a reprographic process.

Multiple copying or communication of insubstantial portions of works- Sec. 51.—(1) Copyright in a literary or dramatic work is not infringed by the **making of one or more copies of a part of the work** in an edition of the work by any person if the copying is carried out **on the premises of an educational institution for the purposes of a course of education** provided by the institution.

(1A) Copyright in a literary or dramatic work is not infringed by the **communication of a part of the work** in an edition of the work by any person if the communication is **initiated from the premises of an educational institution for the purposes of a course of education** provided by the institution. (distance online learning)

- For non-digital works: only 5 pages of a work, only 5% of work (over 500 pages).
- For digital works: only 5% of bytes, 5% of words or 5% of contents.
- Within a 14 days lapse period.

Multiple copying and/or communication under statutory licence by educational institutions- Sec. 52.—(1) **an article contained in a periodical publication may be copied or communicated**, in whole or in part: by or on behalf of the body administering an educational institution for the educational purposes of that or another educational institution; except 2 or more articles contained in the same periodical publication, unless the articles relate to the same subject-matter.

(2) **A work that cannot be obtained within a reasonable time at an ordinary commercial price**
(11) If the owner of the copyright in the work makes a request, in writing, at any time during the prescribed period after the making of the copies, for payment for the making of the copies, pay to the owner such an amount by way of **equitable remuneration** for the making of those copies **as is agreed upon between the owner and the body or, in default of agreement, such amount as is determined by a Copyright Tribunal** on the application of either the owner or the body.

Challenges for the enforcement of E&L

- **Legal uncertainty about exempted uses?**
(e.g. unclear language, insufficient scope, applicable law)
- Exempted uses **prevented by TPM** and/or **contractual terms?**
- **Awareness of © by academics?**
- **Lack of guidance:** are guidelines available?
- **Misconceptions?**
(e.g. off-line = online, 10% always allowed, as long as non-commercial, library-licensed material)

Exempted uses **prevented / restricted by TPM?**

- **TPM can be removed/circumvented/disabled** (*China, Cook Islands, Indonesia, Singapore, Thailand*)
- **© owner is obliged to lift TPM (?)**

As long as: acting in good faith and lawfully acquired copy

Exempted uses **prevented / restricted by licensing terms?**

Terms overriding E&L are:

- **Unenforceable** (*e.g. UK*)
- **Null and void** (*e.g. EU*)

2.- Voluntary Licensing

Individual licensing // Collective licensing
Licensing systems and availability vary

- **Market, economic, cultural (language) circumstances**

In some countries, **collective licensing** fully operational (specially IFRROs – not so much: audiovisual, music)

In others, CMOs not yet operational

- **Different licensing models:**

CMO mandates (voluntary), Extended collective licensing?

Voluntary collective licensing “incentivized by law”

(Afghanistan, Cook Islands, Fiji, EUA, Vanuatu)

Licensing Challenges

- Are licenses available in that market?
- For all kind of works?
- CMOs or individual?
- Have CMOs obtained “mandates” from © owners?
- Can authors / owners / CMOs be identified & located?
- Scope of licensing: is it sufficient?
- Conditions: pricing, timing, TPM, restrict E&L?
- Cumulation & incompatible licensing? Loops? Gaps?
- Territorial scope?

3.- Territorial challenges

- Online teaching and research may be **cross-border**
 - Students, researchers **located in different countries**
 - Materials obtained from **sources “abroad”**
- Which law applies online? (Art.5.2 BC) → different scope of E&L → **legal uncertainty**
- Difficulties in **identifying & locating owners** from other countries
- **Collective licensing is territorial-based**

Attempts to overcome territoriality

- **Licensing** based on **number of students with “access to intranet”** (regardless of territory)
 - and apply one national law, one territorial license
- Licensing **“branch campuses”** separately by each RRO

- **Statutory provision** (a legal fiction): teaching takes place in one country only
 - Only one E&L apply (one national law) + licensing

