BEST CASE SCENARIOS FOR COPYRIGHT

EDUCATION IN ESTONIA

by Teresa Nobre and Alari Rammo

Best Case Scenarios for Copyright is an initiative by COMMUNIA, presenting best examples of copyright exceptions and limitations found in national laws of member states of the European Union. We believe that, by harmonizing copyright exceptions and limitations across Europe, using as a model these best examples that are permitted within the EU law, the EU would reinforce users' rights in access to culture and education.

Read more at http://www.communia-association.org/bcs-copyright

Teresa Nobre is an attorney-at-law based in Lisbon, Portugal. She is the legal project lead of the Best Case Scenarios for Copyright initiative. She is also Creative Commons Portugal legal lead and a member of COMMUNIA. She holds a university degree in Law from the University of Lisbon Faculty of Law and a Master of Laws in Intellectual Property from the Munich Intellectual Property Law Center.

Alari Rammo has been working on communications management and policymaking with the Network of Estonian Nonprofit Organizations (NENO) since 2004. He has a degree in journalism from the University of Tartu, and has held positions at several newspapers and radio channels. In addition, he has held marketing jobs in the private sector and public relations posts at the Estonian Parliament. He obtained a master degree in law from the Tallinn University of Technology in 2013.

COMMUNIA

The **COMMUNIA International Association** on the public domain is a network of activists, researchers and practitioners from universities, NGOs and SME established in 10 Member States. COMMUNIA advocates for policies that expand the public domain and increase access to and reuse of culture and knowledge. We seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

INTRODUCTION

by Teresa Nobre

COMMUNIA has long been arguing that the best way to treat the public interest considerations relating to education *vis-à-vis* the interests of authors and copyright owners is through the adoption of an exception or limitation to copyright for educational purposes that is flexible, neutral with regard to media type, format, and technology, and that covers all necessary uses by all sorts of users provided they are in accordance with fair practice[1].

In the European Union, exceptions and limitations to copyright – including for educational purposes – are regulated by the 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 ("InfoSoc Directive"). The EU education exception is a "categorically worded prototype"[2], which does not restrict the beneficiaries, the types of activities or the categories of works covered by the exception. The only conditions are that the activity in question must have a non-commercial nature and that the source must be indicated.

When implementing exceptions and limitations to the exclusive rights harmonized by the InfoSoc Directive (reproduction, communication to the public, making available to the public, and distribution), Member States must respect those limits imposed by EU policymakers. Outside the EU *acquis*, Member States are free to design their own exceptions and limitations to copyright. In this context, the best example of a national exception or limitation to copyright for educational purposes would be a legal provision that has taken "full advantage of all policy space available" under the European Union law, while fully exploring the "flexibility (that lies) outside the EU *acquis*"[3]. In other words, the best scenario for education would be a provision covering all exclusive rights and at least as broad as the EU exception in what concerns to the rights harmonised under the InfoSoc Directive.

It has been argued that the way to achieve the most flexible implementation of the optional EU exceptions is by means of "literal copies of the prototypes" provided in the InfoSoc (Hugenholtz and Senftleben, 2011: 17). As far as we are aware, Estonia is the EU country that has come closest to a literal transposition of the InfoSoc provision, adopting a similar structure and using the same wordings as the EU exception. This has been done, however, without restricting the scope of application of the legal provision to certain exclusive rights. As a result of this national

1 See COMMUNIA, Leveraging copyright in support of education (2016), available at http://www.communia-association.org/policy-papers/leveraging-copyright-in-support-of-education/
2 Hugenholtz and Senftleben, 2011: 2.
3 Hugenholtz and Senftleben, 2011: 2.

strategy, we now find in Estonia a relatively abstract norm that allows for a broad spectrum of unauthorised uses – including transformative uses, such as translations and adaptations to local needs –, provided that the three-step test criteria is met. This leads undeniably to a flexible "semi-open norm that comes close to open-ended defences, such as the US fair use doctrine" (Hugenholtz and Senftleben, 2011: 17). That is the reason why this national model was selected as one of the best examples of a wide education exception to copyright in the EU context.

The fact that we have selected the Estonian model for this project does not mean, however, that the same is perfect. As we will see, there is one main legal provision in the Estonian Copyright Act (the one that is the closest a national law as come to the structure and wordings of the EU exception) and two other overlapping exceptions, one of which causes some interpretation issues. The true is that, apart from Estonia, only Czech Republic and Cyprus had somewhat broad and flexible exceptions for educational purposes, and they were not without faults either. As we have said before, the national exceptions and limitations dealing with uses of protected works for educational purposes within the EU are a patchwork of different solutions often incomplete considering the needs of teachers, students and educational institutions [4].

In order to select which member state of the European Union offered the best education exception to copyright, we only compared specific exceptions that are provided for in the national laws for educational purposes.

There are different categories of exceptions and limitations that may be relevant for carrying on certain educational activities. For instance, the exceptions and limitations for private use/copying are relevant in the context of personal education and research. Quotation exceptions and limitations are similarly important, because debating, commenting and criticizing existing works are all essential parts of the teaching and learning processes. In common law countries, fair use and fair dealing provisions are the legal basis that students and teachers need to make certain uses of copyrighted works for educational purposes. Library-related limitations and exceptions are also closely related to educational activities. Exceptions and limitations for the visually impaired, to the extent that they address educational needs, would too be pertinent if we had aimed to do an exhaustive analysis of all the exceptions and limitations that could somehow affect education.

Comparing individual exceptions and limitations is already a complex exercise, due to the use of abstract terms or unclear language and to the lack of national case law and legal literature. If we were to compare all those different categories of exceptions and limitations that are closely related to educational activities, we would probably not be able to isolate a copyright law that could be considered a best case from all different angles. That does not mean, however, that we did not

4 See Teresa Nobre, Educational Resources Development: Mapping Copyright Exceptions and Limitations in Europe (2014), available at http://oerpolicy.eu/wp-content/uploads/2014/07/working_paper_140714.pdf

look into other exceptions. As we will see in this study, Estonian copyright law has overlapping exceptions for educational purposes, and we had to look into different legal provisions to better understand those specific education exceptions.

EDUCATION IN ESTONIA

1. Text of the copyright exception or limitation

All provisions mentioned herein are from the Estonian Copyright Act (*Autoriõiguse seadus*) adopted on 11 November 1992 (as last amended on 10 April 2016), available at https://www.riigiteataja.ee/akt/101042016004. An official translation into English is available at https://www.riigiteataja.ee/en/eli/506042016003.

1.1. Main legal provision

The current exception or limitation to copyright for educational purposes was introduced with the implementation of the InfoSoc Directive in 2004. The structure of the main legal provision and the wording used by the national legislator resembles the structure and wording of article 5, paragraph 3, point a) of the InfoSoc Directive.

§ 19 subsection 2 is the main legal provision allowing uses of works protected by authors' rights for educational purposes:

§ 19. Teose vaba kasutamine teaduslikel, hariduslikel, informatsioonilistel ja õigusemõistmise eesmärkidel
Autori nõusolekuta ja autoritasu maksmiseta, kuid kasutatud teose autori nime, kui see on teosel näidatud, teose nimetuse ning avaldamisallika kohustusliku äranäitamisega on lubatud:
/.../
2) õiguspäraselt avaldatud teose kasutamine illustreeriva materjalina õppe- ja teaduslikel eesmärkidel motiveeritud mahus ja tingimusel, et selline kasutamine ei taotle ärilisi eesmärke;
/.../

§ 19. Free use of works for scientific, educational, informational and judicial purposes
The following is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication:
/.../
2) the use of a lawfully published work for the purpose of illustration for teaching and scientific research to the extent justified by the purpose and on the condition that such use is not carried out for commercial purposes;
/.../

1.2. Other relevant legal provisions

§ 19 subsection 3 further allows acts of reproduction in educational and research institutions:

§ 19. Teose vaba kasutamine teaduslikel, hariduslikel, informatsioonilistel ja õigusemõistmise eesmärkidel
Autori nõusolekuta ja autoritasu maksmiseta, kuid kasutatud teose autori nime, kui see on teosel näidatud, teose nimetuse ning avaldamisallika kohustusliku äranäitamisega on lubatud:
/.../
3) õiguspäraselt avaldatud teose reprodutseerimine õppe- ja teaduslikel eesmärkidel motiveeritud mahus haridus- ja teadusasutustes, mille tegevus ei taotle ärilisi eesmärke;
/.../

§ 19. Free use of works for scientific, educational, informational and judicial purposes
The following is permitted without the authorisation of the author and without payment of remuneration if mention is made of the name of the author of the work, if it appears thereon, the name of the work and the source publication:
/.../
3) the reproduction of a lawfully published work for the purpose of teaching or scientific research to the extent justified by the purpose in educational and research institutions whose activities are not carried out for commercial purposes;
/.../

Reproductions for private study and research are foreseen in § 18:

§ 18. Teose vaba reprodutseerimine ja tõlkimine isikliku kasutamise eesmärkidel
(1) Autori nõusolekuta ja autoritasu maksmiseta on lubatud õiguspäraselt avaldatud teost füüsilisel isikul reprodutseerida ja tõlkida isikliku kasutamise eesmärkidel tingimusel, et selline tegevus ei taotle ärilisi eesmärke.
(2) Autori nõusolekuta ja autoritasu maksmiseta ei ole isikliku kasutamise eesmärkidel lubatud reprodutseerida:
1) arhitektuuri- ja maastikuarhitektuuriteoseid;
2) piiratud tiraažiga kujutava kunsti teoseid;
3) elektroonilisi andmebaase;
4) arvutiprogramme, välja arvatud käesoleva seaduse §-des 24 ja 25 ettenähtud juhtumid;
5) reprograafilisel viisil noote.

§ 18. Free reproduction and translation of works for purposes of personal use
(1) A lawfully published work may be reproduced and translated by a natural person for the purposes of personal use without the authorisation of its author and without payment of remuneration on the condition that such activities are not carried out for commercial purposes.
(2) The following shall not be reproduced for the purposes of personal use without the authorisation of the author and without payment of remuneration:
1) works of architecture and landscape architecture;
2) works of visual art of limited edition;
3) electronic databases;
4) computer programs, except the cases prescribed in §§ 24 and 25 of this Act;
5) notes in reprographic form.

Estonian law also allows public performances of protected works in front of a limited school-related audience, under § 22:

§ 22. Teose vaba avalik esitamine
Autori nõusolekuta ja autoritasu maksmiseta, kuid kasutatud teose autori nime või nimetuse, kui see on teosel näidatud, kohustusliku äranäitamisega on lubatud teose avalik esitamine õppeasutustes vahetus õppeprotsessis nende asutuste õpetava personali ja õpilaste poolt ning tingimusel, et kuulajaskonna või vaatajaskonna moodustavad õpetav personal ja õpilased või teised isikud (lapsevanemad, eestkostjad, hooldajad jne), kes on otseselt seotud õppeasutusega, kus teost avalikult esitatakse.

§ 22. Free public performance of works
The public performance of works in the direct teaching process in educational institutions by the teaching staff and students without the authorisation of the author and without payment of remuneration is permitted if mention is made of the name of the author or the title of the work used, if it appears thereon, on the condition that the audience consists of the teaching staff and students or other persons (parents, guardians, caregivers, etc.) who are directly connected with the educational institution where the work is performed in public.

The Estonian Copyright Act defines the term “published work” in § 9:

§ 9. Avaldatud teosed
(1) Teos loetakse avaldatuks, kui teos või teose mis tahes vormis reprodutseeritud koopiad on autori nõusolekul antud üldsusele kasutamiseks koguses, mis võimaldab üldsusel sellega tutvuda või seda omandada. Teose avaldamiseks loetakse muu hulgas teose trükis väljaandmist, teose eksemplaride panemist müügile, jaotamist, laenutamist, rentimist ja muul viisil tasuta või tasu eest kasutada andmist.

(2) Teos loetakse avaldatuks, kui see on salvestatud arvutisüsteemi, mis on üldsusele avatud.
(3) Teose avaldamiseks ei loeta draamateose ja muusikalise draamateose ning muusikateose esitamist, audiovisuaalse teose demonstreerimist, kirjandusteose avalikku esitamist, kirjandus- ja kunstiteose edastamist raadios ja televisioonis või teose edastamist kaabellevivõrgu kaudu, kunstiteose eksponeerimist ja arhitektuuriteose ehitamist, välja arvatud käesoleva paragrahvi 2. lõikes toodud juhul.

§ 9. Published works
(1) A work is deemed published if the work or copies of the work, whatever may be the means of manufacture of the copies, are placed, with the consent of the author, at the disposal of the public provided that the availability of such copies has been such as to enable the public to examine or obtain the work. Publication of a work includes also publication of the work in print, offering original copies of the work for sale, distribution, lending and rental of the work and placing the work at the disposal of the public in any other manner for a charge or free of charge.
(2) A work is deemed published if it is recorded in a computer system accessible to the public.
(3) The performance of a dramatic, dramatico-musical or a musical work, the presentation of audiovisual works, the public recitation of a literary work, the broadcasting or cable transmission of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication, except in the case specified in subsection (2) of this section.

The exceptions and limitations to copyright listed in § 19 subsections 2 and 3 and in § 22 are limited by the three-step test, through the following provision:

§ 17. Autori varaliste õiguste piiramine
Erandina käesoleva seaduse §-dest 13–15, kuid tingimusel, et see ei ole vastuolus teose tavapärase kasutamisega ega kahjusta põhjendamatult autori seaduslikke huve, on lubatud teose kasutamine autori nõusolekuta ja autoritasu maksmiseta ainult käesoleva seaduse §-des 18–25 otseselt ettenähtud juhtudel

§ 17. Limitation to economic rights of authors
Notwithstanding §§ 13 – 15 of this Act, but provided that this does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, it is permitted to use a work without the authorisation of its author and without payment of remuneration only in the cases directly prescribed in §§ 18 – 25 of this Act.

The Estonian Copyright Act offers an exception to related rights that is similar to §19 subsection 2 – § 75 subsection 1 (2) sets forth the education exception to related rights of performers, phonogram producers, film producers, broadcasting entities and other right holders, subjecting it to the conditions of the three-step test:

§ 75. Autoriõigusega kaasnevate õiguste piiramine
(1) Teose esitaja, fonogrammitootja, televisiooni- ja raadioteenuse osutaja, filmi esmasalvestuse tootja, samuti isiku, kes pärast autoriõiguse kehtivuse tähtaja lõppemist esimesena õiguspäraselt avaldab või suunab üldsusele varem avaldamata teose, ja isiku, kes annab välja autoriõigusega mittekaitstava teose kirjanduskriitilise või teadusliku väljaande, loata ning tasu maksmiseta on lubatud teose esituse, fonogrammi, raadio- või telesaate ning nende salvestiste ja filmi kasutamine, sealhulgas reprodutseerimise teel:
/.../
2) illustreeriva materjalina hariduslikel või teaduslikel eesmärkidel nende eesmärkidega motiveeritud mahus ja tingimusel, et selline kasutamine ei taotle mis tahes ärilisi eesmärke ning tingimusel, et märgitakse ära allikas, kui see on võimalik;
/.../
(2) Käesolevas paragrahvis ettenähtud vaba kasutamine on lubatud vaid tingimusel, et see ei ole vastuolus tavapärase kasutamisega ega kahjusta põhjendamatult autoriõigusega kaasnevate õiguste omaja seaduslikke huve.

§ 75. Limitation of related rights
(1) Without the authorisation of a performer, producer of phonograms, broadcasting service provider, producer of the first fixation of a film and a person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully directs at the public a previously unpublished work or of a person who publishes a critical or scientific publication of a work unprotected by copyright, and without payment of remuneration, it is permitted to use the performance, phonogram, radio or television broadcast or recordings thereof, or the film, including by reproduction:
/.../
2) for the purpose of illustration for teaching or scientific research to the extent justified by the purpose and on condition that such use is not carried out for commercial purposes and on condition that the source is indicated, if possible;
/.../
(2) The free use prescribed in this subsection is permitted only on the condition that that this does not conflict with normal use and does not unreasonably harm the legitimate interests of holders of related rights.

The rule that uses made under the exceptions and limitations listed in §§ 18–25 and in §75 are not subject to remuneration has two exceptions, with regards to the reproduction of audiovisual works and sound recordings of works for private studies and research, and another related with the reprographic reproduction of works:

§ 26. Audiovisuaalse teose ja teose helisalvestise kasutamine isiklikeks vajadusteks
(1) Autori nõusolekuta on lubatud reprodutseerida audiovisuaalset teost või teose helisalvestist kasutaja enda isiklikeks vajadusteks (teaduslikuks uurimistööks, õppetööks jms). Autoril, aga samuti teose esitajal ja fonogrammitootjal on õigus saada õiglast tasu teose või fonogrammi sellise kasutamise eest (§ 27).
(2) Käesoleva paragrahvi 1. lõige ei laiene juriidilistele isikutele.

§ 26. Private use of audiovisual works and sound recordings of works
(1) Audiovisual works or sound recordings of such works may be reproduced for the private use (scientific research, studies, etc.) of the user without the authorisation of the author. The author as well as the performer of the work and the producer of phonograms have the right to obtain equitable remuneration for such use of the work or phonogram (§ 27).
(2) Subsection (1) of this subsection does not apply to legal persons.

§ 27. Tasu audiovisuaalse teose ja teose helisalvestise kasutamise eest isiklikeks vajadusteks
(1) Käesoleva seaduse §-s 26 nimetatud tasu maksavad salvestusseadmete ja salvestuskandjate tootja, importija, müüja, isik, kes toob salvestusseadmeid ja -kandjaid Euroopa Ühenduse tolliterritooriumilt EÜ Nõukogu määruse 2913/92/EMÜ ühenduse tolliseadustiku kehtestamine (EÜT L 302, 19.10.1992, lk 1–50) mõistes Eestisse.
(2) Müüja maksab tasu juhul, kui tootja, importija või isik, kes toob salvestusseadmeid ja -kandjaid Euroopa Ühenduse tolliterritooriumilt Eestisse, ei ole tasu maksnud.
(3) Müüjal on õigus tasu tagasi nõuda tootjalt, importijalt ja isikult, kes toob salvestusseadmeid ja -kandjaid Euroopa Ühenduse tolliterritooriumilt Eestisse.
(4) Füüsilised isikud maksavad tasu juhul, kui salvestusseadmete ja -kandjate import või Euroopa Ühenduse tolliterritooriumilt Eestisse toomine toimub kaubanduslikul eesmärgil.
(5) Tasu makstakse tagasi salvestusseadmetelt ja -kandjatelt:
1) mis tehniliste omaduste tõttu ei võimalda audiovisuaalseid teoseid ja teoste helisalvestisi reprodutseerida üksikute koopiatena;
2) mis on eksporditud või Eestist Euroopa Ühenduse tolliterritooriumile viidud;
3) mida kasutatakse ettevõtja põhikirjalise tegevuse raames;
4) mida kasutatakse tegevusel, mille puhul salvestaja põhitegevuse tulemus eeldab vaheetapina audio- või videosalvestise valmistamist;

5) mis on mõeldud salvestustegevuseks haridus- ja teadusasutuste poolt õppe- ja teaduslikel eesmärkidel;
6) mida kasutatakse salvestiste tegemiseks puuetega inimestele.
(6) Kollektiivse esindamise organisatsioon tagastab tasu käesoleva paragrahvi 5. lõikes nimetatud isikutele kuue kuu jooksul, alates vastava kirjaliku taotluse esitamisest.
(7) Tasu suurus on:
1) salvestusseadmete puhul kolm protsenti kauba väärtusest;
2) salvestuskandjate puhul kaheksa protsenti kauba väärtusest.
(8) Tasu jaotatakse autorite, teoste esitajate ja fonogrammitootjate vahel, lähtudes teoste ja fonogrammide kasutamisest.
(9) Tasu jagatakse jaotuskava alusel, mille väljatöötamiseks kinnitab valdkonna eest vastutav minister igal aastal komisjoni, kuhu proportsionaalselt kuuluvad autoreid, esitajaid ja fonogrammitootjaid esindavad kollektiivse esindamise organisatsioonid ning üks Justiitsministeeriumi esindaja.
(10) Tasu võib maksta ka organisatsioonidele muusika- ja filmikultuuri arendamiseks ning koolitus- ja teadusprogrammide finantseerimiseks või kasutamiseks muudel analoogsetel eesmärkidel, kuid mitte üle kümne protsendi jaotamisele kuuluvast tasust.
(11) Valdkonna eest vastutav minister kinnitab hiljemalt kolm kuud pärast eelarveaasta lõppu jaotuskava, olles selle eelnevalt kooskõlastanud autorite, esitajate ja fonogrammitootjate esindajatega.
(12) Tasu kogujaks kinnitab valdkonna eest vastutav minister kollektiivse esindamise organisatsiooni, kellel on õigus kogutud tasust maha arvata tasu kogumise ja maksmisega seotud kulutused. Tasu koguja esitab Justiitsministeeriumile tasu kogumise, maksmise ning tehtud mahaarvestuste kohta kirjalikus vormis aruande iga aasta 31. jaanuariks.
(13) Tasu kogujaks määratud kollektiivse esindamise organisatsioonil on õigus saada tolli- ja statistikaorganisatsioonidelt, tootja- ja impordiorganisatsioonidelt ning müüjatelt vajalikke andmeid. Esitatud andmed on konfidentsiaalsed ning tasu kogujal on õigus neid kasutada või avaldada ainult seoses tasu kogumisega.
(14) Vabariigi Valitsus kehtestab määrusega:
1) audiovisuaalse teose ja teose helisalvestise isiklikeks vajadusteks kasutamise kompenseerimiseks tasu maksmise korra ning salvestusseadmete ja -kandjate loetelu;
2) käesoleva paragrahvi 10. lõikes nimetatud tasu taotlemise korra.

§ 27. Remuneration for private use of audiovisual works and sound recordings of works
(1) The manufacturers, importers, sellers of storage media and recording devices, persons who bring storage media and recording devices from the Community customs territory into Estonia within the meaning of the Council Regulation

(EEC) No 2913/92 establishing the Community Customs Code (OJ L 302, 19.10.1992, pp. 1–50) shall pay the remuneration specified in § 26 of this Act.
(2) The seller shall pay the remuneration in the case when the manufacturer, importer, or the person who brings storage media and recording devices from the Community customs territory into Estonia has not paid the remuneration.
(3) The seller has the right to reclaim the remuneration from the manufacturer, importer and the person who brings storage media and recording devices from the Community customs territory into Estonia.
(4) Natural persons shall pay remuneration in the case when the importing of storage media and recording devices or bringing of the storage media and recording devices from the Community customs territory into Estonia is carried out for commercial purposes.
(5) The remuneration shall be repaid on the storage media and recording devices:
1) which, due to their technical characteristics, do not enable the reproduction of audiovisual works and sound recordings of works as single copies;
2) exported or transported from Estonia into the Community customs territory;
3) which are used in the course of the activities specified in the articles of association of the undertaking;
4) which are used in an activity in the case of which the result of the main activity of the person who makes the recording requires the manufacture of an audio or video recording as an intermediate stage;
5) which are intended for recording activities in educational and research institutions for the purpose of teaching or scientific research;
6) used for making recordings for the benefit of disabled persons.
(6) A collective management organisation shall repay the remuneration to the persons specified in subsection (5) of this subsection within one month after submission of a corresponding written application.
(7) The amount of the remuneration is:
1) 3 per cent of the value of the goods in the case of recording devices;
2) 8 per cent of the value of the goods in the case of storage media.
(8) The remuneration shall be distributed among authors, performers and producers of phonograms according to the use of works and phonograms.
(9) The remuneration shall be distributed on the basis of a distribution plan for the preparation of which the minister responsible for the area shall appoint a committee every year, which is proportionally comprised of collective management organisations representing the authors, performers and producers of phonograms and a representative of the Ministry of Justice.
(10) Remuneration may also be paid to organisations for the development of music and film culture and in order to finance educational and research programmes or for use thereof for other similar purposes, but only in an amount not exceeding 10 per cent of the remuneration subject to distribution.

(11) The minister responsible for the area shall approve the distribution plan not later than three months after the end of the budgetary year, having previously obtained the approval of the representatives of authors, performers and producers of phonograms.
(12) The minister responsible for the area shall appoint a collective management organisation as the collector of remuneration and the organisation has the right to deduct expenses related to the collection and payment of remuneration from the remuneration collected.
(13) The collective management organisation which is appointed as the collector of remuneration has the right to obtain necessary information from customs authorities and statistical organisations and manufacturing and importing organisations and sellers. The information submitted is confidential and the collector of remuneration has the right to use and disclose the information only in connection with the collection of remuneration.
(14) The Government of the Republic shall establish by a regulation:
1) the procedure for payment of remuneration to compensate for private use of audio-visual works and sound recordings of works and the list of storage media and recording devices;
2) the procedure for application for the remuneration specified in subsection (10) of this subsection.

§ 27[1]. Tasu teose reprograafilise reprodutseerimise eest
(1) Autoril ja kirjastajal on õigus saada õiglast tasu teose reprograafilise reprodutseerimise eest käesoleva seaduse § 18 1. lõikes ja § 19 punktis 3 nimetatud juhtudel.
(2) Autorile väljamakstava tasu suuruse arvutamise aluseks võetakse eelarveaastas tasude maksmiseks eraldatud riigieelarvelised vahendid ja Eesti Rahvusraamatukogu rahvusbibliograafia andmebaasis registreeritud teoste nimetuste arv.
(3) Kirjastajale väljamakstava tasu suuruse arvutamise aluseks võetakse eelarveaastas tasude maksmiseks eraldatud riigieelarvelised vahendid ja avalduse esitamisele eelneva kümne kalendriaasta jooksul ilmunud ISBN- ja ISSN-numbriga teoste nimetuste arv.
(4) Tasu maksab välja valdkonna eest vastutava ministri määratud juriidiline isik, kes esindab autoreid või autorite organisatsioone.
(5) Tasu makstakse kirjalikus või kirjalikku taasesitamist võimaldavas vormis avalduse alusel.
(6) Vabariigi Valitsus kehtestab käesoleva paragrahvi 1. lõikes ettenähtud tasu jaotamise määrad ilukirjanduse ning teadus- ja õppekirjanduse autorite ja kirjastajate vahel ning tasu maksmise korra.

§ 27[1]. Remuneration for reprographic reproduction works

(1) Authors and publishers are entitled to receive equitable remuneration for the reprographic reproduction of their works in the cases specified in subsection 18 (1) and clause 19 (3) of this Act.
(2) The amount of remuneration payable to the author is calculated on the basis of the state budget funds allocated for remunerations in the financial year and the number of the names of works registered in the database of national bibliography.
(3) The amount of remuneration payable to the author is calculated on the basis of the state budget funds allocated for remunerations in the financial year and the number of the names of works with an ISBN and ISSN number published during ten calendar years preceding submission of the application.
(4) The remuneration is paid by a legal person who represents the authors or authors' organisations and determined by the minister responsible for the area.
(5) Remuneration shall be paid on the basis of an application in written format or in a format which can be reproduced in writing.
(6) The Government of the Republic shall establish the rates of distribution of the remuneration prescribed in subsection (1) of this subsection between the authors and publishers of fiction and scientific and educational literature and the procedure for payment of remuneration.

2. Analysis of the scope of the exception or limitation

The Estonian Copyright Act, developed in the early 1990ies, is based on the 1971 Paris Act of the Berne Convention and on the Tunis Model Law on Copyright for Developing Countries (1976)[5]. The World Intellectual Property Organization, in its turn, recommended the Estonian Act as a model to countries from Central and East Europe and former Soviet republics[6].

Estonian copyright law was influenced by two different legal systems: Continental European and Soviet legal systems[7]. This means that, while Estonian copyright law is based on the person of the author, culture is also seen as part of its political and philosophical foundations[8]. That cultural dimension justifies its broad exceptions and limitations to copyright[9].

The Estonian Copyright Act embodies education-related exceptions since its adoption in 1992. The main provision, inspired by the Tunis Model Law, covered all acts of use of protected works in publications, radio and television broadcasts, and sound and video recordings, for educational purposes. In addition to this main provision, there was another legal provision in the original version of the Estonian Act, which dealt with reprographic reproductions of periodicals. After the

5 See Pisuke 1994: 167.
6 See Pisuke 2004: 48.
7 See Pisuke 2004: 45-48.
8 Ibid.
9 See Hoffman and Kelli, 2013.

transposition of the InfoSoc Directive, the structure remained the same: one provision dealing with all acts of use, and another dealing with certain reproductions. However, while in the earlier version the two provisions did not overlap in a problematic way, in the current version the intersection poses some interpretation problems.

The structure of the main legal provision and the wording used by the national legislator resembles the structure and wording of article 5, paragraph 3, point a) of the InfoSoc Directive. The Directive has a number of openly formulated concepts (such as "illustration for teaching" and "non-commercial purpose"), which can give national courts some flexibility, but the Court of Justice of the European Union can impose a uniform interpretation of the same, if it is asked to interpret the EU education exception[10].

2.1. Acts

Both § 19 subsection 2 and § 75 subsection 1 (2) apply the verb *use*, which is the wording that – as it is common in the *droit d'auteur* systems – is applied throughout the Estonian Copyright Act to refer to the broad economic right of the author. § 13 [Economic Rights], for instance, starts by stating that the author "*shall enjoy the exclusive right to **use** the author's work in any manner, to authorise or prohibit the **use** of the work in a similar manner by other persons and to receive income from such **use** of the author's work*" (emphasis added). The Estonian legislator then provides a non-exhaustive list of rights included in such broad right to use, which includes all the above-mentioned rights.

Regarding subject matter protected by related rights, such as phonograms, films and broadcasts, is, thus, clear that § 75 subsection 1 (2) – which is the only provision dealing with exceptions and limitations for educational purposes – covers all acts of use, including without limitation reproduction, communication to the public, making available to the public, distribution and translation or other alterations of the work.

Regarding works protected by author's rights, the general exception for teaching purposes foreseen in § 19 subsection 2 is complemented by two other legal provisions: § 19 subsection 3 and § 22, which cover, respectively, certain reproductions and certain public performances for educational purposes. We need therefore to analyse how those overlapping exceptions work together, to fully understand the acts of used covered by the general teaching exception embodied in § 19 subsection 2.

10So far there are no decisions of the CJEU on the EU education exception. Nevertheless, in Case C-510/10 *TV2 Danmark*, 26 April 2012, and also in Case C-201/13 *Deckyman*, 3 September 2014, the CJEU considered that certain expressions that were contained in different optional exceptions foreseen in the InfoSoc Directive to be "autonomous concepts of Union law".

Section § 22 allows public performances of works protected by authors' rights *in the direct teaching process* in the premises of an educational institution by the teaching staff and students. Under Estonian law, public performance is a right that is distinct from the rights of communication to the public and making available to the pubic and also from the right of public display. The Copyright Act clarifies that a work is deemed publicly performed if it is recited, played, danced, acted or otherwise performed directly or indirectly by means of any technical device or process (see § 10 subsection 3).

The idea underlying § 22 seems to be to allow students and teachers to perform works in public for a limited audience consisting of the teaching staff and students or other persons (including parents) who are directly connected with the educational institution. That is, in school events and celebrations, which usually go beyond the instruction itself – although, in Estonia, the law specifically requires the performance to be directly connected with the teaching process.

Anyway, the fact that the Estonian Copyright Act contains a provision dealing with public performances of works in educational institutions does not necessarily mean that § 19 (2) does not cover performances in public for educational purposes. The notion of public emcompasses any "unspecified set of persons outside the family and an immediate circle of acquaintances" (see § 10 subsection 2 (1)). Teachers and students are, normally, a circle of persons larger than the circle of family and friends. This means that any live performances (reciting a poem, playing a music, etc.) that occur in a classroom or in any other educational setting are deemed to be performed in public. Provided that such public performances are made for educational purposes, there is no reason to exclude them from the scope of § 19 subsection 2. In other words, public performances can occur outside the permisses of a formal educational institution under § 19 subsection 2. But if the performance goes beyond the instruction itself, i.e. if it is made in front of an audience that is not involved in the teaching or learning processes, then it can only be made in an educational institution and under the conditions described in § 22.

Let us turn now to § 19 subsection 3. This subsection relates to the reproduction of works *for the purpose of teaching or scientific research* in educational and research institutions. § 13 subsection 1 (1) defines reproduction as *making copies in any form or by any means*.

There is no case law on the scope of application of § 19 subsections 2 and 3 and legal scholars have very different views on the issue: several Estonian scholars seem to consider that § 19 subsection 3 only covers reprographic reproductions[11], and that reproductions made by other means are still covered by subsection 2; others consider that reproductions by all means are excluded from the scope of application of subsection 2[12].

11 Kelli and others, 2013: 70.
12 See Jents, 2012: 503.

Indeed, before the transposition of the InfoSoc Directive, § 19 subsection 3 only dealt with reprographic reproductions of newspapers, journals or other periodicals and extracts from published works[13]. It was then clear that any reproduction by reprographic means of such kinds of works could only be made under that subsection "in educational and research institutions the activities of which do not serve direct or indirect commercial gains". Reproductions of works by other means would still be covered by subsection 2, and were thus not limited to the beneficiaries listed in subsection 3.

After the transposition of the InfoSoc Directive, the Estonian legislator maintained the two legal provisions: the general teaching exception in § 19 subsection 2, now broader in terms of the scope of the unauthorized uses, but more limited in terms of the purposes of the use[14]; and an exception dealing with reproductions made in not-for-profit educational institutions in § 19 subsection 3. However, it is not said any longer that those reproductions are only those made by reprographic means, which would lead us to consider that reproductions by any and all means could only be made under § 19 subsection 3, and not anymore under subsection 2. Yet, the fact that § 27^{1} makes a reference to the reprographic reproductions made under § 19 subsection 3 have lead (or so we think so) several Estonian scholars to consider that the intention of the national lawmaker was to cover only reprographic reproductions in § 19 subsection 3.

The true is that it is strange, to say the least, that the Estonian lawmaker has opted to keep its tradition of exempting a broad spectrum of unauthorized uses for educational purposes in one subsection, just to reduce significantly the scope of application of such exception in the following subsection. After all, the reproduction right is the most important of all the economic rights, and the legislator could have simply excluded it, by listing all the other remaining rights in subsection 2.

As we have said before, courts have not been asked to interpret those provisions. In practice, non-reprographic reproductions of protected works have been carried out by teachers and students, and not only in formal educational institutions. This practice has not so far been repealed, which could suggest that right holders also accept the understanding that reproductions can be made under § 19 section 2. On the other hand, it is has been suggested for future law-making to merge § 19 subsection 2 and 3 to cover all uses in one single subsection that is not limited to educational institutions only[15].

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13 Until 2004, §19(3) provided for the right "to reproduce articles published in newspapers, journals or other periodicals and extracts from published works by reprographic means exclusively for purposes of teaching and scientific research in educational and research institutions the activities of which do not serve direct or indirect commercial gains".

14 Previously to the transposition of the EU exception into national law, §19 (2) permitted "to use a lawfully published work or parts thereof by way of illustration in publications, radio and television broadcasts, sound and video recordings for teaching purposes to the extent justified by the purposes".

15 Kelli and others, 2013: 67.

In any case, we should draw the following conclusion: in the best-case scenario, except for reprographic reproductions, reproductions are not limited to any specific persons or entities; in the worst-case scenario, reproductions by any and all means can only be made by not-for-profit educational institutions. It is worth mentioning that, in any case, students and individuals in general can always make reproductions, by any means, of protected works and related-subject matter in the course of their private studies and research, under the private copying exception embodied in § 18.

2.2. Object

All legal provisions of the Estonian Copyright Act dealing with permitted uses of copyrighted works for educational projects apply to all categories of works. Indeed, the term used – *works* – means any original results in the literary, artistic or scientific domain which are expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices. A work is original if it is the author's own intellectual creation (§ 4 subsection 2). A non-exhaustive list of works in which copyright subsists is provided in the act (§ 4 subsection 3). § 5 lists results of intellectual activities to which the Copyright Act does not apply.

The legal provision dealing with permitted uses of subject matter protected by related rights specified the subject matter that is covered: performance, phonogram, radio or television broadcast or recordings thereof. All types of subject matter protected by related rights are listed therein.

§ 19 subsections 2 and 3 and § 75 subsection 1(2) further state, respectively, that the copyrighted works and related subject matter must have been lawfully published, in order to be used under those provisions. Moreover, those works and related subject matter can only be used to the extent justified by the purpose of illustration for teaching or scientific research.

A work is deemed *lawfully published* if it has been placed, with the consent of the author, at the disposal of the public in any manner, including via Internet (see § 9 subsections 1, 2). The performance of a dramatic, dramatic-musical or a musical work, the presentation of audiovisual works, the public recitation of a literary work, the broadcasting or cable transmission of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture do not constitute publication, unless the same are recorded in a computer system accessible to the public (see § 9 subsection 3).

The extent justified by the purpose has neither been defined in the law nor tried in court in Estonia. It seems reasonable to consider that a copyrighted work or related subject matter could be used in their entirety if it is justified by the permitted purpose. Indeed, several international scholars have expressed the understanding

that, although the wordings "by way of illustration" impose a limitation on the scope of use of the work, they do not bar the use of the entire work if such use is needed for the concerned educational purposes[16].

2.3. Purposes

Save for § 22, all other provisions of the Estonian Copyright Act dealing with educational uses of protected works and related subject matter, state that the permitted uses are limited to the *purpose of illustration for teaching or scientific research* and on the condition that such uses or activities are not carried out for commercial purposes.

The terms *purpose of illustration for teaching* and *commercial purposes* have not been defined in any way in the Estonian law. Nevertheless, the term *illustration for teaching* is used in art. 10(2) of the Berne Convention, and has been extensively analysed by international experts. The general understanding is that such term "cannot further restrict the original scope of the '*educational purposes*'"[17] previously stated in art. 10(2) of the Berne Convention. The wordings "by way of illustration" were introduced in the Berne Convention in an attempt to answer to concerns about the extent of the use (though, as we saw, uses of whole works are still permitted), and not to reduce the scope of "educational purposes" [18].

Estonian scholars share the same understanding of international copyright experts that "[b]oth illustration for teaching and scientific research must be the sole purpose of the use for which the exclusive rights may be restricted. Accordingly, when the reproduction or other use also fulfils an additional purpose, the exception or limitation must not apply"[19].

§ 22 is applicable to public performances in educational institutions directly connected to the *teaching process* made by the teaching staff and students in front of a limited audience consisting of the teaching staff and students or other persons (including parents) who are directly connected with the educational institution. Although this legal provision does not further restrict the purposes of the use, the application of the three-step test may lead to further limitations. In fact, there is a pending litigation in the Estonian courts which may lead to the application of the three-step test to assess if a concert that has taken place in the municipal secondary school Miina Härma Gümnaasium is a use permitted under § 22 or not. The Estonian Author's Society is suing the school for not paying any remuneration in relation to concerts where tickets were being sold. In its preceding nonbinding opinion, the Estonian Ministry of Justice agreed with the applicant's view that such use of works could conflict with a normal exploitation and may have a commercial

16 See Ricketson, 2003: 14; Ricketson and Ginsburg, 2006: § 13.45; Xalabarder, 2009: 16.
17 Xalabarder, 2009: 15.
18 Ibid.
19 Walter, MM. and S. von Lewinski, European Copyright Law: A Commentary (Oxford University Press 2010), p. 1044 cited by Kelli, Tavast and Pisuke, 2012: 46.

purpose, therefore not passing the three-step test and falling outside the scope of the exception provided for in § 22[20].

2.4. Beneficiaries

Neither § 19 subsection 2 nor § 75 subsection 1 (2) impose any limitations as to the persons or entities that can benefit from those exceptions or limitations. Therefore, it is clear that anyone can benefit from those general education exceptions.

Both § 19 subsection 3 and § 22 have limitations as to the beneficiaries of the uses foreseen therein: the first only benefits educational and research institutions *whose activities are not carried out for commercial purposes*, whereas the second benefits educational institutions.

The legislator has not provided any definition for *educational or research institution* in the Copyright Act. Estonian law allows private companies and civil society organizations to manage all types of educational institutions as long as their curriculum is registered with the Ministry of Education and Science. It has been discussed that the list of educational institutions defined in other acts could discriminate non-formal educational institutions (e.g. entities offering lifelong-education): "This list does not include, for example, the classic museums or libraries or any other non-profit organizations that are not directly identified themselves as hobby school, and registered as such." [21] Moreover, the Ministry of Justice has suggested that the exception should under no circumstances include business organizations even if they keep an educational institution since commercial purposes are prohibited.[22]

A definition of *educational institution* has been tried in court once in Estonia. In case *Estonian Performers Association vs. Sports Club Reval-Sport*[23] the applicant requested remuneration for the use of phonograms during training sessions. The court of first instance rejected defendant's main argument, according to which the right to benefit from the exception derives merely from possessing training licences. In the court's view, the fact that the defended had a registered curriculum for recreational sports was not enough to consider that their use had an educational purpose. The defendant status of charitable non-profit organization without commercial purposes was also not seen as relevant to the case. On 2013 the Tallinn District Court confirmed the judgement of the court of first instance to uphold the appeal.

The Estonian Performers Association is currently involved in a similar on-going dispute with a dance school. To clarify the parties' rights, the Ministry of Justice commissioned to Professor Aleksei Kelli a short legal analysis of the relevant legal

20 Response to the request for explanation, Ministry of Justice, 08.05.2015
21 Kelli and others, 2013: 71.
22 Explanatory letter of the draft of Copyright Act, version 21.07.2014 (legislative proceedings postponed) https://ajaveeb.just.ee/intellektuaalneomand/wp-content/uploads/2014/08/Autori%C3%B5iguse-seletuskiri-21-7-2014.pdf
23 Tallinn District Court 2-12-4019 04.06.2013

provisions. Recognizing the lack of clarity of the legal definitions, Prof. Kelli considered that the current law imposes a restrictive interpretation of the term, thus limiting the concept of *educational institution* to general education institutions only.

2.5. Remuneration

According to § 17, the rule in place is that the authors are not entitled to the payment of any remuneration for educational uses of copyrighted works in the cases prescribed in §§ 18–25. The same rule applies to uses of subject matter protected by related rights made under § 75.

However, there are exceptions to that rule. Authors and publishers are entitled to receive equitable remuneration in the following situations: for the reprographic reproduction of their works made for educational and research purposes under § 19 subsection 3 (see § 27[1]); for the reprographic reproduction of their works made for private studies and research under § 18 subsection 1 (see § 27[1]); and for the reproduction of audiovisual works and sound recordings of works for private studies and research (see § 26).

The amount of remuneration payable to the author under § 27[1] is calculated on the basis of the state budget funds allocated for remunerations in the financial year and the number of works registered in the database of national bibliography. The amount of remuneration payable to the publisher is calculated on the basis of the state budget funds allocated for remunerations in the financial year and the number of works with an ISBN and ISSN number published during ten calendar years preceding submission of the application. The remuneration is paid by a legal person who represents the authors or authors' organisations and determined by the minister responsible for the area.

2.6. Other conditions

All exceptions and limitations for educational purposes analysed herein are subject to the three-step test. The Estonian Copyright Act has partially embodied the test in § 17 and § 75 subsection 2. Those legal provisions state that the permitted use must not conflict with a normal exploitation of the work (step two) and does not unreasonably prejudice the legitimate interests of the author (step three).

The inclusion of the three-step test into the national law transformed its function: its role now is "to guarantee that the author's rights are not violated even in cases in which use of a copyright-protected work is formally covered by an exception, where it still has an extremely adverse impact on the author's legitimate interests and there are no justifying circumstances"[24].

24 Kelli, Tavast and Pisuke, 2012: 45.

Although the three-step test raises a number of questions about the limits of the permitted uses, the answers to these questions do not yet exist. Case law on this issue is almost non-existent in the Estonian judicial arena.

Nevertheless, it is worth mentioning that we have seen renowned Estonian scholars praising the position of a World Trade Organization panel on the second step, according to which an exception or limitation rises to the level of a conflict with a normal exploitation of the work "if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains"[25]. Following that approach, those authors – which were analysing whether the use of written and oral texts in the development of databases for scientific purposes would conflict with the normal exploitation of such works or not – concluded that there was no such conflict, because right holders extracted the value of such works mostly through selling of the texts as literary works or offering of advertising on a website or blog[26].

3. Analysis of the impact of the exception or limitation

There are no studies on the social or economic impact of the education-related exceptions and limitations in Estonia.

4. Examples of use

Copyrighted works are widely copied, adapted, performed, compiled, distributed and made available not only in closed e-learning environments (protected by passwords) but also publicly. On the minus side, the awareness on copyright regulation among teaching staff is poor in Estonia.[27]

Estonian quasi-governmental Information Technology Foundation for Education (HITSA) keeps a digital repository[28] of thousands of teaching materials from more than 60 vocational schools and universities. As a main promoter of digital skills, HITSA strongly suggests sharing new original materials under Creative Commons licences. Nevertheless, not all the materials are licensed with CC, and probably most materials contain copyrighted works.

For example, a course material for a Marketing and Sales course found in that repository, from the Estonian Business School, includes diagrams, pictures and also scanned extractions from a book that are all probably copyrighted works, although not all instances of use have a mention of the author[29]. Nevertheless, there are also

25 Kelli, Tavast and Pisuke, 2012: 46.
26 Ibid.
27 Interviews with teaching staff members in secondary schools and universities.
28 www.e-ope.ee/en/repository
29 http://www.e-ope.ee/repositoorium?@=8ni8#euni_repository_10890

materials where authors and even reference to the legal provisions are properly mentioned, e.g. 'Advanced study of International Intellectual Property Law'[30].

Other main online sources are Koolielu (School Life, also managed by HITSA)[31] and e-koolikott (e-school bag)[32]. The sites use mixed methods of linking to other online sources and uploading original or compiled materials directly.

Educational institutions upload materials also on their own public websites. Laagna Secondary School has tens of files uploaded[33], including, for example, a slideshow with many artworks.[34]

One history teacher has created her own separate weblog[35] to share a wide variety of materials with students, some of which are students' own works. The latter practice is not rare since it is easier for a teacher to manage his/her own website than to edit the official homepage of a school.

5. Notes

Case Law

Estonia

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